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Introduction

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Introduction

Kerri Stone^{*}

The year 2013 marks the 20th anniversary of the passage of the Family and Medical Leave Act (FMLA). Title VII of the Civil Rights Act of 1964 will be almost fifty years old. These and other statutes were enacted in an attempt to eradicate discrimination against and prevent the exclusion from the workforce of those historically under-represented in the workplace and denied the opportunity to advance once granted entree. Today, unprecedented numbers of women are getting advanced and professional degrees and the chance to enter the professional workplace. Yet vast disparities, especially at the upper levels of employment, in compensation, power, and titles persist between the sexes today. How can this be explained? Are the biological differences between men and women and disparities in societal expectations of the sexes insurmountable? Or is there something in contemporary workplace culture that is inimical to the retention and advancement of women?

When the plans for this conference were being laid out in the fall of 2011, we knew that the topic of women's struggles to attain equality with men in the workplace was going to generate an important and timely conversation. After all, with the impending anniversary of Title VII and with unprecedented numbers of women attaining graduate and professional degrees and entering the workplace, many in society have expressed the view that we are "post-gender," with legislation to ensure women's equality in the workplace all but obviated. However, the so-called "gender gap" persists today, with full-time salaried women making, on average, eighty-two cents for every dollar that a man

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makes,¹ and barely represented at the highest levels of workplace compensation, influence, power, and prestige.²

We had no way of knowing that the questions we were preparing to ask, questions that invoke the complex interplay among societal expectations of the sexes, the notion of “family work/life balance,” and sub- or unconscious discrimination and prejudice, and its role in the gap’s persistence, were about to take center stage nationally. We had no way of knowing that articles and books like Sheryl Sandberg’s “Lean In,” and Anne Marie Slaughter’s “Why Women Can’t Have it All,” were about to spark a national debate as to the source of the unique challenges facing working women, and how they were expected to best navigate those challenges. Nor did we have any way of knowing that news stories like Yahoo! CEO Marisa Meyer’s controversial decision to end telecommuting at the company, even as she became a new mom and built a nursery next to her office for her own baby, were going to capture and divide the American public and its discourse. The CEO, who famously accepted her position while pregnant, immediately came under fire, even as media outlets published reports that statistics collected on telecommuting bore out the rationality of her decision.

It is, in fact, the case that between 1970 and 2010, the percentage of bachelor’s degrees earned by women rose from 43.1% to 57.2%.³ That number is projected to be 58% in 2020.⁴ Moreover, between 1970 and 2010, the percentage of master’s degrees earned by women rose from 38.8% to 60.3%,⁵ and in 2020, that number is projected to be 60.7%.⁶ Finally, between 1970 and 2010, the percentage of doctoral degrees earned by women rose from 9.6% to 51.7% and is projected

¹ U.S. DEPT. OF LABOR, *Highlight of Women’s Earnings in 2011* (Oct. 2012) [*Highlight of Women’s Earnings in 2011*], available at <http://www.bls.gov/cps/cpswom2011.pdf>.

² See *id.* (“Women are more likely than men to work in professional and related occupations. Within this occupational category, though, the proportion of women employed in the higher paying job groups is much smaller than the proportion of men employed in them.”). See also *Statistical Overview of Women in the Workplace*, CATALYST, <http://www.catalyst.org/knowledge/statistical-overview-women-workplace> (last visited May 24, 2013) [hereinafter *Statistical Overview*]; *U.S. Women in Business*, CATALYST, <http://www.catalyst.org/knowledge/us-women-business-0> (last visited May 24, 2013) (reflecting that women maintain only 4% of the CEOs positions of Fortune 500 companies, 8.1% of the top earning positions, and 16.6% of the board seats).

³ *Women’s Earnings and Income*, CATALYST, http://www.catalyst.org/knowledge/womens-earnings-and-income#footnote11_ji9btiy (last visited May 24, 2013) (referencing DIGEST OF EDUCATION STATISTICS, Table 283: *Degrees Conferred by Degree-Granting Institutions, by Level of Degree and Sex of Student: Selected Years, 1869-70 through 2020-21*, http://nces.ed.gov/programs/digest/d11/tables/dt11_283.asp (last visited May 24, 2013)).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

to be 53.8% by 2020.⁷ In terms of entering classes of professional jobs, women are being hired into large law, accounting, and financial firms in historically unprecedented numbers.⁸

According to the Government's Bureau of Labor Statistics, women make up 46.6% of the labor force.⁹ So why is it that 14.3% of Fortune 500 Company Executives are women, and 16.6% of Board seats are held by women?¹⁰ Just 4.2% of Fortune 500 Company CEOs are women,¹¹ and of the top earners in Fortune 500 companies, a mere 8.1% are women.¹² In the field of law, 19.9% of law firm partners are women, 15% of managing partners are women, and just 4% of managing partners at top 200 firms are women.¹³ By contrast, 45% of associates are women.¹⁴ According to a survey recently released by the American Bar Association, both female partners and female associates trail their male counterparts in pay.¹⁵

