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## Theory Matters—And Ten More Things I Learned from Martha Chamallas About Feminism, Law, and Gender

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# Theory Matters—And Ten More Things I Learned from Martha Chamallas About Feminism, Law, and Gender

DEBORAH L. BRAKE\*

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## I. INTRODUCTION

This Festschrift Essay celebrating the scholarship of Martha Chamallas just may be the most daunting piece of writing I have attempted—both because of my desire to do justice to the work of a dear friend and mentor, and because it is no simple feat to synthesize and contextualize the contributions of a prolific scholar whose writings span nearly four decades. The risk of lapsing into genuflecting praise, unworthy of the critical texture of the work itself, looms large. But for me at least, the payoff far outweighs the risk, as it gave me the opportunity to reread a body of work by one of the most influential feminist legal scholars in the academy. It is a collection of work that remains as urgent as ever.

Martha is quintessentially a *feminist legal* scholar—with each of these terms equally defining. Her scholarship brings a critical feminist lens to the law, and a legal analysis to feminism. Because employment discrimination is a major site of law’s engagement with gender, it is the subject of much of Martha’s scholarship. But hers is a body of work that transcends any single doctrinal category. Martha’s explorations of law span a wide range of areas beyond

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discrimination law, including criminal law (rape and other sexual harms), civil remedies, constitutional law, and torts.<sup>1</sup>

Feminist legal scholarship is often categorized as either applied or theoretical,<sup>2</sup> but I see no such distinction in Martha's work. I quickly discarded any idea of dividing her work along these lines. Even Martha's earliest articles, which initially struck me as applied, upon rereading, blurred this boundary.<sup>3</sup> For instance, one of her early articles examined legal challenges to formally gender-neutral rules governing female-dominated jobs.<sup>4</sup> Precisely because they are mostly (but not entirely) held by women, such jobs are subjected to low pay, few benefits, and restrictive regulations that reveal little respect for the employees who hold them.<sup>5</sup> Published in 1984, the article canvasses the case law to propose adapting disparate treatment doctrine to reach such practices.<sup>6</sup> But it also marks the beginning of theorizing what Martha comes to call *devaluation*<sup>7</sup> as a distinctive type of oppression. Martha's scholarship bolsters the refrain that the best theoretical work is engaged and rife with practical implications. At the same time, her body of work shows that the best applied

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<sup>1</sup> Because no single essay can cover the entirety of her work, I leave Martha's groundbreaking scholarship on torts to other contributors to this issue. For a selection of Martha's torts scholarship, see generally FEMINIST JUDGMENTS: REWRITTEN TORT OPINIONS (Martha Chamallas & Lucinda M. Finley eds., 2020); MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW (2010); Martha Chamallas, *Will Tort Law Have Its #Me Too Moment?*, 11 J. TORT L. 39 (2018); Martha Chamallas, *Beneath the Surface of Civil Recourse Theory*, 88 IND. L.J. 527 (2013); Martha Chamallas, *Gaining Some Perspective in Tort Law: A New Take on Third-Party Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351 (2010); Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115 (2007); Martha Chamallas, *Removing Emotional Harm from the Core of Tort Law*, 54 VAND. L. REV. 751 (2001); Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463 (1998); and Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994).

<sup>2</sup> See, e.g., MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 3 (3d ed. 2013) [hereinafter CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY] (categorizing feminist legal scholarship as "practical" or "theoretical").

<sup>3</sup> See Martha Chamallas, *Women and Part-Time Work: The Case for Pay Equity and Equal Access*, 64 N.C. L. REV. 709, 710 (1986) [hereinafter Chamallas, *Women and Part-Time Work*]. See generally Martha Chamallas, *Exploring the "Entire Spectrum" of Disparate Treatment Under Title VII: Rules Governing Predominantly Female Jobs*, 1984 U. ILL. L. REV. 1 [hereinafter Chamallas, *Exploring the "Entire Spectrum"*]. See generally Martha Chamallas, *Evolving Conceptions of Equality Under Title VII: Disparate Impact Theory and the Demise of the Bottom Line Principle*, 31 UCLA L. REV. 305 (1983) [hereinafter Chamallas, *Evolving Conceptions of Equality*].

<sup>4</sup> Chamallas, *Exploring the "Entire Spectrum," supra* note 3, at 4.

<sup>5</sup> See *id.* at 2.

<sup>6</sup> *Id.* at 39–50.

<sup>7</sup> See, e.g., Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 755 (2001) [hereinafter Chamallas, *Deepening the Legal Understanding of Bias*].

scholarship goes beyond doctrine and concrete applications to grapple with the bigger questions of theory. Much feminist scholarship in recent decades has been heading in this integrated direction, striving to bridge the gap between theory and practice and to ground theory in activism.<sup>8</sup>

One of many things that stands out for me in rereading Martha's scholarship is her uncanny ability to shape how a field is understood in the process of synthesizing it. Her foundational book *Introduction to Feminist Legal Theory*<sup>9</sup> does that masterfully—constructing feminist legal theory as it synthesizes it, building new understandings from the encounters with the work she catalogues.<sup>10</sup> In the spirit of that book's articulation of a numbered list of several key “moves” in feminist legal thinking,<sup>11</sup> I have fashioned this Essay around ten core lessons I have gleaned from reading Martha's scholarship. No one of these insights is uniquely attributable to Martha, as she would be the first to point out. But they are all signature themes in Martha's scholarship. That these lessons still resonate and continue to generate new applications and insights speaks to the richness of Martha's legacy as a scholar.

What follows are my top ten takeaways from Martha's scholarship relating to gender, law, and feminism.

## II. FEMINISM IS PLURAL

It is not enough to attend to feminism as a lens for studying law; we must engage with *feminisms*. Martha's scholarship embraces a plurality of feminisms rather than a singular, one-dimensional version of legal feminism. While many scholars speak in terms of waves or generations,<sup>12</sup> Martha parses the brands and strands of feminist legal theory by their substance.<sup>13</sup> Although, as she points out in her book, they roughly align by decade in terms of their launching points and heydays, the various models of feminist legal theory overlap chronologically

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<sup>8</sup> See, e.g., ANN SCALES, LEGAL FEMINISM: ACTIVISM, LAWYERING, AND LEGAL THEORY 4 (2006); Bridget J. Crawford, Kathryn M. Stanchi & Linda L. Berger, *Feminist Judging Matters: How Feminist Theory and Methods Affect the Process of Judgment*, 47 U. BALT. L. REV. 167, 168 (2018); Emily M.S. Houh & Kristin Kalsem, *It's Critical: Legal Participatory Action Research*, 19 MICH. J. RACE & L. 287, 287 (2014).

<sup>9</sup> See generally CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, *supra* note 2.

<sup>10</sup> Another example is her treatise, MARTHA CHAMALLAS, PRINCIPLES OF EMPLOYMENT DISCRIMINATION LAW 2–3 (2019) (describing current doctrine and precedents while pushing the law in a more employee-protective direction).

<sup>11</sup> CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, *supra* note 2, at 4–15.

<sup>12</sup> See, e.g., Robin West, *Women in the Legal Academy: A Brief History of Feminist Legal Theory*, 87 FORDHAM L. REV. 977, 980–81 (2018); Kathleen Kelly Janus, *Finding Common Feminist Ground: The Role of the Next Generation in Shaping Feminist Legal Theory*, 20 DUKE J. GENDER L. & POL'Y 255, 255 (2013).

<sup>13</sup> See CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, *supra* note 2, at 17–19.

and coexist simultaneously to varying degrees.<sup>14</sup> Dividing these approaches into waves or timeframes alone would give a false picture of a linear progression followed by obsolescence.<sup>15</sup>

One reason this pluralism matters is that understanding feminism's influence on law (or lack thereof) requires parsing the different strands of feminist legal theory. Martha does this masterfully in an important article about the changing role of consent in regulating sex.<sup>16</sup> Published in 1988, *Consent, Equality, and the Legal Control of Sexual Conduct* examines the law's relationship to sex and consent at a time when these topics were finally drawing serious scholarly attention.<sup>17</sup> The article remains one of the most illuminating works of the era, with the 1980s being the decade in which dominance feminism flourished and gained influence in the academy.<sup>18</sup> With forays into several areas of law, including the criminal law of rape, civil rights statutes, and common law civil actions, the article identifies a nascent, feminist-inspired approach to the regulation of sex, which Martha calls the egalitarian approach.<sup>19</sup> Martha contrasts this approach with two that came before, the traditional approach and the liberal approach.<sup>20</sup>

The article traces this evolution, beginning with the traditional approach in which status (e.g., marital status, age, and ancestry) defined the legality, and hence cultural legitimacy, of sexual relationships.<sup>21</sup> From there, the law progressed to a liberal approach in which consent became the touchstone for legality and legitimacy, with the understanding that consensual sex is private and insulated from state control.<sup>22</sup> From this backdrop and her reading of more recent developments, Martha discerns a newer, developing approach influenced by feminism, which she calls egalitarian.<sup>23</sup> In her reading, the egalitarian approach is partially a product of the inadequacy of the liberal account of consent, which feminist critique exposed as falsely equating "choice" with sexual freedom, and its failure to recognize how law and culture construct and constrain women's sexual choices.<sup>24</sup> Prior to the egalitarian approach, liberalism had pushed back against the traditional account but with a different critique attacking the law's reliance on arcane status-based categories.<sup>25</sup> The

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<sup>14</sup> *Id.* at 17–18.

<sup>15</sup> See Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 MICH. J. GENDER & L. 157, 158 (2010) [hereinafter Chamallas, *Past as Prologue*].

<sup>16</sup> Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 814 (1988) [hereinafter Chamallas, *Consent*].

<sup>17</sup> *Id.* at 777–78.

<sup>18</sup> Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal*, 31 WASH. U. J.L. & POL'Y 39, 40 (2009).

<sup>19</sup> Chamallas, *Consent*, *supra* note 16, at 835–36.

<sup>20</sup> *Id.* at 780–84.

<sup>21</sup> *Id.* at 784–90.

<sup>22</sup> *Id.* at 790–95.

<sup>23</sup> *Id.* at 835.

<sup>24</sup> *Id.* at 841–43.

<sup>25</sup> Chamallas, *Consent*, *supra* note 16, at 793.

new egalitarian understanding of a right to mutuality and honesty in sexual relationships buoyed women's claims of sexual abuse, as well as broader civil claims for dishonesty and fraud in sexual relationships.<sup>26</sup> Published decades before the Title IX movement that culminated in the Obama-era strengthening of the rules on campus sexual misconduct,<sup>27</sup> the article presages an emerging vision of sexual relationships grounded in equality and shaped by newer, feminist understandings of law.

After constructing this genealogy, Martha argues that the egalitarian approach is capacious enough to embrace the main strands of feminism of the day.<sup>28</sup> She explains that the egalitarian approach captures dominance feminism's focus on power and the centrality of sex and sexuality in men's exercise of power over women.<sup>29</sup> But, she argues, the egalitarian approach also accommodates sex-positive feminism's appreciation of sex for pleasure and emotional intimacy.<sup>30</sup> Instead of treating dominance feminism and sex-positive feminism as oppositional to one another and mutually exclusive, as they are conventionally understood, Martha shows how these different brands of feminist legal theory not only can coexist, but actually reinforce one another in pressing for an egalitarian approach to sex.<sup>31</sup> Dominance feminism and sex-positive feminism converge in delegitimizing sexual coercion and the trading of sex for money, power, prestige, or security because the lack of mutuality makes the reciprocity of the transaction suspect, leading to alienation and objectification.<sup>32</sup>

Delving into the nuances of the various models of feminism also illuminates the limits of law reform. For example, in the case of sex crimes prosecutions, the shift away from the traditional status-based approach to defining unlawful sex did not lead to reforms in the law's treatment of prostitution, which did not follow the trend to deregulate consensual sex.<sup>33</sup> Martha attributes this to disagreements among feminists over the relationship between consent and prostitution.<sup>34</sup> The view associated with dominance feminism highlights the

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<sup>26</sup> *Id.* at 796–97.

<sup>27</sup> See generally Nancy Chi Cantalupo, *The Title IX Movement Against Campus Sexual Harassment: How a Civil Rights Law and a Feminist Movement Inspired Each Other*, in *THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES* (Deborah L. Brake, Martha Chamallas & Verna Williams eds., forthcoming 2022).

<sup>28</sup> See Chamallas, *Consent*, *supra* note 16, at 841–43.

<sup>29</sup> See *id.* at 842.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 841.

<sup>33</sup> *Id.* at 794.

