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SYMPOSIUM ARTICLES

BEYOND THE GLASS CEILING: THE MATERNAL WALL AS A BARRIER TO GENDER EQUALITY

Joan C. Williams*

My subject is motherhood. More specifically, the intertwining of motherhood, economic vulnerability, and social stigma. We've all heard about the glass ceiling and I'm sad to say that the glass ceiling is alive and well in America. But most women never get near it because they are stopped long before by the maternal wall.

Over eighty percent of women become mothers.[1] And although the wage gap between men and women is actually narrowing, the wage gap between mothers and other adults has actually risen in recent decades. Although young women now earn about ninety percent of the wages of men, mothers still earn only about sixty percent of the wages of fathers.[2] This is what's called the family gap, as distinguished from the wage gap.

Much of this family gap stems from the ways we organize the relationship of market work to family work. We still define the ideal worker as someone who starts to work in early adulthood and works full-time, full force, for forty years straight, taking no time off for childbearing, childrearing, or really anything else. That's not an ungendered norm. Because, after all, who needs time off for childbirth? It's women. And who needs time off for childcare? American women still do seventy to eighty percent of it.[3] In my book *Unbending Gender*, I argue that designing work-

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1. Sara Raley & Suzanne Bianchi, Tabulations based on the 2001 March Current Population Survey, for the Program on Gender, Work & Family (on file with author).

2. Jane Waldfogel, *The Family Gap for Young Women in the U.S. and Britain: Can Maternity Leave Make a Difference?*, 16 J. LABOR ECON. 505, 507 (1998).

3. JOAN WILLIAMS, UNBENDING GENDER: WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT 2 (2000) [hereinafter WILLIAMS, UNBENDING GENDER].

place ideals around this "ideal worker" means that they are designed around men's bodies and men's traditional life patterns in a way that discriminates against women.[4]

For the past several years, with very generous support from the Alfred P. Sloan Foundation to the Program on Work/Life Law, I have followed up on this discrimination analysis through two interrelated efforts.

First, we did a comprehensive survey and looked at every state and federal case in the country that involved family caregivers suing when they felt that they had been unfairly treated. We looked at cases involving men as well as women; in fact, some of the most interesting cases involved men, although, of course, the overwhelming majority involved women. What we found was that family caregivers were beginning to sue, and were beginning to have some success when they sued on the basis of being unfairly disadvantaged due to caregiving responsibilities.[5]

The second major effort, of which Professor William Bielby was a part, was to establish a Cognitive Bias Working Group, to bring together experienced litigators with law professors and social psychologists (both psychologists and sociologists). The Working Group reviewed the existing literature on stereotyping[6] and cognitive bias[7] and tried to shift the framework from thinking not only about *women as opposed to men,* but also about mothers – and fathers – on the front lines of family care. Today I will first discuss the case law. Then I'll discuss the patterns of stereotyping that affect family caregivers. I will end by situating my discussion within feminist theory.

First, the case law. As people know, there is no federal statute that forbids discrimination against adults with caregiving re-

4. *Id.* at 101-110.

5. *See* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003) (for a comprehensive discussion of the case law surrounding discrimination based on caregiving responsibilities).

6. *See, e.g.*, Susan T. Fiske et al., *A Model of (Often Mixed) Stereotype Content: Competence and Warmth Respectively Follow from Perceived Status and Competition*, 82 J. PERSONALITY & SOC. PSYCHOL. 878 (2002); Thomas Eckes, *Paternalistic and Envious Gender Prejudice: Testing Predictions from the Stereotype Content Model*, 47 SEX ROLES 99, 110 (2002).

7. *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (studying the implications of cognitive bias literature for Title VII law).

sponsibilities. Some state statutes do this. The best ones that we found are in Alaska[8] and D.C.[9] D.C. really is the model here. It's a statute that forbids discrimination against people with family responsibilities. In the absence of that kind of statute, plaintiffs have used more than a dozen legal theories when they go into court to challenge what they see as bias, usually against mothers, sometimes against fathers.[10]

