

REMEMBERING THE FOUNDING OF THE *JOURNAL OF GENDER AND LAW*

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In my first year of law school, I felt baffled by the experience of legal education. I had spent three years working in politics—in campaigns and on Capitol Hill—and had entered law school to find a way to add intellectual depth to my instinctive progressive beliefs. But what I found, I perceived to be arid and counterfactual, with caselaw divorced from political context and history that had led legislators and judges to reach particular decisions. I was discouraged and briefly thought I had made a wrong turn on my life path, until I found a group of friends in the same intellectual and spiritual funk.¹ Together we decided to found a new journal, which became the *Journal of Gender and Law* (JGL).

Founding the Journal was a real starting point for me in thinking about gender, sexuality, economic empowerment, and racial justice as overlapping and yet distinct lenses through which to view the law. The group of students who came together shared the feeling that law school was a somewhat strange and alienating environment and didn't seem to provide us with what we were seeking. So we set out to fill that gap ourselves, resulting in the underlying philosophy of JGL: an interdisciplinary approach to the problems that continue to confound our society in terms of gender and race and the simultaneous disadvantages that affect women of color. As Justice Ruth Bader Ginsburg wrote in her introduction to our first issue, the *Columbia Journal of Gender and Law* sought to “portray today’s feminist movement, not as unitary, rigid or doctrinaire, but as a spacious home, with rooms enough to accommodate all who have the imagination and determination to work for the full realization of human potential.”²

The other element of JGL that I cannot overlook is the deep friendships that grew out of the Journal. It was a challenge to carve out time from law school, which included school

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1 I also want to thank Professor Harriet Rabb who also helped me find my way, through her Fair Housing Clinic.

2 Ruth Bader Ginsburg, *Introduction*, 1 COLUM. J. GENDER & L. 1 (1991).

work, of course, but also outside activities and projects, but JGL was an intense experience for us. We were focused on the content—*what* we wanted to say—but the process of getting a magazine together was also fundamental. *How* do we say it? We wanted the Journal to reflect feminist principles in both those ways, so much of our early discussion centered on what process of decision-making would reflect our values and also develop meaningful content. It was an incredible experience that established and strengthened friendships that are lasting and among those I most cherish. We bonded over our shared mission and the goal, which I am proud to say has been realized, that colleagues coming after us would make JGL a leading voice in scholarship and advocacy.

I had long been interested in issues of gender, sexuality, and economic empowerment. In high school, without really understanding that I was starting a journey, I found a family story that intrigued me and became the substance of my college applications and ultimately the introduction of my recent book, *Under the Bus: How Working Women Are Being Run Over*.³ My great-grandmother, Mathilda Olafsson, provides an interesting study in what has changed and what has remained the same for low-wage women. Mathilda left Sweden at eighteen to escape poverty, sailing steerage to Boston alone. She worked as a scullery maid, with days full of backbreaking labor.⁴ Unsurprisingly, like other women at the time, she had no legal rights in the workplace and no right to vote, let alone control her reproduction.

As an aspiring college applicant, I found this a romantic story of a brave young woman striking out on her own, from a distant past so different from today. Sadly, I came to realize that the story is neither unique nor romantic—nor is it an artifact of history. In the course of my research for *Under the Bus*, I read about Sonia Soares, who lives in Boston today. Sonia testified in front of the Massachusetts state legislature that as a domestic worker she regularly worked fourteen-hour workdays, was subject to frequent sexual harassment and physical abuse, and that she was forbidden to see a doctor when she was sick.⁵ Despite her long days of backbreaking labor, she earned no overtime and wasn't even entitled to minimum wage. What I found shocking was that today domestic workers and workers in certain other jobs dominated by women have little more protection than did women like

3 The following sections are drawn from *Under the Bus*. CAROLINE FREDRICKSON, *UNDER THE BUS: HOW WORKING WOMEN ARE BEING RUN OVER* (2015).

4 Information gathered in conversations with my aunt, and review of family tree (on file with the author).

5 Michelle Chen, *Massachusetts Nannies and Housekeepers Now Protected from Long Days, Abuse, Sexual Harassment*, NATION (June 23, 2014), <https://www.thenation.com/article/massachusetts-nannies-and-housekeepers-now-protected-long-days-abuse-sexual-harassment/> [<https://perma.cc/4RPT-J7L4>].

