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Telling Stories Out of Court: Narratives About Women and Workplace Discrimination

Abstract

[Excerpt] Few of the countless real-life stories of workplace discrimination suffered by men and women everyday are ever told publicly. This book boldly and eloquently rights that wrong, going where no plaintiff testimony could ever dare because these stories are often too raw, honest, ambiguous, and nuanced to be told in court or reported in a newspaper. Consider a high school girl's genuine passion for her much older boss, for example, or a middle-class black woman's ambivalence about hiring a younger black woman coming off of welfare—just a couple of the riveting situations portrayed in this book. Most real-life stories, of course, are also too complex to be fully rendered in a court case or human resource department memo. Fiction is less instrumental than nonfiction. Sometimes, because it does not have to persuade, outrage, or inspire a remedy—though it can do any of those things—fiction can afford to be more truthful. In the past, authors such as David Mamet, purportedly striving for complexity on workplace discrimination, have simply served up backlash and stereotype. The stories in this book do something far more provocative; some inspire us to anger on the workers' behalf, others to uncomfortable, unwelcome feelings. All of them leave us thinking hard.

Keywords

workplace discrimination, sexual discrimination, sexual harassment, gender

Disciplines

Civil Rights and Discrimination

Comments

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TELLING STORIES OUT OF COURT

NARRATIVES ABOUT WOMEN AND WORKPLACE DISCRIMINATION

Edited by Ruth O'Brien
Foreword by Liza Featherstone

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FOREWORD

By *Liza Featherstone*

Law is fundamentally about storytelling. While the narrative delights of criminal law are prominently featured in television courtroom dramas (and for *Law and Order* fans, available almost any time of day!) stories about workplace law are far less celebrated. Yet they are equally compelling and, sadly, relevant to most people's everyday lives. Forty percent of women say they have faced workplace sex discrimination, and the rate is much higher for mothers of young children. A survey of blacks and Hispanics in the Boston area found that one in five had experienced racial discrimination on the job *within the past year*.¹ One of the most deeply felt motives for bringing a discrimination complaint against an employer—in addition, of course, to wanting justice, monetary payment, a long-deserved promotion, or systemic reform—is the desire to be heard, to tell one's story at last.

Legal scholars agree that while discrimination lawsuits often yield disappointingly little change, one of their greatest potential benefits is the possibility for public storytelling. That is, even when they fail to achieve concrete institutional change, they get the public to talk about the company's practices, compare notes, and perhaps even discuss their own experiences. A large-scale lawsuit attracts media attention; the story is told in many different ways. Some versions will be more favorable to one party, others biased toward another, while some will aspire to journalistic or scholarly neutrality. One thing is certain, though: The employer would prefer silence. And

employers have, over the years, tried hard to stop workers from telling stories—in or out of court.

That silence begins on the job, where most employees do not know that the right to discuss—and compare—wages is legally protected. Many supervisors exploit that ignorance, telling them that discussing wages is “against company rules.” That’s one reason workers can go for years not knowing that white or male colleagues are getting paid more for doing the same work. Employees also decide, often, that speaking up is simply worth neither the risk of losing their jobs nor the hassle and humiliation. There is also a social taboo in the workplace against complaining too much about unfair treatment; while gossip about a manager’s unreasonable demands, annoying personality quirks, or favoritism is nearly always acceptable water-cooler chitchat, discussion of discrimination can be seen as divisive and whiny, often threatening. Workers may be silenced by the sense that by invoking discrimination, they are making excuses for their own imperfections as workers, passing the blame for their personal failure to get ahead. Workers also—very often—don’t know that organizing, a powerful form of storytelling, is legally protected (indeed, the law is flimsy protection given that one in three employers admits firing people for union activity). Most often, when workers speak out about unfair practices, whether on websites, blogs, or to a member of the news media, they do so anonymously.

One way that companies seek to stop storytelling about discrimination is through legislation aimed at curbing class action lawsuits. But even when workers bring suit, the forum, and listeners, for the story are not assured. Betty Dukes, the lead plaintiff in *Betty Dukes v. Wal-Mart Stores*, the largest sex discrimination class action suit in history, will almost certainly walk away from her case with some money in her pocket.² But she longs for, as she puts it, her “day in court,” the chance to tell her tale publicly, with a judge and jury to weigh, and finally affirm, its rightness. If her suit ends in a settlement, negotiated dryly by lawyers on BlackBerries and speakerphones, she will probably always feel cheated of that public narrative—and audience. Of course, Wal-Mart—where Betty still works as a greeter—would prefer it that way, as would most companies, and that is why most significant lawsuits end with settlements. These can be deeply emotionally unsatisfying for plaintiffs. One woman who was awarded such a settlement against a health food retailer told me that she still resents not being able to tell her story in a courtroom. She walked away a little bit richer but with her tale untold.

