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Still Hostile after All These Years - Gender, Work & (and) Family Revisited

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Foreword

STILL HOSTILE AFTER ALL THESE YEARS? GENDER, WORK & FAMILY REVISITED

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IN 1979, feminist legal scholar Mary Joe Frug, then a faculty member at Villanova University School of Law, published her path-breaking article, *Securing Job Equality for Women: Labor Market Hostility To Working Mothers.*[1] Professor Frug's article was one of the first to examine the structural barriers that impede the achievement of equality for women workers, particularly those with significant child care responsibilities.

Twenty years have now passed since the publication of Professor Frug's article, and women have made some impressive gains. More women than ever are now employed, and the wage gap between full-time male and female workers has narrowed.[2] Within the legal profession, significant numbers of women are now partners, professors, prosecutors and judges. At Villanova and elsewhere, women make up close to fifty percent of a typical law school entering class. Yet other things have remained static. To a significant extent, the labor market continues to be organized, in Professor Frug's words, "as if workers do not have family responsibilities."[3] Moreover, women continue to perform a disproportionate share of childcare and other household labor, whether or not they also work outside the home.[4]

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1. Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility To Working Mothers*, 59 B.U. L. REV. 55 (1979).

2. In 1979, women who were employed full-time, year round, earned, on average, 57% as much as men. *See id.* at 55. By 1997, that gap had narrowed to 73%; it has remained unchanged since then. *See* Charles Babington, *Household Incomes Are At a High; Poverty Drops in South, Census Bureau Reports*, WASH. POST, Oct. 1, 1999, at A-3 (discussing most recent census bureau figures on earnings gap between men and women).

3. Frug, *supra* note 1, at 56.

4. *See* Joan Williams, *Market Work and Family Work in the 21st Century*, 44 VILL. L. REV. 305, 308-09 & n. 28 (1999) (noting that American women still perform approximately eighty percent of child care and two-thirds of housework).

The articles that make up this Symposium were first presented at a conference in honor of Professor Mary Joe Frug, held at Villanova Law School on November 7, 1998. The goal of the conference was to re-examine the work-family issues raised by Professor Frug's seminal article and to explore the extent to which the labor market remains hostile to working mothers (and fathers). To that end, conference presenters examined the assumptions about gender, parenthood and race that govern the contemporary organization of market and family work and that underlie current government tax and benefit programs. Conference participants also explored the ways in which existing antidiscrimination laws and equality theory can be used to challenge these structural barriers. The Symposium's re-examination of Professor Frug's work also included a renewed focus on the gendered division of household labor and the impact of this division of labor on women's equality on the job.

Taken together, the Symposium articles emphasize three themes. First, despite two decades of legal and social reform, the labor market remains distinctly unfriendly—if not downright hostile—to working mothers. As Joan Williams explains in her keynote article, the bland reassurance that "most women now work" masks the reality that labor market success continues to be framed around an "ideal worker," unencumbered by childcare responsibilities and with access to a flow of family services.[5] Because few mothers can perform as ideal workers, women's enhanced market participation has not translated into economic security, nor has it resulted in equality on the job.[6] As Professor Williams succinctly puts it, "[o]ur economy is divided into mothers and others."[7]

Several of the other Symposium authors explore the ways in which core aspects of our legal and economic system reinforce traditional gender and family roles. For example, in his article, *The Burdens of Benefits*, Professor Edward J. McCaffery argues that many of our most pervasive tax and government benefits programs are designed "to enhance and entrench, to aid in the restoration of, or to provide a plausible replacement to, the preferred model of the patriarchal family."[8] McCaffery shows how benefits programs such as social security and joint filing status for married couples, which are designed to *reinforce* traditional family roles, are easily assimilated into the status quo and quickly lose their perceived status as benefits.[9] By contrast, programs such as welfare and the earned income tax credit, which are designed to *substitute* for the formation of a one-earner, two-parent household, continue to be perceived as problematic and are constantly evaluated in consequential terms.[10] Thus, McCaffery

5. *See id.* at 311-12.

6. *See id.* at 313-14.

7. *Id.* at 314.

8. Edward J. McCaffery, *The Burdens of Benefits*, 44 VILL. L. REV. 445, 446 (1999).

9. *See id.* at 452-73.