Mathilda doing the same jobs over one hundred years ago.⁶ What shamed me was that even I, a former labor lawyer and congressional and White House staffperson on labor and employment issues, was ignorant of the fact that these women had been left out of the law's protections. That most of those women are brown or Black, unlike Mathilda, has much to do with the stagnation of their rights and our neglect of the issue.

Writing the book brought me back to the early days with JGL, as I wrestled with how to connect what are often perceived as disparate issues to provide a compelling narrative of how women, and particularly women of color, have been disadvantaged by seemingly neutral laws—and even protective laws. I sought to make visible the overlapping discriminations Professor Kimberlé Crenshaw called “intersectionality,” just as we strived to do at JGL, although I was not able to do so as fully as I would have liked in *Under the Bus*. Since my book focused on the legal structures of work including paid leave and childcare, I did not include reproductive justice as part of the analysis of the barriers that face women in the workplace. In so doing, I recognized that I was omitting a major force behind women's economic disadvantages—that women are women, can get pregnant, and have the lion's share of responsibilities in the home. I hope to come back to the topic in another book, as women's bodily autonomy is integral to a discussion about income inequality in America. But because of the lingering effects of the law's omission of so many women from workplace protections, I wanted to tell that story—especially as I felt we needed a healthy corrective to the “lean in” narrative. While for some women speaking up more in meetings or succeeding in the executive board room are significant issues, for most women the questions are much more existential: how to earn enough to live on, and how to juggle home and work responsibilities.

My original focus was on what the law provides and how it could be better enforced and strengthened, but the more I examined the key workplace laws, the more I was interested in the law's omissions—who was left out and why. Each statute necessarily draws boundaries, but in the case of the New Deal laws and subsequent protections, those left outside of the lines over and over were women, and primarily women of color. These omissions weren't oversights, they were intentional and reflective of politics and power.

Few people know that as we adopted progressive laws to improve the wages and working conditions of many people, we left many others behind. Pervasive ideas about race, women, and work played an enormous role in shaping and limiting what work would

6 NAT'L DOMESTIC WORKER'S ALLIANCE, EMPLOYMENT PROTECTIONS FOR DOMESTIC WORKERS: AN OVERVIEW OF FEDERAL LAW, http://www.domesticworkers.org/sites/default/files/Domestic_Worker_Employment_Protections_Federal.pdf [https://perma.cc/3324-RNLE] (last visited Apr. 15, 2016).

be considered worthy of protection. In the 1930s, President Roosevelt bargained with Democratic members of Congress from the South, known as the “Dixiecrats,” and in the process, traded off the rights of certain African American and women workers to get enough votes for bills providing a minimum wage and overtime and the right to join a union. That the Dixiecrats’ dominant interest was in preventing a change to the plantation economy, fueled by the very cheap labor of African Americans and deeply entrenched racism, is manifest in the Congressional Record—and utterly shocking to a twenty-first century reader. In order to move enough of these members of Congress to get the bills passed, Roosevelt’s allies carved out certain groups of workers, for example, field laborers and domestic help, who were predominately African American, and explicitly exempted them from the workers’ rights bills. In addition to racism, the belief that so-called women’s work, consisting of caregiving, housekeeping, and similar occupations, was women’s natural role helped justify legislation that gave rights only to those engaged in real “work,” mostly white men. With much of the work in the home having been done by African American women, it was particularly devalued as a legacy of slavery and racial oppression. Domestic labor was even known as “niggers’ work.”

After the New Deal, legislation barring discrimination in employment, requiring family leave, and providing health insurance also excluded many women. In 1964, Congress passed the landmark Civil Rights Act, which, among other things, outlawed job discrimination based on race, national origin, religion, and gender, but only for companies with more than fifteen employees. Intended to bar the use of these characteristics from decision-making on hiring, pay, and promotion, the act has had far-reaching consequences. But by limiting its application to larger employers, it has left many workers vulnerable—and the idea that discrimination is permissible in some contexts goes unchallenged. Some analysts estimate that the exclusion leaves close to one-fifth of the workforce without a remedy under the Civil Rights Act.⁷ In other words, leaving small firms out means that somewhere around nineteen million workers are subject to discrimination at work, even without counting the large numbers of temporary and contingent workers.⁸ Or they don’t get hired at all—and despite what could be overt discrimination, they have no legal remedy. And for anyone not considered an “employee,” such as independent contractors or temporary workers, there are no protections at all—no overtime, no minimum wage, no rights under the Civil Rights Act, no family leave. Why have we not reexamined this approach? Perhaps because those affected have so little political voice?