Perhaps one of the most egregious ways in which stories about discrimination are silenced is through settlements with gag orders, in which employees agree not to publicly tell their stories. This has happened in several recent settlements in the financial industry. The women suing Wal-Mart

ferently hope they are not asked to stop telling their stories: They know that their stories are all they really have, their most powerful weapons in the battle for real change.

Few of the countless real-life stories of workplace discrimination suffered by men and women everyday are ever told publicly. This book boldly and eloquently rights that wrong, going where no plaintiff testimony could ever dare because these stories are often too raw, honest, ambiguous, and nuanced to be told in court or reported in a newspaper. Consider a high school girl's genuine passion for her much older boss, for example, or a middle-class black woman's ambivalence about hiring a younger black woman coming off of welfare—just a couple of the riveting situations portrayed in this book. Most real-life stories, of course, are also too complex to be fully rendered in a court case or human resource department memo. Fiction is less instrumental than nonfiction. Sometimes, because it does not have to persuade, outrage, or inspire a remedy—though it can do any of those things—fiction can afford to be more truthful. In the past, authors such as David Mamet, purportedly striving for complexity on workplace discrimination, have simply served up backlash and stereotype. The stories in this book do something far more provocative; some inspire us to anger on the workers' behalf, others to uncomfortable, unwelcome feelings. All of them leave us thinking hard.

ACKNOWLEDGMENTS

Sharing stories about office politics took a turn when I started attending professional conferences. Around a hotel lobby table, often over a glass of wine, I quickly realized how easily my female colleagues and I fell into swapping stories about a different kind of office politics. We told stories about discrimination that we had experienced or our friends had faced. They shared their stories, and I shared mine. Nodding our heads as we compared events and made observations helped fortify us, giving us stamina and strength. I found these gatherings emotionally energizing. Both the listening and the telling constituted a constructive way of channeling my frustration. It transformed a solitary situation into a shared experience, with the bonus of often forging new friendships. Our stories brought us together.

In this book I invited a whole table of wonderful writers to tell their discrimination stories. These writers, however, do not relay their own stories. Nor do they present stories about the academy. Rather, they write fiction. The fictional stories in *Telling Stories out of Court* directly and indirectly reveal what goes into workplace discrimination. I was delighted that Susan Oard Warner, Ellen Dannin, Harriet Kriegel, Aurelie Sheehan, Eileen Pollack, Catherine Lewis, Kristen Iversen, and Alice Elliott Dark contributed provocative and moving pieces of fiction to that end. Calling them up out of the blue, I had no connection to them other than being fans of their fiction. I was also happy that several contributors to *Voices from the Edge: Narratives about the Americans with Disabilities Act*—Chloë

Atkins, Stephen Kuusisto, and Achim Nowak—brought their talents to this project too. All of them offer us the vivid short stories that compose *Telling Stories out of Court*. Being a political scientist, it's a treat to work with "real" writers, or to be generous to my own discipline, I should say those who reach readers outside the academy walls. And of course I extend thanks to Risa Lieberwitz for her four pieces of astute commentary that place the fiction in legal context. Finally, Liza Featherstone graces the book with a foreword.

Had I not met Jim Phelan at a critical juncture *Telling Stories out of Court* might have remained unfinished. Jim gave me that extra intellectual push I needed by putting the project's goal in literary context. Jill Norgren, Nan Marglin-Bauer, and David Schlesinger provided insightful criticism about the introduction. The reviewers for Cornell University Press provided constructive criticism about the project in its entirety. I greatly appreciate how Judith Baer, Amy Bridges, Joyce Gelb, Judith Grant, Eileen McDonagh, Karen Orren, Frances Fox Piven, and Gretchen Ritter have been wonderful mentors and/or role models, some of whom have been encouraging me for some time to get more involved in gender issues. Martha Fineman and Brigitta van Rheinberg remain great sources of inspiration and support.

Thanks is also extended to my supportive friends and colleagues at the City University of New York Graduate Center, including Tom Halper, Jack Jacobs, Jessica Landis, Tom Weiss, and Richard Wolin. Bill Kelly generously afforded me the time and a new position at the Graduate Center, without which it would have been difficult to complete the project in a timely fashion.

Fran Benson of Cornell University Press was the kind of editor every academic dreams about. From the beginning her enthusiasm and encouragement as well as her critical insight made this a better book.

Lastly I owe great thanks to the following friends who regularly heard about the project's different stages: Martha Campbell, Mark Juarez, Susan Martin-Marquez, and Marta Lauritsen. Cate Du Pron, Linda Findley, Virginia Haufler, Mark Hillary, Carol Hutchins, Corey Lin, Brad MacDonald, Patricia Mainardi, Jeanette Money, Barbara Pfetsch, Rouba Abel Malek Rached, Nancy Solomon, Arlene Stein, Lisa and Slawek Wojotowicz, and Shona Wray. Tara Auciello should also be thanked for making my family life work without too much interference.

