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NEW BEGINNINGS: A FEMINIST
EVALUATION OF GENDERED STIGMA IN
THE MODERN LEGAL PROFESSION

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ABSTRACT

The modern woman lawyer faces many of the same challenges that women in law faced during their earliest entry into the profession. While circumstances have certainly improved for women in law, gendered stigma is still prevalent in the profession. In this article, “gendered stigma” refers to circumstances resulting from one’s gender as a salient feature of their work, serving to discredit one’s abilities and accomplishments. Women began to enter the legal profession in large numbers in the 1970s, gaining attention as they did so. Although early research on women in the law focused on blatant discrimination, that type of discrimination is fortunately less common now. Much of the modern research addressing women’s status in the legal profession, however, focuses on the quantitative evidence, like the number of women in the profession and their salaries as compared to men. Numerical evidence does show progress, but qualitative evidence reveals that the gender-driven experiences of women new to the profession are eerily similar to those of women who have long retired from the profession. This belies the assumption that simply improving numbers, e.g., having more women in the profession, would solve the disparities between men and women who practice law. This article relies on identity theory and stigma to inform the cycle of gendered stigma prevalent in the legal profession to critically examine basic tenets of the profession that must change for progress to flourish. This theoretical foundation can then inform practical solutions for mitigating the negative effects of gendered stigma on the profession and the individuals serving within it.

I. INTRODUCTION

The courtroom was warmer than expected. Attorneys mingled casually, distinguishable by their suits and ease of movement throughout the room. Dozens of men, almost all in gray suits, chatted with each other and with the court staff—familiar with the process and comfortable with their duties. Women in skirt suits sprinkled the attorney-only areas, mostly talking amongst themselves, seeming slightly less comfortable than their male counterparts as they tended toward the back of the section and stayed put rather than moving about the room.

Shortly after 9:00 a.m. the judge took the bench. There were no “oyez” called out. Not even the more common, “All Rise!” preceding an announcement by a bailiff letting the courtroom patrons know the judge was taking the bench and to come to order. The judge walked out

and sat behind the bench and then a bailiff called the court to order. Despite the request for order, the attorneys still milled about concerned only with their own tasks at hand. Two men at the front of the attorney line chatted amongst themselves about personal matters. “First in line!” the judge called from the head of the courtroom. The two men continued chatting, unencumbered by the procedural flow they were impeding. Two other men standing nearby stopped their conversation and looked over at the line leaders anxiously but said nothing. After a gracious pause, the judge again called for the first in line, this time louder and with more edge, annoyed. This got their attention and the men indicated that they did not have defendants present and thus were not ready to be heard. Even more annoyed, the judge then called, “First in line with defendant present and ready to go!”

I¹ observed this in a Southern California courtroom in 2018. During a time and in a place where one might expect women² in positions of power to be afforded the same respect as similarly situated men. Yet, that was not the case. The judge, who happened to be a woman, was largely ignored in a situation where she should have been the focal point. Although her presence on the bench is a testament to how far women in the legal profession have progressed since it was a male-only profession, the lack of professionalism towards her shows that the profession is still male centric, even if it is no longer exclusively male. Whether it is a phenomenon that is preventing women from ascending, or whether it is a phenomenon that is pushing women out of the profession before they reach those ranks—it is important to

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² Any reference to woman/female or man/male includes all people who identify with those terms regardless of biological sex at birth. Non-binary identifications are recognized, but the legal profession has moved slowly in recognizing the gender spectrum instead of a gender binary. This paper focuses first on the past and current state of the profession and moves towards a new future. As a result, the historical and present aspects are heavily binary.

understand why the profession remains male-dominated.

Women who practice law can easily recall experiences where their gender played a key role in how they were perceived by others.³ For example, being mistaken for the court reporter, the secretary, the judicial assistant, the janitorial staff; being instructed to perform administrative work outside their job duties; facing commentary about their wardrobe; and being referred to as “honey” or “sweetie.”⁴ All women in the U.S. workforce begin at a disadvantage and work harder to achieve the same status as men within the same field.⁵ This is particularly true for women in historically male-dominated fields, or operating under a male-centric scaffold.⁶ The legal profession is no exception.⁷

The American Bar Association formed a Commission on Women in the Profession in 1987 to “secure full and equal participation of women in the ABA, the profession and the justice system.”⁸ More than thirty years later, this committee, among others, continues to identify and innovate solutions to gender inequity in the profession.⁹ Even though women are entering law school at equal or higher rates than men¹⁰, they are not achieving the same level of professional success as men. The 2019 Bureau of Labor Statistics report shows that women make up 38% of the profession and earn salaries that are 85.3% of male

³ Patricia Yancey Martin et al., *Gender Bias and Feminist Consciousness among Judges and Attorneys: A Standpoint Theory Analysis*, 27 SIGNS: J. WOMEN CULTURE & SOC’Y 665 (2002).

⁴ See Kristy D’Angelo-Corker, *Don’t Call Me Sweetheart!: Why the ABA’s New Rule Addressing Harassment and Discrimination is So Important for Women Working in the Legal Profession Today*, 23 LEWIS & CLARK L. REV. 263, 266 (2019).

⁵ See Jennifer L. Berdahl et al., *Work as a Masculinity Contest*, 74 J. SOC. ISSUES (SPECIAL ISSUE) 422 (2018).

⁶ *Id.*

⁷ LEWIS A. COSER & ROSE LAUB COSER, *GREEDY INSTITUTIONS: PATTERNS OF UNDIVIDED COMMITMENT* 98 (Free Press 1974).

⁸ *Women in the Profession*, AM. BAR ASS’N, <https://www.americanbar.org/groups/diversity/women> (last visited Mar. 3, 2020); *About Us*, AM. BAR ASS’N, https://www.americanbar.org/groups/diversity/women/about_us/ (last visited Dec. 15, 2021).

⁹ *Id.*

¹⁰ Deborah Jones Merritt & Kyle McEntee, *Gender Equity in Law School Enrollment: An Elusive Goal*, 69 J. LEGAL EDUC. 102, 102 (2019).

attorneys' salaries.¹¹ Further, male equity partners are still making 27% more than female equity partners.¹² The 2020 reports indicate that women now make up 37% of the profession.¹³ With the effect of the COVID-19 pandemic on women in the United States' workforce,¹⁴ it will be interesting to see what the 2021 statistics looks like for women lawyers.

Although all working women face obstacles, women who practice law continue to face battles unique to this particular profession. In Florida, for example, female trial attorneys are often the target of what has been colloquially termed the "no-crying motion."¹⁵ This motion is routinely filed in cases that are headed to trial, regardless of the woman's (the target of the motion) past experiences during trial.¹⁶ Essentially, this is a motion filed preemptively, asking the judge to instruct the target of the motion not to prejudice the jury and the trial process by inappropriate displays of emotion.¹⁷ Even though some judges make their annoyance at these motions known, it is still a tactic available to attorneys to use primarily against women who are attorneys. Once it has been filed, the damage is done. The woman attorney is automatically labeled as not being in control of her emotions; therefore, she must not be a superior litigator.¹⁸ Not only does this send a message to the individuals present during the hearings on these motions (clients, potential clients, potential employers, etc.), but it also takes a toll on the

¹¹ In general, women in all occupations earn salaries that are 82% of men's salaries. BUREAU OF LAB. STAT., HIGHLIGHTS OF WOMEN'S EARNINGS IN 2019 17 (2020), <https://www.bls.gov/opub/reports/womens-earnings/2019/pdf/home.pdf>.

¹² AM. BAR ASS'N COMM'N ON WOMEN IN THE PRO., A CURRENT GLANCE AT WOMEN IN THE LAW 6 (2019).

¹³ AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 32 (2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf>.

¹⁴ Tim Smart, *In One Year, Coronavirus Pandemic Has Wreaked Havoc on Working Women*, US NEWS (Mar. 8, 2021, 12:25 P.M.), <https://www.usnews.com/news/economy/articles/2021-03-08/in-one-year-coronavirus-pandemic-has-wreaked-havoc-on-working-women>.

¹⁵ Lara Bazelon, *What It Takes to Be a Trial Lawyer If You're Not a Man*, ATLANTIC (Sept. 2018), <https://www.theatlantic.com/magazine/archive/2018/09/female-lawyers-sexism-courtroom/565778>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

women targeted by these motions.¹⁹ One seasoned attorney who has been the target of many of these motions recalled in her interview with *The Atlantic*, “‘I cannot tell you how much it demeans me,’ she said. ‘Because I am a woman, I have to act like it doesn’t bother me, but I tell you that it does. The arrow lands every time.’”²⁰ Despite her thirty years as a trial attorney, she still faces these demeaning tactics and has no option for recourse.²¹

Moreover, attorneys who also happen to be nursing mothers face challenges particular to the practice of law.²² For example, trial schedules are set well before a trial begins. Any requests to alter the schedule must be done in advance by motion and hearing.²³ This process requires attorneys who are nursing mothers to detail in a public hearing their specific and private medical needs during their breastfeeding journey.²⁴ While all nursing mothers who are also working mothers must make arrangements with their employer for time and space to pump, there is not another profession that requires such a public defense of the need for a specific schedule for women who are nursing. These examples of day-to-day problems experienced by women in the law lend themselves to a discussion of identity and stigma.

This Article critically examines how gendered stigma operates in the modern legal profession for both men and women in order to further explore the effects on actual and virtual perceptions. Here, “gendered stigma” refers to circumstances resulting from one’s gender as a salient feature of their work, serving to discredit one’s abilities and accomplishments. Part I briefly situates the history of women in the United States workforce and women in the United States legal profession. Part II explains the theoretical bases of identity theory and stigma and how they relate to this problem. Part III analyzes prominent themes in the legal profession through a critical lens in order to imagine a new beginning for the U.S. legal profession in a post-pandemic society.

¹⁹ *Id.*

²⁰ *Id.*

²¹ Bazelon, *supra* note 15.

²² Jennifer Feld, *A New Mother’s Guide to Pumping During a Jury Trial*, LAW.COM: DAILY BUS. REV. (Aug. 7, 2018, 11:45 AM), <https://www.law.com/dailybusinessreview/2018/08/07/a-new-mothers-guide-to-pumping-during-a-jury-trial>.

²³ *Id.*

²⁴ *Id.*

II. BACKGROUND

A. Women in the U.S. Workforce

The United States' workforce has been historically male.²⁵ Women were primary caretakers of children, aging parents and in charge of various domestic responsibilities while men worked outside the home.²⁶ However, the tide shifted as American men went off to battle in World War II and women took up the responsibility of working outside the home in addition to their domestic duties.²⁷ Surprisingly, the government even supported working mothers with subsidized childcare centers, so that mothers would have the support and means necessary to provide for their families while many husbands and fathers were away at war.²⁸ As the war waned, and men returned home, there was an expectation that things would return to "normal;" the government even closed the childcare centers provided for under The Lanham Act.²⁹ Much like today, working mothers were faced with the difficult decision of whether and how to work while raising a family. Fortunately, more legislation was on the horizon that would begin to level the workforce playing field for women.

Title VII of the 1964 Civil Rights Act also deals with equal employment opportunities.³⁰ When it was first drafted, this section prohibited discrimination based on religion, race, color, and national

²⁵ Janet L. Yellen, *The History of Women's Work and Wages and How it Has Created Success for Us All*, BROOKINGS (May 2020), <https://www.brookings.edu/essay/the-history-of-womens-work-and-wages-and-how-it-has-created-success-for-us-all>.

²⁶ *See id.*

²⁷ *Women in the Work Force during World War II*, NAT'L ARCHIVES, <https://www.archives.gov/education/lessons/wwii-women.html> (last visited Nov. 9, 2021).

²⁸ Thalia Ertman, *The Lanham Act and Universal Childcare During World War II*, FRIENDS NAT'L WWII MEM'L (June 27, 2019), <https://www.wwiimemorialfriends.org/blog/the-lanham-act-and-universal-childcare-during-world-war-ii>.

²⁹ Lydia Kiesling, *Paid Child Care for Working Mothers? All It Took Was a World War*, N.Y. TIMES (Oct. 2, 2019), <https://www.nytimes.com/2019/10/02/us/paid-childcare-working-mothers-wwii.html>; Lanham Act of 1940, 42 U.S.C. § 1592; *see also* Chris M. Herbst, *Universal Child Care, Maternal Employment, and Children's Long-Run Outcomes: Evidence from the US Lanham Act of 1940*, 35 J. LAB. ECON. 519, 526 (2017).

³⁰ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e.

origin.³¹ However, Howard Smith, a democratic Congressman from Virginia (and avid segregationist) proposed an amendment to add sex to the list of prohibited bases for discrimination.³² According to Smith, this was prompted by a letter from a woman who was concerned about her friends who were unlucky in love and could not find an eligible bachelor to take care of them.³³ Some believe this was Smith's attempt at ensuring that the Civil Rights Act did not pass, but after the laughter settled, several Congress-people were able to get serious consideration for the amendment.³⁴ The amendment passed, and women became slightly more human.³⁵ Although this was a major victory for working women, it was not the end of the story. Courtroom battles ensued to define the boundaries of sex discrimination.³⁶

Similarly, Title IX also affects women in the workforce since it prohibits discrimination at federally funded academic institutions.³⁷ This law focuses on discrimination in the following areas: “[R]ecruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment . . . ; treatment of pregnant and parenting students; discipline; single-sex education; and employment.”³⁸ This is particularly relevant to gendered stigma in the legal profession because pregnant and parenting law students may need accommodations out of medical necessity. Title IX guarantees that these students will be given the opportunity to make up any assignments missed provided that a doctor's recommendation is produced to the institution.³⁹ As many institutions are becoming more available to women with flexible and part-time schedules,⁴⁰ the need for accommodations and protections of

³¹ *Id.*

³² GILLIAN THOMAS, *BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK* 1–2 (2016).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *See* *Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

³⁷ *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last visited Mar. 4, 2020).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *See* *2022 Best Part-time Law Programs*, U.S. NEWS, <https://www.usnews.com/best-graduate-schools/top-law-schools/part-time-law-rankings> (last visited Dec. 15, 2021).

pregnant and parenting students becomes even more relevant.