10. *See id.* at 473-93.

argues that although virtually all government programs create both benefits and burdens, "the benefits that benefit the core cases rarely get noticed and are generally entrenched, while the ones that benefit non-core case are constantly noticed and are constantly at risk."[11]

In *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourses*, Professor Tonya Brito focuses on the assumptions about gender and race that construct the dominant images of welfare mothers in the United States.[12] Brito argues that Progressive Era reformers embraced and successfully exploited the prevailing, racialized images of mothers in order to win passage of early welfare legislation.[13] Current welfare reform efforts reflect this negative legacy and project an image of women on welfare that undermines their role as parents.[14] Brito urges the construction of a new positive ideology of motherhood that emphasizes the common experiences of mothers on welfare and working mothers in the general population.[15] She draws on the image of the "Second Shift Mom" as the basis for such a unifying, positive ideology, arguing that this image "accurately reflects the experience of all working mothers, regardless of race, marital status or welfare receipt."[16]

A second theme that emerges from the articles is the close relationship between gender equality in the workplace and the division of labor at home. As both Professor Joan Williams and Professor Naomi Cahn remind us, women still devote at least twice as much time as men to childcare and other household tasks, even when both partners are employed.[17] Moreover, women's disproportionate responsibility for childcare and other household labor is at the heart of both economic and sociological explanations for the persistent wage gap between male and female workers.[18] Indeed, Professor Michael Selmi argues that one reason the Family and Medical Leave Act has had such a limited effect on workplace equality is that it fails to address this persistent domestic labor gap.[19]

Several of the Symposium articles offer explanations for the persistence of the gendered division of household labor. In her article, *Gendered Identities: Women and Household Work*, Professor Naomi Cahn argues that while men obviously benefit from the current unequal division of household labor, women benefit as well.[20] Cahn suggests that although the

11. *Id.* at 492-93.

12. *See* Tonya L. Brito, *From Madonna to Proletariat: Constructing a New Ideology of Motherhood in Welfare Discourse*, 44 VILL. L. REV. 415 (1999).

13. *See id.* 417-25.

14. *See id.* 425-35.

15. *See id.* at 441.

16. *Id.* at 417.

17. *See* Naomi R. Cahn, *Gendered Identities: Women and Household Work*, 44 VILL. L. REV. 525 (1999); Williams, *supra* note 4, at 309.

18. *See* Michael Selmi, *The Limited Vision of the Family and Medical Leave Act*, 44 VILL. L. REV. 395 (1999).

19. *See id.*

20. *See* Cahn, *supra* note 17, at 526-28.

overall structure of power within the household is patriarchal, women exercise power within that space as a result of their caretaking responsibilities.[21] This household power base exists because women have performed the work expected of their gender.[22] "By mothering children, a woman affirms her identity to herself and to the public."[23] Relinquishing this aspect of gender performance will not be easy for women; both psychological and practical barriers loom large.[24] But Professor Cahn asserts that changing the gendered nature of child care is critical to achieving workplace equality and that women, as well as men, must work to bring this about: "workplace change will be hampered until women relinquish some of the power that they have at home."[25]

In *Caring Enough: Sex Roles, Work and Taxing Women*, Professor Amy Wax offers an alternative explanation for the legal and social norms that reinforce women's traditional domestic roles.[26] Wax begins by asking why societies have developed norms that sharply separate the roles of men and women in general, and that severely restrict the sale of women's labor in particular.[27] She rejects both the traditionalist answer that such norms are natural or inevitable and the conventional feminist view that sex role restrictions are designed to benefit men at women's expense.[28] Instead, Wax posits that sex role restrictions function as a solution to a set of collective action problems that distort the allocation of labor, particularly female labor, away from the care and nurturing of children.[29] Wax argues that because the nurturing of children produces positive externalities —benefits that inure to persons other than the individual nurturer—economic theory predicts that such nurturing will be under-supplied relative to some socially optimal level.[30] One way to cut down on this under-supply is to reduce the opportunities for—and payoffs from—alternative allocations of female labor.[31]

Wax concedes that such a "solution" to the under-supply of caretaking has significant costs, both to individual women and to society as a whole.

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21. *See id.* at 526.

22. *See id.* at 526-27.

23. *Id.* at 528.

