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Katharine Silbaugh

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# GROUNDED APPLICATIONS: FEMINISM AND LAW AT THE MILLENNIUM

*Katharine Silbaugh\**

The conference topic is feminism in the twenty-first century, a dialogue between academics and practicing attorneys. The first order of business will be to resist the millennium invitation to come up with evermore novel, overarching formulations of the mission and means of feminism. At the end of the twentieth century we know quite a bit about the problems presented by feminists and the problems within feminism. We have had a long history of insightful intellectual discourse on questions of equality and on the meaning of gender. We also know that it takes time to absorb and apply broad insights in particular contexts, and to reformulate and refine those insights ever-so-slightly, not just radically, in light of that contextual application. The challenging task is not to forget what we do know. To suggest that feminism in the twenty-first century needs a new overarching theory, a new paradigm, would suggest that its current insights have failed.

It seems to me, instead, that one important aspect of the future of feminist legal approaches will be in asking how some of the debates we've already had apply to particular legal questions in light of the most detailed account we can make of the relationship between women's lives and that particular legal question. In other words, not every feminist legal academic needs to be creating a theory of feminism. We can instead be scholars of particular legal fields or of particular experiences common to some or all women and ask how the law responds to that experience. This is applied feminist legal theory. In my remarks, I'm going to explore two very familiar feminist debates: how to understand women's differences from men, and how to understand women's differences from one another. The exploration of these debates will be in the context of a particularly, though by no means exclusively, female experience: domestic labor or family care. I hope that our dialogue on this exercise may teach us something more about the feminist debates, but more, I hope it can assist in developing a more satisfying legal response to the substantive issue in light of feminist insights.

## WHAT WE KNOW NOW ABOUT DOMESTIC LABOR

I want to look at the issue of domestic labor as a vehicle for considering the application of feminist insights simply because it is a subject I've studied for several years. In using the term domestic labor, I'm speaking about work that is done in the home, ordinarily without pay, that improves the welfare of the family. It includes child care, cooking,

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\* Associate Professor, Boston University School of Law; B.A., 1985, Amherst College; J.D., 1992, University of Chicago. This paper was presented at the *Law, Feminism & the 21st Century* Conference on April 4, 1998, in Portland, Maine.

cleaning, home repair, counseling, yardwork, shopping, car maintenance, driving, laundry, financial planning, and the many other tasks that individuals do to improve their standards of living, and those of their families. It is an area of human activity well-studied by sociologists and economists, and increasingly studied by legal academics as well.

What we know about domestic labor is very significant for women. First, women perform about twice as much unpaid domestic labor as men. This figure changes only slightly when women work full-time in the paid labor force, with the proportion dropping to just less than twice what men do. In other words, this disparity is not simply a product of women's absence, by their own choice or by exclusion, from the paid labor market. In addition, there is some evidence that these figures don't vary dramatically with race, ethnicity, or class.<sup>1</sup> Although different women experience the labor very differently, most women spend a good deal of their time engaged in it. This is what sociologists have shown us over the past several decades, and it suggests that by sheer virtue of the amount of women's energies it absorbs, domestic work is an important subject to feminists.

Moreover, unpaid domestic labor produces tremendous economic value. The United Nations estimates that women's unpaid domestic labor produces the equivalent of eleven trillion dollars of wealth annually worldwide; it puts the value of the entire worldwide economy at twenty-three trillion dollars.<sup>2</sup> Though it is much more likely that women's work will not result in a paying transaction than is the case for men's work, that is not a reflection on the disparate economic value of the work.

Finally, paid domestic labor is performed overwhelmingly by minority women. Over ninety-six percent of private household workers are women, according to the Labor Department.<sup>3</sup> The majority of those who perform housecleaning are Black or Hispanic.<sup>4</sup>

#### THE SAMENESS-DIFFERENCE DEBATE

Feminists in law have set out an impressive amount of work on one particular debate, and that is the sameness-difference debate. This debate will be very familiar to all who have followed work on women and the law in the past few decades.<sup>5</sup> The "same" or "different" are

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1. For the data supporting this paragraph, see sources cited in Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 8-15 (1996).

2. See U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT 1995, at 97 (1995).

3. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS, MONTHLY, Tbl. No. 649 (Jan. 1994).

4. These are the terms used by the Census Bureau, and so I use them here. See *id.*

5. This literature is too vast to cite; but for an influential example in law, see Martha Minow, *The Supreme Court, 1986 Term—Forward: Justice Engendered*, 101 HARV. L. REV. 10 (1987).

ways of conceiving of women when compared with men. Consequences flow from either characterization. In the liberal tradition, if the facts show men and women to be basically (for all relevant purposes) the same, they are entitled to identical legal treatment—that's an easy conclusion to reach. If they are different, it becomes a harder question whether women and men are entitled to equal treatment, and if so, what equal treatment means in the face of difference.

