

Will Women Ever Reach Pay Equity? Book Review: Naomi Cahn, June Carbone, & Nancy Levit, *Fair Shake: Women & the Fight to Build a Just Economy* (New York: Simon & Schuster 2024)

by
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I. Introduction

In their book, *Fair Shake: Women & the Fight to Build a Just Economy*, law professors Naomi Cahn, June Carbone, and Nancy Levit examine the persistence of the gender wage gap in the United States through the lens of women's employment discrimination lawsuits.² Using the stories of individual women as a starting point, the authors engage in a thoughtful analysis of how each particular industry examined treats its workers and how this fits into what the authors call the "winner take all" (or "WTA") economy. The WTA economy, according to the authors, "reserves a disproportionate share of institutional power and rewards for those at the top."³ The authors attribute much of the wage gap faced by working women to the shift in these workplaces, which often pay the best salaries, to the WTA economy. The WTA economy, they posit, fosters competition (rather than collaboration and cooperation) among co-workers that leads to working environments in which women are at a distinct disadvantage for a variety of reasons.

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² NAOMI CAHN, JUNE CARBONE, & NANCY LEVIT, *FAIR SHAKE: WOMEN & THE FIGHT TO BUILD A JUST ECONOMY* 3-4 (2024). I'm using the term "gender" throughout this review as the book authors also use this term to refer to the gender wage gap. *See, e.g., id.* at 4.

³ *Id.* at 2.

After considering more common explanations for why women consistently earn less than men, Cahn et al. argue that women are in a triple-bind. First, “when women don’t compete on the same terms as men, they lose.”⁴ Second, “if women do try to compete on the same terms as the men, they lose because they are disproportionately punished for their sharp elbows or perceived misdeeds.”⁵ Finally, “when women see that they can’t win on the same terms as men, they take themselves out of the game – if they haven’t been pushed out already.”⁶ This triple bind results in fewer women occupying the most lucrative positions in finance, tech, and banking. Indeed, rather than lessening, the gender wage gap between men and women actually increased between 2019 and 2022.⁷ And, as they posit, “if *present trends continue*, women would *never* catch up.”⁸ The book considers not only the situation of women in the more wage lucrative industries, but also looks at women working in the middle and lower tiers of the economy – as public school teachers and at Wal-Mart. After identifying and examining the nature of these three different binds through the women who have brought lawsuits or challenged these practices in other ways, the authors propose solutions.

Several themes emerge over the course of the book. The persistence of sexual harassment and sex discrimination in highly competitive workplaces as well as retaliation for complaining about either discrimination or unethical workplace practices cuts across many of the cases examined. In addition, who is given grace for misdeeds on the job reveals further sex discrimination in these workplaces. The impact of politics – including deregulation and the undermining of labor unions – plays a role in the story of the gender wage gap. Finally, the lack of good and affordable childcare contributes to the lack of lucrative employment opportunities for women.

This book review examines each of the three binds and how the authors use case law and women’s stories to identify and describe the binds. It then evaluates the authors’ assessment of these binds as well as proposed solutions, which include raising

⁴ *Id.* at 14.

⁵ *Id.* at 15.

⁶ *Id.*

⁷ *See id.* at 4.

⁸ *Id.* (emphasis in original).

consciousness about the impact of the WTA economy on women and, ultimately, on American businesses, public shaming, increasing the efficacy of union organizing, and increasing laws' reach to get at some of the continued inequities that lead to pay disparities between men and women in the American workplace. *Fair Shake* is written for a general audience – not one with specialized knowledge of employment discrimination law, politics, or economics. Thus, it is accessible to a wide audience, who will hopefully come to understand these binds and participate in the solutions.

II. When Women Don't Compete on the Same Terms as Men, They Lose

Part 1 of *Fair Shake* uses three different lawsuits and the women who brought them to examine the first gender bind: “When women don’t compete on the same terms as men, they lose.”⁹ Beginning with a look at the facts surrounding *Wal-Mart Stores, Inc. v. Dukes*,¹⁰ a case that made it to the U.S. Supreme Court and resulted in a 5-4 decision in favor of Walmart, the authors move on to *Schaefer v. General Electric*¹¹ and *Messina v. Bank of America Corp.*¹² Thematically, these employers and the lawsuits against them provide examples of the WTA workplace, with Walmart providing an early example of corporate and executive greed taking advantage of a low-level mostly female workforce.

A. Case Study 1: *Wal-Mart Stores, Inc. v. Dukes*

The authors describe the workplace at Walmart through the experiences of Betty Dukes, a woman who started out as a cashier at a Walmart in California with the hopes of working her way up the corporate ladder.¹³ Dukes worked her way up somewhat – becoming a customer-services manager (still an hourly wage position); however, when she asked her supervisors to consider her for management roles, she was told ““People like you don’t get

⁹ *Id.* at 17.

¹⁰ 564 U.S. 338 (2011).

¹¹ No. 3:07-cv-858 (PCD), 2008 WL 2001244 (D. Conn. May 8, 2008) (ruling on a motion to dismiss).

¹² See CAHN ET AL., *supra* note 2, at 63.

¹³ *Id.* at 21.

promoted.”¹⁴ Dukes, a Black woman, assumed this was racially motivated, because her supervisor described himself as a “red-neck.”¹⁵ After complaining, she was reprimanded and eventually demoted to cashier.¹⁶ Retaliation is a common theme in the cases covered in *Fair Shake*. Women who complain about discriminatory behavior often pay a price for their complaints.

While Dukes initially filed a claim for race discrimination, she eventually joined a lawsuit based on sex discrimination brought by a team of lawyers who had success bringing a variety of high-profile lawsuits.¹⁷ There was a pattern of pay and promotion differentials at Walmart that favored men over women.¹⁸ Cahn et al. identify the use of low cost female workers as essential to Walmart’s business model: keeping prices down by lowering the costs of running stores.¹⁹ This entailed Walmart’s Bentonville, Arkansas headquarters carefully managing its supply chain, store expansions, and even going so far as to require temperature settings in company-owned refrigerators.²⁰ Walmart did the opposite with labor; instead of micromanaging, it gave individual store managers discretion with respect to personnel decisions.²¹ And it provided incentives for managers to keep their labor costs low. Walmart used the carrot of increased bonuses for managers who kept their labor costs down, while also using the stick of the risk of demotion should they not perform well on this metric.²² They also moved managers around, often hundreds of miles away, which Sam Walton himself agreed discouraged women from applying for these positions.²³ This meant that managers didn’t get too close to the employees they supervised. These incentives created numerous wage and hour violations as managers sought to gain advantage. Indeed, one report

¹⁴ *Id.* at 22 (quoting NICHOLAS COPELAND & CHRISTINE LABUSKI, *THE WORLD OF WAL-MART: DISCOUNTING THE AMERICAN DREAM* 58 (2013)).

¹⁵ *Id.* at 22.

¹⁶ *Id.* Walmart allegedly reprimanded Dukes for ringing up a one cent transaction to make change. This was not an uncommon practice at the store.

¹⁷ *See id.* at 23.

¹⁸ *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 370 (2011) (Ginsburg, J. concurring in part and dissenting in part).

¹⁹ CAHN ET AL., *supra* note 2, at 24-25.

²⁰ *Id.* at 26.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 26-27.

identified Walmart as “the number one company in the country for the fines and settlements it had paid out for wage theft.”²⁴ What this meant for Dukes, who was concerned about her customers and community, was that she did not have the ruthlessness that it took to compete as a successful manager at Walmart – what Cahn et al. identify as one of the “unwritten rules.”²⁵

The discretionary personnel system at Walmart led to the company not promoting women into management roles and having lower incomes for its hourly female workforce. With respect to management positions, while 65% of Walmart’s hourly personnel were women, only 33% of the supervisor positions and 14% of store manager positions were held by women.²⁶ In addition, female hourly employees earned \$1,150 less per year than comparable male workers.²⁷ Even women managers experienced a wage gap. “[F]emale store managers earned on average \$16,400 less than men.”²⁸ As is typical in employment discrimination class action practice in systemic disparate treatment cases,²⁹ this data was accompanied by anecdotes revealing individual instances of discriminatory treatment.³⁰ Walmart was aware of the gender differences in promotions, but did nothing about it.³¹

The confluence of circumstances that provided Walmart with the ability to engage in these practices involves two themes that pervade the book: Reagan administration policies (often involving deregulation) and the ability to thwart unionization of employees. Yet, unions have been key to creating better wages and working conditions for employees, and, as the authors point out, the wage gap is lowest in workplaces that are unionized.³² Indeed, unions likely would have forced Walmart to regularly obey wage and

²⁴ *Id.* at 28 (citing Philip Mattera, *Grand Theft Paycheck: The Large Corporations Shortchanging Their Workers’ Wages*, CORPORATE RESEARCH PROJECT 8, https://goodjobsfirst.org/wp-content/uploads/docs/pdfs/wagetheft_report_revised.pdf). Walmart paid the most in settlement and fines for violations at \$1.4 billion. Mattera, *supra*, at 4.

²⁵ CAHN ET AL., *supra* note 2, at 29.

²⁶ *See Dukes*, 564 U.S. at 370; CAHN ET AL., *supra* note 2, at 29.

²⁷ CAHN ET AL., *supra* note 2, at 31.

²⁸ *Id.*

²⁹ *See Teamsters v. United States*, 431 U.S. 324 (1977).

³⁰ *See* CAHN ET AL., *supra* note 2, at 31-32.

³¹ *See id.* at 32.

³² *Id.* at 33.

hour laws, resulting in a decrease in the wage gap. Walmart considered unions a threat, with one executive complaining that “[l]abor unions are nothing but blood-sucking parasites living off the productive labor of people who work for a living.”³³ Politics comes into play here as well after Ronald Reagan was elected president. He supported an anti-union, pro-business political agenda.³⁴ A coalition of business leaders successfully created anti-union legislation in many states (often known – somewhat ironically – as “right to work” laws) and worked to have pro-business justices appointed to the Supreme Court.³⁵ Thus, there was a shift from the pro-worker New Deal era to a pro-business (not so helpful to workers) era in corporate America that hurt working women.³⁶

In a 5-4 decision, the Supreme Court ultimately held that Dukes and the women she represented could not form a class action to address the gender inequities in Walmart’s pay and promotion practices.³⁷ This decision is problematic in many ways, but particularly ironic given that the comments on Federal Rule of Civil Procedure 23, which governs class action practice, specifically mention employment discrimination suits as appropriate for class treatment.³⁸ Historically, plaintiffs have used class actions effectively to address widespread sex discrimination.³⁹ Cahn et al. provide as an example the Abercrombie & Fitch case that led to damages and a shift in hiring, promotion, and marketing materials to address race and sex discrimination at the company.⁴⁰ While Walmart has increased its entry-level wages and slowly increased the number of female managers, it has not changed the system that created these disparities.⁴¹ This first case study provides insight

³³ *Id.* (quoting John Tate, an attorney for Walmart).

³⁴ *Id.* at 34.

³⁵ *Id.* at 34-35.

³⁶ *Id.* at 35.

³⁷ *Dukes*, 564 U.S. 338.

³⁸ See FED. R. CIV. P. 23 Notes of Advisory Committee on Rules – 1966 Amendment.

³⁹ See, e.g., *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of America, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Stender v. Lucky Stores*, 803 F. Supp. 295 (N.D. Cal. 1992).

⁴⁰ CAHN ET AL., *supra* note 2, at 37. See Steven Greenhouse, *Abercrombie & Fitch Bias Case Settled*, N.Y. TIMES (Nov. 17, 2004), <https://www.nytimes.com/2004/11/17/us/abercrombie-fitch-bias-case-is-settled.html>.

⁴¹ CAHN ET AL., *supra* note 2, at 38-39.

into the causes of barriers women face in entry-level retail jobs that require less skill. The story of skilled workers provides even greater insight into how the WTA culture limits women's opportunities and thereby their incomes.

B. Case Study 2: *Schaefer v. General Electric*

This chapter explores the case of Lorene Schaefer, who worked for an employer who truly adopted the WTA economy approach to its business model. Schaefer rose in the ranks at General Electric ("GE") to become the General Counsel of GE Transportation.⁴² Under the reign of CEO Jack Welch, GE transformed from a company that fostered a sense of community, collaboration, and conscientiousness among its mostly male employees in the 1950s and 1960s to a company that emphasized short-term profits that increased the price of stock shares.⁴³ This included a system of bonus pay that disadvantaged women and resulted in what the authors called a "masculinity context culture" at GE.⁴⁴ Under a "rank and yank" management model, those who performed best in this system earned more, and those who didn't were let go for inadequate performance if they didn't improve.⁴⁵ This is reflected generally in the CEO to worker pay ratio, which was 20 to 1 in the 1950s and 1960s, and today is 344 to 1.⁴⁶ The authors argue that the WTA approach to business led to competition between employees that made pay disparities for women worse. It also created a system that encouraged in-group bonding between men and distrust of others – including women.⁴⁷ As Cahn et al. note, "[b]onding among men may account for more than a third of the gender gap in promotions."⁴⁸ And bonus pay actually increases gender disparities, with bonuses accounting for "93% of the gender disparities in executive pay."⁴⁹

⁴² *Id.* at 42.