In 2019 women in the United States made up approximately 45% of the workforce.⁴¹ The situation for women seemed to be the best it has been, and still improving. As the COVID-19 pandemic settled in during 2020, however, many women have dropped out of the workforce completely – meaning not only are they not working, but they are no longer looking for work either.⁴²

In September 2020 alone 865,000 women left the U.S. workforce.⁴³ This was four times the number of men who exited the workforce that month.⁴⁴ While some jobs are returning as states begin to open back up, October 2020 saw nearly 2.2 million fewer women in the workforce compared with October 2019.⁴⁵

These statistics are enlightening. Despite the progress that has been made, women's status in the workforce is tenuous. They can be transported back to the 1940s quickly when there is not an infrastructure in place to support working women. Women have been sent the message that these struggles are their own to survive.⁴⁶

There is no help on the way. It is up to the individual person, and up to the individuals who make up the power structures in the workplace to forge sustainable solutions. Although the Civil Rights Act and other legislation did help women's progress, these are largely

⁴¹ See U.S. BUREAU OF LAB. STATS., USDL-20-0010, THE EMPLOYMENT SITUATION—DECEMBER 2019, TABLE A-1: EMPLOYMENT STATUS OF THE CIVILIAN POPULATION BY SEX AND AGE (Jan. 10, 2020).

⁴² *Explainer: How Covid-19 Impacts Women and Girls*, U.N. WOMEN, https://interactive.unwomen.org/multimedia/explainer/covid19/en/index.html?gclid=Cj0KCQiAkZKNBhDiARIsAPsk0WhCbxFWSLXj4LpF3tY3wbWv-uygEAs_82QMOiufhOCJtkabaUZNQ1gaAhPREALw_wcB (Mar. 17, 2021).

⁴³ CLAIRE EWING-NELSON, NAT'L WOMEN'S L. CTR., FOUR TIMES MORE WOMEN THAN MEN DROPPED OUT OF THE LABOR FORCE IN SEPTEMBER 1 (2020), <https://nwlc.org/wp-content/uploads/2020/10/september-jobs-fs1.pdf>.

⁴⁴ *Id.*

⁴⁵ Kathryn A. Edwards, *Women Are Leaving the Labor Force in Record Numbers*, RAND BLOG (Nov. 24, 2020), <https://www.rand.org/blog/2020/11/women-are-leaving-the-labor-force-in-record-numbers.html>.

⁴⁶ MILANA L. HOGAN, GRIT, THE SECRET TO ADVANCEMENT: STORIES OF SUCCESSFUL WOMEN 2 (Am. Bar Ass'n Comm'n on Women in the Pro., 2013); Angela Duckworth et al., *Grit: Perseverance and Passion for Long-Term Goals*, 92 J. PERSONALITY & SOC. PSYCH. 1087, 1087–88 (2007).

focused only on discrimination.⁴⁷ Discrimination is a surface level problem that is latent and exposed for all to see. Gendered stigma, however, includes micro-aggressions, or more covert acts of sexism, that do not rise to the level of discrimination.⁴⁸ But the women who are experiencing these micro-aggressions are still left to deal with these situations on a personal and professional level.⁴⁹

B. Women in Law

1. Law School

Law school is a grueling endeavor that is required in most jurisdictions to take a bar exam, which is the ultimate hurdle to becoming an attorney.⁵⁰ Despite the fact that women may even outnumber men in some schools, the way that law school is taught continues to put marginalized groups at a disadvantage, including women.⁵¹ For example, the Socratic method of teaching in law school is a challenge for marginalized groups who are historically taught that they have no voice and no place at the table.⁵² This method is carried out by professors calling on students without warning and submitting the student to an intellectual inquiry based on the cases assigned for that class period.⁵³ Colloquially, this is referred to as “cold-calling” where students are unaware who the professor will call on next and must always be ready to answer questions.⁵⁴ Depending on the professor, you may be required to stand when you are called on to recite a case and be subject to the professor’s inquiries. In the best-case scenario, the student

⁴⁷ Off. Assistant Sec’y Admin. & Mgmt., *Legal Highlight: The Civil Rights Act of 1964*, U.S. DEP’T LAB., <https://www.dol.gov/agencies/oasam/civil-rights-center/statutes/civil-rights-act-of-1964> (last visited Dec. 15, 2021).

⁴⁸ Christina M. Capodilupo et al., *The Manifestation of Gender Microaggressions*, in MICROAGGRESSION AND MARGINALITY: MANIFESTATION, DYNAMICS, AND IMPACTS 193 (Derald Wing Sue ed., 2010).

⁴⁹ See Amanda M. Fisher, *Gendered Stigma in the Legal Profession* (2021) (Ph.D. dissertation, University of California, Irvine) (ProQuest).

⁵⁰ *Bar Admissions Basic Overview*, AM. BAR ASS’N (June 26, 2018), https://www.americanbar.org/groups/legal_education/resources/bar_admissions/basic_overview.

⁵¹ ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* 3 (Oxford Univ. Press 2007).

⁵² *Id.* at 6.

⁵³ Jeannie Suk Gersen, *The Socratic Method in the Age of Trauma*, 130 HARV. L. REV. 2320, 2324–47 (2017).

⁵⁴ See *id.*

is on call for a few minutes and when the professor is done with that student, the student is free to relax and pay attention to the remaining class discussion.⁵⁵ However, some professors stay with one student for long periods of time, even over an hour.⁵⁶ Ultimately, this can be an uncomfortable experience for anyone, but more particularly when there is a strained power dynamic between the typically older, white, male professors and marginalized students.⁵⁷

The fear-inducing teaching methods are not preventing women from flooding legal education in the United States.⁵⁸ In 2019 the American Bar Association's Commission on Women in the Profession published a report showing that women make up 50% of people who complete their Juris Doctor.⁵⁹ As a means of comparison, in 1971, the number of women in the legal profession was 3%.⁶⁰ The ABA's 2019 report found that women only make up 38% of the legal profession, despite numerical parity in law schools.⁶¹ Further, approximately 23% of partners in law firms are women.⁶² While it may take several years for the number of women completing their Juris Doctor degrees to appear in the numbers of women in the legal profession, the imbalance of gender in the legal profession is not likely to resolve if the profession is not a place where people are treated equally.

These statistics warrant an inquiry into the lived experiences of women in the profession. If women are entering and graduating law school in nearly equal numbers to men, but are not staying in the profession, or making it to the top tiers of the profession, there is attrition happening along the way. In 2017 the ABA launched an initiative into this exact issue.⁶³ It found many reasons why women

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ Gersen, *supra* note 53, at 2347; *See* Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71, 74 (1971); MERTZ, *supra* note 51, at 35.

⁵⁸ *See* Kennedy, *supra* note 57.

⁵⁹ AM. BAR ASS'N COMM'N ON WOMEN IN THE PRO., *supra* note 12, at 4.

⁶⁰ Joyce Sterling & Nancy Reichman, *Overlooked and Undervalued: Women in Private Law Practice*, 12 ANN. REV. L. & SOC. SCIENCE 373, 377 (2016).

⁶¹ AM. BAR ASS'N COMM'N ON WOMEN IN THE PRO., *supra* note 12, at 2.

⁶² *Id.* at 2.

⁶³ *Why Women Leave the Profession*, AM. BAR ASS'N (Dec. 2017), <https://www.americanbar.org/news/abanews/publications/youraba/2017/december-2017/aba-summit-searches-for-solutions-to-ensure-career-longevity-for>.

leave the profession even after fifteen or twenty years, including caretaking responsibilities and toxic law firm culture.⁶⁴

2. Women in the Profession

Law is a “greedy institution,”⁶⁵ meaning that it is an organization that requires total commitment by its members; the military is another example. Practicing law can and does consume many attorneys.⁶⁶ The advent of technology has made the profession more portable, but has also made lawyers more accessible.⁶⁷ Lawyers now can find ways to work during what used to be in-between times.⁶⁸ For example, a lawyer might be able to work in a vehicle while someone else drives through the use of a hotspot. Family is also a greedy institution, particularly for women, based on traditional social expectations.⁶⁹ As one attorney/mother indicated, “I am wear[ied] to my core. The kind of tired that sleep can’t fix.”⁷⁰ As long as women face social expectations to both handle all domesticity and to be career minded, finding balance will continue to be a challenge.

Gendered stigma is a universal struggle for women in law.⁷¹ For example, in 1952 former Supreme Court Justice Sandra Day O’Connor

⁶⁴ *Id.*

⁶⁵ COSER & COSER, *supra* note 7, at 89; CYNTHIA FUCHS EPSTEIN ET AL., THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIVES, FAMILY, AND GENDER 88 (Routledge 1999).

⁶⁶ AM. BAR ASS’N, PROFILE OF THE LEGAL PROFESSION 95-101 (2021), <https://www.americanbar.org/content/dam/aba/administrative/news/2021/0721/polp.pdf>.

⁶⁷ Cynthia L. Cooper, *Work-Life Imbalance: Pandemic Disruption Places New Stresses on Women Lawyers*, AM. BAR ASS’N (Dec. 18, 2020), <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2021/december/worklife-imbalance-pandemic-disruption-places-new-stresses-women-lawyers/>.

⁶⁸ *Id.*

⁶⁹ LEWIS A. COSER & ROSE LAUB COSER, *The Housewife and Her Greedy Family*, in GREEDY INSTITUTIONS: PATTERNS OF UNDIVIDED COMMITMENT 89 (Free Press 1974).

⁷⁰ This quote is a result of the author’s dissertation data collection. See Fisher, *supra* note 49, at 13.

⁷¹ All women struggle against gendered stigma, but the degree women experience it will differ based on intersectionality discussed in more detail below.

graduated third out of her class of over 100 at Stanford Law.⁷² She had extraordinary credentials, including being on the editorial board of the *Standard Law Review*.⁷³ Yet, she could not find work despite applying at firms across California.⁷⁴ Instead, she was offered a position as a legal secretary, which she turned down.⁷⁵ While it seems that these experiences were long ago, the tide still did not turn after she became the first woman appointed to the United States Supreme Court in 1981.⁷⁶ Justice O'Connor spent twelve years on the Court before there was a women's restroom in the judicial robing room. It was 1993, shortly after Ruth Bader Ginsburg joined the Court, that a women's restroom was added.⁷⁷ This degree of obstacle has become quite rare, fortunately, but their victories are in the not-too-distant past. Furthermore, it was only twelve years ago in 2009 when the United States saw the first Latina woman appointed to the Supreme Court of the United States with Justice Sotomayor,⁷⁸ and we are still waiting to see the first African American woman appointed to the Supreme Court of the United States. While these examples are landmarks in women's equality and should be thought of as such, we still have a long way to go.

Finding room at the table is a constant battle. In an effort to encourage women to take their places, the American Bar Association's Commission on Women in the Profession published several reports about successful women attorneys having grit, and how women's successful experiences in the legal profession can be passed down to new female attorneys.⁷⁹ Milana Hogan is credited by the American Bar

⁷² *Sandra Day O'Connor*, SANDRA DAY O'CONNOR INST., <https://oconnorinstitute.org/civic-programs/oconnor-history/sandra-day-oconnor-policy-archives-research-library/biography> (last visited Mar. 4, 2020).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ RUTH BADER GINSBURG ET AL., *MY OWN WORDS* 73 (Simon & Schuster 2018).

⁷⁸ JILL L. CRUZ & MELINDA S. MOLINA, *FEW AND FAR BETWEEN: THE REALITY OF LATINA LAWYERS 2* (Hispanic Bar Ass'n ed. 2009), <http://hnba.com/wp-content/uploads/2015/06/few-far-between.pdf>, reprinted in 37 *PEPP. L. REV.* 971, 974 (2010).

⁷⁹ Kathrine M. Larkin-Wong, *Grit, Growth Mindset, and Being a Great Trial Lawyer*, AM. BAR ASS'N (Mar. 9, 2015), <https://www.americanbar.org/groups/litigation/committees/woman-advocate/articles/2015/grit-growth-mindset-being-great-trial-lawyer>; *Women*

Association (A.B.A.) with the idea that grit makes women successful in legal careers.⁸⁰ Grit is defined by Hogan as “persevere[nce] in the face of challenges, work[ing] harder and longer and . . . more likely to focus . . . efforts on improving . . . performance.”⁸¹ In the context of Berdahl et al.’s research on workplace masculinity contest (discussed in more detail below), this seems to tell women what they already know—you must work harder and longer than your male colleagues to have any hope of being viewed as an equal.⁸² This idea of grit is easily challenged by the notion that women cannot simply work harder and longer and achieve success because of the structural frameworks in place in the profession and in society.⁸³ The A.B.A. publication on grit explains its position by quoting one participant who said, “Grit is not about keeping my head down and just working super long hours. Grit is not about paper-pushing to keep all partners and clients happy. Instead, grit is being a team player, but also being tenacious about my own priorities and living consistent with my values.”⁸⁴ This idea seems to be a modern version of the classic adage, “work smarter, not harder.” But for women, it still translates into working smarter and harder than your male colleagues.

Factions of the legal community have been innovating solutions to specific challenges for women in the legal profession. Lactation rooms in courthouses are one example.⁸⁵ An attorney may wait hours when attending a docket call, so having a place for a nursing mother to pump is as important as having restrooms for everyone.⁸⁶ Currently the Florida Association of Women Lawyers has a task force focused on

in the Profession, *supra* note 8; Comm’n on Women in the Pro., *21 Day Grit and Growth Mindset Challenge: Days 1-10*, AM. BAR ASS’N, <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2021/december/worklife-imbalance-pandemic-disruption-places-new-stresses-women-lawyers/> (last visited Dec. 15, 2021).

⁸⁰ HOGAN, *supra* note 46.

