

Maurice A. Deane School of Law at Hofstra University

Scholarship @ Hofstra Law

Hofstra Law Faculty Scholarship

10-18-2012

Binders for Women, Blinders for Romney

Joanna L. Grossman

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

Joanna L. Grossman, *Binders for Women, Blinders for Romney* Verdict (2012)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/957

This Article is brought to you for free and open access by Scholarship @ Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarship @ Hofstra Law. For more information, please contact lawscholarlycommons@hofstra.edu.

Verdict

October 18, 2012

[Joanna L. Grossman](#)

Binders for Women, Blinders for Romney



It was a welcome moment in the second presidential debate, held October 16 at Hofstra University, when one of the town hall participants asked a question about pay equity. The first debate, after all, had ignored all women's issues, despite the fact that such issues have been at the center of several national political controversies, and reveal stark ideological and practical differences between the two candidates for president. And, of course, it is no secret that women comprise well more than half the electorate and an even greater proportion of the much sought-after "swing" and "undecided" voters.

At Hofstra, Katherine Fenton directed her question at President Barack Obama. "In what new ways," she asked, "do you intend to rectify the inequalities in the workplace, specifically regarding females making only 72 percent of what their male counterparts earn?"

This was something of a softball for Obama, who has an excellent record on women's issues and on pay equity in particular. The very first bill he signed as president was the Lilly Ledbetter Fair Pay Act, which restored the protection to victims of pay discrimination that had been gutted by the Supreme Court in its 2007 ruling in *Ledbetter v. Goodyear Tire & Rubber Co.* (<http://supreme.justia.com/cases/federal/us/550/05-1074/>) (The developments leading to passage of the Act are described in detail [here](http://writ.news.findlaw.com/grossman/20090213.html) (<http://writ.news.findlaw.com/grossman/20090213.html>)). And Obama's healthcare reform law contains many provisions designed to ensure that women have access to essential medical care such as mammograms, Pap smears, and contraception.

The interesting part of this segment of the debate began when Romney opened his mouth (and that is not a sentence I use very often). In his non-answer, Romney revealed that he fundamentally does not understand—or care about—issues like pay inequity that face women in the workplace. And his efforts to suggest that he does were ill-informed, irrelevant and, in some cases, downright offensive.

"Binders Full of—of Women"

To Candy Crowley's lead-in, "Governor Romney, pay equity for women," Romney responded with praise for the "important topic," one that he "learned a great deal about" as governor. His learning came when trying to "pull together a Cabinet and all the applicants seemed to be men." "Well, gosh," he said to his staff, "can't we—can't we find some—some women that are also qualified?" Enter the binders full of women. Romney says he went to women's groups for help in finding qualified women to be considered for his cabinet. As he continued on at the debate, he commented, "And I brought us whole binders full of—of women."

In just twenty-four hours since it was first uttered, this phrase has gone a long way towards infamy. A tumblr [site](http://bindersfullofwomen.tumblr.com) (<http://bindersfullofwomen.tumblr.com>) went up almost immediately featuring image after image mocking it. The images include binders full of dancing women, party girls, and beleaguered office help, and more than one play on the hit song "Single Ladies," inviting Romney to put "three rings on it." (As I'm a longtime fan of the movie *Dirty Dancing*, my favorite is a classic photo of Patrick Swayze with the tagline: "No one puts baby in a binder.") A Democratic PAC bought the domain name bindersfullofwomen.com (<http://bindersfullofwomen.com>) and filled it immediately with tidbits and quotes from Romney on a wide range of women's issues, many of which show the hypocrisy of statements he has made in both debates and elsewhere while on his last-minute attempt to appear moderate on social issues.

But putting this humorous commentary aside—although it was a welcome diversion from an otherwise uninspiring and gloomy campaign season—this comment, and the explanation that came with it, reveals Romney's dated and uninformed conception of women's position in the workforce. News reports after the debate suggest, moreover, that Romney did not go in search of qualified women—the binders were sitting there when he took office, the product of an effort by MassGap, a nonpartisan coalition formed to put more women in senior positions in government. And some have rightfully questioned why a man with his experience and connections didn't already have some women in mind, or why he thought qualified women were in short supply. Romney was taken to task for this mindset in 1994, when he tried unsuccessfully to unseat Senator Ted Kennedy. When was asked why the private equity firm he founded had fewer than ten percent female partners, he cited their lack of interest in the profession and the fact that elite business schools graduate "only a handful" each year. (Harvard Business School, according to an [article](http://www.huffingtonpost.com/2012/10/17/mitt-romney-women-bain_n_1974837.html) (http://www.huffingtonpost.com/2012/10/17/mitt-romney-women-bain_n_1974837.html), in Huffington Post, graduated 30 percent women in 1995.)