<sup>34</sup> Chamallas, *Consent*, *supra* note 16, at 794.

likely abuse of sex workers by johns,<sup>35</sup> law enforcement,<sup>36</sup> and pimps.<sup>37</sup> This contrasts with another feminist perspective, associated with sex positivism or partial agency feminism, that prioritizes autonomy in enabling women to profit from sex as much as any other commodity and contests the puritanical norms that treat women's sexuality as sacrosanct.<sup>38</sup> But even here, Martha explains, sex positivism encompasses a wider range of differing views among feminists than is often acknowledged.<sup>39</sup> Purchasing sex under conditions of economic inequality bears the whiff of coercion, which alienates sex workers from sexual pleasure.<sup>40</sup> The complexity of the transaction, the prospect that the economic coercion stems more from social conditions than the transaction itself, and the (appearance of) agency on the part of the sex worker in initiating the transaction make this a difficult area for feminist consensus.<sup>41</sup> Martha's analysis, while mapping the divergence of these brands of feminism, also reveals broadly overlapping perspectives among feminists: a refusal to penalize sex workers themselves, a recognition of the need to address the economic inequalities that leave sex workers with few economic alternatives, and agreement on the need for a better understanding of the lived realities of sex workers.<sup>42</sup> Martha's complex account upends the reductionist story of "feminist sex wars" that simplistically portrays feminists as intractably divided into separate "camps."<sup>43</sup>

By disentangling the feminisms at work in the egalitarian approach to sex, Martha neither accentuates the conflict between feminisms' brands nor glosses over the tensions to present a unified façade. Instead, she brings them into dialogue. Through such dialogue, the picture that emerges is not that of a fracture in feminist theory as much as a split over tactics and strategy, and disagreement over social facts.

Such nuance in feminist theory divergence is also at the heart of Martha's analysis of the split between the "equal treatment" and "special treatment" feminists over the Pregnancy Discrimination Act (PDA) in the 1980s.<sup>44</sup> When the Supreme Court took up a challenge to California's conferral of a right to leave and reinstatement specifically for pregnant workers, with no equivalent right granted to workers incapacitated due to other conditions, the equal

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<sup>35</sup> Clients of prostitutes are referred to as "johns." In the 1980s and 1990s, many state legislatures enacted legislation, collectively referred to as "anti-john laws," which targeted customers of prostitutes. See Julie Lefler, Note, *Shining the Spotlight on Johns: Moving Toward Equal Treatment of Male Customers and Female Prostitutes*, 10 HASTINGS WOMEN'S L.J. 11, 26–34 (1999).

<sup>36</sup> Chamallas, *Consent*, *supra* note 16, at 827–28.

<sup>37</sup> *Id.*

<sup>38</sup> See *id.* at 828.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 829.

<sup>42</sup> Chamallas, *Consent*, *supra* note 16, at 830.

<sup>43</sup> *Id.* at 840–41.

<sup>44</sup> CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, *supra* note 2, at 51–56.

treatment and special treatment feminists took opposing positions on the case.<sup>45</sup> The New York and D.C. women's groups argued that the state law violated the PDA, while feminist groups from California argued that pregnancy's distinctive role in women's reproductive lives justified the law's allowance of the different, more generous, treatment of pregnancy.<sup>46</sup> The split between formal and substantive equality appears intractable until, digging deeper, Martha explains that the two "camps" were not so far apart after taking into account their long-term strategies and goals.<sup>47</sup> The equal treatment feminists did not seek to invalidate the law, but to extend the state's benefits to workers with other disabilities.<sup>48</sup> They did not quarrel so much with pregnancy's distinctive role in women's lives and centrality to women's inequality as with the social fact (a predictive judgment) of how the different treatment of pregnancy might harm women's employment prospects by making them costlier workers.<sup>49</sup> Both the equal treatment and special treatment feminists agreed on the centrality of pregnancy to women's equality and the end goal that workers should have leave and reinstatement rights accommodating the effects of pregnancy on work.<sup>50</sup> Their disagreement was over the right mix of long-term and short-term strategies for getting there.<sup>51</sup>

By attending to where the brands and strands of feminist legal theory overlap and diverge, and engaging all the feminisms in the room, new insights emerge to light a path forward and out of the shadows of what had seemed an intractable conflict. In the present moment, where a full-scale backlash threatens to silence critical race theory and allied critical movements, including feminism, as too "divisive,"<sup>52</sup> another reason for the urgency of resisting simplistic, homogenous views of feminism comes to mind. These backlash waves ride on a grotesque caricature of the targeted theory as a simplistic and monolithic dogma. Parsing the brands and strands of critical theory and resisting overly simplistic unidimensional accounts is necessary to resist the "strawman" simplification that underlies the backlash.

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<sup>45</sup> *Id.* at 55.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, *supra* note 2, at 55–56.

<sup>51</sup> *Id.*

<sup>52</sup> See Janice Gassam Asare, *Why Does Everything Have to Be About Race?*, FORBES (Oct. 28, 2021), <https://www.forbes.com/sites/janicegassam/2021/10/28/why-does-everything-have-to-be-about-race/?sh=7ebe3de951d0> (on file with the *Ohio State Law Journal*). See generally CONNY ROGGE BAND & ANDREA KRIZSÁN, UN WOMEN, DEMOCRATIC BACKSLIDING AND THE BACKLASH AGAINST WOMEN'S RIGHTS: UNDERSTANDING THE CURRENT CHALLENGES FOR FEMINIST POLITICS (June 2020), <https://www.unwomen.org/sites/default/files/Headquarters/Attachments/SecSecti/Library/Publications/2020/Discussion-paper-Democratic-backsliding-and-the-backlash-against-womens-rights-en.pdf> [<https://perma.cc/8WMT-9X8F>].



## III. GENDER IS INTERSECTIONAL

At the close of the 1980s and the dawn of the new decade, intersectionality exploded onto the scene, as Black feminists, women of color and third world women intervened in both the gender-neutrality of critical race theorists and the inattention to race in feminist legal theory.<sup>53</sup> Kimberlé Crenshaw advanced the term “intersectionality” to capture the crucial insight that neither gender nor race exist on a singular axis, and to reveal the ways in which the dominant narratives of race and gender marginalize the experiences of Black women, who sit at the intersection of gender and race oppression.<sup>54</sup> Crenshaw and other Black feminists and women of color identifying as critical race feminists challenged feminist theory to attend to the intersection of bias and to eschew essentialist understandings of gender proceeding from the false premise that gender operates independently of race.<sup>55</sup> The call to “do” gender intersectionally continues to reverberate in feminist legal scholarship, functioning as both critique and methodology.

Around this time, Martha took up the challenge of intersectionality in exploring the interrelation of gender and race and the importance of perspective in the controversy over Title VII’s objective standard for measuring a hostile environment.<sup>56</sup> Martha finds both promise and peril in the turn toward a situated perspective that takes into account a plaintiff’s race and gender in assessing the reasonableness of experiencing a hostile environment.<sup>57</sup> On the one hand, evaluating severity from a situated perspective, such as a reasonable woman or a reasonable African American employee, has the “potential to challenge the authority of the dominant group’s account of events.”<sup>58</sup> On the other hand, taking a situated perspective such as the reasonable woman “might backfire if courts, lawyers, and other legal actors lose sight of the critique of objectivity and instead treat the women’s view as in women’s minds only,” thereby

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<sup>53</sup> See Emily Houh, *A Genealogy of Intersectionality*, in THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES, *supra* note 27 (manuscript at 2).

<sup>54</sup> For classic foundational works on intersectionality, see generally Kimberlé 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, and Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

<sup>55</sup> Houh, *supra* note 53 (manuscript at 2, 4–5, 10–11) (discussing interventions by scholars like Mari Matsuda, Patricia Williams, Margaret Montoya, and Angela Harris). For an early influential critique of gender essentialism, see generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

<sup>56</sup> See generally Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & L. 95 (1992) [hereinafter Chamallas, *Feminist Constructions of Objectivity*].

<sup>57</sup> *Id.* at 96.

<sup>58</sup> *Id.* at 122–23.

essentializing a gendered perspective and missing the all-important role of social construction.<sup>59</sup>

More specifically, Martha flags three distinctive dangers: first, that of naturalizing difference when accounting for the importance of gender or race in appreciating the plaintiff's perspective; second, having to trust judges to choose between conflicting accounts and assess reasonableness from a victim's perspective; and finally, the inherent difficulty in formulating legal standards that attend to the "diversity within traditionally subordinated groups."<sup>60</sup> The biggest danger she flags is that in setting themselves up as the final arbiters of plaintiffs' "reasonableness" in their perception of harm, judges will fall back on essentialist stereotypes "that will do little to change the distribution of power in the workplace."<sup>61</sup> On the other hand, Martha admits, without an objective standard for assessing a plaintiff's experience, each individual's understanding of their experience would determine reasonableness.<sup>62</sup> While at first glance, this may have some appeal, Martha reminds us that individuals form their perceptions under conditions of inequality.<sup>63</sup> Accordingly, there is a risk that individuals' subjective experiences will reinstate the very social inequality the law should be subverting.<sup>64</sup> And yet, because judges tend to resist crediting the subjective experiences of harassment victims, the bigger risk is that courts will require a unanimity of views among women to find a woman's account reasonable, and insist on a shared viewpoint common to all women while ignoring the importance of diversity among women, including with respect to race, class, and sexual orientation.<sup>65</sup> If employers and judges use disagreements among women to undermine a feminist account of reasonableness, the legal standard will reinforce a reductionist, biological account of how gender influences perspective.<sup>66</sup>

Reckoning with these risks, Martha explains, requires resisting notions of uniformity among women and acknowledging that there is no singular "women's" perspective.<sup>67</sup> Rather than falling back on majoritarian norms to gauge reasonableness, Martha argues for using the perspective of a person in the position of the plaintiff (with respect to the plaintiff's holistic identity) who is seeking equality and advancement in the workplace.<sup>68</sup> Even though some workers surely have learned to accommodate gender and race hierarchies at

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<sup>59</sup> *Id.* at 123.

<sup>60</sup> *Id.* at 123–24.

<sup>61</sup> *Id.* at 131.

<sup>62</sup> Chamallas, *Feminist Constructions of Objectivity*, *supra* note 56, at 131.

<sup>63</sup> *Id.*

<sup>64</sup> For this point, Martha gives the shrewd example of a case in which a woman took offense at the language and sexual openness of her boss, who was gay. *Id.* at 131 n.159 (discussing *Fair v. Guiding Eyes for the Blind*, 742 F. Supp. 151 (S.D.N.Y. 1990)).

<sup>65</sup> *Id.* at 131–32.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 131–37.

<sup>68</sup> Chamallas, *Feminist Constructions of Objectivity*, *supra* note 56, at 139–40.

work, their acquiescence in racist and sexist norms and harassing behaviors should not undermine the reasonableness of the perspective of the plaintiff who challenges these norms.

Martha's attention to difference among women and resistance to any singular "women's" perspective leads her to press the claims of women of color seeking legal redress of intersectional bias.<sup>69</sup> Acknowledging the importance of perspective demands attention to how race and gender simultaneously shape perspective. Martha rejects the "ordinary legal practice" of forcing claimants to segment their identity as either/or race or gender, and argues instead for an approach to the question of perspective that recognizes multiple oppression and "diversity within subordinated groups."<sup>70</sup> It is a masterful example of an early work of anti-essentialist feminist scholarship.

In the intervening decades, intersectional feminism has migrated to the mainstream, not so much as a distinct brand of feminism as a continuing call to do feminism better, whichever brand or strand is in use.<sup>71</sup> Martha's work is part of that dialogue, interrogating the subject of "women" and dwelling in the intersections of lived experience that encompasses gender, race, sexuality, and class. Which is not to say that feminist legal theory—neither Martha's nor anyone's—has fully answered the call and can hang up the phone. The dialogue continues, as does the critique.<sup>72</sup> Martha's work embraces that dialogue and is enriched by it.

#### IV. GENDER IS CONSTRUCTED AND GENDER CONSTRUCTS

Gender is not merely the subject of law. Gender is constructed by law. And in a dialectical turn, gender constructs law. Feminist scholars have long known this, but it bears repeating: gender does not exist in nature, it is socially constructed.

Gender not only takes its meaning from law, society, and culture, gender also constructs the law and legal understandings. Put differently, gender constructs the categories in which law traffics. In an enlightening examination of this process, Martha, with feminist historian Linda Kerber, takes on tort law's evolving treatment of injuries purportedly stemming from "fright."<sup>73</sup> Their

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<sup>69</sup> *Id.* at 139.

