

# THE WORK-LIFE VIRUS: WORKING FROM HOME AND ITS IMPLICATIONS FOR THE GENDER GAP AND QUESTIONS OF INTERSECTIONALITY

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Work-life balance is the top challenge for working women globally. The COVID-19 pandemic catalyzed a worldwide experiment regarding the various components of this challenge and its possible solutions. Because the pandemic forced numerous workers to shift their working lives from the office to their private homes, it created the largest global experiment in remote work in human history with implications for women's equality.

As this Article shows, the phenomenon of remote work illuminates gender inequality for women and the difficulty of achieving work-life balance. Since remote work is mainly conducted from the personal residence of the employee, it generates a hybrid private-professional worksite and brings to the workplace the private characteristics of the employee. Thus, remote work exposes how women's traditional role in the private sphere—namely as caregivers—influences their ability to progress at work. The ubiquity of the trend of remote work during the pandemic also revealed what third-wave feminism argued long ago: the feminine experience is not unitary. Different women have to cope with different difficulties. The pandemic showed that the ability to shift to remote work and successfully balance work with familial duties is not uniform among women. Questions of financial and marital status are also part of this equation.

So far, working from a distance with the help of technology appears to be becoming the most prominent way to conduct work. Unless different regulatory models are developed, the current massive telecommuting trend has the potential to strengthen gendered and socioeconomic inequalities in American society and worldwide. Against this background, this Article suggests a model that considers private-professional hybridity for both

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employers and governmental authorities. In this way, the Article offers broad systemic solutions intended to diminish the effect of an employee’s familial and socioeconomic background on her ability to shift to telework on an equal basis with others and, in doing so, participate equally in the digitalized labor market of the future.

### *Table of Contents*

Introduction.....	758
I. Teleworking from Home .....	765
II. The Right to Equality in the Telework Case .....	768
A. On Gender Inequalities in the Workplace and the Work-Life Challenge.....	769
B. Work-Life Balance in the Telework Case—What Have We Learned from COVID-19?.....	771
C. On Intersectionality and Women’s Equality .....	778
D. Intersectionality in the Telework Case: What Have We Learned from COVID-19?.....	782
III. The Inequality Difficulty .....	788
A. Is It Discrimination? .....	788
B. Structural Discrimination.....	793
IV. The Question of Regulation.....	796
A. Regulation at the State, Federal, and the Labor Market Levels.....	798
1. The Education Domain and the Labor Market.....	799
2. The Familial Domain and the Labor Market.....	803
B. Regulation in the Concrete Workplace: An Equality Policy .....	807
V. Conclusions.....	813

### *Introduction*

Work-life balance is “the top challenge for women at work globally.”<sup>1</sup> Research demonstrates how the traditional perception of women as primary caregivers and the way women are required to combine their professional careers with a disproportionate share of caregiving tasks, hinders them from equally progressing at work, employing their professional abilities to the

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1. LAURA ADDATI ET AL., INT’L LAB. ORG., CARE WORK AND CARE JOBS FOR THE FUTURE OF DECENT WORK 98, 99 (2018), [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_633135.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_633135.pdf) (referring to an international survey conducted by ILO-Gallup in 2016 “in 142 countries and territories together representing 95 per cent of the world’s population, with nearly 149,000 respondents”).

fullest, and achieving their ambitions.<sup>2</sup> The COVID-19 pandemic has escalated this pattern for many women around the world in various ways.<sup>3</sup> In parallel, however, the intensity of the pandemic catalyzed a worldwide experiment regarding the various components of the work-life challenge and its possible solutions.

As part of this, the pandemic made it possible to focus on flexible work schedules and remote work as meaningful tools to relieve the gendered work-life problem. COVID-19 forced many workers, both men and women, to shift their working lives from the office to their private homes and, in doing so, to participate in the “largest global experiment in telecommuting in human

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2. See, e.g., Rahin Ajao Ganiyu et al., *The Glass Ceiling Conundrum: Illusory Belief or Barriers That Impede Women’s Career Advancement in the Workplace*, 3 J. EVOLUTIONARY STUD. BUS. 137, 157 (2018), <https://revistes.ub.edu/index.php/JESB/article/view/j040/22340>; *Gender Inequality and Women in the US Labor Force*, INT’L LAB. ORG., [https://www.ilo.org/washington/areas/gender-equality-in-the-workplace/WCMS\\_159496/lang--en/index.html](https://www.ilo.org/washington/areas/gender-equality-in-the-workplace/WCMS_159496/lang--en/index.html) (last visited Mar. 27, 2023); Paula England, *Gender Inequality in Labor Markets: The Role of Motherhood and Segregation*, 12 SOC. POL.: INT’L STUD. GENDER, STATE & SOC’Y 264 (2005); Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990) [hereinafter Schultz, *Telling Stories*]; Esteban Ortiz-Ospina & Max Roser, *Economic Inequality by Gender*, OUR WORLD IN DATA, <https://ourworldindata.org/economic-inequality-by-gender> (last updated Nov. 2019); Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995 (2015) [hereinafter Schultz, *Taking*].

3. In this way, considerable research worldwide used the pandemic period as a laboratory to explore the work-life challenge and its far-reaching implications for women. See, e.g., Naomi R. Cahn & Linda C. McClain, *Gendered Complications of COVID-19: Towards a Feminist Recovery Plan*, 22 GEO. J. GENDER & L. 1, 2–3 (2020); CLAUDIA HUPKAU & BARBARA PETRONGOLO, CTR. FOR ECON. PERFORMANCE, WORK, CARE AND GENDER DURING THE COVID-19 CRISIS 2, 3 (2020), <http://cep.lse.ac.uk/pubs/download/cepcovid-19-002.pdf>; Massimiliano Mascherini & Martina Bisello, *COVID-19 Fallout Takes a Higher Toll on Women, Economically and Domestically*, EUROFOUND BLOG (June 3, 2020), <https://www.eurofound.europa.eu/publications/blog/covid-19-fallout-takes-a-higher-toll-on-women-economically-and-domestically>; Kristalina Georgieva et al., *The COVID-19 Gender Gap*, IMF BLOG (July 21, 2020), <https://blogs.imf.org/2020/07/21/the-covid-19-gender-gap/>; Jackie Dunham, *Women Disproportionately ‘Bearing the Brunt’ of Coronavirus Crisis, Advocates Say*, CTV NEWS (Apr. 22, 2020, 3:25 PM EDT), <https://www.ctvnews.ca/canada/women-disproportionately-bearing-the-brunt-of-coronavirus-crisis-advocates-say-1.4907309>; EUROFOUND & EURO. TRAINING FOUND., *LIVING, WORKING AND COVID-19 IN THE EUROPEAN UNION AND 10 EU NEIGHBOURING COUNTRIES* 5 (2022), [https://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef21065en.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef21065en.pdf); Gema Zamarró & María J. Prados, *Gender Differences in Couples’ Division of Childcare, Work and Mental Health During COVID-19*, 19 REV. ECON. HOUSEHOLD 11 (2021).

history”<sup>4</sup> (also referred to as “remote work,” “work from home,” and “telework”, and sometimes “ICTM” and “mobile work”).<sup>5</sup> Telework is *not* going to vanish from our lives after the pandemic is over.<sup>6</sup> Research from around the world shows that a hybrid model—with people working both from home and from the workplace—will soon become the most prominent modification of the labor market in recent years and the main way in which people will conduct work in the future.<sup>7</sup>

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4. Dimitris Papanikolaou & Lawrence D.W. Schmidt, *Working Remotely and the Supply-Side Impact of COVID-19* 4 (Nat’l Bureau of Econ. Rsch., Working Paper No. 27330, 2020), <https://www.nber.org/papers/w27330.pdf>. According to Gallup research, as of April 2020, approximately 62% of people in the American workforce had shifted to working from home due to COVID-19. See Megan Brenan, *U.S. Workers Discovering Affinity for Remote Work*, GALLUP (Apr. 3, 2020), <https://news.gallup.com/poll/306695/workers-discovering-affinity-remote-work.aspx>. According to another study based on a nationally representative sample of the U.S. population, as of May 2020, approximately 35.2% of workers had switched to working from home. Erik Brynjolfsson et al., *COVID-19 and Remote Work: An Early Look at US Data* 3-4 (Nat’l Bureau of Econ. Rsch., Working Paper No. 27344, 2020), [https://www.nber.org/system/files/working\\_papers/w27344/w27344.pdf](https://www.nber.org/system/files/working_papers/w27344/w27344.pdf). They joined 15% of workers who were already working from home. *Id.* at 4.

5. INT’L LAB. OFF., ENSURING DECENT WORKING TIME FOR THE FUTURE 267 (2018), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_618485.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_618485.pdf) (referring to the term “telework”); Margrethe H. Olson, *Remote Office Work: Changing Work Patterns in Space and Time*, 26 COMM’NS ACM 182 (1983), <https://dl.acm.org/doi/pdf/10.1145/358061.358068> (referring to the term “remote work” throughout the article); Audronė Nakrošienė et al., *Working from Home: Characteristics and Outcomes of Telework*, 40 INT’L J. MANPOWER 87 (2019) (referring to the term “work from home”); see also JON MESSENGER ET AL., EUROFOUND & INT’L LAB. OFF., WORKING ANYTIME, ANYWHERE: THE EFFECTS ON THE WORLD OF WORK 4 (2017), [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms\\_544138.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_544138.pdf). For the purposes of this Article, the terms “telework” or “remote work” will be used to encapsulate all derivative terms.

6. See, e.g., *Future of Work Research*, ACCENTURE (Nov. 29, 2022), <https://www.accenture.com/us-en/insights/consulting/future-work> [<https://perma.cc/CZZ6-RWDX>] (noting that in the research study majority of workers 83% prefer a hybrid work model and 68% of high-growth companies have already adopted a “productivity anywhere” workforce model).

7. See, e.g., INT’L LAB. ORG., COVID-19: GUIDANCE FOR LABOUR STATISTICS DATA COLLECTION 3 (2020) [hereinafter ILO TECHNICAL NOTE], [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms\\_747075.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---stat/documents/publication/wcms_747075.pdf); INT’L LAB. ORG., WORKING FROM HOME: ESTIMATING THE WORLDWIDE POTENTIAL 1-5 (2020), [hereinafter ILO POLICY BRIEF], [https://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/briefingnote/wcms\\_743447.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/briefingnote/wcms_743447.pdf); Brynjolfsson et al., *supra* note 4; ‘Business as Unusual’: How COVID-19 Could Change the Future of Work, UN NEWS (May 27, 2020) [hereinafter *Business as Unusual*], <https://news.un.org/en/story/2020/05/1064802>; Dominique Allen, *What If Flexibility Became the New Normal Post Covid-19?*, CANADIAN L. WORK F. (Apr.

As this Article shows, the phenomenon of telework illuminates gender inequality and the difficulty of work-life balance. Since telework is mainly conducted from the personal residence of the employee,<sup>8</sup> it generates a hybrid private-professional worksite and brings to the workplace the private characteristics of the employee. In so doing, this “largest global experiment in telecommuting”<sup>9</sup> exposes the ways in which the traditional role of women in the private sphere—namely as caregivers—influences their ability to progress at work, not only when they work in the office but also, and even more so, when they work from home. Additionally, this massive telecommuting experiment exposes the distinctions among women in the workforce: a person’s gender is not the sole determinant of whether she will be able to successfully work from a distance or to achieve work-life balance. Other factors, especially socioeconomic ones, are also part of this equation.<sup>10</sup>

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23, 2020), <http://lawofwork.ca/what-if-flexibility-became-the-new-normal-post-covid-19/>; Mackenzie Bouverat, *News & Commentary*, ONLABOR (May 15, 2020), <https://www.onlabor.org/todays-news-commentary-may-15-2020/>; *Office Re-entry Is Proving Trickier than Last Year’s Abrupt Exit*, *ECONOMIST* (July 1, 2021), <https://www.economist.com/business/2021/07/01/office-re-entry-is-proving-trickier-than-last-years-abrupt-exit>; Papanikolaou & Schmidt, *supra* note 4; *Remote Work, Hybrid Work, In-Office Work Forecast*, GLOB. WORKPLACE ANALYTICS, <https://globalworkplaceanalytics.com/work-at-home-after-covid-19-our-forecast> (last visited June 8, 2023); *The Next Great Disruption Is Hybrid Work—Are We Ready?*, MICROSOFT (Mar. 22, 2021) [hereinafter *Microsoft – Next Great Disruption*], <https://www.microsoft.com/en-us/worklab/work-trend-index/hybrid-work>; MATTIA CORBETTA, OECD, EXPLORING POLICY OPTIONS ON TELEWORKING: STEERING LOCAL ECONOMIC AND EMPLOYMENT DEVELOPMENT IN THE TIME OF REMOTE WORK 7–8 (2020), <https://www.oecd-ilibrary.org/deliver/5738b561-en.pdf?itemId=%2Fcontent%2Fpaper%2F5738b561-en&mimeType=pdf>; OECD, MEASURING TELEWORK IN THE COVID-19 PANDEMIC 4 (2021) [hereinafter OECD, MEASURING TELEWORK], <https://www.oecd-ilibrary.org/deliver/0a76109f-en.pdf?itemId=%2Fcontent%2Fpaper%2F0a76109f-en&mimeType=pdf>; Phil Lord, *The Social Perils and Promise of Remote Work*, 4 J. BEHAV. ECON. FOR POL’Y (SPECIAL ISSUE) 63, 63 (2020); Nikita Lyutov & Ilona Voitkovska, *Remote Work and Platform Work: The Prospects for Legal Regulation in Russia*, 9 RUSSIAN L.J., no. 1, 2021, at 81.

8. Kim Parker et al., *COVID-19 Pandemic Continues To Reshape Work in America*, PEW RSCH. CTR. (Feb. 16, 2022), <https://www.pewresearch.org/social-trends/2022/02/16/covid-19-pandemic-continues-to-reshape-work-in-america/>.

9. Papanikolaou & Schmidt, *supra* note 4, at 4.

10. See, e.g., *Editorial: From Recovery to Resilience After COVID-19*, in OECD, OECD EMPLOYMENT OUTLOOK 2020: WORKER SECURITY AND THE COVID-19 CRISIS 12, 12–13 (Andrea Bassanini ed., 2020) [hereinafter OECD EMPLOYMENT OUTLOOK 2020], [https://catalogue.unccd.int/1515\\_OECD\\_1686c758-en.pdf](https://catalogue.unccd.int/1515_OECD_1686c758-en.pdf); Susanne Tietze & Gill Musson, *The Times and Temporalities of Home-Based Telework*, 32 PERS. REV. 438, 447–50 (2003); Ricardo Espinoza & Laura Reznikova, *Who Can Log in? The Importance of Skills for the Feasibility of Teleworking Arrangements Across OECD Countries* 5 (OECD Social, Emp. & Migration Working Paper, No. 242, 2020), <https://www.oecd-ilibrary.org/deliver/3f115a10->

The COVID-19 pandemic was a perfect laboratory in which to examine these issues. Some research has shown that flexible working hours and the ability to work from home enable women to balance work and familial responsibilities better, promoting more gender equality in the workplace.<sup>11</sup> Other researchers, however, have been more skeptical about whether flexible work patterns are truly beneficial for women and, if so, for whom exactly and under what conditions.<sup>12</sup> The COVID-19 pandemic and consequent lockdowns created an optimal laboratory in which to examine these views and unpack whether flexible work patterns can bring more gender equality and, more importantly, under what precise conditions.

The intensity of the pandemic has also revealed what third-wave feminism argued long ago: that the feminine experience is not unitary.<sup>13</sup> Different women must cope with different difficulties. More specifically, the pandemic showed that the ability to shift to remote work and to successfully balance work with familial routine is not uniform among all women. Questions of financial and marital status are also part of this equation.<sup>14</sup> In other words,

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en.pdf?itemId=%2Fcontent%2Fpaper%2F3f115a10-en&mimeType=pdf; see also Economic News Release, U.S. Bureau of Lab. Stat., Job Flexibilities and Work Schedules Summary (Sept. 24, 2019, 10:00 AM EDT) [hereinafter BLS 2019 News Release on Job Flexibility], <https://www.bls.gov/news.release/flex2.nr0.htm> (providing a similar finding in the United States before the pandemic).

11. See, e.g., Erin L. Kelly et al., *Changing Work and Work-Family Conflict: Evidence from the Work, Family, and Health Network*, 79 AM. SOCIO. REV. 485, 486–87, 509 (2014) (referring to the STAR initiative, in which employees from the information industry could reconsider when and where they worked); Phyllis Moen et al., *Changing Work, Changing Health: Can Real Work-Time Flexibility Promote Health Behaviors and Well-Being?*, 52 J. HEALTH & SOC. BEHAV. 404, 404 (2011) (referring to the results-only work environment model (ROWE), which enables employees to telework when and where they wish as long as they provide the required outcomes by a specific due date); Evangelia Demerouti et al., *New Ways of Working: Impact on Working Conditions, Work-Family Balance, and Well-Being*, in THE IMPACT OF ICT ON QUALITY OF WORKING LIFE 123, 123 (Christian Korunka & Peter Hoonakker eds., 2014) (referring to the new ways of working (NWW) model, in which there is no fixed schedule, and describing both the positive and negative aspects of the NWW model).

12. See *infra* Part II.

13. For an elaboration of third wave feminism, see generally, for example, R. Claire Snyder, *What Is Third-wave Feminism? A New Directions Essay*, 34 SIGNS: J. WOMEN CULTURE & SOC'Y 175, 175, 186 (2008); ASTRID HENRY, NOT MY MOTHER'S SISTER: GENERATIONAL CONFLICT AND THIRD-WAVE FEMINISM (2004); THIRD WAVE FEMINISM: A CRITICAL EXPLORATION (Stacy Gillis et al. eds., 2004).

14. See sources cited *supra* note 10.

the massive universal shift to telework exposed the intensity and relevance of feminist and intersectionality theories.<sup>15</sup>

Technology is an important component of the labor market of the future.<sup>16</sup> Work from a distance, with the help of technology, appears to be the most prominent way work will be conducted in the future.<sup>17</sup> The COVID-19 pandemic and concomitant massive shift to telework have demonstrated how the ability to benefit from technological modifications is not distributed equally among men and women or among socioeconomic groups.<sup>18</sup> There is a high correlation between being a man with a middle- to high-socioeconomic status and being able to successfully telework from home. Therefore, as this Article demonstrates, unless different regulatory models are developed, the telecommuting trend has the potential to strengthen current gendered and socioeconomic inequalities in American society. In

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15. The intersectionality theory was initially developed with regard to gender and race and thereafter was developed as including other identity groups. *See generally, e.g.*, Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139-40; Brittney Cooper, *Intersectionality*, in THE OXFORD HANDBOOK OF FEMINIST THEORY 385, 385-97 (Lisa Disch & Mary Hawkesworth eds., 2016); Anne Sisson Runyan, *What Is Intersectionality and Why Is It Important?*, ACADEME, Nov.-Dec. 2018, at 10, <https://www.aaup.org/article/what-intersectionality-and-why-it-important>.

16. *See* WORLD BANK GRP., WORLD BANK DEVELOPMENT REPORT 2019: THE CHANGING NATURE OF WORK 18-31 (2019), <https://documents1.worldbank.org/curated/en/816281518818814423/pdf/2019-WDR-Report.pdf>; *Editorial: From Recovery to Resilience After COVID-19*, *supra* note 10, at 14.

17. *See* sources cited *supra* notes 4-7.

