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Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism

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Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism

JOAN C. WILLIAMS*

Justice Ruth Bader Ginsburg, since about 1980, has been painted as a feminist committed to “formal equality.” Recent work has contested this depiction. This Article uncovers additional evidence that Ginsburg’s goal was not mere formal equality; her goal was to deconstruct the breadwinner-homemaker system in which men and women were seen as belonging to separate spheres. Ginsburg saw this system as subordinating women, and in that sense is an antisubordination theorist. Yet lumping her together with Catharine MacKinnon, often seen as legal feminism’s foremost antisubordination theorist, proves confusing for a number of reasons. A chief difference is their attitudes towards men. While MacKinnon often paints men as oppressors, Ginsburg saw men, as well as women, oppressed by gender roles. Ginsburg is more accurately seen as a reconstructive feminist, whose chief goal is to deconstruct separate spheres—its breadwinner-homemaker roles and the descriptions of men and women that justify them—and to reconstruct gender along different lines. Today, progress towards her goal has stalled. The key to jumpstarting the stalled gender revolution is to change gender pressures on men. Much of this work involves cultural shift, but in recent years, progress has been made in litigating separate spheres under Title VII, as evidenced by the recent growth of litigation involving family responsibilities discrimination (“FRD”). The Article concludes with a critique of a recent FRD case, EEOC v. Bloomberg L.P.

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INTRODUCTION

For someone who has been called the Thurgood Marshall of women, who some say has had a greater impact on American law than any living judge,¹ Justice Ruth Bader Ginsburg has received remarkably little attention among legal feminists.² For decades, she was consigned to the dustbin of formal equality, as someone obsessed with treating men and women the same under the law, to women's detriment, even when the two groups were clearly different.³ More recently, Neil Siegel and Reva Siegel have contested that characterization, arguing that Justice Ginsburg should be seen through an antisubordination lens.⁴ Siegel and Siegel make an important point. As we shall see in Part I, Ginsburg consistently used antisubordination language not just in the *Struck v. Secretary of Defense*⁵ brief analyzed by Siegel and Siegel, but in many briefs dating from that period. In retrospect, it is a bit shocking that scholars, for so long, looked at the judicial opinions that bleach out Ginsburg's antisubordination language almost completely as evidence of what early legal feminists thought.⁶

But while it is more accurate to see Ginsburg as focused on antisubordination than as focused on empty formal equality, that

1. Peter J. Rubin, *Justice Ruth Bader Ginsburg: A Judge's Perspective*, 70 OHIO ST. L.J. 825, 825 (2009).

2. Cf. Tony Mauro, *Ginsburg Nominated: "Thurgood Marshall of Gender Equality Law,"* USA TODAY, June 15, 1993, at 1A.

3. See, e.g., Judith Baer, *Advocate on the Court: Ruth Bader Ginsburg and the Limits of Formal Equality*, in REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC 216, 231 (Earl M. Maltz ed., 2003).

4. Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 774 (2010). See generally Neil S. Siegel, "Equal Citizenship Stature": *Justice Ginsburg's Constitutional Vision*, 43 NEW ENG. L. REV. 799 (2009).

5. 409 U.S. 1071 (1972).

6. See, e.g., Baer, *supra* note 3, at 231.

characterization, too, ultimately proves confusing. If you compare Ginsburg's approach with that of Catharine MacKinnon, legal feminism's foremost antisubordination theorist, the limitations of lumping the two under a single name become readily apparent. The most obvious divergence concerns their attitudes towards men. Men, in MacKinnon's vision, are subordinators.⁷ Ginsburg sees men in a far more sympathetic light, as people whose lives are also impoverished by traditional gender roles.⁸ Ginsburg's use of antisubordination language proves not that she is in MacKinnon's camp, but that MacKinnon does not have a monopoly on the insight that gender "differences" involve gender hierarchy.

Ginsburg is best understood as a reconstructive feminist, with a very concrete vision of what the world would look like if gender roles changed as she thinks they should. Cary Franklin argues persuasively that Ginsburg brought over from her studies in Sweden the view that gender roles choke off the human potential of men as well as women.⁹ Ginsburg, from the beginning, has been guided by a very concrete vision of what men's and women's lives will look like following a whole-scale dismantling of separate spheres. Part II explores this interpretation of Ginsburg as a reconstructive feminist on the work-family axis.¹⁰

Part III picks up where Justice Ginsburg left off. Sadly, the past fifteen years have seen a stall in the gender-role revolution Justice Ginsburg helped to spark. To jumpstart that stalled revolution, I argue that contemporary feminism should follow her example and place masculinity at the center of a reconstructive analysis. Studies of masculinity, unavailable in Ginsburg's ACLU days, point the way. This topic is discussed in Part III.A.

Research not available in Ginsburg's ACLU days also documents that change for men needs to be matched with change for mothers, a topic discussed in Part III.B. Recent studies document that discrimination against mothers, called "maternal wall bias," is by far the strongest and most open form of gender bias.¹¹ Part III introduces this social science and the Equal Employment Opportunity Commission's ("EEOC") 2007 enforcement guidance on caregiver discrimination,¹²

7. CATHARINE A. MACKINNON, *SEX EQUALITY* 769 (2001) ("[S]exual subjection [by men] is integral to sexuality as normally experienced . . .").

8. See *infra* notes 74–78.

9. Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 97–104 (2009).

10. JOAN C. WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 4–6 (2000).

11. Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOCIOLOGY 1297, 1297 (2007); Faye J. Crosby, Joan C. Williams & Monica Biernat, *The Maternal Wall*, 60 SOC'Y FOR PSYCHOL. STUDY SOC. ISSUES 675, 677 (2004).

12. EEOC, *ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES* (2007).

which together have catalyzed a rapidly growing area of employment law that protects the rights of mothers to work and fathers to participate in family care. This Article ends with a more sustained analysis of a recent important case that is fundamentally inconsistent with the lessons Justice Ginsburg taught us: *EEOC v. Bloomberg L.P.*¹³

I. GINSBURG AS AN ANTISUBORDINATION THEORIST?

Reva Siegel and Neil Siegel are dead right to link Justice Ginsburg with antisubordination rhetoric. The *Struck* brief upon which Siegel and Siegel focus this attention is not an aberration.¹⁴ If one examines the briefs from the landmark 1970s cases Ginsburg was involved with under the auspices of the ACLU Women's Rights Project, they are replete with antisubordination rhetoric.

The 1971 amicus brief Ginsburg co-wrote in *Reed v. Reed* uses the terms "inferior," "subordinate," "subordination," and "second-class" repeatedly.¹⁵ For example, she wrote: "American women have been stigmatized historically as an inferior class and are today subject to pervasive discrimination."¹⁶ In 1972, in the case that was to become *Frontiero v. Richardson*, Ginsburg and co-authors used the terminology "subordination" or "inferiority" twelve times, reiterating that "[h]istorically, women have been treated as subordinate and inferior to men."¹⁷ Relying heavily on the new social history, the brief recalls that "[t]he common law heritage, a source of pride for men, marked the wife as her husband's chattel, 'something better than his dog, a little dearer than his horse.'¹⁸ "Prior to the Civil War," it continues, "[Southern] white women ranked as chief slave of the harem."¹⁹ "Activated by feminists of both sexes, legislatures and courts have begun to recognize and respond to the subordinate position of women in our society and the second-class status our institutions historically have imposed upon them."²⁰ Gender subordination continues up to the present day, the brief argues. "The challenged classification . . . assumes that the man is the dominant partner in a marriage and that the woman occupies a subordinate position . . ."²¹

13. 778 F. Supp. 2d 458 (S.D.N.Y. 2011).

14. See generally Siegel & Siegel, *supra* note 4.

15. Brief for Appellant at 10, *Reed v. Reed*, 404 U.S. 71 (1971) (No. 70-4) ("[T]he distance to equal opportunity for women—in the face of pervasive, social, cultural, and legal roots of sex-based discrimination—remains considerable." (footnote omitted)).

16. *Id.* at 25.

17. Brief of ACLU Amicus Curiae, *Frontiero v. Richardson*, 411 U.S. 677 (1973) (No. 71-1694).

18. *Id.* at 13 (quoting ALFRED LORD TENNYSON, *Locksley Hall*, in *POEMS* (1842)).

19. *Id.* at 14 (internal quotation marks omitted).

20. *Id.* at 18.

21. *Id.* at 24.

The *Struck* brief, also written in 1972, sounds many of the same notes. It decries “the subordinate position of women in our society and the second-class status our institutions historically have imposed upon them.”²² Women are “relegated to an inferior legal status”;²³ like blacks, they have “the stigma of inferiority and second-class citizenship associated with them.”²⁴ This brief again relies heavily on nonlegal materials: “For if women have only a place, clearly the rest of the world must belong to someone else and, therefore, in default of God, to men.”²⁵ The “presumably well-meaning exultation”²⁶ of women “has impelled them to accept a dependent subordinate status in society.”²⁷ “Man’s domination of woman” is referred to as an “historic fact.”²⁸

The 1973 brief in *Kahn v. Shevin* sounds the antisubordination theme yet again. Following the “grandmother brief,” it again asserts, “Historically, women have been treated subordinate and inferior to men.”²⁹ *Kahn* involved a tax exemption offered to widows but not widowers. Ginsburg and her co-authors warned that “favors of this kind come at an exorbitant price,”³⁰ citing in the footnote Sarah Grimke’s famous line (beloved of MacKinnon): “We ask no favors for our sex. All we ask of our brethren is that they take their feet off our necks”³¹ The tax exemption, which appeared to benefit women, “perpetuates sex stereotypes and thereby retards women’s access to equal opportunity and economic life.”³² This is understandable, given that so few women are in politics and therefore that “laws are drafted from masculine perspective.”³³

I could go on and on. Suffice it to say that the notion that Ginsburg wanted lily-livered formal equality is woefully ill-informed. In retrospect, I am shocked that so many of us—myself included—read the Supreme Court opinions in early equal protection cases as evidence of what

22. Brief for the Petitioner at 27, *Struck v. Sec’y of Def.*, 409 U.S. 1071 (1972) (No. 72-178).

23. *Id.* at 29.

