

FOREWORD: LOOKING FOR A MIRACLE? WOMEN, WORK, AND EFFECTIVE LEGAL CHANGE

CATHERINE L. FISK*

If you were asked to blurt out the first few words that popped into your head in response to the words “gender, work, and law,” what would you say? The answer to that question tells us something about the current state of our culture, the law, and legal scholarship on gender, work, and the law. If we take the topics of the fine collection of articles published in this volume as an answer to the question, the words blurted out would be something like “women, children, discrimination, working time, and sex.” If you asked the same person to identify the biggest barriers to gender equality at work, you might generate a similar list.

It is perhaps no surprise that the things that define women and work are the things that have proved to be the most resistant to the legal changes brought about by the long struggles of twentieth-century feminism. Digging deeper into the insights produced by the scholars whose work you hold in your hands (or can read on the screen), we see both the social transformation that the law has wrought in the area of gender in the workplace, but also how resistant social norms and economic inequality are to change through the law.

Four decades after the enactment of Title VII, American law continues to imagine that children and sex shape and constrain the role of women at work but not the role of men. In the legal imagination, children and sex have always been crucial in defining the nature and significance of gender. Children and sex play a dual role in constructing the law’s vision of gender: they are sometimes seen as necessary to, and sometimes as constraints on, women’s ability to achieve economic parity with men, psychic peace for themselves, and respect and status in their social interactions.

Notwithstanding the ambitions of twentieth-century feminism and legal liberalism, both of which held that law reform could transform society, redistribute power, and reshape the human psyche by eliminating bias, law’s vision of women and work has maintained a stable core since industrialization and the ideology of middle- and upper-class domesticity and a separate women’s sphere developed in the nineteenth century. That is, law imagines a fundamental conflict between women’s wage work and a healthy family life, whereas men’s wage work is regarded as the foundation of family. Moreover, law has not fundamentally changed its heteronormative view that sex is a

* Professor of Law, Duke University School of Law. It is a particular pleasure to write this Foreword because it gives me the opportunity to acknowledge and thank the editors and staff of the *Duke Journal of Gender Law & Policy* for their extraordinary work in bringing forth this outstanding volume.

dangerously destabilizing force in the workplace and that women introduce sex to a workplace that could otherwise shut it out.

The articles in this volume illuminate the many facets of and deep structure of the law's vision of the gendered culture of work. It is noteworthy that in a volume on the theme of women and work, all the articles address, in one form or another, one of two topics: children and sexuality. The authors acknowledge the desire of many women to find fulfillment through family and to express (but control) their bodies and sexuality, yet the articles also illustrate the myriad ways that women's bodies and children have been and remain sources of gender subordination. The challenge for contemporary legal reform is to negotiate an accommodation between these conflicting tendencies.

On the question of whether or to what extent law should force work to accommodate family, the articles reveal a profound conflict over whether accommodation will enable women to achieve equality in the workplace or will increase financial incentives for firms to avoid hiring women and perpetuate the notion that work-life conflicts are a women's issue. Reading deeper in them, one can see some doubts over whether an ideology of accommodation will in fact be a barrier to equality.

In addressing the question of the law's role in accommodating work to family life (or vice versa), one must consider whether a legal and political demand that work accommodate family reinforces a gender stereotype or changes it. Theresa Gabaldon and Nicole Porter both remind us that America is currently in an era in which children are ascendant. Porter argues that the notion that women must be "supermoms"—because in an era of children's ascendance that is how we imagine a good mother—is part of women's oppression. Gabaldon explores the unprecedented role of children as consumers in modern society and advocates legal restrictions on corporate business strategies that target children for the sale of harmful products. She makes the crucial point that wealthy children as well as poor ones need protection from unregulated capitalism, and that women's work has lately been imagined as being inconsistent with that protective role. Children's adult-determined "needs," their advertising-manipulated desires, their striving parents' ambitions for their achievement—all these are imagined to define and to dominate the purpose of family. That which defines the purpose of family defines the agenda of women. Of course, as Vicki Lens, Michael Selmi and Naomi Cahn remind us, the primacy of children is a distinctly middle- and upper-class ideology; the poor in America, like the poor everywhere, are supposed to work and are thought to serve their children best by working, not by staying home, and the middle and upper classes seem to expect little from poor children. But in America, upper-class ideologies are the ones that always dominate the law's imagery, so the supermom trumps the working mom as the norm of perfect motherhood.