⁴³ *Id.* at 47-48.

⁴⁴ *Id.* at 48, 50, 55.

⁴⁵ *Id.* at 49.

⁴⁶ Josh Bivens & Jori Kandra, *CEO Pay Slightly Declined in 2022*, ECON. POL'Y INST. (Sept. 21, 2023), <https://www.epi.org/publication/ceo-pay-in-2022/>.

⁴⁷ CAHN ET AL., *supra* note 2, at 57.

⁴⁸ *Id.* at 58.

⁴⁹ *Id.* at 55.

So how does Schaefer's story fit into the authors' account of the WTA economy? After Schaefer took the position of General Counsel at GE Transportation, a new CEO, John Dineen, took over that part of the company. He recruited a new General Counsel, resulting in Schaefer's demotion, even though Schaefer was successful in the position.⁵⁰ Cahn et al. opine that Dineen saw an upcoming battle with the SEC over securities fraud allegations requiring a "better corporate in-fighter" – not a better lawyer.⁵¹ As Schaefer took a closer look at GE's management, she found "no women in the company's top thirty-one corporate officer positions" in addition to only one woman in the ranks of the other six divisional general counsels.⁵² To add insult to injury, GE paid all the male general counsels more than the women.⁵³ This led Schaefer to file a sex discrimination suit against GE, targeting disparities based on sex in both executive employee and attorney positions. Schaefer's suit eventually settled.⁵⁴

Why are women, like Schaefer, unable to compete on the same terms as men? The authors acknowledge the part played by the fairly traditional account of women's priorities:

Women are at a greater disadvantage in the WTA environment for three reasons: they are less likely to put maximizing their next bonus over their families, their co-workers, and simple decency; they are more likely to be repelled by those who thrive in such environments; and they are more likely to find, as Schaefer did, that in tournament-like environments that in group favoritism increases.⁵⁵

The traits that make employees successful in competitive work environments like that of GE "are traits that describe a distinct subset of the general populations that is also more likely to be male."⁵⁶ Women are also perceived as more ethical than men and therefore, the argument goes, women are more likely to be penalized for engaging in unethical conduct because they are acting atypically compared to behavior that is expected of them.⁵⁷

⁵⁰ *Id.* at 51.

⁵¹ *Id.* at 54.

⁵² *Id.* at 51.

⁵³ *Id.*

⁵⁴ *Id.* at 53.

⁵⁵ *Id.* at 55.

⁵⁶ *Id.* at 57.

⁵⁷ *Id.* at 58.

Generalizations about women's behavior and what they prefer in the workplace should make us uncomfortable. Such accounts suggest that women are, in some way, responsible for their own oppression and lack of success in these competitive environments. To the authors' credit, Part Two of the book examines women who adapt to and enjoy (at least initially) working in these environments. So, there are women who attempt to succeed but also encounter obstacles. In addition, these hyper-competitive environments are likely not the types of workplaces that most men would gravitate toward either. And, as the authors point out, it doesn't mean that women are not successful as CEOs or in other high-level corporate executive positions. Indeed, Cahn et al. note that from 2013-2023, the 41 female CEOs of Fortune 500 companies outperformed their male counterparts, with returns of 384 percent compared to 261 percent for companies run by men.⁵⁸ So, why does this inequity persist? The authors note that there is some change going on in corporate America. Diversity has become an increasing emphasis in management reform, because diversity leads to better management.⁵⁹ While the authors doubt that simply increasing diversity will reform these practices, they suggest it is a step in the right direction and, if it does lead to long-term corporate growth, a step that more companies are likely to adopt. It also signals a change in corporate culture.

C. Case Study 3: *Messina v. Bank of American Corp.*

The third chapter of the book shifts to banking and the case of Megan Messina, a single mother and primary caregiver of three children, who had experience in the financial services industry at several different investment banking firms before joining Bank of America.⁶⁰ She eventually rose in the company to become co-head of Global Structured Credit Products and Credit Asset Financing at the bank.⁶¹ But, according to her complaint, things became difficult when she was the only woman who reported to her boss, who didn't appear to respect her.⁶² A system of exclusion began in which Messina was left out of after work dinners, meetings,

⁵⁸ *Id.* at 59.

⁵⁹ *Id.* at 61.

⁶⁰ *Id.* at 63.

⁶¹ *Id.* at 64.

⁶² *See id.* at 64-65.

and other gatherings⁶³ – what I have termed in an earlier article as “reindeer games.”⁶⁴ In comparison to Messina, the male co-head of her department was treated very well, including receiving a bonus that was nearly \$4 million more than hers.⁶⁵

The authors explain that Messina was not alone among women on Wall Street in experiencing a pay gap⁶⁶ and demeaning behavior in Wall Street banking. Entire books have been written about sexual harassment experienced by women working on Wall Street.⁶⁷ Cahn et al. describe the prevalence of sexual harassment in investment banking and how it interferes with women’s ability to succeed in these workplaces.⁶⁸

Messina’s story harkens to another theme running throughout many of the women’s cases highlighted in the book. Messina’s complaint identified unethical practices – in her case accusations directed at her co-head.⁶⁹ Eventually, Messina reported the misconduct, but Bank of America allegedly refused to investigate it, and instead placed her on administrative leave.⁷⁰ Thus, Messina’s complaint presents allegations of unethical conduct, reporting it, and the company retaliating against her. This is a familiar scenario for other women described in this book.

Unsurprisingly, given the experience of women like Messina at Bank of America, the percentage of women in finance has fallen.⁷¹ This adds to the gender wage gap, because finance jobs are some of the most lucrative in the United States.⁷² In addition, within finance, consistent with the experience of Messina, there is a gender wage gap.⁷³ Yet, women still take jobs in finance. As Cahn et al. noted, in 2021, women filled 52% of the entry-level positions in financial services. Their representation declines in the

⁶³ *Id.* at 65.

⁶⁴ See Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions, or Privileges of Employment Under Title VII*, 37 B.C. L. REV. 643 (1995-1996).

⁶⁵ CAHN ET AL., *supra* note 2, at 66.

⁶⁶ *Id.* at 65.

⁶⁷ See, e.g., SUSAN ANTILLA, *TALES FROM THE BOOM-BOOM ROOM: WOMEN VS. WALL STREET* (2002); CAHN ET AL., *supra* note 2, at 69-70.

⁶⁸ CAHN ET AL., *supra* note 2, at 69-70.

⁶⁹ See *id.* at 67.

⁷⁰ *Id.* at 68.

⁷¹ *Id.* at 71.

⁷² *Id.*

⁷³ *Id.*

upper levels and does so especially steeply for women of color.⁷⁴ So, the question for the authors of the book is: why don't women stay in finance?

The authors assert the answer to this question lies in part in relaxed regulations in the industry that permit banks to engage in investment banking – something that was forbidden for post-Depression banks.⁷⁵ While investment advisors created new and risky securities for clients to purchase, Messina took a different tack, creating “new securities for customers who paid her fees for doing so.”⁷⁶ Her approach was safer for the bank and depended on her clients being happy with the results.⁷⁷ Yet, it was not what the bank most valued.

Instead, Bank of America's approach to its business and employees once again reflected the WTA economy, in which managers favored those taking risks. These workplace environments “are likely to promote exclusion and harassment toward historically disadvantaged groups.”⁷⁸ Women, even competent women like Schaefer, lose here, as posited by the authors' first explanation for the wage gap: “when women don't compete on the same terms as men, they lose.” While the typical explanation for why women don't thrive in these environments is that they do not take the same risks as men, Cahn et al. point out that evidence suggests that women are actually very good (or a bit better) than men at managing risks. Schaefer's experience overseeing less risky portfolios during the 2008 financial crisis provides an example of this.⁷⁹ Men, instead, seem to be overconfident, taking risks that are more likely to result in poor outcomes.⁸⁰ The authors explain that the regulations of the New Deal era worked well to lower risks and protect the economy as a whole. A return to these policies would not only benefit the U.S. economy, but also the women who try to labor within the field of finance.⁸¹

⁷⁴ *Id.* at 72.

⁷⁵ *Id.* at 73-76.

⁷⁶ *Id.* at 77.

⁷⁷ *Id.*

⁷⁸ *Id.* at 78 (quoting Shannon L. Rawski & Angela Workman-Stark, *Masculinity Contest Cultures in Policing Organizations and Recommendations for Training Interventions*, 74 J. Soc. ISSUES 607 (2018)).

⁷⁹ *Id.* at 79.

⁸⁰ *Id.* at 79-80.

⁸¹ *Id.* at 81.

III. Part 2: When Women Play by the Same Rules as Men, They Lose

The second part of the book looks at women who wanted to go toe-to-toe with men in competitive environments. Turns out, the results for these women are little better than for women who will not engage in the “sharp elbow” workplace tactics that create success for men. Once again, this phenomenon is told through the stories of lawsuits brought by two women in different sectors of the economy. First is the story of Ellen Pao, a woman who should have thrived in the competitive and lucrative field of venture capital. The second tale comes from the banking industry through the experiences of Misha Patel Terrazas, who allegedly became a scapegoat for the unethical practices of Wells Fargo. These women, who were willing to at least ostensibly play by the rules of their workplaces, are used as examples of how even women willing to play the game fail. Because of the lucrative nature of these businesses, women’s lack of success at the top of these industries provides another explanation for the continuing wage gap.

A. Case Study 1: *Pao v. Kleiner Perkins*

Ellen Pao, a smart and well-educated woman (she had a PhD in Computer Science from the University of Pennsylvania, as well as a BA from Princeton, and a JD and MBA from Harvard), began her career in tech by working for several different start-ups. Eventually she landed a job at Kleiner Perkins Canfield and Byers (“Kleiner”), a powerful venture capital firm in Silicon Valley.⁸² Like the authors have shown in other areas of the WTA economy, venture capital firms pit partners against each other in seeking funding for potential start-ups.⁸³ Pao experienced much of the same conduct the authors examined in part one of the book. Men were permitted to engage in “sharp elbow” tactics to outstrip their colleagues, and Pao was paid less than her male peers.⁸⁴ She was also excluded from the boys’ club at Kleiner.⁸⁵ The story here, however, diverges from that of the women in part one, because Pao was willing to use her

⁸² *Id.* at 85.

⁸³ *Id.* at 87

⁸⁴ *Id.* at 88.

⁸⁵ *Id.* at 93.

own sharp elbows to succeed. She asserted that she was treated differently when she behaved the same as the men.

Despite being heavily recruited by Kleiner because of her unique set of qualifications for the position (which included fluency in Mandarin), Pao eventually hit a point where she could no longer advance at Kleiner and could not find support for the start-ups she scouted.⁸⁶ For example, her pitch to support Twitter as an investment was put to the side when, three and a half years later, a male partner's suggestion that Kleiner support the business was approved.⁸⁷ Because of the limited pool of money to invest, Pao was pitted against her colleagues for support for her investment suggestions – a classic feature of the WTA workplace.⁸⁸ According to Pao, however, the competitive behavior needed to succeed in this environment was only appropriate for some – the men. Pao recounted that her performance reviews included criticisms that she was not collaborative and too territorial.⁸⁹ Other employees didn't trust her, and she wasn't considered a team player.⁹⁰ Yet, Pao claimed that the same behaviors were considered appropriate when engaged in by men.⁹¹

Like other industries that the authors examine, Silicon Valley looked to replicate a certain type of individual who was willing to take risks. The creation of this “bros” culture involved a ““volatile mix of entitlement, hubris and risk-taking.””⁹² This bro culture expanded, according to Pao, after the successful IPO for Facebook, which generated over a hundred billion dollars and was led by 28-year-old Mark Zuckerberg.⁹³ The people who came into these workplaces were self-replicating, white, and male.⁹⁴ This included, once again, excluding women from network-building “extracurricular” activities – the reindeer games.⁹⁵

⁸⁶ *Id.* at 86-87.

⁸⁷ *Id.* at 87.

⁸⁸ *Id.* at 87-88.

⁸⁹ *Id.* at 88.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.* at 91 (quoting EMILY CHANG, BROTOPIA: BREAKING UP THE BOYS' CLUB OF SILICON VALLEY 37 (2019)).