But let's give Romney the benefit of the doubt and assume that he was at least receptive to the idea of putting women into senior positions in his cabinet if presented with binders full of them to choose from. Kudos to him, although [one study](http://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1001&context=cwppp_pubs&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3D%26rct%3Dj%26q%3Dromney%20massachusetts%20appointments%20governor%20women%26source%3D) (http://scholarworks.umb.edu/cgi/viewcontent.cgi?article=1001&context=cwppp_pubs&sei-redir=1&referer=http%3A%2F%2Fwww.google.com%2Furl%3Fsa%3D%26rct%3Dj%26q%3Dromney%20massachusetts%20appointments%20governor%20women%26source%3D) reports that the number of women in senior positions went down during his governorship and up under his successor. Certainly, the glass ceiling that prevents many women from reaching the upper echelons of government and private industry is very real, and it takes proactive efforts, perhaps including binders, to overcome the old-boy network that continues to put white men into these positions in numbers that are disproportionate to their numbers in the qualified labor pool.

But what does this have to do with pay equity and the entrenched gender wage gap that was cited by the questioner? Women continue to make less than 80 cents for every dollar men make, a disparity that cannot be accounted for by labor force commitment, voluntary job choices, or time off to care for children. Indeed, virtually every economist who has crunched the numbers, regardless of his or her ideological slant or background, has concluded that the gender wage gap is at least partially created by

pay discrimination—which means paying women less to do the same job simply because they are women. The wage gap is even larger for women of color and exists at every level of earnings—from surgeons to lunch ladies. And even as women have increased their labor force commitment, little progress has been made in reducing the gap since the 1980s. (A [chart compiled by NCPE \(http://www.gao.gov/new.items/d1210.pdf\)](http://www.gao.gov/new.items/d1210.pdf) shows how slow the progress has been in reducing the wage gap.) The wage gap threatens women's independence and financial security throughout their entire working lives and into retirement.

Pay discrimination is illegal under both the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. But women have had notorious difficulty enforcing their substantive rights under these laws, due in part to a series of procedural obstacles, among them timely filing rules that require them to quickly identify pay disparities (despite the fact that such information is usually kept secret) and challenge those disparities despite a significant risk of adverse consequences for doing so.

The Ledbetter Act signed into law by Obama eliminated one such obstacle by establishing that each paycheck containing a discriminatory wage triggers a new statute of limitations. Romney has refused on many occasions to answer the question whether he would have signed the Ledbetter Act into law—strongly suggesting that he would not have, but does not want to pay the penalty of alienating female voters. And his running mate, Paul Ryan, actually voted against the Act.

The Ledbetter Act addresses only a small component of pay discrimination law. Much broader changes are needed to eradicate intentional pay discrimination and to tackle the even more complicated problem of occupational segregation (the norm of thinking of certain jobs as “men's jobs” or “women's jobs”). A [recent GAO report \(http://www.gao.gov/new.items/d1210.pdf\)](http://www.gao.gov/new.items/d1210.pdf), for example, found that while women represent 49 percent of the overall workforce, they comprise 59 percent of the low-wage workforce.

If Romney won't support small steps to address pay inequity, why would he support any of the larger and more structural changes that are long overdue and necessary to promote women's workplace equality? The fact that he never mentioned pay equity—directly or indirectly—when answering a direct question on the subject does nothing to alleviate this concern. And the fact that his answer to a question about a longstanding, structural problem that plagues working women through the country focused on nothing other than the hiring of his personal staff—and even then, he didn't talk about pay—is dismissive and insulting at best, and a decision to deliberately cover up his positions in this area, at worst.

“If You're Going to Have Women in the Workforce. . .”

While viewers were still stunned by the “binders full of women” remark, Romney plowed ahead to expand on his views of women in the workforce:

I recognized that if you're going to have women in the workforce, that sometimes they need to be more flexible. My chief of staff, for instance, had two kids that were still in school. She said, I can't be here until 7:00 or 8:00 at night. I need to be able to get home at 5:00 so I can be there for—making dinner for my kids and being with them when they get home from school. So we said, fine, let's have a flexible schedule.

If? If?! Why does Romney preface “having women in the workforce” with “if”? Working women are here to stay. Indeed, recent data shows that women comprise 48 percent of the workforce and are poised to overtake men within a few years. Romney's characterization of the issues, and the anecdotes he offered by way of illustration, would have been apt in the 1960s, or maybe even as late as the 1970s. But today, in 2012, getting hired is the least of women's problems. Anti-discrimination laws like Title VII and the Pregnancy Discrimination Act, which have been on the books for 35 and 48 years, respectively, caused a sea change that opened workplace doors to women.

Today, the real problems of gender inequality arise in the types of jobs women hold, and how they are treated once they are employed. Unequal pay, sexual harassment, pregnancy discrimination, and the glass ceiling are just some of the most prevalent problems women in the workplace face. Work/family conflicts are also an important issue, one that Romney alluded to with his tale of flexibility in his desperation to find a qualified woman for his cabinet. But Romney brought up the issue only to suggest that work/family conflicts concern *only* women, and that such conflicts must lead to women working only part of the work day.

It should not be acceptable in this day and age for a presidential candidate to assume, as Romney did, that having women in the workforce means that the work day for them must end before the school bus arrives, or that only women need to worry about taking care of children or making dinner. Wouldn't a more flexible workplace help men, too?