7 Pam Jenoff, *As Equal as Others? Rethinking Access to Discrimination Law*, 81 U. CIN. L. REV. 85, 94 (2013).

8 *Id.* at 104.

The revelation for me was that we celebrate these legislative victories—rightly—but rarely do we examine and critique these omissions. In fact, we keep replicating them, thinking we are helping women workers—indeed we are, but not nearly as many as we think. New bills amend the New Deal or civil rights statutes without addressing the groups of workers who were excluded from the start, or reconsidering the basis for leaving out smaller firms, or addressing the law’s assumptions that workers are not also caregivers.

For the many women who have no legal protection against discrimination because they work for small companies, or are temporary workers, or are independent contractors, not being protected from discrimination affects women’s pay both directly and indirectly. Not surprisingly, women in this excluded workforce suffer from a variety of abuses—sexual and psychological—that have a long-term impact on their ability to earn fair pay. Moreover, hostile working environments force women to change jobs more frequently, which affects their earnings in the long term, and certainly their productivity in the short term. In allowing some business owners to discriminate, our laws open the doors to sexualized, racialized, and oppressive working environments. Sexual harassment has more to do with power than with sex. This explains why women, especially those who are particularly powerless, suffer disproportionately. Women who are single parents and desperately need a wage, or whose immigration statuses could be challenged, or whose lack of education limits their opportunities are exposed to the risks of advocating for themselves: filing complaints or bringing legal charges puts them at greater risk of job loss, retaliation, deportation, or ostracism.

All women are penalized because employers discount their wages because of the possibility they may sometime have children. If they do, in fact, have children, the impact on their economic status is even greater.⁹ Women’s participation in the workforce has grown significantly over time, especially that of women with children: almost 77% of women with children between six and seventeen are working;¹⁰ 64.2% of women whose children are under six are in the workforce, with unmarried mothers having a higher participation rate than married women overall.¹¹ And while we have taken some insufficient steps to combat discrimination in the workplace and to open new opportunities to women, we really haven’t done much at all to address what to do with their children during the workday.

9 Joya Misra, *Which Policies Promote Gender Pay Equality?*, in EQUAL PAY SYMPOSIUM: 50 YEARS SINCE THE EQUAL PAY ACT OF 1963, 14 (Stephanie Coontz ed., 2013).

10 U.S. BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 2 (2013), <http://www.bls.gov/cps/wlf-databook-2012.pdf> [<https://perma.cc/V35S-NLC4>].

11 *Id.*

Families, children, and work—these should be central questions for our economy. Not only do the systems we establish impact current productivity and income levels, but they also deeply affect the success of our future workforce. But because our dominant economic framework still reflects a 1950s myopia, topics such as family leave, childcare and education are all “women’s issues” rather than central questions for our leaders to address, and thus are marginalized and dismissed.

In 1993, the United States finally adopted legislation providing unpaid leave for new parents. The Family and Medical Leave Act (“FMLA”) was a big step forward, providing some workers with the right to take twelve weeks of leave for the birth or adoption of a child or other family healthcare needs. In the FMLA, we have a particularly perverse example of how size-based exclusions particularly harm low-wage women of color. First, only firms with over fifty employees are covered, and, second, the individual employee must have worked at least 1,250 hours previous year. Because of these limits, over 40% of private sector workers don’t qualify and workers with least access to FMLA leave are those most in need—younger, low-wage women of color.¹² And since FMLA provides for only unpaid leave, even mothers who qualify often opt out because can’t afford to lose wages.¹³ According to a survey by the Department of Labor in 2012, 46% of workers who needed leave were not able to take it because they could not sustain the loss of wages.¹⁴

