WLJ
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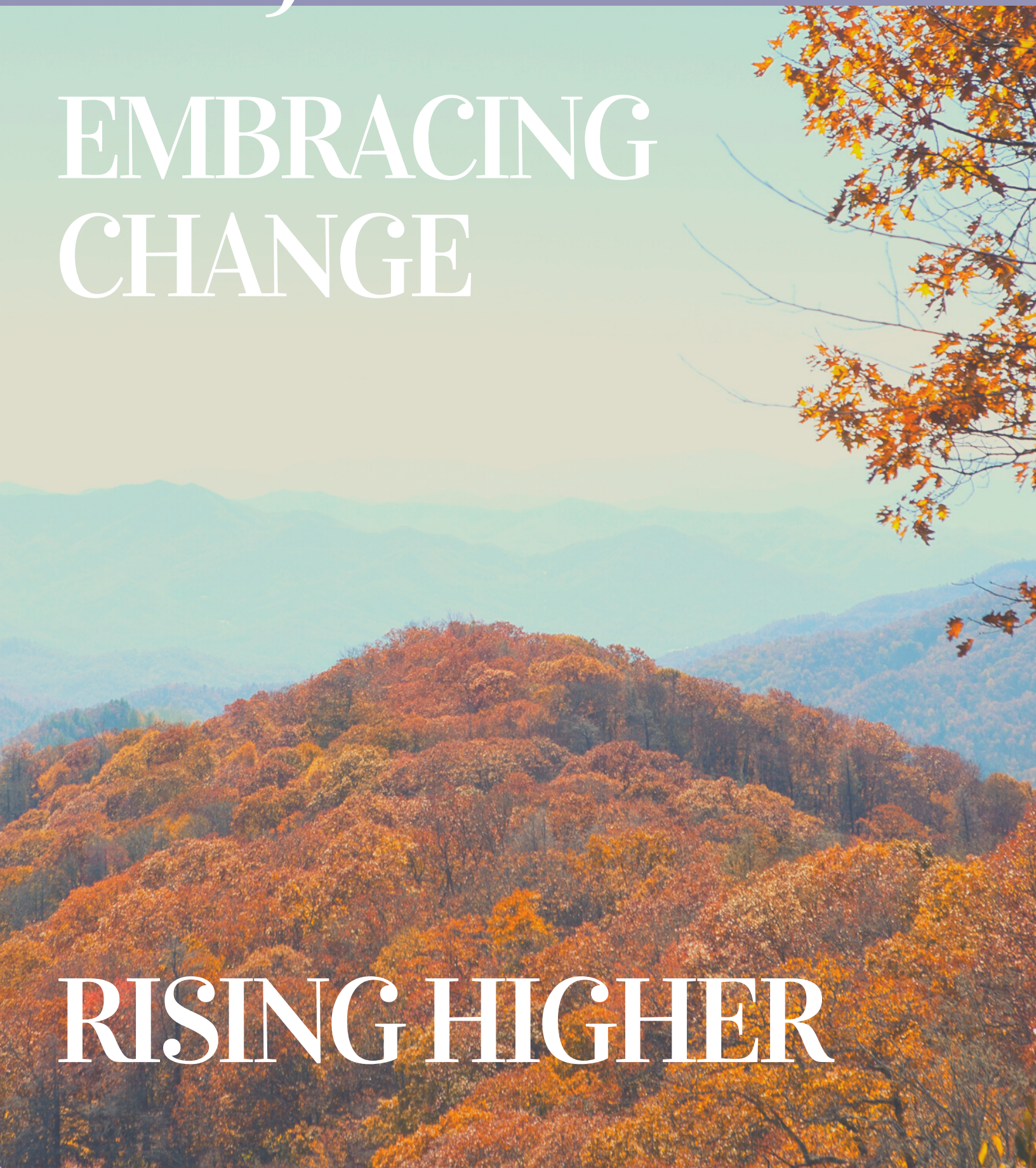
EMBRACING CHANGE



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WLJ WOMEN LAWYERS JOURNAL

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ABOUT WOMEN LAWYERS JOURNAL

EDITORIAL POLICY

The Women Lawyers Journal (WLJ) is published by the National Association of Women Lawyers (NAWL) members as a forum for the exchange of ideas and information. Views expressed in articles are those of the authors and do not necessarily reflect NAWL's policies or official positions. Publication of an opinion is not an endorsement by NAWL. Articles about current legal issues of interest to women lawyers are accepted and may be edited based on the judgment of the editor. Editorial decisions are based upon potential interest to readers, timelines, goals, and objectives of NAWL as well as the quality of the writing. The WLJ also accepts book reviews related to the practice of law. We reserve the right to edit all submissions.

Send submissions via email to iretamoza@nawl.org.

TO SUBSCRIBE

NAWL annual membership dues and sustaining sponsorships include a subscription to the WLJ.

Additional subscriptions or subscriptions by nonmembers are available for $55 in the U.S. and $75 outside the U.S. Back issues, where available, can be purchased for $15 each.

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National Association of Women Lawyers
Empowering Women in the Legal Profession Since 1899

About NAWL

The mission of the National Association of Women Lawyers is to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law. Since 1899, NAWL has been empowering women in the legal profession, cultivating a diverse membership dedicated to equality, mutual support, and collective success.

Benefits of Membership

• Access to career development and continuing legal education programs at reduced member rates. Programs include regional and national seminars designed to provide women lawyers with the skills and resources needed for long-term careers, including signature events like our Annual Meeting, Mid-Year Meeting, and General Counsel Institute.

• Opportunities to build a national network via programs that bring women together, from across the U.S., opening doors to an array of business development opportunities.

• Leadership development through NAWL committees, affinity groups, and strategic partnerships. There are ample opportunities for members to develop and exercise leadership skills.

• Advocacy via NAWL's Advocacy Committee and NAWL's Amicus Committee, which reviews requests for participation as amicus curiae in cases of interest to NAWL members. A sampling of recent issues includes enforcement of Title IX, employment discrimination, women's health, and domestic violence issues.

• Community outreach through Nights of Giving. Throughout each year NAWL hosts a series of philanthropic networking events across the country to support organizations whose mission is to empower women and children.

• Continued learning with the Women Lawyers Journal®. This national publication provides a forum for the exchange of information and presentation of articles about women in the law and society.

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EDITORS' NOTE

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Women are history makers. We are glass ceiling breakers. We are fierce and bold leaders. We are all of this and so much more. Whether it is advocating for better pay, leadership opportunities, or workplace flexibilities to achieve a life-work balance; vocalizing our renewed support for voting rights and reproductive justice; or creating pathways to more leadership roles in boardrooms and in our communities, we have been embracing change and rising higher.

Our work does not stop here, though. This issue of the *Women Lawyers Journal* (WLJ) highlights incredible women and organizations that seek to raise women to be seen and heard in a wide range of environments ranging from virtual law school classrooms, workplaces, corporate boardrooms, and the judiciary. As a first-generation lawyer, Shigufa Saleheen has broken down barriers in law school and the larger legal community and is now taking her passion and fervor to advocate for workers' rights and issues in her community. Then we have Daphne Delvaux, who is a brilliant senior trial attorney working feverishly to protect women's rights in the workplace. Daphne is also the founder of the Mamattorney, an online platform that educates women about their rights in the workplace.

Advocating for women's rights in the workplace not only paves the way for greater representation of women at higher leadership levels but also, in corporate boardrooms, which is something that Malli Garo has been working to achieve for almost two decades.

Now is the time to harness our power, advocate for equality and equity in the workplace, the legal profession, and society as a whole to ensure a sustainable and supportive future for all.

Thank you,

Courtney & Kirtana

“[W]E MUST PERFORM IN SUCH A WAY THAT THESE DOORS REMAIN OPEN AND LEAD TO THE OPENING OF STILL MORE NEW DOORS FOR FUTURE GENERATIONS OF WOMEN TO MARCH THROUGH – OBLIVIOUS TO THE FACT THAT SUCH DOORS WERE ONCE CLOSED!”

– PRESIDENT’S MESSAGE, MARY JO CUSACK, WLJ SUMMER ISSUE, 1985

MALLI GERO

Ensuring a Seat in the Boardroom

INTERVIEWED & WRITTEN BY COURTNEY WORCESTER

Two decades ago, **Malli Gero** did not envision her career path would include both co-founding an organization aiming to increase women on the boards of companies and serving as its president for seven years. Today, Malli's organization, evolved and rebranded to **50/50 Women on Boards**, works to achieve gender balance and diversity on the corporate boards of Russell 3000 organizations. I sat down with Malli to discuss the group's past achievements, its newest goals, and the challenges women face in serving on boards.

This conversation came on the heels of the United States Securities and Exchange Commission ("SEC") approving a Nasdaq Stock Market LLC's ("Nasdaq") proposal on August 6, 2021, that generally requires any company listed on the Nasdaq exchanges to either have at least two diverse directors on its board or explain why it does not.[1]

Nasdaq's proposal, along with laws in California,[2] are amongst the latest efforts to increase the number of board seats held by women and other diverse individuals.

Back in 2010, long before these rulemaking and legislative efforts were in the headlines, Malli and **Stephanie Sonnabend** (the former CEO and President of Sonesta International Hotels Corporation) set out to educate, advocate, and collaborate with corporations and others to increase the number of women holding boards seats. They formed the organization **2020 Women on Boards** ("2020 WOB") and set a ten-year goal: to achieve 20% women on the boards of companies in the Fortune 1000. When it met that goal in 2017, it set a new goal: to have 20% women on the boards of companies in the Russell 3000 index.

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1 "NASDAQ'S board diversity rule what NASDAQ-listed companies should know," available at https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf (noting that "Nasdaq-listed companies that do not have at least two diverse directors, including one who self-identifies as female and one who self-identifies as either an underrepresented minority or LGBTQ+ would provide an explanation for not doing so, and their explanation could include a description of a different approach.").

2 SB 826, passed in 2018, mandates that public companies headquartered in California have at least one women on their boards of directors by the end of 2019. AB 979 requires publicly held companies headquartered in the state to include board members from underrepresented communities which are defined as "an individual who self-identifies as Black, African-American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian or Alaska Native or who self-identifies as gay, lesbian, bisexual, or transgender."

When it achieved that goal in 2019, the organization rebranded itself to **50/50 Women on Boards** to reflect a new goal: gender balance and diversity on the corporate boards of the Russell 3000.

