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LESSONS FROM LABOR FEMINISTS: USING COLLECTIVE ACTION TO IMPROVE CONDITIONS FOR WOMEN LAWYERS

MARION C. BURKE*

INTRODUCTION

Despite the progress women have made, women lawyers continue to face serious obstacles in the profession, particularly if they choose to pursue a career at Big Law.[1] The problem has remained stagnant with little progress

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1. *See An Introduction to "Biglaw"*, TOP-LAW-SCHOOLS.COM, http://www.top-law-schools.com/introduction-to-biglaw.html (last visited Dec. 12, 2017) (defining the

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in recent years, despite the attention and some proposed solutions. Now is the time for women lawyers to turn to the lessons of women unionists of the past who proposed more radical solutions to remedy gender discrimination in the workplace to effect meaningful change.

This essay proceeds in six parts, and it starts by identifying the problem. Women lawyers in the United States simply do not have the same opportunities as their male counterparts. Although access to most areas of the legal profession is no longer a problem for women, statistics reveal women simply do not stay at large law firms at the same rates as men. Additionally, their salaries are much lower than their male counterparts. In the next section, the essay discusses working women more generally. Beginning by examining the status of working women in the wider context, the dismal statistics reveal the invidious practice of second generation discrimination is alive and well in most workplaces. The type of second generation discrimination known as the maternal wall is demonstrated through a case of one woman's career at a telecommunication company. It also analyzes the social construction of gender and how that has influenced the gendered division of labor.

In part four, the women's role in the labor movement is analyzed. The development of labor feminism can be of great instruction to women lawyers today. The discussion begins with women entering the labor force in greater numbers in the 1930s and 1940s. As women influenced the labor movement, women unionists also began to influence the women's movement. The demands of working-class women became more important to the women's movement, an important development now that the majority of women are

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term:

> Although the term "biglaw" is prone to some variance in usage, the most commonly accepted definitions would stipulate that a biglaw job involves working in a large firm (the definition of "large" can also vary; the minimum would be 101 attorneys or more) that pays attorneys the market rate for large firms (currently starting at $160,000 a year), demands long hours, and tends to represent large corporations rather than individuals . . . . It is common for biglaw firms to have multiple offices in the United States or internationally. Some argue that biglaw should be delineated not by firm size *per se* but by a firm's inclusion in a well-known ranking of law firms, such as the NLJ 250 or the Vault 100, but this would not significantly change the firms that are included in the classification.).

working women.

In the next section, the Home Workers Organizing Movement is highlighted. This movement represents the most successful organizing campaign since the sit-down strikes of the Great Depression. The organized workers were largely women and the campaign shifted its organizing techniques in the same way women lawyers need to shift their model in order to realize real and lasting change. This campaign raised the status and well-being of these workers while simultaneously lifting the status of domestic work, both paid and unpaid. This has an important impact on the newly organized group and on all women in general.

Lastly, this essay discusses the various solutions that have been suggested to end the discrimination women workers face, particularly women lawyers. The first solution discussed is litigation: traditional employment discrimination cases are very hard to bring and are often dismissed on the pleadings or at the summary judgment stage. However, there has been recent success with family responsibility discrimination litigation. This new success is limited to the direct parties and does not have the type of revolutionary effect that is needed. The American Bar Association has suggested various ways to improve the status of women lawyers. Employer-driven change is very important and should be encouraged; however, it relies on management to take initiative to solve something that they might not even identify as a problem. In the same way, legislative change is also very important, but it also relies on a top-down approach that will take time and may be ineffective. Instead, this essay concludes that women lawyers should learn from the Home Workers Movement and labor feminism generally by using a worker representation model to take control of the workplace and make real and lasting change.

I. WOMEN LAWYERS

Women lawyers have faced an uphill battle. Historically, women were excluded from admission to the Bar and law schools.[2] By the turn of the century, women had prevailed against the powers-that-be and law schools

2. KAREN BERGER MORELLO, THE INVISIBLE BAR xi, xiv, 1212 (1986) (noting how law schools operated on quota systems if they admitted women at all, and the initially restrictive histories of law schools like Columbia and Harvard); Louis A. Haselmayer, *Belle A. Mansfield – August 23, 1846 – August 1, 1911*, 55 WOMEN L. J. 46, 47 (1969); Kathleen E. Lazarou, *"Fettered Portias": Obstacles Facing Nineteenth Century Women Lawyers*, WOMEN L. J. 21, 21-22 (1978); Nancy L. Farber, *Of Ivory Columns and Glass Ceilings: The Impact of the Supreme Court of the United States on the Practice of Women Attorneys in Law Firms*, 28 ST. MARY'S L. J. 529, 533, 539-40 (1997).

were prohibited from formally excluding women.[3] In practice, however, women were still denied admission.[4] Implicit in this exclusion was the prevailing assumption that women law students were taking the rightful place of men.[5] The women who did gain access to law school continued to face adversity; when they were not actively harassed, this statistically small group was subtly ignored and systematically isolated.[6]

In the 1970s, female students and alumnae formed groups to actively recruit female applicants.[7] These groups were successful — by 1995 women were about forty-four percent of all first-year law students.[8] Due to the bravery of pioneering women law students and as the critical mass of female law students has increased—the law school experience has improved.[9] Despite these improvements, subtle forms of discrimination remain.

> [O]ne of the most common complaints . . . continues to be[] that men are not aware of their own unintentional discriminatory behavior. Recent criticisms of law schools focus on these subtler forms of discrimination: patronizing attitudes, casebooks portraying women as frivolous or simpleminded, percentages of women faculty and administrators that lag far behind the numbers

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3. *See* Farber, *supra* note 2, at 541.

4. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW, 52-53 (Univ. of Ill. Press, 2d ed. 1993) (explaining that while applications "skyrocketed," admission of women to Harvard Law remained at about 3-4%); Donna Fossum, *Women in the Legal Profession: A Progress Report*, 67 A.B.A. J. 578, 579 (1981) (arguing that women were still excluded from law schools in practice because of low quotas and higher standards for female applicants).

5. *See* Farber, *supra* note 2, at 543.

6. *See, e.g.*, JILL ABRAMSON & BARBARA FRANKLIN, WHERE THEY ARE NOW: THE STORY OF THE WOMEN OF HARVARD LAW 1974, at 7 (1986) (describing isolation felt by female law students); Epstein, *supra* note 4, at 61-62 (commenting on tokenism).

7. *See* EPSTEIN, *supra* note 4, at 55-56.

8. A.B.A. COMM'N ON WOMEN IN THE PROF., BASIC FACTS FROM WOMEN IN THE LAW: A LOOK AT THE NUMBERS, 1 (Chicago A.B.A. 1995); Darrell Jordan, *Just a Little Perspective, Please*, 53 TEX. B.J. 8, 8 (1990); Charles Kaufman, *Diversity - Then and Now: The Views of Some Who Led the Way*, 59 TEX. B.J. 876, 878 (1996).

9. A 1967 Harvard graduate explained the institution of "Ladies' Day," a day preserved for calling on the women law students and gently leading them through the class discussion. Abramson & Franklin, *supra* note 6, at 11. Women of the class of 1968 took bold action to protest the practice when the professor chose a property case for the women to recite in which the chattel at issue was ladies' underwear. *Id.* The women appeared in class dressed in black, with horn rim glasses and briefcases; as they answered the final question about what the property in question was, women's underwear, they opened up their briefcases and threw lingerie at the class. EPSTEIN, *supra* note 4, at 67.

> of female enrollment, and sexist comments and attitudes tolerated or ignored by men who would never think of expressing such comments or attitudes themselves. Although the number of women in law school has increased dramatically, these more discrete forms of discrimination serve both as reminders of obstacles that have been overcome and as lingering barriers to the success of female law students.[10]

Despite the difficult law school experience, women law students continue to find success and enter employment at large law firms at about the same rate as men.[11]

However, women continue to face adversity in the workplace. In the past women were often pigeonholed into "gender-appropriate" specialties, such as library work and backroom research and writing.[12] Today women practice a wide array of areas of law.[13] And even as the participation rate of women in the labor market continues to rise and the array of practice areas for women lawyers broadens, the pay gap persists and is currently stagnant.[14]

Women simply do not make partner at anywhere near the same rate as men. In 1980, two percent of partners in law firms were women.[15] By 1991,

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10. Farber, *supra* note 2, at 545-46.