Feminists have disagreed about whether to characterize women as more the same as or more different from men with respect to many issues. There is a strong tradition within feminism of arguing that women are different from men: women reason differently, women are more cooperative and less confrontational, women seek to establish relationships while men seek to establish rights, women are connected, men are autonomous, women employ an ethic of caring instead of rights, and so forth. Difference feminists argue that we ought to celebrate and promote these differences rather than abandon them to achieve a sameness on male terms.<sup>6</sup> Robin West calls this cultural feminism, and is herself an advocate of difference perspectives.<sup>7</sup>

Just as strong within feminism is a tradition of arguing that women are almost always the same as men. This tradition has been incorporated into our constitutional understanding of gender equality. Sameness feminists point out that feminists aren't the only ones to have argued that women are essentially different from men; this concept was used historically to prevent women from enjoying the rights of citizenship accorded men in the political, religious, social, and economic arenas. Difference has too often served as an excuse for discrimination. Moreover, there are simply too many examples of women who defy the "different" description (whatever that is at a given time in history)—too many competitive women, aggressive women, selfish women, physically strong women, smart women—to sustain a decisive account of women's difference.

These stereotype breakers became the cause to be championed in the Supreme Court, as case after case was litigated by men who defied a conventional male stereotype by, for example, being supported by their wives or wishing to raise their children at home,<sup>8</sup> and women who defied a conventional female stereotype, as in the case of a woman who supports her family.<sup>9</sup> In fact, early litigators of constitutional cases were quite concerned that any recognition of empirical differences between the way men and women live their lives on average, even if it compensated for special burdens that resulted therefrom, was unacceptable

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6. This idea is most identified with Carol Gilligan. See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

7. See generally Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

8. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

9. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973).

because it would reinforce stereotypes.<sup>10</sup> Biology (science) is now the one respectable true difference of the late twentieth century,<sup>11</sup> as evidenced by both the Supreme Court's hesitations over pregnancy,<sup>12</sup> a biological difference, and the scholarly debate that has surrounded the pregnancy question.<sup>13</sup> If a difference is not biological, under this view, it is mutable, and so we cannot assume that all women or all men will fit the different description. Those who do not may not be penalized by categorical laws built around those stereotypes. This view has no use for differences that are not essential, not biological, but practically and empirically supported by significant averages.

Later feminists argued that this vision of sameness did well to protect those individuals who defied their gender stereotypes, but did little for those who, in significant respects, conform to those stereotypes.<sup>14</sup> It is fine to challenge the notion that women are inherently different from men, but self-defeating to prove it by making a world responsive to the average man's needs and then inviting women who are the "same" to partake. A requirement that you treat people equally says nothing about how you must treat them: the rich and the poor are free to sleep under the bridges. In our rush to destroy stereotypes we've conceded too much to what is sometimes called "the male standard," but could more neutrally be termed the status quo. We must remember that feminists can just as easily pursue "the female standard" on a gender-neutral basis, so the Supreme Court's gender-neutrality requirement need not be viewed as a failure in the face of this critique.

To shorten the debate: over the past few decades, many feminists have thought that there is nothing worse than reinforcing a stereotype. Others agree that reinforcing stereotypes is risky, but think it is far riskier to ignore them. The latter are asking why women can't be different from men and not be punished for it.<sup>15</sup> The debate is now familiar. But its application can still be enlightening.

Pursuit of something like "the female standard" requires us, though, to have a frank account of empirical, but nonessential differ-

10. See, e.g., *Orr v. Orr*, 440 U.S. 268, 283 (1979) (striking down a gender-based alimony eligibility statute on the grounds that even protective legislation carries "the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection").

11. It was religious authority that told the truth of difference in the nineteenth century. See, e.g., *Declaration of Sentiments*, in *WOMAN'S RIGHTS CONVENTIONS, SENECA FALLS & ROCHESTER* 5-8 (Arno Press 1969) (1848).

12. See, e.g., *Geduldig v. Aiello*, 417 U.S. 484 (1974).

13. For a sampling, see Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 *BERKELEY WOMEN'S L.J.* 1 (1985); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 *COLUM. L. REV.* 1118 (1986).