18. *See generally, e.g.*, Matthew W. Finkin, *Technology and Jobs: The Agony and the Ecstasy*, 41 COMP. LAB. L. & POL'Y J. 221, 233 (2019); Florence Jaumotte et al., *Rising Income Inequality: Technology, or Trade and Financial Globalization?*, 61 IMF ECON. REV. 271 (2013); John Van Reenen, *Wage Inequality, Technology and Trade: 21st Century Evidence*, 18 LAB. ECON. 730 (2011); Jan Steyaert, *Inequality and the Digital Divide: Myths and Realities*, in ADVOCACY, ACTIVISM, AND THE INTERNET 199, 204-09 (Steven F. Hick & John G. McNutt eds., 2002), [https://archive.org/details/isbn\\_9780925065605](https://archive.org/details/isbn_9780925065605); PAUL DiMAGGIO & ESZTER HARGITTAI, FROM THE 'DIGITAL DIVIDE' TO 'DIGITAL INEQUALITY': STUDYING INTERNET USE AS PENETRATION INCREASES 2-3, 8-12 (Princeton Univ. Ctr. for Arts & Cultural Pol'y Stud., Working Paper No. 15, 2001), <https://perma.cc/UGB3-XQ8N>. Note, in this regard, that scholars contend that COVID-19 did not generate a new phenomenon in the workplace context; rather, it escalated processes that had already begun to occur in the modern workplace, mainly due to continual technological advancements. *See* Judy Fudge & Guy Mundlak, *The Future of Work and the Covid-19 Crisis*, FUTURES OF WORK (June 5, 2020), <https://futuresofwork.co.uk/2020/06/05/the-future-of-work-and-the-covid-19-crisis/>; Hayter, *supra* note 7; *see also* CITI GPS, TECHNOLOGY AT WORK v5.0: A NEW WORLD OF REMOTE WORK 47-50 (2020), [https://www.oxfordmartin.ox.ac.uk/downloads/reports/CitiGPS\\_TechnologyatWork\\_5\\_220620.pdf](https://www.oxfordmartin.ox.ac.uk/downloads/reports/CitiGPS_TechnologyatWork_5_220620.pdf).

other words, unless new ways of regulating work are developed, the massive and permanent shift to telework, despite all its benefits, may become a double-edged sword that invisibly reinforces social inequality.

Against this background, this Article suggests a model that accounts for the hybrid nature of working from home. Telework, because it is mainly conducted from home, brings to the fore the personal circumstances of the employee, for example being a mother or being a member of an underprivileged group, and renders these factors crucial to whether she will be able to successfully telework and progress at work. Any model of regulation must take this private-professional hybridity into account and provide an adequate solution. Similarly, since the equality problem in the telework case is embodied in a gendered and socioeconomic structural inequality in American society, the solution must be based on an integrative model that includes both employers and governmental authorities.

Based on these understandings, this Article suggests generating equality policies in the workplace, together with employees' representatives, that account for the individual characteristics of each employee and their implications on her ability to telework. By offering broader systemic solutions, the Article offers a holistic solution to the work-life balance difficulty and to questions of the intersectionality of gender and socioeconomic status. This holistic approach is intended to diminish the effect of the familial and socioeconomic background on the employee's ability to equally shift to telework and participate in the labor market of the future.

To accomplish these aims, the Article proceeds as follows. Part I describes the telework phenomenon and its different forms before and after the COVID-19 crisis, focusing on the hybrid nature of telework and its roots in the contemporary digital reality. Part II explains how the telework trend reproduces and strengthens problematic features of the private sphere of the individual in the workplace, and vice versa. Part II unpacks how the hybridity of the telework phenomenon influences the employee's rights to equality and the various effects of gender, socioeconomic, technological, and legal sources. This Part first explores how all women experience inequality while shifting to work from home because of their traditionally gendered role. Thereafter, this Part demonstrates how women from underprivileged groups—single mothers in particular—find it even more difficult than other women to succeed while shifting to telework. Part III examines whether the telework difficulty falls within the well-known legal definitions of employment discrimination. This Part demonstrates how the inequality problem in telework, which derives largely from preexisting inequality of

underprivileged women in the family domain and American society in general, is part of a broader and more complex phenomenon of structural discrimination. Finally, based on these understandings, Part IV provides suggestions for regulating the telework difficulty by discussing the public-private sources of the problem and offering solutions applicable to the workplace that includes governmental authorities.

### *I. Teleworking from Home*

The phenomenon of telework emerged in the United States in the 1970s when the information industry was developing.<sup>19</sup> Telework is mainly associated with information communication technology (“ICT”), which enables the storage, use, transfer of, and access to information on the internet.<sup>20</sup> ICT enables employees to easily receive information from their workplace and transfer information to it, thus being available for work outside the workplace at any time and from any place, including home.<sup>21</sup>

The phenomenon of telework was widespread before the COVID-19 pandemic, but it was a much smaller percentage of all work than it is today.<sup>22</sup>

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19. See generally Jack M. Nilles, *Telecommunications and Organizational Decentralization*, 23 IEEE TRANSACTIONS COMM'NS 1142 (1975).

20. INT'L LAB. ORG., TELEWORKING ARRANGEMENTS DURING THE COVID-19 CRISIS AND BEYOND 2 (2021), [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---ddg\\_p/documents/publication/wcms\\_791858.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---ddg_p/documents/publication/wcms_791858.pdf).

21. See, e.g., TIM DWELLY, DISCONNECTED: SOCIAL HOUSING TENANTS AND THE HOME WORKING REVOLUTION 10 (2002), <https://www.jrf.org.uk/file/35677/download?token=nQ6vPLil&filetype=full-report>; MESSENGER ET AL., *supra* note 5, at 1; W.C. Bunting, *Unlocking the Housing-Related Benefits of Telework: A Case for Government Intervention*, 46 REAL EST. L.J. 285, 285–87 (2017); see also R. Kelly Garrett & James N. Danziger, *Which Telework?, Defining and Testing a Taxonomy of Technology-Mediated Work at a Distance*, 25 SOC. SCI. COMPUT. REV. 27, 28 (2007); Tracey Crosbie & Jeanne Moore, *Work-Life Balance and Working from Home*, 3 SOC. POL'Y & SOC'Y 223, 224 (2004).

22. See, e.g., MESSENGER ET AL., *supra* note 5, at 4 (noting that telework had become “a growing phenomenon, affecting up to one-third of employees in some . . . countries”). In 2017–18, the share of employees who performed some or all of their work at home was 28.8%. *Economic News Release*, *supra* note 10 (figures accessible under table 1). A more recent survey by OWL Labs from 2019 found that 62% of respondents conducted telework. Of those respondents, 30% were full-time teleworkers. *State of Remote Work*, OWL LABS (Sept. 2019), <https://resources.owllabs.com/state-of-remote-work/2019>. Studies demonstrate similar realities in other countries. An EU study from 2017 found that telework “varies substantially across countries, ranging between 2% and 40% of all employees, depending on the particular country and the frequency with which employees carry out T/ICTM work.” Jon C. Messenger, *Working Anytime, Anywhere: The Evolution of Telework and Its Effects on the World of Work* 304–05 (IUSLabor Working Paper No. 3/2017, 2017), <https://www.upf.edu/documents/3885005/140470042/11.Messenger.pdf>; see also *New Forms of Employment*, EUROFOUND

Telework was commonly available in households around the world through various daily-use devices, such as laptops, tablets, and mobile phones.<sup>23</sup> The COVID-19 pandemic emphasized the feasibility of teleworking as the next big trend in the labor market and the predominate way in which people will conduct work in the future.<sup>24</sup>

According to the U.S. Bureau of Labor Statistics, the percentage of men who worked at home increased during the pandemic from 20% in 2019 to 36% in 2020; for women, those figures are 26% and 49%, respectively.<sup>25</sup> Gallup research revealed a more extreme phenomenon: approximately 62% of people in the American workforce shifted to working from home during the COVID-19 crisis.<sup>26</sup> These new home workers are likely to remain an integral and dominant part of the labor market, even after the pandemic is over. According to a special Global Work-from-Home Experience Survey, “those who were working remotely before the pandemic, will increase their frequency after they . . . return to their offices. For those who were new to remote work . . . we believe there will be a significant upswing in their adoption.”<sup>27</sup> Other research similarly has shown that in a post-pandemic world, employees will work an average of at least 1.3 days per week from home.<sup>28</sup> The Organization for Economic Co-operation and Development

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(May 17, 2023), <https://www.eurofound.europa.eu/new-forms-of-employment> [<https://perma.cc/64GE-YRQP>] (presenting similar findings in other EU countries)].

23. Jon C. Messenger & Lutz Gschwind, *Three Generations of Telework: New ICTs and the (R)evolution from Home Office to Virtual Office*, 31 *NEW TECH., WORK & EMP.* 195, 196–97 (2016); MESSENGER ET AL., *supra* note 5, at 3, 11; Jan Popma, *The Janus Face of the ‘New Ways of Work’: Rise, Risks and Regulation of Nomadic Work* 7–8 (Eur. Trade Union Inst., Working Paper No. 2013.07, 2013), <https://www.etui.org/sites/default/files/13%20WP%202013%2007%20Popma%20Technostress%20EN%20Web%20version.pdf>.

24. See sources cited *supra* note 7.

25. News Release, Bureau Lab. Stat., U.S. Dep’t Lab., American Time Use Survey — May to December 2019 and 2020 Results (July 22, 2021) [hereinafter 2019–20 American Time Use Survey], <https://perma.cc/2K24-8JZE>.

26. See Brennan, *supra* note 4 (noting statistics as of April 2020).

27. *Remote Work, Hybrid Work, In-Office Work Forecast*, *supra* note 7; see also Adam Hickman & Lydia Saad, *Reviewing Remote Work in the U.S. Under COVID-19*, GALLUP (May 22, 2020), <https://news.gallup.com/poll/311375/reviewing-remote-work-covid.aspx>. This research is in follow-up to the research mentioned *supra* note 4. McKinsey made similar findings in this regard. See Brodie Boland et al., *Reimagining the Office and Work Life After COVID-19*, MCKINSEY & CO. (June 8, 2020), <https://www.mckinsey.com/business-functions/organization/our-insights/reimagining-the-office-and-work-life-after-covid-19>.

28. *Remote-First Work Is Taking Over the Rich World*, *ECONOMIST* (Oct. 30, 2021), <https://www.economist.com/finance-and-economics/2021/10/30/remote-first-work-is-taking-over-the-rich-world>.

(“OECD”) comparative report from July 2021 demonstrated that “both employees and employers would intend to make greater use of teleworking than before the pandemic.”<sup>29</sup> Another study from 2022 showed 68% of high-growth companies have already adopted a hybrid model of work.<sup>30</sup> Finally, various research findings and statements made by Microsoft,<sup>31</sup> MIT Technology Review,<sup>32</sup> and others<sup>33</sup> similarly emphasize that the move to remote work will soon be the most transformative labor and technological change in a generation, one that will stay long after the end of the pandemic.

To be sure, the move to telework has various justifications and benefits. Telework is considered to have many positive implications for society, employers, and employees, both during the COVID-19 pandemic and afterward.<sup>34</sup> As demonstrated below, however, along with all of telework’s positive implications, it also has the potential to increase inequality in the United States and worldwide. This potential for negative effects is mainly because working from home, inevitably and consistently, combines two human spheres of an employee, the private and the professional. Thus, teleworking from home can result in the movement of difficulties in the

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29. OECD, MEASURING TELEWORK, *supra* note 7, at 4; *see also* ILO TECHNICAL NOTE, *supra* note 7, at 3.

30. *See Future of Work Research*, *supra* note 6.

31. *Microsoft – Next Great Disruption*, *supra* note 7.

32. *See 10 Breakthrough Technologies 2021*, MIT TECH. REV. (Feb. 24, 2021), <https://www.technologyreview.com/2021/02/24/1014369/10-breakthrough-technologies-2021> (including remote work under “remote everything,” as one of the ten breakthrough technologies for 2021).

33. *See, e.g.*, studies cited *supra* note 27; Lord, *supra* note 7, at 63 (stating that telework “has the potential to be the most transformative labour change in a generation”); Imogen West-Knights, *Get Used to It: Working from Home May Be for Life, Not Just for Christmas*, GUARDIAN (Dec. 13, 2021, 10:34 EST), <https://www.theguardian.com/commentisfree/2021/dec/13/working-from-home-for-life-not-christmas-covid-england-rules>; Mark McKee, *The WFH Revolution: How Covid-19 Is Changing the Way We Think About Remote Work*, FORBES (Oct. 1, 2020, 8:00 AM EDT), <https://www.forbes.com/sites/theyec/2020/10/01/the-wfh-revolution-how-covid-19-is-changing-the-way-we-think-about-remote-work>.

34. Remote work reduces traffic and air pollution. Eleftherios Giovanis, *The Relationship Between Teleworking, Traffic and Air Pollution*, 9 ATMOSPHERIC POLLUTION RSCH. 1 (2018). Remote work can also relieve some of the upward pressure on housing in metropolitan regions. Jerusalem Demsas, *3 Ways Remote Work Could Remake America*, VOX (Jan. 4, 2022, 7:30 AM EST), <https://www.vox.com/22839563/remote-work-climate-change-house-prices-cities>. Remote work is cost-effective for employers because it reduces the need for office space and transportation costs and increases productivity. Stephen Ruth & Imran Chaudhry, *Telework: A Productivity Paradox?*, IEEE INTERNET COMPUTING, Nov.–Dec. 2008, at 87, 87, <https://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=4670124>; *see also* sources cited *supra* note 11 and accompanying text.

employee's private sphere moving into the employee's professional sphere, negatively affecting her professional life. This shift is especially true for the employee's right to equal opportunity in the workplace.

## *II. The Right to Equality in the Telework Case*

Gender inequality in the workplace is a major problem,<sup>35</sup> rooted in long-standing inequality in the labor market and in American society at large. The problem of gender inequality has varying origins and various implications. Gender inequality is experienced differently, with respect to both its commonality and intensity, by women from different socioeconomic, geographic, and ethnic backgrounds.<sup>36</sup> The phenomenon of telework, mainly during the pandemic, but also beforehand, exposed how the difficulties women experience in the workplace are strongly connected to the ongoing challenge of work-life balance and the linkage between a woman's private sphere and her opportunities in the professional sphere. The phenomenon of telework also exposes the connections between socioeconomic inequality and access to technology. It powerfully demonstrates that inequality is not only about the gendered work-life dilemma but also connects to the opportunities and access to technology that women from different backgrounds and with different circumstances have.

Differently put, the massive shift to telework during the pandemic has exposed how the right to equality in the workplace is bound to general inequality in society and within the private sphere of a person. A strong connection exists between gendered inequality and socioeconomic background and access to technology.<sup>37</sup> Preexisting inequalities are difficult to classify and assign responsibility for, especially in the specific context of employment. That is why the problem requires more comprehensive solutions.

In the following section, this Article discusses the general difficulty of work-life balance and its implications for women's equality in the workplace. Thereafter, it reviews the specific phenomenon of telework during the pandemic and examines what it highlights about the sources of gendered inequality and the work-life balance. The section after that examines the

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35. See *infra* Section II.A (addressing gender inequality).

36. See *infra* Section II.B (addressing gender and socioeconomic inequality).

37. See Luca Bonacini et al., *Working from Home and Income Inequality: Risks of a 'New Normal' with COVID-19*, 34 J. POPULATION ECON. 303 (2020) (showing how the shift to telework during the COVID-19 pandemic has exacerbated preexisting gendered and economic inequalities in the Italian labor market).

basics of intersectionality of both gender and socioeconomic issues. Thus, this section will first elaborate on the obvious premise: how the specific socioeconomic background of a woman influences her opportunities in the workplace. Thereafter, it examines this understanding in the concrete case of telework.

*A. On Gender Inequalities in the Workplace and the Work-Life Challenge*

The gendered difficulty of work-life balance has always been embedded in the labor market.<sup>38</sup> International research indicates that women dedicate 3.2 times more hours to unpaid care work at home than men.<sup>39</sup> In the United States, women spend almost twice as much time as men on childcare and household tasks.<sup>40</sup> These realities prevent women from participating in the labor market equally and with equal success. Because women are more frequently forced to combine their professional careers with a disproportionate share of caregiving tasks, the work-life balance challenge is more acute for women than for men.<sup>41</sup>

One of the main causes of this work-life balance difficulty connects to the traditionally biased image of women in the private sphere.<sup>42</sup> The old-fashioned perception is that women are predominately identified with the private sphere and its associated tasks, such as childrearing and housework, while men are mostly associated with the public sphere and its associated

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38. See generally sources cited *supra* note 1-2.

39. ADDATI ET AL., *supra* note 1, at 53; see also INT'L LAB. ORG., ILO MONITOR: COVID-19 AND THE WORLD OF WORK 8–11 (5th ed. 2020) [hereinafter ILO MONITOR: COVID-19], [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms\\_749399.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/briefingnote/wcms_749399.pdf); UN WOMEN, PROGRESS OF THE WORLD'S WOMEN 2019-2020: FAMILIES IN A CHANGING WORLD 15 (2019), <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2019/Progress-of-the-worlds-women-2019-2020-en.pdf>; UN, POLICY BRIEF: THE IMPACT OF COVID-19 ON WOMEN 13–15 (2020) [hereinafter UN POLICY BRIEF], <https://asiapacific.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Policy-brief-The-impact-of-COVID-19-on-women-en.pdf>; Cristian Alonso et al., *Reducing and Redistributing Unpaid Work: Stronger Policies to Support Gender Equality* 28 (Int'l Monetary Fund, IMF Working Paper 19/225, 2019), <https://www.imf.org/-/media/Files/Publications/WP/2019/wpica2019225-print.pdf.ashx>.

40. See Suzanne M. Bianchi et al., *Housework: Who Did, Does or Will Do It, and How Much Does It Matter?*, 91 SOC. FORCES 55, 57–61 (2012); see also ADDATI ET AL., *supra* note 1, at 98–99.

41. See ADDATI ET AL., *supra* note 1, at 98–99.

42. See Schultz, *Telling Stories*, *supra* note 2, at 1756 (highlighting this issue in the context of Title VII employment challenges in U.S. labor law).

professional tasks, such as the duty to provide for the family.<sup>43</sup> This stereotypical division of men and women came into being during the nineteenth century and still has crucial implications for the structure of the workplace and family life today.<sup>44</sup> The legal system maintained the distinction through the years, often ignoring the structural inequalities in the labor market.<sup>45</sup> As Vicki Schultz, law and social science professor from Yale Law School describes, “[C]ourts have assumed that women’s aspirations and identities as workers are shaped exclusively in private realms that are independent of and prior to the workworld.”<sup>46</sup> Courts often explained gender inequalities in the workplace by claiming women “chose” to focus more on their family responsibilities in the private sphere instead of focusing on a professional career.<sup>47</sup> Discriminatory factors were thus understood as related mainly to women’s cultural image “as beings formed in and for the private domestic sphere.”<sup>48</sup>

This problematic and inaccurate perception maintains and justifies discrimination against women in the workplace to this very day. This narrative diminishes the substantial role of employers in perpetuating inequalities in their workplaces and places the blame on women’s supposed preexisting behaviors and choices.<sup>49</sup> This perception also disregards how

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43. See, e.g., Schultz, *Taking*, *supra* note 2, at 1010–11; Arianne Renan Barzilay, *Labor Regulation as Family Regulation: Decent Work and Decent Families*, 33 BERKELEY J. EMP. & LAB. L. 119, 125–17 (2012); Nancy Felipe Russo, *The Motherhood Mandate*, J. SOC. ISSUES, Summer 1976, at 143, 144–45; Shelly J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1298, 1306–07, 1326 (2007); Amy J. C. Cuddy & Susan T. Fiske, *When Professionals Become Mothers, Warmth Doesn’t Cut the Ice*, 60 J. SOC. ISSUES 701, 706, 711, 715 (2004). See generally, e.g., Joan C. Williams, *Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence to Prove Gender Discrimination*, 7 EMP. RTS. & EMP. POL’Y J. 287 (2003); Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOCIO. REV. 204 (2001); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002).

44. LYNN WEINER, FROM WORKING GIRL TO WORKING MOTHER: THE FEMALE LABOR FORCE IN THE UNITED STATES, 1820–1980, at 28–33 (1985); Barzilay, *supra* note 43, at 124–26.

45. See Schultz, *Telling Stories*, *supra* note 2, at 1755–56.

46. *Id.* at 1756.