Earlier in Malli's career, she was the principal of Gero Communications, a boutique PR firm. Her initial introduction to the lack of women on corporate boards came when she was hired to help The Boston Club – an organization focused on connecting and elevating women to leadership positions – with its initiative to increase the number of women on boards for companies based in Massachusetts. In 2003, The Boston Club published its first Census of Women Directors and Executive Officers, which revealed that 50 of the largest 100 public companies in Massachusetts did not have women on their boards and 56 of them did not have women executive officers.[3] As disheartening as the numbers were, Malli realized that efforts focused only on one state would have a limited impact. To draw attention to the lack of women board members and the need for more, the story had to be bigger. As Malli explained, "**We need the story to get into the *Wall Street Journal*.**"

To that end, the **InterOrganization Network** ("ION") was formed in 2004 with the mission to increase the number of women appointed to corporate boards and the executive suite. Its members spanned eight regions in the US, from The Boston Club in Massachusetts to BoardBound by Women's Leadership Foundation in Colorado. ION's reports on the lack of progress women were making into US companies' boardrooms gained the wider audience that Malli had hoped for: in 2008, the WSJ published a story based on ION's work, **"Boards Are from Mars, But Women Executives Are Not."**[4]

Despite succeeding in drawing more attention to the issue, Malli was frustrated by the slow pace of actually getting more women onto boards. A walk with her neighbor Stephanie led to a new approach to the problem. "We decided to take a page out of the playbook of the green movement," Malli explained. The green movement focuses on grassroots efforts to get various stakeholders to change their ways. **"Such an approach had never been tried to increase the number of women on boards, so we decided to give it a go."**

In 2010, with this new approach in mind, Stephanie and Malli launched the 2020 WOB. Its first goal was to increase the percentage of women on US company boards to 20% or greater by 2020. At the time, women comprised less than 15% of board members.[5] Malli explained that it was importanto "set a realistic goal that recognized that board seats don't turn over that often."

Malli marshaled her PR expertise to help bring national awareness to 2020 WOB's work. In particular, she used social media to make sure that as many people as possible learned about the organization and its goal. Starting in 2012, 2020 WOB launched a National Conversation on Board Diversity where, instead of hosting an event at one central location, individuals across the country hosted events on the same date to discuss boardroom diversity. 2020 WOB then broadcast the meetings across social media, which increased attendance and brought national awareness to the organization.

Among the challenges that 2020 WOB faced was the misbelief that women do not want to serve on boards.

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3 "Measuring Success: The 2019 Census of Women Directors and Executive Officers of Massachusetts Public Companies," at 1, available at https://www.thebostonclub.com/wp-content/uploads/2019/11/1910-3282346-Boston-Club-Corporate-Census-2019_v8-for-Web.pdf (discussing the results of the 2003 census).

4 See Heidi Moore, "Boards Are From Mars, But Women Executives Are Not," (March 10, 2008), available at https://www.wsj.com/articles/BL-DLB-2110.

5 See "2020 Women on Boards Gender Diversity Index," at 3, available at http://5050wob.com/wp-content/uploads/2019/09/2016_GDI_Report_Final.pdf.

Malli recalls attending an event where a brave, male CEO stood up and said he supported having women on his board, but could not find any. **"Myself and several other women essentially climbed over tables to hand him the names of women we knew who would be willing to be directors."** Malli also explained that companies would agree to add a woman director, but they all wanted the same two or three women: their response was, "Okay, we want Sheryl Sandberg or no one."

Despite these challenges, 2020 WOB's efforts paid off. In 2017, three years ahead of schedule, women held 20.8% of the board seats of publicly traded companies.[6] That did not mean the 2020 WOB was done. Malli explained that **"20% meant progress, but it was never the end game."** The organization set its next goal: by 2020, women holding 20% of the board seats on publicly traded companies in the Russell 3,000 Index. The new goal recognized that "as a practical matter, smaller companies were lagging behind in adding women to their boards." 2020 WOB once again achieved its goal – a year early. By 2019, women held 20.4% of the board seats of companies on the Russell 3000 Index.[7]

The discussion and attention that 2020 WOB has brought to the issue of seating women on boards have also impacted companies going public. As Malli notes, "These are companies funded by venture capitalists, who are usually male." As a result, their boards tend to be predominately male. **From 2014-2016, of the 75 largest IPOs, 37 companies went public with no women on their boards and another 19 only had one woman.**[8] In contrast, by 2020 just one company went public without a woman director.[9]

Today, Malli "would be shocked that a company would go public in 2021 without at least one woman on its board."

2020 WOB's work is not done. In 2021, it launched a new campaign that calls for gender balance and diversity on the boards of companies in the Russell 3000 index. In recognition of this new goal, the organization rebranded itself as 50/50 Women on Boards.

As Malli reflects on the organization's success, she realizes that her thoughts on diversity efforts like Nasdaq's rule and California's mandates have evolved. **"Ten years ago, I would not have been supportive of government mandates to improve diversity, believing that companies needed to add women because it was the right thing to do and they needed to want to do it. Now, I think without such a 'kick' and left to their own devices, additional forward progress from companies will be too slow."**

Malli is also concerned about the COVID-19 pandemic's impact on the gains that women have made, particularly for the next generation of women in the pipeline to become directors. Malli said that it is no secret that when looking for a director, **"companies are looking for individuals who are at the top of their game."** Women who have transitioned to part-time employment to handle the pandemic's myriad effects on their families are likely to be disadvantaged. In other instances, the pandemic may cause women to shift their priorities and decide they do not want to devote the time and effort necessary to achieve that coveted first board seat.

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6 "2020 Women on Boards Exceeds 20% National Campaign Goal," available at https://www.businesswire.com/news/home/20171108005174/en.
7 "2020 Women on Boards Exceeds Historic Goal One Year Early," https://mgretailer.com/press-releases/2020-women-on-boards-exceeds-historic-goal-one-year-early/.
8 "Women: Not Present on IPO Company Boards," available at http://5050wob.com/wp-content/uploads/2020/03/2017-IPO-Report.pdf.
9 "Women Gain Steam on IPO Boards," available at https://5050wob.com/wp-content/uploads/2021/02/IPO_Report.pdf.

For women who do want to serve on boards, Malli has a wealth of advice, including:

- **Commit and decide that this is a path you want to pursue.** "Being on a board, especially a public company board, is a lot of work." Be realistic about the time commitment being a director will require and how this will fit with all of your other work and personal commitments. "Women can have it all but not at the same time."

- **Don't be shy.** "Exposure is key. You need to tell people that this is what you want." Make sure that decision-makers in your industry know you. Attend industry events and "work your network until you get the introductions you need."

- **Educate yourself.** Organizations like 50/50 Women on Boards and many others offer workshops that can help you develop the strategic tools necessary to obtain a board seat.

- **Serve on a non-profit board, a trade association board, or a state-run advisory board**. This provides valuable practical experience and is an especially helpful step for women beginning their careers who believe serving on a corporate board might be right for them.

Written By Courtney Worcester
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Co-Executive Editor | Women Lawyers Journal

PAY EQUITY

Recent Developments & A Further Call to Action

Written By

Joshua J. Fougere
Sidley Austin LLP | Washington, DC

Kathleen Geyer
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We write to highlight some recent developments on pay equity, to reiterate NAWL's commitment to the issue, and to again urge our members to do their part to create an equal and inclusive workplace for everyone.

We start with the ABA's *In Their Own Words: Experienced Women Lawyers Explain Why They Are Leaving Their Law Firms and the Profession*.[1] This recent and important study is a must-read. Through focus groups and individual interviews, the study offers a qualitative look at the experiences of women lawyers and their decisions to leave or remain in the legal profession.

It adds to a substantial body of research (including from NAWL) aimed at trying to better understand why women have entered the legal profession at the same rate as men for decades but continue to face "slow progress and departures" brought on by the persistent problems of "promotion disparity, pay disparity, and unequal distribution of assignments in firms."[2] The problems are even starker for women of color.[3]

The study's thesis is that, despite the benefits of "challenging and fulfilling" work, women are frustrated "over environments where their contributions were neither recognized nor rewarded" and report "blatantly unfair compensation systems that are rife with gender bias."[4]

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1 Joyce Sterling & Linda Chanow, Am. B. Ass'n, In Their Own Words: Experienced Women Lawyers Explain Why They Are Leaving Their Law Firms and the Profession(2021) https://www.americanbar.org/content/dam/aba/administrative/women/intheirownwords-f-4-19-21-final.pdf. Accessed 29 Aug. 2021.
2 Sterling & Chanow, *supra* note 1, at 3.
3 SeeDestiny Peery, Paulette Brown & Eileen Letts, Am. B. Ass'n, Left Out and Left Behind: The Hurdles, Hassles, and Heartaches of Achieving Long-Term Legal Careers for Women of Color(2020) https://www.americanbar.org/content/dam/aba/administrative/women/leftoutleftbehind-int-f-web-061020-003.pdf. Accessed 29 Aug. 2021.
4 Sterling & Chanow, *supra* note 1, at 2.

Over time, and through an "accumulation of a number of factors," these disparities (unsurprisingly) wear on women and become "strong motivations" for a major career change.[5]

The bulk of the study is dedicated to providing detailed explanations of the contributing factors, accompanied by powerful stories from the women interviewed.

To take just one example, the first factor discussed is **pay disparity.**

The authors report two themes: **"(1) women have a book of business but are paid less than men with lower books, and (2) men are getting credit for the work women are originating."**[6]

The study then elaborates with several anecdotes illustrating the still entrenched belief that men need to be paid more because they have to support a wife and kids. This same reasoning, however, does not seem to apply to working women: one attorney, for instance, was told that, despite supporting her family, the pay disparity at her firm was appropriate because her "husband can leave and go to work."[7]

The remaining factors discussed throughout the study are hyper-competitiveness that erodes collegiality while increasing isolation and sexist and racist behavior, being denied opportunities for career-building work, being passed over for promotion, and the expectation and challenge for women lawyers to "do it all" at work and at home.

The study concludes with 11 recommendations designed to counteract the various concerns and issues reported.

We hope that you will read the study in its entirety. What makes it particularly moving is the human side—the extensive reporting from women who have lived and experienced the inequities that we see frequently presented through raw numbers showing gender gaps in the legal profession. Hearing from more than 100 women about their experiences is compelling, and *In Their Own Words* furthers the case for why urgent and radical change is still needed across the legal industry.

Another development in 2021 reinforces our shared obligation to act. In June, Congress failed to pass the Paycheck Fairness Act. Although the Act had passed the House, and even though overwhelming empirical evidence of pay inequality exists, the Senate filibustered the bill and did not allow a vote. The lack of bipartisan support for such legislation is frustrating, to say the least, **but also underscores the ongoing need for NAWL and its members to continue to fight for pay equity.**

To that end, we want to close by again urging our members to take the **NAWL Pay Equity Pledge 2021**,[8] which was first announced at the 2021 NAWL Annual Meeting. Signing the pledge not only marks your support for pay equity but also includes making a promise to take concrete steps towards securing just and fair compensation. The findings documented in the ABA *In Their Own Words* and Congress's refusal to pass the Paycheck Fairness Act make it clear that **there is still a lot of work to do.**

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5 Sterling & Chanow, *supra* note 1, at 1.
6 Sterling & Chanow, *supra* note 1, at 8.
7 Sterling & Chanow, *supra* note 1, at 9.
8 NAWL Pay Equity Pledge, https://www.nawl.org/p/su/rd/survey=6512ac59-ea69-11eb-9fc7-bc764e103aae

2021 NAWL ADVOCACY

NAWL ADVOCACY COMMITTEE

The **NAWL Advocacy Committee** supports all of NAWL's advocacy efforts which include reviewing public policy matters of interest to NAWL members and recommending appropriate action for the Board's consideration. The Committee recommends board resolutions to determine NAWL's priority policy areas and advocacy issues, and the resolutions detail NAWL's history with a particular issue and or policy area and the parameters for NAWL's advocacy efforts.

In 2021, in support of the work and tireless efforts of the NAWL Advocacy Committee, the NAWL Board unanimously passed three resolutions.