<sup>70</sup> *Id.* at 139, 142.

<sup>71</sup> See CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, *supra* note 2, at 6–7, 407.

<sup>72</sup> For a recent example of a popularized version of the critique, see generally RAFIA ZAKARIA, AGAINST WHITE FEMINISM: NOTES ON DISRUPTION (2021). For a critique of this critique, see Amber Husain, *Against White Publishing: The Limitations of Rafia Zakaria's "Against White Feminism,"* L.A. REV. OF BOOKS (Aug. 19, 2021), <https://lareviewofbooks.org/article/against-white-publishing-the-limits-of-rafia-zakarias-against-white-feminism/> [<https://perma.cc/E5A3-XMF8>].

<sup>73</sup> Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 814 (1990) [hereinafter Chamallas & Kerber, *Women, Mothers, and the Law*].

article, *Women, Mothers, and the Law of Fright: A History*, traces the progression of the common law of recovery for fright-based harm.<sup>74</sup> Under the traditional common law rule, recovery in damages for fright-based harm required a showing of simultaneous physical impact.<sup>75</sup> As the common law evolved, it dropped the requirement of simultaneous impact, but still restricted recovery to physical injuries.<sup>76</sup> It finally arrived at a seemingly more liberal rule that allowed recovery for emotional harm resulting from prior physical impact.<sup>77</sup> This doctrinal evolution is typically taught without reference to gender, as the product of greater scientific understanding of psychological harm and judges' growing resistance to using the common law to subsidize corporate wrongdoing.<sup>78</sup> The conventional story posits a rationalizing process in which law adapts to advancing scientific and societal understandings.<sup>79</sup>

Attention to gender tells a different story. Lost in the standard account is that these claims for fright-based injuries were brought overwhelmingly by women.<sup>80</sup> As Martha and Linda Kerber explain, the paradigm cases are a plaintiff who loses a pregnancy after a shock and a mother who sees her child severely injured or killed.<sup>81</sup> Tort law historically disfavored such claims by categorizing the injuries as involving only emotional harm.<sup>82</sup> This categorization, while gender-neutral on the surface, functioned as a gatekeeper for recovery that elevated the material interests of men (physical security and property) over interests associated with women (emotional wellbeing and relationships).<sup>83</sup> Other tort doctrines reinforced this hierarchy, with judges labeling fright-based harms unforeseeable, remote and unreasonable, and regarding plaintiffs as mere bystanders.<sup>84</sup> These doctrinal rules not only reflected the prevailing views of women's proper domestic role and unfitness for the public realm, they reinforced this hierarchy.<sup>85</sup> Denying women recovery for pregnancy loss coincided with societal views about women's unsuitability for public life.<sup>86</sup> Not coincidentally, the case law protected women from fright-based harms while in their homes, but ruled their losses unforeseeable if they ventured into the world.<sup>87</sup> Likewise, the common law viewed women's claims

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<sup>74</sup> *Id.* at 814–15.

<sup>75</sup> *Id.* at 819.

<sup>76</sup> *Id.* at 820.

<sup>77</sup> *Id.* at 820–21.

<sup>78</sup> *Id.* at 823.

<sup>79</sup> Chamallas & Kerber, *Women, Mothers, and the Law*, *supra* note 73, at 823.

<sup>80</sup> *Id.* at 814–15.

<sup>81</sup> *Id.* at 814.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 816, 838, 860.

<sup>85</sup> Chamallas & Kerber, *Women, Mothers, and the Law*, *supra* note 73, at 816–17, 833.

<sup>86</sup> *Id.* at 833.

<sup>87</sup> *Id.* at 831–32 (“Inside the home, pregnancy and its dangers would be safeguarded from external hazards, but a pregnant woman might be required to bear the risks of machines and human negligence once she ventured outside.”).

for emotional harm skeptically; hypersensitive (female) plaintiffs were required to bear the risk of their oversensitivity.<sup>88</sup>

The linchpin of the story, as Martha and Linda Kerber reveal, is that the modern shift in doctrine (allowing, for example, a mother to recover for emotional harm resulting from witnessing the death of her child killed by a negligent driver<sup>89</sup>) corresponds to changes in society's understanding of women's roles as the earlier understandings were contested.<sup>90</sup> The shift marked a more expansive view of women's legitimate claims to public life, even as it held on to sentimentalized ideals of motherhood to support recovery for emotional harms due to lost relationships with children.

In the article's final analysis, gender—and not just a rationalizing process of developing the common law—is revealed to be a key driver of doctrinal change.<sup>91</sup> The relationship between law, society, and gender runs deep, and is marked by multiple reciprocal arrows of causality.

#### V. EVERYTHING OLD BECOMES NEW AGAIN

As the saying goes, “the more things change, the more they stay the same.”<sup>92</sup> Like many feminist scholars and critical thinkers, Martha is wary of simplistic narratives about progress and linearity.<sup>93</sup> On closer inspection, what looks like change on the surface often masks an underlying continuity. Even when law reform efforts succeed, biased practices do not disappear; they may shift in form, but likely linger.

This insight stands out in all of Martha's work, but is particularly prescient in her article setting out a theory of devaluation as a newer, under-theorized form of bias.<sup>94</sup> In the article, Martha shows how devaluation does much of the same work of subordinating marginalized groups as the older explicit forms of discrimination now prohibited by law.<sup>95</sup> By taking a different form—disadvantaging categories of activity associated with marginalized groups (including women and people of color) instead of treating individual members of these groups differently based on their group status—devaluation carries out the agenda of disparate treatment but adapts to modern conditions so as to skate

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<sup>88</sup> *Id.* at 832–33 (explaining how the law reflected “the belief that only supersensitive or abnormally delicate persons could suffer physical harms from fright”).

<sup>89</sup> *Dillon v. Legg*, 441 P.2d 912, 914 (Cal. 1968).

<sup>90</sup> Chamallas & Kerber, *Women, Mothers, and the Law*, *supra* note 73, at 823.

<sup>91</sup> *Id.* at 862–64.

<sup>92</sup> Or in the original French version, “plus ça change, plus c'est la même chose.” JEAN-BAPTISTE ALPHONSE KARR, 6 *LES GUÊPES* 278, 305 (Paris, Michael Lévy Frères 1862).

<sup>93</sup> *See, e.g.*, Chamallas & Kerber, *Women, Mothers, and the Law*, *supra* note 73, at 823 (rejecting the notion, common in contemporary torts textbooks, that the evolving doctrine of fright-based injury has stemmed purely from sex-neutral factors like increased medical understanding and waning corporate deference).

<sup>94</sup> Chamallas, *Deepening the Legal Understanding of Bias*, *supra* note 7, *passim*.

<sup>95</sup> *Id.* at 752–55.

under the law's radar.<sup>96</sup> Writing in 2001, Martha observed that public attitudes, and with them law, had turned against outward, explicit manifestations of racial and gender bias.<sup>97</sup> Devaluation, on the other hand, lends itself to plausible deniability, even though, as Martha shows, it is as pernicious a form of systemic racial or gender bias as the old forms of discrimination now reachable by law.<sup>98</sup>

The law's ambivalence toward working mothers is another example of the stickiness of what underlies the old forms of bias in the wake of legal and social change. Although employers may no longer openly target women's wages with a motherhood penalty, women who "choose" part-time work are still paid disproportionately less for their work.<sup>99</sup> Martha's examination of the second-tier treatment of part-time workers—which she explains is a feminized category due to women's high representation in these jobs—exposes how change and continuity coexist.<sup>100</sup>

The mid-1980s paired an overt acceptance of married women and mothers in the workforce with lingering cultural resistance to mothers performing paid work outside the home.<sup>101</sup> Of course, this resistance to mothers working outside the home was, and remains, racially specific.<sup>102</sup> Poor women of color have been expected to work, an expectation enforced by changes in welfare policy driven by hostility toward Black mothers.<sup>103</sup> How motherhood is valued is dependent upon race, as reflected in the devaluation of Black motherhood and the judgment (embedded in welfare policy) that Black mothers "have little positive to offer their own children and . . . do not suffer as much as other women when forced to separate from their children."<sup>104</sup> The women's movement and civil rights movement may have driven explicit expressions of these views underground, but sexual and racial double-standards about mothers and work remain influential.<sup>105</sup>

In the evolving cultural views on gender roles, white married women were allowed to work but were expected to put their husbands' careers first.<sup>106</sup>

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<sup>96</sup> *Id.* at 755–56.

<sup>97</sup> *Id.* at 747–55.

<sup>98</sup> *Id.* at 755–57.

<sup>99</sup> *Id.* at 756–60.

<sup>100</sup> Chamallas, *Women and Part-Time Work*, *supra* note 3, at 711, 714–15.

<sup>101</sup> *Id.* at 727–29.

<sup>102</sup> CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, *supra* note 2, at 378.

<sup>103</sup> *Id.* at 378–82.

<sup>104</sup> *Id.* at 379 (citing Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871, 874 (1994)).

<sup>105</sup> *Id.* at 379.

<sup>106</sup> Chamallas, *Women and Part-Time Work*, *supra* note 3, at 728. The choice to capitalize "Black" but not "white" reflects the author's understanding that the term "Black" refers to a shared ethnic identity in a way that "white" does not, and that "it is a kind of orthographic injustice to lowercase the B." Mike Laws, *Why We Capitalize 'Black' (and Not 'White')*, COLUM. JOURNALISM REV. (June 16, 2020), <https://www.cjr.org/analysis/capital-b-black-styleguide.php> [<https://perma.cc/G9UR-7ZPB>]. For an excellent explanation of why the Columbia Journalism Review follows the same approach, see *id.*

Likewise, white women could be regarded as good mothers while working, but only if they subordinated their careers to family demands.<sup>107</sup> Prioritizing their own careers risked triggering the traps set for “career women”—the often-caricatured villains in movies and popular culture.<sup>108</sup> Such women typically get their comeuppance by the movie’s end, and, once reformed, find happiness by scaling back their careers and reconnecting with their families.<sup>109</sup> For women of color, there is little reverence for motherhood and subordinate wifely roles; both their labor and motherhood are devalued, leaving them relegated to low-wage, low status jobs, and treated as unreliable, fungible workers.<sup>110</sup> The law’s neglect of these issues leaves these biases unchecked, as employment discrimination law defers to employer prerogatives and refuses to intervene.

This neglect of part-time workers is part of a broader pattern of the law’s continuation of second-tier status of working mothers, notwithstanding the official story of legal change. While policies openly discriminating against mothers in hiring and promotion are no longer lawful, more subtly biased practices elude the law’s grasp.<sup>111</sup> In a reference to the Supreme Court’s first Title VII case, a challenge to the employer’s policy of refusing to hire women with young children,<sup>112</sup> Martha identifies “the ghost of *Martin Marietta*” in a newer crop of cases alleging discrimination against mothers.<sup>113</sup> With the shift in cultural attitudes toward working mothers from explicit disapproval to ambivalence, courts updated the conceptual tools they used to decide discrimination cases brought by mothers.<sup>114</sup> Writing shortly before “the maternal wall” gained prominence in legal scholarship and advocacy,<sup>115</sup> Martha identified a judicial resistance to recognizing penalties against working mothers as sex discrimination—a throwback to the “sex plus” reasoning that derailed these cases in the lower courts before the Court’s decision in *Phillips v. Martin Marietta Corp.*<sup>116</sup> This newer resistance took the form of finding a gender-neutral ruse to explain the motherhood penalty: a degendered sidelining of

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<sup>107</sup> Chamallas, *Women and Part-Time Work*, *supra* note 3, at 728.

<sup>108</sup> See Rebecca Deczynski, *16 Movies that Shed a Bad Light on Working Moms (PHOTOS)*, CAFEMOM (Nov. 25, 2015), [https://cafemom.com/entertainment/192961-16\\_movies\\_that\\_shed\\_a](https://cafemom.com/entertainment/192961-16_movies_that_shed_a) [<https://perma.cc/TN4F-AX34>].

<sup>109</sup> See *id.*

<sup>110</sup> Chamallas, *Deepening the Legal Understanding of Bias*, *supra* note 7, at 789–95.

<sup>111</sup> Jean Lee, *Discrimination Against Working Mothers Must End*, BLOOMBERG (Mar. 31, 2021), <https://news.bloomberglaw.com/us-law-week/discrimination-against-working-mothers-must-end> [<https://perma.cc/R4QX-3Y3L>].

<sup>112</sup> *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971).

<sup>113</sup> Martha Chamallas, *Mothers and Disparate Treatment: The Ghost of Martin Marietta*, 44 VILL. L. REV. 337, 348 (1999) [hereinafter Chamallas, *Mothers and Disparate Treatment*].