Editing the project in a difficult but very poignant and productive year made me realize how precious and precarious the work/family balance can be. It helped me cope with the death of my mother the year I faced the same circumstances that shaped her rich and full life. It is to my mother and my two sons that I dedicate this book.

TELLING STORIES OUT OF COURT

INTRODUCTION

WOMEN'S WORK

WRITING POLITICS, SHARING STORIES

Ruth O'Brien

It is the aim of *Telling Stories out of Court* to reach readers on both an intellectual and an emotional level, helping them think, feel, and share the experiences of women who have faced sexism and discrimination at work. It focuses on how the federal courts interpreted Title VII—the seventh chapter—of the Civil Rights Act of 1964.¹ To do so, this book uses fiction. Short stories offer readers insights that pedantic law texts cannot. These stories help us concentrate on the emotional content of the experience with less emphasis on the particulars of the law. But this is not to say the fiction is free-floating. Grouped into thematic clusters, the narratives are combined with interpretive commentary and legal analysis that anchors the book. It is the commentary and legal analysis that reveals the impact this revolutionary law had on women in the workplace.

In 1963, a year before Congress passed the Civil Rights Act, Betty Friedan published *The Feminine Mystique*, emboldening American middle-class women by chasing away their malaise and raising their consciousness. Describing “the problem that has no name,” Friedan captured the cultural and economic traps middle-class women encountered.² This volume drew attention to the discrimination women experienced in all facets of their lives and helped initiate the second wave of the women’s movement. Friedan, along with other feminists, changed women’s outlook about sexism, whereas Title VII of the Civil Rights Act changed the law. Women could now address and redress sex discrimination that occurred at work. Under Title VII, women

could marry their new feminist aspirations to the realization of a freer and less discriminatory workplace.

The successes of the women's movement and the protection afforded by this civil rights law freed women of my generation from worry about discrimination in college, graduate school, and the workplace. Taking my first job in 1991, I did not doubt that a career commensurate with my talent could be within my grasp. But this did not mean that I had read *The Feminine Mystique*. Nor did it mean that I had followed the many developmental twists in federal civil rights law. To the rightful consternation of some of my senior female colleagues, what the women's movement had accomplished was what I took for granted. Like many women in my generation, I was overconfident, assuming discrimination had been defeated.

The politics, the internal struggles, and the import of the women's movement's successes sadly had been lost on me. Too late, I realized that National Organization of Women (NOW), an organization Friedan founded in 1966, had a platform that was breathtaking in its scope and vision. Demanding that Title VII be fully enforced, NOW also protested the lack of community child care centers, sought a federal tax deduction for the housekeeping and child care expenses of working parents, and advocated for more equitable divorce laws.³

Fairly soon into my career, I confronted most of these issues. Indeed, professional women my age and much younger are writing about their daily struggles with day care, the expense of housekeeping, the guilt associated with paying other women less than they deserve for doing what many men still see as "our" jobs, and the consequences of the poorly constructed, albeit well-intended, divorce law reforms.⁴ We combat sexism daily. But having not taken the women's movement's efforts and accomplishments for granted I, and probably many women of my generation, might have gotten involved earlier in overcoming these long-lasting hurdles. Just think what our professional and personal lives would look like had more of NOW's initial platform been achieved?

To be sure, the women's movement did make big strides over the last few decades. Reproductive groups maintained their vibrancy.⁵ Hard-fought legislation outlawing violence against women passed in 1989.⁶ And the 1992 Family Medical Leave Act got many employers to reconsider their pregnancy leave plans, permitting more women to have children or to care for a sick parent without losing their jobs.⁷ Despite all these gains, however, the record of what the women's movement fought for and accomplished, particularly given the Republican Party's snowballing strength starting in the 1980s, is checkered.

Hence, the impetus behind *Telling Stories out of Court* is the hope that my generation and the generation coming up behind us share the vision

that NOW first articulated. Figuring out how to convey this message about women's experience, moreover, is critical. Given the uneven record, how can we gauge and express whether our private and public life glasses are half-empty or half-full?

Volumes upon volumes have been written about the Civil Rights Act. Lawyers, historians, and political scientists have studied, interpreted, and analyzed ever facet of this momentous piece of legislation, particularly its impact on racism. Yet, reading about someone's experience in narrative form offers a different vantage point than that provided by a social science monograph or data and statistics.⁸ Fiction resonates.