For instance, there have been cases brought under the Equal Protection Act[11] and the Equal Pay Act,[12] as well as causes of action that have utilized state statutes such as D.C.'s.[13] In addition, we found some causes of action brought under state common law theories, notably wrongful discharge.[14] We found between twenty and thirty cases in which plaintiffs either won, settled successfully, or survived an employer's summary judgment motion—after which the parties often settle. The recoveries in some cases have been substantial.[15] One reported tentative settlement was for $495,000;[16] another settled for $625,000;[17] and the settlement for another was $665,000.[18] There have been jury verdicts in the millions. One jury verdict (later

8. ALASKA STAT. § 18.80.200 (Michie 2001).

9. D.C. CODE ANN. § 1-2512 (1981).

10. Available legal theories are: Title VII disparate treatment (42 U.S.C. § 2000e-2 (1964)); Title VII disparate impact (42 U.S.C. § 2000e-2 (1964)); Title VII hostile work environment and constructive discharge (42 U.S.C. § 2000e-2 (1964)); Title VII retaliation (42 U.S.C. § 2000e-2 (1964)); the Equal Pay Act of 1963 (29 U.S.C. § 206(d)(1)); the Family and Medical Leave Act of 1963 (29 U.S.C.A § 2601); the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101); Section 1983 (42 U.S.C § 1981); state common law actions based on wrongful discharge; and actions based on employment contracts, handbooks, and collective bargaining agreements.

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

12. Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1963).

13. D.C. CODE. ANN. § 1-2512 (1981).

14. *See, e.g.*, Bailey v. Scott-Gallaher, Inc., 480 S.E.2d 502 (Va. 1997); Roberts v. Dudley, 993 P.2d 901 (Wash. 2000).

15. Though some awards have been overturned or diminished upon appeal, such a process is costly. According to plaintiffs' attorneys, a top-tier law firm can easily charge a defendant several hundred thousand dollars just to take a simple discrimination case to trial, not including the cost of an appeal. Telephone Interview with Susan Huhta, Director, Equal Opportunity Project, Washington Lawyers' Committee for Civil Rights and Urban Affairs (Sept. 30, 2002) (on file with author).

16. Alison Schneider, *U. of Oregon Settles Tenure Lawsuit over Maternity Leave*, CHRON. HIGHER EDUC., July 21, 2000, at A12, *available at* http://chronicle.com/free/v46/i46/46a01202.htm; Marjorie Mosier, *Lisa Arkin v. University of Oregon: Settlement*, WAGE NEWSLETTER, no. 14 (Fall 2000), *available at* http://www.wage.org/doc/text/14arkin.html.

17. Walsh v. Nat'l Computer Sys., Inc., 00-CV-82, D.Minn, Order, Aug. 27, 2002.

reversed) was for $3 million,[19] and another in a Family Medical Leave Act[20] case was for over $11 million.[21] One company has actually now been sued three times by three different mothers.[22]

These kinds of numbers can really make employers sit up and take notice. About three quarters of these successful cases were brought after 1990, with the majority brought in the past five years. Plaintiffs are winning in large part because of a very open pattern of stereotyping that occurs in these cases, what I call "loose lips." These are remarkably frank and open statements by employers reflecting the view that mothers don't belong in the workplace, and that fathers don't belong on the front lines of family care.

Here are some examples. In a Tenth Circuit case, *Moore v. Alabama*,[23] a woman's supervisor looked at her walking across campus; she was eight months pregnant. He stared at her belly and said, "I was going to make you head of the office, but look at you now."[24]

In a Virginia state wrongful discharge case, *Bailey v. Scott-Gallaher*,[25] a mother called up her employer to find out when she was supposed to return from maternity leave. He told her that a mother's place was at home with her child, and that she

18. Knussman v. Maryland, 272 F.3d 625 (4th Cir. 2001). Damages were reduced to $40,000 on appeal, although including attorneys' fees the total amount awarded was well over $600,000.

19. Ann Belser, *Mommy Track Wins*, PITTSBURGH POST-GAZETTE, Apr. 30, 1999, at B1, *available at* http://www.post- gazette.com/regionstate/19990430law-suit2.asp. The verdict was later overturned by the judge, and the case ultimately settled. Telephone Interview with Joel Sansone, Attorney for Plaintiff Kathleen Hallberg (Nov. 25, 2002) (on file with author).

20. 29 U.S.C. § 2601 (1963).