<sup>114</sup> See *id.* at 351.

<sup>115</sup> See, e.g., Faye J. Crosby, Joan C. Williams & Monica Biernat, *The Maternal Wall: Research and Policy Perspectives on Discrimination Against Mothers*, 60 J. SOC. ISSUES 675 (2004).

<sup>116</sup> Chamallas, *Mothers and Disparate Treatment*, *supra* note 113, at 342, 348.

“parents” whose responsibilities for children detract from their productivity at work.<sup>117</sup> With a blindness to the reality that fathers did not experience these penalties, and that employers often relied on gendered assumptions about working mothers as a group (rather than experiences with the individual employee), courts attributed the negative treatment of plaintiffs to the “choice” to become a parent.<sup>118</sup> Hence, although *Martin Marietta* stands as precedent against the overt adverse treatment of working mothers, Martha’s analysis reveals how employers and courts adapted their practices to perpetuate the biased treatment of mothers in the workplace.

The past nearly two years’ experience with COVID-19 reminds us just how much remains fundamentally unchanged. Throughout the pandemic, women, and women of color in particular, overwhelmingly bore the brunt of caretaking of babies, toddlers, school-age children, elderly relatives and sick family members, at the cost of a generation’s worth of progress in the labor force.<sup>119</sup> Workers deemed essential—many of whom were women, especially those in lower-paying jobs, and disproportionately women of color<sup>120</sup>—risked their own health to go to work (unable to Zoom in from home) while simultaneously confronting a “choice” between earning a living and caring for vulnerable family members. The public health crisis squashed any rosy-eyed illusion of workplace equality and illuminated the stark realities of double and triple burdens imposed on working mothers. For those who have read Martha’s work, it was clear that these inequities and compound burdens have been present all along.

This insight, that the shiny new thing does not erase what came before, applies to feminism itself. The “old” feminisms of the 1970s and 80s—liberal feminism, dominance feminism, and cultural feminism—remain vibrant and influential, even as newer feminisms gain ascendance. In one illustration of this variation on the theme, Martha makes a persuasive case for resisting any premature claims about the demise of liberal feminism.<sup>121</sup> She uses the celebrated Lilly Ledbetter case to argue that liberal feminism retains purchase in confronting modern-day gender injustices.<sup>122</sup> Although *Ledbetter* is conventionally understood as involving a 1970s-style equal pay for equal work claim, Martha points out that the case actually tells a more complicated feminist

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<sup>117</sup> *Id.* at 351.

<sup>118</sup> *Id.* at 350 (quoting *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340, 342 (8th Cir. 1997)).

<sup>119</sup> Amanda Taub, *Pandemic Will ‘Take Our Women 10 Years Back’ in the Workplace*, N.Y. TIMES (July 29, 2021), <https://www.nytimes.com/2020/09/26/world/covid-women-childcare-equality.html> [<https://perma.cc/UNL3-E9F6>].

<sup>120</sup> Jocelyn Frye, *On the Frontlines at Work and at Home: The Disproportionate Economic Effects of the Coronavirus Pandemic on Women of Color*, CNTR. FOR AM. PROGRESS (Apr. 23, 2020), <https://www.americanprogress.org/article/frontlines-work-home/> [<https://perma.cc/8UAW-9KZN>].

<sup>121</sup> Chamallas, *Past as Prologue*, *supra* note 15, at 161.

<sup>122</sup> *Id.* at 159–61.



story.<sup>123</sup> Lilly Ledbetter's experience involved not only being paid less than her male counterparts to do the same work; she also experienced sexual harassment by her boss, who assessed job performance and set pay raises, and she struggled as a divorced mother in a company culture that was hostile to women.<sup>124</sup> As Martha explains, the case exposes structural inequality and hostile workplace culture, in addition to pay discrimination.<sup>125</sup> The legal claim itself may have been narrow, but the case catalyzed a broader feminist movement to address systemic bias and wage inequality, encompassing more substantive demands for pay transparency and protections for union organizers.<sup>126</sup>

## VI. NOTHING IS AS EASY AS IT SEEMS

For a critical theorist like Martha, simple narratives are suspect, as are absolutes, dichotomies, and easy solutions. There is often more to the story, and it is important to figure it out. Social facts are complex and like many social ills, gender inequality defies a singular, easy fix. Martha's work reflects a hard-won skepticism of coherence in legal responses to complex human conduct and relationships.

And so, in teasing out the implications of the egalitarian approach to law's regulation of sex, Martha cautions against imposing fixed views of the possibilities for egalitarian relationships when it comes to asymmetrical relationships at work and in educational settings.<sup>127</sup> Finding the best (for now) feminist sweet spot is historically contingent. Using an equality framework for regulating sexual encounters means discerning the approach that "places women at least disadvantage."<sup>128</sup> This requires grappling with the specificity of the now, and an understanding of what has come before and is likely to continue or to change.<sup>129</sup> In terms of sexual equality, Martha opines, "[a]t this historical period, the reservation of sex for intimacy and pleasure seems more likely to empower women in sexual encounters than either the traditionalist insistence on marriage or the permissive stance of the liberal."<sup>130</sup> But Martha counsels continued attention to context and changing social facts.<sup>131</sup> Striking a balance between avoiding sexual coercion and encouraging opportunities for sexual intimacy requires a subtle and contextual analysis; neither a blanket ban nor wholesale approval of encounters where "consent" is present but power between sexual partners is disparate, such as in supervisor-employee and professor-

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<sup>123</sup> *Id.* at 160–61.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 161.

<sup>127</sup> Chamallas, *Past as Prologue*, *supra* note 15, at 172.

<sup>128</sup> Chamallas, *Consent*, *supra* note 16, at 839.

<sup>129</sup> *See generally* Chamallas, *Past as Prologue*, *supra* note 15.

<sup>130</sup> Chamallas, *Consent*, *supra* note 16, at 839.

<sup>131</sup> *Id.* at 843.

student relationships.<sup>132</sup> Despite intervening decades of fluctuation in the legal and cultural responses to these controversies, Martha's nuanced stance continues to ask the right questions and emphasizes the importance of continuing to ask them, with humility that the answers may change. Among the "right questions" is not just the wellbeing of the sexual participants in isolation, but the consequences to others.<sup>133</sup>

In addition to being skeptical of easy solutions, Martha casts a critical eye on law's success stories.<sup>134</sup> Progress is not linear; law reform stumbles forward in fits and starts, as the tensions underlying the doctrine ebb and flow. In an early piece exploring this theme, Martha examines the controversy in disparate impact doctrine over how parity in the employer's "bottomline" affects the legality of a particular employment practice that results in a disparate impact.<sup>135</sup> When Martha was writing, the Supreme Court had just decided *Connecticut v. Teal*,<sup>136</sup> a case in which a standardized test for civil service promotions had a disparate impact on the Black employees who took the test, even though the ultimate promotion decisions had no such effect, likely due to the employer's affirmative action policy.<sup>137</sup> Plaintiffs who failed the test brought a disparate impact challenge, while the employer argued that the lack of impact at the bottomline negated their claim.<sup>138</sup> The Court, in an opinion by Justice Brennan, sided with the plaintiffs.<sup>139</sup> Although the opinion seems, at face value, to benefit disparate impact plaintiffs, Martha reveals a more complicated picture.<sup>140</sup> Beneath the doctrinal question of how to treat bottomline parity lies the theoretical one of whether a group-based antidisubordination principle or an emphasis on individual opportunity should animate Title VII.<sup>141</sup> The Court's opinion protected the individuals who were thwarted by the test, but at the expense of a more far-reaching group-based vision of equal opportunity that would prioritize ending systematic disparities.<sup>142</sup> Understood in these terms, *Teal* is not so much a victory for disparate impact plaintiffs as a step backward from the group-based vision of equality at the heart of disparate impact claim, and a precursor to the demise of affirmative action.

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<sup>132</sup> *Id.* at 854.

<sup>133</sup> *Cf.* Amia Srinivasan, Opinion, *What's Wrong with Sex Between Professor and Students? It's Not What You Think*, N.Y. TIMES (Sept. 3, 2021), <https://www.nytimes.com/2021/09/03/opinion/metoo-teachers-students-consent.html> [<https://perma.cc/HZ8D-XS2T>] (downplaying the significance of "consent" in such encounters and emphasizing the harm to teaching and learning when professors have sex with students).

<sup>134</sup> *See generally, e.g.*, Chamallas, *Evolving Conceptions of Equality*, *supra* note 3.

<sup>135</sup> *Id.*

<sup>136</sup> *Connecticut v. Teal*, 457 U.S. 440, 440 (1982).

<sup>137</sup> Chamallas, *Evolving Conceptions of Equality*, *supra* note 3, at 312.

<sup>138</sup> *Teal*, 457 U.S. at 442.

<sup>139</sup> *Id.*

<sup>140</sup> Chamallas, *Evolving Conceptions of Equality*, *supra* note 3, at 313.

<sup>141</sup> *Id.* at 314.

<sup>142</sup> *Id.*

Nearly three decades later, what alarmed Martha in the Court's rejection of the bottomline defense came home to roost when the Supreme Court in *Ricci v. Destefano*<sup>143</sup> elevated the disparate treatment theory and its individualistic, colorblind understanding of equality over and above the race-conscious, group-based disparate impact theory. In a disparate treatment challenge to the city of New Haven's action tossing out the results of firefighter promotion tests in order to avoid a racially disparate impact, the Court in *Ricci* identified a "tension" between disparate treatment and disparate impact doctrine.<sup>144</sup> The Court resolved that tension in favor of the disparate treatment claim and found that the city engaged in unlawful disparate treatment.<sup>145</sup> Going further, Justice Scalia in a concurring opinion even suggested that the disparate impact claim itself may violate the constitutional guarantee of equal protection.<sup>146</sup> The ultimate fate of the disparate impact theory remains to be seen, but it appears to stand on increasingly precarious legs. Rereading Martha's article in light of these subsequent developments reveals the role that the *Teal* case, a sheep in wolf's clothing, played in charting that trajectory.

Starkly presented dichotomies are also ripe for Martha's picking. Of the many dichotomies animating law, none has been more problematic for gender equality than the premise of a sharp distinction between the public and private spheres. Relegated to the private sphere, women have historically been excluded from the public sphere of the market.<sup>147</sup> Work inside the home is privatized (unpaid, unprotected), while paid work outside the home is the subject of legal regulation. The split reinforces not just separation but the social and economic inferiority of women. Much of Martha's employment discrimination scholarship sounds this theme, including her examination of the predicament facing part-time workers.<sup>148</sup> Terminology is important. In the professions, part-time work is referred to as "the mommy track."<sup>149</sup> No one speaks of a working father; he is called an employee.<sup>150</sup> The stark separation of the private (domestic responsibilities) from the public (market work) props up the inadequate legal protections for the part-time work force and the utter invisibility of law's wholesale neglect of domestic (unpaid) labor.

Dichotomous representations are ever-present where law, culture, and gender intersect, and no more so than in the treatment of rape. Martha takes up several such dichotomies in an essay she published in 2005 discussing Alice

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<sup>143</sup> *Ricci v. Destefano*, 557 U.S. 557, 558 (2009).

<sup>144</sup> *Id.* at 582.

<sup>145</sup> *Id.* at 583.

<sup>146</sup> *Id.* at 595 (Scalia, J., concurring).

<sup>147</sup> Chamallas, *Mothers and Disparate Treatment*, *supra* note 113, at 348.

<sup>148</sup> See generally Chamallas, *Women and Part-Time Work*, *supra* note 3.

<sup>149</sup> Tamar Lewin, 'Mommy Career Track' Sets Off a Furor, N.Y. TIMES, Mar. 8, 1989, at A18.

<sup>150</sup> Chamallas, *Women and Part-Time Work*, *supra* note 3, at 726.