47. *Id.* at 1769 (describing this opinion as the conservative explanation and contrasting it with the liberal explanation that attributes sex segregation to employer “coercion”).

48. *Id.* at 1771.

49. *Id.* at 1842–43. In Schultz’s later article from 2015, she emphasized again the substantial way that stereotypes of women in the private sphere as mainly mothers and caregivers influence their opportunities in the labor market. Schultz, *Taking*, *supra* note 2, at

individual so-called preferences, opportunities, and actions are constructed by preexisting socioeconomic conditions and constraints.<sup>50</sup> For example, this presumption ignores the fact that heterosexual couples often “choose” to partly preserve this private-public distinction because of gender wage gaps in society, leading to rational preferences that the male worker will work more and the female worker will do most of the unpaid care work in order to increase the family’s total income.<sup>51</sup> This distinction is exactly what results in the perception that women are less professional and less devoted to work and more distant from the image of the “ideal worker.”<sup>52</sup> These prevailing misperceptions lead employers over and over again to prefer a male worker over a female worker, especially a mother.<sup>53</sup>

As things stand, the impact on women from the problematic distinction between the private sphere and the public sphere is twofold. First, the distinction fosters an image of women as unprofessional workers; and second, it imposes on women the burden of care duties in the private sphere, preventing them from progressing equally in the workplace.<sup>54</sup> As will be shown in the following section, the massive shift to telework during the COVID-19 crisis is linked to these same gender stereotypical concepts and distinctions between the private sphere and the public sphere. Telework during the pandemic is playing an important role, perpetuating the biased perceptions of women in the private sphere mirrored in the public sphere of the workplace.

#### *B. Work-Life Balance in the Telework Case—What Have We Learned from COVID-19?*

From a bird’s-eye view, it appears that the pandemic has harmed women more than men due to preexisting factors related to a woman’s roles in the

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1010–11 (also discussing other stereotypes, such as women being weak, passive, emotional, etc.).

50. See ADDATI ET AL., *supra* note 1, at 98.

51. See *id.* at 98–99.

52. Schultz, *Taking*, *supra* note 2, at 1010–11. For the problematic implications of the image of the “ideal worker” on gender equality in the pandemic context, see Bobbi Thomason & Heather Williams, *What Will Work–Life Balance Look Like After the Pandemic?*, HARV. BUS. REV. (Apr. 16, 2020), <https://hbr.org/2020/04/what-will-work-life-balance-look-like-after-the-pandemic>.

53. Schultz, *Taking*, *supra* note 2, at 1010–11, 1013.

54. That is why this distinction was under attack from a women’s rights and human rights perspective. See Jeff Weintraub, *The Theory and Politics of the Public/Private Distinction*, in PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY 1, 27–30 (Jeff Weintraub & Krishan Kumar eds., 1997).

private sphere and the workplace.<sup>55</sup> Women were more likely than men to work in sectors severely affected by the lockdown, often related to domestic stereotypes (such as domestic work and service) that required a physical presence or face-to-face interactions that could not be shifted to telework.<sup>56</sup> Simultaneously, the closure of schools during the pandemic intensified the

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55. See, e.g., UN POLICY BRIEF, *supra* note 39, at 2 (“Across every sphere, from health to the economy, security to social protection, the impacts of COVID-19 are exacerbated for women and girls simply by virtue of their sex.”); Cahn & McClain, *supra* note 3, at 3–4 (“The catalogue of COVID-19’s impact covers all aspects of women’s lives: work, family, education, health, reproduction, mental and physical well-being, leisure, and even retirement security.”); OECD, CAREGIVING IN CRISIS: GENDER INEQUALITY IN PAID AND UNPAID WORK DURING COVID-19, at 2 (2021) [hereinafter OECD, CAREGIVING IN CRISIS], [https://read.oecd-ilibrary.org/view/?ref=1122\\_1122019-pxf57r6v6k&title=Caregiving-in-crisis-Gender-inequality-in-paid-and-unpaid-work-during-COVID-19](https://read.oecd-ilibrary.org/view/?ref=1122_1122019-pxf57r6v6k&title=Caregiving-in-crisis-Gender-inequality-in-paid-and-unpaid-work-during-COVID-19) (“COVID 19 has laid bare the negative consequences of longstanding gender gaps and norms around caregiving.”); Kalina Arabadjieva, *Reshaping the Work–Life Balance Directive with Covid-19 Lessons in Mind* 13 (Eur. Trade Union Inst., Working Paper No. 2022.01, 2022), <https://www.etui.org/sites/default/files/2021-12/Reshaping%20the%20Work%E2%80%93Life%20Balance%20Directive%20with%20Covid-19%20lessons%20in%20mind-2022.pdf> (“The Covid-19 pandemic has led to increases in unpaid care work, in particular childcare, for both men and women, but emerging research shows that this increase is taking a greater toll on women in various ways.”); EUR. INST. FOR GENDER EQUAL., GENDER EQUALITY AND THE SOCIO-ECONOMIC IMPACT OF THE COVID-19 PANDEMIC 35–36 (2021), [https://eige.europa.eu/sites/default/files/documents/20211734\\_mh0921078enn\\_pdf.pdf](https://eige.europa.eu/sites/default/files/documents/20211734_mh0921078enn_pdf.pdf); EUROFOUND, LIVING, WORKING AND COVID-19 23 fig.13 (2020), [https://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef20059en.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef20059en.pdf) (showing that working women spent, per week, around thirty-five hours on childcare and eighteen hours on housework, while working men spent around twenty-five hours on childcare and twelve hours on housework).

56. HUPKAU & PETRONGOLO, *supra* note 3, at 3; Mascherini & Bisello, *supra* note 3; ILO MONITOR: COVID-19, *supra* note 39, at 10 (referring to domestic work); Georgieva, *supra* note 3 (“Because of the nature of their jobs, teleworking is not an option for many women. In the United States, about 54 percent of women working in social sectors cannot telework.”); see also Titan Alon et al., *The Impact of COVID-19 on Gender Equality* 1–10 (Nat’l Bureau of Econ. Rsch., Working Paper No. 26947, 2020), [https://www.nber.org/system/files/working\\_papers/w26947/w26947.pdf](https://www.nber.org/system/files/working_papers/w26947/w26947.pdf); Anu Madgavkar et al., *COVID-19 and Gender Equality: Countering the Regressive Effects*, MCKINSEY & Co. (July 15, 2020), <https://www.mckinsey.com/featured-insights/future-of-work/covid-19-and-gender-equality-countering-the-regressive-effects> (“The nature of work remains significantly gender specific: women and men tend to cluster in different occupations in both mature and emerging economies. This, in turn, shapes the gender implications of the pandemic: our analysis shows that female jobs are 19 percent more at risk than male ones simply because women are disproportionately represented in sectors negatively affected by the COVID-19 crisis. We estimate that 4.5 percent of women’s employment is at risk in the pandemic globally, compared with 3.8 percent of men’s employment, just given the industries that men and women participate in.”).

duties and responsibilities of women with children.<sup>57</sup> Research shows women disproportionately bore the emotional brunt of the pandemic and, therefore, were more exposed to severe emotional and psychological problems.<sup>58</sup>

Similarly, around the world, female workers have reported that family responsibilities have prevented them from devoting the required time to remote work during the pandemic.<sup>59</sup> To be sure, in many ways, remote work even before the COVID-19 crisis had the potential to benefit women because it seemed to make better work-life balance possible.<sup>60</sup> Telework has the potential to reduce gender gaps and inequalities in the workplace,<sup>61</sup> and it also has the potential to reduce female turnover.<sup>62</sup> In the European Union, directives aimed at promoting flexible work arrangements based on ICT are considered to enable a better work-life balance, mainly for parents.<sup>63</sup> The

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57. ILO MONITOR: COVID-19, *supra* note 39, at 10.

58. Dunham, *supra* note 3; Arabadjieva, *supra* note 55, at 12 (“Some of the main findings are that women have been more affected by the pandemic because they constitute the majority of essential workers, exposed to particularly high physical and psychosocial risks . . .”).

59. In Europe, around 10% of female workers, as opposed to 6.7% of male workers, reported that family responsibilities prevented them from devoting the required time to remote work. ILO MONITOR: COVID-19, *supra* note 39, at 10. In Canada, as well, women who shifted to telework during the pandemic found it difficult to manage households and childcare while still performing their regular professional paid work from a distance. See Jim Stanford, *Working from Home Helps, but It's No Panacea*, TORONTO STAR (May 9, 2020), <https://www.thestar.com/business/opinion/2020/05/09/working-from-home-helps-but-its-no-panacea.html>. In the United Kingdom, teleworking is indeed more possible in female-dominant sectors. However, due to the unequal contribution to home production of men and women, women there have faced more difficulties when shifting to telework. HUPKAU & PETRONGOLO, *supra* note 3, at 3–5. Finally, in Israel, men tended to participate more in unpaid work in the family during the pandemic; however, overall, it appears that women took on more responsibilities in the private sphere. See Efrat Herzberg-Druker et al., *Work and Families in Times of Crisis: The Case of Israel in the Coronavirus Outbreak* 7-8 (June 14, 2020), <https://osf.io/preprints/socarxiv/fxs64/download>.

60. See Lonnie Golden & Jaeseung Kim, *Irregular Work Scheduling and Its Consequences*, in *WORK-LIFE BALANCE IN THE MODERN WORKPLACE* 115, 129–31 (Sarah De Groof ed., 2017); see also Phyllis Moen et al., *Does a Flexibility/Support Organizational Initiative Improve High-Tech Employees' Well-Being?*, 81 AM. SOCIO. REV. 134, 157 (2016).

61. Lord, *supra* note 7, at 63–64.

62. See TARA VAN BOMMEL, *CATALYST, REMOTE-WORK OPTIONS CAN BOOST PRODUCTIVITY AND CURB BURNOUT (REPORT)* 6 n.10 (2021), <https://www.catalyst.org/wp-content/uploads/catalyst-pdf/pdf/9b65d75ac2d8b049085525c2981d1ca7.pdf> (reporting that female respondents with childcare responsibilities who could work remotely were 32% less likely to say they were going to leave their workplace than male respondents).

63. Directive 2019/1158 of the European Parliament and of the Council of 20 June 2019 on Work-Life Balance for Parents and Carers and Repealing Council Directive 2010/18/EU, 2019 O.J. (L 188) 79 [hereinafter EU Directive 2019/1158], <https://eur-lex.europa.eu/legal->

same is true in the United States; diverse models which enable flexible teleworking are perceived as beneficial to women since they allow more autonomy and better work-life balance.<sup>64</sup>

Scholars concede that the picture is more complex, however, by acknowledging that along with its potential positive implications for mothers, telework can lead to greater work-family conflict.<sup>65</sup> The shift to telework, by itself, cannot alone ensure a better work-life balance for mothers. Instead, women working from home, especially mothers, require other elements to enable work from home to better integrate their professional careers with their family lives. Working from home mainly tends to blur the boundaries between work and leisure, forcing female remote workers to work all day without rest and without full compensation for extended working hours.<sup>66</sup> Alongside that, the COVID-19 crisis further emphasized how teleworking at

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content/EN/TXT/PDF/?uri=CELEX:32019L1158&from=EN. *But see* EUROFOUND, WORK-LIFE BALANCE AND FLEXIBLE WORKING ARRANGEMENTS IN THE EUROPEAN UNION 5–7 (2017), [https://www.eurofound.europa.eu/sites/default/files/ef\\_publication/field\\_ef\\_document/ef1741en.pdf](https://www.eurofound.europa.eu/sites/default/files/ef_publication/field_ef_document/ef1741en.pdf) (noting that flexible work arrangements can also lead to an extension of the actual working hours).

64. Kelly et al., *supra* note 11 (referring to the STAR initiative, in which employees from the information industry could reconsider when and where they worked); *see also* Moen et al., *supra* note 11, at 423; Demerouti et al., *supra* note 11, at 123–30.

65. Anne Kaduk et al., *Involuntary vs. Voluntary Flexible Work: Insights for Scholars and Stakeholders*, 22 CMTY., WORK & FAM. 412, 415, 431–32 (2019) (using research data to highlight that the benefits of telework depend on the degree of voluntariness of the schedule variability); Rani Molla, *For Women, Remote Work Is a Blessing and a Curse*, VOX (July 13, 2021, 1:30 PM EDT), <https://www.vox.com/recode/22568635/women-remote-work-home> (“Women may be more likely to want to work from home than men. They’ve also had a harder time doing so, reporting higher rates of stress, depression, and sheer hours worked—especially if they have kids. This paradox is a result of women trying to do the best thing for their careers while also navigating an unfair role in society and at home.”); Arabadjieva, *supra* note 55, at 16 (“Telework also hides risks that could affect women disproportionately, however. It is often associated with increased availability, longer working hours, intensification of work and blurring of boundaries between work and private life, which exacerbate work-life conflicts and pose risks to workers’ mental and physical health . . .”).

66. *See* Tammy Katsabian, *It’s the End of Working Time as We Know It: New Challenges to the Concept of Working Time in the Digital Reality*, 65 MCGILL L.J. 379, 393–99 (2020). For a similar argument regarding the general ability to work from home from a feminist perspective, *see* MELISSA GREGG, WORK’S INTIMACY 54 (2011); Emilie Genin, *The Third Shift: How Do Professional Women Articulate Working Time and Family Time?*, in WORK-LIFE BALANCE IN THE MODERN WORKPLACE, *supra* note 60, at 103, 108–09; *see also* M.C. Noonan & J.L. Glass, *The Hard Truth About Telecommuting*, MONTHLY LAB. REV., June 2012, at 38 (referring to the unique implications of teleworking for mothers).

home can reinforce gender gaps in both the private and public-professional spheres.

In the United States, several recent empirical studies revealed a troublesome unequal reality in households with both male and female teleworkers that promotes inequality of men and women in the workplace.<sup>67</sup> According to research by the National Bureau of Economic Research (NBER), whether the father or the mother in a household with two teleworkers will bear most of the burden of caring responsibilities depends on two main factors: (1) preexisting disparities in hours spent on childcare, and (2) the ability of each parent to telework.<sup>68</sup> As for the first factor, since women are more likely than men to provide more childcare, the NBER researchers explained that “[i]t appears likely that much of this uneven distribution of the burden of childcare will persist during the current crisis.”<sup>69</sup> As for the second factor, women have been more likely to telecommute in the past.<sup>70</sup> Despite this apparent advantage, because women used to telework mainly to balance work and childcare duties, their telework tends to be more affected by childcare requirements during the pandemic.<sup>71</sup>

Other empirical research similarly revealed that among couples with two telecommuting-capable parents, the reduction in hours worked per week between February and April of 2020 was nearly 4.5 times larger for mothers than fathers.<sup>72</sup> Even when both parents were able to telework during the

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67. Alon et al., *supra* note 56, at 11–12. Subsequent research by NBER involving the UK, which was published a year later, in April 2021, and presents a slightly more complex picture, can be found in Titan Alon et al., *From Mancession to Shecession: Women's Employment in Regular and Pandemic Recessions* 47–53 (Nat'l Bureau of Econ. Rsch., Working Paper No. 28632, 2021), [https://www.nber.org/system/files/working\\_papers/w28632/w28632.pdf](https://www.nber.org/system/files/working_papers/w28632/w28632.pdf); see also Gema Zamorro & Maria J. Prados, *Gender Differences in Couples' Division of Childcare, Work and Mental Health During COVID-19*, at 3 (USC CESR-Schaeffer, Working Paper No. 2020-003, 2020), [https://cesr.usc.edu/documents/WP\\_2020\\_003.pdf](https://cesr.usc.edu/documents/WP_2020_003.pdf) (“Among working parents who are married or living with a partner, women were 17 percentage points more likely than men to become the sole childcare provider during the pandemic in our U.S. sample.”).

68. Alon et al., *supra* note 56, at 12–13. The authors included an additional third factor as whether the two parents are working. *Id.* Since this Article assumes the answer to this initial question is positive, I chose to focus only on the other two factors.

69. *Id.* at 14 (arguing that women’s relative income and relative bargaining power and the influence of traditional social norms and role models will continue to apply during the pandemic and will influence the distribution of childcare).

70. *Id.* at 15.

71. *Id.* at 15–16.

72. Caitlyn Collins et al., *COVID-19 and the Gender Gap in Work Hours*, 28 GENDER, WORK & ORG. (SPECIAL ISSUE) 101, 107–09 (2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7361447/pdf/GWAO-28-101.pdf> (“In February, mothers of children aged 6–12

pandemic, mothers scaled back their work because of at-home care responsibilities to a greater extent than fathers.<sup>73</sup> Consequently, teleworkers who are mothers endured a major reduction in work hours during the pandemic, while work commitments of teleworking fathers were relatively unchanged.<sup>74</sup>

Another study revealed a slightly more complex picture,<sup>75</sup> by which, both fathers and mothers who were teleworkers spend more time on childcare during the pandemic.<sup>76</sup> Still, mothers more often teleworked in the presence of a child which harmed their productivity.<sup>77</sup> Tasks in the private sphere not related to childcaring are also distributed unequally between male and female teleworkers.<sup>78</sup> Female teleworkers spend an average of forty-nine minutes more per day on housework than male teleworkers do, associated with an average of \$12.68 in lost daily earnings.<sup>79</sup> Unsurprisingly, teleworking mothers also consistently reported more anxiety, loneliness, and depressed feelings than telecommuting fathers.<sup>80</sup>

Other research has exposed similar realities.<sup>81</sup> Overall, teleworking during the COVID-19 pandemic demonstrates well how the old-fashioned division,

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were predicted to work about 4.7 hours less than fathers of children this age. By April, this gap grew by one third to 6.3 hours. Similarly, among parents with young children aged 1–5, the gender gap in hours worked grew from 4.9 hours in February to 6.2 hours in April. This constitutes an increase of over 25 percent in the gender gap in hours worked.”).

73. *Id.* at 103.

74. *Id.* at 103, 110.

75. Thomas Lyttelton et al., *Gender Differences in Telecommuting and Implications for Inequality at Home and Work 1–2* (July 8, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3645561](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3645561).

76. *Id.* at 21.

77. *Id.* at 2, 30.

78. *Id.*

79. *Id.*

80. *Id.*

81. *See generally, e.g.*, Nicole Buonocore Porter, *Working While Mothering During the Pandemic and Beyond*, 78 WASH. & LEE L. REV. ONLINE 1 (2021) (showing how many women were forced to work from home alongside their children during the pandemic and found work–life balance difficult). This reality led women to their lowest workforce participation rate in almost forty years. *See id.* at 4–5. And even women who did not quit their jobs nevertheless suffered consequences from logging many fewer work hours than before the pandemic. *Id.* at 7–9; *see also* OECD, *CAREGIVING IN CRISIS*, *supra* note 55, at 2 (“Mothers were nearly three times as likely as fathers to report that they took on the majority or all of additional unpaid care work related to school or childcare facility closures: 61.5% of mothers of children under age 12 say they took on the majority or entirety of the extra care work, while 22.4% of fathers report that they did.”); *COVID-19 Threatens to Reverse Five Years of Progress for Women in Corporate America*, MCKINSEY & CO. (Oct. 1, 2020), [<https://digitalcommons.law.ou.edu/olr/vol75/iss4/3>](https://www.mckinsey.com/featured-</a></p></div><div data-bbox=)

placing women in the private sphere and men in the public sphere, remains relevant.<sup>82</sup> The division shows that even in today's world, women are expected to devote more time to home and caring tasks, which has implications for their ability to progress in their careers. Academia is a good example.<sup>83</sup> Research shows that during the first ten weeks of the lockdown in the United States, female academics' research productivity dropped by 13.2% compared to that of their male counterparts.<sup>84</sup> This decline is mainly explained by the historically unequal distribution of home responsibilities

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insights/mckinsey-live/webinars/women-in-the-workplace-2020-progress-toward-gender-equality ("Forty percent of mothers (and 27 percent of fathers) spend at least three hours a day more than they did pre-COVID-19 meeting household responsibilities. . . . Mothers are twice as likely as fathers to worry that their caregiving responsibilities will result in negative judgments of their work performance. One-third of mothers (and one-quarter of four fathers) are thinking about leaving the workforce or downshifting their careers."). Another McKinsey study showed a similar reality. *Women in the Workplace 2021*, MCKINSEY & CO. (Sept. 27, 2021), <https://web.archive.org/web/20220327020712/https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace>; see also Molla, *supra* note 65 ("Even at senior levels, the situation is inequitable. An unpublished McKinsey survey found that while two-thirds of men in top management positions had a partner who stayed at home or who didn't work full time, two-thirds of women in those positions had a partner who was working full time.").