14. See, e.g., Mary E. Becker, *Prince Charming: Abstract Equality*, 1987 *SUP. CT. REV.* 201.

15. See Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 *VAND. L. REV.* 1183 (1989); CATHARINE A. MACKINNON, *Difference and Dominance: On Sex Discrimination*, in *FEMINISM UNMODIFIED* 32 (1987); Martha A. Fineman, *Feminist Theory in Law: The Difference It Makes*, in *FEMINIST LEGAL THEORIES* 213 (Karen J. Maschke ed., 1997).

ences between women and men. Consider the domestic labor issue. Surely few would argue that women have an immutable propensity to perform domestic labor, and any given woman may perform far less of it than any given man. My notion of difference is not concerned with what is in women's hearts and minds, but with what most women do, with women's material circumstances. These are rarely immutable, but they are always highly relevant to our welfare, and so it would seem odd to banish them from discussions of gender on the ground that they only engage gender as a matter of stereotypes, or averages.

It turns out that the role of domestic labor in women's lives has been surprisingly resistant to change. Advances in household technologies, even time-saving ones, have simply led to higher standards at home, not fewer hours.<sup>16</sup> Paid labor force participation by women doesn't lead to substantially fewer hours of domestic labor, especially when compared to men's domestic labor hours.<sup>17</sup> Within marriage, higher earnings for women don't lead to fewer hours; in fact, there has even been some evidence that high-earning wives married to low-earning husbands do *more* of the household labor than wives earning less than their husbands.<sup>18</sup>

Why does the difference persist even when mothers of young children are in the paid labor force in record numbers? Theories abound: women are less powerful and so the work falls to them through losing informal bargains; the work is empowering and so women choose it; it is an efficient specialization of labor resulting from women's lower wage-earning potential; or it's a biologically determined response to women's childbearing abilities. There are well-argued problems with all of these hypotheses. I cannot say that I know the answer. But I believe that we can say something about the implications of this difference even without fully understanding why the difference persists.

Recently some feminists have argued that the search for origins of difference between men and women is either not worth the effort, or positively meaningless. This agnosticism as to origins is intended to short-circuit two uses of origins that cut different ways. Some might use origins as a means of justifying current social and legal practices that have a disparate impact on women, as have some of the New Home Economists who argue that sociobiology dictates women's greater commitment to household labor.<sup>19</sup> Others, including feminists, might

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16. See EUSTON QUAH, *ECONOMICS AND HOME PRODUCTION: THEORY AND MEASUREMENT* 107 (1993); John P. Robinson, *Housework Technology and Household Work*, in *WOMEN AND HOUSEHOLD LABOR* 53, 53-54 (Sarah Fenstermaker Berk ed., 1980); Susan M. Strasser, *An Enlarged Human Existence? Technology and Household Work in Nineteenth-Century America*, in *WOMEN AND HOUSEHOLD LABOR* 29, 30-47 (Sarah Fenstermaker Berk ed., 1980).

17. See, e.g., Catherine E. Ross, *The Division of Labor at Home*, 65 *SOC. FORCES* 816 (1987).

18. See ARLE HOCHSCHILD, *THE SECOND SHIFT* 220-21 (1989).

19. See generally GARY BECKER, *A TREATISE ON THE FAMILY* (1981).

hope to be guided in a return to a difficult-to-define authenticity.<sup>20</sup> I believe that it is appropriate, for the time being, for legal advocates to be agnostic as to the origins of difference. Especially as lawyers, we have a difficult time being confident about the source of differences. More important, those differences that are socialized are no less real as a result.

Some refuse to recognize or accommodate socially created differences because they fear that this will reinforce those differences. *But that fear places value on eliminating differences.* In other words, skepticism over the origin of differences often leads straight to the conclusion that the eradication of difference is either a goal unto itself, or the only means to achieve a different goal—the improvement of women’s welfare and happiness. I believe in the pursuit of the latter goal—improving women’s welfare and happiness by giving legal value to traditionally female occupations—with agnosticism as to whether the gender-neutral legal valuation of women’s gendered roles will reduce difference.

Perhaps valuing women’s domestic work will reduce gender segregation in sex roles rather than maintain it. Valuing women’s segregated work may make it more attractive to men. Maybe “if you build it, they will come.” Consider Duncan Kennedy’s argument that sexy dressing has the power to subvert its own meaning; he argues that there is a value to embodying stereotypes, because it is one mechanism for dismantling them, as we see individual women both fit the stereotype and not fit it at the same time.<sup>21</sup> Despite problems with this idea as applied to sexy dressing, the point about the occupation and subversion of stereotypes might apply to different female stereotypes—including that of greater attachment to children. One might embody that stereotype, for example, and defy other stereotypes about women by being aggressive, competitive, physically strong, income-earning, and so forth. This might be part of the process of undermining the stereotype.