24. *Id.* at 30. The constant analogies to race today seem dicey. They seemed less so in the 1970s. Recall that it was Pauli Murray, a black feminist, who championed the race-sex analogy. See generally Pauli Murray & Mary O. Eastwood, *Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965). At the same time, Ginsburg and her colleagues were lobbying hard to persuade the Court to apply strict scrutiny, which had been developed in the context of race, to sex.

25. Brief for the Petitioner, *supra* note 22, at 38 n.35 (quoting ELIZABETH JANEWAY, *MAN’S WORLD, WOMAN’S PLACE: A STUDY IN SOCIAL MYTHOLOGY* (1971)).

26. *Id.* at 38.

27. *Id.* at 9.

28. *Id.* at 41.

29. Brief for Appellants at 4, *Kahn v. Shevin*, 416 U.S. 351 (1973) (No. 73-78).

30. *Id.* at 16.

31. *Id.* at 16 n.11; see CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 45 (1987).

32. Brief for Appellants, *supra* note 29, at 18.

33. *Id.* at 25.

feminists thought rather than as evidence of what they could get Eight White Guys to accept.³⁴

The early legal feminists not only embraced antesubordination language, they kept on using it even after it became clear that their antesubordination language did not appeal to the Supreme Court. In 1979, Ginsburg wrote (along with a lawyer at her husband Marty's firm, Weil, Gotshal & Manges) a brief in *Wengler v. Druggists Mutual Insurance Co.*, which involved a challenge to a Missouri workers' compensation law that offered automatic death benefits for the spouse of a male worker, but required spouses of female workers to prove incapacity or dependence.³⁵ Statutes that offer "purported favors to females as men's appendages," Ginsburg wrote in the brief, "downgrade women's status as workers and, in the cumulative effect, dampen women's aspirations and limit their opportunities,"³⁶ by perpetuating a "familiar stereotype—the dominant, independent man/subordinate, dependent woman."³⁷ The brief complains that the equation of "widow" with "dependent surviving spouse . . . reflects a traditional way of thinking about females as inferior to males"³⁸ and that the statute reflects "archaic and overbroad generalizations about men as breadwinners and women as dependents" dating from an era when "those in positions of power accepted as axiomatic women's subordination to men."³⁹ Ginsburg and her co-author decried the "old accepted rules and customs purportedly favoring women do so only in conjunction with a view of them as men's appendages."⁴⁰ These gals were antesubordination firebrands.

34. Thurgood Marshall was not the problem. He understood that change needed to come at a structural level, as evidenced in his decision in *California Federal Savings and Loan Ass'n v. Guerra*, 479 U.S. 272, 289 (1987) ("The entire thrust . . . behind this legislation [the Pregnancy Discrimination Act] is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life." (quoting 123 CONG. REC. 29,658 (1977))). Note how Marshall's formulation neatly explains why treating women "the same" entailed upholding their right to pregnancy disability leave; his language parsimoniously deconstructs the masculine norm that "real" workers do not bear children.

35. Brief Amicus Curiae ACLU, *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1979) (No. 79-381), 1979 WL 199959.

36. *Id.* at *3.

37. *Id.* at *10.

38. *Id.* at *19.

39. *Id.* at *35-36.

40. *Id.* at *45.

II. GINSBURG AS A RECONSTRUCTIVE FEMINIST⁴¹

But they were not firebrands like MacKinnon. Just ask MacKinnon herself: “I think the fatal error of the legal arm of feminism has been its failure to understand that the mainspring of sex inequality is misogyny and the mainspring of misogyny is sexual sadism.”⁴² MacKinnon’s focus had been on sex, and in particular, one unhealthy kind of sex: the eroticizing of dominance, whether through sexual harassment,⁴³ pornography,⁴⁴ or rape.⁴⁵ In MacKinnon’s view, “the eroticization of dominance and submission [is what] creates gender.”⁴⁶ Or, more famously, “sexuality is to feminism what work is to marxism.”⁴⁷

The conventional view within legal feminism is that “the sexual realm is where dominance theory has the most to offer.”⁴⁸ But this is untrue. Both Ginsburg and MacKinnon are antisubordination feminists. And yet lumping them together proves confusing. For one thing, MacKinnon and Ginsburg are interested in different axes of gender.⁴⁹ MacKinnon focuses on the linkage of sexuality and dominance, while Ginsburg’s chief concern was with work and family. Virtually all of the cases in which Ginsburg involved the ACLU Women’s Rights Project were challenges to the breadwinner-homemaker dyad. By my quick count, twelve out of fourteen of these early cases aimed at disestablishing

41. This is not to say that no difference exists between Ginsburg and contemporary reconstructive feminists. Ginsburg’s thinking was framed around the problems she faced, namely the need to eliminate statutes that explicitly enforced sex-role stereotypes. Her solution was to eliminate gender as a factor “in determining the legal rights of men and women.” Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U. CIN. L. REV. 1, 23 (1975). This kind of statement ultimately proved confusing, particularly because of Ginsburg’s strategic decision to use the word “gender” rather than “sex.” *Id.* at 1. Does this statement mean that people should never use *sex* (body shape) as a way of allocating legal rights, or that they should never use *gender* (sex role) as a way of allocating legal rights? In my view, Ginsburg meant the first but not the second. For example, the ACLU brief in *Orr v. Orr*, 440 U.S. 268 (1979) (No. 77-1119), clearly advocated that anyone who played the caregiver role should be entitled to alimony (that legal rights should follow sex role rather than body shape). This is what her do-not-use-sex-as-a-proxy language was designed to communicate, as was her insistence on a “change from gender to functional description.” Ginsburg, *supra*, at 12, 24. The understanding of Ginsburg and others of her generation as “formal equality” feminists stems in significant part from the assumption that when they said that legal rights should not follow gender, they meant that women marginalized by caregiving should not have legal rights. This interpretation is understandable, but incorrect.

42. MacKINNON, *supra* note 29, at 5.

43. See generally CATHARINE A. MacKINNON, *THE SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

44. Catharine A. MacKinnon, *Pornography as Defamation and Discrimination*, 71 B.U. L. REV. 793, 796 (1991).

45. See generally CATHARINE A. MacKINNON, *ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES* (2006).

46. MacKINNON, *supra* note 31, at 50.

47. *Id.* at 48.

48. KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 282 (5th ed. 2010).

49. JOAN C. WILLIAMS, *RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER* 110-15 (2010) (identifying three axes of gender: work-family, sex-violence, and queer).

the men-as-breadwinner-women-as-dependent-caregiver paradigm of separate spheres.⁵⁰ In cases that did not directly involve the breadwinner-homemaker dyad, the ACLU briefs focus on deconstructing the descriptions of men and women that justify the breadwinner as the “natural” role for men and the caregiver as the “natural” role for women.⁵¹ Ginsburg’s message was, and has always been, that men can be caregivers and women can be breadwinners, and (to quote her former clerks Susan Williams and David Williams) that “we are human beings with a full emotional palette even in the workplace, and we are thinking, analyzing people, even at home.”⁵²

The second major difference between these two antisubordination theorists is their attitude towards men. MacKinnon typically paints men as oppressors, pure and simple. Men, MacKinnon tells us, do not want to hear that Linda Lovelace (of *Deep Throat*) did not like the sex; “[m]en believe what turns them on” (that is, eroticized violence).⁵³ Occasionally

50. See *Los Angeles v. Manhart*, 435 U.S. 702 (1978) (challenging a pension system that charged women more than men on the grounds that they live longer). For analysis of how this relates to separate spheres, see WILLIAMS, *supra* note 49, at 129–30; see also *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980) (challenging a workers’ compensation law that offered automatic death benefits to wives but required husbands to prove incapacity or dependency); *Califano v. Wescott*, 443 U.S. 76 (1979) (challenging a welfare program that offered benefits to the families of unemployed men but not to the families of unemployed women); *Orr v. Orr*, 440 U.S. 268 (1979) (challenging an alimony law that limited alimony to women); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977) (challenging an employer’s policy of denying seniority status to women returning from pregnancy leave); *Vorchheimer v. Sch. Dist.*, 430 U.S. 703 (1976) (challenging an all-boys public school and stressing the career benefits to girls of attending the school); *Mathews v. Goldfarb*, 430 U.S. 199 (1976) (challenging a social security survivor benefits program that required surviving males, but not females, to prove dependence); *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737 (1974) (challenging the denial of pregnancy benefits in a comprehensive insurance scheme); *Edwards v. Healy*, 421 U.S. 772 (1974) (challenging a system that allowed women to opt out of jury service on grounds of their family responsibilities); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1974) (challenging a social security survivor benefits program that limited eligibility to widows); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (challenging a military program that offered medical and other benefits automatically to the wives of servicemembers, but required husbands to prove dependence); *Struck v. Sec’y of Defense*, 410 U.S. 1921 (1972) (challenging an Air Force officer’s discharge due to her pregnancy); *Reed v. Reed*, 404 U.S. 71 (1971) (challenging a statute that gave automatic preference to men over women in administering relatives’ estates). The two cases I found for which the Women’s Rights Project wrote briefs that did not deconstruct separate spheres were *Coker v. Georgia*, 433 U.S. 584 (1977), and *Craig v. Boren*, 429 U.S. 190 (1976). Ginsburg was vociferous that she did not support the bringing of the lawsuit in *Craig v. Boren* and only got involved to protect the gains attained in other cases.