11. *See* Avivah Wittenberg-Cox, *How One Law Firm Maintains Gender Balance*, HARVARD BUS. REV. (May 27, 2014), https://hbr.org/2014/05/how-one-law-firm-maintains-gender-balance?cm_sp=Article-_-Links-_-Top%20of%20Page%20 Recirculation.

12. *See, e.g.*, EPSTEIN *supra* note 4, at 102 (citing 1958 government publication that recommended women lawyers choose certain areas of practice); BETSY COVINGTON SMITH, BREAKTHROUGH: WOMEN IN LAW 5 (1984) (describing proper specialties for women that kept them out of courtroom and in back rooms); Fossum, *supra* note 4, at 580 (indicating that "back room" specialties with no client contact were suitable for women); Laurel Sorenson, *A Woman's Unwritten Code for Success*, 69 A.B.A. J. 1414, 1415 (1983) (explaining that firms tend to place women on backroom assignments).

13. *See* Sorenson, *supra* note 13, at 1415 (1983) (reporting in 1983 that, although women were still overrepresented in specialties such as family law, they were working in every specialty including litigation and corporate work); Janet Taber et al., *Project, Gender, Legal Education, and the Legal Profession: An Empirical Study of Stan. L. Students and Graduates*, 40 STAN. L. REV. 1209, 1247 (1988) (reporting that survey of Stanford Law School graduates indicated that "women participate with men in all areas of legal practice").

14. Catherine Hill, *The Simple Truth about the Gender Pay Gap*, AM. ASS'N OF U. WOMEN, (Apr. 3, 2016, 11:18 AM), https://www.aauw.org/aauw_check/pdf_download/show_pdf.php?file=The-Simple-Truth.

15. BARBARA A. CURRAN ET AL., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S, 41 (Chi. ABA ed.1985).

women only made up ten percent of partners.[16] A study of lawyers entering firm practice in 1981 at eight large New York City firms revealed that while seventeen percent of the men would eventually be named partner, only five percent of the women had the same success.[17] Focusing on the current numbers and broadening the research to the top one-hundred law firms, women today still only make up seventeen percent of equity partners.[18] Women are not leaving the profession entirely; rather, they are just leaving law firms.[19]

II. WORKING WOMEN

The statistics for women in the labor force are bleak. Women who perform wage labor face invidious discrimination in many workplaces. Societal gender norms imbue workplaces to the disadvantage of women. There is a division of "men's work" and "women's work," where the difference between sex and gender devalues women's work. Cultural expectations surrounding maternal responsibility have led mothers who work outside of the home to work a "second-shift" when they return home—taking care of household responsibilities. These biases contribute to the ever-persistent pay gap between working men and women.

Statistics show that women make eighty percent of what men make.[20] Despite the best attempts of some to explain the pay gap as a result of "choice," the gap simply cannot be rationalized away:

> [A]fter accounting for college major, occupation, economic sector, hours worked, months unemployed since graduation, GPA, type of undergraduate institution, institution selectivity, age, geographical region, and marital status, Graduating to a Pay Gap found that a seven percent difference in the earnings of male and female college graduates one year after graduation was still unexplained.[21]

The pay gap only gets worse with age. Women are typically paid about

16. A.B.A. COMM'N ON WOMEN IN THE PROF., WOMEN IN THE LAW: A LOOK AT THE NUMBERS, 25 (ABA Comm'n on Women in the Prof., ed. 1995).

17. Patsy Engelhard et al., *Unfinished Business: Overcoming the Sisyphus Factor*, A.B.A. COMM'N ON WOMEN IN THE PROF. REP., 11 (1995).

18. Wittenberg-Cox, *supra* note 11.

19. *Id.*

20. Hill, *supra* note 14, at 4.

21. And there is a real philosophical question whether career and family decisions made by women are truly free "choices"; Hill, *supra* note 14, at 20.

ninety percent of what men are paid until they hit thirty-five-years of age.[22] After that, median earnings for women are typically seventy-four to eighty-three percent of what men are paid.[23] Additionally, working mothers see their wages suffer while many working fathers are given a wage premium.[24]

A. Second Generation Sex Discrimination

Feminists recognize these disparities as more than the sexism of some individuals; "discrimination against women [does] not necessarily arise from sexist or misogynist *attitudes* but from *structures*, i.e., the most basic organization and institutions of the economy, society, and culture."[25] Counter to the more modern lean-in philosophy, "[u]nequal pay [i]s an economic structure practiced by employers on the basis of . . . dominant social assumptions about women — such as that women worked for 'pin money' and were mainly supported by husbands' wages, that women couldn't handle machines, or that women couldn't assume authority."[26] The discrimination of today is part of the fabric of the very structures of organizations and is often hard to identify in order to eliminate.

Although blatant discrimination certainly still exists, there is a more invidious type of discrimination that has become commonplace in American workplaces. The obvious discrimination such as ads for "male jobs" that exclude women applicants is known as first generation discrimination and is illegal.[27] Today, most workplaces have formal policies against discrimination; yet, discrimination still exists.[28] Second generation discrimination represents the shift from the obvious, unhidden, direct discrimination.[29] Second generation discrimination captures the idea that "[c]ognitive bias, structures of decision making, and patterns of interaction

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22. *See* Hill, *supra* note 14, at 12.

23. *Id.*

24. *See id.* at 19.

25. DOROTHY SUE COBBLE ET AL., FEMINISM UNFINISHED: A SHORT, SURPRISING HISTORY OF AMERICAN WOMEN'S MOVEMENTS, 87 (2014) (emphasis added).

26. *See generally* SHERYL SANDBERG, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD, 8-10 (2013) (citing women's own internal barriers to success and focusing on personal solutions to problem of sexism); COBBLE ET AL., *supra* note 25, at 87-88.

27. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459-60 (2001).

28. *See Sex Discrimination and Sexual Harassment,* CATALYST, (May 28, 2015), http://www.catalyst.org/knowledge/sex-discrimination-and-sexual-harassment-0#United States (citing 26,027 sex discrimination charges in 2014, 29.3% of total charges in that year).

29. *See* Sturm, *supra* note 27.

have replaced deliberate racism and sexism as the frontier of much continued inequality."[30] Although it is an important milestone to have discouraged *blatant* discrimination in the workplace, the discrimination that has replaced it is often subtler and is challenging to eradicate entirely.

The "maternal wall," a prime example of second generation discrimination, is a more nuanced version of discrimination. As opposed to "glass ceiling" discrimination that prevents women from reaching the highest echelons of employment based solely on gender biases, the maternal wall describes discrimination based on caregiver responsibilities.[31] Consider the case of Nilsa Santiago-Ramos to help distinguish the theories. Santiago-Ramos was hired at the Centennial Cellular Corporations, a telecommunications business operating in Puerto Rico in 1996.[32] Seemingly breaking the glass ceiling, Santiago-Ramos was hired over two male applicants and was the only female among the company's four high-level executives.[33] She was given significant responsibility — she oversaw the company's finances as well as some personnel matters and inventory assignments.[34]

When Santiago-Ramos began her employment, she had one child and was planning to have another in the coming years.[35] During her employment, Santiago-Ramos's supervisor questioned her about balancing work and family responsibilities.[36] He expressed concern about Santiago-Ramos's husband on nights when she worked late and was not able to cook for him.[37]

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30. *Id.* at 460.

31. *See generally* David A. Cotter & Joan M. Hermsen, *The Glass Ceiling Effect*, 80 SOC. FORCES 655 (2001) (analyzing the glass ceiling effect and concluding there is evidence that gender disadvantages are stronger at the top of corporate hierarchies and become worse later in life); *see also* Joan C. Williams, *Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence to Prove Gender Discrimination: The Social Psychology of Stereotyping: Using Social Science to Litigate Gender Discrimination Cases and Defang the "Cluelessness" Defense*, 7 EMP. RTS. & EMP. POL'Y J. 401, 404 (2003).

32. Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 50 (1st Cir. 2000).

33. Although, she could be considered a token in the environment. *See generally* Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. OF SOC. 965, 965-66 (1977) (describing shift in social interactions when groups contain a large percentage of one type of person as compared to another type of person).

34. *Santiago-Ramos*, 217 F.3d at 50.

35. *Id.*

36. *Id.*

37. *Id.*

A company executive asked similar questions and, when Santiago-Ramos mentioned considering having another child, he challenged her ability to effectively continue at her current job with two children.[38] When Santiago-Ramos hired a secretary for her supervisor who happened to be a mother of two, the supervisor expressed concern that Santiago-Ramos had not hired the proper candidate based on the secretary's maternal role.[39] Further, as a member of the personnel team, Santiago-Ramos was privy to the company's profile for prospective employees.[40] The profile "excluded from consideration as . . . employees older persons with heavy non-work commitments, married women, and women with children."[41] Not fitting this mold herself, after breaking through the glass ceiling, Santiago-Ramos ultimately hit the maternal wall and was fired.[42]

Why was Santiago-Ramos considered unequipped to do her job? It seems clear that the decision was not based solely on her status as a woman but more on her status as a mother.[43] Implicit in the work-life balance queries from Santiago-Ramos's superiors was the assumption that it is a mother's responsibility to care for her children, husband, and home. This is based on the social construction of gender which in turn influences work structures.

B. The Social Construction of Gender

"The personal is political."
– Feminist slogan in the late 1960s and 1970s

By definition, sex is a matter of biology; gender, on the other hand, is not.[44] The terms "male" and "female" have very specific, narrow definitions

38. *Id.*

39. *See id.* at 51.

40. *Id.*

41. *Id.*

42. *Id.* at 52.

43. The author recognizes that while Santiago-Ramos seems to have been penalized more for her role as mother than for her identity as woman, work structures discriminate against mothers and non-mothers alike, in part based on their mothering potential and cultural expectation of upholding maternal responsibilities. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 497-498 (1971) (finding that the proper comparison group in a discrimination case based on a mothering role is not women without children but men with children).

44. *See* JUDITH LORBER, *"Night to His Day": The Social Construction of Gender*, THE PARADOXES OF GENDER 22 (1990).

but the meanings of "man" and "woman" are far more broad and complex.[45] From birth, people are taught to be either masculine or feminine through all aspects of life.[46] These lessons are taught by the family unit, schools, through work processes, and through other organizations and institutions.[47] Daily interactions build perceptions and expectations as to how men and women "should" behave. [48]

This social construct of what it means to be a man or woman or what men or women should do is at the root of gender inequality and gender discrimination in the workplace. A gendered division of labor is not necessarily bad — "[a]s a social institution, gender is one of the major ways humans organize their lives."[49] It is important to recognize, however, that the arbitrary assignment of different types of work is also a social construct which has historical roots.[50] During the pre-industrial American colonial period, the primary economic unit was the family.[51] Contributions to this economic unit by men and women alike were very important: "[m]en performed the agricultural work, while women's work was done chiefly in the home . . . . In addition to cooking, cleaning, and caring for children, women did spinning and weaving, made lace, soap, candles, and shoes."[52] The division of labor became more defined in a way that de-valued women's work with the advent of the Industrial Revolution.

After the Industrial Revolution, the family unit was no longer the epicenter of the economy; "men's work" moved outside of the home and gained more value while "women's work" remained in the home and was less valued.[53] Part of the shift in valuation was driven by the capitalistic change, men's work outside the home was given a monetary value through a paycheck; monetary value could not be so easily assigned to women's work.[54] As such, men's work was considered primary and women's work secondary: "[m]an's role continued to be primarily that of worker and provider; women's role

45. *See id.* at 27.

46. *See id.* at 14.

47. *See id.* at 32.

48. *See id.* at 26.

49. *Id.* at 15.

50. *See* SHARLENE NAGY HESSE-BIBER & GREGG LEE CARTER, WORKING WOMEN IN AMERICA: SPLIT DREAMS 20 (2d ed. 2005).

51. *Id.* at 21.

52. *See* HESSE-BIBER & CARTER, *supra* note 50.

53. *See id.* at 30.

54. *See id.*

became primarily supportive."[55] This model of work brought about by the Industrial Revolution represents the traditional division of labor which continues to be entrenched in our culture to this day.

> "Women's employment was a major factor strengthening feminism: there is nothing like seeing one's hard work and competence disregarded to make women notice the inequality of the sexes."

As such, work organizations have become saturated with the traditional notions of gender. While many consider jobs to be gender neutral, feminist scholars believe they are gendered.[56] Businesses are structured on gender bias which is constantly reinforced: the "ideal worker" is an unencumbered male because jobs implicitly assume a separation between work life and home life.[57] This is to say that every job has an abstract worker who can best fulfill the role of that job and, "[t]he closest the disembodied worker doing the abstract comes to a real worker is the male worker whose life centers on his full-time, life-long job, while his wife or another woman takes care of his personal needs and his children."[58] This is problematic for women for obvious reasons. Not only is it harder for women to be hired for jobs where they are so different from the "ideal" candidate, women who are hired are set up to fail, as they will constantly fall short of the job description.

In the early 1970s, the feminist movement began analyzing structures that led to the oppression of women: "[t]he single most important feminist theoretical contribution to social theory was the concept of gender, i.e. the social structures and meanings attributed to sex difference."[59] Recognizing the difference between social and biological factors led women to question other practices previously characterized as natural.[60] For example, the practice that mothers who worked full time were expected to take care of the children and the home, the ever-unachievable beauty standards they must

55. HESSE-BIBER & CARTER, *supra* note 50, at 30.

56. *See* Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 GENDER AND SOC'Y, 139, 142 (1990).

57. *See id.* at 150.

58. Acker, *supra* note 56.

59. COBBLE ET AL., *supra* note 25, at 85.

60. *Id.*

strive for daily, the glorification of the self-sacrificing mother, or sex-segregated jobs.[61]

Since the turn of the twentieth century, women have been joining the workforce in record numbers.[62] Historically, many women entered the labor force because men's real wages were falling and more families needed women's wages in addition to men's wages.[63] Today, seventy percent of children in the United States live in households where all adults are employed.[64]

Despite the rising number of women in the workplace, changes in the work-sphere have not been matched by changes in the home-sphere.[65] The term "second-shift" was coined by Arlie Hochschild and describes the growing number of women who simultaneously hold full-time jobs and do most of the work that goes into maintaining households, raising children, and caring for disabled or elderly family members.[66] Women are clearly shouldering more than their male partners and obvious tensions result.[67] Part of the way in which women are set up to fail is that, by and large, their day is not over when they come home from work.

Rather, women are expected to fulfill the feminine task of household responsibilities in addition to working outside of the home.[68] The 1970s feminist movement "wages for housework" highlighted the fact that the economy depended on unpaid labor.[69] The 1940s and 1950s were the first time a majority of Americans did not experience a clear divide between a domestic space and a wage work space: "[e]arlier generations of women . . . solved the conflict between wage work and family obligations by embracing either one *or* the other."[70] As women entered the work sphere in greater

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61. *See id.* at 86-87.

62. *Id.* at 125.

63. COBBLE ET AL., *supra* note 25, at 125.

64. Joan C. Williams & Heather Boushey, *The Three Faces of Work-Family Conflict: The Poor, The Professionals and the Missing Middle*, 62 CTR. AM. PROGRESS (Jan. 25, 2010), *available at* https://cdn.americanprogress.org/wp-content/uploads/issues/2010/01/pdf/threefaces.pdf.

65. HESSE-BIBER & CARTER, *supra* note 50, at 30.

66. *See* ARLIE HOCHSCHILD WITH ANNE MACHUNG, THE SECOND SHIFT: WORKING FAMILIES & THE REVOLUTION AT HOME 4 (2012).