Solutions to this seemingly intractable problem have been sparse, controversial, and elusive. Just a few months ago, when European Commissioner Viviane Reding announced that, "The Commission had adopted her proposal for a European law mandating quotas so that women represent 40% of company board members by 2020," she observed, "I don't like quotas, but I like what they do."¹⁶ Several European countries, aware of the dearth of women at the helm of leadership in industry and other places, have decided that to the extent that

⁷ *Id.*

⁸ See *Highlight of Women's Earnings in 2011*, *supra* note 1; *A Current Glance at Women in the Law*, A.B.A. (Feb. 2013) [hereinafter *Current Glance at Women in Law*], http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_feb2013.authcheckdam.pdf; *Statistical Overview*, *supra* note 2; *New Statistics for Women-Owned Businesses*, MBE CONNECT, <http://mbeconnect.com/2012/03/new-statistics-for-women-owned-businesses-2/> (last visited Apr. 11, 2013); *Women in Elective Office 2013*, CTR. FOR WOMEN & POLITICS, http://www.cawp.rutgers.edu/fast_facts/levels_of_office/documents/elective.pdf; Louise Single, *Gender, Family and Work-Life Issues in Public Accounting*, AM. INST. CPAS (June 16, 2011), http://www.cpa2biz.com/Content/media/PRODUCER_CONTENT/Newsletters/Articles_2011/Career/IssuesPublicAccounting.jsp (noting 55% of entry-level accounting professionals are women); Larissa Faw, *Why Millennial Women are Burning Out at Work by 30*, FORBES (Nov. 11, 2011), <http://www.forbes.com/sites/larissafaw/2011/11/11/why-millennial-women-are-burning-out-at-work-by-30/> (reporting that 53 percent of corporate entry-level jobs are held by women).

⁹ U.S. DEPT. OF LABOR, *Table 3: Employment Status of the Civilian Noninstitutional Population by Age, Sex, and Race, Annual Averages 2011 (2012)*, available at <http://www.bls.gov/cps/cpsaat03.htm>.

¹⁰ *Statistical Overview*, *supra* note 2.

¹¹ *Id.*

¹² *Id.*

¹³ *Current Glance at Women in Law*, *supra* note 8.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Viviane Reding, Twitter (Nov. 14, 2012, 12:28 AM), <https://twitter.com/VivianeRedingEU>.

the culture of corporate leadership is somehow not welcoming to women or conducive to their success, large scale forced integration is the best way to alter it.

How do underlying societal attitudes, weaknesses in legislation and the doctrines that guide its interpretation, and workplace culture conspire to create the gap? We will examine the numerous binds and catch 22's that existing law and cultural norms impose on working women who would also like to have families. Moreover, what about women without children and women with children who would choose to work and keep pace with men but for the hostility with which they are faced? What about men with family responsibilities or who want to take parental leave and must cope with the gendered assumptions and prejudices of their employers?

Many are content to reason that women, as a group, simply “opt out” of positions of leadership and power, often citing family/work-life balance challenges. This opt-out, some say, is wholly voluntary, and should be respected and left alone. Others argue that the ground gained by generations of women’s hard-won battles for equality of opportunity will be lost if change that is structural, and maybe even compelled, does not come about. They contend that it is imperative that society examine other potential causes of women’s “opting out” or “leaning back,” and question the premises and underlying structure of the contemporary workplace. The countless debates swirling around the gap, the factors that have created it, and whether and how to implement various solutions, or process critiques of existing legislation, jurisprudence, and societal values, have been robust and rich.

So on March 1, 2013, when we assembled for the symposium with some of the world’s leading scholars, we knew that our conversation about “minding the gap,” and the volume that would be generated from it—this volume—were going to be relevant and significant. This symposium aimed to generate discussion that probed beneath simple, pat answers and complacency when it comes to “the gap” between the sexes at work. The articles that comprise this volume are an exposition of some of the most thoughtful, nuanced debates going on the subject in America today.

Taking issue with the notion that the gap discussed in this symposium is something that warrants remediation, Professor Kingsley R. Browne wrote *Mind Which Gap? The Selective Concern Over Statistical Sex Disparities*¹⁷ to take issue with the symposium’s very premise, sparking thought and discussion, both at the event and, likely,

¹⁷ See Kingsley R. Browne, *Mind Which Gap? The Selective Concern Over Statistical Sex Disparities*, 8 FIU L. REV. 271 (2013).

among his readers. Professor Browne illustrates his rejection of the symposium's premise with examples of other so-called gaps, like that between men and women when it comes to being incarcerated for the commission of crimes or instances of being crime victims, and even that of the average life span of men as compared with the average life span of women. Questioning the amount of concern generated over the gap discussed at the symposium as compared with these other gaps, Professor Browne attempts to recontextualize and redefine the nature and extent of the sex/achievement gap as a problem.