51. See generally Motion of ACLU for Leave to File Brief Amicus Curiae and Brief Amicus Curiae, *Craig*, 429 U.S. 190 (No. 75-628) (arguing that the Oklahoma statute prohibiting the sale of 3.2% beer to men younger than 21 and to women younger than 18 reinforced imagery of women as passive and men as active risk takers); Brief Amici Curiae for the ACLU, *Coker*, 433 U.S. 584 (No. 75-5444) (challenging the death penalty for rape, which stressed that rule’s linkage with the tradition of women as property (and racism)).

52. Susan H. Williams & David C. Williams, *Sense and Sensibility: Justice Ruth Bader Ginsburg’s Mentoring Style as a Blend of Rigor and Compassion*, 20 U. HAW. L. REV. 589, 593 (1998).

53. MACKINNON, *supra* note 31, at 11.

MacKinnon acknowledges differences among men⁵⁴ but these moments are fleeting. MacKinnon pays little attention to distinguishing between *men* and the unhealthy *traditions of masculinity* she critiques so searingly well: MacKinnon's view is that "what turns men on, what men find beautiful, is what degrades women."⁵⁵ When men sexually harass women, she notes, "[i]t doesn't mean they all want to fuck us, they just want to hurt us, dominate us, and control us, and that *is* fucking us."⁵⁶ No wonder MacKinnon's view is that women are "born, degraded, and die."⁵⁷

Ginsburg's view of men could not be more different. Thanks to Cary Franklin's brilliant excavations, we now know that Ginsburg brought her views on gender over from the Sweden of the 1960s, where a full-fledged assault had been launched to deconstruct the separate spheres' dichotomy between men, defined as beings whose nature suited them perfectly for market work and public life, and women, defined as beings whose nature suited them perfectly for family work and private life.⁵⁸ The goal in Sweden was to effect structural changes in the organization of market work and family work and in the ideology of what men and women are "really like," to enable both men and women to live up to their full human potential, freed from the straitjacket of conventional gender roles.⁵⁹ Swedish advocates argued that "imprisonment in the masculine role is at least as great a problem to men as conformity to a feminine ideal is to women" and "that a debate on liberation and equality must be about how men as well as women are forced to act out socially determined stereotypes."⁶⁰

This very precisely describes Ginsburg's reconstructive vision:

[W]ere I Queen, my principal affirmative action plan would have three legs. First, it would promote equal educational opportunity and effective job training for women, so they would not be reduced to dependency on a man or the state. Second, my plan would give men encouragement and incentives to share more evenly with women the joys, responsibilities, worries, upsets, and sometimes tedium of raising children from infancy to adulthood. (This, I admit, is the most challenging part of the plan to make concrete and implement.) Third, the plan would make quality day care available from infancy on. Children in my ideal world would not be women's priorities, they would be human priorities.⁶¹

54. *Id.* at 41 ("Men who do not rape women . . . Men who are made sick by pornography . . .").

55. *Id.* at 91.

56. *Id.* at 92.

57. *Id.* at 45.

58. Franklin, *supra* note 9, at 97–105. Justice Ginsburg views reproductive rights through the same prism, namely a concern that laws limiting reproductive rights may impede a woman's ability "to participate equally in the economic and social life of the Nation." See Mickey Kaus, *Moderate Threat*, NEW REPUBLIC, July 12, 1993, at 6 (quoting Justice Ginsburg).

59. Franklin, *supra* note 9, at 100.

60. *Id.* at 101 (quoting HILDA SCOTT, SWEDEN'S "RIGHT TO BE HUMAN": SEX-ROLE EQUALITY: THE GOAL AND THE REALITY 43 (1982)).

61. Ruth Bader Ginsburg, *Some Thoughts on the 1980's Debate over Special Versus Equal*

During my on-stage interview with Ginsburg last September, I asked her whether her chief goal had been to challenge separate spheres. She replied, “Of course that’s what I was trying to do.”⁶²

I also asked what was her favorite comfort food.⁶³ Ginsburg thought a bit, and then replied that her favorite comfort food was her husband Marty’s homemade French bread.⁶⁴ She loves to talk about how good a cook Marty was, and about when Marty and their daughter kicked her out of the kitchen because she was such an uninspired cook.⁶⁵ She also loves to tell the story of what she tartly told her son’s school when they were calling her constantly as he went through a particularly frisky phase. “This child has two parents,” she said. “Next time call his father.”⁶⁶ She tells this story a lot, and repeated it in our interview. She once told a reporter that her ideal is well expressed by the 1970s Marlo Thomas song “Free to Be You and Me” which inspired her view “[t]hat the male or female, you should be free to follow your star, to develop your talent, and you shouldn’t be held back by artificial barriers.”⁶⁷ “But what is very hard for most women,” she continues, “is what happens when children are born. Will men become equal parents, sharing the joys as well as the burdens of bringing up the next generation? But that’s my dream for the world, for every child to have two loving parents who share in raising the child.”⁶⁸

Unlike MacKinnon, whose chief strength is her eloquence in deconstructing current institutions, Justice Ginsburg offers a clear reconstructive vision. And yet this vision embeds a central ambiguity. Often Ginsburg speaks of her ideal as one in which both parents participate simultaneously in market work and family work. Yet at other times, she seems more focused on making the world safe for role switching—for men to be caregivers and women to be breadwinners. She often speaks of *Weinberger v. Wiesenfeld* and makes it clear that Stephen Wiesenfeld’s devotion to his son deeply touched her.⁶⁹ “Just as Paula Wiesenfeld’s status as a breadwinner is devalued so Stephen Wiesenfeld’s parental status is denigrated,” said the brief.⁷⁰ Judges who

Treatment of Women, 4 LAW & INEQ. 143, 146 (1986).

62. *Legally Speaking: Ruth Bader Ginsburg*, U. CAL. TELEVISION (DEC. 5, 2011), <http://www.uctv.tv/search-details.aspx?showID=22928>.

63. *Id.* Many thanks to WorkLife Law Board Member Michele Coleman Mayes for suggesting this question.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Ruth Bader Ginsburg Interview: Trailblazing Advocate for Women’s Rights*, ACAD. OF ACHIEVEMENT, <http://www.achievement.org/autodoc/page/ginoint-5> (last visited May 1, 2012).

68. *Id.*

69. *Id.*

70. Brief for Appellee at 11–12, *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1974) (No. 73-1892).

heard the case were extremely skeptical, or downright certain, that Stephen Wiesenfeld did not actually want to stay home. The brief expressed outrage:

Equally myopic, but impossible to explain in light of his own contemporaneous pronouncements is appellant's reference in this Court, as in the court below, to appellant's advanced degrees and his ability to command a substantial salary. If Jason Paul's surviving parent were a woman, any suggestion that her academic degrees and intellectual capacity indicated she should choose remunerative employment over personal attention to her new newborn child undoubtedly would be dismissed with alacrity.⁷¹

Whether Ginsburg wants to deconstruct separate spheres or simply people them with humans of a different body shape, one thing is clear: Like Olof Palme in the 1960s, she has a clear reconstructive vision, to be reached by working in coalition with men and placing masculinity at center stage.⁷² When asked why she had chosen to work through the ACLU rather than through a women's organization, said Justice Ginsburg in 2009,

I always thought that there was nothing an antifeminist would want more than to have women only in women's organizations, in their own little corner empathizing with each other and not touching a man's world. If you're going to change things, you have to be with the people who hold the levers.⁷³

A *Washington Post* reporter who interviewed Ginsburg in 1993 noted a photograph of her son-in-law "gazing adoringly at his newborn child."⁷⁴ The reporter quotes her as telling visitors, "This is my dream for society . . . Fathers loving and caring for and helping to raise their kids."⁷⁵ Ginsburg's focus on men explains her opposition to "special treatment" for women. "Special benefits for women . . . result in discriminatory treatment of similarly situated men, themselves victims of male sex-role stereotypes," she asserted in the *Kahn v. Shevin* brief,⁷⁶ which also noted that "gender-based discrimination frequently impacts

71. *Id.* at 21–22 (citations omitted).

72. Franklin, *supra* note 9, at 101–02; see Ginsburg, *supra* note 41, at 1 (quoting Palme: "[I]n order that women shall be emancipated . . . men must also be emancipated.").

73. Emily Bazelon, *The Place of Women on the Court: An Interview with Justice Ruth Bader Ginsburg*, N.Y. TIMES, July 12, 2009, (Magazine), at 22, 25; see Michael J. Klarman, *Social Reform Litigation and Its Challenges: An Essay in Honor of Justice Ruth Bader Ginsburg*, 32 HARV. J.L. & GENDER 251, 265–66 (2009).

74. David Von Drehle, *Redefining Fair with a Simple, Careful Assault*, WASH. POST, July 19, 1993, at A1.

75. *Id.*; see Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, (Magazine), at 60, 63 ("This is my dream of the way the world should be . . . When fathers take equal responsibility for the care of their children, that's when women will truly be liberated.").

76. Brief for Appellants, *supra* note 29, at 4.

adversely on both sexes”⁷⁷ and decried the “fundamental unfairness to men as well as women of legislative lines based on sex stereotypes.”⁷⁸

This theme emerged again in *Orr v. Orr*, the case that challenged a statute that limited alimony to women:

The Alabama alimony statute unfairly and unconstitutionally discriminates against husbands who elect to stay at home and care for the family, or who, relying on their wives’ ability and desire to make the major contribution to the financial support of the family, select a less remunerative career, or who, because of involuntary disability, are necessarily dependent on their wives.

....