Suggesting that we can learn by reading fiction is not to say that real stories about sex discrimination offer little insight.⁹ To be sure, they make for good drama. In *Tales from the Boom Boom Room*, journalist Susan Antilla covers women fighting and winning their sexual harassment suit against "Wall Street."¹⁰ Charlize Theron, an Oscar-winning film star, played the Minnesotan miner who led the first class-action sexual harassment suit in the film *North Country*. These "real" stories, however, are bound by their history. Storytellers and critics alike often focus on facts rather than the essence of the story.

This book is different. Not constrained by the facts, it concentrates on the everyday essence of discrimination. *Telling Stories out of Court* gives readers the opportunity to think about discrimination and ponder how it feels to face it.¹¹ Indeed, scholars in the field of philosophy and literature have long observed that simply having a narrative creates a means of examining philosophical issues. An author can create characters that embody philosophical ideals. Then, when readers imagine these characters, they explore these same ideals, albeit through their own subjective lens.

Some narratives can go so far as to raise thought-experiments; that is, readers explore characters' motives, observe their actions, and then watch how it all unfolds. A thought-experiment is the creation of a "what if" scenario or a hypothetical. But unlike the legal hypothetical that asks students to plug in different facts and circumstances and then determine a new outcome in the courtroom, the narratives in this book make the legal facts constant and ask readers to explore more a thought-experiment based on a "what happens" in the story as a result of discriminating behavior. What compels someone to practice discriminatory behavior? Is it ignorance or fear? Perhaps the behavior is motivated by an employer's desire to maintain power or a colleague's quest for power? Is discrimination induced by society, nature, or a bit of both? Is it part of the human condition?

The hypotheticals in this book also constitute how-does-it-feel-experiments. How would it feel to be discriminated against given the circumstances

of the story? Would it limit someone's potential? Would this type of adversity make her stronger? Does someone's discriminating behavior provoke a protagonist's anger? Should it? Or does it deflate, dampen, or limit her energy or the skill she could put into a job? Can discrimination be so subtle that readers wonder if a character understands how debilitating it is? Can a protagonist help engender her own discrimination? Can she participate in her own exploitation? Literature is a branch of aesthetics that provokes philosophical reflection in terms of experiments about thought and feelings.

Fiction captures vivid ideals and images. To place these ideals and images in a wider context, each of the four parts ends with a commentary. Disconnecting the law from the stories not only gives creative writers more room to bring their characters to life but also permits the scholar the means to cover legal questions systematically. The commentary gives readers the chance to explore how the stories mirror typical sex discrimination cases as a means of supplementing the what-happens and how-do-we-feel hypothetical terrain.

The commentary that follows each story cluster pulls out legal themes from the stories and weaves together threads that embody the federal courts' interpretation of Title VII. Each covers a broad range of issues, from an explanation of gender roles to the growth of sexual harassment lawsuits; from the addition in 1991 of punitive damages paid to victims of discrimination to the apparent limits on the law to eliminate the continuing problem of sex discrimination.

While the stories reveal the full gamut of emotions involved in discrimination, the events in themselves may not be enough to prove discrimination. The commentary also points out what is missing from the stories, such as an overt statement from an employer explaining why he discriminated against a female employee. The federal courts created and rely on legal precedents that do not always capture discriminating behavior. Sometimes what is missing, such as employers not stating the intent underlying their discriminatory actions, can be more debilitating than the evidence of discriminatory conduct. As a result, a person faced with discrimination to never seek relief or to drop it because it is too difficult to prove. The absence too is instructive in that it shows how ill-equipped Title VII is to successfully handle discrimination.

Overall, the commentaries use the fiction liberally—exploring the questions raised and not raised by the characters in a specific setting—drawing out and illustrating specific points within the federal courts' interpretation of Title VII. The commentaries often ask—and respond to—questions: Would the women in these stories have a legal claim under Title VII? If so, how would they go about proving that sex discrimination occurred? If not,

what is missing: Is there simply a lack of evidence or does the law not remedy the real problems of everyday gender inequality?

While the commentary offers a broad legal perspective, showing how these stories are typical or representative of charges of discrimination in the federal courts, it is the stories themselves that build the book's structure. The stories are the heart of the book, not flesh on the legal commentaries' bones. The commentary is consciously placed behind the narratives to cast these different kinds of hypothetical and legal shadows rather than to set a foreground. Only after readers identify with a protagonist can they understand the what-happens, how-does-it-feel perspectives. Only after identifying with the protagonist should readers know whether her case would be actionable in a court of law or if she would be disappointed by Title VII's reach. The stories can be read as thought and feeling experiments as well as illustrative of the law or illustrative of what is needed to succeed in a case under Title VII law. Fact follows fiction.