Paid family leave seems an obvious answer. But only 12% of the workforce has it—88% are left to their own financial resources (if, indeed, they have a right to take leave at all).¹⁵ The irony is that men, since they occupy more higher-paid jobs, are more likely to be eligible for both paid and unpaid leave, but because of the social stigma still attached to being a stay-at-home dad, few of these men take the leave.¹⁶

12 See generally Heather Boushey & Alexandra Mitukiewicz, *Family and Medical Leave Insurance: A Basic Standard for Today’s Workforce*, CTR. FOR AM. PROGRESS (Apr. 15, 2014), <https://www.americanprogress.org/issues/labor/report/2014/04/15/87652/family-and-medical-leave-insurance/> [https://perma.cc/KB75-BERQ].

13 Jane Waldfogel, *International Policies Toward Parental Leave and Childcare*, 11 CARING FOR INFANTS & TODDLERS 99, 101 (2001).

14 ABT ASSOCS., FAMILY AND MEDICAL LEAVE IN 2012: TECHNICAL REPORT 127 (2012), <https://www.dol.gov/asp/evaluation/fmla/fmla-2012-technical-report.pdf> [https://perma.cc/LB8G-ZTKE].

15 U.S. DEP’T OF LABOR, DOL FACT SHEET: PAID FAMILY AND MEDICAL LEAVE (2015), <https://www.dol.gov/wb/PaidLeave/PaidLeave.htm> [https://perma.cc/9QNM-TA5B].

16 HUMAN RIGHTS WATCH, FAILING ITS FAMILIES: LACK OF PAID LEAVE AND WORK-FAMILY SUPPORTS IN THE US 31 (2011), <https://www.hrw.org/report/2011/02/23/failing-its-families/lack-paid-leave-and-work-family-supports-us> [https://perma.cc/L97C-4BMG].

After child birth, things only get more difficult for working mothers. Our childcare system—or lack thereof—fails all families with its high costs, limited availability, and often low quality. While the failings of the system may affect most parents, however, they most seriously harm those families that are least able to absorb the extra financial and scheduling burden. Because they simply cannot afford private childcare, low-wage earning women must employ alternate strategies. Women with supportive partners may trade off parenting, finding jobs that take them out of the home at different times. Others have family members, including their older children, who take over some care responsibilities. Still others just leave their kids alone and hope nothing goes wrong. Some decide it is better to slide further into poverty than to leave their children without adequate supervision.

Further complicating access to childcare is the fact that low-wage workers tend to work in the types of jobs that make good parenting especially hard: they work night shifts or weekends, they have no ability to leave work for emergencies, let alone school events or parent-teacher meetings, and they don't get any benefits from their employers, like sick leave or paid vacation. Very few childcare facilities, especially those that serve low-income families, are open during the hours worked by the 40% of American workers who work a nonstandard schedule—nights and weekends.¹⁷ The number of women and children affected is huge. For example, among restaurant workers, whose hours are very unpredictable, almost two million of the over five million female workers in the industry are mothers, and half of those are single mothers with kids under eighteen.¹⁸ Home care workers, who are nearly all women, face a similar struggle to care for their own children when they have to attend to patients in the evening or on weekends.¹⁹ Perversely, the increase in the number of part-time workers, with women making up the majority of those with two or more jobs, has made it harder for low-income parents to find care for their children, with many of those workers subject to on-call scheduling with very erratic hours.²⁰ Mothers who cannot control their work hours have a hard time attending school events or doctor's appointments. If they work a night shift or weekend shift, they might not be able to be at home with their children when the children have unsupervised time—

17 RESTAURANT OPPORTUNITIES CTRS. UNITED, *THE THIRD SHIFT: CHILDCARE NEEDS AND ACCESS FOR WORKING MOTHERS IN RESTAURANTS* 12–13 (2013).

18 *Id.* at 1.

19 *See, e.g.*, PARAPROFESSIONAL HEALTHCARE INST., *WE CAN'T WAIT! AMERICANS SPEAK OUT FOR FAIR PAY FOR HOME CARE WORKERS* 34 (2013).

20 *See generally* CAROLINE FREDRICKSON, *UNDER THE BUS: HOW WORKING WOMEN ARE BEING RUN OVER* 98–128 (2015).

leading to more “self-care”—an actual term used by the United States Census Bureau for latch-key kids—and all the risks that that entails.