... Thus, for example, a husband who would like to be a poet or a painter and whose family can maintain an adequate living standard on his wife’s earnings, is discouraged by the Alabama alimony statute from fully developing his talent and pursuing his aspiration.⁷⁹

That brief also noted, in language reminiscent of *Nevada Department of Human Resources v. Hibbs*,⁸⁰ that “[f]ar more clearly, the discrimination visited upon the husband by the Alabama alimony statute stamps women as persons assigned a special place in a world controlled by men. By steering the husband out of the home, it steers the wife into it and keeps her there, thus discouraging wives from achieving economic self-sufficiency.”⁸¹

In the light of Ginsburg’s early briefs, it becomes clear that her greatest Supreme Court triumph was not *United States v. Virginia*,⁸² as I had always assumed. It was *Hibbs*, written by Justice Rehnquist, which upheld the constitutionality of the Family and Medical Leave Act (“FMLA”) as applied to state governments.⁸³ In the light of Cary Franklin’s work, *Hibbs* can be seen as channeling Ginsburg’s reconstructive vision, virtually unchanged since the 1960s. Like many of the cases that the Women’s Rights Project took on, *Hibbs* involved a man who wanted to care for a family member.⁸⁴ William Hibbs, who worked for the state welfare department, was fired when he took time off to care for his wife after she was very seriously injured in an auto

77. *Id.* at 12.

78. *Id.* at 13.

79. Motion of ACLU for Leave to File Brief Amicus Curiae and Brief Amicus Curiae, *Orr v. Orr*, 440 U.S. 268 (1979) (No. 77-1119), 1978 WL 206698, at *14, *18.

80. 538 U.S. 721 (2003).

81. Motion of ACLU, *supra* note 79, at 27.

82. 518 U.S. 515 (1996).

83. 538 U.S. 721. I have to admit that Justice Ginsburg herself does not agree. See *Remarks of Ruth Bader Ginsburg, March 11, 2004, CUNY School of Law*, 7 N.Y. CITY L. REV. 221, 236 (2004) (“[T]he Virginia Military Academy case was very satisfying because I regard it . . . [as] the culmination of the litigation in which I was engaged in the 1970s.”).

84. 538 U.S. at 725.

accident.⁸⁵ Much to the astonishment of constitutional law scholars, Rehnquist limited the federalism doctrine he himself had championed, which used the Tenth Amendment to reign in Congressional power.⁸⁶

Ginsburg's handprints are all over *Hibbs*.⁸⁷ It involved a statute Ginsburg cared deeply about: the FMLA, championed by Judith Lichtman's Women's Legal Defense Fund (now the National Partnership for Women and Families). Lichtman had co-authored some of the early Women's Rights Project briefs with Ginsburg and had hung tough, resisting pressure to accept a national maternity leave statute in favor of a statute that applied to men as well as women. This was a controversial move, but it is one Ginsburg has defended. For her, the FMLA expresses a key tenet of reconstructive feminism: Ginsburg sees the FMLA as reflecting not a commitment to treat men and women the same, but a commitment to change existing masculine norms, substituting new norms that include the experience of women.⁸⁸ The FMLA does this, she would argue, because it changes the definition of the ideal worker by sending the message that caregiving—both self-care and care of others—naturally plays a role in adults' lives, and that employers should be prohibited from penalizing adults who need time off for caregiving.⁸⁹

Ginsburg had been arguing as much since the 1970s. In her 1971 article *Gender and the Constitution*, she argued that women needed “affirmative action” in order to achieve true equality.⁹⁰ The “overriding objective must be an end to role delineation by gender, and in its place, conduct at every school level, [and] later in the job market, signaling that in all fields of endeavor females are welcomed as enthusiastically as males are.”⁹¹ What this entailed was not to treat men and women the same in the face of norms designed around men, in the way that “formed equality” feminists have often been characterized. Her goal, instead, was “eliminating institutional practices that limit or discourage female participation.”⁹² For example:

85. *Id.*

86. See, e.g., Jennifer Yatskis Dukart, *Geduldig Reborn: Hibbs as a Success (?) of Justice Ruth Bader Ginsburg's Sex-Discrimination Strategy*, 93 CALIF. L. REV. 541, 544–55 (2005).

87. Others have made the same observation. See, e.g., *id.*; Linda Greenhouse, *Learning to Listen to Ruth Bader Ginsburg*, 7 N.Y. CITY. L. REV. 213, 218–19 (2004).

88. Ruth Bader Ginsburg & Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U. CHI. LEGAL F. 9, 18 (“[The FMLA] . . . takes women at work as the model . . . but spreads out to shelter others: men and women who need time off not only to care for a newborn, but to attend to a seriously ill child, spouse, elderly parent or self.”); cf. WILLIAMS, *supra* note 49, at 77–108 (discussing the need to deconstruct masculine workplace norms and replace them with norms that include the traditional life patterns of women).

89. Ginsburg, *supra* note 41, at 29.

90. *Id.* at 28–34.

91. *Id.* at 29.

92. *Id.* at 30.

[D]eferral of an education to raise a family or to finance the education of a spouse might be regarded with the same favor as accomplishments of college athletes or politicians. . . . Extended study programs might be provided for students unable to undertake full-time study because of special family obligations that cannot be met by customary financial aid (notably, care of preschool children).⁹³

Later on in the same article, Ginsburg wrote, “If we are genuinely committed to the eradication of gender-based discrimination, the problem of job and income security for childbearing women workers must be confronted and resolved head-on.”⁹⁴ Comparative evidence “may be useful”: she goes on to advocate (in the politest possible terms) for “comprehensive income protection and medical benefits for pregnancy and childbirth, financed through compulsory social insurance,” parental leaves that can be taken by men or women, and comprehensive, non-means-tested child care.⁹⁵ She argued (as I did thirty years later)⁹⁶ that it is inconsistent with a commitment to gender equality to privatize the costs of childrearing onto mothers, making the mothers’ “choice” to quit less of a choice than a response to a workplace designed (to use my terminology) around an ideal worker who takes no time off for childbearing, childrearing, or anything else: someone with a man’s body and traditional (breadwinner) life pattern.⁹⁷ “We will continue to shortchange parents, particularly mothers, and children until childrearing burdens are distributed more evenly among parents, their employers, and the tax-paying public.”⁹⁸ In other words, Ginsburg—like a true reconstructive feminist—defines equality as treating men and women the same *but only after deconstructing the existing norms defined by and around men and masculinity, and reconstructing existing institutions in ways that include the bodies and traditional life patterns of women.*

This is the theoretical framework Rehnquist adopts in *Hibbs*.⁹⁹ He took what seemed at first glance a workers’ rights statute that gives all eligible employees up to twelve weeks off a year to care for one’s self or a family member with a serious health condition¹⁰⁰ and defended it as a gender bias statute, thereby allowing him to apply intermediate scrutiny

93. *Id.* at 31.

94. *Id.* at 38.

95. *Id.*

96. See generally WILLIAMS, *supra* note 10.

97. *Id.*

98. Ginsburg, *supra* note 41, at 40.

99. See generally *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003); Reva B. Siegel, *You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871 (2006).

100. 29 U.S.C. § 2612 (2010); see RONALD D. ELVING, CONFLICT AND COMPROMISE: HOW CONGRESS MAKES THE LAW 18–21 (1995) (discussing that Washington feminists opposed the maternity leave advocated by a California Congressman and held out for the FMLA).

and uphold its constitutionality.¹⁰¹ Both Rehnquist's language and his logic come right out of the Women's Rights Project briefs of thirty years earlier.¹⁰² He decried the "stereotype-based beliefs about the allocation of family duties [that have] remained firmly rooted"¹⁰³ and noted that seven states' leave statutes reinforced stereotypes by offering maternity leave for women but no leave for men, "reinforc[ing] the very stereotypes that Congress sought to remedy through the FMLA."¹⁰⁴ Like Ginsburg before him, Rehnquist focused on men, noting that "[p]arental leave for fathers . . . is rare. Even . . . [w]here child-care leave policies do exist, men, *both in the public and private sectors*, receive notoriously discriminatory treatment . . ."¹⁰⁵ Rehnquist decried "the pervasive presumption that women are mothers first, and workers second,"¹⁰⁶ concluding:

Stereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. . . . These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.¹⁰⁷

I do not doubt that Justice Rehnquist had his own life experiences that led him to recognize the importance of family caregiving: his wife died of cancer when she was still relatively young, and he sometimes left early from the Supreme Court to pick up his grandchild from day care in order to help his divorced daughter.¹⁰⁸ But I have little doubt that Ginsburg helped him interpret these experiences in a reconstructive vein. She is one charming and persuasive lady.

When MacKinnon protested in 1987 that "[p]articularly in its upper reaches, much of what has passed for feminism in law has been the attempt to get for men what little has been reserved for women," she was embracing the then-current view of Ginsburg as obsessed with formal

101. *Hibbs*, 538 U.S. at 725.

102. See *supra* text accompanying notes 15–40.

103. *Hibbs*, 538 U.S. at 730.

104. *Id.* at 733.

105. See *id.* at 731 (emphasis and alternations in original) (quoting *Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the House Comm. on Educ. and Labor*, 99th Cong. 147 (1986) (statement of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project)).

106. *Id.* at 736 (quoting *Parental and Medical Leave Act of 1986: Joint Hearing Before the Subcomm. on Labor-Mgmt. Relations and the Subcomm. on Labor Standards of the House Comm. on Educ. and Labor*, 99th Cong. 100 (1986) (statement of Meryl Frank, Director of the Yale Bush Center Infant Care Leave Project)).