⁸¹ *Midyear 2017: Researcher Promotes Grit and Growth Mindset as Keys to Success for Women Lawyers*, AM. BAR ASS’N: NEWS (Jan. 31, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/01/midyear_2017_research/.

⁸² See generally Jennifer Berdahl et al., *supra* note 5, at 442–43; HOGAN, *supra* note 46; *Women in the Profession*, *supra* note 8.

⁸³ Fisher, *supra* note 49.

⁸⁴ HOGAN, *supra* note 46, at 4; *Women in the Profession*, *supra* note 8.

⁸⁵ *Breastfeeding Accommodations*, MOTHERSESQUIRE, <https://www.mothersesquire.com/breastfeeding> (last visited Oct. 24, 2021).

⁸⁶ *Id.*

getting lactation rooms in courthouses.⁸⁷ This is a stepping stone in resolving one of the many issues that women face when deciding or trying to return to work after giving birth, which affects women's long-term career trajectories.⁸⁸ However, the simple presence of a lactation room does not completely solve the problem for nursing attorneys. These women still must request permission from the court for trial and hearing timeline adjustments that take into account the potential need to deviate from standard procedure to accommodate a medical necessity (pumping breastmilk).⁸⁹ These requests not only require women to discuss in open court their specific and personal breastfeeding journey, but it also opens the door for opposing counsel to object to the timelines and, as a result, object to the mothers' physical need to pump breastmilk.⁹⁰ Yet, no one objects when a male attorney needs a restroom break.

Women's issues in the legal profession are not limited to mothering responsibilities, however. For example, in September 2019 a Florida attorney was told by opposing counsel's expert witness that she was a "neophyte lawyer" who was "trying to break through the glass ceiling and excel in a man's game" before he threatened her with a complaint to the Florida Bar.⁹¹ Although the man making these comments is not an attorney, he felt confident that his experience "doing real estate and foreclosure since [she was] doing half-naked body shots

⁸⁷ FLA. ASS'N FOR WOMEN LAW, COURTHOUSE LACTATION SPACE HANDBOOK 5–6 (2021), https://www.fawl.org/assets/FAWL%20Lactation%20Space%20Handbook%202021_03.pdf.

⁸⁸ Jennifer A. Kingson, *Women in the Law Say Path is Limited by 'Mommy Track'*, N.Y. TIMES (Aug. 8, 1988), <https://www.nytimes.com/1988/08/08/us/women-in-the-law-say-path-is-limited-by-mommy-track.html>.

⁸⁹ Jennifer L. Feld, *A New Mother's Guide to Pumping During a Jury Trial*, LAW.COM: DAILY BUS. REV. (Aug. 7, 2018), <https://www.law.com/dailybusinessreview/2018/08/07/a-new-mothers-guide-to-pumping-during-a-jury-trial>, reprinted in KUBICKI DRAPER (Aug. 7, 2018) <https://www.kubickidraper.com/a-new-mothers-guide-to-pumping-during-a-jury-trial->.

⁹⁰ *Id.*

⁹¹ Luke Andrews, *Lawyer Exposes 'Sexist' Opponent Who Told Her Law is a 'Man's Game' That He's Been Working at Since She Was 'Doing Half-Naked Body Shots to Impress Drunken Frat Boys'*, DAILY MAIL (Sept. 16, 2019, 9:13 A.M.), <https://www.dailymail.co.uk/femail/article-7468437/Lawyer-exposes-sexist-opponent-told-law-mans-game.html>.

to impress drunken frat boys[]” outweighed her law degree, bar license, and experience as a practicing attorney.⁹² Fortunately, the management at the attorney’s firm took the issue seriously and publicly condemned this man’s behavior towards one of their litigators.⁹³ The support she received from her firm is extraordinary—not at all the norm. This situation highlights that, while women in the legal profession have advanced significantly since the early 20th Century, the work is not yet done.

Recent research by the A.B.A focused on why women leave the profession even after fifteen years of practice or more.⁹⁴ According to their findings, this attrition is likely part of the reason women are not reaching the upper echelons of the legal profession.⁹⁵ Not surprisingly, this research indicates that the top reasons women leave relate to caretaking obligations for children and aging parents.⁹⁶ But these are not the only reasons—the report also indicates a problem in law firm culture.⁹⁷ When team building activities often center on traditionally male activities such as sporting events or golf outings, it may leave women—and particularly women of color—feeling excluded.⁹⁸

While the United States’ workforce has improved for women, and specifically women in the practice of law, the stigma of being a woman in a male-centered profession remains.⁹⁹ The progress made in the gender pay gap and other similar victories should be celebrated, but the cycle has not yet been broken.¹⁰⁰ Despite decades of judicial rulings protecting gender status and the formation of commissions and task forces dedicated to effectuating positive change for women in the legal profession, women still lag behind men in important ways in the legal

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Why Women Leave the Profession*, *supra* note 63.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ DESTINY PEERY ET AL., AM. BAR ASS’N COMM’N ON WOMEN IN THE PRO., LEFT OUT AND LEFT BEHIND: THE HURDLES, HASSLES, AND HEARTACHES OF ACHIEVING LONG-TERM LEGAL CAREERS FOR WOMEN OF COLOR 9—10 (2020), <https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf>.

⁹⁹ Fisher, *supra* note 49.

¹⁰⁰ *Id.*

profession.¹⁰¹

III. THEORETICAL FRAMEWORKS

A. Identity

Women who are attorneys battle a litany of external expectations by way of others' perceptions of them in addition to the internal pressure they apply to themselves.¹⁰² Identity theory forms the foundation for discerning whether the actual and virtual perceptions of women in the legal profession have an effect on individuals in their personal lives and, further, how a person might reconcile who they believe they are (i.e., an excellent attorney) with what society dictates they are (i.e., a caretaker).¹⁰³

A person's self is made of many identities.¹⁰⁴ Some identities are roles that a person chooses to perform and other parts are constructed based on a comparison of a person with group expectations.¹⁰⁵ The result is that identity is a mixture of how individuals view themselves and how the individual believes society views them.¹⁰⁶ Further, identity theory examines how individuals develop and organize a set of meanings encompassing the Self. In 1902, Charles Horton Cooley found that "the individual and society are two sides of the same coin."¹⁰⁷

¹⁰¹ *Frontiero v. Richardson*, 411 U.S. 677, 684–88 (1973) (holding that laws differentiating by sex are subject to strict scrutiny analysis); see *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639–40, 651 (1974) (invalidating rules forcing women to take unpaid leave after their first trimester because they were not suited to work and not allowing them to return to work until their child was three months old); see also *Corning Glass Works v. Brennan*, 417 U.S. 188, 189, 205, 207–08 (1974) (determining that paying female inspectors less than male inspectors was a violation of the Equal Pay Act).

¹⁰² Caroline Spiezio, *Mental Health, Stress Have One-in-Four Women Lawyers Mulling Career Change*, REUTERS (May 17, 2021, 12:03 PM), <https://www.reuters.com/business/legal/mental-health-stress-have-one-in-four-women-lawyers-mulling-career-change-2021-05-12/>.

¹⁰³ Fisher, *supra* note 49.

¹⁰⁴ DAPHNA OYSERMAN ET AL., *SELF, SELF-CONCEPT, AND IDENTITY*, IN *HANDBOOK OF SELF AND IDENTITY* 71–74 (MARK R. LEARY & JUNE PRICE TANGNEY, EDs., The Guilford Press, 2d ed. 2021).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ PETER J. BURKE & JAN E. STETS, *AGENCY AND SOCIAL STRUCTURE*, IN *IDENTITY THEORY 2* (Oxford Univ. Press 2009); see also CHARLES HORTON COOLEY, *HUMAN NATURE AND THE SOCIAL ORDER* 1–7 (Charles Scribner's Sons 1902).

Each is informed and influenced by the other.¹⁰⁸ The positions that people perform are referred to as roles or role-based identity.¹⁰⁹ These can be thought of as individual level identities.¹¹⁰ Social identities relate to the expectations encountered from external sources.¹¹¹ These are group level identities.¹¹² Both individual and group identities are relevant to women who are attorneys. “Attorney” can be both a role-based identity and a social identity. People who are attorneys might self-select the role of attorney when describing themselves to others, but their behavior is also very much group focused in the sense that there are particular expectations of all attorneys.¹¹³ Many of those default group expectations are based around the standards for men.¹¹⁴

1. Role-based Identity

Roles are one facet of how a person categorizes themselves within society’s context.¹¹⁵ For example, employee/employer, student/teacher, spouse, parent/child, etc. Roles are self-selected.¹¹⁶ People who are in “professional” occupations often equate their occupation as a part of their whole Self.¹¹⁷ Doctors, lawyers, and priests are a few examples of professional occupations. Typically, when asked what they do for a living, the response from individuals in these professions might be, “I *am* a lawyer” or “I *am* a doctor” compared with other occupations like a salesperson, who might respond, “I *sell* cars.”

¹⁰⁸ BURKE & STETS, *SUPRA* NOTE 107, AT 2.

¹⁰⁹ PETER J. BURKE & JAN E. STETS, *BASES OF IDENTITIES: ROLE, GROUP AND PERSON, IN IDENTITY THEORY 4* (Oxford Univ. Press 2009).

¹¹⁰ *See id.* at 4.

¹¹¹ *See id.*

¹¹² *Id.*

¹¹³ MODEL RULES OF PRO. CONDUCT (AM. BAR ASS’N 1980).

¹¹⁴ *See* Amanda J. Morris & Glaister Brown, *Working as a Woman in a Male-Dominated Profession: Female and Male Perspectives*, AM. BAR ASS’N: YOUNG LAW. DIV.,

https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/mentoring/working-as-a-woman-a-male-dominated-profession/ (last visited Dec. 15, 2021).

¹¹⁵ Peter J. Burke, *The Self: Requirements from an Interactionist Perspective*, 43 SOC. PSYCH. Q. 18, 19 (1980); *see* BURKE & STETS, *supra* note 107, at 3 (citing GEORGE MCCALL & J.L. SIMMONS, *IDENTITIES AND INTERACTIONS: AN EXAMINATION OF HUMAN ASSOCIATIONS IN EVERYDAY LIFE* (Free Press 1978)).

¹¹⁶ BURKE & STETS, *SUPRA* NOTE 109, AT 1.

¹¹⁷ *Id.* at 4—5.

The distinction between who you are versus what you do is nuanced and related to how salient that identity is to the person's Self.

Although a role may be the label, the role identity is comprised of the meanings and behavioral expectations associated with that specific label.¹¹⁸ Goals, resources, and behaviors are driven by the role identity—the meaning that the individual attaches to the role label.¹¹⁹ Meaning-making and behavior-enforcing groups in power are referred to here as “The Normals.” This moniker is given to this group because it relates back to the sociological origins of deviance. In the context of the legal profession, the people who are maintaining the power structure currently in place are not homogenous, therefore they are difficult to identify in another way. However, these are the people and institutions that drive the in-group membership and expectations. Using this moniker is not a way to indicate that this structure should remain, but instead is a way to identify who is part of the group driving the culture of the profession.

Meaning may differ, however, within roles depending on the individual's interpretation.¹²⁰ Even though many people identify as lawyers, that does not mean that there are no differences between individuals.¹²¹ The group identity attaches certain meanings to the lawyer-role but there is space for some individuals to push the margins of the group.¹²² Burke and Stets use the example that being a student may mean academic discipline for some, but for others, it may mean being social and having fun before “real life” begins.¹²³

Behavior of individuals within a group stem from the meaning(s) associated with the role, but is distinct from the meaning itself. Therefore, when there is dissonance between what an individual believes is the meaning of a role that they hold and the behaviors related to the meaning, they must negotiate meanings to reconcile the differences.¹²⁴ Consider first the role of parent. For some, this means

¹¹⁸ David M. Sluss & Blake E. Ashforth, *Relational Identity and Identification: Defining Ourselves Through Work Relationships*, 32 *ACAD. MGMT. REV.* 9, 10 (2019) (citing HELEN ROSE FUCHS EBAUGH, *BECOMING AN EX* (Univ. Chicago Press 1988)).

¹¹⁹ BURKE & STETS, *supra* note 109, at 4.

¹²⁰ *See id.* at 4–5.

¹²¹ *See id.*

¹²² *See id.*

¹²³ *Id.* at 4.

¹²⁴ BURKE & STETS, *supra* note 109, at 5.

staying home to focus on raising children. For others, this means going to work to support the children. These behaviors are different, but they both imply meaning that it is a parent's responsibility to care for their children. Gender also drives the behaviors and expectations of parents. Depending on the context, it may be more acceptable for a male parent to work long hours or for a female parent to not work outside the home.

Now consider the role of lawyer in addition to the role as parent, specifically mothers. One study indicated that working moms put in an average of 98 hours a week.¹²⁵ What does that mean for working moms who are lawyers since being a lawyer is also considered a significant time demand?

Ultimately, the dissonance between whether being a mother means staying home or working is one example of how an identity's implications can be reconciled by renegotiating meanings.¹²⁶ Whether someone is a working mom or a stay-at-home mom, the behaviors within the role offer support for the children in different ways, so perhaps having the role of mother means that you care for your children, no matter whether that care looks like staying home or going to work.

2. Role Relationships and Identity Salience

The terms "identity" and "identification" are often used interchangeably¹²⁷, but the concepts are slightly nuanced through the more recent identity literature.¹²⁸ The relational identity is the labeled position of one role in opposition from the counter role, such as supervisor/supervisee.¹²⁹ This is the basic notion that one role is based on its relationship with another role.¹³⁰ Role-relational identification,

¹²⁵ Maricar Santos, *When You Factor in Family Duties, the Average Working Mom Works 98 Hours a Week*, WORKING MOTHER (Dec. 21, 2018), <https://www.workingmother.com/when-you-factor-in-family-duties-average-working-mom-works-98-hours-week>.