The ideology of children's primacy and the norm of children's achievement operate to maintain a necessarily separate sphere for women. Consider how the regnant American vision of the role of children in a family differs from that of much of the world and even of America and Europe a century ago. Children do not exist to work, unlike most children in most cultures for most of history, nor do they have their own sphere, as you might imagine they did if you read

children's literature (a realm in which adults are unnecessary and therefore absent). Rather, American society envisions that children need to have their parents to entertain them (so they are not seduced by TV and video games); to educate them (so they achieve); to chaperone them from school to sports to lessons to friends to the mall (because children lack autonomy of movement). If this is your vision of children, and if you imagine family as being about nurturing children, and if you envision women as being the protectors of family, then of course work must accommodate family, and thus work must accommodate women. That, in turn, perpetuates rather than transforms the gender stereotype that has subordinated women since the rise of the cult of domesticity in the nineteenth century. As Porter points out, educated wealthy women play a large role in creating and maintaining the architecture of children's primacy, because it justifies the existence of the highly-educated woman who has given up her job as a lawyer, business person, or doctor to devote herself to raising children. And, as Gabaldon cleverly argues, the problem is not that women's work is bad for children; the problem is that women's constant supervision of children is thought necessary to protect them from the myriad bad influences that corporate marketing departments constantly bombard them with. If you're attracted to utopian thinking when contemplating law reform, you could say that we should focus less on how to restructure work so that women could be at home with their kids more, and more on why it is that children seem to need constant parental supervision.

Time is the battlefield on which the conflict between family and work is envisioned to be waged. There are many reasons for thinking of time as a terrain of battle. The most obvious is that middle-aged professionals who experience scarcity primarily as a shortage of time rather than a shortage of money are the ones who write legal scholarship. We write what we know, and what we know is that we've got too much to do and too little time. Selmi and Cahn remind us just how class-specific that perception is; they assert that three quarters of the increase in working time in recent years is due to growth of dual-earner households; the remaining quarter is an increase in working time, particularly among dual-earner couples. It is also important to remember that a scarcity of time among the upper classes is a modern phenomenon: I've just re-read all of Jane Austen's novels, and time was not in short supply in well-to-do Regency England as she portrays it. These articles force us to think about time and thus help us to see why the impermeability of the maternal wall, as Joan Williams has aptly named the barrier to women's equality, is of quite a different nature than the impermeability of the glass ceiling. We think we know how the law can change biased attitudes—although the persistence of the glass ceiling reminds us that plain old-fashioned unconscious bias is a bit difficult to change, and Ellen Sekreta's article on sexual harassment of women in research laboratories shows that some old-fashioned bias exists in the hierarchical world of science—but we haven't figured out how law can add another eight hours to the day.

Another major theme of these articles has to do with sex at work. Michele Alexandre powerfully reminds us that the female body has long been, and remains, the site on which heterosexual society projects its sexual imagination. The question whether freedom for women is best achieved by sexual liberation

or sexual suppression has divided feminists for decades, and the divide can be seen in these articles. Will protecting the ability to form romantic, intimate, or affective attachments at work ultimately liberate women, because it will reduce the retaliation against women when it occurs? Or is it better to pursue a legal strategy that attempts to prohibit sexual overtures because in the real world, particularly in insular workplaces where power remains in male hands, sexual overtures are more likely to harm women? Sharon Rabin-Margalioth might be read to suggest the former, and views liberation as essential. That is, she points out that while workplace rules that prohibit romantic attachments or marriages between workers do not always protect women from unwanted sex or favoritism, they sometimes force women out of the workplace by making them choose between their relationship and their job. Sekreta, by contrast, seems to tend toward the view that prohibiting sexual relations in the workplace may be the only way to empower women to resist abuses of power that manifest in sexual harassment. Sekreta is skeptical about whether sex at work will free women. And Lorraine Schmall's wide-ranging effort to recast birth control as a labor law issue shows how a backlash against liberated sexuality manifests itself as a moral attack on contraception. As she points out, so-called "pharmacist conscience" policies, which allow pharmacists to refuse to fill prescriptions and pharmacies to refuse to sell birth control devices, are portrayed as protecting the rights of employees, but operate to subordinate women. There is no general right of employees to refuse to do those parts of their job that offend their morals; pharmacists who disapprove of birth control are given rights that most employees lack, and they gain those rights at the expense of women. Now that many speculate there are five votes on the United States Supreme Court to overrule *Roe v. Wade*, Schmall's history of the long fight to secure reproductive freedom reminds us that workplace equality will exist only where there is reproductive freedom.