82. See *supra* notes 42–48 and accompanying text.

83. See, e.g., Giuliana Viglione, *Are Women Publishing Less During the Pandemic? Here's What the Data Say*, 581 NATURE 365, 365–66 (2020) (stating that "[e]arly analyses suggest female academics are posting fewer preprints than men and starting fewer projects" during the initial part of COVID and citing other articles with the same conclusion); David Peetz et al., *Sustained Knowledge Work and Thinking Time Amongst Academics: Gender and Working from Home During the COVID-19 Pandemic*, 32 LAB. & INDUS. 72 (2022) (presenting similar findings based on a survey of 11,288 people working in fourteen universities across Canada and Australia, including 3,480 academics); Jens Peter Andersen et al., *COVID-19 Medical Papers Have Fewer Women First Authors Than Expected*, ELIFE (June 15, 2020), <https://elifesciences.org/articles/58807>; Patricia Garrido-Vásquez et al., *Gender Gaps in the Chilean Young Investigator Grant and the Potential Impact of COVID-19 Lockdowns in 2020* (Oct. 26, 2020), <https://osf.io/ek6aq/download>; Flaminio Squazzoni et al., *Gender Gap in Journal Submissions and Peer Review During the First Wave of the COVID-19 Pandemic. A Study on 2329 Elsevier Journals*, 16 PLOS ONE no. e0257919 (2021), <https://doi.org/10.1371/journal.pone.0257919>; Philippe Vincent-Lamarre et al., *The Decline of Women's Research Production During the Coronavirus Pandemic*, NATURE INDEX (May 19, 2020), <https://www.natureindex.com/news-blog/decline-women-scientist-research-publishing-production-coronavirus-pandemic>.

84. Ruomeng Cui et al., *Gender Inequality in Research Productivity During the COVID-19 Pandemic* 3 (June 9, 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3623492](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3623492) (showing that the effect is more pronounced in top-ranked research universities).

between men and women, which led women to multitask home and research tasks, reducing the amount of time they have for writing.<sup>85</sup>

Following this reality, female teleworkers have been more likely to temporarily drop out of the labor market during the pandemic.<sup>86</sup> Women may face long-term employment penalties while their male colleagues disproportionately benefit from merit-based opportunities and pay raises because their productivity remained high during the pandemic.<sup>87</sup> As one of the research summarized it: the “unprecedented increase in telecommuting in response to COVID-19 has the potential to exacerbate gender inequalities in the formal labor market and the domestic division of labor.”<sup>88</sup>

To put it differently, the telework trend, at the height of the pandemic and afterward, demonstrates the crucial effect the work-life challenge has on the ability of women to progress in the workplace, even when they work from home.<sup>89</sup> Trends show how much more change is needed, both at the workplace, in the familial sphere, and at the governmental level.<sup>90</sup> Before examining solutions, however, it is important to add to this equation another crucial component. The geographic and socioeconomic background of a female worker, and its intersectional implications, directly impacts her ability to progress in the workplace of the future and to successfully shift to telework. In other words, this Article must analyze intersectionality theory.

### *C. On Intersectionality and Women’s Equality*

Stereotypical gender division in the private and professional spheres can explain the difficulty women face while shifting to telework. They cannot, however, provide a complete picture of all the difficulties *all women* face in the transition to remote work. To understand some of these challenges, it is important to also consider the geographic, and especially socioeconomic, characteristics of a female worker.<sup>91</sup> In other words, it is important to refer to

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85. *Id.* at 3 (explicitly showing a decline in the number of papers, not their quality).

86. *See* Alon et al., *supra* note 56, at 16.

87. Collins et al., *supra* note 72, at 103–04.

88. Lyttelton et al., *supra* note 75, at 32.

89. This is since there will always be times when women will have to work with a child at home, whether due to a child’s illness or school vacations or during after-school working hours, etc.

90. *See infra* Part III.

91. *See, e.g.,* Elena Camilletti & Zahrah Nesbitt-Ahmed, *COVID-19 and a ‘Crisis of Care’: A Feminist Analysis of Public Policy Responses to Paid and Unpaid Care and Domestic Work*, 161 INT’L LAB. REV. 171, 196 (2022) (“Women and children, especially those facing discriminations due to specific intersectional characteristics such as race and class, are

the intersectionality theories of gender that reveal how different women face different difficulties and lack of opportunities.<sup>92</sup>

Intersectionality refers to the way women from underprivileged backgrounds on the basis of characteristics like race, economic status, or disability can experience multiple forms of oppression.<sup>93</sup> Many women due to their gender suffer “double” discrimination when coupled with their additional identity (or identities) such as being Black and/or having a disability.<sup>94</sup> This intersectionality discrimination can sometimes be perceived exclusively as “sexism” or “racism,” but it can also occur due to the unique intersection between gender and race (or gender and disability, gender and socioeconomic status, or other combination).<sup>95</sup> The intersectionality theory emphasizes that the feminine experience is not uniform and a person’s experience is not solely based on gender.

This is also true regarding the successful shift to telework. The ability of a woman to transition to telework is not based solely on her gender and the work-life difficulty. Other factors, especially her socioeconomic status and her geographic location (both of which are often correlated with race) impact the success of her transition to working from home.<sup>96</sup>

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more vulnerable to, for example, the risks of dropping out of schools, lost jobs and earnings, and increased violence . . .”).

92. The intersectionality aimed at broadening the initial feminist theory perspective that mainly focused on the experiences of white middle-class women. *See* sources cited *supra* note 15.

93. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1241–44 (1991).

94. Note that the intersectionality theory originally referred to the intersection between gender and race. *See* Crenshaw, *supra* note 15, at 140; *see also* Joanne Conaghan, *Intersectionality and the Feminist Project in Law*, in INTERSECTIONALITY AND BEYOND: LAW, POWER AND THE POLITICS OF LOCATION 21, 24 (Emily Grabham et al. eds., 2008).

95. *See generally* Crenshaw, *supra* note 94; Daniel Martinez HoSang, *Intersectionality*, in KEYWORDS FOR AMERICAN CULTURAL STUDIES 142 (Bruce Burgett & Glenn Hendler eds., 3rd ed. 2020).

96. This is mainly true of socioeconomic status and geographic location and their correlation with race. *See, e.g., Ethnic and Racial Minorities & Socioeconomic Status*, AM. PSYCH. ASS’N (July 2017), <https://www.apa.org/pi/ses/resources/publications/factsheet-erm.pdf> (“In the United States, 39% of African-American children and adolescents and 33% of Latino children and adolescents are living in poverty, which is more than double the 14% poverty rate for non-Latino, White, and Asian children and adolescents . . .”); David R. Williams et al., *Understanding Associations Among Race, Socioeconomic Status and Health: Patterns and Prospects*, 35 HEALTH PSYCHOL. 407 (2016), <http://doi:10.1037/hea0000242>; REGINALD A. NOËL, U.S. BUREAU LAB. STAT., RACE, ECONOMICS, AND SOCIAL STATUS 1 (2018), <https://www.bls.gov/spotlight/2018/race-economics-and-social-status/pdf/race-economics-and-social-status.pdf>;

The consideration of these factors is not unitary among all women in the United States or around the world. American society suffers from significant socioeconomic disparities and inequality.<sup>97</sup> The labor market's current structure contributes to those socioeconomic disparities<sup>98</sup> and to greater disparities among female workers.<sup>99</sup>

The essential role technology plays in the labor market further intensifies preexisting gender and socioeconomic inequalities in society.<sup>100</sup>

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David R. Williams, *Race/Ethnicity and Socioeconomic Status: Measurement and Methodological Issues*, 26 INT'L J. HEALTH SERVS. 483 (1996).

97. See, e.g., *Income Inequality in the United States*, INEQUALITY.ORG, <https://inequality.org/facts/income-inequality/> (last visited Mar. 31, 2023) (highlighting income inequality in the United States); Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, PEW RSCH. CTR. (Feb. 7, 2020), <https://www.pewresearch.org/facttank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/>; Nick Hanauer & David M. Rolf, *The Top 1% of Americans Have Taken \$50 Trillion From the Bottom 90%—and That's Made the U.S. Less Secure*, TIME (Sept. 14, 2020, 9:30 AM EDT), <https://time.com/5888024/50-trillion-income-inequality-america/>. Additionally, however, socioeconomic disparities are in general difficult to capture and cast responsibility for in the current political and legal structure in the United States. See, e.g., K. Sabeel Rahman, *From Economic Inequality to Economic Freedom: Constitutional Political Economy in the New Gilded Age*, 35 YALE L. & POL'Y REV. 321, 321 (2016); Joseph Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality*, 94 TEX. L. REV. 1287, 1287–88 (2016); J. Harvie Wilkinson III, *The Dimensions of American Constitutional Equality*, 55 L. & CONTEMP. PROBS. 235, 243–44 (1992).

98. This is primarily because more and more workers are being “outsourced” and left outside the formal protection of the company for which they work. See, e.g., MATTHEW T. BODIE, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 666–67 (2013); DAVID WEIL, *THE FISSURED WORKPLACE* 1-8 (2014); Rahman, *supra* note 97, at 329; SHARON BLOCK & BENJAMIN SACHS, *CLEAN SLATE FOR WORKER POWER: BUILDING A JUST ECONOMY AND DEMOCRACY* 1-12 (2020), [https://lwp.law.harvard.edu/files/lwp/files/full\\_report\\_clean\\_slate\\_for\\_worker\\_power.pdf](https://lwp.law.harvard.edu/files/lwp/files/full_report_clean_slate_for_worker_power.pdf); Kenneth G. Dau-Schmidt, *The Problem of “Misclassification” or How to Define Who Is an “Employee” Under Protective Legislation in the Information Age*, in *THE CAMBRIDGE HANDBOOK OF U.S. LABOR LAW FOR THE TWENTY-FIRST CENTURY* 140 (Richard Bales & Charlotte Garden eds., 2019).

99. See Erin A. Cech & Mary Blair-Loy, *Perceiving Glass Ceilings? Meritocratic Versus Structural Explanations of Gender Inequality Among Women in Science and Technology*, 57 SOC. PROBS. 371 (2010) (showing how successful women's beliefs about gender inequality having evolved from women's human capital or motivation may influence these successful women's willingness to help remove structural obstacles for other women, in a way that may strengthen inequality in U.S. society); see also Irene Browne & Rachel Askew, *Race, Ethnicity, and Wage Inequality Among Women: What Happened in the 1990s and Early 21st Century?*, 48 AM. BEHAV. SCIENTIST 1275 (2005) (focusing on wage gaps between Black and White women and between Latina and White women in the United States between 1989 and 2003).

100. See generally, e.g., sources cited *supra* note 18.

Technological skills are associated with better positions and higher wages.<sup>101</sup> Women face an opaque barrier related to their gender that prevents them from succeeding in the future digitalized workplace.<sup>102</sup> Women's access to technology and ability to develop technological skills vary and often relate to their preexisting socioeconomic status.<sup>103</sup> According to a comprehensive study from the beginning of the twenty-first century, around 20% of the American population, mainly from underserved communities, face significant barriers to the benefits offered by reliable access to the internet.<sup>104</sup>

It follows, then, that the ability to use technology in the workplace differs from one woman to another and often correlates with the individual's preexisting economic status.<sup>105</sup> Thus, the increasing use of technological innovations in the labor market is another engine driving socioeconomic inequalities broadly for society, but more acutely among female workers.<sup>106</sup>

As part of this phenomenon, female workers' ability to telework in the home also varies. Telework is common in various fields and occupations, even pre-pandemic.<sup>107</sup> Naturally, however, only occupations that are based on autonomous computer work can be shifted to telework. These occupations usually require certain technological skills and education<sup>108</sup> that are more

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101. Teleworking during the COVID-19 crisis is a good example of this argument.

102. See, e.g., ALEXANDRA TYERS-CHOWDHURY & GERDA BINDER, UNICEF, WHAT WE KNOW ABOUT THE GENDER DIGITAL DIVIDE FOR GIRLS: A LITERATURE REVIEW 8-9 (2021), <https://www.unicef.org/eap/media/8311/file/What%20we%20know%20about%20the%20gender%20digital%20divide%20for%20girls:%20A%20literature%20review.pdf>.

103. Sources on this point refer to disparities in technological skills among both men and women. See Steyaert, *supra* note 18, at 204-07; DiMAGGIO & HARGITTAL, *supra* note 18, at 2-3, 8-12.

104. See WENDY LAZARUS & FRANCISCO MORA, CHILD. P'SHIP, ONLINE CONTENT FOR LOW-INCOME AND UNDERSERVED AMERICANS: THE DIGITAL DIVIDE'S NEW FRONTIER 15 (2000), <https://files.eric.ed.gov/fulltext/ED440190.pdf>; see also Jan van Dijk & Kenneth Hacker, *The Digital Divide as a Complex and Dynamic Phenomenon*, 19 INFO. SOC'Y 315, 325-26 (2003).

105. Steyaert, *supra* note 18, at 204-07; DiMAGGIO & HARGITTAL, *supra* note 18, at 2-3, 8-12.

106. Steyaert, *supra* note 18, at 204-07; DiMAGGIO & HARGITTAL, *supra* note 18, at 2-3, 8-12; see also CITI GPS, *supra* note 18, at 47-50.

107. See Walker Ladd, *Telecommuting and Health: Perspectives on the Paradox of Productivity*, UNIV. PHOENIX (Apr. 7, 2018, 7:56 AM MST), <https://web.archive.org/web/20200606185833/https://research.phoenix.edu/center-health-and-nursing-research/blog/telecommuting-and-health-perspectives-paradox-productivity-0>.

108. There is also a correlation between the educational attainments of the employee and the number of hours spent on telework. See News Release, Bureau Lab. Stat., U.S. Dep't Lab., American Time Use Survey — 2021 Results tbl.6 (June 23, 2022, 10:00 AM ET) [hereinafter 2021 American Time Use Survey], <https://www.bls.gov/news.release/pdf/atus.pdf> (noting that

common in higher socioeconomic groups.<sup>109</sup> As a result, the ability to telework, both pre- and mid-pandemic, differs among diverse socioeconomic classes.<sup>110</sup> Female workers with good technological skills and better education in positions based on autonomous computer work can shift to telework from home more easily. Female workers without these skills or in non-office positions struggle to make the same transition.

The COVID-19 pandemic has emphasized how these disparities intensify socioeconomic gaps,<sup>111</sup> and how these gaps are affected by a worker's residence and existing technological infrastructure also reinforce inequality in the workplace. This Article discusses these two gaps in the following section.

#### *D. Intersectionality in the Telework Case: What Have We Learned from COVID-19?*

The COVID-19 pandemic has shifted many people to teleworking from home. This movement, however, does not apply equally to all groups of workers. As explained, only positions based on autonomous computer work that require specific education and skills can be shifted to telework. Most of the available statistics are for both male and female workers. Since socioeconomic disparities exist not only between men and women but also

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less than 20% of persons with only a high school diploma worked from home compared to more than 50% of persons with a bachelor's degree or beyond). The findings were similar in a 2018 survey. See BLS 2019 News Release on Job Flexibility, *supra* note 10 ("Workers with advanced education were more likely to perform work at home."); see also Jeffrey M. Jones, *In U.S., Telecommuting for Work Climbs to 37%*, GALLUP (Aug. 19, 2015), <http://www.gallup.com/poll/184649/telecommuting-work-climbs.aspx>.

109. See Niraj Chokshi, *Out of the Office: More People Are Working Remotely, Survey Finds*, N.Y. TIMES (Feb. 15, 2017), <https://www.nytimes.com/2017/02/15/us/remote-workers-work-from-home.html>. This story is based on Gallup research data. *Id.* As an example, according to the 2019 American Time Use Survey, workers employed in management, business, and financial operations occupations are the ones who were more likely to telework occasionally. 2019–20 American Time Use Survey, *supra* note 25, at 2; see also Diletta Porcheddu & Margherita Roiatti, *A Spotlight on Remote Work and Digital Skills: Preliminary Findings from the IRESDES4.0 Project*, ADAPT INT'L.IT 2–3 (Dec. 10, 2021), <http://englishbulletin.adapt.it/wp-content/uploads/2021/12/A-spotlight-on-remote-work-and-digital-skills-preliminary-findings-from-the-IRESDES4.0-project-december-2021.pdf> (identifying remote work data in Europe).

110. CORBETTA, *supra* note 7, at 28; Porcheddu & Roiatti, *supra* note 109, at 2–3.

111. CITI GPS, *supra* note 18, at 47.

among women, however, non-disaggregated data can still shed light on the discussion of intersectionality in telework.<sup>112</sup>

International research by the OECD demonstrated that not all employees in a given country were able to shift to telework during the pandemic.<sup>113</sup> Top-earning workers were, on average, 50% more likely to telework from home during the pandemic, as compared to workers in the bottom earnings quartile.<sup>114</sup> The United States job market is no different, as domestic research also indicated higher-income positions could shift to telework more easily.<sup>115</sup> Correspondingly, there appears to be a strong link between the jobs that can be done remotely and the average income they provide.<sup>116</sup>

Another study by the OECD showed that the likelihood of shifting to telework during the pandemic decreased for workers without tertiary education and with lower levels of numeracy and literacy.<sup>117</sup> In the United States, workers with higher levels of education, across occupations, were more likely to transfer to telework during the pandemic.<sup>118</sup> In a similar

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112. As a special UN report put it, in a more general context: “There will be an aggravated impacts of COVID-19 for women already living on the economic margins.” UN POLICY BRIEF, *supra* note 39, at 6.

113. OECD, MEASURING TELEWORK, *supra* note 7, at 5.

114. *Editorial: From Recovery to Resilience After COVID-19*, *supra* note 10, at 12–13.

115. JONATHAN I. DINGEL & BRENT NEIMAN, BECKER FRIEDMAN INST., HOW MANY JOBS CAN BE DONE AT HOME? 2 (2020), [https://bfi.uchicago.edu/wp-content/uploads/BFI\\_White-Paper\\_Dingel\\_Neiman\\_3.2020.pdf](https://bfi.uchicago.edu/wp-content/uploads/BFI_White-Paper_Dingel_Neiman_3.2020.pdf); CITI GPS, *supra* note 18, at 51.

116. CITI GPS, *supra* note 18, at 51.

117. Espinoza & Reznikova, *supra* note 10, at 7–15; *see also* BLS 2019 News Release on Job Flexibility, *supra* note 10 (providing similar findings in the U.S. pre-pandemic).