Sebold's memoir, *Lucky*.<sup>151</sup> As first drafted, my Festschrift contribution discussed Martha's analysis of *Lucky* for its unraveling of the tangled dichotomies that still influence the legal system's response to rape. But as this Festschrift issue was working its way through the editorial process, a shattering revelation came to light that fundamentally changes everything about the *Lucky* memoir and any discussion of it. The man convicted in 1982 of raping Sebold when she was a freshman at Syracuse University, Anthony Broadwater, was exonerated after serving sixteen years in prison and twenty-three years on probation as a sex offender.<sup>152</sup> It is now clear that Sebold's status as a white woman and Broadwater's identity as a Black man fundamentally worked a grave injustice far different than the injustice Sebold wrote about in her memoir.<sup>153</sup> Although the facts of the rape itself and the resulting harm Sebold experienced remain, Sebold accused the wrong man and the legal system convicted him. Tragically, even after Sebold identified another man in the police lineup, the prosecutor and judge continued to believe Sebold's insistence that Broadwater was the rapist.<sup>154</sup> Sebold's testimony at trial that it was Broadwater, despite her having pointed to a different man in the police lineup, plus a hair analysis based on junk science were the only pieces of evidence purporting to link Broadwater

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<sup>151</sup> See generally Martha Chamallas, *Lucky: The Sequel*, 80 IND. L.J. 441 (2005) (a narrative analysis of ALICE SEBOLD, *LUCKY* (1999)) [hereinafter Chamallas, *Lucky*].

<sup>152</sup> Douglass Dowty & Tim Knauss, *Alice Sebold Case: How Race and Incompetence Doomed Anthony Broadwater to Prison*, SYRACUSE (Jan. 25, 2022), <https://www.syracuse.com/news/2022/01/alice-sebold-case-how-race-and-incompetence-doomed-anthony-broadwater-to-prison.html> [<https://perma.cc/9DJU-BBRK>]; Karen Zraick & Alexandra Alter, *Man Is Exonerated in Rape Case Described in Alice Sebold's Memoir*, N.Y. TIMES (Dec. 1, 2022), <https://www.nytimes.com/2021/11/23/nyregion/anthony-broadwater-alice-sebold.html> [<https://perma.cc/D2V3-AAXD>]; see also Johanna Berkman, *Why Didn't More of Us Question Alice Sebold's Memoir*, N.Y. MAG. (Dec. 10, 2021), <https://www.thecut.com/2021/12/questioning-alice-sebold-memoir-lucky.html> (on file with the *Ohio State Law Journal*).

<sup>153</sup> Sebold issued a public apology to Broadwater, expressing regret for having "unwittingly" played a role in "a system that sent an innocent man to jail," and in a remarkable statement, Broadwater accepted Sebold's apology, saying "it's a strong thing for her to do, understanding that she was a victim and I was a victim too." See Alexandra Alter & Karen Zraick, *Alice Sebold Apologizes to Man Wrongly Convicted of Raping Her*, N.Y. TIMES (Nov. 30, 2021), <https://www.nytimes.com/2021/11/30/nyregion/alice-sebold-rape-case.html> [<https://perma.cc/Q5DX-QHMS>] [hereinafter Alter & Zraick, *Alice Sebold Apologizes*]. Anthony Broadwater is now suing the State of New York for \$50 million. *Man Cleared in Author's 1981 Rape Sues NY Over Conviction*, ASSOCIATED PRESS (Feb. 25, 2022), <https://apnews.com/article/new-york-lawsuits-syracuse-nyc-state-wire-alice-sebold-3e82cf299b7fea59a4e903392ef57cd0> (on file with the *Ohio State Law Journal*).

<sup>154</sup> Dowty & Knauss, *supra* note 152. Even at that time, eyewitness identification was known to be highly fallible, and especially so for cross-racial identification. *Id.* In light of the large numbers of convictions that have been overturned based on false eyewitness accounts, it is logical to assume that many cases resulting in convictions in prior decades were tainted by false identifications. *E.g., id.* ("Mistaken eyewitness identifications contributed to 69% of more than 375 wrongful convictions in the United States overturned by DNA evidence since 1992, according to the Innocence Project.").

to the crime.<sup>155</sup> It took a movie producer working on a film version of *Lucky* decades after the memoir's publication to raise questions about Broadwater's guilt.<sup>156</sup> His persistence in pursuing these questions set in motion a process that eventually exonerated Broadwater nearly forty years after his wrongful conviction.<sup>157</sup>

In light of this stunning development, it is impossible to discuss *Lucky*, or any analysis of it, without reckoning with the centrality of race—race privilege as well as race bias—and how it distorted the criminal legal system's response to Sebold's rape. Sebold's memoir did not ignore race, but its account failed spectacularly in missing the deep truths about how race drove the trajectory of the criminal proceedings. Sebold acknowledged the existence of systemic racism and the long history of Black men wrongly convicted for sexually assaulting white women.<sup>158</sup> But Sebold's writing about her angst over her initial failure to identify Broadwater in the lineup,<sup>159</sup> and the defense attorney's highlighting of Broadwater's race to call into question the accuracy of cross-racial identification,<sup>160</sup> are particularly painful to reread. Sebold portrayed as unfair the defense lawyer's questioning of her credibility in identifying Broadwater at trial merely because she made a mistake in the lineup.<sup>161</sup> In its final analysis, Sebold's account of how race infected the proceeding came down to her expressing a wish that her rapist had been white, as if Broadwater's race was a complication or inconvenience that would have been better for her to avoid.<sup>162</sup> That Sebold, a self-styled liberal sympathetic to racial inequality,<sup>163</sup> viewed this as an example of how the racial dynamics at trial harmed her credulity, shows both the depths of systemic racism toward Black defendants and the utter inadequacy of white liberal perspectives to come to grips with the full measure of racism's distortion of criminal justice.

In a 2017 "afterward" to her memoir, Sebold returned to the racial inequities as she then-understood them to have affected the case.<sup>164</sup> She wrote, "My rapist

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<sup>155</sup> See Douglass Dowty, *40-Year-Old Syracuse Rape Conviction at the Heart of Author Alice Sebold's Memoir Is Thrown Out*, SYRACUSE (Dec. 1, 2022), <https://www.syracuse.com/news/2021/11/40-year-old-syracuse-rape-conviction-at-the-heart-of-author-alice-sebolds-memoir-is-thrown-out.html> [<https://perma.cc/2LC3-E25X>]; Alter & Zraick, *Alice Sebold Apologizes*, *supra* note 153.

<sup>156</sup> Dowty & Knauss, *supra* note 152.

<sup>157</sup> Dowty, *supra* note 155; Alter & Zraick, *Alice Sebold Apologizes*, *supra* note 153.

<sup>158</sup> Sarah Weinman, *Rereading Alice Sebold's Lucky*, ELLE (Dec. 6, 2021), <https://www.elle.com/culture/books/a38425267/rereading-alice-sebolds-lucky/> [<https://perma.cc/LD7H-6TR6>].

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> Berkman, *supra* note 152.

<sup>162</sup> Weinman, *supra* note 158.

<sup>163</sup> Alice Sebold, *Statement from Alice Sebold*, MEDIUM (Nov. 30, 2021), [https://medium.com/@Alice\\_Sebold/statement-from-alice-sebold-c109361d6150](https://medium.com/@Alice_Sebold/statement-from-alice-sebold-c109361d6150) (on file with the *Ohio State Law Journal*).

<sup>164</sup> Dowty & Knauss, *supra* note 152.

was poor, black, and uneducated, and came from a family with an entrenched criminal record. I was a middle-class white girl attending an expensive university. . . . I knew that my words mattered.”<sup>165</sup> Sebold’s point in acknowledging these disparities was not to reconsider whether Broadwater might have been railroaded into a wrongful conviction, but to highlight the greater difficulty a woman with less privilege would have faced in having her story believed. The latter point is well-grounded.<sup>166</sup> But, the acknowledgement of Broadwater’s lack of privilege lands entirely differently now that we see his innocence and realize that Sebold’s privilege was powerful enough to condemn a Black man to a lengthy prison term for a crime he did not commit.

This is not to say that gender bias did not also influence the legal system’s response to the rape, and in ways that map onto how it has historically discredited rape victims. The initial law enforcement response was to question whether Sebold had been raped at all, despite her physical injuries, immediate police report, and distraught presentation<sup>167</sup>—all indicia of the biased prototypes used to distinguish “real” rape from bad sex or exaggerated claims.<sup>168</sup> These tropes map onto stereotypes used to differentiate good girls and real victims (Sebold’s status as a virgin was repeatedly mentioned at trial as a reason to believe her and take the harm seriously<sup>169</sup>) from women who deserve what they get.<sup>170</sup> Race and class fundamentally affect how these lines are drawn and which women are entitled to the law’s protection.<sup>171</sup> The title of the memoir refers to the many times Sebold was told she was “lucky” to signify that she met the criteria for a real rape and was deserving of justice: she was a virgin, was raped by a stranger, and had physical injuries that were sufficient to corroborate a crime, but not as bad as they might have been.<sup>172</sup> Of course, crucially, she was also white. These aspects of the rape likely overcame law enforcement’s initial skepticism of Sebold’s report of the rape.<sup>173</sup> It is no small irony—indeed, “irony” does not begin to capture it—that in Sebold’s encounters with law enforcement she was closely scrutinized for her account of whether she was raped but uncritically and unequivocally believed when she pointed to a Black man as her rapist.

Martha’s critical examination of the *Lucky* narrative was written nearly two decades before Broadwater’s exoneration,<sup>174</sup> and the implications of this grave

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<sup>165</sup> *Id.*

<sup>166</sup> See CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, *supra* note 2, at 299.

<sup>167</sup> See Dowty & Knauss, *supra* note 152.

<sup>168</sup> For a discussion of rape prototypes, see CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, *supra* note 2, at 296–98.

<sup>169</sup> Dowty & Knauss, *supra* note 152.

<sup>170</sup> *Id.*; CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, *supra* note 2, at 296–303.

<sup>171</sup> CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, *supra* note 2, at 7.

<sup>172</sup> Chamallas, *Lucky*, *supra* note 151, at 442.

<sup>173</sup> Dowty & Knauss, *supra* note 152.

<sup>174</sup> Chamallas, *Lucky*, *supra* note 151, at 443.

injustice will continue to reverberate as legal scholars and close observers of the criminal law's engagement with race and rape draw lessons from what happened. And yet, the questions Martha explored in her essay remain vital ones in theorizing about rape. One such question that has concerned feminist theorists and criminal law scholars is whether rape is fundamentally a crime of sex or of violence.<sup>175</sup> The question matters because the understanding of the harm of rape, as either the absence of consent to sex or as sexualized violence, shapes the law's response.<sup>176</sup> The two ways of understanding rape are often presented as alternatives, but Martha's analysis reveals this to be a false dichotomy; it can be both.<sup>177</sup> And the tilt toward one or the other may be more particular than universal.<sup>178</sup> For Sebold—who did experience a brutal and devastating rape, although not by Broadwater—the act of sexual penetration was not the defining harm, despite the criminal law's singular insistence on this point of contact as an element of the crime.<sup>179</sup> As Martha's analysis explains, a violent nonsexual assault would not have produced the same harm.<sup>180</sup> The harm of rape is attributable to neither sex nor violence alone; it is the intertwining of the two that makes rape a distinctive crime with a distinctive harm.<sup>181</sup> It is that complexity that law and culture must grapple with in order to fully understand and address the harm of rape.

In the years since Martha wrote this essay, there has been more pushback to “trauma” discourse and controversy within critical theory circles about how to characterize the harm of sexual violence.<sup>182</sup> Martha's analysis still speaks to these flashpoints in culture and critical theory, as she persuasively explains that a major part of the harm of rape stems from the cultural and social misunderstanding of the survivor's experience.<sup>183</sup>

The effect of cultural representations of rape and social reactions to survivors was more recently the subject of a critically acclaimed HBO series, “I May Destroy You.”<sup>184</sup> In this contemporary drama the lead character is a Black British woman struggling to piece together and come to terms with her rape, which is clouded by her impaired memory (her rapist, whose identity she does not learn until the end of the series, drugged her).<sup>185</sup> The protagonist experiences

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<sup>175</sup> *Id.* at 444.

<sup>176</sup> *See id.* at 461.

<sup>177</sup> *Id.* at 461–67.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Chamallas, *Lucky*, *supra* note 151, at 467.

<sup>181</sup> *Id.* at 469.

<sup>182</sup> *See generally* Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193 (2010) (blaming the rise of the abortion regret thesis on the dominance of trauma as the lens for understanding women's harms from sexual violence).

<sup>183</sup> Chamallas, *Lucky*, *supra* note 151, at 463–64.

<sup>184</sup> *I May Destroy You* (HBO 2020).