VOTING RIGHTS

On August 27, 2021, the NAWL Board passed a resolution stating that NAWL remains steadfast in its commitment to protecting **voting rights** and access to the polls, and supports legislative efforts that would expand, restore, and strengthen equal access and protection of the right to vote for eligible voters, and opposes legislation that creates barriers preventing eligible voters from exercising their right to vote. Find the full resolution on pages 17 and 18.

REPRODUCTIVE JUSTICE

On September 13, 2021, the NAWL Board passed a resolution stating that NAWL commits its collective voice and the power of law to advance **reproductive justice** in the U.S. and around the world and to actively support, promote, and advocate for reproductive justice under the law. Find the full resolution on pages 19 and 20.

PAY EQUITY

On November 5, 2021, the NAWL Board passed a resolution affirming NAWL's steadfast support and advocacy for **pay equity** and equal economic opportunity in the legal profession and beyond. Find the full resolution on pages 21 and 22.

*If you're interested in being a part of the **NAWL Advocacy Committee** and supporting NAWL's advocacy efforts to advance women in the legal profession and advance gender equity under the law, reach out to us at NAWL@nawl.org.*

National Association of Women Lawyers
Empowering Women in the Legal Profession Since 1899

Resolution Supporting Voting Rights in the United States

The following resolution was approved by the Board of Directors of the National Association of Women Lawyers ("NAWL") on the 27th day of August, 2021.

WHEREAS the mission of the National Association of Women Lawyers is to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law;

WHEREAS the National Association of Women Lawyers was established in 1899 and has been empowering women in the legal profession and cultivating a diverse membership dedicated to equality, mutual support and collective success for over one hundred twenty years;

WHEREAS the right to vote is the cornerstone of our democracy, the right from which all other rights ultimately flow;

WHEREAS, the first advocacy initiative of the National Association of Women Lawyers was women's suffrage, and NAWL since has long supported and advocated for voting rights, particularly, the right for women to vote, and, more broadly, the "full enjoyment of all the rights and privileges of citizenship" for all U.S. citizens (*Women Lawyers Journal* 1911);

WHEREAS continuing this legacy, the National Association of Women Lawyers (NAWL) adopted a resolution on October 6, 2020, "to actively oppose structural racism and combat the impact of systematic racism by reiterating and reinforcing NAWL's commitment to racial equity and justice;"

WHEREAS the Fifteenth Amendment to the Constitution of the United States granted that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude; and

WHEREAS the Nineteenth Amendment to the Constitution of the United States granted that the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex; and

WHEREAS legislation that creates barriers preventing eligible voters from exercising their right to vote has a disproportionate impact on voting access for women and people of color;

NOW, THEREFORE, BE IT RESOLVED, the National Association of Women Lawyers remains steadfast in its commitment to protect voting rights and access to the polls; and

BE IT FURTHER RESOLVED, the National Association of Women Lawyers supports legislation

that would expand, restore, and strengthen equal access and protection of the right to vote for eligible voters, and opposes legislation that creates barriers preventing eligible voters from exercising their right to vote, which disproportionately impact women and people of color;

BE IT FINALLY RESOLVED that the National Association of Women Lawyers commits to advocate at the federal, state, and local level for laws and policies that will ensure all eligible voters may exercise their right to vote as guaranteed by the laws and Constitution of the United States, to partner with organizations who research and advocate for laws and policies that advance and support this fundamental right, and to offer programming and resources for our members and partners to provide education, discussion, exploration, and opportunities to advance laws and policies that have the effect of expanding, restoring, and strengthening voting rights and access to the polls.

National Association of Women Lawyers
Empowering Women in the Legal Profession Since 1899

Resolution in Support of Reproductive Justice

The following resolution was approved by the Board of Directors of the National Association of Women Lawyers on the 13th day of September, 2021.

WHEREAS, the mission of the National Association of Women Lawyers ("NAWL") is to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law;

WHEREAS the National Association of Women Lawyers was established in 1899, and, as an organization that is over one hundred and twenty years old, has the power of the law and advocacy experience to advance reproductive justice under the law;

WHEREAS, the National Association of Women Lawyers acknowledges that reproductive justice is fundamental for the dignity, equality, health, and well-being of every person, and that women cannot be fully equal under the law—or professionally, as lawyers—without bodily autonomy, including the legal right to decide whether, when, and by what means to have the number of children they desire, access to reproductive health care such as abortion, life-saving obstetrics care, pre-natal healthcare, and contraception, the ability to parent children in safe and sustainable communities, and freedom from gender-based violence and abuse based on an individual's biological sex and gender identity;

WHEREAS, the National Association of Women Lawyers supports the right of all individuals to have their privacy and personal autonomy respected, to freely define, choose, and exercise their own sexuality, to decide whether, when, and whom to marry, and to have access over their lifetimes to the information, resources, services, and support necessary to achieve the above free from discrimination, coercion, exploitation, and violence;

WHEREAS, the National Association of Women Lawyers believes in advancing these goals through advocacy and public policy that enables women and their families to thrive, and that NAWL must make its organizational commitment to reproductive justice under the law clear, intentional, and explicit;

WHEREAS, the National Association of Women Lawyers has long supported women's rights as fundamental human rights and advocated for these rights through amicus briefs, programming, collaborations with partner organizations, and by providing a forum for debate and advocacy since 1912 in the *Women Lawyers Journal*;

National Association of Women Lawyers
Empowering Women in the Legal Profession Since 1899

WHEREAS, the National Association of Women Lawyers recognizes matters of reproductive justice are equally economic justice issues, public health issues, and racial justice issues and that NAWL must continue its advocacy so that all persons, not just those in a position of privilege, may make their own reproductive and health care decisions with dignity;

WHEREAS, the National Association of Women Lawyers reaffirms its commitment to support "every woman's right to reproductive self-determination", and to promote "efforts to secure equal protection of the laws for . . . women by allowing the use of public funds for abortions" as resolved in 1988 together with its endorsement of *Roe v. Wade*; and

WHEREAS, continuing this legacy, on October 6, 2020, the National Association of Women Lawyers adopted a resolution that, "commits to actively oppose structural racism and combat the impact of systematic racism by reiterating and reinforcing NAWL's commitment to racial equity and justice," and recognizes that laws and legislative efforts on the federal, state, and local level create barriers and restrict access to reproductive healthcare, and that education creates systems of inequality disproportionately impacting people of color;

NOW, THEREFORE, BE IT RESOLVED, the National Association of Women Lawyers will not relent in our advocacy, and we will support individuals seeking abortions and fight for all individuals to get the care they need wherever they may be located;

NOW BE IT FURTHER RESOLVED, the National Association of Women Lawyers commits its collective voice and the power of law to advance reproductive justice around the world and to actively support, promote, and advocate for reproductive justice under the law by partnering with and supporting the efforts of international, national, and local organizations to further public policy, by encouraging lawmakers to take legislative action to restore and protect these rights, by exploring *pro bono* opportunities, and program content and speakers for NAWL, and by engaging the Amicus and Supreme Court Committees on these subjects.

National Association of Women Lawyers
Empowering Women in the Legal Profession Since 1899

Resolution in Support of Pay Equity

The following resolution was approved by the Board of Directors of the National Association of Women Lawyers on the 5th day of November 2021.

WHEREAS, the mission of the National Association of Women Lawyers ("NAWL") is to provide leadership, a collective voice, and essential resources to advance women in the legal profession and advocate for the equality of women under the law;

WHEREAS, NAWL was established in 1899, and, as an organization that is over 120 years old, has the power of the law and advocacy experience to advance the fundamental issue of pay equity under the law;

WHEREAS, NAWL maintains that advocacy to ensure pay equity and opportunity is critical for advancing NAWL's mission because pay equity is integral to economic equity and equity of opportunity, and therefore essential for women to thrive, advance, and be recognized for their contributions in the legal profession, and across all industries;

WHEREAS, NAWL recognizes the well-documented gender pay disparity that disadvantages women and further aggravates issues of racial, LGBTQ+, and age discrimination;

WHEREAS, NAWL acknowledges that increased investments in generalized diversity initiatives have directed much-needed focus to pay equity disparities but have not produced meaningful increases in representation, retention, or pay for women; furthermore, a broad focus on reaching equality without recognition of pay disparity and concerted efforts to remedy the disparity limit protections that would promote pay equity and the advancement of women in the workplace;

WHEREAS, NAWL expresses its goal to propose and promote policy initiatives aimed at closing this pay and economic opportunity gap in the legal profession and at achieving pay equity in the legal profession and beyond;

WHEREAS, NAWL has long supported pay equity through support of equal pay legislation, calls for employers to support an ongoing pay equity pledge, efforts of the NAWL Survey Committee against pay disparities and the gender pay gap in the legal profession, education on constitutional, and statutory rights and remedies related to pay inequities, and articles observing pay disparities and advocating for pay equity since at least 1945, as documented in the *Women Lawyers Journal*;

WHEREAS, in continuing this legacy, on March 6, 2020, NAWL adopted a resolution supporting the ratification of the Equal Rights Amendment to the United States Constitution, and in doing so acknowledged that "the people of the United States continue to experience the negative effects of the lack of political parity between men and women, including unequal opportunity and pay"; and

WHEREAS, NAWL believes that an integral part of addressing pay inequity and creating equal economic opportunity includes continuing the commitments outlined in its October 6, 2020, *Resolution on Racial Equity & Justice* that "commits to actively oppose structural racism and combat the impact of systematic racism by reiterating and reinforcing NAWL's commitment to racial equity and justice."

NOW THEREFORE BE IT RESOLVED, NAWL calls for detailed data collection to allow for a more robust and nuanced analysis of pay equity issues and to identify "root cause" issues that contribute to the gender pay gap in all industries such as childcare, caregiving responsibilities, parental leave, mentorship, and systems of evaluation and promotion issues, as well as such issues specific to the legal industry including origination credit, matter responsibility, client contact, and client succession planning;

NOW BE IT FURTHER RESOLVED, NAWL remains steadfast in its commitment to advocate for and support pay equity and equal economic opportunity to advance women in the legal profession, and advance equality for all under the law;

NOW BE IT FURTHER RESOLVED, NAWL commits to advancing pay equity by continuing its efforts to ensure that this issue is recognized nationally as one of utmost importance, provide ongoing direct support in the form of amicus briefs and other forms of advocacy, promote research on root causes, and identify best practices for employers that have been proven to reduce the effect of such issues on women's advancement, achievement, and pay; and

NOW BE IT FURTHER RESOLVED, NAWL commits to continuing its leadership through its collective voice and the power of law to advance pay equity and equal economic opportunity by producing the NAWL Survey, which serves to inform and educate the legal industry on the persistent economic and opportunity disparities in the legal profession, and by partnering with and supporting the efforts of national, state, and local organizations to further relevant public policy; by encouraging lawmakers to take legislative action to establish and support pay equity and equal economic opportunity; by exploring *pro bono* opportunities, and program content and speakers for NAWL related to pay equity issues; and by providing ongoing direct support in the form of amicus briefs by engaging the Amicus Committee on pay equity under the law.

The ERA: *To Be or Not to Be* – That is the Century's Long Question

Written by Galit Kierkut & Kirsten Silwanowicz

Photo from the Everett Collection, Canva Pro Designs

The Equal Rights Amendment ("ERA") is a constitutional amendment that proposes to grant equality to all people, regardless of their sex.