67. *See* ARLIE HOCHSCHILD WITH ANNE MACHUNG, *Tensions in Marriage in an Age of Divorce*, *in* THE SECOND SHIFT, 201 (2012).

68. *See generally id.*

69. COBBLE ET AL., *supra* note 25, at 125.

70. DOROTHY SUE COBBLE, THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA, 121 (2004).

numbers, they realized the sphere was made for men; for women to be able to participate fully in the market economy, the world of work would need to be fundamentally restructured.[71] Women workers have a storied history of lobbying to change the structure of work and make improvements for employees in various other ways.

III. WOMEN AND THE LABOR MOVEMENT

"A double issue is involved in the organization of women: the rights of women and the rights of labor. Both the labor movement and the 'woman' movement had to wage a stubborn fight against the practice which seeks to grade human beings arbitrarily, by race and sex or class, into superiors and inferiors, and both are based on the principle of equal opportunity for all."

– Gladys Dickason, Vice-President and Research Director, ACWA 1947

"Not all wage-earning women saw themselves as feminists, nor did unionism spread to every workplace. Yet a new workplace rights consciousness and a new class militancy among wage-earning women was evident, expressed in large part through women's increasing willingness to join union institutions and lead them."
–Dorothy Sue Cobble

One important way women sought to change the status quo was through involvement in the labor movement. Women first began to enter the workforce in higher numbers in the 1940s and 1950s and soon became an important part of labor unions. Next, labor women became an important part of women's groups. Labor feminism sought to bring about economic equality. Labor feminists had varying successes and failures throughout history and many of these lessons can be applied today by women lawyers.

By the end of the 1940s, it became a financial necessity for most working-class women to engage in paid labor.[72] The same reality came to middle-class women a generation later.[73] Typically, working class women entered

71. *See id.*
72. *See id.* at 12.
73. *Id.*

the workforce earlier and spent more time in the workforce.[74] World War II had an important impact on these working-class women.[75] "Rosie the Riveter" was not the middle-class housewife; she was the low-wage woman worker moving from traditional women's work to higher-paying men's work.[76] These women were not able to keep these higher-paying, more stable jobs when the men returned from the war, and they were not returning to the life of a housewife, either.[77] Rather, most returned to, "the blue – and pink – collar ghetto of women's work" and still others slipped into stretches of unemployment.[78]

While the women were not able to keep the higher-paying, more respected men's jobs, they still were deeply impacted by the experience. According to "[f]irst-time war-worker Carmen Chavez," the women of her neighborhood were forever changed by the experience, "[w]e had a taste of independence we hadn't known before the war. We developed a feeling of self-confidence and a sense of worth."[79] Now, women knew they were able to perform "men's work" just as well as men and the work was not much harder than "women's work."[80] So why did employers evaluate and compensate them so differently? These Rosies also developed a taste for "[t]he high wages, respect, and unionization" that accompanied the men's jobs.[81] In the 1940s, there was a surge in unionization among women in particular: "Less than a million women belonged to trade unions at the end of the 1930s. By the early 1950s, that number jumped to three million, and another two-million women flocked into auxiliaries."[82]

After the decline in unionism of the 1930s, major labor organizations began organizing new members, now ignoring old obstacles of race, ethnicity and gender.[83] The number of women in labor unions tripled in the 1930s.[84] As Ruth Milkman describes it, this increase in numbers has nothing to do with labor unions recognizing the importance of the rights of women

74. *See* DOROTHY SUE COBBLE, THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA, 121 (2004).

75. *Id.* at 13.

76. COBBLE, *supra* note 74, at 13.

77. *Id.*

78. *Id.* at 13.

79. *Id.* at 13-14.

80. *See id.* at 13.

81. *Id.*

82. COBBLE, *supra* note 74, at 11.

83. *See id.* at 16.

84. *Id.*

workers; but, rather, "the inclusive logic of industrial unionism."[85] Nevertheless, women made a distinct impact on unions: while, the number of women in unions dropped after World War II when men returned home from the war and back to their jobs, the numbers increased again in the late 1940s until they actually had more women members after the war than before the war.[86] Further, although women were not holding top executive positions in national and international unions, they had moved into important positions at the national, regional, and local levels.[87] Although women's voices were not dominant in the movement, they were able to influence union policies and practices at key times.[88] One important success of labor women in the 1940s and 50s was lowering the barriers based on marital status.[89]

While women were becoming a growing number in labor unions, naturally, unionists were becoming a growing constituency in women's groups. In the Women's Bureau, while older organizations like the National Consumers' League were shrinking in importance, labor women were growing, "[a]fter the 1930s . . . labor women and the institutions they represented became the *dominant* constituency."[90] This represented an important political shift in the women's movement.

> [L]abor women represented organizations with millions of members, ample treasuries, and an impressive degree of political and economic clout; they also simply outnumbered the other groups. The vitality of social feminism after the 1930s, then, no longer rested on the persistence of the older Progressive Era women's groups. The political weight had shifted. Labor and working-class women had a greater voice in the social feminist movement than ever before, and the network gathered around the Women's Bureau drew its power from its connections to labor institutions as much as to women's organizations.[91]

The power of labor organizing led to the amplified voice of working women, specifically labor women, in important women's groups.

While labor women brought a new energy to the feminist movement in the

85. *Id.*
86. *See id.*
87. *See id.* at 26.
88. *See* COBBLE, *supra* note 74, at 26.
89. *See id.* at 92.
90. *Id.* at 51.
91. *Id.*

1930s, it also brought conflicting ideology.[92] There was a palpable divide in policy goals generally in accordance with class lines.[93] Middle-class women promoted "maternalist feminism" that clung to the feminist ideal, often through promoting charity to poor women and their families.[94] Working-class women, on the other hand, favored policies that promoted worker organization so that they could provide for their families without government assistance.[95] By the 1930s, labor feminists had won the debate with the White House and economic rights and equality were central to the feminist movement starting in the 1940s.[96] There were different strategies among feminists on how to achieve economic rights and equality, or what that even meant.[97]

Following the success of the Nineteenth Amendment, the National Woman's Party began to promote a second constitutional amendment, the Equal Rights Amendment.[98] The purpose of the amendment was to achieve full legal equality of rights for women, known as the Equal Rights approach.[99] Other women's groups, like the Progressive Era Hull House and National Consumers' League, objected to the wording of the proposed amendment.[100] These women worried that equality of treatment based on identity could lead to inequality and, instead, argued gender differences should be accommodated, a common labor feminism idea.[101] Labor feminists, in particular, wanted "equality *and* special treatment, and they did not think of the two as incompatible . . . .Theirs was a vision of equality that claimed justice on the basis of their humanity, not on the basis of their sameness with men."[102]

At times, there was conflict between Equal Rights feminists and Labor feminists. The National Women's Party and other equal rights feminists had an important success in 1923 when the Supreme Court overturned Washington D.C.'s minimum wage law for women.[103] Labor feminists saw

92. *See id.* at 56.
93. *See id.*
94. COBBLE, *supra* note 74.
95. *See id.*
96. *See id.*
97. COBBLE ET AL., *supra* note 25, at 69-70.
98. *See id.* at 9.
99. *See id.*
100. *See id.* at 10.
101. *See id.*
102. COBBLE, *supra* note 74, at 7-8
103. *Id.* at 10.

this legislation as a significant blow to working women, "[t]he right of women to work for starvation wages was no right at all."[104] The root of the tensions were class differences. While equal rights feminists had a singular focus on passing the Equal Rights Amendment and achieving legal equality with men, labor feminists understood the significant overlap between various rights.[105] Labor activist Mary Anderson urged, "to insist only upon women's legal rights no matter what happened to other rights could result in *greater* inequality."[106] Labor feminists were particularly concerned with retaining laws that treated women differently such as leave following childbirth and the right to return to their job after that leave.[107] The formal tool of the Equal Rights Amendment never came to fruition.[108]

In 1963, there was success on the federal level when President John F. Kennedy signed the Equal Pay Act into law.[109] The final law, however, reflected a victory for the Equal Rights feminists when the bill was revised from "for work of comparable character" to "for equal work."[110] Republican Congresswoman Katharine St. George offered words in support of the changed language, "we do not want favors . . . What we really want is equality."[111] In practice, this meant that only women who performed substantially similar work to men were affected by the law.[112] The majority of women, who had a considerably different lot in life than Congresswoman St. George, were unaffected by the new law:

> By denying the sex bias in wage setting in female-majority jobs and the need for more broad-based comparisons, the law left pay in the

104. *Id.* at 11.