¹²⁶ This example is used in a vacuum to exemplify the concept of identity dissonance and renegotiating meanings. Often whether a parent stays home or goes to work is much less a choice than is described in this example. Parents of color and parents of low socioeconomic status may not have the luxury to choose whether to work or stay home with their children.

¹²⁷ See Sluss & Ashforth, *supra* note 118, at 11.

¹²⁸ See Marilyn B. Brewer & Wendi Gardner, *Who is This "We"? Levels of Collective Identity and Self Representations*, 71 UNIV. OHIO J. PERS. SOC. PSYCH. 83, 83–93 (1996).

¹²⁹ Sluss & Ashforth, *supra* note 118, at 11.

¹³⁰ *Id.*

however, refers to how a person's sense of Self might be affected by the role-relationship.¹³¹ The difference is important because there are instances where a person has been devalued based on an identity, but through resistance mechanisms, the external devaluation did not affect the person's sense of Self.¹³² Figuring out how important a particular role is to a person's sense of Self can also depend on the context of any given interaction.¹³³ When a lawyer appears in court on behalf of a client, the lawyer role is likely most important, or most salient. Salient roles are those that are at the top of a person's list, meaning that they are most central to the person's sense of Self in a given context.¹³⁴ The same lawyer may have other roles that are also salient, but those roles move down the hierarchy when the lawyer role is front and center. The more salient the role, the higher the likelihood that the role will give a person significant satisfaction if that role is verified.¹³⁵ Salience depends on context, however, and a role that is verified in one circumstance may take a backseat in another circumstance so that an alternative role may be verified.¹³⁶

3. Social Identity

Being a lawyer is more than an occupational role, it also means belonging to a group of people who have, minimally, also been through law school and passed a bar exam. Social identity comes from the groups to which individuals belong rather than the roles they perform.¹³⁷ Social groups are made up of members who share similar views and behaviors that produce value or significance to each person in the group.¹³⁸ Over time, those similarities become a collective

¹³¹ *Id.*

¹³² *Id.* at 14.

¹³³ *Id.*

¹³⁴ Jan E. Stets & Peter J. Burke, *Identity Theory and Social Identity Theory*, 63 *SOC. PSYCH. Q.* 224, 229 (2000) (citing SHELDON STRYKER, *SYMBOLIC INTERACTIONISM: A SOCIAL STRUCTURAL VERSION* (1980)).

¹³⁵ Peter L. Callero, *Role-identity Salience*, 48 *SOC. PSYCH. Q.* 203, 203–14 (1985); see generally Henri Tajfel & John C. Turner, *The Social Identity Theory of Intergroup Behavior*, in *POLITICAL PSYCHOLOGY: KEY READINGS* 283 (John T. Jost & Josh Sidanius eds., 2004).

¹³⁶ Sluss & Ashforth, *supra* note 118.

¹³⁷ *Id.*; Stets & Burke, *supra* note 134, at 225.

¹³⁸ Stets & Burke, *supra* note 134, at 225.

personality.¹³⁹ Even though lawyers vary widely in individual characteristics, there is a handful of primary motivations for attending law school, thus setting out on the journey to becoming an attorney.

The process of forming a social identity includes an informal comparison of individual views and behaviors with those of the group.¹⁴⁰ People who align with the group are part of the in-group, and people who do not are part of the out-group.¹⁴¹ This in-group/out group categorization is the process of othering, or creating a collective “us” versus a collective “them.”¹⁴² As the group grows, a prototype forms as a composite of the members.¹⁴³ The prototype embodies the features that make people within the group similar and people outside the group different.¹⁴⁴ Since lawyers rely heavily on networking, the informal process of othering can often happen via networking events.

At times, group membership can be arbitrary.¹⁴⁵ At other times, the separation is intentional. In the legal profession, people often self-select into subgroups.¹⁴⁶ Practice area is a common way that attorneys separate into groups.¹⁴⁷ There are bar associations, conferences, and gatherings that are planned based on practice area.¹⁴⁸ Political affiliation is another example of social identity.¹⁴⁹ When a person identifies with a major political party, one can assume that person shares views, feelings, and behaviors with the prototypical

¹³⁹ Stets & Burke, *supra* note 134, at 225; JOSÉ M. MARQUES, *The Black-Sheep Effect: Out-Group Homogeneity in Social Comparison Settings*, in SOCIAL IDENTITY THEORY 134 (Dominic Abrams & Michael A. Hogg eds., 1990).

¹⁴⁰ Stets & Burke, *supra* note 134, at 225.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Stets & Burke, *supra* note 134, at 225; MARQUES, *supra* note 139, at 131–32; JAN E. STETS, *Identity Theory*, in CONTEMPORARY SOCIAL PSYCHOLOGICAL THEORIES 89 (Peter J. Burke ed., 2006).

¹⁴⁵ See Stets & Burke, *supra* note 134.

¹⁴⁶ *ABA Groups*, AM. BAR ASS’N, <https://www.americanbar.org/groups/> (last visited Dec. 15, 2021).

¹⁴⁷ *Id.*

¹⁴⁸ See CMTY. ASS’NS INST.,

https://www.caionline.org/pages/default.aspx?gclid=Cj0KCQiAqbyNBhC2ARIsALDwAsBMqZYcmYqAbZEDeezPOUKgtGns9NjwbsBjdt7JfxX9ML6Lblm7MbEaAiUTEALw_wcB (last visited Dec. 15, 2021).

¹⁴⁹ PETER J. BURKE & JAN E. STETS, *IDENTITY THEORY* 120 (Oxford Univ. Press 2009).

person from the political party. Further, just as in role-based identities, people seek out verification of their social identity as verification produces a sense of self-worth and a sense of belonging.¹⁵⁰ Being part of a group that shares values is one way to verify a social identity.¹⁵¹

Moreover, being part of an in-group does not mean that every member is exactly the same, but that there are enough similarities with respect to the prototype that the individual is more like the in-group and less like the out-group.¹⁵² Lawyers share perspectives, experiences, and behaviors. Lawyers are expected to be analytical, not because every person who is a lawyer is right brained, but because lawyers all share foundational training.¹⁵³ It is unlikely that anyone leaves law school and passes a bar exam without having a highly developed ability to analyze anything put in front of them. Lawyers are also expected to be hardworking and have a keen attention to detail, yet there are many sloppy lawyers.¹⁵⁴ Group expectations, real or perceived, can be a driving force behind an individual's behavior.¹⁵⁵

4. Identity conflict

In any given situation, individuals seek to confirm the meaning of their identity.¹⁵⁶ What happens when pieces of an individual's identity conflict—when a person cannot verify one part an identity without invalidating another part? Women in the legal profession face this obstacle relentlessly. Further, for many women who are also lawyers and mothers, this conflict may be a daily occurrence. Even for women who are not mothers and may never want to be mothers, but are perceived as being of child-bearing age, can experience the same conflict due to the expectations being placed on them by external forces. How would a lawyer who is also a mother decide which identity to disconfirm? Which identity is more important than the other?

Without identity-verification, people become dissatisfied and may remove themselves from the situation that is not confirming their

¹⁵⁰ See Stets & Burke, *supra* note 134, at 225.

¹⁵¹ BURKE & STETS, *SUPRA* NOTE 149, AT 15—17.

¹⁵² *Id.* at 118.

¹⁵³ 2021-2022 *Standards and Rules of Procedure for Approval of Law Schools*, AM. BAR ASS'N: STANDARDS, https://www.americanbar.org/groups/legal_education/resources/standards/ (last visited Dec. 15, 2021).

¹⁵⁴ Fisher, *supra* note 49.

¹⁵⁵ BURKE & STETS, *SUPRA* NOTE 149, AT 7.

¹⁵⁶ BURKE & STETS, *supra* note 109, at 9.

sense of self. The legal profession is rampant with people suffering from depression, substance abuse, and various other mental health struggles.¹⁵⁷ A 2016 study surveyed nearly 13,000 attorneys in the U.S. and found that 28% of the respondents were suffering from depression, 19% from anxiety, 23% from stress, and 22.6% of respondents indicated problematic alcohol or substance use.¹⁵⁸ Although the respondents in this study did not remove themselves physically from the profession, these results suggest that lawyers may cope with identity disconfirming contexts by removing themselves mentally.

Moreover, there is widespread attrition of women in the legal profession. In 2017 the ABA launched an initiative on Achieving Long Term Careers for Women in Law to gather empirical evidence supporting why women leave the profession.¹⁵⁹ In 2019 the ABA released the first report from this initiative.¹⁶⁰ This report focused specifically on why women leave the profession after 15 or more years as lawyers.¹⁶¹ The main influences on why women leave include caretaking commitments (58%), Work life balance (46%), and personal or family health concerns (42%).¹⁶² Even though this report concluded with recommendation on how to prevent this attrition, one critic points out that the weakest suggestion for improvement was related to the most prominent reason women left—caretaking.¹⁶³ Ultimately, the culture of the profession as a whole is typically not conducive to people with other

¹⁵⁷ AM. BAR ASS'N, *supra* note 66, at 95—101.

¹⁵⁸ Patrick R. Krill, et al. *The Prevalence of Substance Use and Other Mental Health Concern Among American Attorneys*, 10 J. ADDICT. MED. 46 (2016).

¹⁵⁹ Comm'n on Women in the Pro., *Achieving Long-Term Careers for Women in the Law*, AM. BAR ASS'N, https://www.americanbar.org/groups/diversity/women/initiatives_awards/long-term-careers-for-women/ (last visited Dec. 15, 2021).

¹⁶⁰ ROBERTA D. LIEBENBERG & STEPHANIE A. SCHARF, AM. BAR ASS'N COMM'N ON WOMEN IN THE PRO., *WALKING OUT THE DOOR: THE FACTS, FIGURES, AND FUTURE OF EXPERIENCED WOMEN LAWYERS IN PRIVATE PRACTICE* (2019), <https://www.americanbar.org/content/dam/aba/administrative/women/walking-out-the-door-4920053.pdf>.

¹⁶¹ *Id.* at i.

¹⁶² *Id.* at 12.

¹⁶³ Lori Mihalich-Levin, *What's Missing from the ABA's Report on Why Women Leave Law Firms?* FIRSTHAND (Jan. 7, 2020), <https://firsthand.co/blogs/vaults-law-blog-legal-careers-and-industry-news/whats-missing-from-the-abas-report-on-why-women-leave-law-firms>.

obligations.¹⁶⁴ When faced with whether to stay at a demanding job that made them unhappy or to leave and focus on other aspects of their identity, many women have chosen to exit. Viewing this problem against the theoretical framework of identity theory may help to discern the nuances in why women leave and how the profession might implement practical solutions to keep more women in the profession.

5. Intersectionality

At one time, lawyer was synonymous with wealthy, white male.¹⁶⁵ While the stereotype remains, recent efforts to diversify the profession means that there are many differences within the lawyer group.¹⁶⁶ These differences within the in-group may encourage people to form smaller groups of people more like themselves. For example, being a lawyer and being a first-generation college student are separate roles, but lawyers who are also first-generation college students form a social sub-group within the larger lawyer group. That they are all lawyers, sets them apart from first generation individuals who are not lawyers, and that they are all first-generation college students sets them apart from all lawyers. Their collective experiences make them unique at the juncture of first-generation college student and lawyer.

In addition to the roles people select and the groups they join, there are certain characteristics about a person that are immutable such as race, ethnicity, ability, and sexual orientation. Race is an important part of a person's identity that drives their experiences in society at large.¹⁶⁷ The National Association of Law Placement released a report in February of 2021 on diversity within the legal profession.¹⁶⁸ One of the most astonishing statistics is that the percentage of associates who

¹⁶⁴ COSER & COSER, *supra* note 69, at 91.

¹⁶⁵ See Allison E. Laffey and Allison Ng, *Diversity and Inclusion in the Law: Challenges and Initiatives*, AM. BAR ASS'N (May 2, 2018), <https://www.americanbar.org/groups/litigation/committees/jiop/articles/2018/diversity-and-inclusion-in-the-law-challenges-and-initiatives/>.

¹⁶⁶ *Id.*; NAT'L ASS'N FOR L. PLACEMENT, 2020 REPORT ON DIVERSITY IN U.S. LAW FIRMS 4 (2021), https://www.nalp.org/uploads/2020_NALP_Diversity_Report.pdf.

¹⁶⁷ Peter Aspinnall & Miri Song, *Is Race a 'Salient...' or 'Dominant Identity' in the Early 21st Century: The Evidence of UK Survey Data on Respondent's Sense of Who They Are*, 42 SOC. SCI. RSCH. 547, 547 (2012) (finding that race is a salient identity).

¹⁶⁸ NAT'L ASS'N FOR L. PLACEMENT, *supra* note 166.

were black women in 2009 was 2.93%.¹⁶⁹ By 2020, that number increased to 3.04%. It took eleven years for that percentage to increase by *one-tenth of a percent*.¹⁷⁰ These numbers seem hopeless. As a comparison, the total percentage of associates who are women was 47.45% and the percentage of women of color who are associates was 15.17% in 2020.¹⁷¹ White women have a much larger presence in the profession than women of color. Given the stark contrast in the numbers, it would be ignorant to assume that a group of white women who are attorneys might represent the experiences of all women attorneys.

Intersectionality recognizes that discrimination is not one characteristic versus another, such as race versus gender.¹⁷² Instead, a person's experience and the discrimination one faces is often a result of various facets of their identity overlapping or intersecting.¹⁷³ Many women who are lawyers are mistaken for administrative professionals despite race or ethnicity, but women of color often face harsher devaluation than their white counterparts. In *De Graffenreid v. General Motors*, a group of Black women brought a discrimination claim because they had all been laid off.¹⁷⁴ The court found in favor of General Motors and stated,

The plaintiffs are clearly entitled to a remedy if they have been discriminated against. However, they should not be allowed to combine statutory remedies to create a new "super-remedy" which would give them relief beyond what the drafters of the relevant statutes intended. Thus, this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.¹⁷⁵

¹⁶⁹ *Id.* at 5.