What differentiates this book from that of critical race storytellers, such as Derrick Bell and Patricia Williams, is how it separates fact from fiction, leaving room for many different kinds of interpretation.¹² Little discussion, let alone analysis, of the Civil Rights Act appears in the stories. Setting the narratives apart from the commentary gives readers room to relate to the characters without being distracted by the law. This separation affords the storytellers more space or creative license, freeing them from the artifice of the law.¹³ What is more, most of the writers are fiction or short story writers and the commentary is drafted by a legal scholar.

Another reason for separating fiction from fact is aesthetic. Message-driven fiction is simply bad fiction. A "good story only rarely sets out to change the world," writes feminist legal theorist Kathryn Abrams. "[W]e are wont to call literature 'didactic' when an author lets his or her normative framework show."¹⁴ Meanwhile, commentary that lacks rigor could make readers feel manipulated or intellectually out of control. Are they getting a full picture about civil rights law? Separating the stories from the commentary ensures that a reader's reaction to the fiction is not confused with her response to the federal courts' interpretation of Title VII. Whereas a story is aesthetic—it either rings true or false or is authentic; legal commentary can be taken apart logically. The commentary constituted one interpretation, not the only interpretation, of the federal courts' development of employment law.

Finally, highlighting fiction can be subversive. Fiction brings "moral conflict to the forefront."¹⁵ Stories, therefore, have the capacity to inspire collective action, whereas legal interpretations of statutes rarely do.¹⁶ As experiential storyteller Nan Bauer-Maglin explains, "in the 1970s, women turned what they did in private (talking to each other) into something

political (consciousness-raising): by telling stories, what is private becomes understood in social context."¹⁷

Similarly, the stories in the book were solicited for the express purpose of "writing politics"; that is, to seek normative change or reform as all legal scholarship is expected to do. As a result, the book's short story authors created scenes that will evoke an emotional response from readers. Only after experiencing this response do readers seek a legal explanation in the commentary. The book therefore replicates the legal process in that women first encounter the discrimination and then second seek legal counsel about whether the discrimination is actionable.

What if a protagonist's emotional needs are greater than the potential legal response? Such a disjunction between the stories and the legal commentary may provoke an even greater response from readers if the protagonist's emotional needs are greater than the potential legal response. The stories recount how women feel facing discrimination, whereas the federal courts' interpretation of the law, which does not necessarily offer them relief, may provoke a reader to feel frustration, anger, or outrage. The injustice of the discrimination coupled with the unfairness of the federal courts' interpretation may raise readers' consciousness about the judiciary's bias against women and people of color. If narratives motivate enough readers to find their voice, these voices could turn into a chorus for legal reform or, at the very least, address the need for it.¹⁸

Telling Stories out of Court embraces an ethical or moral point of view. Relying on a branch of narrative theory in literature that rejects universal truths, the book embodies an antidiscrimination set of ethics or morals. What is the difference between writing that espouses a moral point of view and message-driven fiction? As novelist Anne Lamott writes,

The word moral has such bad associations: with fundamentalism, stiff-necked preachers, priggishness. . . . We have to get past that. If your deepest beliefs drive your writing, they will not only keep your work from being contrived but will help you discover what drives your characters. You may find some really good people beneath the packaging and posing—people whom we, your readers, we like, whose company we rejoice in. . . . So a moral position is not a message. A moral position is a passionate caring inside you. . . . A moral position is not a slogan, or wishful thinking. It doesn't come from outside or above. It begins inside the heart of a character and grows from there.¹⁹

The narratives in this book contain an antidiscrimination message—a message that is buried in it like a piece of sand ingested by an oyster that

produces a pearl.²⁰ The pearl's value, its beauty, comes from the fact it is not just rare but also natural or organic. A story must be authentic to speak to a reader.

The Facts

American women work. Poor and working-class women have always worked. By the 1970s, it was middle-class women who began entering the workforce in large numbers. Today, 72 percent of women work who are raising children under age eighteen. If the children are under six, this number drops to 66 percent; if they are infants, the number falls more, dropping to 57 percent of women working.²¹

As more women entered the workforce in the 1970s, society shifted. Some adjustments were easy, though perhaps bittersweet. Rather than a wife's earnings being compiled to her husband's healthy earnings, the primary reason the per capita medium household income has not dropped and that there has not been more discontent about the U.S. economy since the 1970s, many economists argue, is because most women work.²² Put differently, the medium family income would have dropped had women not entered the workforce in such large numbers. Indeed, the gender pay gap itself has narrowed from 31 to 12 points because men make less than they did thirty years ago. It's not that women make much more. Sixty percent of this gain is attributed to a real decline in men's earnings rather than to a rise in women's wages.²³ It is family income that is more.