107. *Id.*

108. Linda Greenhouse, *Heartfelt Words from the Rehnquist Court*, N.Y. TIMES, July 6, 2003, at WK3 ("[Chief Justice Rehnquist's] daughter, Janet, is a single mother who until recently held a high-pressure job and sometimes had child-care problems. Several times this term, the 78-year-old Chief Justice of the United States left work early to pick up his granddaughters from school.").

equality for exceptional women who followed traditionally male life patterns.¹⁰⁹ MacKinnon, along with other feminist scholars, now recognizes Ginsburg's antisubordination frame.¹¹⁰ But, as discussed, Ginsburg's antisubordination frame is very different from MacKinnon's—so different that lumping them together is likely to prove confusing.

At issue is not simply the interpretation of Ginsburg. The larger point is that the conventional association of antisubordination with MacKinnon is oversimplistic. In fact, virtually every mainstream legal feminist embraces antisubordination as a goal. This is true not only of MacKinnon and Justice Ginsburg. It is also true of Carol Gilligan, whose work was designed to end the subordination of what Gilligan saw as women's ways of reasoning and women's different voice.¹¹¹ Gilligan, at core, protests the devaluation of the feminine, and its subordination to values associated with men and masculinity.¹¹² It is time to recognize that antisubordination logic underlies every major school of legal feminism.

III. RECONSTRUCTIVE FEMINISM: NEXT STEPS

A. JUMPSTARTING THE STALLED GENDER REVOLUTION: GENDER PRESSURES ON MEN

As noted above, the antistereotyping vision in Sweden proposed structural changes to enable both men and women to live up to their full potential as human beings. In 1970, Olof Palme, one of the leaders of the sex equality movement and later Prime Minister of Sweden, delivered his manifesto "The Emancipation of Man": "[I]n order that women shall be emancipated from their antiquated role the men must also be emancipated."¹¹³ Palme explained, "[T]he culturally conditioned expectations of an individual on account of sex[] act as a sort of uniform,"¹¹⁴ forcing men to comply with sex role stereotypes. In fact, Palme argued, "the emancipation of men was the linchpin in the struggle for sex equality."¹¹⁵

109. MacKinnon, *supra* note 31, at 4.

110. Catharine A. MacKinnon, *A Love Letter to Ruth Bader Ginsburg*, 31 *WOMEN'S RTS. L. REP.* 177, 181 (2010).

111. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* 1-5 (1982).

112. *Id.*

113. Franklin, *supra* note 9, at 101-02 (alteration in original) (quoting Olof Palme, Swed. Prime Minister, *The Emancipation of Man*, Address before the Women's National Democratic Club (June 8, 1970), in KENNETH M. DAVIDSON, RUTH BADER GINSBURG & HERMA H. KAY, *TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION* 938 (1974)).

114. *Id.* at 102 (quoting Olof Palme, Swed. Prime Minister, *The Emancipation of Man*, Address before the Women's National Democratic Club (June 8, 1970), in KENNETH M. DAVIDSON, RUTH BADER GINSBURG & HERMA H. KAY, *TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATION* 941 (1974)).

115. *Id.*

We need to listen up. In the thirty years since the Women's Rights Project litigated its landmark cases in the 1970s, the gender revolution has stalled out in a big way. Men's household contributions stalled out around 1985.¹¹⁶ Mothers still spend nearly twice as much time as fathers both doing core household tasks and caring for children as a primary activity.¹¹⁷ About five years after fathers' family work stalled out, women's workforce participation did, too.¹¹⁸ One out of every four mothers aged twenty-five to forty-four remains out of the labor force, and women's average work hours remain far below full-time in an economy that severely penalizes "part-time" work.¹¹⁹ Sex segregation has decreased sharply for college graduates, but for other women it remains very high, and has changed little since the 1990s.¹²⁰

To jumpstart the stalled gender revolution, I have argued elsewhere, we need to change gender pressures on men.¹²¹ The conventional wisdom is that the persistence of work-family conflict reflects women's failure to bargain effectively in the family.¹²² My hypothesis, instead, is that the stalled gender revolution reflects the fact that gender pressures on men remain largely unchanged.

These pressures are intense. Unlike womanhood, which is understood to be a biological inevitability, manhood is seen as something that has to be earned.¹²³ Manhood is both elusive and tenuous—something that has to be proven in public, over and over again.¹²⁴ This leads to "gender role stress," which in many men is chronic: anxiety over whether one is enough of a man.¹²⁵ Actions that provide temporary relief from this anxiety include "drinking heavily, driving fast, excelling at sports, making lots of money, bragging about their sexual exploits, and fathering many children," according to experimental social psychologist Joseph A. Vandello and his colleagues.¹²⁶

For most men, manhood remains intertwined with breadwinning. Historians point out that when masculinity first became associated with breadwinner status in the nineteenth century, anxiety became men's heritage. "Sons had to compete for manhood in the market rather than

116. JOAN C. WILLIAMS ET AL., "OPT OUT" OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT 20 (2006).

117. *Id.* at 20.

118. *Id.* at 21 fig.3.

119. WILLIAMS, *supra* note 10, at 2.

120. WILLIAMS ET AL., *supra* note 116, at 23 fig.7.

121. WILLIAMS, *supra* note 49.

122. LINDA BABCOCK & SARA LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE 180-85 (2003).

123. Joseph Vandello et al., *Precarious Manhood*, 95 J. PERSONALITY & SOC. PSYCHOL. 1325, 1325-26 (2008).

124. *Id.* at 1326-27.

125. *Id.* at 1327.

126. *Id.*

grow into secure manhood by replicating fathers,” to quote one historian.¹²⁷ “The birthright of every American male is a chronic sense of personal inadequacy,” chimed in another twentieth-century author.¹²⁸ The bulwark against inadequacy is to be “successful,” which means to be successful at work. This makes it difficult for men to challenge the felt mandate to live up to workplace norms. “I was talking to a friend of mine, a partner at a major San Francisco law firm,” Derek Bok, former president of Harvard University, told me in 2001. “He was always complaining about how hard he worked, so I asked: ‘Then why don’t you just work three-fifths as hard and take three-fifths the salary?’ He was tongue-tied. But of course the real reason he couldn’t is that then he feared he wouldn’t ‘be a player.’”¹²⁹ This single quote goes a long way toward explaining the provenance of work-family conflict among the professional-managerial class.¹³⁰

In sociologist Pamela Stone’s study of highly educated women who “opted out,” she found that husbands were a key influence on well over half (sixty percent) of women’s decisions to quit.¹³¹ The “unspoken backdrop against which these women’s decisions to quit are negotiated and decided” is that men’s careers take precedence.¹³² As one mother put it, explaining why she left her high-level job, “[My husband and I] were both working these killer jobs. And I kept saying, we need to reconfigure this. And what I realized was, he wasn’t going to.”¹³³ Said one woman, “He has always said to me, ‘You can do whatever you want to do.’ But he’s not there to pick up any load.”¹³⁴ These kinds of statements show the flawed logic of the oft-repeated assertion that women just need to bargain better at home if they want equality at work. Women are fated to lose on home-front negotiations so long as gender pressures on men remain unchanged.

Men often say they want to spend more time with their families, and have for a long time. Why don’t most deliver? Most feel they cannot afford not to be a “player”: men not only have the *right* to perform as ideal workers; most feel they have the *duty* to do so. According to a 1997 study, eighty-three percent of American women and an even higher percentage of childrearing mothers felt their husbands should be the

127. CHARLES SELLERS, *THE MARKET REVOLUTION: JACKSONIAN AMERICA, 1815–1846*, at 246 (1991).

128. MICHAEL S. KIMMEL, *Masculinity as Homophobia*, in *THE GENDER OF DESIRE: ESSAYS ON MALE SEXUALITY* 35 (2005).

129. Email from Derek Bok, Professor, Harvard Univ., to Author (2007) (on file with Author) (confirming statements made in 2010).

130. For a discussion of gender pressures on blue-collar men, see WILLIAMS, *supra* note 49, at 83–86.

131. PAMELA STONE, *OPTING OUT? WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* 62 (2007).

132. *Id.* at 65.

133. *Id.* at 61.

134. Pamela Stone & Meg Lovejoy, *Fast-Track Women and the “Choice” to Stay Home*, 596 *ANNALS AM. ACAD. POL. & SOC. SCI.* 62, 76 (2004).

primary providers.¹³⁵ Americans see being a good provider as an integral part of being a good father, according to another study; gender pressures on men to be good fathers send them away from home, rather than towards it.¹³⁶

Sad to say, feminism has not made things any easier. In fact, the mainstream formulation is that feminism is about choices: A woman should be able to choose whether she stays home or whether she continues working. Think about it—the assumption is that women are entitled to be supported by a man if they choose to be. Even feminism has played a role in policing men into breadwinner roles.

To jumpstart the stalled gender revolution on the home front, we need to open up a discussion about gender pressures on men at work. These pressures are not subtle. To quote an engineer in Silicon Valley:

Guys constantly try to out-macho each other, but in engineering it's really perverted because out-machoiing someone means being more of a nerd than the other person. . . . It's not like being a brave firefighter and going up one more flight than your friend. There's a lot of see how many hours I can work whether or not you have a kid. . . . He's a real man; he works 90-hour weeks. He's a slacker; he works 50 hours a week.¹³⁷

A key place men earn their manhood is on the job. Marianne Cooper's brilliant study of Silicon Valley, "Being the 'Go-To Guy,'" details this process in the white-collar context.¹³⁸ She shows that white-collar men enact masculinity on the job, in a way that contests blue-collar men's claims that being a "real man" requires having the brute strength to do hard, dirty jobs.¹³⁹ This is a source of anxiety, because white-collar men's work is clean, gender-neutral knowledge work—pencil pushing—which leaves white-collar men eager to shift the definition of manliness.