¹⁷⁰ *Id.* at 5.

¹⁷¹ *Id.* at 14.

¹⁷² Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN L. REV. 1241, 1243—44 (1991).

¹⁷³ *Id.* at 1244.

¹⁷⁴ *De Graffenreid v. Gen. Motors Assembly Div.*, 558 F.2d 480 (8th Cir. 1977).

¹⁷⁵ *De Graffenreid*, 558 F.2d at 483 (8th Cir. 1977) (quoting *De Graffenreid v. Gen. Motors Assembly Div.*, 413 F. Supp. 142, 143 (E.D.Mo. 1976)).

This court effectively erased these women's identities as Black women and indicated that they needed to choose between their race and their gender as their primary identity. But the difference between choosing one or recognizing that they intersect makes the case. If they chose race discrimination, they would likely need to include Black men who had also been laid off, and maybe there were none. If they chose sex discrimination, they would likely need to include white women who had also been laid off and maybe there were none. This court refused to acknowledge the unique experiences of Black women due to their race and gender compounding on one another. This Article critically analyzes differences of lived experiences in the legal profession with an eye towards solutions for new beginnings.¹⁷⁶

B. Stigma

“Until women themselves reject stigma and refuse to feel shame for the way others treat them, they have no hope of achieving full human stature.”

-Germaine Greer¹⁷⁷

Stigma is closely related to identity theory because it explains how society assigns value to portions of individual identities. In 1963 sociologist Howard Becker wrote that, “social groups create deviance by making the rules whose infraction constitutes deviance[.] . . .”¹⁷⁸ As such, deviance first requires a set of norms.¹⁷⁹ Then, as power emerges through social groups, there becomes a separation of those who follow the social norms and those who do not.¹⁸⁰ As with many areas of study, research on deviance largely focused on men.¹⁸¹ After all, men have

¹⁷⁶ Critical perspectives generally recognize the racist, sexist, and classist notions ingrained into structures and institutions. See Patrizia Zanoni et al., *Unpacking Diversity, Grasping Inequality: Rethinking Difference Through Critical Perspectives*, 17 ORG. EDITORIAL 9, 14—16 (2010).

¹⁷⁷ Germaine Greer, *Guilt Poisons Women*, CNN: OPINION, <https://www.cnn.com/2013/03/12/opinion/greer-women-and-guilt/index.html> (Mar. 12, 2013).

¹⁷⁸ HOWARD S. BECKER, *OUTSIDERS: STUDIES IN THE SOCIOLOGY OF DEVIANCE* 9 (1963).

¹⁷⁹ *Id.* at 8.

¹⁸⁰ EDWIN M. SCHUR, *LABELING WOMEN DEVIANT: GENDER, STIGMA, AND SOCIAL CONTROL* 7 (1984); see also BECKER, *supra* note 178, at 8.

¹⁸¹ Frances Heidensohn, *The Deviance of Women: A Critique and an Inquiry*, 61 BRITISH J. OF SOCIOLOGY 111, 111 (2010).

always been the norm in most research studies¹⁸², just as men are the norm in the legal profession.¹⁸³ Women may be more present in the profession now, but since it is still a male-dominated and male-centric profession, women maintain their deviant status.

However, tides began to turn in the 1980s as academics started paying more attention to women.¹⁸⁴ As Schur points out, “[W]e might . . . say that women have served as ‘all-purpose deviants’ within our society.”¹⁸⁵ Due, in large part, to the fact that men have most often been the “deviance-classifiers and processors[,]” which lead to categorical devaluation of women.¹⁸⁶ Moreover, this categorical devaluation is maintained by everyday gendered interactions.¹⁸⁷ Deviance borne of powerful social strata is reified and reproduced through these day-to-day interactions because women are still fighting against male-dominated social structures. Therefore, men are “The Normals” and women are “The Deviants.”

Stigma, an outgrowth of labeling processes associated with the creation of deviance, has been described as a “spoiled identity.”¹⁸⁸ Spoliation often begins with a mark, or a negative attribute; a deviation from the norm.¹⁸⁹ Once deviant marks are recognized, they aggregate into categories, which is the mechanical, unconscious processing of “maximum information with [the] least cognitive effort . . .”¹⁹⁰ Importantly, marking only occurs when there is a normative entity with the power to label individual(s) as deviant.¹⁹¹ Stigma is wholly dependent on power.¹⁹² Without a person or group in power, stigma cannot attach. Moreover, stigma can be characterized as negative effects resulting in discomfort and hostility, whereas stereotypes are the

¹⁸² SCHUR, *supra* note 180, at 14.

¹⁸³ NAT’L ASS’N FOR L. PLACEMENT, *supra* note 166, at 4.

¹⁸⁴ See generally SCHUR, *supra* note 180.

¹⁸⁵ SCHUR, *supra* note 180, at 7.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ See ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 1 (1963).

¹⁸⁹ EDWARD E. JONES, *SOCIAL STIGMA: THE PSYCHOLOGY OF MARKED RELATIONSHIPS* 5 (1984).

¹⁹⁰ See ELEANOR ROSCH, *COGNITION AND CATEGORIZATION* 28 (Eleanor Rosch & Barbara B. Lloyd eds., 1978).

¹⁹¹ See GOFFMAN, *supra* note 188, at 5.

¹⁹² See Bruce G. Link & Jo C. Phelan, *Conceptualizing Stigma*, 27 *ANN. REV. SOCIO.* 363, 375 (2001).

internalization of categories to the extent that the negative affect is “justified.”¹⁹³ This highlights a flex point wherein a person can choose to internalize the external expectations they are experiencing as part of their identity, or they can choose to reject it.¹⁹⁴ Women in the legal profession are marked by their gender and deal with these same negative effects regularly.¹⁹⁵ Lawyer turns into female lawyer, trans lawyer, LGBTQ+ lawyer, as individuals are categorized in the aggregate.¹⁹⁶

More recent research has focused on minority related stressors and how marginalized individuals experience not only major life events as stressors, but also “from the totality of the minority person’s experience in dominant society.”¹⁹⁷ Lewis, et al. focused particularly on the minority stressors for the LGBTQ+ community, finding that life-stress (major life events) and gay related stress (stressors unique to sexual orientation) are both positively correlated to depressive symptoms.¹⁹⁸ Additionally, this study also found that stigma consciousness is another independent factor affecting depressive symptoms in LGBTQ+ individuals.¹⁹⁹ Stigma consciousness is when a marginalized individual anticipates being stereotyped by others.²⁰⁰ Pinel has developed stigma consciousness scales that are specific to marginalized groups—one for women and one that includes both gay men and lesbians—as well as having conducted a total of six studies to test the reliability and validity of these scales.²⁰¹ The 10-item scale developed for women includes items such as, “Stereotypes about women have not affected me personally (R)” and “Most men have a problem viewing women as equals.”²⁰² Women in the legal profession

¹⁹³ See EDWARD E. JONES ET AL., SOCIAL STIGMA: THE PSYCHOLOGY OF MARKED RELATIONSHIPS 5 (Richard C. Atkinson et al. eds., 1984).

¹⁹⁴ See *id.* at 9.

¹⁹⁵ See generally Fisher, *supra* note 49.

¹⁹⁶ Link & Phelan, *supra* note 192, at 367.

¹⁹⁷ See Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. HEALTH & SOC. BEHAV. 38, 39 (1995).

¹⁹⁸ See Robin J. Lewis et al., *Stressors for Gay Men & Lesbians: Life Stress, Gay-Related Stress, Stigma Consciousness, & Depressive Symptoms*. 22 J. SOC. & CLINICAL PSYCH. 716-29 (2003).

¹⁹⁹ *Id.* at 716.

²⁰⁰ See Elizabeth C. Pinel, *Stigma Consciousness: The Psychological Legacy of Social Stereotypes*, 76 J. PERSONALITY & SOC. PSYCH. 114, 115 (1999); Lewis et al., *supra* note 198, at 718.

²⁰¹ Pinel, *supra* note 200, at 124.

²⁰² *Id.* at 120.

are indoctrinated into the profession beginning in law school.²⁰³ They are made aware of the inequities in the profession either directly or indirectly, but being aware of gendered stigma is different than experiencing it during the regular course of your occupation.

Pinel and Paulin further expanded on stigma consciousness in the workplace in their 2005 study.²⁰⁴ They took a sample of staff workers at an academic institution and related stigma consciousness with disrespect, which they predicted would lead to disengagement.²⁰⁵ Their hypotheses were supported, finding that people who feel disrespected at work are more likely to disengage and even leave their place of employment.²⁰⁶ Additionally, people who scored high on the stigma consciousness scale, perceived more instances of disrespect.²⁰⁷ An individual's awareness of gendered perceptions (stigma consciousness) may affect how daily interactions are perceived. Even though women lawyers may not view themselves as deviant simply by being present in the profession, battling gendered stigma is a common occurrence and women are not integrated with "The Normals."

Since the literature on stigma is vast, and sometimes conflicting, researchers have grown accustomed to choosing how to define and apply it.²⁰⁸ Although Goffman's original iteration of stigma is a staple in the world of social psychology, more recent definitions and applications shifted to the sociological.²⁰⁹ Moreover, by taking a more sociological perspective, Link and Phelan in 2001 have reconciled the core criticisms regarding stigma research—how it is defined and how it is applied—by reformulating stigma conceptually.²¹⁰ This

²⁰³ Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, in *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* 28 (Beacon Press 1997).

²⁰⁴ Elizebeth C. Pinel & Nicole Paulin, *Stigma Consciousness at Work*, 76 *BASIC & APPLIED SOC. PSYCH.* 345 (2005).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 346.

²⁰⁷ *Id.* at 345.

²⁰⁸ MARK C. STAFFORD & RICHARD R. SCOTT, *Stigma, Deviance, and Social Control*, in *THE DILEMMA OF DIFFERENCE* 77 (1986); Jennifer S. Crocker et al., *Social Stigma*, in *HANDBOOK OF SOCIAL PSYCHOLOGY* 504, 504—505 (Daniel T. Gilbert et al., eds., 4th ed., 1998); JONES ET AL., *supra* note 193, at 22.; *see also* Bruce G. Link et al., *Public Conception of Mental Illness: Labels, Causes, Dangerousness, and Social Distance*, 89 *AM. J. PUB. HEALTH* 1328 (1999).

²⁰⁹ JONES ET AL., *supra* note 193, at 25; Link et al., *supra* note 208 at 1328.

²¹⁰ Link & Phelan, *supra* note 192, at 366—67.

conceptualization of stigma also addresses two challenges for stigma researchers. The first is that stigma is often researched by individuals who are not part of the marginalized group, and the second that stigma research often focuses only on the individual level without consideration of the structural aspects that allow (and encourage) stigma to continue.²¹¹ To address these concerns, Link and Phelan have re-conceptualized stigma as a convergence of four components: (1) distinguishing and labeling human differences; (2) “dominant cultural beliefs link[ing] labeled persons to undesirable characteristics—to negative stereotypes;” (3) categorizing the labelled individuals into “us” and “them” groups; and (4) labelled people’s experience as status loss resulting in unequal treatment.²¹² Despite the varied definitions and applications of stigma, Link and Phelan’s conceptualization harkens back directly to Goffman’s origination of stigma while modernizing the concept and addressing major problems in other stigma-related projects. Moreover, the focus on stigma as a cluster of interrelated ideas rather than a linear process reflects the intersectionality of the individuals in the legal profession.

While gender is the focus here, it is undeniable that other characteristics are as important or more important as gender on daily interactions. For example, age or race may compound with gender to produce stigmatic interactions. White women who are attorneys may commonly report being mistaken for an administrative professional, but Black women who are attorneys also report being mistaken for a member of janitorial staff.²¹³ The complicated nature of one’s identity can only be evaluated using a definition and application of stigma that acknowledges all the moving pieces.

Link and Phelan have been credited with first discussing structural stigma in addition to intrapersonal stigma (how an individual either internalizes or resists stigma) and interpersonal stigma (how stigma affects relationships between people).²¹⁴ While they did not provide a definition in 2001, they analogized this concept with institutional racism.²¹⁵

Since then, researchers have continued to build on the concept

²¹¹ *Id.* at 365—66.

²¹² *Id.* at 367.

²¹³ Fisher, *supra* note 49.

²¹⁴ Mark L. Hatzenbuehler & Bruce G. Link, *Introduction to the Special Issue on Structural Stigma and Health*, 103 SOC. SCI. & MED. 1, 4 (2014).

²¹⁵ Link & Phelan, *supra* note 192, at 372.

of structural stigma and have discerned components.²¹⁶ Components include institutional policies that disparately affect stigmatized individuals,²¹⁷ and dominant cultural norms that socially devalue particular statuses.²¹⁸ In 2014, in an effort to synthesize these components, Hatzenbuehler and Link offered an initial definition: “societal-level conditions, cultural norms, and institutional policies that constrain the opportunities, resources, and wellbeing of the stigmatized.”²¹⁹ As the concept of structural stigma broadens, researchers have determined two primary ways to measure structural stigma. The first is content analysis of institutional policies.²²⁰ But this method will necessarily overlook the informal ways in which stigma is perpetuated.²²¹ The second method of measuring structural stigma involves aggregation of individual level social attitudes up to the community level.²²² The aggregation approach is directly related to this project. Individual participants were asked about their personal experiences and perspectives, but they were also asked a referent-shifting question to “assess the climate of their group.”²²³

Referent-shifting composition allows a researcher to collect individual data, but instead of directly using that data to aggregate the group’s perspective (direct-consensus composition), the researcher asks a referent-shifting question about the individual’s perspective of the group dynamic. If sufficient agreement is met, then the researcher can aggregate to the group level.²²⁴ Moreover, a content analysis of legal institutional policies would not likely yield any results indicative of gendered structural stigma. For example, it is unlikely to be written anywhere that particular judges prefer women to appear in skirt suits in

²¹⁶ See generally Hatzenbuehler & Link, *supra* note 214.