21. Schultz v. Advocate Health and Hospitals Corp., No. 01C- 0702, 2002 U.S. Dist. LEXIS 9517 (N.D. Ill. May 24, 2002); *see also* Dee McAree, *Family Leave Suit Draws Record $11.65M Award*, NAT'L L.J., Nov. 11, 2002, at A4. The elements of a retaliation claim under the FMLA are as follows: (1) the plaintiff is protected by the FMLA; (2) the plaintiff suffered adverse employment action; and (3) the plaintiff was treated less favorably than an employee who had not requested leave under the FMLA, or the adverse action was taken because the employee took FMLA leave.

22. Trezza v. The Hartford, Inc., No. 98 Civ. 2205, 1998 U.S. Dist. LEXIS 20206, at *1 (S.D.N.Y. Dec. 30, 1998); Goldstick v. The Hartford, Inc., No. 00 Civ. 8577, 2002 U.S. Dist. LEXIS 15247 (S.D.N.Y. Nov. 9, 2000) (settled for an undisclosed amount); Capruso v. The Hartford, Inc., No. 01 Civ. 4250 (complaint filed and removed to S.D.N.Y. May 18, 2001).

23. 980 F. Supp. 426 (M.D. Ala. 1997).

24. *Id.* at 431.

25. 480 S.E.2d 502 (Va. 1997).

was fired "because she was no longer dependable since she had delivered a child."[26]

A third was the $3 million jury verdict, where the president of a woman's company said, "Look, you've got to decide, do you want a baby or do you want a career here?"[27] All these cases involve what psychologists call hostile prescriptive stereotyping.[28]

In fact, we find not only gender policing of women into caregiving roles, but also gender policing of men out of caregiving roles. Here the leading case is *Knussman v. Maryland*.[29] In that case, Trooper Knussman wanted to take three months paid leave off under a Maryland state statute and the Family Medical Leave Act.[30] Because his wife had been put on bed rest due to complications concerning the pregnancy, he wanted three months off after she delivered. His supervisor told him that in order for him to be eligible his wife would have to be "in a coma or dead."[31]

These cases suggest that employers now know enough not to say, "we don't hire women here," but they don't get it when it comes to caregiving. The cases suggest that mothers encounter statements that track documented comments of gender stereotyping, which employers evidently consider no more than "hard truths" or "tough love" rather than gender bias. The result is hostile prescriptive stereotyping, in the forms of statements that prescribe traditionalist roles for both men and women. In addition to this pattern, we also see what's called benevolent stereotyping.[32]

Here, the best story emerged from an interview on a project I co-direct with Cynthia Calvert, called the Project on Attorney Retention (PAR),[33] which studies work/life issues in the legal

26. *Id.* at 503.

27. Belser, *supra* note 19, at BI.

28. *See* Peter Glick & Susan T. Fiske, *Hostile and Benevolent Sexism: Measuring Ambivalent Sexist Attitudes Toward Women*, 21 PSYCHOL. OF WOMEN Q. 119 (1997).

29. *Knussman*, 272 F.3d at 625.

30. 29 U.S.C. § 2601 (1963).

31. *Knussman*, 272 F.3d at 630.

32. *See* Peter Glick & Susan T. Fiske, *Sexism and Other "Isms": Interdependence, Status, and the Ambivalent Context of Stereotypes*, *in* SEXISM AND STEREOTYPES IN MODERN SOCIETY: THE GENDER SCIENCE OF JANET TAYLOR SPENCE 206-07 (William B. Swann, Jr. et al. eds., 1999).

33. For more information about the PAR project, visit http://www.pardc.org.

profession. We heard of two lawyers, a husband and wife, who worked for the same firm. After they had a baby, the wife was sent home like clockwork at 5:30 – after all, she had a baby to take care of. The husband was kept late almost every night – after all, he had a family to support. That's called benevolent stereotyping. It's stereotyping done in a very different tone of voice than hostile stereotyping, but the effect is much the same: the employer polices men and women into traditionalist bread-winner/housewife roles—clearly an inappropriate role for an employer to play.

Another example of benevolent stereotyping is in *Trezza v. The Hartford, Inc.*[34] The Hartford is the company that's been sued three times by three different mothers.[35] *Trezza* involved a woman who was going great guns until she had kids, and then, like many women, she began to experience problems. In one context she was not considered for a promotion; when she asked why, they told her that it was because the job required travel.[36] That's benevolent stereotyping. The appropriate thing for the employer to do is to ask the woman what she wants to do; many mothers don't mind travel.