Yet another prism through which to view these articles is doctrinal: in one way or another, all of them consider what sort of legal regime might transform (a) the cultural climate regarding women, family, work, and sex, and (b) the economy of women's work. Joan Williams, Elizabeth Westfall, and Sharon Rabin-Margalioth cast their lot with antidiscrimination law, urging us to see and address the barriers to women's equality in the framework of civil rights. A more creative approach to the Pregnancy Discrimination Act and the Family and Medical Leave Act and a less crabbed notion of the discrimination effected by antinepotism rules and antifraternization rules are, in their view, part of a legal strategy of women's empowerment. Sekreta includes within her analysis not only Title VII and Title IX, but also laws regulating misconduct in laboratories as tools to combat sexual harassment in the workplace. Susan Carle's insightful analysis of the affirmative defense in sexual harassment cases is a powerful argument about how technical legal doctrines are used to undermine a law that has, but may fail to realize, the potential to transform sexual exploitation at work. Like Williams, Westfall, Sekreta, and Rabin-Margalioth, Carle too advocates a civil rights strategy.

In contrast, Lens, Gabaldon, Alexandre, Selmi and Cahn look to legal change that is more overtly about changing the architecture of economic entitlements (as in the case of Lens' work on welfare), changing the legal duties

of large-scale corporations who are dominant economic actors (as in the case of Gabaldon's focus on corporate law), or changing public policy regarding work schedules, school schedules and day care, and domestic violence (as Selmi and Cahn suggest). Alexandre pursues a third way, one that you might consider more ideological, in calling for an across-the-board effort by women to "infiltrate the political system" in Trinidad and Tobago to transform an entire jurisprudence of gender bias.¹

The most significant convergence of all the articles is in their creative efforts to devise ways that law can change aspects of culture that have proven far more resistant to change than many feminist legal theorists acknowledged decades ago. It turns out that transforming society through changing law is so difficult that it seems almost miraculous when it occurs. Twenty years ago, in my first published article, I chose to tackle what I thought was the last major remaining barrier to women's workplace equality: the difficulty of combining work and family.² In the mid-1980s, I was quite sure that the Family and Medical Leave Act was never going to get out of Congress or past President Reagan's veto, so I developed a theory of how a failure to accommodate family care responsibilities was sex discrimination prohibited by Title VII. My goal was to force employers to provide childcare for employees on the low-end of the pay scale; I figured that rich families would take care of themselves. Even as I wrote, I knew my legal arguments were a bit of a stretch, but I regarded the project as a "thought piece" that might catalyze new approaches to removing an obstacle to the liberation of working class single mothers. I was, without a doubt, astonishingly naïve. Even accounting for that, however, the intervening twenty years have suggested the enormous difficulty of identifying a legal strategy that will transform the social norms that structure gender inequality at work. If you had told me then that we'd still be struggling with the exact same issue now, except that not even wealthy families would have figured out how to raise children while allowing all parents to have paying jobs, I would have been stunned. The articles that comprise this volume help us understand why the law has failed to change social norms regarding gender, family, and work that an earlier generation of lawyers naively thought might occur. As it stands today, the authors of these articles are debating, to use Porter's phrasing, whether law-plus-sustained effort can change the institutional cultures that perpetuate women's subordination, or whether it requires a miracle. I don't believe in miracles, so my money is on the law. And these articles are wonderful contributions to that long-term project.

1. Reading Alexandre together with Schmall, here's an idea for a legal strategy based on body protest: the women in Aristophanes' *Lysistrata* refused sex with their husbands until the men made peace with Sparta. Perhaps, if contraception and abortion become unavailable, women should pursue a similar strategy until reproductive freedom is guaranteed.

2. Catherine L. Fisk, *Employer-Provided Child Care Under Title VII: Toward an Employer's Duty to Accommodate Child Care Responsibilities of Employees*, 2 BERKELEY WOMEN'S L.J. 89 (1986).