In *The Gender/Class Divide: Reproduction, Privilege, and the Workplace*,¹⁸ Professors June Carbone and Naomi Cahn examine the impact of advances in the technology of egg freezing on workplace sexual equality. By exploring the ways in which the increased scientific capabilities have influenced and predicated many women's choices with respect to career and family planning, the authors are able to lend and advance important insights into workplace demographics and inequalities not only between the sexes, but across socio-economic classes.

Professor Henry L. Chambers, Jr., argues in *The Cost of Non-Compensable Workplace Harm*¹⁹ that in a society in which sex discrimination persists despite legislation, the equal skill and efforts of men and women will nonetheless yield a "gap" because of the built-in headwind of the discrimination. He maintains that large gaps in Title VII's substantive coverage, compounded by judicial interpretations, both substantive and procedural, that further limit the statute's reach, demonstrate that the statute is not the panacea seemingly required to transform the socio-professional landscape and close the gap. Professor Chambers's close query into these gaps and limitations provides an explanation for the current state of things and prompts potential responses.

In *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*,²⁰ Professor D. Wendy Greene seeks to identify a nexus between the promulgation and enforcement of grooming and appearance codes in the workplace and the gap between men and women in the workplace. Exhorting "jurists, practitioners, and civil and workers' rights advocates" to "engage in cross-cultural coalition discourse and advocacy efforts so that the multidimensional

¹⁸ See June Carbone & Naomi Cahn, *The Gender/Class Divide: Reproduction, Privilege, and the Workplace*, 8 FIU L. REV. 287 (2013).

¹⁹ See Henry L. Chambers Jr., *The Cost of Non-Compensable Workplace Harm*, 8 FIU L. REV. 317 (2013).

²⁰ See D. Wendy Greene, *A Multidimensional Analysis of What Not to Wear in the Workplace: Hijabs and Natural Hair*, 8 FIU L. REV. 333 (2013).

mensional experiences of women of color who don hijabs and natural hairstyles—in the workplace and beyond—are meaningfully addressed,” Professor Greene posits that this kind of coalition advocacy is most needed and can yield great results. By focusing on the unique ways in which women of color are disadvantaged, Professor Greene provides yet another important insight into the gap.

In *Discursive Disparities*,²¹ Professor Nancy Leong highlights documented disparity in what she terms the respective amount of “discursive space men and women occupy.” By linking the relative absence of the female voice in public discourse to consequences like women’s relative lack of prestige, influence, and compensation in professional and social spheres, Professor Leong identifies a significant problem. Her proffered solutions to the problem, which involve exhorting and inspiring women to write more and removing barriers and impediments to women’s participation in public and written discourse, ought to provoke discussion and awareness of this important initiative.

In *A Dilemma of Doctrinal Design: Rights, Identity and the Work-Family Conflict*²² Professor Lauren Sudeall Lucas questions the role that law and formal rights-based doctrine ought to play in the struggle for women’s equality against the backdrop of the work/family life balance debate. Professor Lucas notes that for “second-generation problems, the rights-based paradigm—and by extension, the [Supreme] Court—cannot accomplish those aims alone.” In the end, Professor Lucas advocates a “productive conversation about how to move the discussion of work-family balance forward . . . [.] driven by the recognition that one’s identity is more than a compilation of individual rights or entitlements and that those rights are not exercised in a vacuum.”

In *Constitutional Limitations on Closing the Gender Gap in Employment*,²³ Professor Marcia L. McCormick probes into the ways in which the Supreme Court has retracted Congress’s power address inequality, and specifically, the achievement gap. Examining jurisprudential and legislative failings, Professor McCormick concludes that “[o]verall, we have not progressed very far in addressing inequality in contexts where we think people are different.” Thinking outside traditional lines, however, she posits that perhaps the only available power left for Congress to successfully employ to address the issue is the taxing power. She then makes several very novel and exciting suggestions regarding that avenue.

²¹ See Nancy Leong, *Discursive Disparities*, 8 FIU L. REV. 369 (2013).

²² See Lauren Sudeall Lucas, *A Dilemma of Doctrinal Design: Rights, Identity and the Work-Family Conflict*, 8 FIU L. REV. 379 (2013).

²³ See Marcia L. McCormick, *Constitutional Limitations on Closing the Gender Gap in Employment*, 8 FIU L. REV. 405 (2013).