²¹⁷ Patrick W. Corrigan et al., *Structural Levels of Mental Illness Stigma and Discrimination*, 30 SCHIZOPHRENIA BULL. 481, 481 (2004).

²¹⁸ Lawrence Hsin Yang et al., *Culture and Stigma: Adding Moral Experience to Stigma Theory*, 64 SOC. SCI. & MEDICINE 1524, 1525 (2007).

²¹⁹ Hatzenbuehler & Link, *supra* note 214, at 2.

²²⁰ *Id.*

²²¹ Mark L. Hatzenbuehler, *Structural Stigma and Health Inequalities: Research Evidence and Implications for Psychological Science*, 71 AM. PSYCH. 742, 742 (2017).

²²² Hatzenbuehler & Link, *supra* note 214, at 3.

²²³ Van Mierlo et al., *Composing Group Level Constructs from Individual-Level Survey Data*, 12 ORG. RSCH. METHODS 368, 369 (2009).

²²⁴ See David Chan, *Functional Relations Among Constructs in the Same Content Domain at Different Levels of Analysis: A Typology of Composition Models*, 83 J. OF APPLIED PSYCH. 234, 235 (1998); Mierlo, *supra* note 223.

their courtrooms, but that information will be passed along informally between attorneys, which is why this project utilizes interviews to gather information. For these reasons, Link and Phelan's components form the framework for this article.

Further, there is burgeoning literature on stigma resistance that builds directly from Link and Phelan's conceptualization of stigma.²²⁵ This literature suggests that despite the theories (e.g., symbolic interactionism, classic labeling theory) suggesting that social devaluation leads to self-devaluation, some individuals are able to resist stigma.²²⁶ Stigmatized individuals have three general responses: (1) internalize the stigma and devalue themselves, (2) be indifferent to the stigma, or (3) have higher self-esteem than non-stigmatized individuals, perhaps due to righteous anger.²²⁷ Further resistance strategies include denial of the stigmatized characteristic confrontation of the stigma by educating others about their misconceptions, and embracing the idea that one can be successful and happy despite the social stigma.²²⁸ Although stigma has been studied widely in social contexts, this framework provides a novel lens to examine not only the extent to which women in the legal profession remain stigmatized, but also how individuals in the legal profession react to or resist gendered stigma.

1. Defining Gendered Stigma in the Legal Profession

Component 1 of conceptualizing stigma, according to Link and Phelan, involves first identifying differences and then labeling those differences.²²⁹ Link and Phelan point out that even at the most basic level, categorization into rudimentary groups is still not ideal for distinguishing difference.²³⁰ Despite major categories of race, there are many ways in which race overlaps, and there is a wide range of differences among individuals within each race category.²³¹ The same concept holds true for gender. The widely accepted binary of male/female, woman/man takes for granted that biological sex and

²²⁵ Peggy A. Thoits, *Resisting the Stigma of Mental Illness*, 74 SOC. PSYCH. Q. 6, 7 (2011).

²²⁶ *Id.* at 8–9.

²²⁷ *Id.* at 9.

²²⁸ *Id.* at 11–20.

²²⁹ Link & Phelan, *supra* note 192, at 367.

²³⁰ *Id.*

²³¹ Erin Blakemore, *Race and Ethnicity: How Are They Different*, NAT'L GEOGRAPHIC: CULTURE (Feb. 22, 2019),

<https://www.nationalgeographic.com/culture/article/race-ethnicity>.

gender are (1) always in alignment, and (2) clearly distinguishable from the other.²³² In fact, despite the many people who can be categorized into the gendered categories of woman and man based on their biological sex, there are still wide spectra of characteristics within each category.²³³ Just as race cannot be simplified only to “black” and “white” neither can gender be simplified into “male/man/masculine” versus “female/woman/feminine.”²³⁴ The legal profession lags behind society regarding gender identities and still recognizes only the gender binary rather than gender as a spectrum.²³⁵ Most ABA reports, for example, only include categories for men and women.²³⁶ Moreover, the dress codes required in certain courts or jurisdictions may force individuals into the binary regardless of whether they would otherwise choose to embrace non-binary gendered expressions.²³⁷ The long-debated issue of the attire of female attorneys is largely unchanged, perhaps in part because “the law moves slowly, and older male judges still reign behind most benches.”²³⁸ Yet, “[t]here is no generic woman.”²³⁹ Despite the differences that are perceived between men and women, gender makes up a miniscule portion of those differences.²⁴⁰

²³² See *Gender and Health*, WORLD HEALTH ORG., https://www.who.int/health-topics/gender#tab=tab_1 (last visited Dec. 16, 2021).

²³³ See generally Surya Monro, *Beyond Male and Female: Poststructuralism and the Spectrum of Gender*, 8 INT’L J. OF TRANSGENDERISM 3 (2005).

²³⁴ DEBORAH L. RHODE, AM. BAR ASS’N COMM’N ON WOMEN IN THE PRO., *THE UNFINISHED AGENDA: WOMEN IN THE LEGAL PROFESSION* 9 (2001).

²³⁵ See generally Monro, *supra* note 233; Jena McGill & Amy Salyzyn, *Queer Insights on Women in the Legal Profession*, 17 LEGAL ETHICS 231, 257 (2014).

²³⁶ AMY J. ST. EVE & JAMIE B. LUGURI, AM. BAR ASS’N COMM’N ON WOMEN IN THE PRO., *HOW UNAPPEALING: AN EMPIRICAL ANALYSIS OF THE GENDER GAP AMONG APPELLATE ATTORNEYS* 8 (2001).

²³⁷ Amanda Hess, *Female Lawyers Who Dress Too "Sexy" Are Apparently a "Huge Problem" in the Courtroom*, SLATE (Mar. 21, 2014, 9:38 AM), <https://slate.com/human-interest/2014/03/female-lawyers-still-must-dress-conservatively-to-impress-judges.html>.

²³⁸ *Id.*

²³⁹ RHODE, *supra* note 234.

²⁴⁰ *Id.*

In addition to distinguishing the differences, those differences then must be labeled.²⁴¹ When Justice Ginsburg was a law student at Harvard in 1956, she and her female classmates were invited to a dinner at the dean's home.²⁴² While there, each woman was asked to justify why she deserved a place at Harvard Law instead of a man.²⁴³ Moreover, after women began being admitted to law schools, male law professors still insisted on referring to entire classes as "gentlemen," not even acknowledging that there were women in the classrooms, because the ideal law student and lawyer was male.²⁴⁴ Women were told that in order to be successful in law school and in the practice of law, they must indeed become gentlemen and therefore the professor(s) would refer to them as such, "elevating" their status from being women, to being gentlemen.²⁴⁵ While today's professors are not as overtly sexist, the undertones are deafening.

Link and Phelan describe Component 2 as associating human differences with negative attributes.²⁴⁶ Others have found that working parents who hire help at home to focus on demanding careers continue to face criticism for outsourcing their home responsibilities.²⁴⁷ Before the COVID-19 pandemic, women across the world performed "three times as much unpaid care and domestic work as men [did]."²⁴⁸ The COVID-19 pandemic intensified these responsibilities of women to a breaking point that forced many women out of the workforce.²⁴⁹ Men also were forced out of the workforce at the start of the pandemic, but

²⁴¹ Link & Phelan, *supra* note 192, at 367.

²⁴² LINDA R. HIRSHMAN, *SISTERS IN LAW: HOW SANDRA DAY O'CONNOR AND RUTH BADER GINSBURG WENT TO THE SUPREME COURT AND CHANGED THE WORLD* 15 (2016).

²⁴³ *Id.*

²⁴⁴ LANI GUINIER, ET AL., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, in *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997).

²⁴⁵ *Id.*

²⁴⁶ Link & Phelan, *supra* note 192, at 368.

²⁴⁷ Jerry A. Jacobs & Kathleen Gerson, *Understanding Changes in American Working Time: A Synthesis*, in *FIGHTING FOR TIME: SHIFTING BOUNDARIES OF WORK AND SOCIAL LIFE* 42 (Cynthia Fuchs Epstein & Arne L. Kalleberg eds., 2004).

²⁴⁸ U.N. WOMEN, *PROGRESS OF THE WORLD'S WOMEN 2019-2020: FAMILIES IN A CHANGING WORLD* 169 (2019).

²⁴⁹ U.N. WOMEN, *supra* note 42.

have since regained nearly all of the lost 2.9 percentage points.²⁵⁰ Comparatively, women have regained six tenths of the 3.4 percentage points that were lost.²⁵¹ Additionally, the pandemic has illuminated how being a woman is a negative attribute for many employers.

Men may be lauded for hiring help at home²⁵², but women are expected to work as if they do not have families, and raise families as if they do not work.²⁵³ For women who are practicing law, this often means choosing career paths that are more sympathetic to having responsibilities outside the office. For example, compared with men, women are more likely to work in public sector or public service jobs instead of law firms, which are perceived as more demanding.²⁵⁴ Perceptions about the opportunities available in the different types of practice may be partially responsible for these disparities. According to Rhode, most studies show that men are two-to three-times more likely to make partner in a law firm than women.²⁵⁵

There is no debate that men and women face different societal expectations that often cause struggles in their work lives; but for stigma to apply, there has to be some sort of negativity that arises from the labelling of differences identified in Component 1.²⁵⁶ More specifically, Link and Phelan describe this component as being a label and a stereotype, “with the label linking a person to a set of undesirable characteristics that form the stereotype.”²⁵⁷

Stereotypes serve as pathways so that brain function is free to perform other tasks. In a psychological study by Macrae, et al., researchers found that subjects who were provided labels along with vignettes could

²⁵⁰ Tim Smart, *In One Year, Coronavirus Pandemic Has Wreaked Havoc on Working Women*, US NEWS (Mar. 8, 2021)

<https://www.usnews.com/news/economy/articles/2021-03-08/in-one-year-coronavirus-pandemic-has-wreaked-havoc-on-working-women> (quoting Federal Reserve Bank of Minneapolis).

²⁵¹ *Id.*

²⁵² Alexis Coe, *Dads Caring for Their Kids: It's Parenting, Not Babysitting*, ATLANTIC: SEXES (Jan. 23, 2013),

<https://www.theatlantic.com/sexes/archive/2013/01/dads-caring-for-their-kids-its-parenting-not-babysitting/267443/>.

²⁵³ Shanna Hocking, *Why Are Women Expected to Work Like They Don't Have Children and Mother Like They Don't Work?*, MOTHERLY (Sep. 3, 2019), <https://www.mother.ly/life/carscoms-report-safest-cars-for-car-seats/>.

²⁵⁴ RHODE, *supra* note 234, at 26.

²⁵⁵ *Id.* at 8.

²⁵⁶ Link & Phelan, *supra* note 192, at 367.

²⁵⁷ Link & Phelan, *supra* note 192, at 369.

more easily perform simultaneous tasks such as turning off a beeping computer compared with subjects who were not provided with labels.²⁵⁸

For many years, being a woman, specifically a woman who may already have or who may choose to have a family while employed in a private firm, was referred to as being on the “Mommy Track,” as opposed to being on the partner track.²⁵⁹ The idea was that a woman could not both be a mother and be successful as an attorney.²⁶⁰ The mark of being female has always carried negative connotation in the legal world because it was something “other” than the default male.²⁶¹ While the ways in which stigma attaches may have changed, gender still implies a negative association for women.²⁶²

The third component in Link and Phelan’s conceptualization of stigma is drawing the line between “us” and “them.”²⁶³ In the workplace, gender discrimination has been linked to cultural attitudes and beliefs about gender as reflective of distinct social types.²⁶⁴ However, the mechanisms that reinforce these ideas within employment processes is still under scrutiny.²⁶⁵ Gendered stigma is born from centuries of the “us” versus “them” mentality ensuring that women in the workforce are still fighting against these negative attributions.²⁶⁶ Women in law are no exception.²⁶⁷

The legal field began as an all-male profession. Although the numbers have become more equitable, the experiences have not. Men are still the default “us” and women are still the default “them.”

²⁵⁸ See generally C. Neil Macrae et al., *Stereotypes as Energy-Saving Devices: A Peek Inside the Cognitive Toolbox.*, 66 J. PERS. SOC. PSYCH. 37 (1994).

²⁵⁹ Kingson, *supra* note 88.

²⁶⁰ See J.C. Williams, *Sticking Women with the Office Housework*, WASH. POST, (Apr. 16, 2014), <https://www.washingtonpost.com/news/on-leadership/wp/2014/04/16/sticking-women-with-the-office-housework/>.

²⁶¹ Fisher, *supra* note 49.

²⁶² *Id.*

²⁶³ Link & Phelan, *supra* note 192, at 370.

²⁶⁴ CECILIA L. RIDGEWAY & PAULA ENGLAND, *Sociological Approaches to Sex Discrimination in Employment*, in SEX DISCRIMINATION IN THE WORKPLACE 189, 190 (Faye J. Crosby, Margaret S. Stockdale, & S. Ann Ropp eds., 2007); Donna Bobbitt-Zeher, *Gender Discrimination at Work: Connecting Gender Stereotypes, Institutional Policies, and Gender Composition of Workplace*, 25 GENDER & SOC’Y 764, 764–765 (2011).

²⁶⁵ Bobbitt-Zeher, *supra* note 264, at 765.

²⁶⁶ Pinel, *supra* note 204, at 345.

²⁶⁷ Mihalich-Levin, *supra* note 163.

Interestingly, Cynthia Fuchs Epstein, a prolific researcher on women lawyers, has found that successful women are more likely married, although the reasoning for this may vary. Presumably, being married means women have someone else to share domestic responsibilities with,²⁶⁸ but the extent to which responsibilities are shared in most heterosexual relationships is questionable.²⁶⁹ More likely, according to Epstein, is that married women are more plugged in to the male networks, and married women are more acceptable thus causing fewer issues for clients and colleagues.²⁷⁰ Marriage may move heterosexual women closer to the margins of “us” that are “The Normals.”