24. *See id.* at 536-41 (examining barriers to reallocation of household labor).

25. *Id.* at 526.

26. *See* Amy L. Wax, *Caring Enough: Sex Roles, Work and Taxing Women*, 44 VILL. L. REV. 495 (1999).

27. *See id.* at 496-504.

28. *See id.* at 505-09.

29. *See id.* at 510-18.

30. *See id.* (asserting that market will outbid caring sector not because varieties of market work are necessarily more socially valuable than work done in home, but because unregulated markets do not pay women enough to lure them into domestic tasks).

31. *See id.* (noting that traditional sex role restrictions evolved in response to recalcitrant forms of market failure generated by externalized benefits to free-riding third parties).

She suggests, however, that these costs may be partially offset by social benefits, particularly to children.[32] Indeed, Wax suggest that "the primary effect of traditional sex role norms may have been to increase the well-being of children at the expense of women as a group."[33] If this is true, then removal of the legal and social barriers that limit women's participation in the market may not be an unmitigated social good, particularly if these efforts are not accompanied by other measures designed to ensure an adequate supply of caregiving.[34]

A third theme that emerges from the Symposium is the importance of taking a multipronged approach to the achievement of gender equality in the workplace. For example, Professor Martha Chamallas focuses on Title VII disparate treatment liability in her article, *Mothers and Disparate Treatment: The Ghost of* Martin Marietta.[35] Chamallas asserts that Title VII's ban on disparate treatment of men and women—the most frequently used theory of liability—should bar employers from making assumptions about how individual women will combine their careers and families.[36] Thus, "employers should not be able to presume that once a woman has her first child, or a subsequent children, she will drop out of the workforce, or that she will want to work only part-time. Nor should employers be able to presume that working mothers are less committed to their Job, or less interested in advancement, travel or demanding new assignments."[37] As Professor Chamallas notes, this understanding of the statutory ban on disparate treatment "means that Title VII challenges the conventional wisdom that a woman will place her family obligations before her responsibilities on the Job."[38] In support of this interpretation, Professor Chamallas points to several recent cases in which plaintiffs have successfully pursued disparate treatment claims based, in part, on an employer's stereotyped views of working mothers.[39] Although many plaintiffs will lack such "smoking gun" evidence of disparate treatment, Chamallas' analysis underscores the importance of disparate treatment theory in affording women the "opportunity to convince a jury that, in their case, the work/family conflict was all in the employer's mind."[40]

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32. *See id.* at 505 (discussing gender norms, "rent-seeking" by men at women's expense and complex patterns of intra and intergenerational transfers that shunted resources from selective persons of both sexes to others and most importantly, to children).

33. *Id.* at 518.

34. *See id.* at 523 (suggesting that heavy dose of caring and other "women's work" is vital to society and that such work is potentially in short supply).

35. Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of* Martin Marietta, 44 VILL. L. REV. 337 (1999).

36. *See id.* at 337-39.

37. *Id.* at 338.

38. *Id.*

39. *See id.* at 348-54.

40. *Id.* at 353.

In his article, *The Limited Vision of the Family and Medical Leave Act*, Professor Michael Selmi focuses on the shortcomings, as well as the transformative potential, of federal family leave legislation.[41] Selmi argues that the current Family and Medical Leave Act (FMLA) has afforded little assistance to working women, and may have exacerbated, rather than reduced, existing gender-based inequalities in the workplace.[42] In part, this is because the FMLA has done little to disrupt the gendered patterns of behavior that continue to define men's and women's labor force participation. Selmi asserts that further progress toward workplace equality will require that working men begin to act more like their female counterparts—in particular, that more men take leave for purposes of caring for children.[43] One way to induce men to do this, Selmi contends, is to offer incentives to employers.[44] For example, Selmi suggests that eligibility for federal contracts could be tied to an employer's parental leave utilization rates.[45] Employers who have a strong record of men taking leave might receive a plus in the bidding process akin to existing programs for disadvantaged businesses.[46] As Selmi notes, inducing substantial numbers of men to take parental leave would have two important salutary effects. First, it would render less useful the signal that employers currently use to discriminate against women based on their projected labor force attachment.[47] Second, it would normalize an employment pattern traditionally associated with women, thereby helping to re-calibrate the expected balance between market and family work.[48]