105. *See id.*

106. *Id.*

107. *See id.* at 42.

108. Although there is no statutory tool like an Equal Rights Amendment, the campaign to bring about that amendment did shape the debate surrounding women's right to such an extent that we have a "de facto Equal Rights Amendment." *See* Reva Siegel, *The Brennan Center Jorde Symposium on Constitutional Law: Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1324 (stating that "With energetic countermobilization, the ERA was defeated. In this same period, the Court began to interpret the Fourteenth Amendment in ways that were responsive to the amendment's proponents - so much so that scholars have begun to refer to the resulting body of equal protection case law as a 'de facto ERA.'").

109. *See* COBBLE ET AL., *supra* note 25, at 52.

110. *Id.* at 54.

111. *Id.*

112. *See id.*

> majority of women's jobs unchanged. Many of these jobs would continue to pay poverty wages into the twenty-first century, even though, as with childcare, they were among some of the most valuable, demanding, and responsible jobs in society.[113]

Labor feminists were not successful on the federal level in promoting their vision of change.

By the 1970s, however, although some labor feminists still fervently opposed it, a significant portion of women union members began to support the equal rights approach.[114] By this time, few states had sex-based laws and class lines were blurring as more women were entering college, including the daughters of working-class union members.[115] Access began to trump security, which had always been the union standard.[116] In 1970, labor women were the first to secure an Equal Rights Amendment endorsement from a union at a United Auto Workers convention.[117] Soon the American Federation of Teachers, the Newspaper Guild, the International Brotherhood of Teamsters, and even the Women's Bureau became supporters.[118]

Although there was much controversy, the sex amendment included in the 1964 Civil Rights Act was passed the next year.[119] While originally opposing the amendment because it was meant as a way to derail the law, liberals and moderates in both parties endorsed the legislation for the final vote with the support of labor, civil rights and women's rights activists.[120] In the debate, labor feminists' call for valuing women's work, including women's domestic work in the home, was not heeded.[121]

Sex discrimination was also combatted on the state level and in union bargaining. Social justice feminists introduced an "equal pay for comparable work" bill to Congress in 1945 and every year until the early 1960s.[122] Unlike the Equal Rights Amendment, this bill would not only gain equal pay for the small portion of women in "men's job," it would also address the

113. *Id.*
114. *See id*. at 191.
115. *See* COBBLE ET AL., *supra* note 25, at 190-91.
116. *See id.* at 191.
117. *See id.*
118. *See id.*
119. *See id*. at 58.
120. *See id.*
121. *See* COBBLE, *supra* note 74, at 57.
122. COBBLE ET AL., *supra* note 25, at 37.

more complex problem of sex bias in wages.[123] Female-dominated jobs were, and continue to be, much lower paid than male-dominated jobs.[124] The wage gap between male-dominated jobs and female-dominated jobs is not based on any discernible difference in education, skill or productivity. Therefore, it seems the only basis stems from socially constructed gender norms: "[e]radicating the 'sex bias' in wages mean[s] rethinking the value, pay, and productivity of all jobs and understanding that women, like men, deserve[] a wage capable of providing support for themselves and their dependents."[125] Although the movement failed on the federal level, it was successful in eighteen states in the 1940s and 1950s.[126]

Some of the most success in combatting sex bias in wages came from union labor groups. The electrical unions led the fight for women's wage justice in the 1940s and 1950s.[127] During World War II, the United Electrical Workers brought a case to the War Labor Board for wage increases based on discrimination toward women and minorities.[128] After the war, the United Electrical Workers made ending wage discrimination a central demand.[129] The electrical industry complied by adopting a job evaluation system put forth by unions.[130] As a result, women's wages in the electrical industry were raised across the board.[131]

Although labor women largely accepted the gendered division of work, they recognized that discrimination against workers based on sex existed and that it was a problem.[132] The Congress of Industrial Organization was a leader in this movement.[133] During World War II, the CIO published materials promoting "the eradication of discrimination against women workers."[134] In 1951, the CIO passed a resolution accepting women to full union membership.[135] The organization also called for elimination of discrimination based on tradition and rather to look to "current ideals and

123. COBBLE ET AL., *supra* note 25, at 37.
124. *See id.* at 38.
125. *Id.*
126. *Id.*
127. *See id.*
128. *See id.*
129. *See id.* at 38-39.
130. *Id.* at 39.
131. *See id.*
132. COBBLE, *supra* note 74, at 88.
133. *See id.*
134. *Id.*
135. *Id.*

needs."[136] The United Electrical Workers already had union clauses prohibiting discrimination on the basis of sex.[137] These clauses were expanded in that union and others during the postwar period.[138]

During this time period, different views within feminism continued to exist; one main difference can be explained in part through a tale of two bras. Feminists "burning bras" is a well-known symbol of feminism in the United States.[139] Although it is unclear if bras were actually burned, the image comes from the 1968 Miss America Pageant in Atlantic City.[140] The Women's International Terrorist Conspiracy from Hell, WITCH, along with about two-hundred other activists gathered on the boardwalk to protest the pageant.[141] At the protest, women threw girdles, high heels, bras and other articles of women's clothing into a "freedom trash can."[142] Thus, the bra became a symbol of women's oppression about a personal desire to be free of psychological and physical bondage.[143]

Across the country in California, three years later, the bra was used in another way that emphasized civil and economic rights.[144] In this instance, the bra was a symbol of economic inequality.[145] Here, workers were protesting for a raise in the minimum wage in front of the California Industrial Welfare Commission, the state body that set labor standards.[146] To make her point about the inadequacy of current wage rates, labor feminist Anne Draper held up her bra purchased from Woolworth's for $1.19, the amount allowed in the state budget cost of living calculations.[147] The bra was tattered and falling apart after only three washes.[148] Such feminist activism is indicative of a labor feminism approach.[149] While the bra was a symbol of personal psychological oppression in Atlantic City, it was a

136. *Id.*
137. *Id.*
138. *See id.*
139. *See id.* at 180.
140. *Id.*
141. *Id.*
142. COBBLE, *supra* note 74, at 180.
143. *Id.*
144. *Id.*
145. *See id.*
146. *See id.* at 181.
147. *Id.*
148. *Id.*
149. *Id.*

symbol of economic oppression to working class women in California.[150]

Around this time, Title VII was a valuable tool to women lawyers.[151] Although it was not used often, it was effective in two cases in the 1960s and 1970s.[152] Two important decisions came from complaints by women students at New York University and Columbia University.[153] The students claimed that firms either refused to interview qualified women or offered them positions with lower pay than men and no opportunity for advancement.[154] The New York City Commission on Human Rights investigated these claims focusing on ten major New York City law firms and found there was a pattern of sexual discrimination in recruiting, hiring, promotion and general treatment of women lawyers.[155] The cases that followed were resolved successfully in favor of the plaintiffs.[156]

By 1984, with the *Gunther* decision, it appeared that comparable worth advocates had finally prevailed based on the Court's interpretation of the Equal Pay Act of 1963.[157] Justice Brennan opined that based on the structure of the Equal Pay Act and the remedial purposes of Title VII, there should be a "transparently sex-based system for wage discrimination."[158] The decision was lauded as a breakthrough in sex discrimination that would extend beyond equal work to comparable work, because it expanded prohibitions on wage differentials in sex-segregated jobs and allowed the use of job evaluation studies to compare even dissimilar jobs.[159] In the end, however, the opinion did not explicitly support the comparable worth theory and did not make any subjective ruling on the worth of the jobs in question.[160] The decision was limited in scope; now, it seems the Court follows the much more restrictive dissent which held a much more restrictive view of Title VII.[161] While legislative goals were always a part of the labor feminists' agenda, it seems clear that direct union organizing made the biggest impact.