The unfortunate truth about motherhood—and the possibility of motherhood—in America is that it is one of the causes of lingering inequality between men’s and women’s wages. But public policy can make a real difference. In countries with publicly provided or funded childcare, women pay a lesser penalty for motherhood. Countries that do little to assist with childcare have a 9.5% wage penalty versus 4.3% in countries with more robust programs and only 2% in those countries with the highest enrollment in childcare.²¹

Why is the lack of childcare and family leave not seen as harming our economy? And why is it not a subject for an anti-discrimination analysis?²²

In my book, *Under the Bus*, I explore the legal structures of work, and how our policies reflect a history of misogyny and racism that continues to seethe beneath the surface, particularly because we continue to view each issue in isolation and out of its historical context. The well-known Jain story about the blind men—or women—and the elephant is illustrative of how even we advocates who push for paid leave or childcare or comparable worth can obfuscate the multivalent reality of women’s lives. When each woman grabbed a different part of the animal, she thought she knew what she was touching—the elephant’s leg was a pillar, the belly was a wall, the trunk a pipe, the ear a fan. And each was right, but each understood the elephant only partially. So it is with women’s lives. Credit Barbara Ehrenreich, who in her book *Nickel and Dimed* documented her transformation into a minimum-wage worker, living as they do, suffering the deprivations and humiliations they do, so she could more fully understand the three-dimensionality of the real challenges of surviving on much less than a living wage.²³ It wasn’t just the wages; it was the lack of benefits and access to credit, childcare, paid sick days, and time off, and it was the indignities of harassment and misogyny, although she was spared the sting of racism. Those of us who are interested in addressing economic inequality as well as the status of women need to step back and examine the whole elephant to know what it really looks like—and

21 Misra, *supra* note 9, at 12.

22 Even an organization I very much admire, the Economic Policy Institute, recently proposed a “Women’s Economic Agenda” that included childcare, paid sick leave, and other key elements of a robust and fair economy and that should not be relegated to being “women’s issues,” as opposed to issues for our society at large. *Women’s Economic Agenda: Creating an Economy that Works for Everyone*, ECON. POL’Y INST., <http://www.epi.org/womens-agenda/> [https://perma.cc/A73V-FXN3] (last visited Mar. 29, 2016).

23 BARBARA EHRENRICH, *NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA* (2001).

to understand the historical legacy that has denied so many women basic legal protections and essential social programs. Being sensitive to intersectionality helps us recognize that there are “interconnected forms of discrimination, whose consequences each woman has to balance and negotiate, and feminists have to acknowledge and understand.”²⁴

There’s a lot of truth to the “joke” that if men could get pregnant, abortions would be free and available on demand. JGL has played a critical role in showing that the dominant narrative in the law is in fact a perspective and reflects an identity, which, being white and male, is often taken for the universal and the neutral position. It is vital in JGL’s anniversary year to acknowledge that the Journal’s work is far from done and that it must continue to apply new and different lenses to law and society, to uncover hierarchies and unpack prejudices, in order to create a more just and fair society and to make visible the implicit biases that infect our legal system.

Describing Gloria Steinem, a recent profile ascribed to her “the radical conviction that gender, race, class, age, and ethnicity were all targets of inequality, and belong together in any over-arching struggle for human and civil rights.”²⁵ The same could be said of JGL.²⁶

24 Jane Kramer, *Road Warrior*, *NEW YORKER*, Oct. 19, 2015, at 46, 55.

25 *Id.* at 51.

26 Indeed, the website for JGL sums up the philosophy and practice of the Journal: “The *Columbia Journal of Gender and Law* is the preeminent journal for scholarship on the interaction between gender and law. The Journal fosters dialogue, debate, and awareness about gender-related issues and feminist scholarship. We consider gender to be a broad category which includes issues relevant to people of different colors, classes, sexual orientations, and cultures. Our articles express an expansive view of feminist jurisprudence, embracing issues relating to women and men of all races, ethnicities, classes, sexual orientations, and cultures.” *COLUM. J. GENDER & L.*, <http://cjgl.cdrcs.columbia.edu/> [<https://perma.cc/J2YZ-6BJ8>] (last visited Apr. 23, 2016).