On the other hand, accommodating the stereotypical female biography, including as it does both wage labor and significant family care, may not undermine stereotypes; it may instead reinforce them as so many have predicted. It seems an unanswerable hypothetical question, given our current state of understanding, one that might come out either way. But an equality of kinds will be achieved *in either case* when legal reform focuses on the legal treatment of the roles typically associated with women. Moreover, even if the result is not one talked about in the language of equality, we might argue that valuing family care is in its own right a good, even as it directly benefits more women than men.

We should be perfectly happy at the thought of gender-segregated sex roles ending, if that’s what valuing women’s differences does, but without making that an end in itself.

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20. See MACKINNON, *supra* note 15. An authenticity is implicit in her notion that women can’t experience authenticity under current conditions.

21. See DUNCAN KENNEDY, *SEXY DRESSING ETC.* 177-81 (1993).

## WOMEN'S DIFFERENCES FROM ONE ANOTHER

As feminists, we know that it is a challenge to conceptualize an issue as though all women experience it similarly. Women are divided at least by their experiences, religion, preferences, race, sexual orientation, class, and age. These different perspectives greatly inform how women think differently about domestic labor. For some women, domestic labor is drudgery to be escaped for the more stimulating world of the paid labor market.<sup>22</sup> For others, domestic labor is the site of racialized hierarchies that are particularly painful because they are enforced over intimate matters, as in the case of African-American or immigrant paid domestic workers and their often white and middle-class employers.<sup>23</sup> For others, domestic labor in one's own home provides a creative opportunity that is less strained by racism than market labor,<sup>24</sup> and more independently managed than much paid labor. For still other women living in poverty, domestic labor is denigrated by a government that embraces a rhetoric suggesting that domestic labor is not work at all.<sup>25</sup>

These differences of perspective may seem so great that they threaten our ability to have a clear feminist program around domestic labor. A woman who thinks of the issue as "the servant question"<sup>26</sup> will have a hard time developing solidarity with a person who views doing domestic work in someone else's home as a reproduction of colonial race relations. Is it possible for women, given their very different experiences of domestic labor, to practice feminism around it? Mindfulness

22. This is the feminism of Betty Friedan's early second-wave manifesto, *The Feminine Mystique*, in which she asks, "Is this all?" BETTY FRIEDAN, *THE FEMININE MYSTIQUE* 15 (1963).

23. See JUDITH ROLLINS, *BETWEEN WOMEN: DOMESTICS AND THEIR EMPLOYERS* 155-203 (1985); MARY ROMERO, *MAID IN THE U.S.A.* 97-133 (1992); Evelyn Nakano Glenn, *Cleaning Up/Kept Down: A Historical Perspective on Racial Inequality in "Women's Work,"* 43 *STAN. L. REV.* 1333, 1335 (1991); Dorothy E. Roberts, *Spiritual and Menial Housework*, 9 *YALE J.L. & FEMINISM* 51 (1997).

24. See Patricia Hill Collins, *Shifting the Center: Race, Class, and Feminist Theory About Motherhood*, in *REPRESENTATIONS OF MOTHERHOOD* 56, 64-65 (Donna Bassin et al. eds., 1994); EVELYN NAKANO GLENN, *ISSEI, NISEI, WAR BRIDE: THREE GENERATIONS OF JAPANESE AMERICAN WOMEN IN DOMESTIC SERVICE* 192 (1986).

25. As the welfare reform debate unfolded, we repeatedly saw women who were taking care of their children at home denigrated for the failure of their work ethic.

26. This was a turn-of-the-century term used in upper income writings about the movement of low-wage women into industrial jobs. This made it harder to hire domestic servants on the terms that had previously been commonplace, which included very low wages, long hours, usually seven days a week around the clock live-in work, and often physical discipline. See DONNA L. VAN RAAPHORST, *UNION MAIDS NOT WANTED: ORGANIZING DOMESTIC WORKERS 1870-1940*, at 63-71 (1988). The tension between the needs of women who employ domestic workers and the domestic workers they employ could be seen again recently in what are called the Zoe Baird amendments to the Social Security Act. These amendments make it easier to employ domestic workers without paying employment taxes—meaning without enrolling those workers in the old age security system. See Social Security Domestic Employment Reform Act of 1994, Pub. L. No. 103-387, 103 Stat. 4071 (replacing the quarterly threshold of \$50 with a yearly one of \$1000 for paying social security tax on domestic workers).



of differences must inform how we think about domestic labor, but there may still be common ground. What might the goals of feminism be here, given what we know of women's differences?