⁹³ CAHN ET AL., *supra* note 2, at 92.

⁹⁴ *Id.* at 93.

⁹⁵ See, e.g., *id.* at 94 (describing the exclusion of women from an all-male ski trip); Beiner, *supra* note 64.

Pao's story also involved another form of sexual harassment – retaliation for a failed consensual relationship. Pao had engaged in a consensual relationship with a colleague who allegedly told her that he was getting a divorce. When that turned out to be untrue, she ended the relationship.⁹⁶ Once the relationship ended, her former paramour began to retaliate, including becoming hostile, leaving her out of meetings and emails, and “blocking her work.”⁹⁷ When he was promoted to senior partner – a position that provided him with power over Pao – he began to give her negative reviews.⁹⁸ Eventually she complained to no avail. She later found out that he had made overtures to another women, prompting them both to complain about his behavior.⁹⁹ Although he left the firm during Pao's time there, it was with a generous severance package.¹⁰⁰ While Kleiner also asked Pao what it would take for her to quietly leave, they did not provide her with the same package as her former paramour – which is what she requested.¹⁰¹ Instead, Pao filed a sex discrimination suit against Kleiner and was asked to leave the company.¹⁰²

Ellen Pao, like several of the women highlighted by Cahn et al., lost her case. The jury held in favor of Kleiner despite the evidence in her favor.¹⁰³ It seems that Pao's experiences were, on the one hand, all too common for women in the workplace and, on the other hand, not quite extreme enough to warrant a jury verdict in her favor.¹⁰⁴ It also may be emblematic of the difficulty employment discrimination plaintiffs have in the court system.¹⁰⁵ In Silicon Valley, as the authors point out, her experiences are not uncommon. Eighty-four percent of women surveyed in a 2015 report responded that they were told they were “too aggressive,” while

⁹⁶ CAHN ET AL., *supra* note 2, at 94.

⁹⁷ *Id.* at 95.

⁹⁸ *Id.*

⁹⁹ *Id.* at 96.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 96-97.

¹⁰³ *See id.* at 100.

¹⁰⁴ *Id.*

¹⁰⁵ *See, e.g.,* SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* (2017); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (2009).

64% reported that they were excluded from important events based on sex.¹⁰⁶ Finally, 60% reported experiencing unwanted sexual attention at work.¹⁰⁷ The attention that Pao's case received, despite the results, created some change in Silicon Valley. Women are increasing in number in Venture Capital firms, although the number was only at 15% as of 2021.¹⁰⁸ The progress is slow, but it has begun.

B. Case Study 2: *Terrazas v. Wells Fargo*

Misha Patel Terrazas provides the story of a “woman as scapegoat” while trying to do the right thing. A manager at Wells Fargo, Terrazas became caught up in the scandal involving Wells Fargo employees opening up accounts that its customers did not request and often didn't even know about.¹⁰⁹ Terrazas stood out among her colleagues. She often was the only woman manager in meetings and the only woman of color, being of East Indian descent.¹¹⁰ While women are less likely to commit misconduct, Cahn et al. assert that they are more likely to be penalized when they do.¹¹¹ And that is what happened (kind of) to Terrazas.

Wells Fargo had created an environment in which employees were under continually increasing pressure to have customers agree to as many products as possible. The business model of Wells Fargo shifted to a selling mentality.¹¹² Meanwhile, managers, also under pressure to increase the volume of products, looked the other way when their employees engaged in shady practices, including creating accounts that no client requested.¹¹³ This created a scenario in which managers could engage in “plausible deniability,” because they had no actual knowledge of their underlings’

¹⁰⁶ CAHN ET AL., *supra* note 2, at 101 (citing Trae Vassallo et al., Elephant in the Valley, <https://www.elephantinthevalley.com/>).

¹⁰⁷ *See id.*

¹⁰⁸ *See id.* at 102.

¹⁰⁹ *Id.* at 105.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 107.

¹¹² *Id.* at 108-09.

¹¹³ *Id.* at 108, 110.

wrongdoing.¹¹⁴ At the same time, these tactics made the bank appear successful, increasing managers' bonuses.¹¹⁵

Consistent with the propensity of women not to engage in misconduct (or at least to do so less often), Terrazas actually trained her employees to help customers open accounts that would be helpful to them.¹¹⁶ Indeed, Terrazas asserted that it was her manager who had designed the shady approach to opening un-requested accounts.¹¹⁷ Despite this, when it came to consequences for these actions, Terrazas was fired because her name showed up in media accounts discussing the wrongdoing. This happened even though she alleged other managers who committed worse misconduct were not let go.¹¹⁸ This picks up on another theme that runs through some of the cases: when women engage in misconduct, they suffer worse consequences than similarly situated men. The authors back up this theory with a study by Mark Egan, a professor at Harvard's business school, and his colleagues.¹¹⁹ Egan et al. found that women are more likely to be penalized than men for misconduct, speculating that this might result from the gap in tolerance for mistakes and misconduct by managers for members of their own group when compared to members that are not of the same ethnicity and/or gender.¹²⁰ The statistics of who left employment at Wells Fargo bear this out. Seventy-two percent of women separated, whereas only 42% of men with similar records of misconduct separated from the bank.¹²¹

Cahn et al. are a bit equivocal on the reasons for this difference in treatment. They note that the traditional account suggests that women are less likely to commit misconduct, so when they do, they are treated more harshly.¹²² They suggest that, in this instance, it may be more about managers protecting men with whom

¹¹⁴ *Id.* at 107.

¹¹⁵ *Id.* at 113.

¹¹⁶ *Id.* Indeed, she reported that her employees complained when she was fired, "You were the one teaching us the right way to do this." *Id.*

¹¹⁷ *Id.* at 106.

¹¹⁸ *See id.* at 114.

¹¹⁹ *Id.* at 114-15 (describing Mark Egan, Gregor Matvos, & Amit Seru, *When Harry Fired Sally: The Double Standard in Punishing Misconduct*, 130 J. POL. ECONOMY 1184 (2022)).

¹²⁰ *See id.* at 115.

¹²¹ *Id.* at 115.

¹²² *Id.* at 116.

they identify than about punishing women.¹²³ Or, as I have noted elsewhere, it may be about who gets cut slack when mistakes are made.¹²⁴ Regardless of the explanation for these differences in treatment, the pattern still puts women at a disadvantage in the workplace.

This chapter ends with some suggestions for improvement, although this subject is taken up more specifically in the final section of the book. In particular, Cahn et al. suggest that women will compete better in an environment where there are rules and the rules apply to everyone.¹²⁵ The authors also are encouraged by instances of consequences for bad corporate behavior, including the rise of clawback provisions that require CEOs found to be engaging in misconduct to give back some of their compensation.¹²⁶ This actually happened to Wells Fargo's CEO, who had to return \$28 million in compensation to the company, although he still ended up a wealthy man.¹²⁷ Significant economic consequences like this may help dismantle the culture of plausible deniability that created the situation at Wells Fargo. In the case of Wells Fargo, the misconduct eventually came to light through the efforts of employees who complained, governmental enforcement personnel, and journalists.¹²⁸ Cahn et al. later explain that this type of public shaming is a good way to attack these problematic corporate practices.

IV. Part 3: When Women See What the New Rules Are, They Refuse to Play the Game

The third part of the book looks at women who refuse to engage in these highly competitive and mostly masculine workplaces. In three chapters, Cahn et al. tell the stories of women who encountered similar problems in three different industries. The first is the story of Ingrid Avendaño, who suffered through sexual harassment and retaliation at Uber. The second is that of Lauren Martinez, who parted with her employer due to employer rigidity when she experienced failures of child care during the

¹²³ *Id.* at 117.

¹²⁴ Beiner, *supra* note 64, at 646-47.

¹²⁵ CAHN ET AL., *supra* note 2, at 118.

¹²⁶ *Id.* at 119.

¹²⁷ *Id.*

¹²⁸ *Id.* at 120-21.

Covid pandemic. Finally, chapter 8 takes a look at the gig economy, profiling the experiences of Patti Cris, a gig home cleaner who experienced sexual harassment. Many of the same themes that were explored in other chapters – the persistence of sexual harassment, discrepancies in wages for men versus women, etc. – appear in these chapters. The difference is that these women chose not to play the games required to succeed in these work environments.

A. Case Study 1: *Women v. Uber*

Ingrid Avendaño, a Venezuelan native, was excited to begin a career in coding at Uber, at the time a five-year-old up and coming company.¹²⁹ Like so many companies enamored by the WTA approach to running a business, Uber fostered competition between its employees.¹³⁰ According to Avendaño, her efforts to increase her pay resulted in a threat to rescind Uber's offer of employment.¹³¹ Cahn et al. note that this is common in tech, where women receive lower salary offers than men for the same work 63% of the time.¹³² To avoid pay comparisons, Uber forbade employee discussion of salaries.¹³³

Along with wage differentials and competition, sexual harassment was rampant at Uber. Uber's CEO, Travis Kalanick, was one of the instigators.¹³⁴ Studies of sexual harassment show that when those in charge tolerate, encourage, or engage in sexual harassment, it's more likely that sexual harassment will become common in a workplace.¹³⁵ On the other hand, when managers take sexual harassment seriously and there are consequences for such behavior, sexual harassment decreases.¹³⁶ Thus, it's no surprise that

¹²⁹ *Id.* at 126-27.

¹³⁰ *Id.* at 127.

¹³¹ *Id.*

¹³² *See id.* (citing Connie Loizos, *In Tech, The Wage Gender Gaps Worsen for Women over Time, and It's Worst for Black Women*, TECHCRUNCH.COM (Apr. 4, 2017), <https://techcrunch.com/2017/04/04/in-tech-the-wage-gender-gap-worsens-for-women-over-time-and-its-worst-for-black-women/#:~:text=Indeed%2C%20over%20time%20and%20across,peers%20for%20the%20same%20work>).

¹³³ CAHN ET AL., *supra* note 2, at 127.

¹³⁴ *Id.* at 128.

¹³⁵ THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* 128-31 (2005).

¹³⁶ *See id.*

sexual harassment was a significant issue at Uber. Avendaño, like other women profiled, complained about the sexual harassment, only to have Uber retaliate in response, including denials of promotions and pay increases and being subjected to 24-hour shifts.¹³⁷ Avendaño eventually resigned, becoming one of the women unwilling to continue working in a toxic environment.¹³⁸

The authors assert that the work environment at Uber is emblematic of the WTA tech workplace. According to the authors, women, like Avendaño, leave tech at twice the rate as men.¹³⁹ And they do not appear to leave for family reasons. Instead, most cite the nature of the workplace environment and “feeling stalled” in their careers.¹⁴⁰ That women leave tech is not costless for the industry; it’s estimated that the tech industry loses \$16 billion a year based on women exiting.¹⁴¹ Cahn et al. describe a transition in tech from a “nerds” environment to the “bros” environment that prevailed at Uber, while at the same time men received far more computer science degrees than women in this industry, which pays high salaries.¹⁴²

Uber was a difficult place for women to work. Travis Kalanick, who founded Uber, ignored laws to start the company.¹⁴³ Uber, with little in the way of a human resources department and a company whose founders didn’t like to follow rules, did not have a system in place for women who, like Avendaño, experienced sexual harassment or other discriminatory behavior.¹⁴⁴ Kalanick, like others who start innovative businesses, hired people like himself, creating a tournament-like atmosphere.¹⁴⁵ As Cahn et al. explain, “[a]ll this creates the kind of self-reinforcing WTA culture that overwhelming selects for leaders with what are known as the ‘dark triad’ personality traits – narcissism, psychopathy, and Machiavellianism – and whose leaders then select managers in their image, who go

¹³⁷ CAHN ET AL., *supra* note 2, at 131.

¹³⁸ *Id.* at 130.

¹³⁹ *Id.* at 132.

¹⁴⁰ See *id.* (quoting Liza Mundy, *Why Is Silicon Valley so Awful to Women?*, ATLANTIC (Apr. 2017), <https://www.theatlantic.com/magazine/archive/2017/04/why-is-silicon-valley-so-awful-to-women/517788/>).

¹⁴¹ See CAHN ET AL., *supra* note 2, at 132.

¹⁴² *Id.* at 133-35.

¹⁴³ *Id.* at 136, 138-39.

¹⁴⁴ *Id.* at 137.