While pay inequity persists, with women making seventy-seven cents to a man's dollar, the educational gap between the sexes does not.²⁴ The gap has, dramatically, all but closed. Women now make up 60 percent of all college undergraduates, and half of the undergraduate science majors and more than one-third of the engineering majors are women.²⁵ Ironically, while former Harvard President Larry Summers argued that "intrinsic aptitude" was a factor in the scarcity of women in the highest ranks of science and engineering, the *Wall Street Journal* ran an article showing that girls are closing the gender gap and pulling ahead of boys in math.²⁶

Women not only dominate undergraduate programs, but they constitute two-thirds of those in graduate journalism programs and half of those earning degrees in medicine and law. The numbers are similarly rising in traditionally male disciplines such as biology and mathematics.²⁷ There is "ample evidence that any performance gap between men and women is changeable and is shrinking to the vanishing point."²⁸ Clearly, women have caught up in education. But promotions still elude many women given the

persistence of glass ceilings. Only 17 percent of women in law firms become partners, though they have been receiving law degrees at about the same rate as men for more than twenty years.²⁹

Curiously, education no longer matters as much as it once did in narrowing the gender wage gap. In fact, professional women make less than their nonprofessional counterparts vis-à-vis men. The median income for a woman who worked full time in 2004 was 76 percent of their male counterparts, whereas professional women received 3 percent less than this.³⁰ There are a few exceptions that seem promising, most notably a study revealing a salary gap in favor of young women working in New York City and Dallas.³¹

Women, however, remain burdened with what sociologist Arlie Hochschild calls the "second shift," meaning doing the housework and being the children's primary caregiver. In the late 1990s, women still do the majority of their family's child care and household duties.³² Meanwhile, in the countries with national child care, more mothers work, the gap between men's and women's wages is smaller, and there are lower poverty rates among single mothers.³³ A World Economic Forum study placed the United States seventeenth out of fifty-eight nations in measuring the gender gap, finding that little economic opportunity exists for U.S. women.³⁴ None of the countries in similar standing were industrialized. Lesotho, Swaziland, and Papua New Guinea joined the United States in lagging far behind other nations given the wage inequalities in the private sector, the lack of paid childbirth leave, and little state-sponsored child care.

Family life imposes enormous costs on most women, including lower incomes and higher risks of poverty than men or women without children. Even more than sex discrimination, this "mommy tax," as author Ann Crittenden calls it, exposes women to higher risks of poverty in old age or in the event of divorce. But sex discrimination and the mommy tax are one in the same. Some of the women who cannot afford to work and care for children do drop out of the workforce given how little flexibility there is in the workplace.³⁵

Rather than making this a personal or individual choice—a battle between husband and wife, or a contest between mother and child—the state needs to step up. As Crittenden argues, "feminism needs a fresh strategy." After thirty years of liberation, most women continue to do nearly all the parenting work. Instead of making change happen on a personal, household-by-household level, structural changes should occur in law and society.

The European nation-states give families more child care services than anywhere else in the world.³⁶ But laws only go so far. Faced with balancing a career and children, European women are having fewer children. In Italy,

where the birth rate is the second lowest in the world, women do not have more children, a professor of statistics found, largely because of how few of their husbands help out with housekeeping and child rearing. Only 6 percent of Italian men “always” or “often” do household chores. “Many women cannot face the dual burden of going out to work,” as one article explains, “and looking after an extra child. They have to give up one of those two options: they usually decide to sacrifice the extra child.”³⁷ Italy was no exception. Social science studies reveal the same juggling act in other industrialized European nations.³⁸

Meanwhile, U.S. laws have not gone as far as those in the European nation-states.³⁹ The absence of a strong welfare state makes life harder for all employees, not just women. New public policies and laws protecting women, in particular, and the family, in general, are needed. A 2004 Bureau of Labor report showed that 89 million of the 122 million employees in the private workforce have less than seven days of paid sick leave that they can use to take care of sick children, spouses, or elderly parents.⁴⁰ Over 70 percent of the private workforce cannot spend any paid sick leave time taking care of their dependents.

Neofems and “Mommy Myths”

Given how little women’s pay inequity has changed and how much home and child care women still do, compounded by the fact that women have more than achieved educational parity, why hasn’t the women’s movement rebounded? In the 2006 anniversary edition of *Backlash*, Susan Faludi tells us we are living in an era of new traditionalism.⁴¹ Back in the 1980s, the press made statements like “You’re more likely to be killed by a terrorist than to kiss a groom!” Or “your biological clock will strike midnight, and you’ll turn into a barren pumpkin.”⁴²

All this changed in 1991 when the Clarence Thomas Supreme Court confirmation hearings contributed to a new sense of urgency about sexual discrimination in the workplace. Anita Hill’s testimony emboldened working women, fostering a fresh sense of solidarity among them. Emily’s List, a fund-raising organization for Democratic female candidates, raised an unprecedented six million dollars for thirty-nine women. By 1992, dubbed the “Year of the Woman” by Democrats, the Senate tripled its number of women members to six, and the House added nineteen for a total of forty-seven women Representatives, most of whom were Democrats.⁴³