Using her renowned and groundbreaking work in masculinities as a lens through which to view the gap, Professor Ann C. McGinley, uses her article, *Masculine Law Firms*²⁴ to employ Multidimensional Masculinities Theory in order to explore the gap in the contemporary American law firm and to lend greater insight into what is truly happening and why. She posits that since masculinity and femininity are social constructs, the conservative clientele and cultures of law firms, engenders the performance of traditional gender roles in the workplace and the re-enforcement of masculine norms so as to cement and routinize them. Ultimately, Professor McGinley identifies the ensuing harms to members of both sexes, especially parents, and she concludes that the imposition of masculine work norms on employees by law firms is, and should be viewed by courts as violative of Title VII's prohibition of sex-based discrimination unless the firms demonstrate that these norms and requirements are bona fide occupational qualifications.

In *The Blame Game: How the Rhetoric of Choice Blames the Achievement Gap on Women*,²⁵ Professor Nicole Buonocore Porter seeks to challenge the notion that women who have somehow "opted out" of professional advancement or participation have made free and unconstrained choices against a legitimate and fixed backdrop of written and unwritten rules that must not be challenged or changed. By providing an exposition of this "blame narrative," Professor Porter furnishes her readers with the groundwork to challenge and uproot it, noting that, "Instead of looking at possible discriminatory reasons for the achievement gap . . . society, the media, employers, and courts blame women themselves." The first scholar to compile and assess all three so-called "choices" subsumed within the "blame narrative," Professor Porter provides a significant way to account for and to help to narrow the gap.

In *After Dothard: Female Correctional Workers and the Challenge to Employment Law*,²⁶ Professors Brenda V. Smith and Melissa C. Loomis focus on female corrections officers and the way in which the gap affects and marginalizes these women. The authors also focus on some surprising and unintended ramifications of the progress that women have made, professionally, in correctional institutional; for example, they assert that this progress actually operates to place female inmates at a greater risk for sexual victimization. By examining the various areas of law and feminist theories that have been impacted

²⁴ See Ann C. McGinley, *Masculine Law Firms*, 8 FIU L. REV. 423 (2013).

²⁵ See Nicole Buonocore Porter, *The Blame Game: How the Rhetoric of Choice Blames the Achievement Gap on Women*, 8 FIU L. REV. 447 (2013).

²⁶ See Brenda V. Smith & Melissa C. Loomis, *After Dothard: Female Correctional Workers and the Challenge to Employment Law*, 8 FIU L. REV. 469 (2013).

by the proliferation of female staff and their roles at institutions, the article contributes further to our understanding of the gap.

In *Litigating the FMLA in the Shadow of Title VII*,²⁷ Professor Sandra F. Sperino critiques courts' application of the McDonnell Douglas burden-shifting framework for establishing causation in discrimination cases to cases brought under the Family and Medical Leave Act. According to Professor Sperino, this application is often misplaced and distracting, nurturing a "frameworks mentality" that can obscure the core questions posed, thwart reasoned analysis, and undermine the proper application of law to facts. To the extent that framework-driven issues consume FMLA cases, Professor Sperino argues, core entitlements conferred on individuals by the statute may be lost.

In *Navigating the Gap: Reflections on 20 Years Researching Gender Disparities in the Legal Profession*,²⁸ Professors Joyce S. Sterling and Nancy Reichman reflect upon their extensive studies of and conclusions about the compensation, retention, and advancement of the sexes in the legal field. Their groundbreaking work has resulted in both insights crucial to a better-informed understanding of the gap and recommendations necessary to its closure.

Professor Michael J. Zimmer writes in *Binders Full of Women & Closing the Gap*²⁹ about the aforementioned EU Commission's adoption of a directive requiring EU member states to mandate that boards of large European corporations be made up of "40% of the underrepresented gender" for non-executive, outside director seats. Calling the directive a "bold step forward," Professor Zimmer examines the directive thoughtfully with an eye toward the problem of the achievement gap, and even as he notes that such a move is presently "far off the radar" in this country, he lauds the EU for having "passed the US by in terms of moving toward greater gender equality."

The articles in this volume represent the conversations and debates being held on the subject of the gap, its origins, and ways to rectify gender inequality in the workplace by some of the greatest contemporary scholars working on and thinking about this issue. These conversations will surely continue, and the ideas, arguments, and insights in these articles are certain to shape and steer them.

²⁷ See Sandra F. Sperino, *Litigating the FMLA in the Shadow of Title VII*, 8 FIU L. REV. 501 (2013).

²⁸ See Joyce S. Sterling & Nancy Reichman, *Navigating the Gap: Reflections on 20 Years Researching Gender Disparities in the Legal Profession*, 8 FIU L. REV. 515 (2013).

²⁹ See Michael J. Zimmer, *Binders Full of Women & Closing the Gap*, 8 FIU L. REV. 541 (2013).