One way they do so is by interpreting long work hours as a heroic activity ("He's a real man; he works 90-hour weeks.").¹⁴⁰ Another example:

Even under normal circumstances, when there are no extraordinary demands, you see people working 36 hours straight just because they are going to meet the deadline. They are going to get it done, and everybody walks around proud of how exhausted they were last week

135. WILLIAMS, *supra* note 10, at 27 (quoting JEAN L. POTUCHEK, WHO SUPPORTS THE FAMILY? 4 (1997)).

136. See generally NICHOLAS TOWNSEND, THE PACKAGE DEAL: MARRIAGE, WORK AND FATHERHOOD IN MEN'S LIVES (2002).

137. Marianne Cooper, *Being the "Go-To Guy": Fatherhood, Masculinity, and the Organization of Work in Silicon Valley*, in FAMILIES AT WORK: EXPANDING THE BOUNDS 7 (Naomi Gerstel et al. eds., 2002) (quoting engineer Scott Webster). For an example of the somewhat different ways gender pressures on men operate in the blue-collar context, see WILLIAMS, *supra* note 49, 56–61 (discussing "caring in secret" among blue-collar men).

138. See generally Cooper, *supra* note 137 (discussing masculinity as performed in white-collar jobs).

139. *Id.*

140. *Id.* at 7.

and conspicuously putting in wild hours. It's a status thing to have pizza delivered to the office. So I don't know why it happens, but I really feel like it is kind of a machismo thing: I'm tough. I can do this thing. Yeah, I'm tired, but I'm on top of it. You guys don't worry about me. . . . The people who conspicuously overwork are guys, and I think it's usually for the benefit of other guys.¹⁴¹

"The successful enactment of this masculinity," Cooper writes, "involves displaying one's exhaustion, physically and verbally, in order to convey the depth of one's commitment, stamina, and virility."¹⁴²

Common, but unconvincing, are claims that this kind of peacocking is efficient. Much of the time, Cooper points out, Silicon Valley engineers' schedule reflect a simple lack of planning: "Remarkably, poor planning is reinterpreted as a test of will, a test of manhood for a team of engineers."¹⁴³ Failure to delegate is widespread: "[M]ost of them don't know how to delegate," one informant remarks of his colleagues.¹⁴⁴ Also accepted is overwork to the point of inefficiency: "My god, I mean, talk about sweatshops. I mean, they are oblivious. The managers have no idea what an altered state they are in all the time while they are managing these guys."¹⁴⁵ Extensive research documents that sleep deprivation corrodes performance, and that constant stress leads to higher health insurance costs.¹⁴⁶

All this holds important messages for feminism. If manhood is forged on the job, then clearing up the confusion between masculine gender performance and productivity becomes a crucial part of the feminist agenda. So does developing the case law that allows men to sue when gender discrimination against men is triggered by their perceived failure to fulfill the mandated masculine role.¹⁴⁷

B. LITIGATING SEPARATE SPHERES THROUGH TITLE VII

If one key component of reconstructive feminism is to change the gender pressures that police men into the breadwinner role, another is to

141. *Id.* at 9 (quoting Kirk Sinclair).

142. *Id.*

143. *Id.* at 10.

144. *Id.* at 14.

145. *Id.*

146. See Stanley Coren, *Sleep Deprivation, Psychosis and Mental Efficiency*, *PSYCHIATRIC TIMES*, Mar. 1, 1998, at 15 ("People who are operating with a sleep debt are less efficient, and this inefficiency is most noticeable when the circadian cycle is at its lowest ebb. Among the common consequences of a large sleep debt are attentional lapses, reduced short-term memory capacity, impaired judgment and the occurrence of 'microsleeps.'"); Emily Tanner-Smith & Adam Long, *The Stress-Health Connection and Its Implications for Employers*, *MANAGED CARE OUTLOOK*, May 15, 2008, at 21; Mary Corbett Clark, *The Cost of Job Stress*, *WINNING WORKPLACES* (Feb. 17, 2012, 5:13 PM), http://www.winningworkplaces.org/library/features/the_cost_of_job_stress.php ("Job stress is a key driver of health care costs. . . . [H]ealth care expenditures are nearly 50 percent greater for workers reporting high levels of stress.")

147. See generally Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 *HASTINGS L.J.* 1297 (2012).

change the gender pressures that police women out of that role, most notably gender bias against mothers.¹⁴⁸ Recent studies suggest that this kind of “maternal wall” bias is alive and well. It may well be the strongest form of gender discrimination in today’s workplace. The leading study gave subjects resumes identical in every way except that one, but not the other, was a mother.¹⁴⁹ The study found that mothers were 79% less likely to be hired, 100% less likely to be promoted, offered an average of \$11,000 less in salary, and held to higher performance and punctuality standards than otherwise identical nonmothers.¹⁵⁰ Numerous other studies confirm this finding, which suggests maternal wall bias against mothers is by far the strongest type of gender bias, many times stronger than the glass ceiling bias triggered by being a woman.¹⁵¹ Separate spheres ideology operates to trigger strong negative competence and commitment assumptions against mothers even if they perform at precisely the same level they performed before they had children.¹⁵² When mothers are perceived as ideal workers, another study found, they nonetheless encounter bias at work based on the assumption that if they are ideal workers, they must be bad mothers.¹⁵³

This sex-role stereotyping sometimes operates precisely the way the stereotyping functioned in the ACLU cases of the 1970s: stereotyping that stems from overgeneralization from the norm. “[S]tereotype is not a synonym for mistake or false impression. It identifies the average,” read Ginsburg’s 1974 brief in *Califano v. Westcott*, a case involving a challenge to a welfare program that offered benefits to families with unemployed fathers but not to those with unemployed mothers.¹⁵⁴ In that same year, the brief in *Weinberger v. Wiesenfeld* noted that propositions such as that “wives are typically dependent” (in *Frontiero*) and “men typically have more business experience” (in *Reed v. Reed*) “concededly may be reasonable as highly generalized solutions.”¹⁵⁵

The issue in all of those cases is the reasonableness of treating the substantial population of individuals and families who do not match the

148. ACAD. OF ACHIEVEMENT, *supra* note 68, at 5 (“But what is very hard for most women is what happens when children are born. Will men become equal parents, sharing the joys as well as the burdens for bringing up the next generation? But that’s my dream for the world, for every child to have two loving parents who share in raising the child.”).

149. Correll, Benard & Paik, *supra* note 11, at 1309.

150. *Id.* at 1316 tbl.1.

151. See generally Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359 (2008) (reviewing the literature).

152. Correll, Benard & Paik, *supra* note 11, at 1326.

153. Stephen Benard & Shelley J. Correll, *Normative Discrimination and the Motherhood Penalty*, 25 GENDER & SOC’Y 616, 621 (2010).

154. Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae at 32, *Califano v. Westcott*, 443 U.S. 76 (1979) (No.78-689).

155. Brief for Appellee, *supra* note 70, at 18 n.11.

gross generalization as if they did match it.¹⁵⁶ The 1978 brief in *Orr v. Orr*, which involved a challenge to a state statute that offered alimony only to women, argued, “The sharp sex line [the statute] draws reinforces ‘the role-typing society has long imposed’ upon men and women [husband at work, wife at home] and invidiously discriminates against spouses who do not conform to this type casting.”¹⁵⁷ Again in the case that became *Frontiero v. Richardson*, the brief noted, “The challenged classification, which assumes that the man is the dominant partner in a marriage and that the woman occupies a subordinate position . . . reinforce[s] restrictive and outdated sex-role stereotypes and penalize[s] married women who do not conform to the assumed general pattern.”¹⁵⁸ Again in 1996, Ginsburg wrote, “I am fearful, or suspicious, of generalizations about the way women or men are. My life’s experience indicates that they cannot guide me reliably in making decisions about particular individuals.”¹⁵⁹

Yet assumptions that exceptional mothers will conform to the norm is only one way gender stereotyping works. Maternal wall bias also disadvantages mothers in at least two other ways. As the studies by Shelley Correll, Stephen Benard, In Paik, and their colleagues demonstrate, maternal wall bias often stems from prescriptive bias, in the form of backlash against mothers who are seen as too devoted to work, in violation of the prescription that mothers’ lives should revolve around their children.¹⁶⁰ A third form of maternal wall bias reflects the automatic association of mothers with a lack of workplace competence and commitment, which reflects separate spheres’ linkage of motherhood with family work, not market work.¹⁶¹ The social science has progressed far beyond where it was in the 1970s.

This new social science paved the way for the EEOC’s 2007 enforcement guidance on caregiver discrimination, which asserted that discrimination against caregivers is a form of gender discrimination.¹⁶² This was important because, in some prior case law, employers faced with a lawsuit charging discrimination against mothers promoted a woman without children and claimed that action as proof they were not discriminating against women.¹⁶³ The EEOC’s guidance also helped to address situations where mothers’ lawsuits were dismissed on the grounds that the plaintiff could point to no similarly situated man

156. *Id.* at 18 n.12.

157. Motion of ACLU, *supra* note 79, at 13 (citation omitted) (quoting *Stanton v. Stanton*, 421 U.S. 7, 15 (1975)).

158. Brief of ACLU, *supra* note 17, at 24.

159. Ginsburg, *supra* note 61, at 148.

160. See Benard & Correll, *supra* note 153, at 1385; Correll, Benard & Paik, *supra* note 11, at 1326.

161. Correll, Benard & Paik, *supra* note 11, at 1306.

162. EEOC, *supra* note 12, § II.

163. *E.g.*, *Trezza v. Hartford, Inc.*, No. 98 Civ. 2205, 1998 WL 912101, at *5 (S.D.N.Y. Dec. 30, 1998).