¹⁴⁵ *Id.* at 138.

on to create highly toxic workplaces.”¹⁴⁶ This includes workplaces where sexual harassment and bullying become the norm, and women, unsurprisingly, don’t want to stay.¹⁴⁷ This is consistent with what is known about hypermasculine workplaces. Sexual harassment is more likely to exist, and those not fitting the macho norms of the workplace are more likely to be the targets.¹⁴⁸

In a rare instance in the saga of women highlighted in this book, the women of Uber won. Kalanick was forced to resign, and the new management of Uber paid women damages as well as reformed its employee policies, including how compensation and bonuses were assessed.¹⁴⁹ Yet, women still are disproportionately affected when tech has bad years – as it did in 2022. Women were 65% more likely to be laid off than men.¹⁵⁰ Some women have started their own companies to avoid the problems associated with being employed in tech, giving the authors of the book some hope for women’s future in tech.¹⁵¹

B. Case Study 2: *Martinez v. Aspen Dental*

The story of Lauren Martinez is a familiar one for women with children: the failure of childcare exacerbating the difficulties of balancing work and family. Martinez worked for a dental office and was asked to return to work during the pandemic, even though her two children, one an infant, remained at home.¹⁵² Martinez asked to work remotely and was told she would be fired if she did not return to work.¹⁵³ Ultimately, she was fired for staying home with her sick children.¹⁵⁴ This chapter focuses on the impact of the failure to provide “working parents with adequate and affordable childcare.”¹⁵⁵ Such failures to invest in what the authors call the “collective good” is typical of the WTA economy, which instead fosters a system in which a “small group extracts immediate

¹⁴⁶ *Id.* at 139.

¹⁴⁷ *Id.*

¹⁴⁸ BEINER, *supra* note 135, at 116-17.

¹⁴⁹ See CAHN ET AL., *supra* note 2, at 140.

¹⁵⁰ *Id.* at 140-41.

¹⁵¹ *Id.* at 141.

¹⁵² *Id.* at 142.

¹⁵³ *Id.* at 143.

¹⁵⁴ *Id.* at 143.

¹⁵⁵ *Id.* at 146.

gains, leaving everyone to fend for themselves in a negative-sum contest.”¹⁵⁶ Martinez’s situation is typical of women during the pandemic, 5.4 million of whom lost jobs compared to 4.4 million men who lost positions.¹⁵⁷ Working class women were particularly affected by the pandemic.¹⁵⁸ The pandemic hit working mothers hard, with “[e]mployment for mothers with children under the age of 13 plummet[ing] compared to fathers with similar-aged children.”¹⁵⁹

How does Martinez’s dental office fit within the WTA economy? While the dental industry became increasingly open to women and people of color, since the mid-2010s, private equity firms increased investments in medical practices, including dental practices. The practices of private equity transformed these work environments from looking after the needs of medical care providers and their patients to WTA economy-type business entities aimed at reducing costs, boosting earnings, and selling for a profit.¹⁶⁰ Cahn et al. chart this phenomenon not only in dental practices, but across other medical industries, including nursing homes.¹⁶¹

An interesting part of this chapter is its review of the history of publicly supported childcare in the United States. During World War II, publicly supported childcare centers opened so that women could work in the war effort.¹⁶² In the 1970s, Congress enacted the Comprehensive Child Development Act, which would have created a national network of childcare centers. This network never came to fruition thanks to the veto of then President Richard Nixon.¹⁶³ Cahn et al. explain that Nixon’s veto harkened the advent of the free-market ideals advocated by the American right, who were motivated to undo the regulations and restrictions on business that resulted from the New Deal.¹⁶⁴ The cry for such reform was taken up by billionaires such as the Koch brothers, who pushed for less government regulation.¹⁶⁵ Thus, childcare remains

¹⁵⁶ *Id.* at 147.

¹⁵⁷ *See id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 144.

¹⁶¹ *Id.* at 145.

¹⁶² *Id.* at 148.

¹⁶³ *Id.* at 148-49.

¹⁶⁴ *Id.* at 149.

¹⁶⁵ *Id.* at 149-50.

largely a private responsibility that individuals must solve themselves without government support.

The need for quality, affordable childcare has increased as more women have entered the workforce and has contributed to economic inequality in the United States. Cahn et al. refer to the “motherhood penalty” – children affect women’s earnings in ways that don’t impact men.¹⁶⁶ Indeed, fathers actually earn more than men without children at home.¹⁶⁷ This gender gap includes salaries that are tied to time at the workplace, diminished flexibility on the job, and the notion that women who have children are less committed to their jobs.¹⁶⁸ It’s little wonder that women drop out of workplaces given the pressures of access to childcare and the difficulties advancing and being paid fairly in the workplace.¹⁶⁹ Access to affordable childcare is even more difficult for working class women.¹⁷⁰

At this point, the authors take a digression – although not entirely unrelated – into the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, the case that made it legal for states to prohibit abortions.¹⁷¹ As Cahn et al. explain, restrictions and bans on abortions will no doubt have an impact on women’s ability to work.¹⁷² Studies indicate that access to abortion has a significant effect on women’s wages and education – with the strongest impact on Black women.¹⁷³ Protections already afforded working women, such as the Family and Medical Leave Act, don’t cover all working Americans and often require them to take leave without pay – something many workers can’t afford to do.¹⁷⁴

¹⁶⁶ *Id.* at 153.

¹⁶⁷ See Rakesh Kochhar, *The Enduring Grip of the Gender Pay Gap*, PEW RESEARCH CENTER (Mar. 1, 2023), www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/.

¹⁶⁸ CAHN ET AL., *supra* note 2, at 153. I experienced this first hand as an associate in a law firm. When I returned from maternity leave, the partner with whom I shared an administrative assistant told my administrative assistant, “Let’s see how long she lasts.” I lasted for another two and a half years.

¹⁶⁹ *Id.* at 153.

¹⁷⁰ *Id.* at 154.

¹⁷¹ 597 U.S. 215 (2022).

¹⁷² CAHN ET AL., *supra* note 2, at 155.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

Meanwhile Martinez, like many women highlighted in this book, lost her lawsuit because, according to the court, her children's illnesses were not covered under the FMLA and she did not specifically tell her employer that she believed her children had Covid.¹⁷⁵ The difficulties posed by the lack of adequate and affordable childcare in the United States were revealed during the pandemic for many women like Martinez. Despite the politically powerful still limiting the types of benefits that would help women like Martinez flourish rather than leave their careers, Cahn et al. believe that there is an increasing awareness of the need for a comprehensive childcare infrastructure as a job creator.¹⁷⁶ Recent legislation such as the Providing Urgent Maternal Protections for Nursing Mothers Act and the Pregnant Worker Fairness Act give them hope.¹⁷⁷ It remains to be seen whether this post-pandemic momentum will continue.

C. Case Study 3: *Gig Workers v. Handy*

In chapter 8, Cahn et al. take on the gig economy. When most people think of gig workers, they tend to think of Uber – a company that was already discussed by Cahn et al. in a different context. Yet, the gig economy covers a variety of fields. Cahn et al. define gig work as “any job that is not permanent and does not accrue benefits.”¹⁷⁸ It's estimated that 30% of the U.S. population engages in gig work.¹⁷⁹ While such positions provide workers with flexibility that can be helpful,¹⁸⁰ they also offer workers fewer legal protections. For example, gig work does not provide health benefits or retirement plans, and, importantly for women workers, is not covered by antidiscrimination laws.¹⁸¹ This leaves gig workers vulnerable. While both male and female gig workers experience this vulnerability, female gig workers are twice as likely as male

¹⁷⁵ *Id.* at 157.

¹⁷⁶ *Id.*

¹⁷⁷ *See id.* 158. PUMP Act, 29 U.S.C. § 218d; PWFA, 42 U.S.C. §§ 2000gg-1 to 2000gg-6; *but see* Texas v. Garland, -- F. Supp. 3d --, No. 5:23-CV-034-H, 2024 WL 967838 (N.D. Tex. Feb. 27, 2024) (holding that the PWFA violated the Quorum Clause and enjoining enforcement).

¹⁷⁸ CAHN ET AL., *supra* note 2, at 160.

¹⁷⁹ *See id.* at 160.

¹⁸⁰ *Id.* at 159.

¹⁸¹ *Id.* at 160.

workers to have wages that are below minimum wage.¹⁸² Even in gig work, the discrepancies in pay between men and women persist.

The authors look at gig work through the story of Patti Cris, a thirty-four-year-old who ran her gig work through Handy's online marketplace¹⁸³ (now part of Angi Services).¹⁸⁴ Cris, who provided cleaning services through Handy, found a customer waiting for her completely naked.¹⁸⁵ When she reported it to the company, nothing was done and instead she was fined \$15 for not finishing her assigned job.¹⁸⁶ The area of temporary work has a long history as female terrain. The authors mention Kelly girls, an early agency that provided temporary female workers in corporate America.¹⁸⁷ Workers in these positions, like those in retail, domestic, and farm work, were not initially covered by the Fair Labor Standards Act, the main federal law providing minimum wage and maximum hour protections as well as overtime.¹⁸⁸ While today such workers are covered, those participating in the gig economy are not.

A lot of the gig positions exist in tech.¹⁸⁹ While the flexibility of such gig work might seem attractive, most gig workers – 52% of them – take gig work out of economic necessity.¹⁹⁰ Political and corporate forces, according to Cahn et al., leave these workers with little legal protection, representing yet another area in which there has been a shift from corporate and government responsibility for worker prosperity to making working Americans take on these responsibilities themselves.¹⁹¹ It is also another area of work in which, as the authors have noted before, harassment flourishes. Between twenty and thirty percent of gig workers report unwanted sexual advances or harassment, although it could well be

¹⁸² *Id.* at 160-61.

¹⁸³ *Id.* at 161.

¹⁸⁴ *See Be a Professional with Angi Services*, HANDY.COM <https://www.handy.com/apply> (last visited Aug. 16, 2024); Olsin & Umang, *Handy + HomeAdvisor + Angie's List*, HANDY.COM (Jan. 11, 2024), <https://www.handy.com/blog/handy-life/handy-homeadvisor-angies-list>.

¹⁸⁵ CAHN ET AL., *supra* note 2, at 161.

¹⁸⁶ *Id.* at 162.

¹⁸⁷ *Id.* at 163.

¹⁸⁸ *Id.* at 164.

¹⁸⁹ *Id.* at 166.

¹⁹⁰ *See id.*

¹⁹¹ *Id.* at 167.

more because there is not a good way to gather this data.¹⁹² And, the wage gap persists in gig jobs as well, with men charging more than women for their gig work.¹⁹³

Gig workers in many ways epitomize the WTA economy. It is truly an “every man for himself” workplace.¹⁹⁴ In addition, these workers have difficulty organizing because their ability to engage with each other is limited and their status as independent contractors leaves them unprotected by labor laws that permit employees to organize.¹⁹⁵ In the case of Handy, workers, including Cris, have begun to fight back, including challenging workers’ status as independent contractors.¹⁹⁶ Handy settled a worker class action for wage and hour violations brought in California.¹⁹⁷ While union organizing may still be unavailable for most gig workers, other organizations are popping up to support these workers.¹⁹⁸ Because the WTA economy benefits from the isolated nature and nonexistent benefits of gig employees, Cahn et al. suggest that there needs to be more federal action directed at helping and protecting these workers.¹⁹⁹ Otherwise, the Handy companies of this world will continue to exploit them.

V. Part 4: Taming the WTA Economy

To their credit, Cahn et al. not only identify problems with the current WTA economy and how it exacerbates the gender wage gap, but also provide suggestions for change. In the last two chapters, they suggest a variety of approaches to “taming the WTA economy.”²⁰⁰ Solutions, as the authors point out, transcend the economic sphere and enter the political sphere.²⁰¹ Women, they explain, are angry and less willing to be silenced, and the authors liken this to the consciousness raising days of the early feminist

¹⁹² *Id.* at 168.

¹⁹³ *Id.* at 168-69.

¹⁹⁴ *Id.* at 171.

¹⁹⁵ *Id.* at 170.

¹⁹⁶ *See id.* at 171-72.

¹⁹⁷ *Id.* at 172.

¹⁹⁸ *Id.* at 173.

¹⁹⁹ *Id.* at 174.

²⁰⁰ *Id.* at 175.

²⁰¹ *Id.* at 176.

movement.²⁰² Women have found a commonality in their stories that harkens to systemic problems that are about more than their individual grievances.²⁰³ Unions and organizing are part of the solution as is, perhaps, public outcry like that of the #MeToo movement.²⁰⁴ Still the authors recognize that “raw assertion[s] of political power,” such as the nomination and confirmation of Supreme Court Justice Brett Kavanaugh – despite the accusations of Christine Blasey Ford – suggest a Court that will continue to undermine women’s rights.²⁰⁵ Once again, the authors use women’s stories, but this time to provide examples of methods for potential change.