In the caregiver context, one key study by Susan Fiske and her colleagues, ranked stereotypes by perceived competence.[37] Fiske and her colleagues found that businesswomen were rated as very high in competence, similar to businessmen and millionaires. Housewives, on the other hand, were rated as very low in competence – similar to – (here I quote the researchers) the elderly, blind, "retarded," and "disabled."[38]

To see how the caregiver stereotype operates in practice, let's recall the famous story of the Boston attorney who returned from maternity leave and found she was given the work of a paralegal. She said, "I wanted to say, 'Look I had a baby, not a lobotomy.'"[39] What happened? She was taken out of the high

34. No. 98 Civ. 2205, 1998 U.S. Dist. LEXIS 20206, at *1 (S.D.N.Y. Dec. 30, 1998).

35. Williams & Segal, *supra* note 5, at 81.

36. *Tressa,* No. 98 Civ. 2205, 1998 U.S. Dist. LEXIS 20206 at *3.

37. Fiske, *A Model of Stereotype Content, supra* note 6.

38. *Id.*

39. Joan Williams, *From Difference to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT L. REV. 1441, 1476 (2001) (quoting Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585,588 (1996)).

competence "business woman" category and put into the low competence caregiver category.

Understanding this process is very important for understanding the kinds of problems mothers often experience at one of three particular moments in time: when they get pregnant, return from maternity leave, or go on a flexible work arrangement.

In many workplaces, of course, mothers do not experience any problems. But, in some workplaces, stereotyping begins immediately when a woman gets pregnant.[40] Thus, in one law firm case, a pregnant woman lawyer found that she was subject to rumors and isolated from participation in firm activities upon announcing her pregnancy.[41] In other cases, as in the case of the Boston lawyer,[42] the stereotyping occurs when a woman returns from maternity leave.

But, in many cases, women who have not had problems when they got pregnant or returned from maternity leave, find they do have problems if they go part-time or on a flexible work arrangement. For example, in work-family studies, there is a lot of talk now about the job detriments associated with the use of family friendly policies.[43] Combining this finding with empirical social psychology suggests that the flexible work arrangements so often are viewed as career stoppers because they trigger the stereotype of the housewife or caregiver. This seems particularly true when the businesswomen-housewife studies[44] are juxtaposed with another earlier study that shows that women who work part-time are viewed primarily as homemakers rather than as employees or workers[45] and a more recent study that reports that work-

40. Of particular interest is a study analyzing pregnancy as a source of bias in performance evaluations. This study found that "performance reviews by managers plummeted after pregnancy." Jane A. Halpert, Midge L. Wilson & Julia Hickman, *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. ORGANIZATIONAL BEHAV. 649, 650 (1993).

41. Sigmon v. Parker Chapin Flattau & Klimpl, 901 F. Supp. 667, 671-72 (S.D.N.Y. 1995) (where the discrimination occurred after the plaintiff announced her pregnancy and continued after the plaintiff returned from maternity leave).

42. Williams, *From Difference to Domesticity, supra* note 44, at 1476.

43. *See, e.g.*, Jennifer Glass, *Blessing or Curse? Family Responsive Policies and Mothers' Wage Growth* (unpublished manuscript) (on file with author); ARLIE RUSSELL HOCHSCHILD, THE TIME BIND: WHEN WORK BECOMES HOME & HOME BECOMES WORK, 25-34 (1997).

44. Fiske, *A Model of Stereotype Content, supra* note 6.

45. Alice H. Eagly & Valerie J. Steffen, *Gender Stereotypes, Occupational Roles, and Beliefs About Part-Time Employees*, 10 PSYCH. OF WOMEN Q. 252, 254 (1986). *See also* Claire Etaugh & Cara Moss, *Attitudes of Employed Women Toward Parents*

ing mothers are rated as more similar to housewives than to businesswomen.[46]