The ERA has been one of the most controversial and challenged Amendments to the Constitution. It has existed for nearly one hundred years and has only recently received enough votes by the states for ratification as of January 2020. However, whether ratification has actually occurred and is valid is still an outstanding question for the United States. The ERA has had a torrid history since its inception and has evolved with the country.

Some important key points to know about the ERA are as follows:

- The ERA included a seven-year ratification time limit clause, but it was extended by Congress to June 30, 1982.[1]
- Both the U.S. House of Representatives and the U.S. Senate have to pass an Amendment to the Constitution by a two-thirds vote in order to enact the ERA.
- Ratification to make the ERA an Amendment of the Constitution requires 38 out of 50 states, a three-fourths vote of the states.
- States certify an Amendment by passing it through their legislatures or a state convention but do not require a signature by the state Governor.[2]

1 https://www.history.com/news/equal-rights-amendment-failure-phyllis-schlafly
2 https://www.smithsonianmag.com/history/equal-rights-amendment-96-years-old-and-still-not-part-constitution-heres-why-180973548/

1920s: A Call for Gender Equality

The ERA began with the first wave of feminists in the early 1900s with the suffragists. The Amendment was first initiated in 1923 by Alice Paul[3] at Seneca Falls during the celebration of the 75th anniversary of the 1848 Woman's Rights Convention.[4] The Amendment was called the "Lucretia Mott Amendment" at the time and **promised that men and women shall have equal rights throughout the United States and every place subject to its jurisdiction.**[5]

The National Women's Party persuaded Susan B. Anthony's nephew, Republican Representative Daniel Anthony, Jr. of Kansas, and future vice president to Herbert Hoover, Charles Curtis, to introduce the earliest version of the ERA to Congress in 1923.[6] The Joint Resolution was introduced on December 13, 1923, that proposed a 20th Amendment to the U.S. Constitution that would guarantee equal treatment regardless of sex.[7] **However, "despite repeated reintroduction, the ERA got nowhere in the face of continued opposition from the labor and Progressive movements."**[8]

The 1940s: The Words We Know Today

In 1943, Alice Paul proposed a change to the wording of the ERA in order to align the verbiage with the Fourteenth Amendment.[9]

It was known as the Alice Paul Amendment and read as we all know it today: **"Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."** It was introduced in every session of Congress between 1943 and 1972.[10]

1970s: States Ratify, Opposition Builds

Without success in the early 20th century, the second wave of feminism attempted again to ratify the ERA. Under the leadership of U.S. Representative Bella Abzug of New York and feminists Betty Friedan and Gloria Steinem, it won the requisite two-thirds vote from the U.S. House of Representatives in October 1971. However, it was quite a struggle to get there. "In 1970, Democratic Rep. Martha Griffiths of Michigan brought the ERA to the floor of the House by gathering 218 signatures from her colleagues on a discharge petition."[11] A discharge petition is governed by the discharge rule, which provides a means for members of the House to bring to the floor for consideration a public bill or resolution that has been referred to committee but not reported.[12] This was a necessary political move by Rep. Griffiths because she needed to "bypass the pro-labor committee chair, who had blocked hearings for twenty years."[13]

On March 22, 1972, the ERA was approved by the U.S. Senate with a 91.3% majority[14] and sent to the states[15] for ratification.

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3 https://www.history.com/news/equal-rights-amendment-failure-phyllis-schlafly
4 https://www.equalrightsamendment.org/the-equal-rights-amendment
5 *ibid.*
6 https://www.smithsonianmag.com/history/equal-rights-amendment-96-years-old-and-still-not-part-constitution-heres-why 180973548/
7 *ibid.*
8 *ibid.*
9 https://www.history.com/news/equal-rights-amendment-fail-phyllis-schlafly
10 *ibid.*
11 https://www.smithsonianmag.com/history/equal-rights-amendment-96-years-old-and-still-not-part-constitution-heres-why-180973548/
12 https://sgp.fas.org/crs/misc/R45920.pdf
13 https://www.smithsonianmag.com/history/equal-rights-amendment-96-years-old-and-still-not-part-constitution-heres-why-180973548/
14 https://www.history.com/news/equal-rights-amendment-fail-phyllis-schlafly
15 https://www.history.com/this-day-in-history/equal-rights-amendment-passed-by-congress

Hawaii was the first state to ratify the ERA, with over 22 states ratifying in the first year it was introduced.[16] In 1972, the ERA had enough support to be ratified and become a part of the Constitution.[17] At this time, it was on track to be the 27th Amendment of the U.S. Constitution.[18] But the pace slowed as opposition began to organize – only eight ratifications in 1973, three in 1974, one in 1975 and none in 1976."[19]

However, even with the slowdown of the ratification process, both the Democratic and Republican parties had made it a part of their platforms and continued to do so in 1976.[20] The ERA had the support of the majority of the public during the years it was up for ratification.[21]

Then, like a hurricane, the conservative anti-ERA advocate Phyllis Schlafly came into the picture. She started a revolution in opposition to the ERA, using some of the same techniques and playing on the same fears that had generated female opposition to women's suffrage.[22] She created two different organizations to halt the progress of the ERA: STOP (an acronym for "Stop Taking Our Privileges") ERA and the still-active conservative interest group Eagle Forum.[23]

One of Schlafly's main arguments as to why the ERA should be voted down was because of how non-specific the language was in the ERA. She argued that broad language in a Constitutional Amendment led to open interpretation in the courts which would act to eliminate any government distinctions between men and women.[24] She spread her beliefs that the ERA could open the door to allowing courts to decide on controversial issues, such as **"mandatory military service for women, unisex bathrooms, unrestricted abortions, women becoming Roman Catholic priests, and same-sex marriage."**[25] She also posited that women would lose their right to alimony and child support.[26] Schlafly further argued that there was already enough protection for women under the law particularly given the Civil Rights Act of 1964 (which banned sex-based employment discrimination).[27]

However, the true crux of her argument was **"that greater sex equality would lead to a moral decline in society by changing the roles that women had traditionally held,"**[28] which meant **"marriage, home, husband and children."**[29] Despite her official position on the ERA, Schlafly was a working woman as well, simply by her advocacy against the ERA. It is ironic that the very thing she was fighting against would have provided her with even more benefits in the long run.

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16 https://www.equalrightsamendment.org/the-equal-rights-amendment https://www.history.com/news/equal-rights-amendment-fail-phyllis-schlafly
17 The ERA Won. At Least in the Opinion Polls, Mark R. Daniels, Robert Darcy and Joseph W. Westphal PS Vol. 15, No. 4 (Autumn, 1982), pp. 578-584 (7 pages) Published By: American Political Science Association.
18 https://www.history.com/news/equal-rights-amendment-failure-phyllis-schlafly
19 https://www.equalrightsamendment.org/the-equal-rights-amendment
20 The ERA Won. At Least in the Opinion Polls, Mark R. Daniels, Robert Darcy and Joseph W. Westphal PS Vol. 15, No. 4 (Autumn, 1982), pp. 578-584 (7 pages) Published By: American Political Science Association.
21 https://www.smithsonianmag.com/history/equal-rights-amendment-96-years-old-and-still-not-part-constitution-heres-why-180973548/
22 https://www.equalrightsamendment.org/the-equal-rights-amendment
23 https://www.smithsonianmag.com/history/equal-rights-amendment-96-years-old-and-still-not-part-constitution-heres-why-180973548/
24 *ibid.*
25 *ibid.*
26 https://www.history.com/news/equal-rights-amendment-fail-phyllis-schlafly
27 https://www.equalrightsamendment.org/the-equal-rights-amendment
28 https://www.history.com/news/equal-rights-amendment-failure-phyllis-schlafly
29 https://www.smithsonianmag.com/history/equal-rights-amendment-96-years-old-and-still-not-part-constitution-heres-why-180973548/

Other protests about the ERA were based on states' rights, arguing that the ERA was a federal power grab, and business interests such as the insurance industry opposed a measure they believed would cost them money.[30] Opposition was organized by various religious groups as well.

In the face of this opposition, pro-ERA advocacy was led by the National Organization for Women (NOW) and ERAmerica, which was a coalition of nearly eighty other mainstream organizations.[31] In 1977, Indiana became the 35th state to ratify the ERA.[32] Even after struggling to acquire thirty-five states for ratification, **"some states tried to propose or pass rescission bills, despite legal precedent that states do not have the power to retract their ratification."**[33] Nebraska, Tennessee, Idaho, Kentucky, and South Dakota all voted to rescind their support of the ERA.[34] The validity of whether rescission is even possible is still a debatable topic today.

The 1980s: Politicizing the ERA

As 1979 approached, and the ERA remained three states short, however, the Democrat-controlled Congress extended the ratification deadline to June 30, 1982.[35]

Tides turned quite quickly during the next election. **In the 1980 presidential campaign, Ronald Reagan made the ERA a partisan issue and effectively removed it from the Republican Party platform**.[36]

Because President Reagan politicized it, Republicans began to believe that there was something wrong with the ERA and therefore public support was the lowest in its entire life span.

Despite the change in the point of view of the Republican Party, pro-ERA activities increased and women continued to fight for the ERA. There was **"massive lobbying, petitioning, countdown rallies, walkathons, fundraisers, and even the radical tactics from the suffragists including hunger strikes, White House picketing and civil disobedience."**[37]

By the close of the 1982 deadline, the ERA lacked three votes for ratification to become the 27th Amendment to the U.S. Constitution.[38] On July 1, 1982, the day after the ratification deadline passed, at Phyllis Schlafly's victory party, the band played "Ding Dong, the Witch is Dead."[39]

The 1990s: Continued Stagnation

Even in the 1990s, the ERA was never ignored or forgotten. **"Congresswomen and men routinely introduced bills to disregard the ratification window or resubmit the amendment (or an updated version that would add the word 'woman' to the Constitution) to the states."**[40] However, none of these bills ever got any traction, even under Democratic administrations.

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30 https://www.equalrightsamendment.org/the-equal-rights-amendment
31 *ibid.*
32 *ibid.*
33 *ibid.*
34 https://www.history.com/news/equal-rights-amendment-fail-phyllis-schlafly
35 https://www.senate.gov/artandhistory/history/minute/Senate_passes_ERA.htm https://www.equalrightsamendment.org/the-equal-rights-amendment
36 The ERA Won. At Least in the Opinion Polls, Mark R. Daniels, Robert Darcy and Joseph W. Westphal PS Vol. 15, No. 4 (Autumn, 1982), pp. 578-584 (7 pages) Published By: American Political Science Association. https://www.equalrightsamendment.org/the-equal-rights-amendment
37 https://www.equalrightsamendment.org/the-equal-rights-amendment
38 https://www.senate.gov/artandhistory/history/minute/Senate_passes_ERA.htm
39 https://www.smithsonianmag.com/history/equal-rights-amendment-96-years-old-and-still-not-part-constitution-heres-why-180973548/
40 *ibid.*

The 2000s: State Ratification At Last!