A. Chapter 9: Fighting Back

Cahn et al. provide the story of Melissa Tomlinson, a New Jersey public school teacher, as an example of women fighting back. Tomlinson is perhaps best known for her public confrontation of then New Jersey governor Chris Christie during his reelection campaign.²⁰⁶ Upset by Christie’s attacks on teachers in New Jersey, Tomlinson believed that parents and students were beginning to reflect Christie’s disrespect for teachers.²⁰⁷ While Christie claimed he was only attacking unions, Tomlinson felt that the crowd at a Christie rally she attended “echoed that disrespect” for teachers.²⁰⁸ Christie cut funding for public schools, resulting in fewer programs and less funding for teachers’ benefits.²⁰⁹ While Christie was reelected, he left office “as the most unpopular governor in New Jersey history.”²¹⁰

Cahn et al. see Tomlinson’s situation and that of the teachers for whom she was advocating as involving three factors: the

²⁰² *Id.* at 178.

²⁰³ *Id.*

²⁰⁴ *Id.* at 179.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 181. The photos of this confrontation were well covered by the Press. See David Weigel, *Behind that Photo of Chris Christie Wagging His Finger at a Teacher*, SLATE.COM (Nov. 4, 2013), <https://slate.com/news-and-politics/2013/11/melissa-tomlinson-behind-that-photo-of-chris-christie-wagging-his-finger-at-a-teacher.html>.

²⁰⁷ CAHN ET AL., *supra* note 2, at 183.

²⁰⁸ *Id.* at 183.

²⁰⁹ *Id.*

²¹⁰ *Id.* at 184.

values underlying the WTA economy; a battle involving the status of women in the economy; and the politics surrounding race, taxes, and public school funding.²¹¹ In this clash, Tomlinson and teachers like her represent communal values that are at odds with the WTA economy, which emphasizes the individual winner. Christie's tactic of targeting teachers and schools appealed to wealthy taxpayers who opposed additional taxation (a voter base he needed for his presidential run), while ignoring the educational needs of the state's school children.²¹²

Teachers have had a particularly tough time. As Cahn et al. point out, while other college educated individuals saw increases in pay in the late 1990s, teachers' pay actually decreased.²¹³ Today, public school teachers are experiencing the highest wage penalty in history, earning 23.5% less than people with similar degrees.²¹⁴ While the number of male teachers increased early in the 1990s, public school teaching has once again become a female occupation, with 77% of teachers being women.²¹⁵ While it is obvious that the occupation one chooses has an impact on how much one earns, women's choices, according to economists, account for 51% of the gender wage gap.²¹⁶ One might ask, well why don't women choose more lucrative occupations? The authors do an interesting comparison here between jobs that appear in some manner to be comparable, but dominated by either men and women, while comparing the wages in these occupations. For example, they compare skincare specialists' wages (99% of whom are women) to wages of brick masons (99% of whom are men). Skincare specialists' annual wages are \$24,706, whereas bricklayers earn \$39,391.²¹⁷ The authors really don't examine why women persist in going into fields where their work is valued less. Of course, there are obvious reasons why K-12 teaching is attractive to women – especially for those who have young children. The ability to have summers off while their children are out of school makes this a realistic career option for working mothers. And, given that most American

²¹¹ *Id.*

²¹² *Id.* at 185.

²¹³ *Id.* at 186.

²¹⁴ *Id.*

²¹⁵ *Id.* These are the statistics in 2019.

²¹⁶ *See id.* at 187.

²¹⁷ *Id.*

women will have children²¹⁸ and the persistence of traditional gender roles when it comes to responsibility for child rearing,²¹⁹ this is a reasonable career choice.

Cahn et al. account for the difficulties in increasing teacher wages as a conflux of politics, race, and taxes, which come into play in public school funding.²²⁰ New Jersey essentially becomes their case study on lower funding for public schools, especially in poorer areas where there are higher percentages of people of color, due to the lack of political will to increase taxes to fund schools properly. The WTA economy plays a role here as well. New Jersey's governors underfunded teacher pension plans and got away with it.²²¹ Christie, in particular, supported attempts at privatization, shifting responsibility to educate children from the government to voucher-supported private schools and charter schools.²²² Tomlinson saw this as an attack on both women and teachers.²²³ Her fighting back, along with others who confronted Christie on his anti-public school rhetoric, ultimately paid off. Christie's poll numbers fell.²²⁴ A new governor was elected who was more supportive of teachers, with aid increasing to underfunded school districts.²²⁵

This isn't the end of the story, however. The authors place the experience of Tomlinson in the larger context of public sector

²¹⁸ Gretchen Livingston, *They're Waiting Longer, but U.S. Women Today More Likely to Have Children Than a Decade Ago*, PEW RESEARCH CENTER (Jan. 18, 2018), <https://www.pewresearch.org/social-trends/2018/01/18/theyre-waiting-longer-but-u-s-women-today-more-likely-to-have-children-than-a-decade-ago/>.

²¹⁹ See, e.g., Julia Haines, *Gender Reveals: Data Shows Disparities in Child Care Roles*, US NEWS & WORLD REP. (May 11, 2023), <https://www.usnews.com/news/health-news/articles/2023-05-11/gender-reveals-data-shows-disparities-in-child-care-roles>; Shruti Jolly, et al., *Ad Gender Differences in Time Spent on Parenting and Domestic Responsibilities by High-Achieving Young Physician-Researchers*, 160 ANN. INTERN. MED. 344 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4131769/> (reporting a study of doctors showing that women spent more time on domestic work and were more likely to take time off when there was a disruption in child care).

²²⁰ CAHN ET AL. *supra* note 2, at 187-90.

²²¹ *Id.* at 191.

²²² *Id.* at 192, 194.

²²³ *Id.* at 192.

²²⁴ *Id.* at 193.

²²⁵ *Id.* at 195.

unions and their workers, who are mostly women.²²⁶ Because unions fight for vulnerable workers, including increased worker protections, Cahn et al. argue, corporate America and the politicians it supports have targeted unions.²²⁷ This targeting has taken many forms, including allegations about what teachers teach about race and sexuality in school,²²⁸ and Supreme Court cases attacking union membership.²²⁹ Unions recently have promoted gender equity, with helpful results for their female members.²³⁰ As the authors point out, women in public sector unions earn 23% more than public sector employees who don't have the benefits of a union, and the wage gap is less among these workers.²³¹ Thus, it makes sense that Cahn et al. suggest union organizing could lessen the gender wage gap.

B. Chapter 10: #MeToo

The second “taming” chapter recounts the successes of the #MeToo movement and the potential for consciousness raising and public shaming to have an impact on the prevalence of sexual harassment, which occurred in many of the cases Cahn et al. recount. Starting with the disturbing sexual harassment experienced by farm worker Marlyn Perez, the authors run through the crescendo of female voices that began to speak out about the prevalence of sexual harassment, including sexual assault, in a variety of industries and the impact of the telling of these stories.²³² Finally, there are starting to be consequences as a result of #MeToo. Perez received close to a million dollars in damages; Harvey Weinstein received a 23-year prison sentence in

²²⁶ *Id.*

²²⁷ *Id.* at 195.

²²⁸ *Id.* at 196.

²²⁹ *Id.* at 196-97. See *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps.*, 585 U.S. 878 (2018), a 5-4 decision explaining that public employees need not pay union dues based on the First Amendment to the unions representing them.

²³⁰ CAHN ET AL., *supra* note 2, at 198.

²³¹ *Id.*

²³² *Id.* at 201-03.

New York;²³³ Charlie Rose was fired from CBS;²³⁴ and New York's governor, Andrew Cuomo, resigned.²³⁵ These are just some examples of the more than 200 men who the *New York Times* documented as being seriously affected by this movement.²³⁶ In addition, millions of women (and some men) used the hashtag to out their harassers and tell their stories, lending heft to the gravity and veracity of their accounts.²³⁷

The authors situate the movement in the larger landscape of the development of sexual harassment law and its continued persistence in the American workplace.²³⁸ Importantly, they link sexual harassment to the WTA workplace. These highly competitive environments attract the type of people who are likely to sexually harass since bullying and harassment are "built into the fabric of the WTA economy every bit as much as traditional sexism was built into the gender-segregated workplaces of the industrial era."²³⁹ Thus, as the authors point out, "[s]exual harassment is . . . both a symptom and consequence of a WTA economy."²⁴⁰

Yet, sadly, sexual harassment law has been notoriously ineffective in stopping this toxic workplace practice.²⁴¹ The legal standards for what constitutes harassment require outrageous behavior before it becomes actionable,²⁴² and, even when an employer is found liable, damage caps in these cases make the consequences for

²³³ *Id.* at 203. *But see Harvey Weinstein's New York Conviction Is Overturned*, N.Y. TIMES (May 23, 2024), <https://www.nytimes.com/live/2024/04/25/nyregion/harvey-weinstein-appeal> (noting that although Weinstein's New York conviction was overturned because the trial judge admitted testimony from other alleged victims when those crimes had not been charged, his California conviction of sixteen years still stands).

²³⁴ CAHN ET AL., *supra* note 2, at 205.

²³⁵ *Id.*

²³⁶ *See id.* at 206; Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 23, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html>.

²³⁷ CAHN ET AL., *supra* note 2, at 204-05.

²³⁸ *Id.* at 207-09.

²³⁹ *Id.* at 209.

²⁴⁰ *Id.*

²⁴¹ *Id.* at 210.

²⁴² *See, e.g.,* Theresa M. Beiner, *The Trouble with Torgerson: The Latest Effort to Summarily Adjudicate Employment Discrimination Cases*, 14 NEV. L.J. 673 (2014).

employers relatively insignificant.²⁴³ Because of this and the risk of retaliation for reporting, many instances of sexual harassment go unreported.²⁴⁴ This is where, according to the authors, the #MeToo movement provides some hope. As a result of it, they assert that prosecutors and jurors now understand the patterns of sexual harassment and are more willing to find offenders guilty or liable.²⁴⁵ They provide the cases brought by E. Jean Carroll against Donald Trump²⁴⁶ and Lauren Bonner against Point72 Asset Management, a New York hedge fund, as examples of the impact of #MeToo.²⁴⁷ The authors describe the #MeToo tactics of “focusing on unsavory practices, generating publicity, and tying together different kinds of misconduct” as providing “new weapons in the fight against discriminatory workplaces.”²⁴⁸

The authors identify three steps that they believe will help women in these workplaces. The #MeToo movement has already started the first step: the public needs to see the problem, and people as well as companies must be held accountable.²⁴⁹ The second step is to change the laws that permit the enforcement of mandatory arbitration and nondisclosure agreements that mask repeated instances of harassment and protect serial offenders.²⁵⁰ Finally, there must be a change to the WTA culture in which sexual harassment continues to be prevalent.²⁵¹ This is a bigger challenge, and the authors suggest a multi-front attack. Using McDonald’s as an example, they argue for consequences for those at the top of the food chain – including CEOs – who engage in this behavior or tolerate it. In the case of McDonald’s CEO Stephen Easterbrook, the company’s board clawed back more than \$100 million in compensation from him.²⁵² The Board also went after the human resources director, suing him for ignoring an atmosphere that would likely encourage sexual harassment and for engaging in it himself.²⁵³

²⁴³ CAHN ET AL., *supra* note 2, at 210-11.

²⁴⁴ *See id.* at 211.

²⁴⁵ *Id.* at 212.

²⁴⁶ *See id.* at 212-13.

²⁴⁷ *See id.* at 214-17.

²⁴⁸ *Id.* at 217.

²⁴⁹ *Id.* at 218.

²⁵⁰ *Id.* at 219.

²⁵¹ *Id.* at 221.

²⁵² *Id.*

²⁵³ *Id.*

Interestingly, a Delaware court ruled that sexual harassment of this sort can be actionable as a “breach of the duty of loyalty,” allowing for individual accountability²⁵⁴ – something not available under Title VII.²⁵⁵ These cases also are not subject to the damages caps under Title VII.²⁵⁶ Along with these board actions, individual employees brought their own claims, and the EEOC brought an action as well against one franchise.²⁵⁷

The authors explain that individual employee cases do not have the same impact as making the elimination of sexual harassment a corporate responsibility. What is needed is reform of corporate cultures.²⁵⁸ Unions and employee organizing can help in this effort, but companies like McDonald’s have fought unionization. Instead, like other members of the WTA economy, McDonald’s makes money while ignoring the plight of its employees – limiting corporate responsibility and instead leaving it with individual stores.²⁵⁹ While the #MeToo movement had an immediate impact, the authors are more sanguine about its continued success. Still, “if the ability to confront attackers unites women and connects them to a larger constituency for reform,”²⁶⁰ change is possible.