The psychological literature that provides insights into what's going on with women also provides very important insight into what's going on with men. One significant study is by Monica Biernat and Diane Kobrynowicz. They compared the "good father" to the "good mother," and they found a lot of overlap.[47] But they also found one key difference, in the time culture of parenthood. The "good mother" was viewed as someone who was always available to her children. Consequently, a man who rated himself as a very good father actually spent about the same amount of time away from his kids as a woman who rated herself as only an alright mother.[48] When a woman cuts back her hours, she may trigger stigma of various sorts and cease to be considered an ideal worker, at least she'll often be considered an ideal mother. The same is not true of many fathers. Nick Townsend, in a wonderful recent book, *The Package Deal*, pointed out that our ideals of fatherhood retain a strong emphasis on fathers as the providers.[49] And studies of masculinity by Scott Coltrane and others document how we still tie masculinity very tightly into the size of a paycheck.[50] These studies help us understand why the chilly climate for mothers at work often becomes a frigid climate for fathers who take an active role in family care. This frigid climate can give rise to some troubling situations. For example, in another PAR interview, we heard of men who literally had been told different things about the availability of part-time work than the women in their law firms.[51] This

Who Choose Full-Time or Part-Time Employment Following Their Child's Birth, 44 SEX ROLES 611 (2001).

46. Amy J.C. Cuddy, Susan T. Fiske, & Peter Glick, *Working Moms Can't Win: Mothers are Incompetent and Career Women are Unkind*, J. SOC. Iss. __(forthcoming) (on file with author).

47. Diane Kobrynowicz & Monica Biernat, *Decoding Subjective Evaluations: How Strategies Provide Shifting Standards*, 33 J. EXPT. SOC. PSYCHOL. 579, 587-88 (1997).

48. *Id.* at 588.

49. NICHOLAS W. TOWNSEND, THE PACKAGE DEAL: MARRIAGE, WORK, AND FATHERHOOD IN MEN'S LIVES 117-37 (2002).

50. SCOTT COLTRANE, FAMILY MAN: FATHERHOOD, HOUSEWORK, AND GENDER EQUITY 53 (1996); Robert E. Gould, *Measuring Masculinity by the Size of a Paycheck, in* MEN AND MASCULINITY 96 (Joseph Pleck & Jack Sawyer, 1974).

51. Joan Williams & Cynthia Thomas Calvert, *Balanced Hours: Effective Part-time Policies for Washington Law Firms*, 8 WM. & MARY J. WOMEN & L. 357, 398 (2002).

does not look good from a legal standpoint, for it involves disparate treatment of women and men.

The stigma that's associated with flexible work arrangements also reflects various patterns of unexamined bias. Here again, I will refer to an interview from PAR:

> Before I went part-time and people called and found that I wasn't at my desk, they assumed I was somewhere else at a business meeting. But after I went part-time, the tendency was to assume that I wasn't there because of my part-time schedule, even if I was out at a meeting. Also, before I went part-time, people sort of gave me the benefit of the doubt. They assumed that I was giving them as fast a turn-around as was humanly possible. This stopped after I went part-time. Then they assumed that I wasn't doing things fast enough because of my part-time schedule.[52]

As a result, she said, she used to get top-of-the-scale performance reviews, but now she didn't, "even though, as far as I can tell, the quality of my work has not changed."[53] Here we can identify three types of unexamined bias.

The first is attribution bias. When she was full-time and was not there, her co-workers attributed her absence to legitimate business reasons. But when she was part-time, and they found her not there, they attributed her absence to family reasons—even if she was at a business meeting.

The second kind of bias is called in-group favoritism. The in-group for this purpose is full-timers, and the out-group is part-timers, who are almost exclusively female. When the informant was in the in-group, she was given the benefit of the doubt. But after she went part-time, she was in the out-group and that stopped. The literature on in-group favoritism provides fascinating and important insights into objective rules, which have often been considered to be the key to eliminating bias. According to Marilyn Brewer, one of the leading scholars in this area, "Coldly objective judgment may be reserved for outsiders."[54] Thus, when this attorney was in the in-group they gave her the benefit of the

52. Interview, confidentiality promised, in Washington, D.C. (Fall 2002) (on file with author).

53. *Id.*

54. *See* Marilynn B. Brewer, *In-Group Favoritism: The Subtle Side of Intergroup Discrimination*, *in* CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 59 (David M. Messick & Anne E. Tenbrunsel eds., 1996)

doubt, whereas when she went part-time they threw the book at her.

Finally, in this PAR interview, we recall the businesswoman housewife studies,[55] and, in particular, the study that found that women employed part-time were viewed similar to "housewives."[56] In other words, women who worked part-time were viewed more as housewives rather than as businesswomen.