Under the leadership of Senator Patricia Spearman, Nevada ratified the Equal Rights Amendment on March 21, 2017.[41] In April of 2018, in contradiction of Phyllis Schlafly's hopes and dreams, her home state of Illinois ratified the ERA as well. Finally, on January 27, 2020, the state of Virginia ratified the ERA with a passing vote from both chambers of the General Assembly.[42] **Finally, the ERA had enough support to become an amendment, but of course three of the ratifications came after the deadline.**

Why Do We Still Need the ERA?

There are many who question why we still need the ERA when the U.S. Supreme Court recognized sex discrimination as a violation of the equal protection clauses of the Fourteenth Amendment in the cases of *Frontiero v. Richardson* and the *U.S. v. Virginia*. However, because current sex-based discrimination precedent is dependent on interpretation by the Courts, it is always possible that the outcome in the Courts can be dependent upon the judges' opinions and personal ideologies, which can change with the political tides.

Having a basis in the Constitution to bring a sex-based discrimination claim would change the course of women's equality moving forward. The late U.S. Supreme Court Justice Ruth Bader Ginsburg said, **"Every modern human rights document has a statement that men and women are equal before the law. Our Constitution doesn't. I would like to see, for the sake of my daughter and my granddaughter and all the daughters who come after, that statement as part of our fundamental instrument of Government."**[43]

"If ratified, the ERA would give policymakers a two-year buffer period to bring existing laws into compliance, and after that policy that differentiated by sex would be permitted only when they are absolutely necessary and there really is no sex-neutral alternative," explains Professor Martha Davis at Northeastern School of Law.

And If You're Still Not Convinced....

- Without the ERA, the Constitution does not explicitly guarantee that the rights it protects are held equally by all citizens without regard to sex. The first — and still the only — right that the Constitution specifically affirms and applies equally to women and men is the right to vote.

- The equal protection clause of the 14th Amendment was first applied to sex discrimination only in 1971, and it has never been interpreted to grant equal rights on the basis of sex in the uniform and inclusive way that the ERA would.

- The ERA would provide a clearer judicial standard for deciding cases of sex discrimination. Not every state in the U.S. has ratified the ERA, and therefore federal and state courts are inconsistent in their rulings regarding claims of sexual discrimination.

- The ERA would provide a strong legal defense against a rollback of the significant advances in women's rights that have been achieved since the mid–20th century.

- The ERA would guarantee "Equal Justice Under Law" and work against writing, administering, or adjudicating laws unfairly on the basis of sex which could provide protection to ensure equal access to medical care.

41 https://ag.nv.gov/News/PR/2020/Attorney_General_Ford_Sues_to_Ensure_Equal_Rights_Amendment_is_Added_to_U_S__Constitution/
42 https://www.smithsonianmag.com/history/equal-rights-amendment-96-years-old-and-still-not-part-constitution-heres-why-180973548/ https://www.equalrightsamendment.org/the-equal-rights-amendment
43 Helena Hunt, Ruth Bader Ginsburg: In Her Own Words, (2018) at 14.

- Without the ERA, women regularly — and occasionally men — have to fight difficult, lengthy, and expensive legal battles in an effort to prove that their rights are equal to those of the other sex.

- The ERA would improve the United States' standing in the world community with respect to human rights. The governing documents of many other countries affirm legal gender equality, however imperfect the global implementation of that ideal may be.[44]

Finally, the most significant answer to this question is – **why should women be the only group in the United States who do not have explicit equality under the Constitution?**

However, all of the same objections that Schlafly raised in the 70s continue to resonate with the opponents of the ERA today, and most importantly, the concern that it will be used as additional support for abortion rights under the Constitution.

The Current Path to Ratification

With the final three states ratifying the bill, one path to ratification runs through legislation to remove the time limits placed on the ERA. In the 117th Congress, bills have been introduced in both the House (H.J. Res 17), and the Senate (S.J. Res. 1) to remove the time limit placed on the ERA. These bills have limited bipartisan support. The House bill was referred to the Subcommittee on the Constitution, Civil Rights, and Civil Liberties. The Senate bill is currently in the judiciary committee for review. The vote on the House bill has passed, however, the Senate bill has not yet been brought for a vote.[45]

There is concern that there will be legal challenges to Congress' ability to remove the time limit placed on the ERA. However, because the limit was in the introductory proposing clause rather than in the text, there is a strong argument that it will stand. **"A challenge to the constitutionality of the extension was dismissed by the Supreme Court as moot after the deadline expired, and no lower-court precedent stands regarding that point."**[46]

In the 117th Congress, the following legislation was proposed in support of the "Begin Anew" approach to ratifying the Equal Rights Amendment, as there is concern that the time limit removal will not pass the Supreme Court challenge that is bound to come.

Proposing an amendment to the Constitution of the United States relative to equal rights for men and women.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the several States:

Article —

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Section 3. This article shall take effect 2 years after the date of ratification.

44 EqualRightsAmendment.org
45 https://www.equalrightsamendment.org/incongress
46 *ibid.*

There has been no action on the Senate version.

However, in February 2021, the House proposed yet another version of the ERA as follows:

> *Article —*
>
> *Section 1. Women shall have equal rights in the United States and every place subject to its jurisdiction. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.*
>
> *Section 2. Congress and the several States shall have the power to enforce, by appropriate legislation, the provisions of this article.*
>
> *Section 3. This article shall take effect 2 years after the date of ratification.*

The proposal notes that in Section 1, the first sentence has been added to include women specifically and equally in the Constitution and to clarify the intent of the amendment to make discrimination on the basis of a person's sex unconstitutional. It is adapted from the text of Alice Paul's original.[47] The second sentence is identical to the wording of S.J. Res. 16 and the 1972 ERA.

In Section 2, the addition of "and the several States" restores wording that was supported by Alice Paul but that was removed before the amendment's passage in 1972. It affirms that enforcement of the constitutional prohibition of sex discrimination is a function of both federal and state levels of government.

This text has been referred to the House Committee on the Judiciary. No further action has been taken.[48]

What We Can Do

NAWL has been active in voicing its support for the ERA and has urged its members to lobby their representatives to support the time limit removal legislation as this is the fastest path to potential ratification. **We must continue to be vigilant, as it is incumbent upon us as women lawyers, to see this process through for future generations and the women who came before us.**

Written By

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Great Lakes Water Authority | Detroit, MI

47 https://www.equalrightsamendment.org/history
48 *ibid.*

SHIGUFA SALEHEEN:

A PASSIONATE ADVOCATE FOR WORKERS' RIGHTS & JUSTICE

Each year, NAWL presents a member of each graduating class of an ABA-approved law school with an outstanding law student award. This year, we are pleased to present an in-depth interview with one of the recipients – **Shigufa Saleheen.**

Shigufa, a recent graduate of LMU Loyola Law School in Los Angeles and passionate advocate for workers' rights, is thrilled to be embarking on her legal career this year as an Associate Attorney at Lebe Law, APLC where she will be representing employees and advocating against injustice in the workplace.

Written By Karen Sebaski
Holwell Shuster & Goldberg LLP | New York, NY

Path to Law School

Shigufa is a first-generation lawyer, as her decision to pursue a law degree made her the first in her family to do so. Shigufa's love for reading and writing, and innate passion for social justice issues, have always drawn her to the legal field. Although at first, embarking on a legal career felt unfamiliar and difficult to navigate, Shigufa quickly put herself out there and formed strong mentor relationships, which have made all the difference. As a result, Shigufa herself is a natural mentor and she looks forward to working with underrepresented communities to help **"make navigating the law and legal system more accessible."** She also is an advocate for community lawyering and rightly recognizes that **"when you teach one person, you're honestly educating everyone in their social circle"** about their legal rights.

Graduating Law School in a Pandemic

Like so many law students that graduated this year, Shigufa did not have the opportunity to return to campus after COVID-19 changed the world in the spring of her 2L year. That experience was **"disorienting"** at first, and Shigufa recognizes that **"maybe there's a part of me that still hasn't coped."** At the same time, however, remote learning "opened up borders" to opportunities for Shigufa–a true silver lining. For example, a virtual internship at Neighborhood Legal Services was one of her most rewarding law school experiences. Surprisingly, the Socratic method also got a pandemic boost, as Shigufa noted her professors called on students with greater frequency than during in-person classes. A joint graduation ceremony at SOFI stadium with other LMU students also was particularly meaningful.

Passion for Worker's Rights

As a recent graduate, Shigufa is focused on the plaintiff's side employment law. She is particularly attuned to the growing community of gig workers that often do not have access to health insurance and other benefits through their employers, a state of affairs that she believes has been exacerbated by the current pandemic. In her own words, **when "workers have strong rights and are not being exploited, our entire society is better for it."** Shigufa looks forward to building on her first client experiences at the Loyola Immigration Justice Clinic and as an intern for Neighborhood Legal Services, where she helped clients navigate a challenging and stressful landscape of unemployment benefits during the COVID pandemic.

Advice to Incoming Law Students

Shigufa's strong personal relationships were a key factor in her success and enjoyment of law school. Her advice for incoming students is to find mentors – **"the more people who know you, who can advise you, who will root for you, the better your experience will be."** Taking that advice to heart, during law school Shigufa was extremely active in her school's chapter of the Public Interest Law Foundation, South Asian Law Student's Organization, and the National Lawyers Guild, and served as an ABA liaison, which gave her the opportunity to plan diversity week events celebrating and uplifting minority and communities of color on campus.

In general, Shigufa is keenly aware of the difference that one's mindset can make, and notes that it is not uncommon for incoming women and minorities to feel as though law school and other institutions were not built for people like them; imposter syndrome can be a very real hurdle. Shigufa's advice: **"Go achieve the dream that got you into law school. You already made it through the hurdles that you faced up to this point. You'll get through this one too."**

2021 NAWL Outstanding Law Student Awardees

Presented to the outstanding law student in the graduating class of participating ABA-approved law schools who demonstrated academic achievement, exhibited motivation, tenacity, and enthusiasm; contributed to the advancement of women in society; promoted issues and concerns of women in the legal profession; and earned the respect of the dean and law faculty.