<sup>185</sup> *Id.*; E. Alex Jung, *Michaela the Destroyer: How a Young Talent from East London Went from Open-Mic Nights to Making the Most Sublimely Unsettling Show of the Year*,

profound alienation in the course of processing what happened and emerges with a changed understanding of herself and her relationships.<sup>186</sup> As in *Lucky*, neither the sexual nor the violent dimension of the attack singularly captures the harm. But unlike *Lucky*, the series narrative stays focused on the interaction of harm and identity and eschews vindication in the criminal justice system for a postmodern ending of differently imagined scenarios and their relationship to healing.<sup>187</sup>

Even with a better understanding of the harms of rape, the role of criminal law in pursuing justice for rape victims remains a site of controversy. Critical legal theorists, including Martha, have long recognized that calling on the state to address gendered harm is fraught with peril.<sup>188</sup> It remains vital for law to recognize and respond to the complex harms of rape, and Martha's analysis stands as an insightful, nuanced account of those harms. But the unraveling of the criminal case against Sebold's alleged rapist now adds to the known racial injustices in law enforcement that demand not mere "reform" but a deep and unvarnished reckoning.

#### VII. GENDER HIDES IN PLAIN SIGHT

Gender is ubiquitous; if you don't see it, dig deeper. All of Martha's scholarship probes the places where gender lurks, so I will limit my discussion to just a few examples. To be sure, the regulation of sexuality wears only a thin veneer of neutrality masking gendered double standards. This is no revelation to anyone who has studied sexuality, but Martha's analysis of the layers of gender goes deeper than most. For example, she observes, the traditional approach to regulating sex based on status superficially required all persons to refrain from nonmarital sex, but the subordinate position of wives (socially and economically) and the cultural double-standard of sexual morality made this supposed gender neutrality more farce than reality.<sup>189</sup> Less obvious, Martha explains, is that the liberal approach is just as gendered.<sup>190</sup> Even though consent held a marginally more plausible claim to gender-neutrality, it masks the physical and social inequality in male-female relationships that situate men as sexual initiators and women as passive participants.<sup>191</sup> Liberalism's shroud of

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VULTURE (July 6, 2020), <https://www.vulture.com/article/michaela-coel-i-may-destroy-you.html> (on file with the *Ohio State Law Journal*).

<sup>186</sup> *I May Destroy You*, *supra* note 184.

<sup>187</sup> Jung, *supra* note 185 (spoilers included).

<sup>188</sup> See CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, *supra* at 2, at 306–09, 406, 409. See generally Angela Y. Davis, *Rape, Racism, and the Capitalist Setting*, 9 BLACK SCHOLAR 24 (1978); Jennifer Wriggins, Note, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103 (1983).

<sup>189</sup> Chamallas, *Consent*, *supra* note 16, at 788.

<sup>190</sup> *Id.* at 796.

<sup>191</sup> *Id.* at 814.



consent protected sexual exploitation by making it less visible and therefore a less likely target of law reform.<sup>192</sup>

Once you start seeing gender in formally neutral rules and practices, you find it permeates legal and social structures. In the mid-1980s very few people viewed the precariousness of part-time work as a gender issue.<sup>193</sup> But Martha showed how the gender composition of the group, part-time workers being predominantly female, drove pay disparities between the part-time and full-time workforce.<sup>194</sup> These disparities are not explained by differences in the number of hours worked or other gender-neutral factors.<sup>195</sup> Likewise, superficially gender-neutral rules regulating workers in predominantly female jobs are fashioned to correspond to the gender composition of the group.<sup>196</sup> Such rules take the form of low-pay, no benefits, and regimented treatment.<sup>197</sup> That these rules also apply to the few men working in female-dominated jobs does not make them gender-neutral in anything but form.

These examples support a point Martha has developed in much of her scholarship, that the gender composition of a group triggers cognitive bias and schemas according to stereotypes about the group.<sup>198</sup> For part-time work, the gendered meaning is not just that part-time workers are mostly women, but that full-time work is incompatible with the demands of families and parenting disproportionately borne by women.<sup>199</sup> The association between part-time work and working mothers defines the category of part-time work in the public consciousness and employer policies. A similar gender association underlies the low value placed on domestic carework and housework.<sup>200</sup> The formal neutrality of the category lends a plausible deniability to charges of gender bias.

The urge to deny the role of gender in the unfair treatment of a formally gender-neutral category is aided by constitutional law's emphasis on sex and race classifications as the *sine qua non* of discrimination.<sup>201</sup> As with the refrain that the presence of some white persons in a disfavored category consisting mostly of people of color refutes a claim of race discrimination, the scattering of men among a group comprised mostly of women serves to redirect attention away from gender. As social psychologists have shown, calling out race and gender bias is unpopular because it upends deep seated cultural beliefs in a "just

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<sup>192</sup> *Id.* at 796.

<sup>193</sup> Chamallas, *Women and Part-Time Work*, *supra* note 3, at 724–25 (noting that part-time work and the treatment of part-time workers was not a major subject of attention in the feminist movement, partly due to ambivalence about accentuating women's differences in employment).

<sup>194</sup> *Id.* at 725–31.

<sup>195</sup> *Id.* at 741.

<sup>196</sup> Chamallas, *Exploring the "Entire Spectrum," supra* note 3, at 4.

<sup>197</sup> *Id.* at 29.

<sup>198</sup> *See generally, e.g., id.*; Chamallas, *Women and Part-Time Work, supra* note 3.

<sup>199</sup> *See* Chamallas, *Exploring the "Entire Spectrum," supra* note 3, at 10 n.46.

<sup>200</sup> *Id.* at 26–27.

<sup>201</sup> *See id.* at 5–22 (noting how case law regarding disparate treatment has emphasized sex and race classifications).

world.”<sup>202</sup> Martha’s analysis pushes back against this resistance, explaining why the inclusion of some men in a second-class category does not cleanse it of gender.<sup>203</sup> The fact that some men are part-time workers, for example, does not interrupt the feminization of the category, nor its association with women and the mommy track; instead, the few men in the category are feminized and harmed as a result.<sup>204</sup> Of course, the position that men can be harmed by sex discrimination was staked out much earlier, in the 1970s by Ruth Bader Ginsburg’s iconic litigation strategy.<sup>205</sup> But long after equal protection has all but ridden the law of sex-based classifications, the feminization of certain categories associated with women continues to disadvantage the many women and few men belonging to them.

#### VIII. IT’S THE INSTITUTION, STUPID!<sup>206</sup>

Institutions shape law and law shapes institutions. Change does not occur from law reform alone; institutions carry out, respond to, and subvert legal mandates. Institutional practices, cultures and structures must be understood and addressed for law to matter.

This insight, which pervades Martha’s work and is a core premise of the law and society school of scholarship, is summed up nicely in her article on sex and consent: “Whatever the law’s language, its utility to women is likely to depend heavily on the presence of institutions responsive to women that exert pressure on the law.”<sup>207</sup> Hence, changes to the legal definition of consent would have mattered little without the creation of rape crisis centers, battered women’s shelters, and trainings for law enforcement and social service providers.<sup>208</sup>

The theme of the importance of institutions is central to Martha’s scholarship. In an essay reflecting on the legacy of Fifth Circuit Judge Alvin Rubin, Martha brings this insight to bear on her analysis of the judge’s employment discrimination opinions.<sup>209</sup> In two opinions dissenting from decisions in favor of the employer, Judge Rubin found systemic discrimination responsible for continuing patterns of occupational segregation.<sup>210</sup> Martha’s analysis of these cases demonstrates the importance of dismantling the veneers

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<sup>202</sup> See, e.g., Katie Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1303–07 (2012).

<sup>203</sup> See, e.g., Chamallas, *Exploring the “Entire Spectrum,”* *supra* note 3, at 46–48.

<sup>204</sup> See Chamallas, *Women and Part-Time Work*, *supra* note 3, at 730.

<sup>205</sup> See generally *Moritz v. Comm’r*, 469 F.2d 466 (10th Cir. 1972).

<sup>206</sup> Those of a certain age will recognize the reference to James Carville’s reminder to Democrats during the Clinton Administration, “It’s the economy, stupid!” (circa 1992).

<sup>207</sup> Chamallas, *Consent*, *supra* note 16, at 815.

<sup>208</sup> *Id.*

<sup>209</sup> See generally Martha Chamallas, *Racial Segregation and Cultural Domination: A Rubin Trilogy on Title VII*, 52 LA. L. REV. 1457 (1992) [hereinafter Chamallas, *Racial Segregation and Cultural Domination*].

<sup>210</sup> See generally *Hill v. Miss. State Emp. Serv.*, 918 F.2d 1233 (5th Cir. 1990); *EEOC v. Kimbrough Inv. Co.*, 703 F.2d 98 (5th Cir. 1983).

of “choice” and custom masquerading as business need and foregrounds the institutional practices responsible for these patterns.

In one of these cases, the employer, a hotel, relegated African Americans to low-paying, low-skill service jobs, mirroring patterns of racial segregation in the hospitality industry.<sup>211</sup> While the majority attributed this disparity to employee choice, Judge Rubin dissented, connecting the dots between the hotel’s historic and continuing patterns of racial segregation and its intent to discriminate.<sup>212</sup> Martha’s discussion of the practices behind this segregation sheds light on the importance of an institutional analysis. She points out that the hotel’s process for filling jobs was designed in a way likely to entrench the racial status quo.<sup>213</sup> Rather than posting openings, potential applicants learned of opportunities by word of mouth.<sup>214</sup> Then, the hotel’s white supervisors filled openings based on their subjective discretion.<sup>215</sup> Written forms completed by applicants were placed into folders according to the applicant’s specified “first choice” of position—which was often steered by the interviewer to conform to the hotel’s racial hiring patterns.<sup>216</sup> If the applicant did not list a first choice and expressed a willingness to take any position, their application was placed in an “anything” folder.<sup>217</sup> Unbeknownst to the applicants who expressed this preference (likely those most eager for a job), the “anything” folder was never considered when the hotel managers filled open positions.<sup>218</sup> Pointing to these practices, Martha shows how applicant “choice” is institutionally constructed.<sup>219</sup> While the panel majority saw the racial hiring pattern as a product of African American applicants preferring the jobs for which they were hired,<sup>220</sup> attention to the institution’s active role in constructing applicant preference reveals a different picture of the hotel’s responsibility, one in which the “folder system” is not a benign custom after all.<sup>221</sup>

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<sup>211</sup> *Kimbrough Inv. Co.*, 703 F.2d at 101–02. The hotel hired African Americans to work in the kitchen, housecleaning, and bellhop areas, while hiring white employees in the customer-facing jobs of front desk, bartender, and cocktail waitress; higher-skill positions such as accountants, sales, security and skilled maintenance were also filled by white employees. *Id.* at 105–06 n.11 (Rubin, J., dissenting).

<sup>212</sup> *Id.* at 106.

<sup>213</sup> Chamallas, *Racial Segregation and Cultural Domination*, *supra* note 209, at 1460–61.

<sup>214</sup> *Id.* at 1460.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 1460–61.

<sup>217</sup> *Id.* at 1460.

<sup>218</sup> *Id.* at 1461.

<sup>219</sup> Chamallas, *Racial Segregation and Cultural Domination*, *supra* note 209, at 1461.

<sup>220</sup> *Id.*

<sup>221</sup> Martha likewise singles out appreciation for institutional context—and specifically the realities of pay practices in obstructing employee knowledge—as the highlight of Justice Ginsburg’s dissenting opinion in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 643–61 (2007) (Ginsburg, J., dissenting). Martha Chamallas, *Ledbetter, Gender Equity and Institutional Context*, 70 OHIO ST. L.J. 1037, 1046–48 (2009) (explaining Justice Ginsburg’s dissent as tracking the institutional account of pay discrimination and rejecting

Martha does not let Judge Rubin off the hook when he fails to hone in on the institutional dynamics behind racial hierarchy in workplace culture.<sup>222</sup> In a now-notorious decision, Judge Rubin authored the court's opinion in *Garcia v. Gloor*,<sup>223</sup> upholding a lumber supply company's strict English-only policy without requiring any showing of business necessity. Observing that the rule did not operate to exclude Latinx employees, since the majority of the company's positions were filled by Spanish-speaking employees, Judge Rubin reasoned that the plaintiff and other bilingual employees could have avoided any disparate impact by refraining from speaking Spanish at work.<sup>224</sup> Martha's critique elaborates her theory of cultural domination as a form of discrimination.<sup>225</sup> Judge Rubin's "mutable condition" exception to disparate impact doctrine<sup>226</sup>—giving employers a pass when the protected class could choose to avoid the impact—is predicated on a false understanding of Title VII's protected classes (race, national origin and sex) as fixed and unchanging, restricting protection to only immutable conditions.<sup>227</sup>

In contrast, Martha's analysis centers the cultural meaning of the no-Spanish rule, made visible only when understood in the context of the institutional culture of the workplace.<sup>228</sup> As Martha explains, the English-only rule functioned as a "cultural marker" for the employer to position itself as "an Anglo business" in spite of the Latinx composition of its workforce.<sup>229</sup> Far from white-washing the English-only rule, the predominantly Latinx composition of the workforce helps explain why the English-only rule is discriminatory.<sup>230</sup> Drawing on feminist philosopher Iris Marion Young's work on oppression, which connects segregation to the culture that sustains it, Martha highlights the importance of cultural domination as an institutional practice linked to embedded patterns of racial segregation.<sup>231</sup> This lens enables her to explain in compelling terms how Judge Rubin's opinion rested on an essentialist and problematic understanding of Title VII's protected classes.<sup>232</sup> In Martha's account, it is the social meaning of the protected class—how others perceive

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the neoclassical understanding of employers as passive price-takers in the market when they set employee wages).