While Professors Chamallas and Selmi focus on federal legislation, Professor Candace Saari Kovacic-Fleisher draws on the Supreme Court's recent equality jurisprudence to develop a constitutional theory for litigating work-family issues.[49] Professor Kovacic-Fleisher begins with *United States v. Virginia*,[50] in which the Court held that Virginia's refusal to admit women to a state-supported military academy violated the equal protection clause of the Fourteenth Amendment.[51] Significantly, the Court did not merely order VMI to admit women.[52] Rather, it noted that VMI would need to accommodate the differences between the sexes by making institutional alterations to its program.[53] Applying this reasoning to the em-

41. *See* Selmi, *supra* note 18, at 395-99.
42. *See id.* at 397.
43. *See id.*
44. *See id.* at 411.
45. *See id.*
46. *See id.* at 412.
47. *See id.* at 413.
48. *See id.*
49. *See* Candace Saari Kovacic-Fleischer, *Litigating Against Employment Penalties for Pregnancy, Breastfeeding and Childcare*, 44 VILL. L. REV. 355 (1999).
50. 518 U.S. 515 (1996).
51. *See id.*
52. *See id.* at 525.
53. *See id.*

ployment context, Professor Kovacic-Fleischer argues that "[i]f equality under the Fourteenth Amendment requires VMI not merely to admit women but also to accommodate their admission, then equality under Title VII should require the workplace now not merely to admit women, but also to adjust for them as well."[54]

Kovacic-Fleischer bolsters this equality theory by pointing to several of the Court's pregnancy discrimination cases. She notes that in *California Savings & Loan v. Guerra*,[55] the Court upheld a California statute that required employers to grant leave for pregnancy-related disability, even if the employer provided no other disability leave, on the ground that such leave was necessary to allow women, as well as men, to have families without losing their Jobs.[56] Several years earlier, in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,[57] the Court had held that Title VII required employers to cover the costs of pregnancy-related medical care not only for female employees, but for the spouses of male workers.[58] Failure to do so, the Court reasoned, would constitute sex-based discrimination against male employees with families.[59] Combining these decisions, Kovacic-Fleischer concludes that the Court has constructed a two-step approach to equality in the workplace.[60] Under that approach "[a]ccommodations for women's reproduction and childcare differences must be made for women to be equal to men in the workplace, and these accommodations, such as leave during childbirth and childcare leaves, must be extended to men so that they will be equal with women in the workplace."[61] Gender equality, so understood, requires that the workplace be restructured to allow both women and men engage in both family and market work.

Keynote author Joan Williams provides the theoretical framework that encompasses these various reform strategies. Williams challenges the conventional wisdom that anti-discrimination law offers few tools to address work-family conflict.[62] She proposes a paradigm shift that would identify an employer's refusal to accommodate family responsibilities as discrimination against women actionable under both Title VII and the Equal Pay Act.[63] "A system that requires workers to command the social power of men in order to get good jobs is one that discriminates against women in both the vernacular sense of being inconsistent with our ideals of gender

54. Kovacic-Fleischer, *supra* note 49, at 362.

55. 479 U.S. 272 (1987).

56. *See id.* at 273.

57. 462 U.S. 669 (1983).

58. *See id.*

59. *See id.* at 677.

60. *See* Kovacic-Fleischer, *supra* note 49, at 368.

61. *Id.*

62. *See* Williams, *supra* note 4, at 305-06.

63. *See id.* at 306.

equality and in the traditional sense of having a disparate impact on women that is not justified by business necessity."[64]

Although acknowledging that litigation is not the ideal means of social change, Williams' analysis reminds us that "legal liability has a remarkable ability to focus the mind."[65] Moreover, the paradigm shift that Williams proposes would also empower fathers to break away from the provider role that domesticity scripts for them. As Williams reminds us, once the marginalization of committed parents is recognized as actionable discrimination, "the result will be to unbend gender for men as well as women."[66] Scholar, reformer and post-modern critic Mary Joe Frug would undoubtably have approved.[67]

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64. *Id.* at 317.

65. *Id.* at 333.

66. *Id.* at 336.

67. *See, e.g.*, Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045 (1992) (discussing role of legal system in creating and maintaining gender identities).