But, the Republicans recovered quickly. By 1994, they went on the offensive with a two-punch strategy, visibly supporting women while advocating a return to their traditional roles. First, House Speaker Newt Gingrich gave

five of the top seven posts on the National Republican Congressional Committee to women, showing their commitment.⁴⁴ Second, vice presidential candidate Dan Quayle, protesting that “[a] feminist army . . . had invaded our culture,” tried to appeal to traditionalism.⁴⁵ While this symbolic posturing combined with “let’s-turn-back-the-clock appeals in the media did not have the adamancy of the backlash ‘trend’ stories of the 1980s,” writes Faludi, the Republicans, and the so-called neofems or women advocating traditionalism helped foster a new cultural climate in the United States.⁴⁶

This change manifested itself in two conflicting messages. Conservative intellectuals of both sexes, the Christian right, and mainstream media championed the traditional nuclear family, particularly motherhood; whereas the Hollywood film and television industry and the Madison Avenue advertising industry recast some of “the fundamentals of feminism in commercial terms.”⁴⁷ Faludi herself received offers to brand everything from blue jeans to breast implants. And as she quoted Alexis de Tocqueville’s statement “I know of no notion more opposed to revolutionary attitudes than commercial ones.”⁴⁸

These conflicting messages within popular culture obscured the conservative/progressive political divide about the women’s movement. It was by idealizing the American family and turning feminism into a commodity, Faludi maintains, that a supposedly new women’s movement became described as an “opt-out revolution.” In this movement, women no longer want to “conquer the world.”⁴⁹ They no longer roar.

The neofems focused on a few women who chose to leave the workplace. “Why don’t women run the world?” asked journalist Lisa Belkin. To her it was simple—because “they don’t want to.”⁵⁰ Or as another women explained on a *60 Minutes* television interview, more and more of these liberated women who supposedly “had it all” regret their “choice.” Having it all wasn’t enough. And as a result “female careerists were forgoing their fat salaries (though not their husbands’) in favor of the stroller-pushing suburban life.”⁵¹

But who were the masses behind this revolution? How many women could even afford to opt out? The number is exceedingly small—unrepresentative of the female workforce. In 2001, 36 percent of women with college degrees stayed home with a child under one year old versus 32 percent in 1995.⁵² “This hardly amounts to a revolution,” as one journalist put it “It’s not even necessarily a steady trend.”⁵³

Given how few women these numbers represent, the question is not how could this happen, but how could the Republicans make believe women wished it had happened to them. Why did the term “opt-out revolution” resonate? Why did this new traditionalism that idealizes those in the upper socioeconomic stratum capture the public imagination? Did this idea reflect

the cultural mentality that characterizes a society built on a growing chasm between the rich and the poor, where only the former are credited and applauded for their choices? The journalist Caitlin Flanagan, who turned her own "choice" into a personal opt-out story for the *Atlantic Monthly*, admitted that she had a nanny.⁵⁴ Caitlin opted out of the workforce, but she did not make motherhood a full-time job. The opt-out revolution reveals an acceptance of the early twenty-first century income inequality divide.⁵⁵

What makes the stay-at-home mommy bubble burst even louder is that while the educational and economic elite heralds motherhood, the poor, particularly women of color, are criticized for staying home with children. The same decade that witnessed the promotion of traditional families also witnessed the passage of welfare reform.⁵⁶ Politicians found that many voters liked the idea that women on welfare be put to work. While some Democrats had reservations about the 1996 Welfare Reform Act, Republicans and Democrats alike overwhelmingly supported its reauthorization in 2005.⁵⁷ And when governors across the country implementing this reform tell their voters that women who do not work enough hours will have their benefits cut, there is little to no public outcry. The double standard about motherhood is glaring. Highly educated women should opt out of the workforce, while women on welfare must enter it. Dependency depends on one's socioeconomic status, which is closely correlated with race, though the gendered economic fallout of divorce does not follow race or class lines.

Sex: That "One Word Surprise"

The present political climate blows few winds for change. The existing civil rights structure for women and people of color is not amenable to much of an architectural overhaul. Built on a foundation of negative rights, Title VII of the Civil Rights Act establishes not what the employer can do for you—the employee—but rather what he or she is prohibited from doing to you. An employer, for instance, cannot fire a woman for having a child.⁵⁸ But this does not mean that the employer has to consider this child when planning her work schedule.