<sup>222</sup> Chamallas, *Racial Segregation and Cultural Domination*, *supra* note 209, at 1457.

<sup>223</sup> *Garcia v. Gloor*, 618 F.2d 264, 266 (5th Cir. 1980).

<sup>224</sup> *Id.* at 272.

<sup>225</sup> Chamallas, *Racial Segregation and Cultural Domination*, *supra* note 209, at 1475–76.

<sup>226</sup> *Id.* at 1471–75.

<sup>227</sup> *Id.* at 1473–74.

<sup>228</sup> *Id.* at 1474.

<sup>229</sup> *Id.* at 1475.

<sup>230</sup> *Id.* at 1473.

<sup>231</sup> Chamallas, *Racial Segregation and Cultural Domination*, *supra* note 209, at 1478 (citing IRIS M. YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 49–59 (1990)).

<sup>232</sup> *Id.* at 1478–79.

and respond to people based on their identity—that matters most for properly interpreting the civil rights laws.<sup>233</sup>

The institutional account can also help judges select from competing expert testimony and social science research in discrimination cases. In her analysis of the controversy over the proper perspective to use in gauging the severity of harassment—the reasonable woman versus the reasonable person standard—Martha argues against merely searching for the “best” social science research to inform judges’ decisions.<sup>234</sup> She begins by pointing out that, like law, the social sciences have marginalized feminist accounts and women’s perspectives, and notes the dangers of a “neutral” approach that masks implicit biases in favor of majority (white, male) perspectives.<sup>235</sup> Instead, she urges judges to draw on the disciplines and research that foreground the role of institutions, particularly organizational structure and culture, to inform their decisions.<sup>236</sup> In sexual harassment cases, for example, she notes the relevance of research by scholars such as Dr. Susan Fiske, a social psychologist whose institutional perspective explains how harassment undermines women’s opportunities for advancement.<sup>237</sup> Without understanding how organizational culture and structure shape women’s responses to harassment, courts run the risk of trivializing these harms. Focusing on the institutional structure and culture in which harassment occurs can also help judges avoid falling into the trap of essentializing women and their experiences of harassment. As Martha explains, although some (perhaps many) women are not offended by exposure to sexually explicit material outside of work, the same material in a workplace context in which women are marginalized has very different consequences for women’s careers.<sup>238</sup>

#### IX. MIND THE GAP

Often, what matters most falls into the gaps between categories. It is in law’s silences and open spaces that the gems can be found. Categories are entrenched in law and endemic to legal reasoning, but what they leave out can be just as important and illuminating as what they capture, if not more so.

So it is with what Martha theorizes as devaluation, a type of bias that flies under the radar of the legally recognized categories of discrimination, disparate treatment and disparate impact.<sup>239</sup> By exploring what is left out of the main doctrinal categories, Martha observes that many gender-linked harms—for

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<sup>233</sup> *Id.* at 1474–79.

<sup>234</sup> Chamallas, *Feminist Constructions of Objectivity*, *supra* note 56, at 114.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 115.

<sup>237</sup> *Id.*; see also Martha Chamallas, *Listening to Dr. Fiske: The Easy Case of Price Waterhouse v. Hopkins*, 15 VT. L. REV. 89, 107 (1990) (explaining how insights from social psychology can illuminate the institutional practices likely to lead to bias in organizations).

<sup>238</sup> Chamallas, *Feminist Constructions of Objectivity*, *supra* note 56, at 116.

<sup>239</sup> Chamallas, *Deepening the Legal Understanding of Bias*, *supra* note 7, at 755–56.

example, rape, domestic violence, sexual harassment, household labor, occupational segregation, abortion, and welfare reform—occur in single-gender settings and environments, and are thus impervious to discrimination law’s comparative framework.<sup>240</sup> Women and the injuries they experience are devalued precisely because of their distance from men’s interests, which are more highly valued.<sup>241</sup> With devaluation, bias is directed toward women, people of color, and other subordinated groups, but without demonstrable intentional discrimination targeting individual members of the group for different treatment.<sup>242</sup>

The depression of wages in women-dominated occupations is a leading example. While courts have resisted recognizing a cause of action for such bias—often termed “comparable worth”—Martha shows that when jobs become gendered female, stereotypes result in depressed wages.<sup>243</sup> Because it is the category of jobs that is targeted for biased treatment, and not women as a class or individual women, the law does not recognize it as discrimination.<sup>244</sup> Not limited to gender, devaluation is also a tool of racial subordination.<sup>245</sup> Writing decades before the Black Lives Matter movement brought the devaluation of African American lives to the forefront of public consciousness, Martha critiqued constitutional law’s failure to remedy the devaluation of African American lives in the administration of the death penalty.<sup>246</sup> Even though defendants charged with killing white victims were shown to be more than four times as likely to receive the death penalty than defendants charged with killing Black victims,<sup>247</sup> the Supreme Court famously upheld the constitutionality of the administration of the death penalty against an equal protection challenge.<sup>248</sup> Despite the clear devaluation of Black victims, the pattern of bias did not match up to what the Court requires for an equal protection violation: intentionally different treatment of individual defendants based on race.<sup>249</sup>

In her elaboration of devaluation, Martha laid the groundwork for stretching the existing categories to better address this pervasive and heretofore under-

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<sup>240</sup> *Id.* at 753–56.

<sup>241</sup> *See id.* at 757–58.

<sup>242</sup> *See id.* at 772–77.

<sup>243</sup> *See id.* at 765–67.

<sup>244</sup> *Id.* at 771.

<sup>245</sup> *See Chamallas, Deepening the Legal Understanding of Bias, supra note 7, at 760–61.*

<sup>246</sup> *Id.* at 760–64.

<sup>247</sup> *Id.* at 760 (citing DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990)). A recent follow-up study examining the data on persons actually put to death (not just sentenced) found that the execution rate for defendants convicted of killing white victims was seventeen times greater than that for defendants convicted of killing Black victims. *See Scott Phillips & Justin Marceau, Whom the State Kills, 55 Harv. C.R.-C.L. L. Rev. 585, 587 (2020).*

<sup>248</sup> *See McCleskey v. Kemp, 481 U.S. 279, 297 (1987).*

<sup>249</sup> *Id.*

theorized form of bias.<sup>250</sup> One way she did this was by sketching the similarities between devaluation and discrimination, as conventionally defined.<sup>251</sup> Her key insight is that the Ruth Bader Ginsburg-litigated constitutional law precedents striking down sex-based classifications that treat men as breadwinners and women as homemakers actually reflect an implicit recognition of the harm of devaluation.<sup>252</sup> Martha shows that, although these cases involved a quasi-suspect sex-based classification, the only way to understand them is through the lens of devaluation.<sup>253</sup> Otherwise, cases involving men who were denied the same spousal benefits that wives received through their husbands' labor force participation would involve discrimination only against men. But at the time these now-classic cases were decided, the case for heightened scrutiny for discrimination against men lacked a doctrinal foundation and would not likely have appealed to the Court.<sup>254</sup> Only by understanding that these classifications worked a devaluation of women as wage-earners could the Court appreciate the invidiousness of the harm.<sup>255</sup> In addition, Martha points out, although devaluation does not involve the different treatment of individuals along suspect lines, it is, at its core, comparative.<sup>256</sup> The ultimate inquiry is not unlike that of disparate treatment: whether the treatment of the group (women, for disparate treatment; persons within categories associated with women, for devaluation) would have been better had there been no cognitive association with women.<sup>257</sup> Although recognizing devaluation as a legal wrong is still some distance from disparate treatment's anti-classification, individualistic model, Martha persuasively situates it as more of a modification than a radical departure.<sup>258</sup>

These insights likely will not sway the present Supreme Court to embrace devaluation as an actionable wrong, but Martha's analysis lays the groundwork for future steps in that direction. Admittedly, in some respects, recent developments have made this hope appear even more unrealistic. The Court's elevation of disparate treatment above disparate impact in *Ricci*, discussed above, surely signals a hostility to moving from individualistic to more group-conscious approaches to discrimination.<sup>259</sup> But looking elsewhere in the intervening case law reveals some shred of hope, even if flickering. In the pathbreaking pregnancy discrimination case, *Young v. United Postal Service, Inc.*,<sup>260</sup> the Court broke free from the constraints of the disparate treatment and disparate impact categories, as traditionally defined, to embrace a claim for bias

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<sup>250</sup> See generally Chamallas, *Deepening the Legal Understanding of Bias*, *supra* note 7.

<sup>251</sup> See *id.* at 753–55.

<sup>252</sup> See *id.* at 756–59.

<sup>253</sup> *Id.* at 757.

<sup>254</sup> *Id.*

<sup>255</sup> See *id.* at 758.

<sup>256</sup> Chamallas, *Deepening the Legal Understanding of Bias*, *supra* note 7, at 775–76.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> See *supra* text accompanying notes 143–46.

<sup>260</sup> See generally *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).

that looks very much like devaluation.<sup>261</sup> The Court's holding embraces a discrimination claim for devaluing pregnant women in the calculation of whether to accommodate their pregnancy-related conditions by offering light duty work.<sup>262</sup> While the Court never used the word "devaluation," its approach to pregnancy discrimination maps onto Martha's theory of devaluation quite nicely. While the Court purports to limit its novel approach to pregnancy discrimination only, new legal theories cannot always be cabined.<sup>263</sup>

This optimistic note leads me to my last (substantive) takeaway from Martha's scholarship.

#### X. TAKE THE LONG VIEW

Martha began publishing in the early 1980s, well after the heyday of Warren-style judicial activism<sup>264</sup> and at a time when Reagan appointees were populating a more conservative federal bench.<sup>265</sup> Since then, the rightward shift of the federal courts has only intensified, and particularly so on the Supreme Court, with the passing of Justice Ginsburg.<sup>266</sup> But far from losing hope, rereading Martha's scholarship left me recommitted to the importance of bringing feminist theory and feminist insights to bear on law. Martha's imaginative reconstructions of doctrine and legal theory dwell in hope and possibility.

Martha has a keen eye for finding the cracks in the patriarchy and the legal system that supports it—cracks that let in glimpses of light that, with the right pressure points, may someday widen into a fracture. In her article on devaluation, she counters the anticipated objection that her theory is "impractical" with the observation that the discriminatory intent requirement for disparate treatment (both statutory and constitutional) has long been shifting and contested, and points out the openings (for example, where the law has already moved to recognize causation as a stand-in for intent) for moving the needle.<sup>267</sup>

Even when Martha's proposed rethinking of legal theory is far afield from existing law, she lights a path toward change. Martha acknowledges, for example, that the form of bias she calls "biased prototypes" is not addressed by

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<sup>261</sup> *Id.* at 1354–55.

<sup>262</sup> *Id.* at 1347.

<sup>263</sup> *Cf.* Chamallas, *Past as Prologue*, *supra* note 15, at 161 ("[T]here are some claims for equality that, once unleashed, cannot easily be contained.").

<sup>264</sup> Daniel Frost, *Judicial Excellence After Earl Warren*, *JUDICATURE*, Spring 2017, at 57, 58.

<sup>265</sup> Graeme Browning, *Reagan Molds the Federal Court in His Own Image*, 71 *ABA J.* 60, 60 (1985).

<sup>266</sup> Shannon Larson, *Ruth Bader Ginsburg Died a Year Ago. Here Are Four Ways Her Death Has Already Reshaped the Supreme Court*, *BOS. GLOBE* (Sept. 23, 2021), <https://www.bostonglobe.com/2021/09/23/nation/ruth-bader-ginsburg-died-year-ago-here-are-four-ways-her-death-has-already-reshaped-supreme-court/> (on file with the *Ohio State Law Journal*).