(“comparator”).¹⁶⁴ By clearly stating that caregiver-bias lawsuits could be proven through stereotyping evidence alone, even in the absence of a comparator, the EEOC addressed these problems.¹⁶⁵ The EEOC’s embrace of stereotyping evidence was important not only because comparators can be difficult to find, but also because stereotyping often is easy to prove. In the landmark early case of *Back v. Hastings on Hudson Union Free School District*, a school psychologist was told that she was not a suitable candidate for tenure because “[she] had little ones at home.”¹⁶⁶ Many other cases involve open bias against mothers, as when an employer told a car salesman she should “do the right thing” and stay home with her children, and that as a woman with a family she would always be at a disadvantage at the dealership.¹⁶⁷ The prevalence of such comments in the case law suggests they are common in today’s workplace.¹⁶⁸

Family responsibilities discrimination cases increased almost 400% in the ten years from 1999 to 2009, and have higher success rates than do most other forms of employment litigation.¹⁶⁹ A recent important development is a large class-action win: A jury awarded \$256 million against Novartis in a case that combined caregiver discrimination with sexual harassment and other, more conventional forms of gender discrimination.¹⁷⁰

I will conclude this Article with a discussion of a recent pattern-and-practice case out of the Southern District of New York, *EEOC v. Bloomberg L.P.*,¹⁷¹ which represents a setback for mothers and raises issues straight out of the Ginsburg briefs of the 1970s. Ample evidence in *Bloomberg* illustrated that the maternal wall bias was particularly strong, according to allegations by the claimants.¹⁷² All of the statements that

164. *Compare Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 739 (1994) (finding that the plaintiff’s “failure to present any comparator evidence doomed her case” despite having been told that she was terminated because the human resources manager did not believe she would return to work after maternity leave), with EEOC, *supra* note 12, § II(A)(3) (discussing assumptions about the work performance of female caregivers).

165. EEOC, *supra* note 12, § II(A)(3).

166. 365 F.3d 107, 120 (2d Cir. 2004) (alteration in original).

167. *Plaetzer v. Borton Auto., Inc.*, No. Civ. 02-3089 JRT/JSM, 2004 WL 2066770, at *1 (D. Minn. Aug. 13, 2004).

168. See generally CYNTHIA THOMAS CALVERT, THE CTR. FOR WORKLIFE LAW, FAMILY RESPONSIBILITIES DISCRIMINATION: LITIGATION UPDATE 2010 (2010); CYNTHIA THOMAS CALVERT, GARY PHELAN & JOAN C. WILLIAMS, FAMILY RESPONSIBILITIES DISCRIMINATION (forthcoming 2012).

169. CALVERT, *supra* note 168, at 9, 11.

170. *Velez v. Novartis Pharm. Corp.*, 244 F.R.D. 243 (S.D.N.Y. 2007). The case subsequently settled for \$175 million. Judy Greenwald, *In 2010, Bias Cases Dominate Employment Legal Landscape*, BUS. INS., Jan. 10, 2011, at 4.

171. 778 F. Supp. 2d 458 (S.D.N.Y. 2011).

172. EEOC’s Memorandum of Law in Opposition to Defendant Bloomberg L.P.’s Motion for Summary Judgment as to EEOC’s Pattern-or-Practice Claim, *Bloomberg*, 778 F. Supp. 2d 458 (No. 07-8383).

follow are based on these allegations. When one claimant told former boss Michael Bloomberg she was pregnant, his answer was a simple: “kill it.”¹⁷³ Allowing mothers flexible work arrangements, he reportedly commented, was like allowing a man time off to practice his golf swing.¹⁷⁴ The CEO who took over after Bloomberg left the company, Lex Fenwick, allegedly demanded that managers “get rid of these pregnant bitches” (referring to two women on maternity leave).¹⁷⁵ In response to a human resources manager who complained about this outburst, Fenwick asked, “[W]ell, is every fucking woman in the company having a baby or going to have a baby?”¹⁷⁶ Fenwick also opined that, unless mother or child has a health issue, “there’s absolutely no reason for someone to take paternity leave.”¹⁷⁷ The Head of News commented that “half these fuckin’ people take the [maternity] leave and they don’t even come back. It’s like stealing money from Mike Bloomberg’s wallet. It’s theft. They should be arrested.”¹⁷⁸ The Head of Global Data allegedly asked, “Who would want to work with an office full of women?”¹⁷⁹ When a female employee complained to the President of Tradebook Sales about her pay, he asked, “[C]an’t you just be happy being pregnant?”¹⁸⁰ These comments suggest that the separate spheres ideology was alive and well at Bloomberg.

Yet federal Judge Loretta Preska granted summary judgment for Bloomberg in an opinion that seemed designed to clear Bloomberg’s reputation in the press. “In a heralded complaint,” her opinion begins, “the United States Equal Employment Opportunity Commission accused Bloomberg L.P. of engaging in a pattern or practice of discrimination against pregnant employees or those who have recently returned from maternity leave However, ‘J’accuse!’ is not enough in court. Evidence is required.”¹⁸¹ She continued: “As its standard operating procedure Bloomberg increased compensation for women returning from maternity leave more than for those who took similarly lengthy leaves and did not reduce the responsibilities of women returning from maternity leave any more than of those who took similarly lengthy leaves.”¹⁸²

The informed reader is left wondering whether Judge Preska is reaching a merits determination after weighing competing evidence. If

173. *Id.* at 2.

174. *Id.*

175. *Id.* at 3.

176. *Id.* at 4.

177. *Id.* at 3.

178. *Id.* at 4.

179. *Id.* at 5.

180. *Id.* at 4.

181. *EEOC v. Bloomberg, L.P.*, 778 F. Supp. 2d 458, 461–62 (S.D.N.Y. 2011).

182. *Id.* at 462.

so, that is an intriguing development in a motion for summary judgment, a situation in which the judge is not authorized to weigh competing versions of the facts. Of course, a news reporter reading the decision typically would know none of this.

The beginning of Judge Preska's opinion (the part reporters would read) intimates that the EEOC had no, or very little, evidence.¹⁸³ The opinion presents the statistical evidence of Bloomberg's experts, followed by the statement that, "[a]gainst this *data*, the EEOC has presented anecdotal testimony from several claimants stating that they were discriminated against in terms of compensation."¹⁸⁴ This makes it sound as if the EEOC had submitted no statistical evidence. Only much later, in a footnote, does Judge Preska mention that the reason the EEOC had only anecdotal evidence is that Judge Preska had excluded all of the EEOC's expert evidence while allowing in all of Bloomberg's.¹⁸⁵ Even in that footnote, Judge Preska makes it sound as if the EEOC's experts agreed with the conclusions of Bloomberg's expert, which they did not: "The EEOC disputes the 'analysis' of [Bloomberg's] experts, but it does not dispute the statements contained in the reports."¹⁸⁶ Only one of the many shocking statements by officers at the highest levels of Bloomberg is mentioned, and it is buried toward the end of the opinion.¹⁸⁷ Instead, Judge Preska intimates that the EEOC's case consisted of colorless claims by certain class members that they were not promoted or that their compensation was decreased following their return from maternity leave, and concludes, "Generally, all of these assertions, taken together, boil down to the EEOC's conclusion that Bloomberg management is predominantly male, and has tended to follow Wall Street's model of having few women in top management positions."¹⁸⁸

Bloomberg's lawyers argued successfully to exclude many of the statements quoted above on the grounds that they were hearsay. Judge Preska's opinion neglects to mention that many of the offending statements were made by high-ranking company officials. Surely such highly placed officials had authority to make these statements or made them within the scope of their employment. Accordingly, those statements were party admissions—not hearsay.¹⁸⁹ Other key statements,

183. *Id.* at 461–62.

184. *Id.* at 465 (emphasis added).

185. *Id.* at 464 n.3. The EEOC's statistical evidence compared mothers to other leave-takers and found pay and promotion discrimination against mothers. EEOC's Memorandum of Law in Opposition to Defendant's Bloomberg L.P.'s Motion for Summary Judgment, *supra* note 172, at 15, 18.

186. *Bloomberg*, 778 F. Supp. 2d at 464 n.3.

187. *Id.* at 479.

188. *Id.* at 466 (internal quotation marks omitted).

189. See FED. R. EVID. 801(d)(2) (providing that party admissions are not hearsay, and that when a corporation is a party opponent, a declarant's statement is not hearsay if made while she was acting

such as the statement by the head of human resources that “the problem with women is that they go off and have babies,” were not hearsay because they were not offered to prove that women irresponsibly go off and have babies, but rather to show the speaker’s bias.¹⁹⁰ Again, Judge Preska’s opinion functions quite nicely to send the message to the world that Bloomberg’s reputation had been unjustly besmirched.

What Judge Preska appeared to be concerned about was the “inflammatory” nature of the statements by high-level Bloomberg corporate officials. One wonders whether the jury would have been inflamed—and, if so, whether it would have been due to the blatantly discriminatory nature of many of the comments of managers at Bloomberg. The legal issue is whether the potential prejudice substantially outweighs the probative value of the evidence.¹⁹¹ If the judge’s opinion had focused on this issue, however, it would not have succeeded in conveying the message that Bloomberg’s reputation had been unjustly besmirched.

Even more troubling is the little sermon Judge Preska offered at the end of her opinion. “At bottom, the EEOC’s theory of this case is about so-called ‘work-life balance.’ . . . [The EEOC’s claim] amounts to a judgment that Bloomberg, as a company policy, does not provide its employee-mothers with a sufficient work-life balance.”¹⁹² She quotes former General Electric CEO Jack Welch: “There’s no such thing as work-life balance. There are work-life choices, and you make them, and they have consequences.”¹⁹³ Judge Preska defends Mr. Welch’s view, which (she says) “reflects the free-market employment system we embrace in the United States,” although she then goes on to say it is not the role of judges “to engage in policy debates” and that “[t]he law does not mandate ‘work-life balance.’ It does not require companies to ignore employees’ work-family tradeoffs—and they are tradeoffs—when deciding about employee pay and promotions.”¹⁹⁴

This sermon takes us back to the Ginsburg briefs of the 1970s and the principle that it is discrimination to treat women who do not conform to stereotypes according to the assumption that all women will conform to the norm.¹⁹⁵ The claimants in this case were not asking for work-life balance. They were asking that their employer not discriminate against

within her scope of employment or with proper authority).