“I'm Going to Help Women in America Get—Get Good Work by Getting a Stronger Economy”

The entirety of Romney's plan to address women's issues is to usher in a “new economy,” one in which employers will be so “anxious to get good workers they're going to be anxious to hire women.” The logic is bizarre: Prosperity will breed desperation; desperation will breed gender equality. Romney cites the loss during the current economic downturn of 580,000 jobs held by women as support for the idea that a stronger economy will help women. A stronger economy will help women—and men. But it will not help women relative to men.

In fact, while men and women have generally experienced similar levels of unemployment since the 1970s, men's unemployment rises more sharply than women's during periods of recession, and in the most recent such period, even more so. The simple explanation for this is workplace inequality itself: Because men are paid more and are more likely to work in high-wage jobs, full-time jobs, and jobs with benefits, they are more expensive to employ. Thus, when employers have to cut back, laying off men does more for the employer's bottom line than does laying off women. And the occupational segregation that reserves most manufacturing jobs for men meant that it was men who were particularly hard hit by reductions in that sector. These are two reasons that men have been on the receiving end of more layoffs since 2008 than women have experienced.

Because the recession is not the cause of workplace inequality for women, a return to a more robust economy will not cure that inequality. Instead, workplace equality requires an understanding of the complexities of the problem, and a will to address it. Romney made clear in this debate that he has neither that understanding, nor that will.

“Every Woman in America Should Have Access to Contraceptives”

After each candidate had two minutes to opine on the issue of pay inequity (only one, Obama, seized that opportunity), another audience member was called upon to ask a question. This voter asked Romney to distinguish himself from George W. Bush, with whom she had been disappointed.

Before answering her question, however, Romney insisted on going back to the pay equity question—or, more specifically, Obama's answer to it, in which he said that his healthcare law mandate that employer-based insurance provide no-cost contraceptive coverage is an “economic issue for women.” Obama pointed out that Romney has opposed this provision (as well as the rest of the healthcare law) and has supported other measures that would undermine women's access to contraception. The contraceptive mandate was necessary because employers, when left to their own devices, routinely excluded prescription contraceptives (used only by women) from otherwise comprehensive health insurance plans. And courts were loath to understand this sex-based exclusion as a form of unlawful sex discrimination under Title VII. (This issue is explained in more detail [here \(http://verdict.justia.com/2012/02/21/a-federal-judge-thwarts-title-vii-and-the-pregnancy-discrimination-act-by-ruling-bizarrely-that-lactation-is-not-related-to-pregnancy\)](http://verdict.justia.com/2012/02/21/a-federal-judge-thwarts-title-vii-and-the-pregnancy-discrimination-act-by-ruling-bizarrely-that-lactation-is-not-related-to-pregnancy).)

In his late rebuttal, Romney stated unequivocally:

I don't believe that bureaucrats in Washington should tell someone whether they can use contraceptives or not, and I don't believe employers should tell someone whether they could have contraceptive care or not. Every woman in America should have access to contraceptives.

What can this possibly mean? Surely Romney does not believe that permission to “use contraceptives” is a live issue. After all, the Supreme Court decided in the 1960s that the right of access to contraceptives is constitutionally protected by the Fourteenth Amendment. And employers don’t dictate whether someone “could have contraceptive care.” But they do decide whether to buy insurance policies that include coverage for prescriptions.

The issue when it comes to access to effective birth control is cost. Based on that finding, and the research showing the importance of family planning to women’s health, the Institute of Medicine included no-cost contraception as one of the essential health services that all employer-based health plans must cover under the Affordable Care Act. (There is a narrow, yet hotly contested exception to contraception coverage for certain religious employers.) Obama’s Department of Health and Human Services issued corresponding regulations to make this happen.

Romney, on the other hand, has opposed all efforts to maintain or increase women’s access to contraception. He has promised to overrule healthcare reform if elected; he has promised to withdraw federal funding from Planned Parenthood, which provides low-cost contraception to millions of women; and he has supported “personhood” measures that would make some forms of birth control arguably illegal. In Romney’s world, “access” to contraception simply means not being arrested for using it; in the real world, “access” is only guaranteed by ensuring that it is not cost-prohibitive. Perhaps he assumes that women can borrow money from their parents for contraception, on top of the money they are borrowing to attend college. Or maybe his promised reduction in the capital gains tax, which he offered as a means to help the overburdened “middle class,” will free up some much-needed cash. Although one wonders how much overlap there is between women burdened by the tax rate on dividends and capital gains and those who cannot afford reliable birth control.

In sum, the call is not even remotely a close one: It is President Obama, and not Mitt Romney, whose policies will promote women’s equality and well-being.



Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of [Inside the Castle: Law and the Family in 20th Century America](#) (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of [Gender Equality: Dimensions of Women's Equal Citizenship](#) (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.

Follow @JoannaGrossman

Posted In [Civil Rights](#), [Employment Law](#), [Politics](#)

Access this column at <http://j.st/ZOJY>

© 2011-2014 [Justia](#) :: Verdict: Legal Analysis and Commentary from Justia ::

JUSTIA

The opinions expressed in Verdict are those of the individual columnists and do not represent the opinions of Justia

[Have a Happy Day!](#)