Women were an afterthought when Title VII of the Civil Rights Act was constructed.⁵⁹ How was it that Title VII of the Civil Rights Act of 1964 applied to women? It was Howard K. Smith who sprang the one-word surprise—*sex*—that made Title VII inclusive of women. By the fall of 1963, the John F. Kennedy administration and Congress began drafting Title VII. While many states had what were commonly referred to as Fair

Employment Practice Commissions, this national statute contained a regulatory commission called the Equal Employment Opportunity Commission (EEOC). The EEOC is a five-member commission that has the authority to hear complaints and investigate charges of discrimination in the public and private sectors. It can subpoena witnesses, require companies to keep records, and ask these companies to write reports periodically about their progress in hiring women and people of color.⁶⁰

The EEOC, however, was not given as much power as other quasi-judicial agencies like the National Labor Relations Board (NLRB). A legislative compromise stripped this new agency of its cease-and-desist authority. If the EEOC had cease-and-desist authority, it could have ordered employers to stop certain discriminatory practices immediately as well as preventing them from continuing these practices in the future. It also diminished much of the EEOC's structural apparatus as a quasi-judicial agency.⁶¹ While the EEOC kept its prosecutorial powers, gaining the authority to file civil suits in federal district court to prevent employers from committing future violations, as well as the power to reinstate an employee and the recovery of back pay for women and people of color who faced discrimination, it could not investigate, try, and punish these employers.⁶² The EEOC had less power than all other quasi-judicial agencies.

The Civil Rights Act passed in the spring of 1964. The EEOC opened its doors scarcely a year later on July 2, 1965. Only one of its five commissioners was female, and no women became members of the professional staff. None of this helped make the EEOC any less cautious about its new ban on sex discrimination. The commissioners did not arrive at a new consensus about sex discrimination during this critical precedent-setting time. Racial discrimination topped the EEOC's priority list.⁶³

None of the EEOC's ambiguity about sex discrimination stopped women workers from filing complaints. From the beginning the EEOC was "inundated by complaints from sex discrimination that diverted attention and resources from the more serious allegations by members of racial, religious, and ethnic minorities."⁶⁴ Between 1970 and 1989, whereas the caseload in all federal courts grew by 125 percent, the employment discrimination caseload grew by twentyfold to 2,166.⁶⁵ This figured quadrupled again less than a decade later. In 1989, there were 8,993 employment discrimination matters filed in federal courts, and by 1997 the number jumped almost fourfold to 24,174. By 2004 one in every ten cases on federal court dockets involves a question of employment discrimination.⁶⁶ "At the century's end," said law professor Thomas Kohler, "the United States has more formal employment law than ever before."⁶⁷

Further, Title VII discrimination cases affected wrongful discharge actions that benefited all employees. Employment-at-will shields most hiring/

firing decisions from legal challenge. An employer can hire or fire an employee for no reason at all. Before 1980, what were called wrongful discharge actions were almost unknown. But how was it that women and people of color could protest discrimination? How was it that they could challenge an employer's decision not to promote them or to fire them? State courts began to recognize this discrepancy. They began creating common law or judge-made unjust dismissal claims reigning in some employers and reducing the reach of the employment-at-will doctrine. Wrongful discharge actions for all employees were born. Civil rights legislation was not just good for African Americans, Latinos and Latinas, white women, and other women of color, but all employees, particularly older white men in white-collar positions.⁶⁸ By 1990, federal laws protected all employees against age and disability discrimination.

Enforcing these rights was a different matter. Under Presidents Ronald Reagan and George W. Bush, senior, the federal bench became more conservative. It became less reluctant to enforce Title VII, particularly if it involved disparate impact and not intentional discrimination. The federal courts were no longer upholding the 1971 landmark decision of *Griggs v. Duke Power Co.*, which created the disparate impact analysis test that measured the discrepancy between how employers treated men and women in or applying for the same positions.⁶⁹ Regardless of an employer's motivation, the fact that certain job requirements, such as physical tests for police officer applicants, excluded more women than men was evidence of discrimination.

The Democratic Congress was aware of the federal courts' reluctance. After the Anita Hill debacle, amendments were passed in 1991 that bolstered Title VII. Referred to as the "Anita Hill Bill," these amendments to the Civil Rights Act created jury trials and made compensatory and punitive damages available in cases alleging intentional discrimination. The legislation therefore created an enforcement mechanism, "encourage[ing] citizens to act as private attorney generals."⁷⁰

While the amendments have had mixed success in the federal courts, the post-1991 judicial developments did emit two rays of hope. The Supreme Court held in 2006 that all but trivial actions taken against a worker filing a discrimination claim must be considered illegal forms of retaliation. Workers who file discrimination complaints cannot be shifted to less appealing jobs, nor can they have their work schedule altered or changed.⁷¹

Meanwhile, two years earlier, a federal district court opened a door of opportunity for women, certifying the largest class-action employment lawsuit in history against the largest retailer in the world—Wal-Mart. Women can form a class, suing a company for discriminatory employment