<sup>267</sup> Chamallas, *Deepening the Legal Understanding of Bias*, *supra* note 7, at 753–54.



discrimination law, nor likely to be so in the future.<sup>268</sup> She demonstrates, nonetheless, that perceptions of injury are circumscribed by cognitive bias that centers a presumptively “representative” image, often in ways that compound disadvantage to women and people of color.<sup>269</sup>

Martha’s analysis identifies three features of biased prototypes.<sup>270</sup> First, although they loom large in the cultural imagination, they are not actually representative.<sup>271</sup> Most rapes are not stranger rape,<sup>272</sup> most rapists are not Black men,<sup>273</sup> and most rapes are intraracial, not interracial.<sup>274</sup> And yet, the prototype of a “real” rape is a Black man raping a white woman who is a stranger.<sup>275</sup> Second, biased prototypes contain a false theory about causation of harm: they point to the character of the individuals involved, rather than the social situation, as the root cause.<sup>276</sup> Third, they trade in harmful dualisms and false dichotomies, reinforcing sharply differentiated categories,<sup>277</sup> such as stranger/acquaintance, chaste/promiscuous, and race/gender.

Unlike devaluation, the harm of biased prototypes is noncomparative, and thus falls farther from the core of discrimination law.<sup>278</sup> Identifying bias in a prototype does not mean, for example, that a female rape victim would be treated better if she were male, or that a mother who receives welfare would be less culturally tarnished if she were a father on welfare. Rather, Martha’s point is that cultural scripts about rape victims and welfare mothers drain empathy, obscure injury, and deny redress in law and social policy.<sup>279</sup> Although the harm is not comparative, Martha points out that this form of cognitive bias is nonetheless harmful in ways that align with gender and racial subordination.<sup>280</sup> The prototype of “real rape,” for example, reinscribes sexist and racist scripts.<sup>281</sup>

Martha is not optimistic about the capacity of discrimination law to expand to capture this harm.<sup>282</sup> She counsels that a more robust set of legal rights is not always the answer to subordination,<sup>283</sup> and reminds us that feminism has a complicated relationship to law reform.<sup>284</sup> And yet, far from rendering her analysis futile, this insight points the way to a different strategy for change, one

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<sup>268</sup> *Id.* at 803.

<sup>269</sup> *Id.* at 779–80.

<sup>270</sup> *Id.* at 780–82.

<sup>271</sup> *Id.* at 780–81.

<sup>272</sup> *Id.* at 783.

<sup>273</sup> Chamallas, *Deepening the Legal Understanding of Bias*, *supra* note 7, at 784.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.* at 781–82.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 803.

<sup>279</sup> Chamallas, *Deepening the Legal Understanding of Bias*, *supra* note 7, at 786–95.

<sup>280</sup> *Id.* at 783–84.

<sup>281</sup> *Id.* at 786–89.

<sup>282</sup> *Id.* at 789.

<sup>283</sup> *Id.* at 795–98.

<sup>284</sup> *Id.* at 798.

of pushing back on the narratives that support biased prototypes. Martha concludes with a call “to expose the underlying normative judgments embedded within the biased prototypes to get at precisely what is objectionable about this kind of cognitive shortcut.”<sup>285</sup> In recent years, we have seen this very strategy come to fruition, with burgeoning progressive movements like #MeToo and Black Lives Matter advancing counter-narratives that center authentic stories of racial and sexual harm.<sup>286</sup> While still very much a work in progress, these movements have the potential to dislodge the conventional narratives that sustain biased prototypes.

Finally, much of Martha’s scholarship makes the case to use the doctrine when you can.<sup>287</sup> Nearly all her articles do this, and some plant seeds that have borne fruit, as with her analysis on gender and part-time work.<sup>288</sup> She carefully maps the opening for courts to adopt a tougher approach to the factor other than sex defense under the Equal Pay Act, with the goal of narrowing the room for employers to explain disproportionate gaps in pay between part-time and full-time workers without stronger business justifications.<sup>289</sup> It has taken nearly three decades, but some lower courts have been tightening up the defense (albeit, not yet specifically in challenges to part-time workers’ pay).<sup>290</sup> Other efforts to work with legal doctrine have found a more hostile judicial reception, as with Martha’s threading of the needle on constructive discharge to make the doctrine more plaintiff-friendly, an approach that was rejected by the Supreme Court a few months after the article’s publication.<sup>291</sup> Even so, the article’s valiant attempt to broaden employer responsibility for the injuries caused by

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<sup>285</sup> Chamallas, *Deepening the Legal Understanding of Bias*, *supra* note 7, at 803; *see also id.* at 806 (acknowledging that the process of subverting biased prototypes is not easy; that it “calls for noncomparative strategies that take us quite a long way from the equality-based remedies for intentional disparate treatment”).

<sup>286</sup> ‘#MeToo Gave Me Confidence to Report My Sexual Abuse,’ BBC (Sept. 22, 2021), <https://www.bbc.com/news/uk-england-york-north-yorkshire-58624904> [<https://perma.cc/L4HY-MVBA>]; Char Adams, *A Movement, a Slogan, a Rallying Cry: How Black Lives Matter Changed America’s View on Race*, NBC News (Dec. 29, 2020), <https://www.nbcnews.com/news/nbcblk/movement-slogan-rallying-cry-how-black-lives-matter-changed-america-n1252434> (on file with the *Ohio State Law Journal*).

<sup>287</sup> Chamallas, *Women and Part-Time Work*, *supra* note 3, at 712–13.

<sup>288</sup> *See, e.g., id.*

<sup>289</sup> *Id.* at 746–48.

<sup>290</sup> *See, e.g., Rizo v. Yovina*, 950 F.3d 1217, 1229–30 (9th Cir. 2020) (en banc) (overruling earlier circuit precedent that accepted salary history as a factor other than sex and restricting the defense to legitimate, job-related factors such as experience, qualifications, and prior job performance).

<sup>291</sup> *See* Martha Chamallas, *Title VII’s Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 313–14 (2004) (analyzing constructive discharge as a “dilemma” that brings to the forefront the crisis brewing in Title VII’s rigid categorical approach and urging courts to engage in a more forthright inquiry into how to attribute responsibility for it). *But see* Pa. State Police v. Suders, 542 U.S. 129, 131–32 (2004) (holding that constructive discharge is not a tangible employment action and allowing employers to avoid liability with an affirmative defense).

sexual harassment may yet help bolster more plaintiff-friendly approaches to the principles supporting employer liability for supervisor misconduct.<sup>292</sup>

One of my favorite examples of Martha's persistence in refusing to give up on a feminist reconstruction of law comes from her review of a book by social science scholars critiquing the convention of relying on the market to excuse gendered pay inequities.<sup>293</sup> Martha fundamentally agrees with and further elaborates their argument that both courts and employers too readily default to "the market" as the explanation for paying female-dominated jobs less than predominantly male jobs, even when the market does not actually support paying women less.<sup>294</sup> Martha's point-by-point review of the book's argument situates their critique in the case law and explains why the case studies the authors use reveal the hollowness of the market-based explanation that courts uncritically accepted in those cases.<sup>295</sup> But Martha parts ways with the authors when they conclude that disparate impact doctrine is ill-suited to scrutinizing market justifications and too close to the long-discarded comparable worth theory.<sup>296</sup> In an exhaustive review of disparate impact doctrine, Martha demonstrates that the very insight at the heart of the authors' argument—that employers are not passive followers of the market but rely on their own institutional practices to set pay—provides the building blocks for legal theory to overcome judicial resistance to disparate impact pay claims.<sup>297</sup> At bottom, Martha's difference with the authors boils down to her optimism about the potential for legal theory to move legal doctrine, not through a process of rationalization alone, but through struggle, aided by the right intellectual tools.<sup>298</sup>

With the unpredictable and ever-changing COVID-19 pandemic have come intense dislocations that have renewed our sense of urgency to reconsider work, vulnerable workers, and their sacrifices. Scholars, advocates, and practitioners are in the midst of fresh conversations about changing the nature of work,

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<sup>292</sup> Although Justice Ginsburg authored the Court's opinion in *Suders*, she dissented in a later case that adopted a narrow definition of a "supervisor" for purposes of imposing vicarious liability for supervisor misconduct. See *Vance v. Ball State Univ.*, 570 U.S. 421, 454–55 (2013) (Ginsburg, J., dissenting) (arguing for a broader approach to vicarious liability and emphasizing the harms of unremedied injuries to harassment victims under the Court's narrower approach). The rift on the Court in *Vance* shows dissension among the Justices over how high to set the hurdle for vicarious liability. See also Martha Chamallas, *Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law*, 75 OHIO ST. L.J. 1315, 1315 (2014) (critiquing the Court's turn to agency principles to limit vicarious liability for sexual harassment and other discrimination claims).

<sup>293</sup> See generally Martha Chamallas, *The Market Excuse*, 68 U. CHI. L. REV. 579 (2001) (reviewing ROBERT L. NELSON & WILLIAM P. BRIDGES, *LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA* (1999)).

<sup>294</sup> See *id.* at 612.

<sup>295</sup> *Id.* at 596.

<sup>296</sup> *Id.* at 600.

<sup>297</sup> *Id.* at 607, 610–12.

<sup>298</sup> See *id.* at 612.

working less, valuing it more, and easing the gendered burdens that beset the most vulnerable workers.<sup>299</sup> Before COVID hit, no one would have predicted the opportunities of the present moment. It is far too soon to say what, if any, legal and social changes will emerge, but we are reminded that even systemic societal failures can spark change, as they expose fractures and instability in the existing order. Every crisis is an opportunity to revisit what once seemed unrealistic and too radical, if we can fend off complacency and hopelessness.

#### XI. FEMINISTS HELP OTHER WOMEN (AND MEN), AND NEVER LOSE THEIR SENSE OF HUMOR

While I have focused on Martha's scholarship, I cannot conclude my contribution to this Festschrift without saying something about the person behind the scholar. Without exaggeration, as a mentor, she is simply the best. If you have ever had the good fortune to have Martha read a draft of your work (and we are a large club because Martha is a generous reader), then you know of what I speak. Martha's insight as a reader and editor is truly a gift; she sees the kernel of an idea even when it is covered in a field of weeds. She treats it as a fragile seedling and crafts a set of instructions for how to water, fertilize, nurture, and grow it into a mature stalk.<sup>300</sup> If the academy had more mentors and readers like Martha, we would all be better and stronger.

As valuable as Martha's generosity in reading other scholars' work (though that is hard to top) is her sharing of wisdom as a sage academic who has seen it all. Even (now more than) two decades ago, when I joined the Pitt Law faculty, Martha was the wise stateswoman of the faculty. She knew, and shared, how to walk the tightropes, dodge the landmines, and where the bodies were buried. She was tireless and stalwart in the pursuit to diversify the faculty, always ready to beat back the old tropes set in opposition with an astute and diplomatic rejoinder. But my favorite is the unfiltered Martha, with her trademark sense of humor that never fails to lift up the absurdities of academic life, and life in general, and hold them to the light for a good laugh. Sometimes this sense of humor comes with what my grandmother used to call "language."<sup>301</sup> Let's just say, it is probably best not to answer a call from Martha on speaker when in the

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<sup>299</sup> E.g., Nicole Buonocore Porter, *Working While Mothering During the Pandemic and Beyond*, 78 WASH. & LEE L. REV. ONLINE 1 (2021); Arianne Renan Barzilay & Ana Ben-David, *Platform Inequality: Gender in the Gig-Economy*, 47 SETON HALL L. REV. 393 (2017); Anne Branigan, *Can Four-Day Workweeks Help Women? More Companies Are Trying It Out.*, LILY (Dec. 23, 2021), <https://www.thelily.com/can-four-day-workweeks-help-women-more-companies-are-trying-it-out/> [<https://perma.cc/K8W3-QVDY>]; Edward Lempinen, *Very Big Changes Are Coming Very Fast to the American Workplace*, BERKELEY NEWS (July 1, 2021), <https://news.berkeley.edu/2021/07/01/very-big-changes-are-coming-very-fast-to-the-american-workplace/> (on file with the *Ohio State Law Journal*).

<sup>300</sup> She would surely redline this cringy metaphor, but I got carried away!

<sup>301</sup> Let no one deny us the pleasure of uncensored conversations. Cf. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (detailing facts of partners objecting to plaintiff's swearing only "because it's a lady using foul language").

car with the kids. Amidst all these lessons, perhaps the most important thing I learned from Martha about being a feminist in the academy is this: oftentimes the best medicine for exhaustion, frustration, and life's myriad challenges is laughter. Martha's brand of equanimity, intellect, and mad humor is a beacon for legal academics, and lights a path for feminist scholars and critical theorists in these challenging times.