IV. The Conclusion

In the conclusion to the book, Cahn et al. revisit the triple bind and what can be done to unwind it. Looking at WTA economy’s big winners like Elon Musk and the political landscape that allows it to thrive,²⁶¹ they ask, “How can we harness the values of a women’s coalition – which combines women’s leadership and their ballot power, together with the support of their allies – in the

²⁵⁴ *Id.* at 222. *In re McDonald’s Corp. S’holder Derivative Litig.*, 290 A.3d 343 (Del. Ch. 2023).

²⁵⁵ *See, e.g.,* *Kachmar v. SunGard Data Sys., Inc.*, 109 F.3d 173, 184 (3d Cir.1997) (citing *Sheridan v. E.I. DuPont de Nemours & Co.*, 100 F.3d 1061, 1077 (3d Cir. 1996) (en banc); *Dici v. Commonwealth of Pennsylvania*, 91 F.3d 542, 552 (3d Cir.1996)); *Miller v. Maxwell’s Int’l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993).

²⁵⁶ CAHN ET AL., *supra* note 2, at 222.

²⁵⁷ *See id.*

²⁵⁸ *Id.* at 223.

²⁵⁹ *See id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 225-30.

broader fight against the excesses of the WTA economy?”²⁶² They set out a three step process that includes: (1) “making visible the injustices of the WTA economy;”²⁶³ (2) “showing the links between sex discrimination and WTA practices that are counterproductive to society;”²⁶⁴ and (3) “empowering women’s voices.”²⁶⁵

They acknowledge that this is not an easily won battle and includes a Supreme Court that is not very sympathetic to employment discrimination claims.²⁶⁶ They recommend using publicity, lawsuits, and the ballot box to make changes in five areas.²⁶⁷ These changes include “[c]apping the accumulation of power at the top,”²⁶⁸ and making it difficult to turn an increased profit by breaking rules as well as reining in executive pay.²⁶⁹ It means a return to corporations that are run based on collective values – not the winner take all approach described in earlier chapters of the book.²⁷⁰ They also propose “[r]eset[ting] labor markets and reform[ing] management practices.”²⁷¹ Cooperative management styles are part of this, but these reforms also include support for workers so they can say no to sub-standard pay. This would create a scenario in which corporations would have an incentive to invest more in worker training and retention.²⁷² It also is a solution to a critique found in earlier chapters – a shift to companies becoming more concerned with long-term growth and less with the next quarter’s earnings.²⁷³ Cahn et al. advocate for increasing the minimum wage, arguing to “[r]aise the floor.”²⁷⁴ “Invest[ment] in individuals, children and communities” is the fourth pillar of their proposal.²⁷⁵ This includes greater public support for child-care, pre-K, “paid family leave, and family-friendly workplaces.”²⁷⁶

²⁶² *Id.* at 230.

²⁶³ *Id.* at 231.

²⁶⁴ *Id.* at 232.

²⁶⁵ *Id.* at 233.

²⁶⁶ *Id.* at 234.

²⁶⁷ *Id.* at 235.

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 235-36.

²⁷⁰ *Id.* at 236.

²⁷¹ *Id.* at 237.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 238.

²⁷⁵ *Id.* at 239.

²⁷⁶ *Id.*

Finally, they assert that there needs to be a “[s]trengthen[ing] of the rule of law.”²⁷⁷ The stories discussed in this book are rife with instances of law breakers not only getting away with it, but also benefitting from it. The reforms needed here are big – they require acts of Congress, changes in Supreme Court outcomes, voting, and public outrage.²⁷⁸ These reforms, they assert, would make meaningful change for working women, and, hopefully, render the gender wage gap a thing of the past.

VII. So, What Does It All Amount to?

There’s a ton of interesting information in *Fair Shake*, and Cahn, Carbone, and Levit make a compelling case that the WTA economy is harming women not only in terms of wages, but also with respect to employment opportunities generally. Two things struck me about the book. First, as someone who has studied and taught employment discrimination law, the prevalence of sex discrimination in the stories of these women was disheartening and, unfortunately, not surprising. Title VII, the main antidiscrimination law addressing sex discrimination (including sexual harassment) in the workplace, has not provided sufficient relief for those experiencing discrimination or much incentive for employers to curb discriminatory practices as one might have hoped. Second, while the authors blame the WTA workplace for the stagnant nature of the gender wage gap, there are other potential explanations. The WTA workplace might be part of it, but other aspects of life likely play a significant role in curtailing gender wage equity.

A. The Persistence of Sexual Harassment and Sex Discrimination in the Workplace

As someone who has been researching and writing about workplace sexual harassment for twenty-five years,²⁷⁹ the persistence of this pernicious workplace practice and its negative impact on working women (and some men) continues to perplex me. That sexual harassment factored into so many of these women’s

²⁷⁷ *Id.* at 240.

²⁷⁸ *Id.* at 241.

²⁷⁹ The first article I wrote on the subject was published in 1999. See Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999).

stories despite the Supreme Court's recognition of this claim under Title VII in 1986²⁸⁰ is disturbing. Cahn et al. see hope in the aftermath of the #MeToo movement.²⁸¹ Yet, I am more skeptical, having seen consciousness raised about sexual harassment in the past, and yet it persists in the workplace. Without a significant change in the manner in which courts approach these cases in many jurisdictions and/or congressional action addressing harassment, it's unclear whether much progress will be made. However, there are some signs of hope.

During Supreme Court Justice Clarence Thomas's confirmation hearings in 1990, then law professor Anita Hill²⁸² testified to the sexual harassment she experienced while working for Thomas during his time with the Department of Education and (ironically) as head of the Equal Employment Opportunity Commission.²⁸³ The hearings spurred awareness about the workplace sexual harassment women experienced and led to a 150% increase in sexual harassment charges filed with the EEOC.²⁸⁴ Indeed, Marcia Greenberger, founder and co-president emerita of the National Women's Law Center, explained that Professor Hill "sparked conversations among women that they had never had before about experiences they realized were shared by so many others."²⁸⁵ As Greenberger noted, phones "began ringing off the hook" at her organization as women who had experienced sexual harassment

²⁸⁰ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

²⁸¹ CAHN ET AL., *supra* note 2, at 217-20, 233.

²⁸² Professor Hill is now a Professor of Social Policy, Law, and Women's Gender and Sexuality Studies at Brandeis University. See *Anita Hill, Scholarship and Biography*, SCHOLARWORKS, scholarworks.brandeis.edu/esploro/profile/anita_hill/overview (last visited Aug. 16, 2024).

²⁸³ See, e.g., Don DeMaio, *Sexual Harassment Complaints Are Increasing in Rhode Island*, PROVIDENCE BUS. NEWS, Apr. 10, 1995, at 15; M.A. Stapleton, *Sexual Harassment Filings on Rise as Awareness Increases, Seminar Told*, CHI. DAILY L. BULL., Dec. 8, 1994, at 1 (recounting the increase in sexual harassment suits after the hearings); Phil Willon, *EEOC Chief Faces Long Haul: America Mired in Decade of Anger, Confusion over Equal Rights*, RICHMOND TIMES-DISPATCH, Dec. 24, 1995, at A1.

²⁸⁴ See Beiner, *supra* note 279, at 72 n.6 (noting that there was a 150% increase in charges filed over the four years following the hearings and citing sources).

²⁸⁵ Sarah Pruitt, *How Anita Hill's Testimony Made America Cringe – And Change*, HISTORY (Feb. 9, 2021), <https://www.history.com/news/anita-hill-confirmation-hearings-impact>.

sought legal advice.²⁸⁶ The hearings influenced Congress to pass the Civil Rights Act of 1991, which provided compensatory and punitive damages in Title VII cases, although there were caps on these damages.²⁸⁷ In addition, a record number of women were elected to Congress following the hearings.²⁸⁸ Yet, nearly twenty-five years later, women and some men still experience harassment in the workplace at unacceptable rates²⁸⁹ – especially in the workplaces highlighted in *Fair Shake*. This begs the question of why. The authors note that the damage caps imposed under Title VII for compensatory and punitive damages awards are part of the problem.²⁹⁰ The most an employer can be liable for in compensatory and punitive damages is \$300,000.²⁹¹ This does not provide much incentive for an employer to stem sexual harassment. If juries could award millions of dollars, perhaps employers would take more notice.²⁹²

A significant problem is the courts and the complex legal rules they have established for plaintiffs to be successful with these claims. Many sexual harassment law scholars have noted that plaintiffs in these cases have a difficult time in court.²⁹³ Along

²⁸⁶ *Id.*

²⁸⁷ *Id.*; 42 U.S.C. § 1981a(b)(3).

²⁸⁸ Pruitt, *supra* note 285.

²⁸⁹ See, e.g., CAHN ET AL., *supra* note 2, at 21, 101.

²⁹⁰ CAHN ET AL., *supra* note 2, at 210-11.

²⁹¹ 42 U.S.C. § 1981a(b)(3). This is the cap for the largest employers – those who employ 500 or more employees. These caps were set in the Civil Rights Act of 1991 and have not been adjusted in the thirty-plus years since the law was enacted.

²⁹² While punitive damages are designed to punish and deter, their efficacy and deterrent value is controversial. See, e.g., BEINER, *supra* note 135, at 191-200; Paige Griffith, *Why Don't Punitive Damages Punish or Deter? Beyond the Constitution Toward an Economic Solution*, 77 MONT. L. REV. 327 (2016); Kevin S. Marshall & Patrick Fitzgerald, *Punitive Damages and the Supreme Court's Reasonable Relationship Test: Ignoring the Economics of Deterrence*, 19 ST. JOHN'S J. LEGAL COMMENT 237 (2005); Cass R. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998).

²⁹³ See, e.g., Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791 (2002); Beiner, *supra* note 279; Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 STAN. L. REV. 691 (1997); L. Camille Herbert, *How Sexual Harassment Law Failed Its Feminist Roots*, 22 GEO. J. GENDER & L. 57 (2021); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1033.

with scholars who have studied the problematic use of procedural rules to dismiss employment discrimination cases,²⁹⁴ law professors Kevin Clermont and Stewart Schwab found a lack of success for employment discrimination plaintiffs in federal courts generally.²⁹⁵ In a study of federal employment discrimination cases decided from 1979 to 2006, they found that overall plaintiff win rates were much better before juries than judges, and among plaintiffs receiving bench trials, employment discrimination plaintiffs lost far more often than other civil litigants.²⁹⁶ These low bench trial win rates, Clermont and Schwab argue, might explain why plaintiffs also lose in pretrial adjudications, because judges “lean” against plaintiffs in these case in a way that is different than other civil plaintiffs.²⁹⁷ They also document an anti-plaintiff bias in the federal circuit courts, in which plaintiffs fare far worse on appeal than defendants.²⁹⁸

Cahn et al. suggest that movements such as #MeToo might have an influence on case outcomes in sexual harassment cases.²⁹⁹ The #MeToo movement has spurred legislative change, including the federal Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021,³⁰⁰ the Speak Out Act,³⁰¹ limits on federal tax deductions for settlements of sexual harassment and

²⁹⁴ See, e.g., SPERINO & THOMAS, *supra* note 105, at 15-29; Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 105 (2007); Seiner, *supra* note 293, at 1033.

²⁹⁵ Clermont & Schwab, *supra* note 105, at 130.

²⁹⁶ *Id.* Plaintiffs were successful at jury trials 37.63% of the time, and only successful in bench trials 19.62% of the time. *See id.* The general civil win rate for plaintiffs in bench trials was 45.53%—much higher than the win rate for employment discrimination plaintiffs. *Id.*

²⁹⁷ *Id.* at 131.

²⁹⁸ *Id.* at 111-12. Reversal rates on appeal for defendants from plaintiff pretrial wins is 30% compared to a 11% reversal rate for plaintiffs who appeal defendant pretrial wins. The reversal rate from trial wins is 41% for defendants on appeal compared to plaintiff appeal wins of 9% when the defendant wins at trial. Clermont and Schwab note that the 41% to 9% spread in reversal rates is more extreme than the difference between plaintiff and defendant reversal rates in non-job cases. *Id.*

²⁹⁹ CAHN ET AL., *supra* note 2, at 205-06.

³⁰⁰ Pub. L. No. 117-90, 136 Stat. 2 (2022). This law is not without its detractors. See Imre S. Szalai, #MeToo's Landmark, Yet Flawed, Impact on Dispute Resolution: The Ending of Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 18 NW. J. L. & Soc. POL'Y 1 (2023).

³⁰¹ 42 U.S.C. §§ 19401-19404 (2022) (prohibiting enforcement of pre-dispute nondisclosure and disparagement clauses with respect to sexual harassment or sexual assault).

abuse cases that include nondisclosure agreements,³⁰² and state legislation.³⁰³ Could the influence of #MeToo extend to how courts decide these cases?