118. Anthony P. Carnevale & Megan L. Fasules, *Who’s Working from Home: The Education Divide*, MEDIUM (Apr. 29, 2020), <https://medium.com/georgetown-cew/whos-working-from-home-the-education-divide-5422ce774c9d>. At the international level, see Mariya Brussevich et al., *Who Will Bear the Brunt of Lockdown Policies? Evidence from Tele-workability Measures Across Countries* 4, 17–18 (IMF, Working Paper No. WP/20/88, 2020), <https://www.imf.org/-/media/Files/Publications/WP/2020/English/wpica2020088-print-pdf.ashx>; 2019–20 American Time Use Survey, *supra* note 25, at 2 tbl.4 (showing that before and during the pandemic, teleworkers have been mainly college educated and employed in professional occupations). Before to the pandemic, in 2019, 37% of those employed with a bachelor’s degree or better worked at least partly from home, while only 13% of workers with a high school diploma or less performed part of their work remotely. *Id.* During the pandemic, in 2020, these percentages rose to 65% and 19%, respectively. *Id.*; *see also* Susan Lund et al., *What’s Next for Remote Work: An Analysis of 2,000 Tasks, 800 Jobs, and Nine Countries*, MCKINSEY & CO. (Nov. 23, 2020), <https://www.mckinsey.com/featured-insights/future-of-work/whats-next-for-remote-work-an-analysis-of-2000-tasks-800-jobs-and-nine-countries> (showing that the potential to move to remote work was mostly

manner, industries that mainly employ workers without a college degree and that are usually based on face-to-face communication could not shift to telework.<sup>119</sup>

The Federal Reserve's study found a correlation between a weighting of race, education, and average income of a person and their ability to shift to telework.<sup>120</sup> Among other things, this research showed that before the pandemic, 6.8% of Black workers and 5.2% of Hispanic workers teleworked from home, while 9.7% of white workers did.<sup>121</sup> After the pandemic began, the proportion of Black and Hispanic workers teleworking from home rose to 24.5% and 23.4%, respectively; for white workers, it rose to 39.4%.<sup>122</sup> Additional research similarly demonstrated that during the pandemic, "Black women and Hispanic women still experience[d] a significantly higher probability of losing their jobs compared to white men even if they are employed in industries with highly teleworkable jobs."<sup>123</sup>

Workers who could easily shift to telework during the pandemic could keep their jobs and continue earning income without exposure to the virus. The most vulnerable group, unable to shift to telework, were non-college-educated female workers with young children.<sup>124</sup> This powerfully illustrates the point of intersectionality. Mothers found it more challenging to telework;

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present among highly educated and highly skilled workers in certain occupations and geographic regions).

119. See sources cited *supra* note 115. As indicated by the American Time Use Survey, in 2019 before the pandemic, around 34% of management, business, financial, and professional workers worked remotely at least partly, while around 16% of workers in construction, manufacturing, and transportation did so. 2019-20 American Time Use Survey, *supra* note 25, at tbl.5. During the pandemic, in 2020, these numbers rose to around 64% and 25%, respectively. *Id.*

120. See Alexander Bick et al., *Work from Home After the COVID-19 Outbreak 2* (Fed. Rsv. Bank Dall., Working Paper No. 2017, 2020), <https://www.dallasfed.org/~media/documents/research/papers/2020/wp2017r1.pdf> ("[S]witching to working from home was more prevalent among workers who were highly educated, white, and high income prior to the pandemic.").

121. *Id.* at 8. These statistics reflect data from February 2020. *Id.* It is not clear from this research how many of the persons identified in the research are female and how many of them are male.

122. *Id.* The subsequent statistics reflect data from May 2020. *Id.*

123. Armagan Gezici & Ozge Ozay, *How Race and Gender Shape COVID-19 Unemployment Probability 1* (Political Econ. Rsch. Inst., Working Paper Series No. 521, 2020), [https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1320&context=peri\\_workingpapers](https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1320&context=peri_workingpapers).

124. Betsy Vereckey, *Telecommuting Exposes Fault Lines in COVID-19 Economy*, MIT SLOAN SCH. MGMT. (June 25, 2020), <https://mitsloan.mit.edu/ideas-made-to-matter/telecommuting-exposes-fault-lines-covid-19-economy>.

poor mothers, especially Black and Hispanic women, found it even more difficult to do so because of the additional barrier of lacking professional skills associated with their economic status. As authors from the IMF concluded in the title to a blog, “Teleworking is Not Working for the Poor, the Young, and the Women.”<sup>125</sup>

Part of this trend was that the shift to teleworking “was not feasible for households who do not have a computer or access to the internet at home, or difficulty due to space constraints or because devices need to be shared among household members.”<sup>126</sup> That is why the ability to shift to telework during the pandemic varied among countries. Research has shown that the ability of any country to successfully shift to telework mainly depends on the technological base of its production processes and the extent of its access to digital infrastructure.<sup>127</sup> To be more specific, even in teleworkable positions, a worker needs a quiet working space with good lighting (for work and for online meetings) to telework from home.<sup>128</sup> She also needs basic office equipment, such as a computer and mobile phone, an office chair, and a desk, dedicated to her work (that is, that she need not share with family

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125. Mariya Brussevich et al., *Teleworking Is Not Working for the Poor, the Young, and the Women* (July 7, 2020), IMF BLOG, <https://blogs.imf.org/2020/07/07/teleworking-is-not-working-for-the-poor-the-young-and-the-women>.

126. OECD EMPLOYMENT OUTLOOK 2020, *supra* note 10, at 74.

127. *Id.* at 7–9, 17 (showing how the ability of a country to shift to telework depends on how technological its production processes are and its access to digital infrastructure). This research also demonstrates how the ability to shift to telework increases inequalities within each country, not just between countries. *Id.* It appears that the 15% of the workforce that cannot transfer to telework share similar characteristics—they are mainly young, without a college education, and in less secure work arrangements. Correspondingly, workers who are less able to shift to telework suffer more from the economic effects of the pandemic, and the income inequality between them and those who can telework only increases. *Id.*; *see also* Sarah H. Bana et al., *Ranking How National Economies Adapt to Remote Work*, MITSLOAN MGMT. REV. (June 18, 2020), <https://sloanreview.mit.edu/article/ranking-how-national-economies-adapt-to-remote-work> (showing, on the basis of data from thirty countries, that developed countries were more likely to easily shift to teleworking from home, while “[d]eveloping countries all finished lower in the rankings”); Brussevich et al., *supra* note 118, at 17.

128. Lord, *supra* note 7, at 64; Stanford, *supra* note 59; *see also* P. Shareena & Mahammad Shahid, *Work from Home During COVID-19: Employees Perception and Experiences*, GLOBAL J. RSCH. ANALYSIS, May 2020, at 72, 74, [https://www.worldwidejournals.com/global-journal-for-research-analysis-GJRA/fileview/work-from-home-during-covid-19-employees-perception-and-experiences\\_May\\_2020\\_1589537443\\_8108579.pdf](https://www.worldwidejournals.com/global-journal-for-research-analysis-GJRA/fileview/work-from-home-during-covid-19-employees-perception-and-experiences_May_2020_1589537443_8108579.pdf) (showing, based on a questionnaire of fifty respondents, how the “[m]ajority of the respondents opined that in order to work from home, one should have quiet environment, comfortable space and all the other facilities which is very much required to work from home”).

members).<sup>129</sup> Finally, the worker needs a good internet connection that enables her to conduct her work as if she were in the workplace, without any difficulties or distractions.<sup>130</sup> These basics are not equally available in U.S. households.

For these reasons, the partial shift to teleworking during the COVID-19 pandemic accelerated income disparities.<sup>131</sup> These disparities also apply to women in a way that has implications not only for inequality between women and men, but also for the issue of inequality among women. More specifically, COVID-19 disparities have intensified socioeconomic gaps between women from urban geographical areas with a medium- to high-socioeconomic status and women with low-socioeconomic status.

Finally, single mothers, especially those with an underprivileged background, found it most difficult to shift to telework during the pandemic.<sup>132</sup> In this way, “[s]ingle parents, both women and men, are much less able to telecommute.”<sup>133</sup> Impactfully as related to the pandemic “the challenges for families during the current crisis are unprecedented, severe, and falling disproportionately on those least able to respond, such as low-income single mothers.”<sup>134</sup> Even during “normal” times, underprivileged

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129. Lord, *supra* note 7, at 64; *see also* Laura Robinson et al., *Digital Inequalities in Time of Pandemic: COVID-19 Exposure Risk Profiles and New Forms of Vulnerability*, FIRST MONDAY (July 6, 2020), <https://firstmonday.org/ojs/index.php/fm/article/view/10845/9563>; Elisabeth Beaunoyer et al., *COVID-19 and Digital Inequalities: Reciprocal Impacts and Mitigation Strategies*, 111 COMPUTS. HUM. BEHAV. article 106424 (2020); Alex Christian, *As Winter Bites, Employers Need to Cover Working from Home Costs*, WIRED (Oct. 26, 2020, 6:00 AM) <https://www.wired.co.uk/article/work-from-home-heating-costs> (referring to the high costs of heating, water and electricity in teleworking).

130. *See* Shareena & Shahid, *supra* note 128, at 73 (“Majority of the respondents stated that, ‘Work from home need high speed internet connectivity and classes will be effective only if there is uninterrupted internet connectivity.’”).

131. *See* DINGEL & NEIMAN, *supra* note 115, at 9; CITI GPS, *supra* note 18, at 51–52.

132. *See* ILO MONITOR: COVID-19, *supra* note 39, at 10; Vartika Kapoor et al., *Perceived Stress and Psychological Well-being of Working Mothers During COVID-19: A Mediated Moderated Roles of Teleworking and Resilience*, 14 EMP. RELS.: INT’L J. 1290, 1295 (2021) (“Work flexibility also has a different effect on different gender; work-life conflicts are more for women or single parents than men since they prefer to work from home settings for childcare reasons.”); ZSUZSA BLASKÓ ET AL., EUR. COMM’N, HOW WILL THE COVID-19 CRISIS AFFECT EXISTING GENDER DIVIDES IN EUROPE? 2 (2020) (“Coping with the increased burden at home and making ends meet at the same time can be particularly difficult for already vulnerable groups such as single mothers.”); *COVID-19 Threatens to Reverse Five Years of Progress for Women in Corporate America*, *supra* note 81 (“Single mothers, of course, usually bear the full weight of the additional responsibilities.”).

133. Alon et al., *supra* note 56, at 15.

134. *Id.* at 24. According to this research,

single mothers who cannot afford daycare or must work during afternoon hours when children are not in school find it more difficult to successfully work from home. Since single mothers cannot effectively or efficiently telework when a child is home, they tend to be the first to drop out of the labor market.<sup>135</sup> This reality demonstrates more than anything else the meaning of intersectionality: being a woman, especially being a single mother, and having very few economic resources—all make it more difficult to shift to telework. Both economic factors and preexisting perceptions of women’s traditional role impact this transition. This intersection creates a special, multilevel challenge that cannot be attributed to only one source.

For these reasons, teleworking during the pandemic was *influenced by* preexisting inequalities and *produced* further inequalities in society. The ability to shift to teleworking was affected by various characteristics of a female employee related to her preexisting private identity, primarily, being a mother who must cope with work-life balance in her private sphere. Along with gender identity, factors such as a worker’s education, technological skills, access to a computer, access to reliable internet, and a quiet, bright space in her home are important predictors of her ability to successfully shift to telework. Additionally, her marital status matters, especially if her income is low.

These factors—especially technological skills and education—have always influenced a woman’s professional track, of course. Teleworking from home has intensified the weight of these preexisting inequalities in the workplace context by duplicating features of the private identity of the employee in her professional life—not only with regard to her gender, but also with regard to her socioeconomic and marital status. Since the future workplace will be more technology-based and more positions will continue

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Single parents (17 percent of all households) will be particularly hard hit, and as Table 3 shows, there are more than 8.5 million more single mothers than single fathers in the United States today. . . . 21 percent of all children live only with their mother, compared to 4 percent living with their father only. Thus, the current crisis will affect mothers very disproportionately. If all schools in the US are closed for a prolonged period, so that single mothers cannot work, then 21 percent of all children are at risk of living in poverty. . . . The 15 million single mothers in the United States will be the most severely affected, with little potential for accessing other sources of childcare under social isolation orders, and little possibility to continue working during the crisis. Supporting these women and their children during the crisis is among the most immediate and important policy challenges.

*Id.* at 12, 16.

135. *Id.* at 11–16.

to shift to telework, it is important to ensure that the telework trend will be equally available and that all socioeconomic groups will have the opportunity to equally participate.

### *III. The Inequality Difficulty*

#### *A. Is It Discrimination?*

The statistics presented in this Article show a picture of unequal outcomes for female workers, especially those from unprivileged groups, throughout the shift to telecommuting during the COVID-19 pandemic and after it.<sup>136</sup> Do these unequal outcomes fall within the well-known legal parameters of actionable discrimination? This Part argues that although the shift to teleworking reinforces inequality in employment, these effects do not easily fit the common legal understanding of wrongful discrimination for which an employer should be liable. Due to their complex origins and operations, the discriminatory effects of shifting to telework are part of a more intricate social phenomenon of structural discrimination. The following section defines and discusses structural discrimination in the telework context. But before that, it is important to explore what the law can and cannot offer to solve the telework intersectional inequality difficulty.

The Fourteenth Amendment's Equal Protection Clause developed over the years in a way that gave individuals a constitutional right to equality.<sup>137</sup> The Civil Rights Act gives effect to that right to equality in the specific context of employment.<sup>138</sup> Title VII of the Civil Rights Act provides that certain types of conduct that affect specific protected groups<sup>139</sup> are considered an "unlawful employment practice" and give affected employees the right to

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136. *See supra* Part II.

137. The right to equality is a constitutional value that was initially established as part of the Constitution in a limited manner, mainly as applying against states. *See* U.S. CONST. amend XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); *see also 14th Amendment*, CORNELL L. SCH. LEGAL INFO. INST., <https://www.law.cornell.edu/constitution/amendmentxiv> (last visited Apr. 2, 2023). It is also important to note that the right to equality initially evolved in questions related to race and segregation. *See generally, e.g.*, William Van Alstyne, *Rites of Passage: Race, the Supreme Court, and the Constitution*, 46 U. CHI. L. REV. 775 (1979).

138. Mainly in Title VII of the Civil Rights Act of 1964. *See Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

139. 42 U.S.C. § 2000e-2(a) (identifying protected classes as "race, color, religion, sex, or national origin").

take legal action against the employer.<sup>140</sup> A discriminatory procedure or policy is an “unlawful employment practice” under Title VII if it falls into one of three categories; (1) disparate treatment, (2) disparate impact, or (3) refusal to accommodate the workplace to a religious or disabled worker.<sup>141</sup>

Regarding inequality in teleworking, because the employer does not directly prevent a protected group from shifting to telework, the first category, disparate treatment generally does not apply.<sup>142</sup> The third category also does not apply, because gender and socioeconomic inequalities, not accommodation to religious requirements or disability, are teleworking’s major hurdles.<sup>143</sup> The only test that may be relevant, then, is the second: disparate impact.

Disparate impact occurs when an employer implements an ostensibly neutral rule, policy, or selection criterion that is not necessary for a specific position and unfavorably affects a protected group.<sup>144</sup> The *first* threshold,

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140. *Id.*; see also CHRISTINE J. BLACK & WILSON C. FREEMAN, CONG. RSCH. SERV., R45155, SEXUAL HARASSMENT AND TITLE VII: SELECTED LEGAL ISSUES 38 (2018).

141. See 42 U.S.C. § 2000e-2; cf. Omer Kimhi, *Falling Short: On Implicit Biases and the Discrimination of Short Individuals*, 52 CONN. L. REV. 719, 748–52 (2020).

142. Disparate treatment occurs when the employer treats an employee in a protected group under Title VII in a less favorable way. See *Teamsters*, 431 U.S. at 335 n.15.

143. Forbidden discrimination can occur when the employer refuses to accommodate a position to an employee’s disability or religious beliefs and practices. For further elaboration on the importance of the accommodation duty in the international context, see Guy Davidov & Guy Mundlak, *Accommodating All? (Or: ‘Ask Not What You Can Do for the Labour Market; Ask What the Labour Market Can Do for You’)*, in REASONABLE ACCOMMODATION IN THE MODERN WORKPLACE 191, 191–206 (Roger Blanpain & Frank Hendrickx eds., 2016). For example, with respect to disability under the Americans with Disabilities Act, employers are required to take into consideration a worker’s disability while considering the worker’s costs and productivity and evaluate them accordingly. See, e.g., Stewart J. Schwab & Steven L. Willborn, *Reasonable Accommodation of Workplace Disabilities*, 44 WM. & MARY L. REV. 1197, 1227–33 (2003).

144. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430–32 (1971) (holding that employer violated Title VII through disparate impact policy and defining early contours of the doctrine). Congress would later codify disparate impact by statute. See Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074 (codified at 42 U.S.C. § 2000e-2(k)(1)(A)(i)); see also Lawrence Rosenthal, *Saving Disparate Impact*, 34 CARDOZO L. REV. 2157, 2158 (2013). For further elaboration of the disparate impact liability theory in its initial stages, see generally Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305 (1983); Steven L. Willborn, *The Disparate Impact Model of Discrimination: Theory and Limits*, 34 AM. U. L. REV. 799, 801–04 (1985); Ramona L. Paetzold & Steven L. Willborn, *Deconstructing Disparate Impact: A View of the Model Through New Lenses*, 74 N.C. L. REV. 325 (1996); Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV.

then, in demonstrating disparate impact is showing that the claimant belongs to a protected group based on her race, color, religion, sex, national origin, age, disability, or genetic information.<sup>145</sup> With regard to gender inequalities, female workers clearly belong to a protected group.<sup>146</sup> Title VII, however, is blind to gender and socioeconomic intersectionality because people who are disadvantaged are not entitled to the protection of Title VII.

As this Article has discussed,<sup>147</sup> there is a clear correlation between race and socioeconomic status,<sup>148</sup> and empirical research indicates that there is also a correlation between the weighting of race, education, and average income of a person and her ability to shift to telework.<sup>149</sup> Race is not the exclusive factor here, however, and so it is difficult to determine the exclusive effect of a worker's race on her ability to shift to telework. Sometimes racial discrimination is the outcome of another form of discrimination or of an employer's "neutral" policy.<sup>150</sup> This is the main idea

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701 (2006); Reva B. Siegel, *From Colorblindness to Antibalkanization: An Emerging Ground of Decision in Race Equality Cases*, 120 YALE L.J. 1278 (2011).

145. *Who Is Protected from Employment Discrimination?*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/employers/small-business/3-who-protected-employment-discrimination> (last visited Apr. 3, 2023). Disability and genetic information based discrimination prohibitions are covered under specific federal laws passed after Title VII. See *Genetic Information Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/genetic-information-discrimination> (last visited Apr. 3, 2023); *Disability Discrimination and Employment Decisions*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/disability-discrimination-and-employment-decisions> (last visited Apr. 3, 2023).

146. For further elaboration of sex discrimination in the workplace under Title VII, see generally, for example, John J. Donohue III, *Prohibiting Sex Discrimination in the Workplace: An Economic Perspective*, 56 U. CHI. L. REV. 1337 (1989); Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479 (1994); Maxine N. Eichner, Note, *Getting Women Work That Isn't Women's Work: Challenging Gender Biases in the Workplace Under Title VII*, 97 YALE L.J. 1397 (1988); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Schultz, *Telling Stories*, *supra* note 2. Note that state and local laws, in parallel, offer parents stronger protections against discrimination. See, e.g., WORKLIFE LAW, U.C. HASTINGS COLL. OF LAW, PROTECTING PARENTS DURING COVID-19: STATE AND LOCAL FRD LAWS PROHIBIT DISCRIMINATION AT WORK 1-11 (2020), <https://worklifelaw.org/wp-content/uploads/2020/11/Protecting-Parents-During-Covid-19-State-and-Local-FRD-Laws.pdf>.

147. See *supra* Part II.

148. See sources cited *supra* note 96.

149. See Bick et al., *supra* note 120, at 2.

150. As was the case in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In *Griggs*, the Court established disparate impact theory as a basis for liability under Title VII. The defendant, Duke Power, required a high school diploma in recruitment and promotion of employees. *Id.* at 427–28. The Court found this criterion as irrelevant for the positions in

underlying the disparate impact theory.<sup>151</sup> In the case of telework, studies suggest that the socioeconomic status of the employee is the crucial factor here. It follows that only gender inequality based on sex discrimination, without considering the additional disadvantage of low socioeconomic status, passes the first threshold in the disparate impact analysis in the context of shifting to telework.