If the desire to "escape" this labor is to be pursued by some, a good feminist vision would work to conceive of a form of escape that is not dependent on reproducing the racial hierarchies historically associated with paid domestic workers. This could mean a range of things. It could mean supporting efforts to make sure that immigrant, African-American, and low-income women have alternative paid labor opportunities so that they too can escape domestic labor, if they choose, on an equal footing with other women. It could mean reducing the amount of domestic work done by anyone, as with an individual decision not to have children. It could mean reallocating the work to others for whom it is done, including intimate partners or older children. It could mean structuring the reallocation to paid workers and other parents in a manner designed not to reproduce racial hierarchies, as in the case of collective day care. It could mean minimizing the reproduction of racial hierarchies by providing paid caregivers with all the trappings of ordinary wage labor, including both pay that reflects the importance of the work and employment benefits.

Moreover, feminists who prefer escape should advocate structuring it in a way that does not harm women who prefer to—or for other reasons will—focus on domestic labor.<sup>27</sup> For example, some middle-class women strongly support work requirements for welfare recipients on the theory that changes in gender roles have now brought many middle-class mothers of small children into the workforce, and the same may be expected of women living in poverty. As Martha Minow points out, this argument overlooks the content of the middle-class trade-off; many middle-class women earn enough to make this a worthwhile pursuit. The same may not be said of the minimum wage jobs available to those coming off of welfare.<sup>28</sup> Moreover, the element of choice is critical for middle-class women, who may have the opportunity to choose to structure their paid labor force participation such that it imposes the least on their family time. Finally, as a matter of principle, feminists who don't prefer domestic labor ought to be concerned about criticizing women who do, because expression of disdain for many women's activities can be hard to distinguish from disdain for women.<sup>29</sup>

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27. Here I think of Herma Hill Kay's view that we in family law should not reward traditional roles because that encourages women's financial dependence, which shows Kay's clear preference for seeing *all* women choose to focus primarily on paid labor. See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 77-89 (1987).

28. See Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817, 826-28 (1994). For an excellent discussion of the limited options available to welfare recipients, see Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 GEO. L.J. 1961 (1993).

29. In the middle-class context, consider the dispute among mothers in Wellesley, Massachusetts, over whose children ought to ride the school bus longer: those who are being taken

Feminist lawyers, legislators, and academics need to think through a number of legal issues, including improving the compensation of paid caregivers and the enforcement of labor laws giving paid domestic workers benefits, reproductive control, full employment policies, the provision of safe and affordable childcare, and dignifying poverty supports, for their effects on domestic labor as it is experienced by a range of women.

The insight is not novel: women are not all the same, and perceive the same subject very differently depending on facts about their lives other than gender.<sup>30</sup> Without a doubt these differences among women pose a serious challenge to feminism. Yet, in this context, feminism need not be undermined by that difference—gender unites most women around domestic labor simply because most women do much more of it than do most men, regardless of their race, ethnicity, or social class.<sup>31</sup> Feminism in the twenty-first century will be productive if it brings awareness of differences among women to bear fully in examining the legal structure of this particular aspect of most women's experience, and destructive if it ignores differences. Before we search for more theoretical insight, we should try more careful application of the insights we have.

### CONCLUSION

It should not be an insult to an idea within feminism that it is one more version of an older idea. Reading the works of feminists of the nineteenth century can be a humbling experience; they anticipated in some way many of the theoretical debates that would occur in late twentieth-century feminism.<sup>32</sup> Many of the ideas of feminism have long histories and traditions. Novel reconceptualizations of feminist tensions can be refreshing and challenging, but so can attempts to apply time-honored feminist insights to particular legal issues.

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home after school to their mothers who have limited their paid labor force time, or those who are being taken to after-school programs. See Adam Bryant, *In the Case of Working Mothers Plenty of Judges*, N.Y. TIMES, Nov. 16, 1997, at A18.

30. The literature making this point is large. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

31. See Heidi Hartmann, *The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework*, 6 SIGNS: J. WOMEN IN CULTURE & SOC'Y 366, 385 (1981).

32. In a quick perusal of the *Declaration of Sentiments*, for example, we see the problem of "false consciousness" raised, the problem of women as spectacles on the stage, the question of what women's higher moral reasoning should mean—whether all should be held to it, the problem of valuing what women do, and the problem of stereotyping women. See *Declaration of Sentiments*, *supra* note 10.