There is some support for the influence of the #MeToo movement on judicial decisionmaking, but the studies thus far are not entirely promising. An early look at case law following the #MeToo movement found only one circuit that referenced the movement as a basis for overturning a summary judgment motion in a Title VII sexual harassment case.³⁰⁴ The case – *Minarsky v. Susquehanna City*³⁰⁵ – is encouraging. In it, the Third Circuit reversed a trial court’s grant of summary judgment on the *Ellerth/Faragher* defense after the trial judge adopted a magistrate’s recommendation to grant the motion in part because the plaintiff, Minarsky, was not reasonable in failing to report the harassment under the employer’s anti-harassment policy.³⁰⁶ While the plaintiff alleged that she failed to report the harassment earlier for fear of retaliation, the trial court ruled that her delay was unreasonable and her fears of retaliation unfounded.³⁰⁷ In reversing the trial court, the Third Circuit seemingly relied on the #MeToo movement (although it didn’t name it directly) in a footnote, holding that a jury could find her failure to report reasonable under the circumstances.³⁰⁸ Footnote 12 alludes to a “veritable firestorm of allegations of rampant sexual misconduct

³⁰² 26 U.S.C. § 162(q)(1) (West 2022).

³⁰³ See, e.g., Workplace Transparency Act, 802 ILL. COMP. STAT. ANN. § 96/1-20 (West 2020) (prohibiting contracts that limit employees’ ability to report sexual misconduct to public officials); *Id.* § 1-25 (prohibiting unilateral requirement of employment that requires arbitration of employment claims); N.Y. LAB. LAW § 201-g (McKinney 2019) (requiring employers to adopt the model sexual harassment prevention policy developed by the state); see also Chris Micheli & Ashley Hoffman, *How California Lawmakers Responded Legislatively to the #MeToo Movement*, 53 U. PAC. L. REV. 724 (2022) (describing California’s legislative changes directed at issues raised by the #MeToo Movement).

³⁰⁴ Natalie Pedersen & Christine Cross, *#MeToo and the Courts: An Analysis of the Movement’s Effect on Workplace Sexual Harassment Law*, 53 U. TOL. L. REV. 71 (2021).

³⁰⁵ 895 F.3d 303 (3d Cir. 2018).

³⁰⁶ *Id.* at 311.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 313.

that has been closeted for years, not reported by the victims.”³⁰⁹ Apparently based in part on the public discussion from many victims who failed to report harassment, the court explained that “a mere failure to report one’s harassment is not *per se* unreasonable.”³¹⁰ Instead, the circumstances of incidents of harassment are “highly circumstance-specific,” and the “reasonableness of a plaintiff’s actions is a paradigmatic question for the jury.”³¹¹ This shift in the court’s approach appears to be influenced by the #MeToo movement.

While this 2021 study documented one other district court alluding to the Third Circuit’s footnote,³¹² there are now several more district court cases from the Third Circuit that refer to the reasoning in *Minarsky* and hold that the plaintiff will have an opportunity to present facts at trial to establish she was reasonable in failing to report harassment.³¹³ District courts outside of the Third Circuit have cited *Minarsky* positively to deny summary judgment to employers asserting the *Ellerth/Faragher* defense.³¹⁴ Consistent with this, a recent study by Li, Hall, and Martinez found a pro-plaintiff shift in the federal trial courts after the #MeToo

³⁰⁹ *Id.* at 313 n.12.

³¹⁰ *Id.* at 314.

³¹¹ *Id.*

³¹² See Pedersen & Cross, *supra* note 304, at 80-81; Williams v. United Launch Alliance, L.L.C., 2018 U.S. Dist. LEXIS 235684 (N.D. Ala. Sept. 14, 2018) (referring to the *Minarsky* footnote in denying the defendant fees in a case in which the plaintiff lost).

³¹³ See, e.g., Delval v. Town of McCandless, No. 2:20cv1839, 2024 WL 1346670 (W.D. Pa. Mar. 29, 2024); Lockhart v. Energy Transfer Partners, LP, No. 2:20cv258, 2022 WL 4553183 (W.D. Pa. Sept. 29, 2022); Kanish v. Crawford Area Transp. Auth., Case No. 1:19-cv-00338 (Erie), 2021 WL 1520516 (W.D. Pa. Mar. 26, 2021); Barbounis v. Middle East Forum, Case No. 2:19-cv-05030-JDW, 2021 WL 5106046 (E.D. Pa. May 28, 2021); Mercado v. Sugarhouse HSP Gaming, L.P., Civ. Action No. 18-3641, 2019 WL 3318355 (E.D. Pa. July 23, 2019); Kastanidis v. Pennsylvania Dept. of Hum. Servs., Civ. Action No. 1:16-CV-1548, 2018 WL 3584976 (M.D. Pa. July 16, 2018).

³¹⁴ See, e.g., Orr v. Russell Forest Products, Inc., Case No.: 5:19-cv-01173-HNJ, 2021 WL 5216884 (N.D. Ala. July 14, 2021); Doe v. District of Columbia, Civ. Action No. 1:19-cv-01173 (CJN), 2023 WL 3558038 (D.D.C. Feb. 14, 2023); Moore v. U.S. Virgin Islands Dep’t of Tourism, Civ. Action No. 2014-0081, 2020 WL 5219533 (D. V.I. Aug. 31, 2020).

movement.³¹⁵ Indeed, a quick Westlaw search reveals 132 cases – mostly in the district courts -- with “#MeToo” mentioned.³¹⁶

The story is different in the courts of appeals. Li, Hall, and Martinez found no pro-plaintiff impact in the courts of appeals after the #MeToo movement; in fact, the study found the probability of a pro-employee ruling dropping in the circuit courts of appeal after 2017 – the beginning of the #MeToo movement.³¹⁷ Interestingly, among the 132 cases I discovered after a recent search in Westlaw for the term #MeToo, there were no court of appeals cases that used the term #MeToo in a pro-plaintiff manner, and in several cases alleged perpetrators of harassment or sexual assault argued that the #MeToo movement had caused an overreaction – and even sex discrimination – directed at alleged harassers.³¹⁸ In none of the court of appeals cases in which the movement was directly mentioned was it used to help a Title VII plaintiff.

While courts are showing mixed results, hope does come from the corporate sphere. Legal scholars have documented a shift in corporate governance cases.³¹⁹ Hemel and Lund recounted outcomes of shareholder lawsuits involving sexual misconduct pre-2017 and those in the period after the #MeToo movement became part of household discussions, explaining that shareholder suits started making it past motions to dismiss or settling for significant sums post #MeToo.³²⁰ This was not the case for pre-#MeToo lawsuits. In addition, like Cahn et al.,³²¹ they recount the ouster of several CEOs as a result of sexual harassment allegations.³²²

³¹⁵ Carol T. Li, Matthew E.K. Hall & Veronica Root Martinez, *#MeToo & the Courts: The Impact of Social Movements on Federal Judicial Decisionmaking*, 81 WASH. & LEE L. REV. ONLINE 79, 83 (Dec. 29, 2023).

³¹⁶ Westlaw search by author on August 1, 2024. Search of all federal cases with search terms “#MeToo” or “MeToo Movement”.

³¹⁷ Li et al., *supra* note 315, at 83 (“The probability of a pro-employee ruling . . . increased from .03 to .13 after November 1, 2017.”).

³¹⁸ See, e.g., *Doe v. Stonehill Coll., Inc.*, 55 F. 4th 302, 335-336 (1st Cir. 2022) (Title IX case, in which the court did not support the plaintiff’s position); *Johnson v. Marian Univ.*, 829 Fed. Appx. 731, 732 (7th Cir. 2020) (Title IX case).

³¹⁹ See Brenda Cossman, *#MeToo and the Corporation in Popular Culture*, 46 SEATTLE U. L. REV. 607, 636-38 (2023) (recounting the shift); Daniel Hemel & Dorothy Shapiro Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1612-28 (2018) (discussing cases before and after #MeToo).

³²⁰ Hemel & Lund, *supra* note 319.

³²¹ CAHN ET AL., *supra* note 2, at 221.

³²² Hemel & Lund, *supra* note 319, at 1614-15.

The impact of sexual harassment allegations levelled at corporate CEOs goes beyond successful shareholder derivative suits and fired CEOs. Revelations of sexual misconduct by CEOs has resulted in significant drops in stock prices.³²³ Increasingly, lawsuits involving allegations of sexual misconduct by CEOs are settling – suggesting that the shift in understanding of the serious nature of sexual harassment allegations has reached corporate legal counsels’ offices.³²⁴ This has led one commentator to opine, “It is not the law that has changed; the tests for fiduciary duty liability and securities non-disclosure liability remain unchanged. What has changed is the understanding of how sexual misconduct fits into that legal framework.”³²⁵

A recent study of CEO employment contracts revealed a significant increase in what the authors of the study call “MeToo termination rights” clauses, whereby companies can terminate CEOs for cause based on sexual harassment or other sexual misconduct.³²⁶ These researchers found the incidence of these contract clauses went from 3.9% in the three years before #MeToo to 15.2% in the three years after #MeToo became a household word.³²⁷ Interestingly, this trend increased over the three years of the study after #MeToo, with the third quarter of 2020 showing nearly 40% of the contracts including a sexual harassment clause.³²⁸ Thus, although at first the gains may look modest, the trend appears to be increasing over time. In addition, there was a significant rise in contract terms allowing for “for cause” termination due to

³²³ See *id.* at 1620, 1624, 1625 (recounting instances of stock prices dropping for corporations shortly after allegations of sexual harassment by CEOs became public).

³²⁴ See *id.* at 1621, 1622 (recounting cases that have settled); see also *In re Signet Jewelers Ltd. Sec. Litig.*, Civ. Action No. 1:16-cv-06728-CM-SDA, 2020 WL 4196468 (S.D.N.Y. July 21, 2020) (order approving \$240 million settlement of shareholder suit against Signet Jewelers regarding sexual misconduct by the CEO and others).

³²⁵ Cossman, *supra* note 319, at 637.

³²⁶ Rachel Arnov-Richman, James Hicks & Steven Davidoff Solomon, *Do Social Movements Spur Corporate Change? The Rise of “MeToo Termination Rights” in CEO Contracts*, 98 IND. L.J. 125 151-52 (2022).

³²⁷ *Id.* at 151.

³²⁸ *Id.* at 154-55. The authors are hesitant to say the trend will continue into the future. As they point out, “it may be that the incidence of these clauses will reach a natural ceiling.” *Id.* at 155; see also *id.* at 173 (discussing uncertainty that the trend will persist).

violations of company policy, with the presence of such clauses rising from 53% pre-#MeToo to 67% post-#MeToo.³²⁹ These types of clauses, which are publicly available,³³⁰ signal that those at the top of the corporate food chain will be held accountable for sexual misconduct on the job.³³¹ This is something that was unlikely pre-#MeToo.³³² Importantly, this lets other workers at these businesses know that this misconduct will not be tolerated by anyone in the workplace. It also likely will lessen sexual harassment in these workplaces, as studies suggest that the more seriously an organizational leader takes sexual harassment allegations, the less likely harassment will occur.³³³ When the head of an organization is him or herself someone who engages in sexual harassment and gets away with it, this undermines efforts to change this part of the corporate culture.

Cahn et al. also recount some of the impact of the #MeToo movement, but the extent of the #MeToo movement's impact on court decisionmaking remains to be seen. The movement in corporate cases and CEO contract clauses are promising. However, it's still unclear whether this will extend to women (and some men) who challenge sexual harassment directly in court. Although historically there are examples of courts shifting positions based on social movements,³³⁴ the continued salience of this movement for sexual harassment cases remains unclear. Still, given the potential for social movements to influence courts, as Cahn et al. suggest, this is one sensible strategy to address the gender wage gap. Less sexual harassment at work should keep women in positions and help them thrive in the workplace.

Along with sexual harassment, many of the women highlighted experienced sex discrimination – whether through employers paying women less than similarly situated men or employers penalizing women for actions when men were given a pass for

³²⁹ *Id.* at 152. The authors note that many of these clauses include some limitations on for cause terminations on these grounds, such as a seriousness threshold, intent requirements, or procedural protections. *See id.* at 156-57.

³³⁰ *Id.* at 147.

³³¹ *Id.* at 170.

³³² *Id.* at 133.

³³³ BEINER, *supra* note 135, at 128-31.