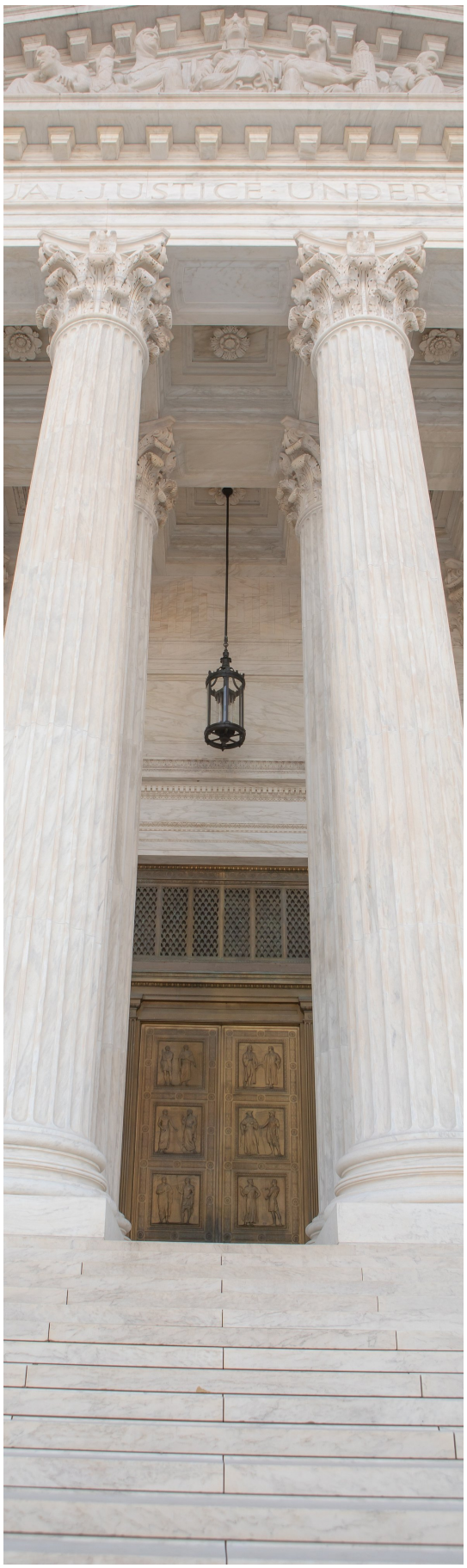
Anne Horissian	Penn State Dickinson Law
Ashley Faulkner	West Virginia University College of Law
Bianca Gutierrez	Penn State Law
Brooke Elizabeth Noack	University of Iowa College of Law
Carly Pannella	Stetson University College of Law
Carrie Thompson	University of Pittsburgh School of Law
Cristina Spear	University of Tennessee College of Law
Georgia Reid	Touro Law Center
Gina M. McKlveen	The George Washington University Law School
Hannah Hansen	Regent University School of Law
Jessica Feinberg	University of Virginia School of Law
Jessica Szuminski	University of Minnesota Law School
Katherine Payne	University of Georgia School of Law
Kenya Maria Glover	Campbell University School of Law
Maeve Dineen	Case Western Reserve University School of Law
Marisa Pizana	Vermont Law School
Mary Humphreys	Fordham University School of Law
Maxine (Faisant) Mahabub	University of Connecticut School of Law
Megan Cauda	Quinnipiac University School of Law
Molly Harwood	Vanderbilt Law School
Nina Rodriguez	Rutgers Law School
Olivia Patenaude	University of Wyoming College of Law
P. MacKenzie Miller	Mercer University School of Law
Patricia L. Pfeiffer	Southern Illinois University School of Law
Rachel Hileman	Duquesne University School of Law
Samantha Gagnon	St. John's University School of Law
Samantha Galina	University of Richmond School of Law
Sanchita Mukherjee	University of Maine School of Law
Sarah Abutaleb	University of Maryland School of Law
Shigufa Saleheen	Loyola Law School
Stephanie Padilla	UNM School of Law
Whitney Amber Petrie	Drexel University Thomas R. Kline School of Law

2021 SELMA MOIDEL SMITH WRITING COMPETITION WINNING ESSAY

MERITORIOUS DIVERSITY

An Analysis of the Relationship Between Diversity in State Judiciaries and Judicial Selection Methods

WRITTEN BY
MADELYN COX-GUERRA



The development of a diverse and inclusive judiciary is vital to the implementation of justice. Diversity among judges is severely lacking, continuing an imbalance in how the law is implemented. This results in unjust and unequal outcomes. State judge selection methods that promote diversity and inclusion can help establish the equality necessary for just outcomes under the rule of law.

This essay argues that merit-selection systems designed to be inclusive are the best method of increasing diversity in state judiciaries, thus incorporating the equality necessary for just outcomes under the rule of law. Part I reviews the importance of diversity and inclusion in state judiciaries. Part II analyzes state judicial selection systems for their ability to advance diversity and inclusion.

PART I

The Importance of Diversity and Inclusion to State Judiciaries

Diversity & Inclusion

There are three overarching reasons a diverse and inclusive judiciary is vital for a fair and equal justice system. First, **impartiality: a judiciary built of people with many backgrounds establishes a wider range of viewpoints and backgrounds present, which increases the likelihood that judges will judge impartially.** A judiciary constructed of homogenous judges becomes an echo chamber of judicial opinions and decisions, and there is a greater probability their shared viewpoint is partial. When the judiciary is diverse, judges' opinions are reviewed by other judges with differing backgrounds, which tests the impartiality of their decisions. Furthermore, a wide range of views and identities means that no one background and perspective becomes overly dominant and taints the judiciary with false objectivity.

The second reason is **representation**. This does not mean that judges of specific identities vote uniformly in alignment in favor of those who share their identities. **Rather, judicial representation creates a diverse judiciary that better serves a diverse population because the judges share more common experiences with their population.**

Third, **public confidence** in the judiciary is positively impacted by judicial diversity. Public confidence is an oft-cited measure of judiciary legitimacy: **if the public does not view the courts as just, equal, and impartial, then the court has no legitimacy in the eyes of the public.**

A diverse and inclusive judiciary is impartial and representative. Additionally, the perception of equality stems from the ability of citizens to cross-compare legal cases and see consistent results. **A judiciary that is representative and impartial treats citizens equally, which contributes to public confidence. Impartiality, representation, and public confidence all indicate that a judiciary is in fact, just.**

Establishing impartiality and representation necessitates a structural change. Dr. Sherrilyn Ifill, the President and Director-Counsel of the NAACP Legal Defense and Educational Fund, Inc. (LDF) calls this **structural impartiality**. Representation is a vital piece of impartiality as a structure, rather than individual impartiality. Ifill argues for structural impartiality in her essay "Judging the Judges: Racial Diversity, Impartiality, and Representation on State Trial Courts." Ifill examines how "the very suggestion that judges can represent a community counters the traditional view of judges as impartial decision-makers."[1]

1 Sherrilyn A. Ifill, Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts, 39 Boston College L. Rev. 95, 95–99 (1997).

However, this "prevailing" view of impartiality is flawed, as white judges are assumed to be impartial despite being equally able to judge with racial bias.[2] The Fourteenth Amendment asserts that citizens have the right to "equal protection of the laws."[3] Ifill argues that the Fourteenth Amendment grants the right to individually and structurally impartial judges: **"structural impartiality exists when the judiciary as a whole is comprised of judges from diverse backgrounds and viewpoints."**[4] Diverse judiciaries ensure that several **"viewpoints fosters impartiality by diminishing the possibility that one perspective dominates adjudication."**[5]

Thus, **"diversity then functions as a check on bias."**[6] This interpretation of the Fourteenth Amendment is sound because the Supreme Court has **"identified the exclusion of African Americans, Mexican Americans and women from the jury venire as damaging to the impartiality of the jury venire."**[7] Structural impartiality means the method of judicial selection should enhance diversity and inclusion.

The Importance of State Judges

This essay focuses on state judges because they are a key measure of judicial diversity.

Most importantly, research from The Gavel Gap indicates that **"state courts handle more than 90% of the judicial business in America."**[8] Furthermore, federal courts fill judges with the established and constitutional approval system. In contrast, states have control over how their courts are filled. This means changing how states choose judges is far easier and more likely than changing the federal court appointment system. State courts also have general jurisdiction, "which means they can hear questions of state and federal law."[9] **Also, in examining diversity among law students, attorneys, and judges, it is clear that diversity among judges is the most lacking.** This is alarming because, of those in the Bar, judges have the most power and influence. Overall, an increasing number of law students are from diverse backgrounds, and law schools tout their inclusivity. Despite this, there has been limited progress in diversifying in the legal market and on the bench. The Gavel Gap calls this pattern "the shrinking door."[10] **Women have made up 50% of students in law schools in the past 20 years, but are only 36% of attorneys and 30% of judges.**[11]

Diversity and inclusion in state courts have the most impact on equality, justice, and the rule of law.

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2 *Ibid.* at 98.
3 U.S. Const. amend. XIV.
4 Ifill, *supra* note 1, at 99.
5 *Ibid.*
6 *Ibid.* at 120.
7 *Ibid.* at 121.
8 Tracey E. George & Albert H. Yoon, The Gavel Gap, Who Sits in Judgement on State Courts? 3 (American Constitutional Society, ed., 2016).
9 *Ibid.*
10 The Gavel Gap, American Constitution Society (last visited Jun. 1, 2020), https://gavelgap.org.
11 *Ibid.*

The Current State of Judicial Diversity

Unfortunately, state judiciaries are not as diverse as the actual population. Data from The Gavel Gap demonstrates that the demographics of state judges are far removed from the demographics of the populations they serve. **White men, only 30% of the national population, comprise 58% of judges on all state courts.**[12] The over-representation of white men is conjoined with the underrepresentation of women of color, men of color, and white women. **Women of color, in particular, are the least represented: 8% of state judges are women of color even though 19% of the national population is women of color.**

The available data on state judge demographics are limited to race and binary gender. The queer community has been overlooked by these studies, even though queer issues are at the forefront of state law. Very few states collect demographic information, which makes it difficult to analyze representation overall, and especially the queer community, in state courts. Lambda Legal prepared a report called "Diversity Counts: Why States should Measure the Diversity of their Judges and How They Can Do It." This report reveals the lack of any comprehensive studies on queer diversity in state courts, as well as identifying that only four state courts systematically collect and publish data on court diversity: California, New Jersey, Georgia, and Texas.[13]

Only one state, California, collects data on gender identity and sexual orientation.[14] **The available information collected by Lambda Legal reveals that, of all the state judges in the country, there are only 2 openly trans judges, 10 openly gay judges, and no openly bisexual or HIV-positive judges.**[15] Furthermore, 9 of 10 of the openly gay judges were appointed, and all by Democratic governors.[16]

The chasm between judges and those they pass judgment on is even greater when examining criminal trials and state supreme courts.

Criminal trials are significant because they make up a significant portion of state court cases, can result in incarceration or capital punishment for defendants, and, as will be discussed in Part II, are heavily impacted by the judicial selection method. A study by The Gavel Gap published in 2016 reported the results of researchers at Vanderbilt University and the University of Toronto, who analyzed the demographics of 10,000 judges serving in state courts.[17] The majority of cases heard in state court are traffic cases, at 54%.[18] Criminal cases make up 21%, civil cases make up 18%, family cases make up 6%, and juvenile cases make up 1%." [19] While traffic cases might not be the most impactful, criminal, civil, and juvenile cases have a massive impact on the population, particularly African American, Indigenous, and people of color.

12 *Ibid.*
13 Yuvraj Joshi, Lambda Legal & American Constitution Society, Diversity Counts: Why States should Measure the Diversity of their Judges and How They Can Do It 1 (Eric Lesh ed., 2016).
14 Eric Lesh, Anthony Michael Kries, Ryan Krog, & Alison Trochesset, Justice Out of Balance: An Empirical Examination of Support for LGBT Rights Claims in State High Courts 2003-2015 14 (Lambda Legal ed., 2015).
15 *Ibid.*
16 *Ibid.*
17 George & Yoon, *supra* note 8, at 3.
18 *Ibid.* at 4.
19 *Ibid.*

The separation between the demographics of state judges and the populations they serve is even greater when examined in the context of criminal law. This is because a significant portion of criminal defendants are people of color, while most trial judges are white. **This paradigm from The Gavel Gap demonstrates that 80% of trial judges are white, compared to 30% of criminal defendants**. Meanwhile, 44% of defendants are Black and 24% are Hispanic, while 7% of judges are Black and 5% are Hispanic.[20] These are, respectively, 37 and 17-point differences.