150. *See id.*

151. *See* Farber, *supra* note 2, at 549.

152. *Id.*

153. *Id.*

154. *Id.*

155. *See id.*

156. *See id.* at 549-551.

157. Cty. of Wash. v. Gunther, 452 U.S. 161 (1981); MICHAEL W. MCCANN, PAY EQUITY AS PUBLIC POLICY, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION, 37 (1994).

158. *Gunther*, 452 U.S. at 202-04.

159. McCann, *supra* note 157, at 37.

160. *Id.*

161. *Id.*

Notwithstanding, feminists continued to champion the cause of economic justice well into the 1980s. A major goal of the movement was ending the family wage system which assumed a male breadwinner who needed a higher wage and a female whose role in the family is not economic and, therefore, did not need as high of a wage.[162] Another important goal was to bring about the redistribution of family costs, so that women alone did not bear the cost of having and caring for children; rather, the cost was shared by the larger society which benefits from such reproduction labor.[163] Such goals have only been partially accomplished:

> The redistributive aims imagined by legal feminists in the sixties, seventies, and eighties, are only partially realized today. Over the last half century, both statutory and constitutional law ha[s] evolved to affirm the idea that sex equality entails cost sharing. This evolution has brought some of legal feminists' redistributive objectives to fruition. In particular, the PDA and the Family and Medical Leave Act of 1993 shift some of the costs of pregnancy, childbirth, and familial caregiving from individuals to the larger society.[164]

Such aims continue to be important so that women can have meaningful equality with men.

IV. HOME WORKERS AND THE LABOR MOVEMENT

In the years that followed, union membership and thus union power declined. "As a percent of employed workers, union membership peaked in 1954 at 28.3 percent."[165] In 2003, only 11.5 percent of employed workers were union members.[166] While union organizing has been on the decline in recent years, there are still pockets of success for some groups of workers; this was true of domestic workers in the 1990s.[167] One of the largest-scale successful union organizing campaigns was of domestic workers, a

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162. Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV., C.R.-C.L. L. REV., 415, 419 (2011).

163. *Id.* at 417-418

164. *Id.* at 420-21.

165. GERALD MAYER, CONGRESSIONAL RESEARCH SERV., RL32553, UNION MEMBERSHIP TRENDS IN THE UNITED STATES, 12 (2004).

166. *Id.*

167. *See generally* Eileen Boris & Jennifer Klein, *Labor on the Home Front: Unionizing Home-Based Care Workers*, 17.2 NEW LAB. F. 33, 37 (2008) (noting that the health care industry is one industry where union membership still exists).

population largely made up of women.[168] The success of the predominantly female Home Workers Movement is not only a poignant lesson for women in other professions, it is important for all women because domestic work is considered "women's work" and so-called women's work needs to be assigned a higher value.[169]

The traditionally low status of domestic work represents the continued dichotomy between women/men as well as between care/wage:

> For some[,] . . . the notion of a care work economy represents an oxymoron. Care and market just don't mix; just like love and money, they exist apart in hostile worlds. Caring for dependents, usually defined as the frail, ill, and young, should defy the cash nexus . . . . It is only the most genuine—that is, caring—if undertaken freely, not for pecuniary reward. Such assumptions repackage the ideology of separate spheres: women give care, men earn money.[170]

As a result, care work for wages is devalued as something any woman can do.[171] It is devalued based on the race, class and gender of the workers.[172] And lastly, it is devalued because our capitalist system prioritizes the consumer at the expense of the worker.[173]

In 1999, 74,000 home healthcare workers in Los Angeles voted to join to the Service Employees International Union.[174] In 2005, 50,000 domestic childcare workers did the same in Illinois.[175] This was the most successful union organizing campaign since the famous sit-down strikes during the Great Depression.[176] The success came despite considerable obstacles to organizing this group of workers. For one, home-based care workers are historically a service provided by the government.[177] With vulnerable populations as both clients and workers, the profession was marginalized and manipulated when the government needed an easy-fix often entirely

168. *See generally id.*
169. *See* COBBLE ET AL., *supra* note 25, at 70.
170. Boris, *supra* note 167, at 8.
171. *Id.*
172. *See id.*
173. *See id.*
174. *See id*. at 33.
175. *See id.*
176. *See id.*
177. *Id.* at 35-36.

unrelated to the program.[178] The Supreme Court has ruled that caregiving workers are exempt from the nation's wage and hour laws, based in part on a concern for clients in need of such care-work.[179] Another way the government made sure to cut costs was to re-classify the workers to make it harder to form unions.[180] Further, "[t]he architecture of U.S. union representation has rested on two assumptions: an unambiguous employer-employee relationship and a shared worksite. Neither condition exists for home-based care workers . . . ."[181]

A capitalist economy relies on a distinction between workspace and home space.[182] The assumption capitalism rests on is that home is a space for privacy and intimacy; work takes place outside of this home space.[183] Yet, home care workers *work* inside the *home*. Workers are dispersed and have trouble coming together in any meaningful way to organize.[184] This obstacle was overcome by using a community organizing model which visited women at bus stops, put together neighborhood committees and created a space for domestic workers.[185] A major element in the success of the campaign was workers joining together with their clients and linking better wages to better care.[186]

Despite the significant obstacles, even this non-traditional workforce was able to successfully organize. The results for domestic workers are higher wages, better resources and an opportunity to have solidarity like more traditional shared-workspace workers.[187] But the challenge still remains for unions to cause a paradigm shift that re-values domestic work:

> Unions will have to deal with the fundamental question of how to revalue this labor, still assumed to be the unpaid obligation of wives, mothers, and daughters, or the racially stigmatized work of poor women of color, and justified on the basis that recipients need care no matter what, that denial and self-sacrifice are essential to

178. *Id.* at 36.
179. *Id.* at 8.
180. *Id.* at 34.
181. *Id.* at 35.
182. *See id.*
183. *See id.*
184. *See id.* at 37.
185. *See id.*
186. *See id.* at 40.
187. *See id.* at 41.

the "ethic of care."[188]

By raising the status of paid domestic labor, the social feminist goal of raising the value of unpaid domestic labor can also be achieved.

V. SOLUTIONS

Various solutions have been suggested and enacted, but change has been slow to come and too tepid where it has occurred. Litigation has had limited success; and it is exceedingly difficult to get victims of employment discrimination their day in court. The American Bar Association offers excellent suggestions to employers on how to retain women talent at law firms. Various employers have implemented important measures to provide women lawyers more support in the workplace. But these measures, just like legislative measures, rely on a third-party to implement change. The already attempted measures have been unsuccessful in making any large-scale meaningful change. It is time to try something more radical; a lesson can be learned by emulating the recent labor organizing of domestic workers and the labor feminists of the past.

A. Litigation

Traditional employment cases are difficult to win, especially in federal court.[189] Employment discrimination plaintiffs tend to "get less time in court, with judges quicker to throw out their cases."[190] This includes dismissal on the pleadings as well as summary judgment.[191] Litigation is on the rise, however, with claims about second generation discrimination, family responsibility discrimination, and the maternal wall.[192] Despite some push-back and complexities in using the law to make maternal wall claims, there has been success.[193] According to statistics from the Center for WorkLife, family responsibility employment discrimination cases filed nationally increased by almost 400% from 2000 to 2010.[194] The biggest

188. *See id.* at 40.

189. *See* Nathan Koppel, *Job Discrimination Cases Tend to Fare Poorly in Federal Court*, WALL ST. J. (Feb. 19, 2009), http://online.wsj.com/articles/SB123500883048618747.

190. *See id.*

191. *See id.*

192. *See* CYNTHIA THOMAS CALVERT, CTR. FOR WORKLIFE, FAMILY RESPONSIBILITIES DISCRIMINATION: LITIGATION UPDATE 2010, 2 (2010), http://www.worklifelaw.org/pubs/FRDupdate.pdf.