In the *second* disparate impact threshold, plaintiffs must prove that the practice of teleworking *de facto* disproportionately affects women because of telework's impacts on hiring, firing, and promotion.<sup>152</sup> Research findings play an important role in this regard.<sup>153</sup> As discussed, recent empirical research reveals gender gaps between men and women, especially single mothers, in the ability to successfully shift to telework during the pandemic.<sup>154</sup> These gaps were explained mainly on the basis of the traditional roles men and women play in the private and professional spheres. Statistics from research can thus indicate a clear connection between the challenged

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question; the policy had the effect of ruling out a disproportionate percentage of Black people. *Id.* at 431–32. The court ruled that such a requirement operated *de facto* to freeze the status quo of previous discriminatory practices against Black workers. *Id.* at 432–33. Since the employer was unable to prove a connection between a high school diploma and a successful work performance, the Court ruled that the requirement violated Title VII. *See id.* at 432, 436.

151. *See id.* at 432 (clarifying that there is no need to prove an intent to discriminate).

152. *See, e.g.,* Lanning v. Se. Penn. Transp. Auth., 181 F.3d 478, 485 (3d Cir. 1999) (“Plaintiffs establish a *prima facie* case of disparate impact by demonstrating that application of a facially neutral standard has resulted in a significantly discriminatory hiring pattern.”); *see also* Linda Lye, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 317 (1998); Ricci v. DeStefano, 557 U.S. 557, 578 (2009).

153. It may seem problematic to rely on statistical evidence in this regard, since statistics do not explicitly prove discrimination against the specific protected group encompassing the persons who filed the lawsuit. However, the Supreme Court has clarified that statistical evidence can be used to show that a specific policy or practice causes a disproportionate adverse effect on minorities with respect to employment. *See, e.g.,* *Griggs*, 401 U.S. at 430–31 (relying on statistical evidence of the number of Black workers who had high school degrees compared to white workers to conclude that a degree requirement harmed Black workers relative to white workers); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 650 (1989) (acknowledging that “statistical proof can alone make out a *prima facie* case”); *Alabama v. United States*, 304 F.2d 583, 586 (5th Cir.) (“[S]tatistics often tell much, and Courts listen.”), *aff'd*, 371 U.S. 37 (1962); *see also* Amelia M. Wirts, Note, *Discriminatory Intent and Implicit Bias: Title VII Liability for Unwitting Discrimination*, 58 B.C. L. REV. 809, 835–36 (2017); Noah D. Zatz, *Disparate Impact and the Unity of Equality Law*, 97 B.U. L. REV. 1357, 1362–64, 1392 (2017).

154. *See* discussion *supra* Section II.B.

policy or practice, like in the shift to telework, and discriminatory outcomes for women.<sup>155</sup>

The *third* disparate impact threshold, showing that a criterion is not necessary for a specific position,<sup>156</sup> is legally more complex and focuses on the employer's defense to the *prima facie* discrimination case. An employer can justifiably contend that the decision to shift to telework was "job-related" and "consistent with business necessity."<sup>157</sup> After all, the pandemic is what forced employers to first implement these policies. Remote work was in many ways employers' only option for continuing to operate their businesses in a time of lockdown and social distancing.

Additionally, the employer can argue that the shift to telework was not discriminatory toward women *per se*. Even after the pandemic is over, the shift to telework can be considered beneficial for women in some cases, and it will be difficult to prove actionable discrimination in this context.<sup>158</sup> This is particularly true since many women prefer working from home because it supposedly balances their work-life difficulties.<sup>159</sup> As demonstrated, the unequal implications of telework for men and women, and women from underprivileged groups in particular, are not the direct outcome of the decision to shift to telework. Rather, disparate results are the outcome of an unequal division of labor in the private sphere and economic inequality among households, which has far-reaching implications for the role of women in the labor market including in the telework setting.

Therefore, discrimination law cannot by itself assist women, particularly underprivileged women, in challenging the inequality they face when shifting to telework. Though telework may have further implications for societal inequalities in the future, business and workers alike may question the elimination of teleworking as a matter of policy. With all its advantages, American society more likely wishes to eliminate only its unequal disadvantaging effects.<sup>160</sup>

This complex state of things is not surprising. Telework is located at the hybrid junction of the professional sphere of an employee and her private

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155. See *supra* note 153.

156. See *Lanning v. Se. Penn. Transp. Auth.*, 181 F.3d 478, 485 (3d Cir. 1999) ("Once the plaintiffs have established a *prima facie* case, the burden shifts to the employer to show that the employment practice is 'job related for the position in question and consistent with business necessity . . .'" (quoting 42 U.S.C. § 2000e-2(k))).

157. 42 U.S.C. § 2000e-2(k).

158. See *supra* note 64 and accompanying text.

159. See *supra* notes 60–64 and accompanying text.

160. As was noted earlier, teleworking can be beneficial to employees, especially to female employees. See *supra* notes 60–64.

sphere. Consequently, its discriminatory effects derive from the intersection of the two spheres, with all their social, economic, and gender constructions. In other words, the discriminatory effects of teleworking during the pandemic are the result of long-standing structural discrimination in American society in both spheres, not of a sole decision or policy of the employer.<sup>161</sup> This structural understanding of discrimination cannot be located within the law as it currently exists.<sup>162</sup> Yet, reality shows that this structural understanding of discrimination indeed has far-reaching implications for the value of equality. This leads to the conclusion that if legislators and practitioners wish to take the value of equality seriously, the more complex understanding of structural discrimination should instead be applied.

### B. Structural Discrimination

To understand the concept of structural discrimination, it must be viewed from a broad perspective detached from a specific decision, a specific domain, or a specific moment in time. Structural discrimination is the consequence of institutional or organizational “neutral” practices and policies over the years that have longstanding unequal effects on certain minority groups.<sup>163</sup> These ongoing practices or policies were not designed or intended to discriminate against a specific group, yet, in the long run, they do.<sup>164</sup>

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161. Cf. Ruqaiyah Yearby & Seema Mohapatra, *Structural Discrimination in COVID-19 Workplace Protections*, HEALTH AFFS. BLOG (May 29, 2020), <https://www.healthaffairs.org/doi/10.1377/hblog20200522.280105/full/> (referring to workers who were forced to work during the pandemic and were exposed to the virus and to a lack of employment protection due to structural discrimination that has disproportionately disadvantaged women of color and low-wage workers); Emily A. Benfer et al., *Health Justice Strategies to Combat the Pandemic: Eliminating Discrimination, Poverty, and Health Disparities During and After COVID-19*, 19 YALE J. HEALTH POL’Y, L. & ETHICS 122 (2020) (arguing similarly in the context of health inequality during the pandemic and its connections to structural discrimination in employment).

162. See, e.g., Note, “Trading Action for Access:” *The Myth of Meritocracy and the Failure to Remedy Structural Discrimination*, 121 HARV. L. REV. 2156, 2167–68 (2008) [hereinafter “Trading Action for Access”]; Olatunde C.A. Johnson, *Disparity Rules*, 107 COLUM. L. REV. 374, 376 (2007).

163. “Trading Action for Access”, *supra* note 162, at 2159.

164. *Id.* (“Structural discrimination is unintentional and often not perceived because it is based on subconscious beliefs, attitudes, and shared cultural values.”); Fred L. Pincus, *Discrimination Comes in Many Forms: Individual, Institutional, and Structural*, 40 AM. BEHAV. SCIENTIST 186, 190–92 (1996).

Devah Pager and Hana Shepherd, Harvard sociological professors, described structural discrimination using three conceptualizations that operate either together or separately.<sup>165</sup> The first highlights past discrimination and its ongoing implications for today's world and its modern biases.<sup>166</sup> The second emphasizes "contemporary policies and practices that systematically disadvantage certain groups."<sup>167</sup> The third conceptualization focuses on the influences among diverse domains, particularly the way a specific policy or decision in one domain generates inequality in other domains.<sup>168</sup>

In the workplace context, structural discrimination is understood as the result of the construction of the labor market over the years.<sup>169</sup> At the same time, according to Pager and Shepherd's two other definitions, structural discrimination can derive from current policies in the labor market or from the influences of other domains—such as the private family sphere—on the labor market. More specifically, the discriminatory effects of telework on women, mainly socioeconomically disadvantaged employed women, is part of ongoing structural discrimination against these groups within the labor market as well as in other domains that influence them, especially the private familial domain.

Gender inequality in the workplace is bound to past perceptions that women belong in the private domain—mainly as housewives and caregivers—and thus are less suitable for the workplace's structure and demands.<sup>170</sup> This perception of women maintained by courts and employers over decades is still reflected in many recent legal orders, judicial decisions,

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165. Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 ANN. REV. SOCIO. 181, 197 (2008).

166. *Id.* at 197–98.

167. *Id.* at 198–99.

168. *Id.* at 199–200.

169. See Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating Employer Wrong*, 60 VAND. L. REV. 849, 857–58 (2007). For further elaboration on structural discrimination in employment, see generally, for example, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Katherine V.W. Stone, *The New Psychological Contract: Implications of the Changing Workplace for Labor and Employment Law*, 48 UCLA L. REV. 519 (2001); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91 (2003) [hereinafter Green, *Discrimination Dynamics*].

170. See discussion *supra* Section II.A.

and employment policies.<sup>171</sup> In other words, past policies and perceptions of women related to the domain of family life influence the issue of women's inequality in the labor market today. Similarly, the lack of current governmental and private policies in the employment and family domains also affect women's equality in the labor market. This complex reality influences women's ability, and especially mothers' ability, to shift to telework successfully on an equal basis with men.<sup>172</sup>

Similarly, telework preserves and expands socioeconomic gaps due to the specific structure of the labor market, along with growing inequality among households. The U.S. labor market, with its employment policies and regulations, preserves *de facto* inequalities in society.<sup>173</sup> Socioeconomic inequality is thus the result of a lack of sufficient employment and labor law protection through the years for the most underprivileged groups of employees.<sup>174</sup>

As discussed above, there is a clear correlation between the ability of a person to acquire a good education, especially a technical education, and her ability to progress in the labor market and enjoy a good salary with favorable job conditions.<sup>175</sup> Similarly, the differences among households in their economic ability to invest in education, obtain technological skills, acquire technological equipment, and access a quiet environment for study and work

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171. Schultz, *Telling Stories*, *supra* note 2, at 1756. See generally Marques Lang, *Income Disparity for Working Mothers: Eliminating Structural Discrimination Through Public Policy*, 5 PORTLAND ST. U. MCNAIR SCHOLARS ONLINE J. article 3 (2011), <https://pdxscholar.library.pdx.edu/cgi/viewcontent.cgi?article=1107&context=mcnair>.

172. Cf. Cahn & McClain, *supra* note 3, at 16 (“[D]espite slogans like ‘We’re all in this together,’ the structural inequalities around race and class also shaped how women experienced the pandemic’s effects.”).

173. The labor market’s current structure produces even greater socioeconomic disparities in society. In recent years, more and more workers are “outsourced” and left outside the formal protection of the company for which they work. Additionally, their legal status as employees is questioned and they are pushed outside the protection of labor and employment law. Consequently, the economic gaps between these workers and recognized employees—not to mention managers or company owners—are widening. See generally, e.g., WEIL, *supra* note 98, at 1–8; Rahman, *supra* note 97, at 321–29; BLOCK & SACHS, *supra* note 97; Dau-Schmidt, *supra* note 98; Bodie, *supra* note 98, at 666–68; Kenneth G. Dau-Schmidt, *The Labor Market Transformed: Adapting Labor and Employment Law to the Rise of the Contingent Work Force*, 52 WASH. & LEE L. REV. 879, 882; Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers Without Workplaces and Employees Without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 286 (2006).

174. See sources cited *supra* note 173.

175. See, e.g., Brussevich et al., *supra* note 118, at 4 (establishing this connection in the context of telework).

all influence the ability of individuals to succeed in their studies and professional careers.<sup>176</sup> This complex reality influences the ability of a person, especially a woman who already faces other barriers, to shift successfully to telework during or after the pandemic. In other words, the policies and structure of the labor market sustain inequalities in other domains, especially economic inequality among households. And these economic inequalities thereby influence and preserve existing inequalities in the labor market. In this way, systemic discrimination is a cycle where different systems feed off of one another, exacerbating inequalities at scale. These parallel conditions of inequality apply to the specific policy of shifting to telework and these conditions functionally hinder women, especially poor women, from progressing in the future labor market.

Therefore, to put an end to ongoing structural discrimination in the telework context, employers and legislators should consider the broader sources of the inequality difficulty and, in particular, the implications of the private domain to achieve equality for women. Of course, the State is the entity that can most directly modify this reality through proactive legislation aiming at inducing more equality in the familial sphere and among households. The development of the labor market over time, however, and the application of a telework policy in specific workplaces also has meaningful effects on the ability of the individual to successfully shift to telework.<sup>177</sup> Thus, employment law must also be adjusted to reflect the structural difficulties the digital reality brings to the telework case. This Article elaborates in depth on these understandings in its conclusion, which sets out a model solution.

#### *IV. The Question of Regulation*

This Article has demonstrated how the background of the employee—being female and coming from an underprivileged background—influences her ability to successfully and equally shift to telework. This intersectional experience derives in many ways from the teleworker’s workspace, generally the home office, and its hybrid nature involving both the private and public-professional spheres of the employee. In this reality, the guiding principles to regulate the telework setting must recognize that working from home accentuates personal characteristics of the individual. Unlike a separate

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176. See, e.g., *id.*; Espinoza & Reznikova, *supra* note 10, at 17–18; OECD EMPLOYMENT OUTLOOK 2020, *supra* note 10, at 74.

177. Following Pager and Shepherd’s second principle in their model. See Pager & Shepherd, *supra* note 165, at 198.

professional workspace, her gender role, marital status, or socioeconomic capabilities are even more prominent in the new telework-place context than they would be otherwise.

In other words, the hybrid sources of the inequality in the telework case, call for a complex model of regulation that tackles both private and the professional aspects. The regulation model must account for the preliminary, personal conditions of workers who came to the workplace from a disadvantaged starting point. A new model must also account for the way the workplace historically intensified these disadvantages and made them more prominent in the decision to shift to telework. Based on these understandings, the model of regulation must apply at both the state and federal levels. At the same time, it must also tackle workplaces' arrangements and generate specific policies that produce more equality among workers within a specific workplace in the shift to telework.

To be sure, creating such a complex model of regulation is more difficult than applying a few narrow rules in a particular workplace. Since telework will become an integral part of our future labor market,<sup>178</sup> it is crucial to generate a holistic solution to the problems telework generates. The OECD reached a similar conclusion with respect to the implications of telework for high-skilled and low-skilled workers, as well as those in urban and rural areas, and urged the development of comprehensive solutions involving a diverse group of actors.<sup>179</sup>

In this sense, the COVID-19 crisis has only clarified and emphasized difficulties that would have soon erupted in the future digitalized workplace anyway.<sup>180</sup> The future workplace holds various new and complex challenges that have yet to be discovered and for which employers must find necessarily complex solutions.<sup>181</sup> The telework case study is one of those challenges and it is a good case with which to start.

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178. Jacques-François Thisse et al., *Teleworking Will Reshape Labour Markets and Cities*, CEPR (Dec. 6, 2022), <https://cepr.org/voxeu/columns/teleworking-will-reshape-labour-markets-and-cities> (“There is growing evidence that higher rates of teleworking are part of the post-pandemic new normal.”).

179. See OECD, *MEASURING TELEWORK*, *supra* note 7, at 16, 21. According to the OECD, since telework challenges the balance between employers, employees, firms, and local labor markets, it requires a complex and gradual policy approach that involves various legal entities, especially the state. *Id.* at 43.

180. See, e.g., Fudge & Mundlak, *supra* note 18; *Business as Unusual*, *supra* note 7; CITI GPS, *supra* note 18, at 8–14.

181. For further elaboration on the complex implications of technology on the future workplace, see this comprehensive report written by several MIT scholars: DAVID AUTOR ET AL., MIT, *THE WORK OF THE FUTURE: BUILDING BETTER JOBS IN AN AGE OF INTELLIGENT*

The remainder of this Article discusses regulatory solutions at the state and federal levels. Naturally, these suggestions are far-reaching in their requirements and will affect other challenges of inequality in the workplace beyond the telework case. Alongside that, to link these suggestions to the reality of employment, this Article also shows how solutions can and should go hand-in-hand with a specific workplace's policies. In this way, this Article focuses on specific solutions that are applicable in the workplace context. It suggests generating an equality policy that each workplace should strive to promote, which is adjusted to the unique characteristic and features of the concrete workplace.

*A. Regulation at the State, Federal, and the Labor Market Levels*

The sources of gender and socioeconomic inequalities in the case of telework are not solely embodied in the policies of the specific employer in a concrete workplace. Rather, they stem from ongoing structural discrimination in the private sphere and in the labor market.<sup>182</sup> Therefore, state and federal governments are in the best position to effect change and ensure equality both in the private and professional domains of workers. In this respect, telework is no different than any other incident of structural inequality in the labor market. As in other cases of structural inequality, in the telework setting, it is difficult to shift the responsibility for persistent, structural discrimination to a specific employer.

Pager and Shepherd showed in this regard how diverse domains can generate a structural inequality in the labor market.<sup>183</sup> In the context of telework, it appears that the educational domain, the familial domain, and the general structure of the labor market have the most meaningful impact on the ability of an underprivileged woman to successfully make the shift to telework.<sup>184</sup> Therefore, in the following sections, this Article focuses on solutions in the educational domain and the labor market that can directly influence equality in the telework setting. Thereafter, the Article focuses on the private-familial domain along with the employment domain (the labor market), and on the possible solutions within them that could generate more equality in the telework case.

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MACHINES 76–80 (2020), <https://workofthefuture.mit.edu/research-post/the-work-of-the-future-building-better-jobs-in-an-age-of-intelligent-machines/>.

182. *See supra* Section III.B.

183. *See* Pager & Shepherd, *supra* note 165, at 199.

184. *See supra* Part II.

### 1. *The Education Domain and the Labor Market*

A systematic change in the educational system could diminish both gender and socioeconomic inequalities in the labor market. This, of course, would require a profound modification of the education domain, from preschool to higher education.<sup>185</sup> For the modest purposes of this Article, which focuses on inequality in teleworking as a prominent case study for inequality in the future workplace, only two limited modifications are proposed. The first proposal is to subsidize early childhood education.<sup>186</sup> The second proposal recommends a focus on teaching students, especially young girls, technological skills. Since this section explores the links between education and employment in this context, these two suggestions will also implicate possible changes in the employment domain.

Research reveals that “[e]arly childhood education programs provide greater childcare services and may facilitate the labor market careers of parents, but their greatest potential value is as a human capital investment in young children, particularly children from economically disadvantaged families.”<sup>187</sup> This essentially means that a good early education program can assist underprivileged women in two ways exactly at the intersectional point, both as young students and as mothers of young children.

A preschool education is considered to be the best way to develop a young child’s capabilities and skills and give her the tools necessary to succeed later as an adult in the labor market.<sup>188</sup> Additionally, a subsidized long preschool day can enable mothers, especially those from underprivileged backgrounds, to integrate more easily into the labor market.<sup>189</sup> According to the Childcare

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185. See, e.g., Greg J. Duncan & Katherine Magnuson, *Investing in Preschool Programs*, J. ECON. PERSPS., Spring 2013, at 109, 127–28.

186. Cf. OECD, *CAREGIVING IN CRISIS*, *supra* note 55, at 2 (“The social policy response to the crisis should include greater public investments in good-quality childcare, education, and out-of-school support . . .”).

187. Duncan & Magnuson, *supra* note 185, at 109. Research highlights that “[h]igh-quality early childhood education can significantly improve a child’s pre-literacy, pre-writing, and pre-math skills.” Juliana Herman et al., *The United States Is Far Behind Other Countries on Pre-K*, CTR. FOR AM. PROG. (May 2, 2013), <https://www.americanprogress.org/article/the-united-states-is-far-behind-other-countries-on-pre-k>; see also Kenneth B. Robin et al., *Is More Better? The Effects of Full-Day vs. Half-Day Preschool on Early School Achievement 2* (Nat’l Inst. for Early Educ. Rsch., Working Paper, 2006), <https://nieer.org/wp-content/uploads/2016/08/IsMoreBetter.pdf>.