Likewise, state supreme court diversity is significant because they establish the most important decisions in each state and establish the highest level of binding precedent for state law. **Even in 2019, "25 states began . . . with an all-white supreme court."**[21] The Brennan Project 2020 Update demonstrates a comparison of the national population to supreme courts. Again, we see that white men are overrepresented while people of color are underrepresented. **The national population of white women is similar to the demographic composition of white women on state supreme courts: 31% of the national population and 29% of state supreme court justices.**[22]

While 23 states have all-white state supreme courts, only 6 states (California, Connecticut, Minnesota, North Carolina, Oregon, and Washington) have supreme courts in which the percentage of people of color is greater than that of the state population.[23] California and Connecticut use merit selection for supreme court justices, but Minnesota, North Carolina, Oregon, and Washington use nonpartisan elections to select supreme court justices.[24]

There is a clear lack of impartiality and representation in the state judiciary, which is destructive to equality. This destruction is evidenced by a lack of public confidence. **A 2003 research report funded by the Department of Justice found that, when asked questions about the "trustworthiness" of the courts, white respondents said yes 78% of the time, while Black respondents said yes 66% of the time and Latino respondents said yes 71% of the time.**[25] In 2015, Lambda Legal published the results of a national survey examining the treatment of the queer community by schools and the justice system. **It found that only 27% of trans people and 33% of LGBT people of color trust the courts.**[26] That same survey of the queer community found that, of respondents who had been in courts in the five years prior to the survey,

20 *Ibid.*
21 Douglas Keith, Patrick Berry & Eric Velasco, The Politics of Judicial Elections, 2017-18: How Dark Money, Interest Groups, and Big Donors Shape State High Courts 2 (The Brennan Center for Justice ed., 2019).
22 Janna Adelstein & Alicia Bannon, State Supreme Court Diversity—February 2020 Update, The Brennan Center for Justice (Feb. 20, 2020), https://www.brennancenter.org/our-work/research-reports/state-supreme-court-diversity-february-2020-update.
23 *Ibid.*
24 George & Yoon, *supra* note 8, at 17.
25 David B. Rottman, Randall Hansen, Nicole Mott, & Lynn Grimes, Perceptions of the Courts in Your Community: The Influence of Experience, Race, and Ethnicity, Final Report 70 (U.S. Department of Justice ed., 2003).
26 Lesh, Kries, Krog, and Trochesset, *supra* note 13, at 12.

19% said they heard a court employee "make negative comments about a person's sexual orientation, gender identity or gender expression," while 16% said their "sexual orientation or gender identity was raised in court when it was not relevant," and 15% "reported having their HIV status raised in court when it was not relevant."[27] The divide between the makeup of the national population and state judges demonstrates the need for diversity and inclusion in the state judiciary.

PART II

An Analysis of Judicial Selection Methods

This section is an analysis of both representation and impartiality. The three major types of judicial selection are **appointment systems, merit systems, and elections.** Many studies conclude that, of those three, merit systems are the most conducive to diversity. Still, the impact of any merit system in increasing diversity depends largely on if the system is designed inclusively. The appointment system is less able to promote diversity than the merit system, but studies have not found it to be associated with an increase in impartiality. Meanwhile, judicial elections pose a danger to the impartiality of judges.

The Merits of the Merit System

There is a consensus among case studies that merit selection is the best at increasing the diversity of the state judiciary.

A report by the American Judicature Society examined race and gender data from all-state appellate and 10% of state trial judges serving in 2008, with special attention to the fact that 45% of judges were appointed to life terms before the method of selection was legally changed, an overlooked fact that can skew data.[28] **The study concluded that judges who were women or people of color were most often selected through the merit system (54.3% and 48.5%).**[29]

A critique of merit systems is that they can create high barriers for entry that prevent women and minorities from being selected. There are many different types of merit systems, so the way the system is designed changes the impact on diversity and inclusion. Lambda Legal promotes a merit system with the following standards:

- "Judicial nominating commissions that consist of commissioners who are professionally, politically, geographically, and demographically diverse. Diversity in nominating commissions should be established by statute when possible.
- Clearly established and published procedures for how judicial nominating commissions will operate, with written ethics procedures for conflicts.
- Mandatory implicit bias training and diversity training for commissioners.
- Clarity and prioritization of diversity in the nominating process and strategic recruitment measures to ensure wide distribution of judicial opening announcements.
- Transparency in the application and interview process, and published record keeping."[30]

27 Lambda Legal, Protected, and Served? A National Survey Exploring Discrimination by Police, Courts, Prisons, and Schools Against LGBT People and People Living with HIV in the United States x (Lambda Legal ed., 2015).
28 Malia Reddick, Michael J. Nelson & Rachel Paine Caulfield, Racial and Gender Diversity on State Courts: An AJS Study, 48 Judges' J. 28 (2009).
29 *Ibid.*
30 Lesh, Kries, Krog, & Trochesset, *supra* note 13, at 26.

In order to maximize inclusivity, merit systems must be designed to prioritize diversity. Local advocacy groups are important because they can influence the selection commission, promote minorities for vacancies, record the appointment histories of authorities so they can be held accountable, and encourage good data collection practices.[31]

Merit systems that prioritize diversity benefit from being more inclusive while still retaining high standards for selection. This establishes impartiality while avoiding barriers to an election. **In particular, people of color face major barriers to an election, mainly "racially polarized voting and the inability to raise sufficient campaign funds."**[32] These barriers also apply to the queer community and religious minorities. A report by the Center of American Progress titled "More Money More Problems: Fleeting Victories for Diversity on the Bench" found that **in judicial elections white incumbents had a 90% re-election rate, compared to 80% for black incumbents and 66% for Latino incumbents.**[33] Beyond that, elections force judges to consider their reelection when they decide cases. The perceived impartiality of merit systems is shown true through polling data. **The Greenberg Quinlan Roser Research Inc. poll found that a total of 70% of respondents were in support of a proposed merit selection policy with a public vote on judge retention each term; 37% of them "strongly supported" the policy.**[34]

Merit systems also seem fairer to citizens. Not only do merit systems result in the most diversity in comparison to elections and appointments, but the maintenance of selection criteria is also very impartial, as demonstrated in polling data in support of merit systems.

Judicial Elections Threaten Impartiality

Judicial elections, in general, are criticized for destroying the impartiality of state judges. They are the poorest selection method for increasing diversity. First, elections impact judicial decision-making through the influence of campaign donors and the electorate. Second, the negative impact of judicial elections is demonstrated by a lack of public confidence.

Yet, a case study of four states (New York, California, Texas, and Mississippi) by the Open Society Foundation demonstrates that minority groups, in jurisdictions where these groups are a significant portion of the population, sometimes prefer elections. However, **"although many minority communities favor judicial elections over the appointment process, neither of these selection models does an adequate job of promoting minorities to the bench".**[35] The report explains that this is because some diverse jurisdictions have increased their judicial diversity through elections.

31 *Ibid.* at 27.
32 Alton & Ali, *supra* note 27, at 10.
33 Michele L. Jawando and Billy Corriher, More Money More Problems: Fleeting Victories for Diversity on the Bench 7 (Center for American Progress ed., 2015).
34 Greenberg Quinlan Roser Research Inc., Justice at Stake-State Judges Frequency Questionnaire, The Brennan Center for Justice (2002), https://www.brennancenter.org/sites/default/files/2001%20National%20Bipartisan%20Survey%20of%20Almost%202%2C500%20Judges.pdf.
35 Kimberly Alton & Grace Ali, Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selection Models and their Impact on Diversity x (Lawyer's Committee for Civil Rights Under Law ed., 2005).

The conclusion of the report focuses on how the **"success of each model in creating racial diversity depends heavily on the political clout and influence held by the different minority groups within their local communities."**[36]

Campaign donors have enormous sway over judges. **Candidate fundraising accounts for 71% of judicial election spending, and interest group spending accounts for 27% of spending.**[37] Interest group spending is not transparent. In fact, 82% of the biggest campaign spenders did not disclose the sources of their funds, according to an analysis from a 2015-2016 Lambda Legal study.[38] One particular example mentioned in the study is the Judicial Crisis Network, an organization that funds campaigns for conservative judges, that spent $3.8 million on state court elections in 2018.[39] The Brennan Center published data on judicial elections in a report entitled "The Politics of Judicial Elections, 2017-18: How Dark Money, Interest Groups, and Big Donors Shape State High Courts." **It found that interest groups "accounted for 27[%] of all supreme court election spending," which is far higher than the 19% average for public interest spending in congressional elections.**[40] Many state regulations do not require the disclosure of campaign donors.[41]

In 2009, there was a massive increase in state judge campaign financing: state supreme court justice campaigns raised a total of $206,941,244.[42]

Donors have so much power because the supreme court cases *Citizens United v. FEC* in 2010 and *Republican Party of Minnesota v. White* in 2002 eliminated many restrictions on elections, with disastrous results. The *Citizens United* case ruling eliminated limitations on election spending, and the *Republican Party of Minnesota v. White* is a Supreme Court ruling that **"struck down rules barring judicial candidates from announcing their positions on legal and policy issues"** on First Amendment grounds.[43] It allowed organizations like the Judicial Crisis Network to file lawsuits **"attempting to expand the ruling to strike other ethics rules that limited campaign conduct like canons prohibiting direct solicitation of contributions and rules designed to limit partisan political activity, like permitting judicial candidates to endorse or campaign for other candidates for political office."**[44] That ruling allowed special interest groups and political parties to even send questionnaires to judges asking about their positions on contested issues, like LGBT rights, abortion, and religious rights.[45]

36 *Ibid.*
37 Keith, Berry, & Velasco *supra* note 20, at 5.
38 Lesh, Kries, Krog, & Trochesset, *supra* note 13, at 2.
39 *Ibid.*
40 Keith, Berry, & Velasco *supra* note 20, at 1.
41 James Sample, Adam Skaggs, Jonathan Blitzer, and Linda Casey, The New Politics of Judicial Elections 2000-2009: Decade of Change 4 (The Brennan Center for Justice, ed., 2010).
42 *Ibid.* at 6.
43 Lesh, Kries, Krog, &Trochesset, *supra* note 13, at 21.
44 *Ibid.*
45 *Ibid.* at 20.

The tangible effect of donors' power is seen through studies on corporate and criminal law. An American Constitution Society study entitled "At Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions" concluded that there is a **"statistically significant, positive relationship between campaign contributions from business groups and justices' voting in favor of business interests"** based on their analysis of campaign funding and judicial opinion data from 2010-2012.[46] This relationship is specific to election as a method of selection, and not in election retention systems.[47] Disturbingly, the study finds that **"a justice who receives half of his or her contributions from business groups would be expected to vote in favor of business interests almost two-thirds of the time."**[48] In fact, an analysis of high court cases by the Center for American Progress found that, from 2000-2010, the six high courts with the greatest dollar amount of judicial campaign contributions (Alabama, Texas, Ohio, Pennsylvania, Illinois, and Michigan) **ruled in favor of corporations, in lawsuits between corporations and individuals, 71% of the time.**[49]

Regarding criminal law, there were two key findings from a study by the American Constitution Society that examined the impact of TV advertisements on state supreme court elections.