193. *See id.*

194. *See id.*

individual verdict was for more than ten million dollars.[195] Such results, however, do not extend to the wider public.

B. Employer-Driven Change

Based on a fear to suffer similar lawsuits or a desire to retain valuable talent, employers can also drive change. Employers should review policies on attendance, leave, promotion, flexible work arrangements, performance evaluations, compensation and benefits to ensure they fit the actual job requirements rather than being tailored to the unencumbered and largely non-existent "ideal worker."[196] Offering flexible work schedules, for example, is a positive step but must not be stigmatized as a career-ender.

A French law firm, TAJ, was highlighted in the Harvard Business Review for its maintenance of gender balance, with fifty-percent exactly of each gender at all levels, including equity partners and governance bodies.[197] TAJ is ranked fifth in that country, attributing its success, in part, to retaining its female talent.[198] The head of the firm is responsible for this gender parity through constant oversight of the firm's business.[199] He makes sure that the best assignments are distributed evenly between men and women.[200] The best female attorneys are assigned to the most difficult cases.[201] If a client objects to a woman being on the case, the head will personally reach out and insist that the client accept the assignment.[202] He tracks promotions and compensation and if there is a gap, he demands a reason why.[203] He is involved in every promotion decision.[204] According to this leader, the "lean-in" philosophy is misguided,

> "If partners aren't convinced, you won't get anywhere. And diversity programs headed by women reporting to all-male boards will never work." He never referred to his gender push as a diversity initiative, and he has never run diversity programs. "What I have done is promote people on performance. If someone works

195. *See id.* at 20.
196. *See* Kanter, *supra* note 33, and accompanying text.
197. *See* Wittenberg-Cox, *supra* note 11, at 1.
198. *Id.*
199. *Id.* at 2.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*

> 50% of the time, we adjust that performance to its full-time equivalence. When you adjust performance . . . maternity issues stop being an indicator."[205]

For him and many leaders, these initiatives are about retaining top talent for the bottom line.

C. American Bar Association Suggestions

The American Bar Association advocates for firm-driven change. The lawyer organization has a Gender Equity Task Force that was created to develop solutions to the persistent gender bias in the legal profession, with a focus on the wage gap between men and women partners.[206] *Closing the Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation* was released in 2013 and directed at law firm leaders.[207] The Task Force found that the inequality problem at law firms cannot be accounted for simply because of the impact of family responsibilities that women tend to shoulder more heavily.[208] Rather, women are paid less than men because of unconscious bias that infiltrates the compensation system.[209] The report offers suggestions to counteract this problem.

The recommendations are simple and straightforward and would not only be beneficial to women in the law but would create more fair and transparent workplaces for all workers. Recommendations include the following: (1) Include a critical mass of minorities on compensation committees.[210] Token minorities do not influence the majority.[211] Further, studies show that companies with more women leaders out-perform the competition.[212] (2) Develop a way to have fair and accurate recording and compensation for billing and origination.[213] The system must be transparent, discourage client hoarding, promote collaboration, and incentivize partners to share credit.[214]

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205. *See* SANDBERG, *supra* note 26; *see also* Wittenberg-Cox, *supra* note 11, at 2.

206. *See* LAUREN STILLER RIKLEEN, A.B.A., CLOSING THE GAP: A ROAD MAP FOR ACHIEVING GENDER PAY EQUITY IN LAW FIRM COMPENSATION, III (2013), http://www.americanbar.org/content/dam/aba/administrative/women/closing_the_gap.authcheckdam.pdf.

207. *Id.*

208. *See id.* at 3.

209. *See* RIKLEEN, *supra* note 206, at 18-19.

210. *See id.* at 32.

211. *See id.* at 33.

212. *See id.*

213. *See id*.

214. *See* RIKLEEN, *supra* note 206, at 33-34.

(3) Develop formal means for client succession so that women partners share in the benefit of having clients passed down from retiring partners.[215] (4) Implement a system to resolve disputes over credit allocation in a fair and expedient way.[216] This system should include a diverse oversight committee that is completely transparent.[217] (5) Have training for everyone who participates in the evaluation and compensation process.[218] Key to this training is facilitating individuals to recognize their own biases and to learn ways to overcome the effects of those biases.[219] (6) Make clients a part of the mission to close the gender gap.[220] While all of these suggestions would be excellent if enacted, they rely on the employer to initiate a solution when they might not even see a problem.

D. Policy Change

To make true and lasting change that does not rely on management, with its ultimate focus on the bottom line, legislative change offers a more reliable resolution. The United States is one of the only nations that does not provide paid family leave for new parents.[221] Despite the pervasive pro-life rhetoric in American politics, the United States lacks many pro-life policies.[222] This difference between the U.S. and its peer nations can be explained, in part, historically.[223] The United States did not experience the devastation of World War II and the subsequent declining birth rates.[224] Most other developed nations have adopted family friendly policies that make it possible to be a working parent, a way to encourage population growth that was sorely needed after devastation from the war.[225] These policies include government-subsidized childcare, shorter workweeks, universal healthcare and mandatory paid maternal leave.[226] Only with this type of important change will mothers' decisions to work outside of the home not be so

215. *See id.* at 37.

216. *See id.* at 39.

217. *See id.*

218. *See id.* at 40.

219. *See id.* at 41.

220. *See id.* at 42.

221. Tara Siegel Bernard, *In Paid Family Leave, U.S. Trails Most of the Globe*, N.Y. TIMES (Feb. 5, 2013), http://www.nytimes.com/2013/02/23/your-money/us-trails-much-of-the-world-in-providing-paid-family-leave.html?_r=0.

222. *See* COBBLE, *supra* note 74, at 123.

223. *See* COBBLE, *supra* note 74, at 122.

224. *See id.*

225. *See* Bernard, *supra* note 221.

226. *See id.*

entwined with concern about their children's well-being or their family's economic situation.[227]

Government funded childcare was an important element of the feminist movement in the 1960s and 1970s.[228] In 1962, Congress authorized funding for the daycare of children of low income women.[229] By the late 1960s, feminists, including prominent labor feminists, rallied around state childcare as a service that should be provided to all families, not just as welfare for low-income women.[230] President Nixon's 1970 Task Force on Women's Rights and Responsibilities included a suggestion in its report for federal child care services to be improved and expanded, as well as to offer tax deductions for childcare.[231] In 1971, a comprehensive childcare bill that provided free childcare to low-income Americans and on a sliding scale basis to middle-income families passed both the House and Senate.[232] President Nixon, however, vetoed the bill, believing it to be a radical piece of legislation that would commit the government to a communal approach of raising children rather than a family-centered one.[233] He expressed concern that the law threatened to turn children into wards of the state.[234] Tax amendments affecting childcare and family income were unsatisfactory solace in 1971 and 1972.[235] Comprehensive childcare legislation has still yet to come to life.

E. Revisit Unionization and Labor Feminism

A major problem with the above solutions is that, other than arguably that the litigation strategy really only affects the direct parties in our adversarial system, it relies on third-party actors to create change. Unions, on the other hand, allow workers to take control of their own circumstances and levy more lasting change.

> *"Unions give the people a voice for themselves—to help them not be robots that the boss can boss around"*
>
> *—Caroline Dawson Davis, head of the Women's Department of the*

227. *See id.*
228. *See* COBBLE, *supra* note 74, at 122.
229. *Id.*
230. *Id.*
231. *Id.*
232. COBBLE, *supra* note 74, at 122.
233. *Id.*
234. *Id.*
235. *Id.*

United Auto Workers from 1948 to 1973.