Furthermore, Berdahl et al. examined what they refer to as Masculinity Contest Cultures.²⁷¹ These are workplace environments where toxic masculinity and bullying take primary import over the entity’s mission. “Work becomes a masculinity contest when organizations focus not on mission but on masculinity, enacted in endless ‘mine’s bigger than yours’ contests to display workloads and long schedules (as in law and medicine) . . .”²⁷² The legal profession is adversarial by nature and it measures success by counting hours and sacrifices, championing those who work the most, even if their work is inefficient. This is another mechanism that may move women closer to the margins of “us” as delineated by “The Normals.”

²⁶⁸ CYNTHIA F. EPSTEIN, *WOMEN IN LAW* 158 (1981).

²⁶⁹ Theoretically, single women or women without support systems are thus left trying to balance all responsibilities. See generally EPSTEIN, *supra* note 268; MICHAEL KAUFMAN, *MEN, FEMINISM, AND MEN’S CONTRADICTORY EXPERIENCES OF POWER* 147 (1998). Although time-poor theories for single mothers have been called into question. Pepin et al., *Marital Status and Mothers’ Time Use: Childcare, Housework, Leisure, and Sleep*, 55 *DEMOGRAPHY* 107, 108 (2018). Significant research supports the notion that being married to a man does not reduce the amount of housework for women. *Id.* at 121; Suzanne M. Bianchi et al., *Housework: Who Did, Does or Will Do It, and How Much Does It Matter?*, 91 *SOC. FORCES* 55, 57 (2012); Liana C. Sayer, *Gender, Time and Inequality: Trends in Women’s and Men’s Paid Work, Unpaid Work and Free Time*, 84 *SOC. FORCES* 285, 287(2005); See Scott J. South & Glenna Spitze, *Housework in Marital and Nonmarital Households*, 59 *AM. SOCIO. REV.* 327, 332 (1994); Victoria Vernon, *Marriage: For Love, for Money . . . and for Time?*, 8 *REV. ECON. HOUSEHOLD* 433, 435 (2010).

²⁷⁰ See EPSTEIN, *supra* note 268.

²⁷¹ Jennifer L. Berdahl et al., *Work as a Masculinity Contest*, 74 *J. SOC. ISSUES* 422, 422 (2018).

²⁷² *Id.* at 423 (internal citations omitted).

The fourth and final component of Link and Phelan's stigma framework is status loss and discrimination.²⁷³ Importantly, these two concepts are distinct. Status loss happens immediately upon successfully labeling a person and placing the individual on a lower rung of the social hierarchy based on the identified negative attribute.²⁷⁴ Certain labels that are immediately recognizable (commonly race and gender) would be referred to as a "master status."²⁷⁵ These are attributes that most people cannot hide from the general public even if they wanted to.²⁷⁶ These open traits allow others to place an individual on the social hierarchy upon first glance.²⁷⁷ Other traits that may be stigmatized, such as mental health, are more easily disguised. While stigma based on "invisible" traits is just as prevalent²⁷⁸, the distinction is in the lived experiences of the individuals. A cis-woman may not be able to hide the fact that she is a woman, but she may be able to hide that she is also bi-polar. Since the legal profession is still heavily entrenched in the gender binary and since it also places significant emphasis on appearances, gender is not easily hidden.

Epstein wrote, "[I]t is one thing to be employed, and even paid well, and another to be a true working partner in the camaraderie of the legal community."²⁷⁹ Even when she published her book about women in law in 1981, Epstein recognized that simply fixing the gender pay gap and promoting women to similar positions as men would not solve the problem²⁸⁰—and it hasn't. In law, gender hierarchies begin in legal education. Although women are no longer asked why they took a valuable place in law school from a man,²⁸¹ women still find themselves in classrooms where archaic teaching methods leave them at a social disadvantage.²⁸² Moreover, once women in law school graduate, pass

²⁷³ Link & Phelan, *supra* note 192, at 370.

²⁷⁴ *Id.* at 371.

²⁷⁵ Everett C. Hughes, *Dilemmas and Contradictions of Status*, 50 Am. J. Socio. 353, 357 (1945).

²⁷⁶ *See id.*

²⁷⁷ *Id.*

²⁷⁸ Link et al., *supra* note 208, at 1329—31.

²⁷⁹ EPSTEIN, *supra* note 268, at 265.

²⁸⁰ *See generally id.*

²⁸¹ HIRSHMAN, *supra* note 242.

²⁸² *See* LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 75 (1997); *see also* ELIZABETH MERTZ, *Student Participation and Social Difference: Race, Gender, Status*,

the bar exam, and are inducted into the practice of law, they are subject to female diminution engrained into the profession.²⁸³

Recently, committees within the American Bar Association have proposed that the anti-discrimination rules be amended to address issues of discrimination in the rule itself and not just in the comments.²⁸⁴ Despite the ABA Model Rules of Professional Conduct stating the importance of anti-discrimination efforts, there are other mechanisms falling below the threshold of discrimination that may still be hindering women's experiences in practicing law. For example, women are often expected to perform more of the house keeping responsibilities at the office, such as taking notes in meetings or even making coffee, more so than their male colleagues.²⁸⁵ Women also tend to take on more mentoring responsibilities.¹⁷³ These expectations, and perhaps even performance by the woman, are based on the historical expectation that women are caretakers.¹⁷⁴

Despite these frameworks, individuals still have agency.¹⁷⁵ Studies on cognitive bias or confirmation bias indicate that people are highly unlikely to change their minds when presented with information that conflicts with their views.¹⁷⁶ Identity and stigma both allow room for people to reject the negative information they receive or the devaluation they experience.²⁸⁶ Role or group expectations may pressure a person into a pre-existing mold, but individuals can push

and Context in Law School Classes, in *THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER"* (2007).

²⁸³ See generally Fisher, *supra* note 49.

²⁸⁴ D'Angelo-Corker, *supra* note 4, at 285–89; MODEL RULES OF PROFESSIONAL CONDUCT r. 8.4(g) (AM. BAR ASS'N 2016).

²⁸⁵ Joan C. Williams, *Sticking Women With the Office Housework*, WASH. POST (Apr. 16, 2014), <https://www.washingtonpost.com/news/on-leadership/wp/2014/04/16/sticking-women-with-the-office-housework/>.

¹⁷³ See MEERA E. DEO, *UNEQUAL PROFESSION: RACE AND GENDER IN LEGAL EDUCATION* 59 (2019).

¹⁷⁴ See SHELLEY E. TAYLOR, *THE TENDING INSTINCT: HOW NURTURING IS ESSENTIAL FOR WHO WE ARE AND HOW WE LIVE* 24–25 (2002).

¹⁷⁵ See PETER J. BURKE & JAN E. STETS, *IDENTITY THEORY* 10–11 (Oxford Univ. Press 2009).

¹⁷⁶ Raymond S. Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175, 187 (1998).

²⁸⁶ See Thoits, *supra* note 225, at 10.

those boundaries and re-create roles by renegotiating meaning.²⁸⁷ Additionally, when a person experiences stigma, those experiences can be rejected by stigma resistance mechanisms such as denial, confrontation, and embracing the idea that a person can be content despite being stigmatized.²⁸⁸

These overlapping theoretical frameworks allow for an in-depth exploration into the day-to-day experiences of attorneys at work and at home to illuminate how gendered stigma is recognized, perceived, and internalized or resisted by attorneys.

IV. NEW BEGINNINGS

“You may say I’m a dreamer, but I am not the only one[.]”

-John Lennon²⁸⁹

“We would like to offer you a job. The position is completely remote and you will never be required to be in the office unless you want to be. If you decide to work here in person, we have an office open and ready for you. You have complete control over your schedule and your hours. We will give you as much work as you want, but will pull back if you ask. If you want to move up the ranks to partner, fantastic. If not, that is perfectly fine, too. Oh, and we will pay you more than double your previous hourly rate. We are thrilled to have you on board.”

After hearing all of this, Sabrina¹⁷⁷ was confused. This conversation did not go as she had expected. For the first time in her life, she had planned to negotiate the employment terms, but these terms were better than what she had planned to negotiate for. She was skeptical—what is the catch? When will the true nature of the firm be revealed? She had been through eight interviews with the firm. It seemed excessive to her, but she was also shocked that the attorneys at the firm would take so much of their own time in looking for a new associate.

Sabrina accepted the job in October. The firm had a virtual Halloween party complete with a costume and pumpkin carving contest. They did a holiday gift exchange, fully funded by the firm. Everyone was provided with firm swag (jackets, mugs, masks). Birthday wishes

²⁸⁷ Thomas B. Swan & Suzanne Benack, *Renegotiating Identity in Unscripted Territory: The Predicament of Queer Men in Heterosexual Marriages*, 8 J. GLBT FAM. STUD. 46, 48 (2012).

²⁸⁸ See Thoits, *supra* note 225, at 10.

²⁸⁹ John Lennon, *Imagine*, in *IMAGINE* (Apple Records 1971).

¹⁷⁷ Pseudonym

are sent from the firm for every person involved with them. Not just a boilerplate birthday card, but individual wishes from every person. There is no distinction between full and part time, salaried and independent contractors. The managing partner checks in with Sabrina every few weeks to make sure all is well and is never annoyed when her son interrupts their meeting. The practice area is interesting and intellectual. There has yet to be any dispute over her billable hours. She never has to go to court or deal with opposing counsel. It is now June, and Sabrina is still wondering when something will go wrong. Is it possible that she has landed the perfect lawyer position? Only time will tell.

Although the above vignette is a composite crafted from the experiences of women who are attorneys²⁹⁰, the COVID-19 pandemic has allowed reimagining of age-old tenets of the legal profession. Attorneys no longer have to prove their worth by excessive facetime in the office.²⁹¹ While there seems to be a positive trend towards allowing more remote work and flexible schedules,²⁹² creative reimagining should be employed more widespread to solve several of the major precepts on which the profession has been built. New meanings can be assigned to roles and groups can shift their prototype to encompass more inclusive behaviors and beliefs.

Blur the “us” versus “them” lines that have been drawn in the sand by the group in power that no longer reflects what the profession can and should be. Recognize each other’s humanity in any situation. Reimagine what the profession could look like. The only way for this to succeed is a simultaneous and comprehensive approach. Different factions of the professions have been trying to make change since women were first allowed in, but these efforts have been largely siloed.²⁹³ Individuals have worked to make change by employing stigma resistance and identity agency in their own situations, such as by

²⁹⁰ See generally Fisher, *supra* note 49 (This vignette is imagined based on a compilation of experiences, reported to the author throughout her dissertation research.).

²⁹¹ Danielle Braff, *Thanks to the COVID-19 Pandemic, Law Firms are Starting to Embrace Virtual Offices—But Will It Last?*, ABA J. (Feb. 1, 2021, 1:10 AM), <https://www.abajournal.com/magazine/article/thanks-to-the-covid-19-pandemic-law-firms-are-starting-to-embrace-virtual-officesbut-will-it-last>.

²⁹² *Id.*

²⁹³ See generally DESTINY PEERY ET AL., *supra* note 98.

leaving law firm life to go solo.²⁹⁴ People sometimes call out inappropriate behavior directly and take steps to try and change the culture in a particular firm.²⁹⁵ Often, especially for attorneys who are not part of the in-group, this means leaving for a better workplace or even going solo.²⁹⁶ While these efforts are commendable, they only affect the individual level problems in the profession. Some firms provide fantastic balance to their employees including remote work, flexible hours, empathy, and even compassion. While the powerhouses within these firms may be able to influence others to treat their employees better, this still only helps the attorneys fortunate enough to land a job at a place like this. Even the large-scale efforts like amending the Model Rules for more inclusivity²⁹⁷, or the advocacy work being done by so many ABA committees, are barely moving the needle.²⁹⁸ Change needs to be sweeping, it needs to toss aside all of the basic assumptions about the profession and start over.

A. Group Level Changes

1. Billable Hours and the Production Machine

One of the top complaints of lawyers is the billable hour and how much emphasis is placed on more and more billable hours.²⁹⁹ The billable hour is one of the primary reasons that attorneys in private practice are regarded as working constantly.³⁰⁰ This is a problem for all attorneys, but is a specific issue for women because of competing social expectations.³⁰¹ Billable practice often ignores the administrative tasks

²⁹⁴ See generally Fisher, *supra* note 49 (This is a conclusion drawn from empirical data collected by author. The data is on file with the author.).

²⁹⁵ See *id.* (Empirical data on file with author.).

²⁹⁶ See *id.* (One participant in the study left a male dominated BigLaw firm and moved to another BigLaw firm, run mostly by women. Several participants left firms to go solo.).

²⁹⁷ See AM. BAR ASS'N CTR. PRO. RESP., DIVERSITY AND INCLUSION THREE-YEAR PLAN 3 (2020),

https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/diversity-equity-and-inclusion-three-year-plan-2020-2022.pdf.

²⁹⁸ See generally DESTINY PEERY ET AL., *supra* note 98.

²⁹⁹ See Iain Campbell & Sara Charlesworth, *Salaried Lawyers and Billable Hours: A New Perspective from the Sociology of Work*, 19 INT'L J. LEGAL PRO. 89, 91 (2012).

³⁰⁰ *Id.*

³⁰¹ Hilary Sommerlad, *Women solicitors in a Fractured Profession: Intersections of Gender and Professionalism in England and Wales*, 9 INT'L J. LEGAL PRO. 213, 218 (2002); Liza Webley & Liz Duff, *Women Solicitors*

necessary for practicing law.³⁰² Meetings, tracking time, learning new skills, taking continuing legal education—these are all tasks necessary to being a successful attorney that are not billable.³⁰³ By focusing primarily on the billable hour and how many one can produce, the profession is discouraging efficiency. Additionally, research and case strategy are often limited by the client or by the assigning partner to a specified amount of time. Associates may be told, “Spend one hour researching [*this*] and let me know what you find.” Sometimes, the problem is not even close to being solved after just one hour. So, does the associate spend more time to do the job properly knowing they will not receive credit for that work? Or does the associate turn in an incomplete task and truly limit it to the time specified. Neither option is great.