188. Herman et al., *supra* note 187.

189. See, e.g., Elizabeth U. Cascio, *Maternal Labor Supply and the Introduction of Kindergartens into American Public Schools*, 44 J. HUM. RES. 140, 141–42 (2009); Jonah B.

Resource Center, subsidized childcare allows mothers to return to work sooner, “generating an estimated \$79,000 lifetime earnings increase for mothers.”<sup>190</sup>

In the United States, there is a large preschool access gap. The overall enrollment of American children in preschool is around 67%, “the lowest out of all but two OECD countries.”<sup>191</sup> The international community considers the U.S. government as underinvested in preschool compared to most OECD countries.<sup>192</sup> There is a significant disparity among states in the U.S. in investment-per-child at the preschool stage, as well as in the assessment of preschool activity.<sup>193</sup> The most obvious solution, therefore, is to invest more in early education at the state and federal levels. This could benefit not only future female teleworkers, but also society more broadly.<sup>194</sup>

For this solution to impact the employment domain, it is important that workplaces participate in encouraging preschool education. The primary way employers can do so is by subsidizing preschools for workers’ children. Currently, very few companies share in the expenses of preschool for their

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Gelbach, *Public Schooling for Young Children and Maternal Labor Supply*, 92 AM. ECON. REV. 307, 307–08, 320–21 (2002).

190. CHILDCARE AWARE OF AM., PARENTS AND THE HIGH COST OF CHILD CARE 7 (2016), [https://www.childcareaware.org/wp-content/uploads/2016/12/CCA\\_High\\_Cost\\_Report.pdf](https://www.childcareaware.org/wp-content/uploads/2016/12/CCA_High_Cost_Report.pdf).

191. Lauren Camera, *U.S. Trails in Early Childhood Education Enrollment*, U.S. NEWS & WORLD REP. (June 21, 2017), <https://www.usnews.com/news/best-countries/articles/2017-06-21/us-falls-behind-other-developed-countries-in-early-childhood-education-enrollment>.

192. See Herman et al., *supra* note 187.

193. See NAT’L ASS’N STATE BUDGET OFFICERS (NASBO), STATE EXPENDITURE REPORT: EXAMINING FISCAL 2013-2015 SPENDING 18-21 tbl.7-10 (2015), <https://perma.cc/YLQ7-Z3YG> (highlighting state by state statistics on education expenditures); Kate Hodges, *NIEER Pre-K Data Snapshot: Pre-K and Kindergarten Entry Assessment (KEA) Alignment: 2018–2019 School Year*, NAT’L INST. EARLY EDUC. RSCH. (Aug. 2020), [https://nieer.org/wp-content/uploads/2020/12/Data-Snapshot\\_PK-Assessment\\_8.2020.pdf](https://nieer.org/wp-content/uploads/2020/12/Data-Snapshot_PK-Assessment_8.2020.pdf).

194. Additionally, to ensure that preschool education provides children the tools essential to their futures, states should formalize clear methods of assessing the quality of preschool systems. The federal government can assist in this regard mainly by increasing the federal funds that are made available for this purpose. For further elaboration on the state–federal relationship in this regard, see Duncan & Magnuson, *supra* note 185, at 109–10, 127–28; NAT’L ASS’N STATE BUDGET OFFICERS (NASBO), *supra* note 193, at 16–17 (clarifying that in December 2015, Congress passed the Every Student Succeed Act (ESSA) reauthorizing the Elementary and Secondary Education Act eight years after the expiration of No Child Left Behind. This new law transferred more decision-making authority to state and local governments). The report includes further elaboration on the division between the federal and state funds for this purpose and its modifications over the years. See *id.* at 17–22.

workers' children.<sup>195</sup> Corporate human resources research before and during the pandemic has exposed the necessity of such an arrangement for the benefit of both workers and companies.<sup>196</sup> The research revealed what the telework revolution has also shown: the ability to succeed in the workplace is heavily related to the familial conditions of mothers.<sup>197</sup> Mothers from underprivileged groups, who cannot afford childcare, are those who find it most difficult to successfully combine work and family life, even when they work at home.<sup>198</sup> Therefore, for states and employers subsidization of preschool would be a meaningful step toward narrowing the gender and intersectionality gap.

Along with subsidizing preschools, the technological education of women should also be the focus of regulation. The COVID-19 pandemic has exposed the increasing technological inequalities among people and their relevance to economic resilience during the pandemic.<sup>199</sup> This is particularly true

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195. For further elaboration on companies' involvement in this regard, see Erin L. Kelly, *The Strange History of Employer-Sponsored Child Care: Interested Actors, Uncertainty, and the Transformation of Law in Organizational Fields*, 109 AM. J. SOCIO. 606 (2003); Ann Therese Palmer, *Who's Minding the Baby? The Company*, BLOOMBERG (Apr. 25, 1999, 11:00 PM CDT), <https://www.bloomberg.com/news/articles/1999-04-26/whos-minding-the-baby-the-company>.

196. See, e.g., *Subsidized/Reimbursed Child Care or Referral*, FAMILY FORWARD NC, <https://familyforwardnc.com/family-forward-policies/subsidized-reimbursed-child-care> (last visited Apr. 5, 2023); Kylie Ora Lobell, *Employers Consider Child Care Subsidies*, SHRM (Sept. 22, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/many-workplaces-consider-child-care-subsidies.aspx>; Seamus Roddy, *How to Offer Childcare Benefits at Your Business*, MEDIUM: THE STARTUP (Jan. 9, 2020), <https://medium.com/swlh/how-to-offer-childcare-benefits-at-your-business-1d934ffa8d4f>.

197. See sources cited *supra* note 196.

198. See *supra* notes 132–135 and accompanying text.

199. Beaunoyer et al., *supra* note 129, at 3; AUTOR ET AL., *supra* note 181, at 51, 71 (addressing the importance of training for successfully integrating in the future labor market); CORBETTA, *supra* note 7, at 23–28 (focusing on the importance of training to equally participate in telework). Additionally, against the backdrop of these digital inequalities, several countries have engaged in the task of enabling good access to digital services for teleworkers during the pandemic. Among these countries are Austria and Italy, which seem to be the most successful and prominent examples in this regard, as well as Canada, Ireland, Malaysia, Mexico, Portugal, Spain (Barcelona), and France. OECD, *MEASURING TELEWORK*, *supra* note 7, at 6–33. This has included, for instance, providing free digital solutions for video conferencing and online meetings, virtual workspaces, cyber security solutions, and digital training. By comparison, in the United States (at least at the federal level) there seem to be no special assistance programs to increase digital access for teleworkers during the pandemic. This state of things is particularly problematic because of the general inequality among households with regard to digital infrastructure, as discussed in Section II.D.

regarding young women. International research exposes how women and young girls face an additional barrier related to their gender that prevents them from succeeding in the future digitalized workplace.<sup>200</sup>

Against this backdrop, emphasis must be put on providing technological education and skills to members of underprivileged groups.<sup>201</sup> Due to the intersectionality difficulties faced by young women and girls, their training should be the subject of particular focus.<sup>202</sup> During their elementary and high school studies, students, particularly young women, need to acquire informational and strategic skills that will enable them to be integrated into the future workplace more easily.<sup>203</sup>

Additionally, in the employment domain, companies that wish to shift to telework must provide *all* their workers the vocational training required to do so,<sup>204</sup> including workers who may find it difficult to telework today but whose positions could be done remotely if they had the required skills and capabilities (such as underprivileged women or elderly women).<sup>205</sup> The importance of technological training spans different sites of workers' lives. Moreover, reality shows that digital skills are already mainly acquired in the workplace rather than in schools.<sup>206</sup> Hence, workplaces shifting to telework should supply technological training, with an emphasis on women and underprivileged groups. This sort of solution reflects the interrelationship between the private sphere and the professional sphere in the telework case and can provide a comprehensive solution.

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200. See, e.g., UNICEF, *supra* note 102, at 1–7.

201. *Id.* at 18–20; see also Steyaert, *supra* note 18, at 208–11. According to a comprehensive 2021 study from the Pew Research Center, “Racial minorities and those with lower levels of education and income are less likely to have broadband service at home.” *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/?tabId=tab-2ab2b0be-6364-4d3a-8db7-ae134dbc05cd>.

202. See UNICEF, *supra* note 102, at 18–20.

203. See Steyaert, *supra* note 18, at 208–11.

204. Technological training can, in parallel, be achieved by facilitating private sector investment in training and by significantly increasing federal funding for technological training programs for adults. See AUTOR ET AL., *supra* note 181, at 76–80; CORBETTA, *supra* note 7, at 28.

205. This is true regarding “pink collar” positions such as secretarial work and customer service. See generally S. Basu et al., *Health and Pink-Collar Work*, 65 OCCUPATIONAL MED. 529, 530 (2015).

206. Van Dijk & Hacker, *supra* note 104, at 326.

## 2. *The Familial Domain and the Labor Market*

Along with proposals that focus on the education system, other policies tackling the current gender balance between the private-familial sphere and the public-professional sphere should be developed.<sup>207</sup> One possible solution is implementing paid parental leave for men and women.<sup>208</sup> Since parental leave is an explicit welfare right that is usually granted by the government, this Article focuses on this regulatory element at the governmental level rather than in employment.<sup>209</sup>

The right to enjoy parental leave (or family leave) is provided by the states' varying forms of the Family Leave Act<sup>210</sup> and by the federal Family and Medical Leave Act of 1993 (FMLA).<sup>211</sup> Only a few states currently give employees paid family leave.<sup>212</sup> This differentiates the United States from

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207. See Simeon Djankov & Eva (Yiwen) Zhang, *The Expanding Gender Gap in the US Due to Covid-19*, CEPR (Nov. 26, 2020), <https://voxeu.org/article/expanding-gender-gap-us-due-covid-19> (identifying three “areas for change” for gender balance in this realm).

208. OECD, CAREGIVING IN CRISIS, *supra* note 55, at 2.

209. As will be shown below, this is the case in most Western countries. This is mainly to provide any parent the right to spend time with her newborn and to allow mothers to recover from the birth. Thus, such a right is considered a welfare right that is not dependent on the specific employer, but rather on the welfare system. Note, however, that companies can voluntarily provide their workers additional parental leave as a benefit for workers. This is quite common in profitable high-tech companies. See, e.g., Lisa Kim, *Google Just Increased Parental Leave to 24 Weeks—Here’s How That Compares to Other Tech Giants*, FORBES (Jan. 27, 2022, 5:36 PM EST), <https://www.forbes.com/sites/lisakim/2022/01/27/google-just-increased-parental-leave-to-24-weeks-heres-how-that-compares-to-other-tech-giants>.

210. See, e.g., Cassandra Engeman et al., *United States*, in INT’L NETWORK ON LEAVE POLICIES & RSCH., 15TH INTERNATIONAL REVIEW OF LEAVE POLICIES AND RELATED RESEARCH 2019, at 498, 499-503, 506 (Alison Kozlowski et al. eds., 2019), [https://www.leavenetwork.org/fileadmin/user\\_upload/k\\_leavenetwork/annual\\_reviews/2019/2\\_2019\\_Compiled\\_Report\\_2019\\_0824-.pdf](https://www.leavenetwork.org/fileadmin/user_upload/k_leavenetwork/annual_reviews/2019/2_2019_Compiled_Report_2019_0824-.pdf) (identifying recent state level examples, including inter alia, the Massachusetts Paid Family Medical Leave Act, the New York Paid Family Leave Benefit Law, and the California Family Rights Act).

211. For more information, see *Leave Benefits: Family and Medical Leave (FMLA)*, U.S. DEP’T LAB., <https://www.dol.gov/general/topic/benefits-leave/fmla> (last visited Apr. 6, 2023).

212. See *State Family and Medical Leave Laws*, NAT’L CONF. OF STATE LEGIS., <https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx> (last updated Sept. 9, 2022) (identifying six states with enacted and implemented and four other states with enacted and unimplemented paid family leave laws). At the federal level, only certain groups of employees are entitled to an unpaid leave for up to twelve weeks. ABT ASSOCS., INC., FAMILY AND MEDICAL LEAVE IN 2012: EXECUTIVE SUMMARY 1 (2013), <https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/FMLA-2012-Executive-Summary.pdf>. In 2012, 13% of employees exercised their right to family leave. See *id.* at 2 (stating that

many other countries, where in all other OECD countries,<sup>213</sup> paid family leave is the norm. In these other countries, paid leave is usually given by state legislation for at least fourteen weeks, and the amount paid is no less than two-thirds of previous earnings.<sup>214</sup>

Paid family leave is a meaningful tool to enable women to better balance working life and parenthood.<sup>215</sup> As the International Labour Organization (ILO) report put it, “gender-responsiveness is a core principle particularly relevant to ensuring that leave policies enable both women *and* men to engage in the care of children and other family members and that, in general, unpaid care work is redistributed more equally among them.”<sup>216</sup> Family leave at the federal and state levels is gender-neutral and available to both a mother and father.<sup>217</sup> Due to our gendered structural reality, however, most fathers do not take parental leave and mothers primarily stay at home to take care of a baby after it is born.<sup>218</sup> One of the main ways to encourage fathers to play an integral part in the private sphere and to establish a “dual-earner/dual-career model” is to have a father’s quota, defined as “a reserved, individual entitlement to take parental leave that cannot ordinarily be transferred to

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“[t]hirteen percent of all employees took leave for a qualifying FMLA reason in the past year,” and that of those employees, 21% used leave for pregnancy or childbirth reasons).

213. *Policy Brief: Parental Leave: Where Are the Fathers?*, OECD (Mar. 2016) [hereinafter OECD, *Parental Leave Policy Brief*], <https://www.oecd.org/policy-briefs/parental-leave-where-are-the-fathers.pdf> (“All OECD countries, except the US, offer nationwide paid maternity leave for at least 12 weeks, and over half grant fathers paid paternity leave when a baby arrives.”). According to a more updated OECD research from October 2021, “almost all OECD countries provide mothers with at least 14 weeks [paid] leave around childbirth; the main exception is the United States, which is the only OECD country to offer no statutory entitlement to paid leave on a national basis.” *OECD Family Database: PF2.1 Parental Leave Systems*, OECD at 2, [https://www.oecd.org/els/soc/PF2\\_1\\_Parental\\_leave\\_systems.pdf](https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf) (last updated Dec. 2022).

214. ADDATI ET AL., *supra* note 1, at 127.

215. Marian Baird, *Orientations to Paid Maternity Leave: Understanding the Australian Debate*, 46 J. INDUS. RELS. 259, 270 (2004).

216. ADDATI ET AL., *supra* note 1, at 128.

217. *Id.* at 129; *see also* Yaling Jin & Qifei Zhu, Paid Family Leave, Inventor Mobility, and Firm Innovation 6–7 (2021), [https://papers.ssrn.com/sol3/Delivery.cfm/SSRN\\_ID4325297\\_code2881503.pdf?abstractid=3894180&mirid=1](https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4325297_code2881503.pdf?abstractid=3894180&mirid=1).

218. *See* Engeman et al., *supra* note 210, at 10.

children's mothers."<sup>219</sup> Such a quota is based on use-it-or-lose-it principles in addition to a mothers' right to maternity leave.<sup>220</sup>

The idea of father's quota is not implemented yet in the United States but is an integral part of the parental leave system in other countries. The European Union embraced father's quotas in a special Directive from 2019,<sup>221</sup> by which "each parent has an individual right to four months of parental leave in respect of each child up to the age of eight, two months of which are nontransferable between parents."<sup>222</sup> Among all European countries, however, a father's quota is most common in Nordic countries.<sup>223</sup> Norway was the first Scandinavian country to offer a four-week father's quota.<sup>224</sup> Today Sweden,<sup>225</sup> and Iceland<sup>226</sup> also offer father's quotas in various forms. Similarly, in the last decade, more and more OECD countries have offered father's quotas; among them are Korea, Japan, France, Luxembourg, Portugal, Belgium, Germany, and Austria.<sup>227</sup> As of October

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219. Linda Haas & Tine Rostgaard, *Fathers' Rights to Paid Parental Leave in the Nordic Countries: Consequences for the Gendered Division of Leave*, 14 CMTY., WORK & FAM. 177, 186 (2011); see also Linda Haas, *Parental Leave and Gender Equality: Lessons from the European Union*, 20 REV. POL'Y RSCH. 89, 90, 104 (2003); *OECD Family Database: PF2.1 Parental Leave Systems*, *supra* note 213, at 2 ("Father-specific parental and home care leave: covers any weeks of employment-protected parental or home care leave that can be used only by the father or 'other parent'. This includes any weeks of parental leave that are an individual non-transferable entitlement for the father or 'other parent', plus any weeks of sharable leave that are effectively 'reserved' because they must be used by the partner of the main leave-taker (often the father) in order for the family to qualify for bonus weeks. Weeks are included here only if they are fully non-transferable. Any entitlements that are initially given to the father but that can be transferred to the mother are not included.").

220. Haas & Rostgaard, *supra* note 219, at 180.

221. EU Directive 2019/1158, *supra* note 63.

222. Oxana Golyner & Pascale Lorber, *Directive 2019/1158 on Work-Life Balance for Parents and Carers in the UK: The Brexit Effect*, REVUE DE DROIT COMPARÉ DU TRAVAIL ET DE LA SÉCURITÉ SOCIALE, 2020/3, at 108, 111; see also EU Directive 2019/1158, *supra* note 63, art. 5, §§ (1)-(2).

223. Haas & Rostgaard, *supra* note 219, at 180; Haas, *supra* note 219, at 90-91. Note that parental leave with a father's quota was common in Norway from the beginning of the twenty-first century, while the EU Directive on this matter is from 2019 (and was firstly initiated in 2010, in a Council Directive 2010/18/EU). See EU Directive 2019/1158, *supra* note 63; Haas & Rostgaard, *supra* note 219, at 180.

224. Haas & Rostgaard, *supra* note 219, at 180. This quota was eventually extended to twelve weeks. *Id.*

225. *Id.*

226. *Id.* at 180-81.

227. See OECD, *Parental Leave Policy Brief*, *supra* note 213. As noted in the OECD policy brief reflecting data from 2015, Korea offered fifty-three weeks father's quota, Japan offered fifty-two weeks father's quota, France offered twenty-six weeks father's quota,

2021, OECD countries on average offered just over eight weeks of father's quota.<sup>228</sup> Twelve OECD countries reserved three months or more of paid parental leave,<sup>229</sup> and Japan and Korea provided the longest reserved paid parental leave in the OECD at twelve months.<sup>230</sup>

Research has shown that father's quotas have a meaningful effect and that the vast majority of fathers actually use this benefit.<sup>231</sup> A father's quota fosters a better long-standing connection between a father and child and thus identifies the father as a person who could stay with the child in the future during school breaks or illness (or another global pandemic...).<sup>232</sup> Father's quotas are also connected to a reduction of fathers' working hours when they return to work and to more equal distribution of care work in the long term.<sup>233</sup> Father's quotas similarly enable mothers to return to work at an earlier stage if they wish to do so, thus avoiding long breaks in their professional progress.<sup>234</sup> In other words, paid family leave with father's quotas can best shift the gendered private-public balance to a more neutral point.

Parental leave with a specific focus on fathers can be particularly beneficial in the telework setting. Research focusing on fathers and telework has revealed that flexible working arrangements, like work from home policies, eventually lead to *an increase* in working hours for fathers due to traditional ideals about responsibilities at home.<sup>235</sup> Additional work hours

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Luxembourg offered twenty-six weeks father's quota, Portugal twenty-one offered weeks father's quota, Belgium offered nineteen weeks father's quota, Germany offered nine weeks father's quota, and Austria also offered nine weeks father's quota. *Id.* The average father's quota in OECD states stood on eight weeks as of 2015. *Id.*

228. See *OECD Family Database: PF2.1 Parental Leave Systems*, *supra* note 213, at 7.

229. *Id.* at 5, 7.