190. See FED. R. EVID. 803(c) (providing that a statement not introduced to prove the truth of the matter asserted cannot be hearsay).

191. FED. R. EVID. 403.

192. *Bloomberg*, 778 F. Supp. 2d at 485.

193. *Id.*

194. *Id.*

195. Ruth Bader Ginsburg, *Sex and Unequal Protection: Men and Women as Victims*, 11 J. FAM. L. 347, 349 (1971) (“As long as a woman’s access to equal opportunity could be barred by unproved assumptions concerning her inherent disqualifications, she would have no chance to prove those assumptions false.”).

them because they were mothers: not to insult them, exclude them from meetings, depress their pay, cease their promotions, or subject them to rigid rules that were not applied to nonmothers. Remember the studies by Correll, Benard, and Paik: Mothers with identical resumes were 100% less likely to be promoted, offered much lower pay, and held to higher performance standards.¹⁹⁶ The issue here is not a desire for work-life balance, but breathtaking evidence of the strongest and most open form of discrimination against women.

The most disturbing thing about Judge Preska's sermon, however, is the insight it provides into her ruling in the *Daubert* motion in which she excluded the evidence of the EEOC's experts—the ruling that in effect decided the case. The EEOC's statistical evidence used maternity leave as a proxy for motherhood and compared the wage growth of women who had taken maternity leave with that of everyone at Bloomberg who had not taken maternity leave.¹⁹⁷ In an unusual move, the judge ruled this evidence inadmissible.¹⁹⁸

Judge Preska took the step of excluding the EEOC's statistical evidence because she said it compared the wrong groups.¹⁹⁹ She admitted only the evidence from Bloomberg's statistical expert, which compared mothers who had taken leave with other employees who had taken leaves of sixty days or more, arguing that this was the correct analysis “to compare the class members to similarly situated employees, namely, those who have taken a substantial amount of leave.”²⁰⁰ Judge Preska not only considered this the relevant comparison, she considered the comparison proposed by EEOC's expert so flawed that his evidence should not even be submitted to a jury.²⁰¹

There are several problems with her analysis. The first is that this comparison is not probative. Comparing leave-takers to leave-takers may simply tell you that all leave-takers are being discriminated against, or that employees who take maternity leave are being discriminated against a little more or a little less than are those who take leave due to other serious medical conditions. The fact that leave-takers often are discriminated against is so well established that Congress noted it, and prohibited it, in the FMLA.²⁰²

A related problem with Judge Preska's proposed methodology is that courts have rejected regression analyses that use, as controls,

196. See *supra* note 150 and accompanying text.

197. EEOC v. Bloomberg L.P., No. 07 Civ. 8383(LAP), 2010 WL 3466370, at *2 (S.D.N.Y. Aug. 31, 2011) (order excluding testimony).

198. *Bloomberg*, 778 F. Supp. 2d at 464 n.3.

199. *Bloomberg*, 2010 WL 3466370, at *12 (“[The EEOC's expert] does not accurately compare class members to other similarly situated Bloomberg employees . . .”).

200. *Id.* at *7.

201. *Id.* at *12.

202. 29 U.S.C. § 2601 (2010).

variables that themselves may be affected by the discrimination that is being challenged. Thus in *James v. Stockham Valves and Fittings*, a defendant in a race-based wage discrimination case used “skill level” and “merit rating” as two factors that helped explain the contested wage differentials.²⁰³ The court rejected this analysis on the grounds that the evidence suggested that African Americans were given lower-skilled jobs and lower merit ratings because of race.²⁰⁴ This is sometimes referred to as the problem of “tainted variables.”²⁰⁵ In *Butler v. Home Depot, Inc.*, a court rejected a regression analysis that controlled for what job the plaintiffs started in, on the grounds that because women were discriminated against at the time of hiring, controlling for starting job was a tainted variable, “one whose value is affected by discrimination and has the effect of concealing disparities due to discrimination.”²⁰⁶ Similarly, a regression analysis that compares leave-takers to leave-takers is tainted by the discrimination against both mothers and individuals with disabilities (the other group most likely to take long leaves).

A third problem with Judge Preska’s insistence on comparing leave-takers to leave-takers, rather than mothers to others, lies in her underlying assumption that employees who have taken leave are not comparable, by definition, to those who have never taken leave because they are less productive, less dependable, and less committed. She quotes with approval the statement of a Bloomberg expert who said, “If a long leave has some lasting effect on performance-related factors, such as productivity, and therefore on pay, employees with a recent long leave . . . are not similarly situated to employees who have never been on a long leave.”²⁰⁷ This assumption (without proof from the individual workplace in question) that women are less productive once they become mothers is precisely the kind of maternal wall stereotyping that courts are supposed to be protecting plaintiffs against.

But the problems do not end there. In light of the judge’s sermon about work-life balance, the reasons behind her *Daubert* ruling become clear: She is assuming that an employer is entitled to act on an unproven assumption that anyone who takes leave will, upon their return, be less productive than anyone who has not taken leave. But acting on that assumption without proof violates the FMLA, which prohibits retaliation

203. 559 F.2d 310, 332 (5th Cir. 1977).

204. *Id.* at 349.

205. *Butler v. Home Depot, Inc.*, Nos. C-94-4335 SI, C-95-2182 SI, 1997 WL 605754, at *10 n.21 (N.D. Cal. Aug. 29, 1997).

206. *Id.*

207. *EEOC v. Bloomberg L.P.*, No. 07 Civ. 8383(LAP), 2010 WL 3466370, at *11 (S.D.N.Y. Aug. 31, 2011) (order excluding testimony).

against anyone who has taken a federally protected leave.²⁰⁸ In essence, Judge Preska not only has forgotten that the FMLA prohibits retaliation against leave-takers, she also puts her seal of approval on precisely this kind of retaliation.

Judge Preska opines that the plaintiffs' proposed comparison between women who have returned from maternity leave and everyone else at Bloomberg violates the Pregnancy Discrimination Act because it offers special treatment to pregnant women.²⁰⁹ But it offers special treatment to women returning from maternity leave only if an employer is prohibited from discriminating or retaliating against mothers for taking leave in a context where the employer is free to discriminate or retaliate against others for taking leave. But, again, the FMLA prohibits discrimination or retaliation against *anyone* who takes a protected leave.²¹⁰ Therefore, after passage of the FMLA in 1994, the Pregnancy Discrimination Act's insistence that pregnant women be treated "the same" as other employees amounts to a requirement that pregnant women (along with other employees) not be penalized due to the unsupported assumption that they will be less productive upon their return to work.

Suffice it to say that the analysis in *Bloomberg* is severely flawed. Any employer who relies on the key evidentiary ruling in *Bloomberg* will weaken its case: Insisting in a maternal wall case that the correct comparison is between mothers and other leave-takers because the careers of all leave-takers stall out is a virtual admission that the company has violated the FMLA.²¹¹

This all brings us back to Justice Ginsburg's unfinished agenda: to ensure that the law does not function to police women into the domestic sphere and men out of it. Justice Ginsburg began this process by eliminating government programs that explicitly embraced separate spheres. But the ACLU cases of the 1970s were only an initial victory in a much larger campaign. Today, family responsibilities cases are the front line in contesting separate spheres. The EEOC's enforcement guidance on caregiver discrimination articulated a reasonable set of rules about how maternal wall suits should be litigated, highlighting the use of stereotyping evidence in order to avoid just the kind of thing that

208. See 29 U.S.C. § 2615 (2010); 29 C.F.R. § 825.220 (2011) (describing the FMLA's prohibitions against discrimination and retaliation for taking FMLA leave).

209. *Bloomberg*, 2010 WL 3466370, at *7.

210. See U.S.C. § 2615; 29 C.F.R. 825.220.

211. The reason the choice of comparators is so important is that if the correct comparison is between mothers and other people who have taken long leaves, then this will often mean that a mother's case will fail due to her inability to find a suitable comparator or (in a class action) a sufficient number of comparators such that she can produce a statistically reliable comparison. This takes mothers right back to where they were a decade ago: with no practical way to contest the strongest form of gender discrimination in today's workplace.

happened in *Bloomberg*.²¹² Judge Preska ignored the EEOC's guidance; by doing so, she fell into the old-fashioned kind of stereotyping Justice Ginsburg taught us to avoid.

CONCLUSION

To return to Judge Preska's opinion, recall her assertion that "[t]he law does not mandate 'work-life balance.' It does not require companies to ignore employees' work-family tradeoffs—and they are tradeoffs—when deciding about employee pay and promotions."²¹³ That's true. But what employers are not allowed to do is discriminate against one group of mothers because a different group of mothers decided to leave the fast track. As Ginsburg taught us long ago, you cannot penalize women who do not conform to stereotypes just because other women do conform. We abandon this basic principle at our peril. Doing so would be a truly devastating setback for women, given that studies show that what dooms women economically in the United States today is not being a woman—it is being a mother.²¹⁴ If the courts refuse to protect mothers on the fast track simply because other mothers left the fast track, Justice Ginsburg's reconstructive vision will remain elusive. That's for damn sure.

²¹² EEOC, *supra* note 12.

²¹³ EEOC v. Bloomberg, L.P., 778 F. Supp. 2d 458, 485 (S.D.N.Y. 2011).

²¹⁴ See Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204 (2001) (finding a significant wage penalty); see also Correll, Benard & Paik, *supra* note 11, at 1299–1300 (reviewing the literature).