The billable hour itself is not likely to go away.³⁰⁴ Even if the profession was rebuilt from the ashes of a former iteration, the billable hour is potentially an effective way to charge clients. However, it is not the most effective way to evaluate an employee, and that is something that can be changed. When the profession was only men and it was a time where many men had wives at home to take care of all the domestic responsibilities, maybe chasing the billable hour made sense. The more an employee bills, the more money they bring into the business, so the business rewards the employee who works long hours.³⁰⁵ Now that the profession is not only men, many lawyers are juggling multiple responsibilities and not simply devoted to their jobs.³⁰⁶ Some may argue that lawyers who are only dedicated to work are still the gold standard, but those people are likely “The Normals.” For many people, the rat race of chasing the billable hour is not worth it even when salaries might

as a Barometer for Problems Within the Legal Profession—Time to Put Values Before Profits?, 34 J. L. & SOC’Y 372, 389 (2007).

³⁰² See generally YALE L. SCH. CTR. CAREER DEV., THE TRUTH ABOUT THE BILLABLE HOUR (2018), https://law.yale.edu/sites/default/files/area/departement/cdo/document/billable_hour.pdf.

³⁰³ See *id.* at 3.

³⁰⁴ Stephen J. Harper, *The Tyranny of the Billable Hour*, N.Y. TIMES: OPINION (Mar. 28, 2013), <https://www.nytimes.com/2013/03/29/opinion/the-case-against-the-law-firm-billable-hour.html>.

³⁰⁵ *Id.*

³⁰⁶ See *Why Women Leave the Profession*, *supra* note 63.

be particularly high in some of these areas.³⁰⁷ With a *slightly* more diverse profession now, banking billable hours seems less productive than assigning everyone a reasonable number of hours to attain in a relatively normal workweek. Firms that require 35 to 40 billable hours a week are favored by people looking to have a work/life balance.³⁰⁸ Yet, even 35 to 40 billable hours a week likely means working 50 or more actual hours each week.³⁰⁹ If firms required 30 billable hours a week, employees could reasonably meet this goal and still have the opportunity to live a well-rounded life. Perhaps some lawyers would prefer to work many hours in a week, but the profession should not be offering up huge monetary bonuses for people overworking themselves. As a profession that is already struggling with mental health and substance abuse, laying off the billables could create an environment ripe for collaboration instead of competition.

2. Office Culture

Flexibility and autonomy would go a long way in changing office culture.³¹⁰ The vignette above should not represent the profession's anomaly. For many firms the COVID-19 pandemic has illuminated the possibility for remote working, but some firms have tightened their grip.³¹¹ Billable hours typically might be reported on a weekly or monthly basis, but the pandemic had some employers so scared that their employees would not be working hard enough that the requirement became daily.³¹² A little flexibility can go a long way in ensuring employee loyalty. Rhode found in 2001 that the lack of balance in workplace structure was a primary concern for women in law, and it was viewed as one of the primary obstacles to women's advancement in the profession.³¹³ With the increased availability and

³⁰⁷ Fisher, *supra* note 49 (One participant in the study left a male dominated BigLaw firm and moved to another BigLaw firm, run mostly by women. Several participants left firms to go solo).

³⁰⁸ *Id.* (drawn from empirical data on file with the author).

³⁰⁹ See generally YALE L. SCH. CTR. CAREER DEV., *supra* note 302.

³¹⁰ See Amanda Semaan, *A Review: The Happy Lawyer: Making a Good Life in the Law*, AM. BAR ASS'N: PRAC. POINTS (Jan. 3, 2018), <https://www.americanbar.org/groups/litigation/committees/woman-advocate/practice/2018/book-review-the-happy-lawyer-making-a-good-life-in-the-law/> (book review).

³¹¹ Braff, *supra* note 291.

³¹² See generally Fisher, *supra* note 49 (empirical data on file with author).

³¹³ RHODE, *supra* note 234, at 17—18.

“always on” mentality of modern American society, attorneys may face increasing demands from clients and supervisors.³¹⁴ Even though billable hours might allow a parent to leave work to attend a child’s school function, those hours still have to be accounted for at some other time, leaving that parent to choose between early mornings or late nights to continue the workday.³¹⁵ Coupled with family demands, this stress leaves no clear division between work and home, preventing an attorney parent from having any time to rest or recharge. The COVID-19 pandemic has exacerbated the troubles of working parents, and specifically the default parent.³¹⁶ The current U.S. presidential administration has gone so far as to declare that the hemorrhaging of women from the U.S. workforce is a national emergency.³¹⁷

B. Aggregate Level Changes

In an effort to refine the procedures for new parents who happen to be attorneys, Florida added a Rule of Judicial Administration allowing a 90-day continuance period for lawyers expecting the birth or adoption of a child.³¹⁸ As long as the request is timely and the client will not face any prejudice, then the judge should grant the request by default.³¹⁹ In the event opposing counsel objects to the continuance on

³¹⁴ Christian Mellner, *After-Hours Availability Expectations, Work-Related Smartphone Use During Leisure, and Psychological Detachment: The Moderating Role of Boundary Control*, 9 INT’L J. WORKPLACE HEALTH MGMT. 146, 147 (2016).

³¹⁵ See Gayle Cinquegrani, *Lawyers Need Vacations. Case Closed.*, BLOOMBERG L.: NEWS (May 25, 2018, 6:16 AM), <https://news.bloomberglaw.com/business-and-practice/lawyers-need-vacations-case-closed/>.

³¹⁶ Liane Jackson, *How Pandemic Practice Left Lawyer-Moms Facing Burnout*, ABA J. (Aug. 1, 2021), <https://www.americanbar.org/groups/journal/articles/2021/how-pandemic-practice-left-lawyer-moms-facing-burnout/>. As used in this paper, default parents are individuals who take on primary caregiving responsibilities without regard to biological sex or gender identity.

³¹⁷ Katie Rogers, *2.5 Million Women Left the Work Force During the Pandemic. Harris Sees a ‘National Emergency.’*, N.Y. TIMES (Mar. 30, 2021), <https://www.nytimes.com/2021/02/18/us/politics/women-pandemic-harris.html>.

³¹⁸ Gary Blankenship, *Parental Leave Continuance Rule Approved*, FLA. BAR: NEWS (Dec. 19, 2019), <https://www.floridabar.org/the-florida-bar-news/parental-leave-continuance-rule-approved/>.

³¹⁹ *Id.*

the grounds of prejudice to the client, then the burden shifts to the requesting attorney to show that the client would face no prejudice as a result of the continuance.³²⁰ Powerhouses in the profession opposed this rule as unnecessary because judges have the discretion to allow for the continuance.³²¹ Proponents of the rule argued that codifying this policy would ensure that expectant attorneys were provided with adequate time to recover from childbirth.³²² This is a big win for all attorneys, as it is not specific to women. By allowing anyone to take parental leave, the rule is helping to normalize the idea that domestic duties can and should be tended to by all people. Nursing lawyers also need blanket policy protections. Every courthouse and law office should be equipped for pumping or nursing attorneys. In addition to the physical facilities, there should be default plans in place that allow people to have the time needed to tend to nursing-related issues. If jurisdictions begin to recognize the need for parental policies, then firms and organizations may be inclined to follow suit.

Policies should not be limited to addressing issues affecting parents. The unfortunate truth about the profession is that it is still very much considered a “Good Ol’ Boys’ Club.” It’s 2021 and this is unacceptable. Recognizing intersectionality is one step in the right direction. Again, change is likely to happen more effectively if it comes from people in power. Judges, partners, shareholders, law professors and anyone else who has a platform to push change should confront stigma in every form until the culture improves. But improving culture cannot focus only on gender, or race, or ability separately. The culture needs to be transformed so drastically that the profession becomes inclusive for everyone.

Age stigma is a bigger problem than it may seem on the surface.³²³ Further, it is not necessarily on par with the typical age discrimination where an older person is devalued and pushed out.³²⁴ Instead, there is an assumption of incompetency for young lawyers.³²⁵ Instances of more experienced lawyers berating new lawyers for their

³²⁰ *Id.*

³²¹ See Gary Blankenship, *Lawyers Sound off on Parental Leave Continuances*, FLA. BAR: NEWS (Dec. 15, 2018), <https://www.floridabar.org/the-florida-bar-news/lawyers-sound-off-on-parental-leave-continuances>.

³²² *Id.*

³²³ See generally Fisher, *supra* note 49 (empirical data on file with author).

³²⁴ See *id.*

³²⁵ See *id.*

youth and newness to the profession are rampant.³²⁶ Young attorneys should not be referred to as “little girl” or be faced with letters from opposing counsel written to judges inaccurately accusing the newer attorney of making a mistake and indicating that it was due to her youth and inexperience. While age compounds with race, gender, and other identities, even men have indicated that they feel they are taken more seriously if wearing a wedding band, for example, to indicate that they are not newly barred.³²⁷

C. Individual Level Changes

Empowering individuals to advocate for themselves is a delicate balance. All too often those who are disenfranchised are told to have grit, be resilient, pull themselves up by their bootstraps.³²⁸ None of these pieces of advice are appropriate solutions to systemic inequities. Those who are being oppressed should never be tasked with resolving their own oppression. Instead, there needs to be a balance of power and the oppressors should listen and hear the voices of the people who continue to be marginalized.³²⁹ Individuals can be empowered once the group and aggregate changes have started. Until people feel that they have a foundation to stand on and support from their community (here, the legal profession), then one can never expect people will make waves, while fearing that the ocean will swallow them.³³⁰

For many attorneys, specifically attorneys who are far removed from “The Normals” in the profession, the decision to go into solo practice is the only solution.³³¹ After having spent many years and more money than is acceptable on their legal education, few people have the

³²⁶ See *id.* (empirical data on file with author).

³²⁷ See *id.* (This is an experience shared by a subject of the study, contained in the empirical data on file with the author).

³²⁸ See generally HOGAN, *supra* note 46.

³²⁹ Helena R. M. Radke et al., *Beyond Allyship: Motivations for Advantaged Group Members to Engage in Action for Disadvantaged Groups*, 24 PERSONALITY & SOC. PSYCH. REV. 291, 306 (2020).

³³⁰ See Lani Gunier et al., *Becoming Gentlemen: Women’s Experience at One Ivy League Law School*, 143 U. PA. L. REV. 1, 66 (1994).

³³¹ See Joleena Lewis, *The Pros and Cons of Choosing to Be a Solo Attorney*, LAW FIRM SUITES: THINGS I WISH I KNEW (Apr. 30, 2014), <https://lawfirmsuites.com/2014/04/solo-attorney-joleena-louis-freedom-can-be-a-hard-weight-to-bear/>.

privilege of simply opting out.³³² Going solo gives attorneys much more autonomy because you are your own boss.³³³ They have control over the cases and clients they take on.³³⁴ They can control their work hours and their balance, but they also then do not necessarily have guaranteed income to rely on.³³⁵ The exclusive nature of law and specifically Big Law creates a deeper fissure by driving people out of powerful circles³³⁶—those very circles that are necessary for change. People who choose to leave toxic firm life for solo or boutique practice are not the problem, but the culture that drives so many people out³³⁷ is the problem. Attorneys should have the ability and independence to challenge inappropriate and unacceptable cultural norms so that the choice to move to solo practice is one that is truly a choice—not a survival narrative.

V. CONCLUSION

In a perfect profession, attorneys would feel comfortable being themselves in the office, in the courtroom, and in public spaces. They would not be afraid of being ostracized for not assimilating to a toxic culture. People would not have to write off the option of becoming an attorney because the profession rejects any part of their Self. While this perfect profession may never be actualized, the push for progress should not be abandoned. These recommendations are barely the start of a more equal profession. Sweeping changes need to be made at all levels, beginning with the aggregate since it has the most power to set a positive example. Even though the legal profession in the United States is more diverse today than it was in the 1970s, it is still more exclusive than inclusive³³⁸—women are still being punished for having children³³⁹, Black attorneys are still facing inherent structural racism³⁴⁰, LGBTQ+

³³² See generally Fisher, *supra* note 49 (contained in empirical data on file with author).

³³³ Lewis, *supra* note 331.

³³⁴ *Id.*

³³⁵ See *id.*

³³⁶ See generally Fisher, *supra* note 49 (contained in empirical data on file with author).

³³⁷ See generally LIEBENBERG & SCHARF, *supra* note 160.

³³⁸ See generally NAT'L ASS'N FOR L. PLACEMENT, *supra* note 166.

³³⁹ Kingson, *supra* note 88.

³⁴⁰ See Cindy-Ann Thomas et al., *Law Firms, Let's Talk About Racism*, CASETEXT (June 24, 2020), <https://casetext.com/blog/law-firms-lets-talk-systemic-racism/>.

attorneys are still hiding their orientation in work settings³⁴¹, openly trans attorneys are incredibly rare³⁴², other-abled attorneys still face logistical battles and stigma³⁴³—the list goes on. A more equal legal profession would mean happier, healthier advocates. In turn, clients would be better represented, and on a large scale, the legal profession would have the opportunity to lead other industries to making similar changes as well.

³⁴¹ Todd Brower, *Sexual Orientation Visibility and Its Effects on the Experiences of Sexual Minorities in the Courts*, 27 PACE L. REV. 141, 181 (2007).

³⁴² Patrick Folliard, *Getting Real: Transgender Attorneys Talk About Coming Out in the Workplace*, MCAA, <https://www.mcca.com/mcca-article/getting-real-transgender-attorneys/> (last visited Dec. 16, 2021).

³⁴³ See Peter Blanck, *Diversity and Inclusion in the American Legal Profession: Workplace Accommodations for Lawyers with Disabilities and Lawyers Who Identify as LGBTQ+*, 30 J. OCCUPATIONAL REHAB. 537, 539—41 (2020).