230. *Id.*

231. See Haas & Rostgaard, *supra* note 219, at 189. As an example, in 2002–03, 86% of Swedish fathers and 89% of Norwegian fathers used their father's quota. *Id.* Research shows that “[f]athers are much less likely to share the periods of paid parental leave that are offered to fathers and mothers together as a family entitlement beyond the quota.” *Id.*

232. See OECD, *Policy Brief*, *supra* note 213, at 1 (“OECD research shows that fathers who take paternity or parental leave are more likely to perform tasks such as feeding and bathing children. And this is a lasting effect: Fathers who care for children early tend to stay more involved as children grow up.”); see also ADDATI ET AL., *supra* note 1, at 122, 128; Haas & Rostgaard, *supra* note 219, at 186.

233. ADDATI ET AL., *supra* note 1, at 120–22, 128; Haas & Rostgaard, *supra* note 219, at 179–80.

234. See ADDATI ET AL., *supra* note 1, at 120–22 (using comparative research in this regard).

235. See Susanne Wanger & Ines Zapf, *For Better or Worse: How More Flexibility in Working Time Arrangements and Parental Leave Experiences Affect Fathers' Working and*

leads to a reduction in time spent by fathers on childcare activities.<sup>236</sup> Having flexible working arrangements for fathers with parental leave can change this reality. It can lead to a more equal distribution of work and familial obligations, specifically in the telework setting.<sup>237</sup>

To be sure, it is doubtful whether the United States will soon have six months of paid parental leave distributed equally between fathers and mothers.<sup>238</sup> The pandemic, however, has shown the importance of regulation and the unequal implications of the current policies. The pandemic has also shown the meaningful role the familial domain has in the workplace, particularly for instances in which work is conducted from home. A specific period of paid parental leave, including a specific father's quota, would be a meaningful first step in changing this inequality. Due to the technological future of the labor market and the important role telework will play, this policy would enable both men and women to equally progress in the labor market and to equally enjoy the ability to work from home.

#### *B. Regulation in the Concrete Workplace: An Equality Policy*

Along with more general policies presented so far, since employers play an integral role in sustaining inequality, employers must also do their part to enable more equality for their workers while shifting to telework. Legal scholars have explained that the duty to accommodate the labor market for specific minorities to promote more equality cannot solely be imposed on the government; employers should also bear an economic burden.<sup>239</sup>

The same is true in the telework setting. The shift to telework does not occur in a sterile environment. It occurs in a specific workplace and impacts a specific employer and a specific employee. The way to change the unequal implications of telework is, therefore, to require employers to ensure that the

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*Childcare Hours in Germany*, 34 J. FAM. RSCH. 582, 597 (2021), <https://doi.org/10.20377/jfr-644>.

236. *Id.* at 598.

237. *Id.*

238. In Iceland, for instance, both the mother and the father have an independent right to three months of parental leave. See Haas & Rostgaard, *supra* note 219, at 180.

239. See Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1399 (2016). According to Dagan & Dorfman, this analysis reflects the outcome of distributive justice, equal citizenship, and most of all, relational justice. See *id.* at 1443–45. For further elaboration a private law duty to accommodate see also Sophia Moreau, *What Is Discrimination?*, 38 PHIL. & PUB. AFF. 143, 145, 147 (2010); Seana Valentine Shiffrin, *Egalitarianism, Choice-Sensitivity, and Accommodation*, in REASON AND VALUE: THEMES FROM THE MORAL PHILOSOPHY OF JOSEPH RAZ 270, 297–98, 302 (R. Jay Wallace et al. eds., 2004).

shift to telework does not cause discriminatory outcomes in its workplace. In other words, structural discrimination needs to also be remediated by the specific employer who enables ongoing inequality.

Scholars have argued that to recover from structural inequalities in the labor market, the system must “hold[] employers directly liable for organizational structures and institutional practices,” even if the specific employer is not the sole source.<sup>240</sup> Others have gone further by stressing that the traditional idea of discrimination is difficult to apply in today’s world, when discrimination is often structural and indirect.<sup>241</sup> Thus, employers should implement broader equality duties in the workplace than the law currently requires.<sup>242</sup> Similarly, in the specific case of structural discrimination in telework, the employer must bear legal duties to ensure that women, especially those from underprivileged groups, can equally enjoy remote work and succeed while shifting to telework.

To ensure that employers adapt and incorporate these expanded legal duties, in light of employee needs and ongoing challenges of changing technology, employers should generate a formal *equality telework policy*. Employers should actively consult employees’ representatives when developing this policy.<sup>243</sup> This process has been partly adopted in other countries.<sup>244</sup> Such a telework policy can be adapted to changing realities and changes in each specific workplace. The policy can also adjust to clarify the duties of the employer and explain to workers their rights while shifting to telework.

The involvement of employees’ representatives in this process is necessary to ensure that the right to equality is considered throughout the

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240. Green, *Discrimination Dynamics*, supra note 169, at 93; see also sources cited supra note 169.

241. See Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 770 (2011) (“The claim of structural analysis, as noted earlier, suggests that standard enforcement of discrimination laws misses many of the ways in which members of nondominant groups are excluded or marginalized.”).

242. See *id.* at 763–64.

243. Cf. Tammy Katsabian, *Employees’ Privacy in the Internet-Age—Towards a New Procedural Approach*, 40 BERKELEY J. EMP. & LAB. L. 203, 248–49 (2019) (arguing for this policy from a privacy perspective); see also David Weil, *Individual Rights and Collective Agents: The Role of Old and New Workplace Institutions in the Regulation of Labor Markets*, in EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY 13, 14 (Richard B. Freeman et al. eds., 2005).

244. See MESSENGER ET AL., supra note 5, at 48–49 (addressing telework policies in Italy, Spain, Finland, Belgium, and the Netherlands, and dealing with the involvement of trade unions in regulating general issues regarding telework).

shifting process. Employee consultation ensures the policy includes everything relevant to producing work from a distance for each specific position, and ensures that teleworkers' various needs are heard and considered. The involvement of employees' representatives can also remediate the inherent power imbalance in the workplace.<sup>245</sup>

Trade unions are, naturally, the most suitable entity to serve as the employees' representative.<sup>246</sup> Many workplaces in the United States do not, however, have a formal trade union.<sup>247</sup> In workplaces that are not unionized, the voices and interests of employees can be incorporated in other ways by using other forms of organized workers, a discussion of which is beyond the scope of this Article.<sup>248</sup>

The telework policy should, therefore, include specific arrangements regarding teleworkers' equipment and working space. The telework policy should also cover teleworkers' technological training and childcare subsidization. Also importantly, any employer-developed policy must also include a flexible working schedule for parents to balance their work-life challenges when they work from home.

Members of underprivileged groups, including underprivileged mothers, find it difficult to successfully shift to telework because they lack the required

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245. As scholars have clarified in the past, workers' representatives are the meaningful way to balance and even reduce the current power employers have in the United States (and also in global context). For further elaboration, see generally RICHARD B. FREEMAN & JAMES L. MEDOFF, *WHAT DO UNIONS DO?* 90–93 (1984).

246. See Weil, *supra* note 243, at 23–24; GUY DAVIDOV, *A PURPOSEFUL APPROACH TO LABOUR LAW* 238 (2016).

247. According to the U.S. Bureau of Labor Statistics, 10.1% of U.S. wage and salary workers belonged to a union in 2022. News Release, Bureau Lab. Stat, U.S. Dep't Lab., *Union Members — 2022* (Jan. 19, 2023, 10:00 AM ET), <https://www.bls.gov/news.release/pdf/union2.pdf>.

248. For example, scholar Harry W. Arthurs' addresses alternative forms of organization in a proposal for Canada that in non-unionized workplaces a new "Workplace Consultative Committee" should represent employers. HARRY W. ARTHURS, *CANADIAN FED. LAB. STANDARDS REV., FAIRNESS AT WORK: FEDERAL LABOUR STANDARDS FOR THE 21ST CENTURY* 131–33 (2006), <https://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1166&context=reports>; see also Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 377–402 (2005) (highlighting the various models of employee representation, particularly the hybrid model of self-regulation); CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 170–89 (2010) (same); Catherine L. Fisk, *Reimagining Collective Rights in the Workplace*, 4 U.C. IRVINE L. REV. 523, 525 (2014) (discussing the importance of collective action of employees and other forms of organizations); Alex J. Wood, *Networks of Injustice and Worker Mobilisation at Walmart*, 46 INDUS. RELS. J. 259, 269–71 (2015) (dealing with alternative forms of unionization of workers in the digital reality based on social media sites).

equipment in their private homes, such as technological infrastructure and the appropriate physical space for work.<sup>249</sup> In the hybrid “home-office” format, the employee provides their own needed infrastructures, and so teleworking from home shifts this economic burden from the employer to the employee. That is exactly why, according to OECD, employers have benefited from the shift to telework on an average profiting \$11,000 per year for every employee working remotely half time.<sup>250</sup> Consequently, in other countries, employees have sued their employers for reimbursement of their expenses due to the shift to telework, expenses that saved money for employers.<sup>251</sup> In the physical workplace, the employer is responsible for providing the employee with necessary work equipment. Thus, the employer should retain the duty to provide workplace materials even when work is transitioned to remote, regardless of what technology and other equipment the employee has in her home.<sup>252</sup> This duty should be described in the formal telework policy and applied equally to all workers who shift to remote work.

Additionally, just as the employer is responsible for placing the employee in an appropriate working space on-site, the employer should assist the employee in finding a quiet location in which the employee can telework. One way to assist employees is to encourage the remote worker to find professional space near her home that is subsidized directly by the employer. This subsidization could ensure that the shift to telework would not be “conceptualised as a reallocation of the cost of workspace from employers to

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249. See *supra* Section II.D.

250. CORBETTA, *supra* note 7, at 8–9; see also *Remote Work, Hybrid Work, In-Office Work Forecast*, *supra* note 7.

251. In Israel, two such claims have been brought to court, the first against EY-Israel and the second against an insurance company, AIG. See, e.g., Ela Levi-Weinrib, *EY-Israel Employees Started a Labor Dispute with the Chain’s Management Led by CPA Ronan Barel*, GLOBES (Mar. 4, 2021), <https://www.globes.co.il/news/article.aspx?did=1001362887> (translated into English); *Strike at AIG: “Our Reimbursement of Expenses Is NIS 2.5 Gross Per Day”*, WALLA (Feb. 14, 2021), <https://finance.walla.co.il/item/3417942> (translated into English); see also Tom Bateman, *Portugal Makes It Illegal for Your Boss to Text You After Work in ‘Game Changer’ Remote Work Law*, EURONEWS NEXT (Feb. 15, 2022), <https://www.euronews.com/next/2021/11/08/portugal-makes-it-illegal-for-your-boss-to-text-you-after-work> (“Companies must also now contribute to expenses that workers have incurred as a result of switching to remote working. This can include bills for electricity or internet, but not water. Employers can write off these costs as a business expense.”).

252. This means the employee should be provided equipment such as a mobile phone, laptop, and telecommunication system. See PIERRE BÉRASTÉGUI, ETUI POL’Y BRIEF 2021.05, TELEWORKING IN THE AFTERMATH OF THE COVID-19 PANDEMIC: ENABLING CONDITIONS FOR A SUCCESSFUL TRANSITION 7 (2021), <https://perma.cc/7PVQ-Y9FB>; cf. Lord, *supra* note 7, at 64.

employees.”<sup>253</sup> Private office space could also ensure that female workers have a space in which she can devote her time exclusively to work, without the distractions of household duties. The telework policy should include this provision. Similarly, the policy could provide specific solutions for workers who work in areas with poor or no internet access, who find it more difficult than others to work online.<sup>254</sup>

The telework policy should also cover, in detail, technological training for teleworkers and subsidization of preschool issues.<sup>255</sup> The precise duties of the employer in this regard, such as what the employer must provide each employee and at what amount, can be adapted to the concrete workplace and specified in the telework policy. Such a policy could include many details with adjustments for the specific positions and circumstances.

Finally, such a policy could also ensure that the specific needs of mothers, who find it more difficult to work remotely due to their preexisting gendered “personal” conditions, are also considered by the employer.<sup>256</sup> In other words, the telework policy must include special arrangements to deal with the difficulties of work-life balance. Since the hybrid nature of work from home has accentuated the traditional maternal role of women in the private sphere,<sup>257</sup> thus preventing mothers from equally succeeding while shifting to telework, the telework policy must include specific methods to resolve this inequality. This understanding is consistent with a broader interpretation of Title VII disparate impact theory, which requires employers to remove “artificial, arbitrary, and unnecessary barriers” that prevent underprivileged groups from equally succeeding in the workplace.<sup>258</sup>

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253. Lord, *supra* note 7, at 64.

254. See CORBETTA, *supra* note 7, at 22–23.

255. See *supra* notes 195–197 and accompanying text.

256. On the ability of employees’ representatives to adapt a policy to specific groups of employees—such as parents—with their unique characteristics and needs, see Einat Albin, *Sectoral Disadvantage: The Case of Workers in the British Hospitality Sector* 274 (Jan. 10, 2010) (Ph.D. thesis, University of Oxford) (on file with the British Library, University of Oxford).

257. Compare to the discussion in Schultz, *Telling Stories*, *supra* note 2, at 1756; Schultz, *Taking*, *supra* note 2, at 1010–11; Barzilay, *supra* note 43, at 125; Russo, *supra* note 43, at 144; Correll et al., *supra* note 43, at 1298, 1306–07, 1326; Cuddy & Fiske, *supra* note 43, at 706, 711, 715. See generally, e.g., Williams, *supra* note 43; Budig & England, *supra* note 43; Siegel, *supra* note 43.

258. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). For further elaboration, see *supra* note 144 and compare Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J. L. & POL’Y 203, 205–06, 212 (2021) (describing how accommodations regarding flexible working hours need to be made for

Some may justifiably argue that the concept of telework is a form of accommodation for working mothers that gives them a better work-life balance.<sup>259</sup> However, as was demonstrated throughout this article, since the hybrid nature of telework from home intensifies preexisting inequalities from the private domain in the professional sphere of the female teleworker, it is not enough to merely enable mothers to work from home. Other accommodations are also needed to promote gender equality.<sup>260</sup>

Such accommodations are already common in other countries, such as the EU level. According to the EU Directive on Work-Life Balance for Parents and Caregivers from 2019, parents and caregivers have a right to change the number of hours worked, times at which work is required, and the place of work.<sup>261</sup> This essentially means that caregivers can enjoy flexibility for both the place of work and the exact number of hours worked per day.<sup>262</sup> American scholars have made similar suggestions in the past to accommodate the caregivers in the workplace to provide equal opportunities, mainly by enabling flexible work schedules and flexible deadlines.<sup>263</sup> Other scholars'

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women with caregiving responsibilities in accordance with Title VII of the Civil Rights Act of 1964 similar to other accommodations analysis under the Americans With Disabilities Act).

259. See *supra* notes 60–66 and accompanying text.

260. Cf. Lisa Waddington & Mark Bell, *The Right to Request Flexible Working Arrangements Under the Work–Life Balance Directive — A Comparative Perspective*, 12 EUR. LAB. L.J. 508 (2021) (providing similar discussion regarding the right to ask for flexible work schedule in the EU and the fact that flexible work arrangements might be insufficient to promote gender equality due to the preexisting inequality between men and women in the private sphere).

261. EU Directive 2019/1158, *supra* note 63, art. 3, § 1(f), art. 9; see also Golyunker & Lorber, *supra* note 222, at 115.

262. Compare EU Directive 2019/1158, *supra* note 63, art. 3, § 1(f), art. 9 with Jane Lewis & Mary Campbell, *UK Work/Family Balance Policies and Gender Equality, 1997–2005*, 14 SOC. POL. 4, 5–6 (2007) (highlighting the British policy that enables parents (both mothers and fathers) to request flexible work arrangements from the employer, including from home, due to their familial responsibilities). As noted by Golyunker & Lorber, “all employees can request a change of working time or arrangements under section 80F of the British Employment Rights Act 1996. Golyunker & Lorber, *supra* note 222, at 116 (emphasis added). Note, however, that this is only a right to request flexible work arrangements, and that in the British context as well, there is a special emphasis on parents and care givers. See *id.* at 116–117. See generally SARAH TIPPING ET AL., DEP’T FOR BUS. INNOVATION & SKILLS, THE FOURTH WORK-LIFE BALANCE EMPLOYEE SURVEY 99–111 (2012), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32153/12-p151-fourth-work-life-balance-employee-survey.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32153/12-p151-fourth-work-life-balance-employee-survey.pdf) (providing data from UK on parents and caregivers).

263. See, e.g., Travis, *supra* note 258, at 205–06; Rachel Arnow-Richman, *Accommodation Subverted: The Future of Work/Family Initiatives in a “Me, Inc.” World*, 12 TEX. J. WOMEN & L. 345, 358 (2003); Peggie R. Smith, *Accommodating Routine Parental*

proposals have primarily been made as part of the legal duty to accommodate workers under Title VII.<sup>264</sup> Similarly, the telework equality policy should delineate specific methods to accommodate primary caregivers' ability to conduct work from a distance in accordance with their position and tasks. To guarantee that this sort of adaption would not strengthen the stereotypical image of a woman as a primary caregiver and, accordingly, as a "bad worker,"<sup>265</sup> the equality policy should apply to all genders of teleworkers who are the caregivers in their households.<sup>266</sup>

The telework policy should, thus, include an adapted working timeline that takes into consideration the worker's familial burdens and ongoing tasks. This enables the worker to perform her professional duties in a way that accommodates her familial obligations. Likewise, the telework policy must cover the unique commitments that parents have during certain times, from unprecedented pandemics to ordinary holidays and children's sick days, when a child is present with the teleworker-parent and may impact her work production. The employer's telework policy must specify the specific forms of relief and adjustments for teleworkers who are also parents, adapted to the specific workplace and its specific positions. To ensure that the worker's voice is truly heard and taken into consideration, this policy must also be developed together with employees or their representatives.

### V. Conclusions

The COVID-19 pandemic has given everyone an unexpected glimpse of the future workplace and the new-old challenges it will bring. The pandemic has compelled the world to conduct a massive, powerful experiment regarding flexible working patterns, the ability to telework, and the far-reaching implications surrounding the challenges of gender inequality and intersectionality.

As this Article demonstrated, the hybrid sources of telework have brought the employee's private life and background—socioeconomically and as a woman—into her professional sphere, often interrupting her opportunities at

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*Obligations in an Era of Work-Family Conflict: Lessons from Religious Accommodations*, 2001 WIS. L. REV. 1443, 1445-78; Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J. L. REFORM 371, 457-59 (2001).

264. See Travis, *supra* note 258, at 227-28.

265. See Schultz, *Taking*, *supra* note 2, at 1010-11.

266. Cf. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 221 (2000) (arguing that laws designed to protect caregiving should be gender neutral).

work. By so doing, intersectionality has exposed how socioeconomic and gender inequalities are embedded in American society, reproducing themselves in the labor market.<sup>267</sup> Similarly, the telework case is a practical experiment revealing and validating the well-known gendered features of the challenge of work-life balance, as well as the intersectionality difficulty and its relevance for feminism.

In this sense, the COVID-19 pandemic offers a historic opportunity to adopt a governmental policy addressing the root problem of inequality in the future labor market. The telework trend rethinks current policies and emphasizes how much change is needed. The hybridity of telework—which combines the private and professional spheres—makes it obvious that the required policy changes cannot focus on one domain only. Changes must tackle all the domains relevant to the issue at stake. Equally, the telework difficulty shows how policy changes cannot focus on one entity only—both employers and governmental authorities must be involved. This sort of complex solution will enable more equality for women in general, specifically for women from underprivileged backgrounds. A complex solution with input from all actors can solve the specific difficulty of the shift to telework, while shedding light on what modifications are required to promote more equality in the future technological labor market.

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267. *See supra* Section II.B.