We have reached a time for women, in particular women lawyers, to re-visit the strategies of labor feminism of the past in order to bring about real and meaningful changes in their lives. One important aspect of labor feminism that should be re-visited is dismantling gender hierarchies.[236] Masculinity should not be valued over femininity.[237] Systems that value male activities over female activities and give benefits only to men or those who conform to male ideals should be dismantled.[238] These are ideas straight from the labor feminists:

> [m]id-century labor feminists articulated a vision of gender equality that, far from being conservative, demanded sweeping change, change geared not toward ending gender divides but destabilizing gender hierarchies . . . They wanted access to paid work and to the status, power, and monetary benefits it bestowed. Yet they refused to see it as the only realm that should offer such rewards.[239]

Further, the idea of the nuclear family and policies that promote such a family design should be challenged, "[t]he cultural ideal that the nuclear family should consist of an independent male breadwinner, a dependent female caregiver, and children, shaped law as well as social policy and employer practices. Although the family-wage ideal did not comport with demographic reality for many American families" the concept contributed to gender inequality.[240] Such a re-shifting of world order requires grassroots activism because that traditional notion is a cultural norm.

Another element for labor feminists, as opposed to their liberal democratic allies, was an emphasis on bottom-up reform.[241] While their allies promoted state intervention and regulation of the market, labor activists also promoted populism, "while they believed in state regulations, they tempered this endorsement with the need for voluntary decentralized institutions like unions."[242] Their belief then holds true now. While we need government intervention to set baseline rules to allow women access and equal treatment

236. *See id.*
237. *See id.*
238. *See* COBBLE, *supra* note 74, at 122.
239. *Id.*
240. Dinner, *supra* note 162, at 419.
241. *See* Cobble, *supra* note 74, at 224.
242. *Id.*

in the workplace, more local systems between employee and employer groups will bring about tailored and effective change.

Such local solutions cannot happen in the absence of collective representation in the workplace. As labor feminists constantly pointed out, "liberty of contract" does not truly exist.[243] There is only freedom of contract when there is a viable alternative for each worker.[244] For qualified women lawyers there is no viable alternative other than leaving the big firm market altogether, where treatment of women is the same across the board, which is what they are doing in droves.[245] In order to establish true "liberty of contract," there needs to be equal bargaining power which can be brought about by worker organization.

Yet, unions no longer have the power that they once did. According to the Bureau of Labor Statistics, the percentage of workers in unions in the United States was eleven percent in 2015, basically unchanged from 2014.[246] Public workers had a unionization rate of thirty-five percent as compared to the extremely low rate of less than seven percent among private-sector workers.[247] Clearly, unions, or some new form of worker organization must reformulate the model to be more successful in representing U.S. workers. The organizing model was reimagined in the Domestic Workers' organizing campaign to great success and must be reimagined once again.[248]

Postwar labor feminists were too tied to the traditional industrial model of unionization.[249] In the past, "[r]elying on the factory as the prototypic workplace, the unions that arose in the 1930s assumed a rigid and non-overlapping demarcation between employee and employer, an adversarial relation between worker and boss, and a homogeneous, semiskilled workforce with little interest in career advancement or workplace governance."[250] Work and workers have changed since that time and the model does not fit most workers in the U.S. today, certainly not lawyers. Any success of a worker organizing movement would require a drastic re-visioning of the industrial union model.

While unions traditionally focus on blue collar workers, blue collar work

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243. *See* Cobble, *supra* note 74, at 224.

244. *See id.*

245. *See* Wittenberg-Cox, *supra* note 11, and accompanying text.

246. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL-17-0107, UNION MEMBERS - 2016 (2017), https://www.bls.gov/news.release/pdf/union2.pdf.

247. *Id.*

248. *See supra* Section V.

249. *See* COBBLE, *supra* note 74, at 143.

250. *Id.* at 226.

is decreasing[251] and white-collar workers should be one of the next frontiers in worker organization. The common conception is that part of being a professional is being different from workers who have to unionize.[252] However, it is clear that even professional workers are in serious need of representation as even professional work is being commodified: "When professional autonomy and expertise is subordinated to management control in the quest for profit maximization, professionals' very identity as professionals is jeopardized."[253] There have been recent successful attempts for union organizations to reach out to professional workers; for example, the AFL-CIO launched the Department for Professional Employees in 1977 and it now includes more than four-million members under its umbrella including, "teachers, physicians, engineers, computer scientists, psychologists, nurses, university professors, actors, technicians, and others in more than 200 professional occupations."[254] This type of success needs to be spread throughout the professional work world.

For unions representing professionals, the goal is oftentimes different from the goals for non-professional workers:

> supervisory and professional employee unions generally seek to regulate the work hours and workloads of the employees they represent. For example, unionized legal services lawyers and social workers have negotiated limits to their caseloads, unionized medical interns have negotiated the maximum number of nights that they must work each month, unionized teachers have negotiated class size, and unionized nurses have negotiated limits on consecutive workdays and numbers of shifts.[255]

In this way, unions benefit professionals by giving them control and making their jobs more endurable, but they also have the added benefit of securing better services for clients. For lawyers, it also protects them from violating ethical obligations that are more likely due to poor work conditions: "[i]n

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251. Louis Uchitelle, *The Wage That Meant Middle Class*, N.Y. TIMES (Apr. 20, 2008) http://www.nytimes.com/2008/04/20/weekinreview/20uchitelle.html?_r=0.

252. Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI.-KENT L. REV. 543, 544 (2004).

253. *Id.* at 545 (citing "[t]he transformation of the professional class from [] self-employed . . . to salaried . . . [and t]he increasing pressure for profitability and related management strategies designed to contain costs.").

254. *About DPE*, AFL-CIO, http://dpeaflcio.org/about (last visited Dec. 12, 2017).

255. Peter D. DeChiara, *Rethinking the Managerial Professional Exemption of the Fair Labor Standards Act*, 43 AM. U.L. REV. 139, 168 (1993).

adopting an increasingly profit-driven business model that mirrors that of their clients, lawyers have adopted a model that is fundamentally at odds with their professional obligations."[256] It is a critical time for lawyers to unionize.

Lawyers have had some success unionizing already.[257] It is not commonplace but lawyers have formed unions and the National Labor Relations Board has recognized those union labor organizations.[258] Lawyer unionization in private firms is even less common but there is a firm in Los Angeles that had a successful organizing campaign in 2003.[259] These lawyers have not faced any disciplinary action due to their organizing activities.[260] Learning from the success of the Domestic Workers' organizing campaign and the limited lawyers who are unionized, women lawyers should join together with other lawyers facing similar concerns to hold employers accountable for their practices that negatively impact women lawyers and force real change in their workplaces.

VI. CONCLUSION

While women lawyers have gained access over the decades: gaining

256. Melissa Mortazavi, *Lawyers, Not Widgets: Why Private-Sector Attorneys Must Unionize to Save the Legal Profession*, 96 MINN. L. REV. 1482, 1483 (2012) (This author similarly concludes that private sector lawyers must unionize to cause real change:

> "only a structural change in firm institutions - a seismic shift - can reorder the legal workplace into one conducive to professionally responsible practice. Past solutions - such as piecemeal amendments to the American Bar Association Model Rules of Professional Conduct (Model Rules), or relying on firms and individuals to self-police - are ineffective. Similarly, banishing the billable hour is neither pragmatic nor likely. Agreements between lawyers regarding pay are antitrust violations. Labor discussions between individual lawyers and their firms reveal extreme leverage inequalities, lack enforceability, and are subject to client and economic pressures to be competitive with other firms. As such, this Article proposes the most effective remaining alternative: private-sector attorneys must unionize.").

257. *See UAW Local 2320*, NAT'L ORG. OF LEGAL SERVS., http://nolsw.org/, (last visited Dec. 12, 2017) ("The National Organization of Legal Services Workers (NOLSW), UAW Local 2320, AFL-CIO is the union representing the majority of those who work in federally-funded legal services programs across the USA. We also represent workers in other types of law offices and in various human services programs.").

258. Mortazavi, *supra* note 256, at 1527.

259. *See id*. at 1528.

260. *See id.*

access to the Bar, to law schools, and to law firms were important steps towards equality with men, women lawyers have yet to achieve equality with men such that they can remain at firms and earn success in large numbers the way men do. The worker organizing model must be re-fashioned in order to adapt to the needs of this group of workers. Collective representation will give women lawyers the bargaining power they need to cause real change in the push to dismantle male ideals and the systemic gender discrimination in the workplace, and go a long way in providing women true equal footing with men.