The implication of all these studies is that the chilly climate for family caregivers at work, including the stigma that attaches to many part-time and other flexible work arrangements, stems in part from gender stereotyping. Gender stereotyping, in certain fact patterns, may be successfully challenged in court.

This is important for several reasons. It's important, first because this stereotyping could give rise to liability; that's an important message for employers. Yet, at this point, you need very particular sets of facts in order for liability to arise. But the case law suggests, even at this early point, that if an employer has a family-hostile workplace and an employee with "loose lips," family caregiving issues can take on a legal dimension. For an employer, that's a sobering message, because how many employers know what every single employee is doing? All an employer needs is a few employees with extremely traditional attitudes, and you are looking at a situation that could become very uncomfortable.

This is particularly true given that maternal wall cases can be litigated as "family values" cases. Consider the case of *Walsh v. National Computer Systems*.[57] *Walsh* was the $625,000 case covered by CBS Nightly News when we issued our initial *New Glass Ceiling* report.[58] The facts of this case are vivid: the plaintiff's supervisor is alleged to have thrown a phone book at her and told her to find a new pediatrician because her son got a series of ear infections. Jim Caster represented the mother. The story he told in court was that his client was being made to choose between being a good mother and being a good worker. "And you

55. Fiske, *A Model of Stereotype Content*, *supra* note 6.

56. Eagly & Steffen, *supra* note 50, at 259.

57. Walsh v. Nat'l Computer Sys., Inc., 00-CV-82, D.Minn, Order, Aug. 27, 2002.

58. *Fighting Maternal Discrimination*, Nov. 13, 2002, *available at* http://www.cbsnews.com/stories/2002/11/13/eveningnews/main529258.shtml; Joan Williams & Nancy Segal, *The New Glass Ceiling: Mothers & Fathers Sue for Discrimination* (Revised 2002), *available at* http://www.worklifelaw.org.

know," he said, "that made the jury really mad" – $625,000 mad.[59]

These cases can, and should, be framed around family values. There is a very widespread and uncontroversial sense that children need and deserve time with their parents. That's one of the things that give these cases "legs."

Our case law survey not only shows that the threat of legal liability is real, it also has important implications outside the courtroom. The literature on the new institutionalism shows that once a social situation begins to be perceived through the lens of discrimination, employers often go far beyond what legal cases initially require.[60] Take for example sexual harassment initiatives that end up with no dating policies.

Are no dating policies required by Title VII? Of course not. So why do they emerge? One reason is that, in the United States, anti-discrimination law operates as a language of social ethics. When people begin to see something as "discrimination" in the U.S., they begin to act quite differently, without tight reference to the specific contours of case law. This is a peculiarity of American legal culture.

The institutionalism reminds us that lawyers, as litigators, are not the key delivery system for law-fueled social change. What drives change on the ground is really the response of intermediaries to the threat of litigation.[61] For example, in a recent speech to the Association of Work-Life Professionals, I said that for twenty years work/life professionals have tried to encourage employers to implement work-life policies with reference to the "business case" – the argument that family-friendly policies help employers' bottom line. Today, part of that business case is the potential for legal liability and work/life professionals stand to play a crucial role in shaping our sense of social entitlements in this arena.

At the Program on Work/Life Law, we work with employers, with employees, and with intermediaries such as work-life

59. Jim Kaster, Plaintiff Shirleen Walsh's Attorney, Remarks at the New Glass Ceiling Conference, Washington College of Law, Washington, D.C. (Jan. 24, 2003) (transcript on file with AM. U. J. OF GENDER SOC. POL'Y & L.).

60. *See, e.g.*, Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth,* 105 AM. J. SOC. 406, 408, 432-45 (1999).

61. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 523 (2001).

professionals and diversity experts. We're also working with attorneys on the management side as well as on the plaintiffs' side. Management side attorneys may ultimately play a more important role than plaintiffs' attorneys; if you're talking about fueling social change, the key role is not the lawyer as litigator, but lawyer as counselor. In response to the *New Glass Ceiling* report, one firm of management side employment lawyers advised their clients to review personnel policies to assess whether they adversely affect employees with family responsibilities; to "consider prorating at least some benefits for part-time employees"; to consider permitting flexible schedules and/or telecommuting unless this would impede productivity; to consider allowing employees to "borrow" sick leave from future years or other employees when they need it; and to avoid asking questions or making assumptions about employees' family situations, and "Instead, inquire about the ability to perform job functions and meet attendance and other job requirements."[62]

I want to end with a few words about feminist theory, by addressing the ghost of the old-fashioned sameness/difference debate. Unhappily, this debate has been recreated in contemporary law review articles on what's now increasingly being called the care work debate.[63]

The sameness/difference debate parallels the mommy wars one sees reported all of the time in the newspapers. Why is motherhood so divisive? Here's why. Faced with the ideal worker norm, designed around someone who takes no time off for childbearing or childrearing, feminists can take one of two tacks. Either they can seek to empower women in their undervalued traditionally feminine roles or they can seek to empower women by gaining access for women to highly valued traditionally masculine roles.

I call this the split between the femmes and the tomboys. The femmes are those who focus on empowering women in feminine roles. An example is Martha Fineman's proposal to celebrate the mother/child bond and to provide subsidies to enable

62. *Discrimination: A Glass Ceiling for Parents?*, 3 no. 6 D.C. EMP. L. LETTER (Krukowski, Costello, S.C.), November 2002 at 1.

63. *See* Joan Williams, *"It's Snowing Down South": How to Help Mothers and Avoid Recycling the Sameness/Difference Debate*, 102 COLUM. L. REV. 812 (2002) (arguing that the sameness/difference debate is being recycled); Symposium, *The Structures of Care Work*, 76 CHI.-KENT L. REV. 1389 (2001).

mothers to care for their children themselves.[64] She's embracing a traditionally feminine role, the mothering role, and trying to empower women within it.

The tomboys' goal is quite different. Their goal is to empower women by gaining access to traditionally masculine roles. This is the central thrust of feminism in the United States. An example is the move to open up construction jobs to women or the move to get women onto corporate boards. Both are tomboy initiatives, aimed at empowering women by moving them into traditionally masculine roles.[65]

So I ask the question. Should feminists seek to empower in traditionally feminine roles or should they seek to gain access to the preserves of masculinity? I think the answer is both. Gaining access to traditionally masculine roles is vitally important. It's important first to all the tomboys who want to play traditionally masculine roles, and it's also important because those are the roles that traditionally carry prestige, wealth, and power. Yet tomboy strategy really does not help the bulk of women whose lives still are framed by mothering and by traditional femininity. After forty years of feminism, I think it's time to realize the gender traditions have proven remarkably resilient. Over eighty percent of women become mothers, and when they do, two out of three mothers work less than forty hours a week year-round during the key career-building years.[66] In professions such as law, where full-time can mean fifty to sixty hours a week, this picture is even bleaker, because ninety-five percent of mothers age 25 – 44 work less than fifty hours a week year-round.[67] That's probably why eighty-seven percent of law firm partners are still men,[68] and why we see a glass ceiling that is created, in part, by a maternal wall.

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64. Martha Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U.J. GENDER SOC. POL'Y & L. 13, 26-27 (2000) (describing the new care work debate).

65. *See* Williams & Segal, *The New Glass Ceiling*, *supra* note 58 (for a discussion of various tomboy initiatives in feminist jurisprudence).

66. WILLIAMS, UNBENDING GENDER, *supra* note 3, at 2 (two out of three mothers, 25-44, work less than forty hours per week); Raley & Bianchi, *supra* note 1 (over 80% of women become mothers).

67. WILLIAMS, UNBENDING GENDER, *supra* note 3, at 2; Raley and Bianchi, *supra* note 1.

68. WILLIAMS, UNBENDING GENDER, *supra* note 5, at 67 (quoting ABA Comm'n on Women in the Profession, Women in the Law: A Look at the Numbers 3 (1995)).

Women don't need sameness if that means the ability to live up to the ideal worker norm without the flow of family work that supports men who are ideal workers. And they don't need difference if that means a marginalized mommy track. What they really need is simple equality. But what simple equality requires is deconstructing the ideal worker norm and replacing that with a norm of a balanced worker: a worker whose life requires him to balance work obligations and family obligations, because he is not relying on the erased labor of a stigmatized and economically vulnerable partner. We need to deconstruct gender, for men as well as for women—and to offer both men and women a reimagined world where family work and market work mesh.