³³⁴ Pedersen & Cross, *supra* note 304, at 85-88 (providing examples); *see generally* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821 (2021).

engaging in the same actions. And, several of these women – Dukes (Walmart), Pao (Kleiner Perkins), and Martinez (Aspen Dental) – lost their lawsuits. Like the difficulties faced by plaintiffs in sexual harassment cases, plaintiffs in sex discrimination lawsuits also face substantial hurdles to success. Increasing damages and making Title VII and the Equal Pay Act more effective in court can only help women be more successful in these lawsuits. Given the questionable progress in the courts after #MeToo, it may well take congressional action – such as eliminating the damage caps under Title VII – to make a difference.

B. The Mothering Penalty and the WTA Workplace

The authors lay much of the blame for the continued gender wage gap at the feet of the WTA economy and business leaders who adopt this approach to running their organizations. They make a persuasive case that these workplace environments are not places where many women can thrive or would wish to work. Indeed, regardless of whether or not the shift from cooperative workplaces to WTA workplaces is the cause of the continued gender wage gap, it's clear that women will struggle to be successful in these workplaces. Given that studies show that women are successful in the modern workplace,³³⁵ discouraging employers from adopting policies that foster a WTA workplace makes sense. It's also likely that many men wouldn't thrive in these workplaces, although clearly more men than women do. The personality type that Cahn et al. identify as prevalent in these workplaces may be more common among men, but many men would not conform as well.³³⁶ But is the WTA economy the root cause of the persistence of the gender wage gap or is something else going on?

Women were making significant gains in wages vis-a-vis men through the 1980s.³³⁷ Beginning in the 1990s, those gains slowed

³³⁵ Indeed, Cahn et al. cite many instances of women leaders being successful in a variety of businesses. *See, e.g.,* CAHN ET AL., *supra* note 2, at 59.

³³⁶ *See id.* at 139 (describing personality type that succeeds in these environments).

³³⁷ Francine D. Blau & Lawrence M. Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can?*, 21 ACAD. MGMT. PERSP. 7 (2007); Francine D. Blau & Lawrence M. Kahn, *The U.S. Gender Pay Gap in the 1990s: Slowing Convergence*, 60 INDUS. & LAB. RELATIONS REV. 45 (2006).

and that stagnation has continued into the twenty-first century.³³⁸ Women begin their careers with near wage parity with men, but lose that parity as they continue to age and progress through their careers.³³⁹ Economist Claudia Goldin has looked at workplaces and why women are less often making it to the top tier (and better paying) positions. For her, it is about family. Most women have children, and, for couples, it makes sense for one person in the couple to pursue a higher income position that has more time demands while the other person in the couple takes a lesser-paying, more flexible position so that there is time for the needs of children and the family.³⁴⁰ Goldin talks in terms of “greedy work” – work that demands overtime, weekend and evening work in order to earn the most income.³⁴¹

Goldin has gathered studies looking at women’s and men’s earnings in professional occupations where earnings are highest – the area of the workforce that has the greatest gender wage gap.³⁴² The gender wage gap in earnings changes over time, with “women usually taking a big earnings hit when they have children.”³⁴³ While the wage gap has closed since the 1960s and 1970s, interestingly, the gap today is larger for college educated women than it is for all women.³⁴⁴ While education, job experience, and other skill-related explanations accounted for the gender wage gap early on, the continued gap is complicated.³⁴⁵ Looking at college graduates, Goldin recounts how these men and women start out with fairly similar salaries; however, as these women continue in their careers, the earning gap grows.³⁴⁶ In a study recounted by Goldin of University of Chicago MBA students who graduated between 1990 and 2006, in their first jobs, these women earned 95 cents on the male MBA graduate dollar.³⁴⁷ By year thirteen, these women were earning 64 cents on the male dollar; their

³³⁸ Kochhar, *supra* note 167.

³³⁹ *See id.*

³⁴⁰ *See* CLAUDIA GOLDIN, CAREER AND FAMILY: WOMEN’S CENTURY-LONG JOURNEY TOWARD EQUITY 9-13 (2021).

³⁴¹ *Id.* at 9.

³⁴² *See id.* at 170.

³⁴³ *Id.* at 160.

³⁴⁴ *Id.*

³⁴⁵ *See id.*

³⁴⁶ *Id.* at 161-62.

³⁴⁷ *See id.* at 162.

earnings relative to men had dropped considerably.³⁴⁸ This gap was not a random phenomenon. As Goldin points out, “it emerges largely with the arrival of children.”³⁴⁹

Two factors relevant for this group were that women had more career interruptions and worked fewer weekly hours than men.³⁵⁰ She notes that the time off these women took was not that extensive – after seven years, they took just over four months and after thirteen years, just about a year.³⁵¹ Still, it was less than their male counterparts, who only took off less than one month at year seven and six weeks at year thirteen.³⁵² So, even though these women didn’t take a lot of time off in those years, it was more than the men. The other significant difference was the difference in hours worked per week between men and women. At the beginning of their careers, both men and women were averaging around 60 hours per week, but the difference by the time they are thirteen years from graduation is eight hours per week – women in this sample averaged 49 hours whereas men averaged 57 hours.³⁵³ The gender pay gap for these MBA degree earning individuals, according to Goldin, exists “because the high-paying corporate and financial sector positions heavily penalize employees who have even brief career disruptions and those who do not work exceptionally long and grueling hours.”³⁵⁴ Hours-wise, this sounds like the WTA economy, but Goldin calls the arrival of children and the caregiving responsibility that comes with this as the “main contributor” to women’s lack of continuity and lesser work hours, resulting in less pay.³⁵⁵ Indeed, University of Chicago MBA women without children were earning only about 9 cents less than their male counterparts thirteen years after graduation.³⁵⁶ They still earn less than men, but not nearly as stark as the difference for women with children.

³⁴⁸ *Id.*

³⁴⁹ *Id.* at 163.

³⁵⁰ *Id.* at 163-64.

³⁵¹ *Id.* at 164.

³⁵² *Id.*

³⁵³ *Id.* at 164. Much of this difference is because more of these women work part-time – around 18% of them. In addition, a majority of those who worked part-time worked for themselves. *Id.*

³⁵⁴ *Id.* at 165.

³⁵⁵ *Id.*

³⁵⁶ *Id.* at 166.

The gender pay gap does vary by profession, with women in science and engineering (among highly educated women) having a lesser gap.³⁵⁷ Finance – one of the areas discussed in *Fair Shake* – has one of the largest gender wage gaps.³⁵⁸ Interestingly, unlike the women in tech described in *Fair Shake*, the study Goldin relies on found a lower gender wage gap in tech, where women earned 94 cents on the male dollar but used “engineering” for tech – a potentially very different occupational group from the one that Cahn et al. were using.³⁵⁹ Looking at the Occupational Information Network maintained by the U.S. Department of Labor, Goldin recounts how certain occupations have higher time demands and larger gender wage gaps, while other occupations (including engineering and science) have lower time demands and a lower gender wage gap.³⁶⁰ Fields with high client contact, such as doctors, dentists, and lawyers, have a higher gender wage gap, as do management, administration, and sales.³⁶¹ Women are more likely to be the “on call” parent, requiring more flexibility in hours worked.³⁶² As Goldin concludes, “[w]omen incur penalties in certain occupations because they require more controllable hours.”³⁶³ With high client demands and long hours in the office leading to higher incomes, this is sounding more like the WTA economy that Cahn, Carbone, and Levit identify in *Fair Shake*.

Still, it looks like children and the caregiving responsibility they require are a major factor in the gender wage gap that the structure of certain positions exacerbates. Using a hypothetical involving a couple who are both attorneys, Goldin argues that the resulting wage gap between the husband and wife after they decide to have children is based upon “the very structure of work.”³⁶⁴ In particular with attorneys, studies Goldin relies upon show that the attorneys who average a 60 hour week earn more than two and a half times those who only work 30 hours per week – regardless of

³⁵⁷ *Id.* at 170 & Fig. 8.4.

³⁵⁸ *Id.* Women in finance earn 77 cents on the male finance dollar.

³⁵⁹ *Id.* at 170; CAHN ET AL., *supra* note 2, at 133-34..

³⁶⁰ GOLDIN, *supra* note 340, at 173.

³⁶¹ *Id.* at 173, 184.

³⁶² *Id.* at 171.

³⁶³ *Id.* at 174.

³⁶⁴ *Id.* at 180.

gender.³⁶⁵ Thus, there's an hourly premium paid to those who are willing to work longer hours.

While Goldin acknowledges that sex discrimination was prevalent in the past, she argues that it doesn't have much of an impact on the current gender wage gap. As she explains:

The difference in earnings between men and women, according to the logic and data we're exploring, have little direct relationship to bias in the workplaces or to a lack of family-friendly policies or to any of the other quick fixes mentioned. . . . But the features of the jobs they have now are the reason why they are earning less. These are the aspects of jobs that make a particular worker – lawyer, accountant, consultant, financial advisor – indispensable to the account, client, deal.³⁶⁶

To create the kind of equity that would allow both men and women with children to earn at the same levels, Goldin argues that the “system” of how work is arranged would need to change.³⁶⁷ She uses pharmacists as an example of where it has changed in a way that has increased earnings equity while creating a workplace with flexible hours.³⁶⁸ Pharmacy used to be a male-dominated field that featured individually owned pharmacies.³⁶⁹ In that environment, women pharmacists were few and usually worked for a male-owned pharmacy as an assistant, earning 67 cents on the male pharmacist's dollar.³⁷⁰ These pharmacists were a lot like lawyers – they could be woken up in the middle of the night to fill a prescription for an important client and had individual relationships with their customers.³⁷¹ There was a shift in ownership of these pharmacies to corporations, which, along with changes in insurance and health care, resulted in pharmacy becoming a rare area where the entering of corporations into the business actually helped create a more gender egalitarian workplace.³⁷² With drugs becoming more standardized and technological advances, pharmacists didn't need to have an ongoing personal relationship with a client in order to provide safe advice on things like drug interactions.³⁷³ All these

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 186.

³⁶⁷ *Id.* at 186-87.

³⁶⁸ *Id.* at 187-92.

³⁶⁹ *Id.* at 188.

³⁷⁰ *Id.*

³⁷¹ *Id.* at 189.

³⁷² *Id.*

³⁷³ *Id.* at 190.

changes did not mean that being a pharmacist became easier; indeed, medicines became more complex requiring more education on the part of pharmacists.³⁷⁴ With huge national chains such as Walgreens, CVS, and the like taking over the ownership part of the business, pharmacists became employees and much more fungible.³⁷⁵ Because pharmacists could easily substitute for each other, the penalty for part-time work nearly disappeared, with the median salary for female pharmacists being around 94 cents on the male pharmacist dollar.³⁷⁶ Women pharmacists took advantage of this, with nearly one-third of those at thirty years old working less than 35 hours per week.³⁷⁷ With about 65% of PharmD graduates being women, earnings have remained high. Pharmacy is a rare female-dominated occupation where salaries didn't decrease even though it is dominated by women.³⁷⁸

It's not so clear how the restructuring of the pharmacy workplace might translate into other workplaces that reflect the WTA economy. However, it is interesting that one of the aspects of the economy that the authors bemoan – corporatization of health care – actually helped women in the case of pharmacy. That employees can be substituted for one another is an interesting idea, but doesn't help women who want to climb to the top of the corporate ladder in their workplaces. These positions usually are dependent on unique skills.

Still, the ideas in Goldin's book are worth exploring as a way of lessening the gender wage gap. She has several suggestions that might help, including getting men on board to help implement change.³⁷⁹ Additional solutions she suggests include reducing the

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 190-91.

³⁷⁶ *Id.* at 191.

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 192. Increased use of AI and automation in pharmacy likely accounts for part of this as well as the decline in the number of pharmacists. See Joy Liu, Opinion, *Addressing the Decline in Graduating Pharmacists: The Role of Artificial Intelligence and Automation*, PHARMACY PRAC. NEWS (June 6, 2024), <https://www.pharmacypracticenews.com/Opinion/Article/06-24/Addressing-the-Delay-in-Graduating-Pharmacists-The-Role-of-Artificial-Intelligence-and-Automation/74011>.

³⁷⁹ GOLDIN, *supra* note 340, at 218.

cost of job flexibility,³⁸⁰ lessening the cost of childcare,³⁸¹ and altering societal norms so that women are not always the ones who take on the majority of childcare and home-related duties.³⁸² These are fairly sweeping changes and, unlike the approach of the authors of *Fair Shake*, Goldin provides no clear guidance on how these solutions might be accomplished. Still, considering how work might be restructured so that gender pay equity decreases has appeal. The workplaces that actually are innovative enough to do so just might end up the winners when it comes to attracting and retaining talented employees.

³⁸⁰ *Id.*

³⁸¹ *Id.* at 219.

³⁸² *Id.*