Researchers from Emory University Law took data from approximately 3,100 criminal appeals cases regarding violent crimes from 2008-2013 and examined the opinions.[50] First, "the more TV ads aired during state supreme court judicial elections in a state, the less likely justices are to vote in favor of criminal defendants."[51] **TV ads are significant because 82% of judicial election attack ads from 2013-2014 discussed criminal justice.**[52] Votes in favor of criminal defendants, regardless of the soundness of the ruling, are often used as fodder in attack ads. The impact on rulings is present, though "marginal:" a doubling of TV ads increases rulings against violent criminal defendants by 8%.[53] Second, "Justices in states whose bans on corporate and union spending on elections were struck down by *Citizens United* were less likely to vote in favor of criminal defendants than they were before the decision."[54] The study found that,in the 23 states with laws preventing union and corporate electioneering, there was an average **7% decrease in rulings in favor of criminal defendants after the *Citizens United* ruling.**[55] This is disturbing because, as mentioned in Part I, the majority of criminal defendants are people of color while the majority of trial judges are white. Elections exacerbate this disparitywith bias against criminal defendants.

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46 Joanna Shepherd, Justice at Risk: An Empirical Analysis of Campaign Contributions and Judicial Decisions 13 (American Constitution Society ed., 2013).
47 *Ibid.* at 15.
48 *Ibid.* at 13.
49 Billy Corriher, Big Business Taking Over State Supreme Courts 2 (Center for American Progress ed., 2012).
50 Joanna Shepherd & Michael S. Kang, Skewed Justice: Citizens United, Television Advertising and State Supreme Court Justices' Decisions in Criminal Cases x (American Constitution Society ed., 2014).
51 *Ibid.*
52 Kate Berry, How Judicial Elections Impact Criminal Cases 3 (The Brennan Center for Justice, ed., 2015) (https://www.brennancenter.org/sites/default/files/2019-08/Report_How_Judicial_Elections_Impact_Criminal_Cases.pdf).
53 Shepherd & Kang, *supra* note 49.
54 *Ibid.*
55 *Ibid.*

Additionally, the predicted response from the electorate changes how judges rule. A report titled *"Justice Out of Balance: An Empirical Examination of Support for LGBT Rights Claims in State High Courts, 2003-2015"* published by Lambda Legal reveals the results of the study done on the impact of judicial elections on LGBT claim rulings. This study used data from all cases regarding LGBT claims in state high courts from 2003-2015, totaling 127 cases.[56] The cases were then categorized as having verdicts that were "either favorable or unfavorable to LGBT rights."[57] There are two findings. First, **"state high courts whose judges stand for election are less supportive of LGBT rights claims,"** and second **"that lack of support for LGBT rights among state high courts with elected judges can be attributed to ideological factors playing a larger role in shaping judges' decisions on these courts"**[58] Regarding the first conclusion, there is a significant difference in how judges rule on LGBT issues depending on the judicial selection method. **Overall, judges in partisan elections vote in favor of LGBT claims 53% of the time, judges in nonpartisan elections vote in favor of LGBT cases 70% of the time, judges in uncontested retention elections vote in favor of LGBT cases 76% of the time, and appointed judges vote in favor of LGBT cases 82% of the time.**[59]

The second conclusion refers to the finding that judges are more likely to vote for LGBT issues when they are not participating in elections. **Conservative judges vote in favor of LGBT issues 20% of the time when selected by partisan elections, 37% of the time when selected by non-partisan elections, 42% of the time when selected by uncontested retention elections, and 57% of the time when selected through lifetime appointments or reappointments.**[60]

The pressure of partisan elections has a significant impact on how judges rule. Thus, since the method of judge selection alters decision-making, judge selection directly impacts impartiality. The process of being elected requires judges to respond to voters and donors rather than the law. There is a massive shift for conservative judges on LGBT rulings because of the Republican party's usual stance against LGBT justice issues. The explanation for this is that **"judges in states with contested partisan judicial contests inevitably feel pressure to curry favor with the political parties that helped elect them and likely feel pressure to rule in ways that will attract the political fundraising necessary to keep them in their jobs."**[61]

One could criticize this argument by stating it is biased towards judges that support LGBT issues. However, the study is truly focused on the disparity in voting across judicial selection methods.

56 Lesh, Kries, Krog, &Trochesset, *supra* note 13, at 21.
57 *Ibid.*
58 *Ibid.* at 1.
59 *Ibid.* at 22.
60 *Ibid.* at 24.
61 *Ibid.* at 15.

Regardless of how judges vote, whether in favor or against LGBT issues, when judges change their voting habits to prevent backlash from donors it indicates that the donors have sway over their decisions. Conservative judges often prioritize religious rights in LGBT cases, but that does not mean conservative judges do not examine each case fairly and independently. These judges have more freedom to rule with their convictions if appointed for life, compared to judges whose rulings are influenced by reelection. This is further demonstrated by the report's focus on the diversification of judges, not the increase of liberal judges.

The Lambda Legal report proposes "a commission-based appointment system of selecting judges based on merit."[62] A well-designed merit system is **"the best way to ensure due process, boost public confidence in the courts, improve the quality of justice and guard against money and political influence affecting judicial decision-making."**[63]

Secondly, the deterioration of equality resulting from judicial elections is further proven by its chilling impact on public confidence. A national bipartisan poll of 1,000 citizens performed in 2001 by the Greenberg Quinlan Roser Research, Inc. found that, while citizens generally expressed great confidence in state judges, they also expressed a great deal of concern about campaign donations.

In response to the question "how much trust and confidence do you have in courts and judges in your state?" 25% said "a great deal," 52% said "some," 16% said "just a little," and 5% said "nothing at all."[64] Only 1% responded saying they did not know enough about the court system.[65] In contrast, when responding to the question "how much influence do you think campaign contributions made to judges have on their decisions -- a great deal of influence, some influence, just a little influence, or no influence at all?" 36% of respondents said "a great deal of influence," and 40% of respondents said, "some influence."[66] **A total of 80% of respondents were in support of policies that eliminated private campaign donations in favor of public election funds; 57% of them "strongly supported" the policy.**[67] This data shows a significant majority of citizens that were polled feel that campaign donations threaten the impartiality of judges, and a majority also supports transparent campaign donations and merit systems.

Judges express less concern about donations' threat to impartiality. Greenberg Quinlan Roser Research Inc. performed a national bipartisan poll of 2,428 judges. In response to the question "how much influence do you think campaign contributions made to judges have on their decisions?" 4% of judges said "a great deal ofinfluence," 22% said "some influence," 20% said "just a little influence," 36% said "no influence at all," and 16% said, "don't know."[68]

62 *Ibid.* at 1.
63 *Ibid.*
64 Greenberg Quinlan Roser Research Inc., *Justice at Stake-State Judges Frequency Questionnaire*, 3 The Brennan Center for Justice (2002), https://www.brennancenter.org/sites/default/files/2001%20National%20Bipartisan%20Survey%20of%20Almost%202%2C500%20Judges.pdf.
65 *Ibid.*
66 *Ibid.*
67 *Ibid.*
68 Greenberg Quinlan Roser Research Inc., *supra* note 63, at 5.

Yet, the same poll found that 97% of the state Supreme Court justices felt pressure to raise money for their campaigns during election years, compared to 93% of judges in appeals courts and 92% in lower courts.[69]

To conclude, judicial elections, in addition to undermining diverse representation, make judges beholden to their donors and electorates.

CONCLUSION

Part I compared the gap in diversity between the population and judiciary to show the need for a more inclusive judicial selection method. Part II demonstrated that merit selection is the most inclusive selection method, while elections erode impartiality. The third selection method, judicial appointment, lacks the representation of merit selection even if it avoids the skewed judging that results from elections. Most states that use the appointive method rely on just the governor to choose the justices, though a few states need the confirmation of the state legislature.[70] Thus, the appointment system is not the best method for judge selection.

This essay concludes the best method is a merit system that includes input from diverse local Bar associations and a comprehensive diversity data system. Lambda Legal and Open Foundations both promote including local diverse Bar associations in the process.

This includes a diverse judicial nominating commission, implicit bias training for judges, a clear acknowledgment of the need for diversity, and a public and transparent application process. This also includes robust diversity data collection for a better understanding of judge diversity.

Ultimately, an inclusive merit system under the rule of law is the most conducive to diversity, which makes the judiciary more impartial and representative; **an impartial and representative judiciary is necessary for equality, which establishes justice and creates public confidence.**

This essay was submitted by Madelyn Cox-Guerra for the 2021 Selma Moidel Smith Writing Competition and was selected as the winning essay.

Madelyn Cox-Guerra is currently attending the University of Minnesota Law School.

69 *Ibid.* at 4.
70 Kimberly Alton & Grace Ali, Answering the Call for a More Diverse Judiciary: A Review of State Judicial Selection Models and their Impact on Diversity 10 (Lawyer's Committee for Civil Rights Under Law ed., 2005).

Ladies Who Law School

Ladies Who Law School is a weekly podcast hosted by two Texas-based law students, Haylie and Sam. This podcast serves as a community for everyone who ever thought *hmmm maybe law school seems fun.*

Written By Madison R. Flareau

How was the podcast first conceptualized?

Upon meeting for the first time at their law school orientation at Oklahoma City University School of Law, rising 1Ls Sam and Haylie were both equally as nervous and apprehensive for their law school journeys to begin. Both being 1st generation law students, they took to social media and various internet outlets in an attempt to conceptualize what they were getting themselves into and what to expect on day one. This is when they quickly realized that there was no "How-To-Guide" for law school, they were essentially flying blind into unchartered territory.

What do we wear on the first day of class? What is a case brief? What is this outlining thing that everyone talks about? IRAC? What? Do we only have one graded exam for the entire class? How does that even work? These were the questions that the ladies behind the podcast were searching for answers to no avail; much like many similarly situated soon-to-be law students across the nation.

It was then that the gap in the market was identified and the concept behind Ladies Who Law School, LLC was born. "We honestly sat down and created what we wanted from a consumer standpoint because that was exactly how all of this came to be. We were the consumer searching for this uncreated market" Sam began to explain.

As 1Ls still trying to figure out how to navigate their way through law school themselves, they knew taking on the task of starting a business was no small one. However, Haylie explained that she and Sam had lengthy conversations regarding if they thought they could handle being both full-time students and full-time business owners prior to the podcast ever launching. The ladies both emphasized that if they were going to take on this endeavor, it was all or nothing.

How do you both manage to be full-time students, business owners, and podcasters?

Haylie explained, "If you want to do anything, you have to truly commit yourself 100% to it and I feel like that is often forgotten. There are times when we are not perfect, there are times when we doubt ourselves, and of course, there are times when we are just so overwhelmed that we don't even know where to begin. But in all of those times, we are always drawn back to our community of incredible women that we have built around us and it's that support that undoubtedly keeps us going 100%."

"And I have to give major props to Sam here because she never lets us fall back on any promises we have made. Even if it's 1 am and we are exhausted and just need a break but have committed to X, Y, and Z the next day, Sam will always be there encouraging us to push through" she adds. "It's truly a team effort and we are constantly learning and evolving daily. That's the beauty in all of this, I never thought at 24 I would be getting ready to graduate law school and be a full-on business owner. That's the main motivation in itself."

Given the fact that you are now 3Ls and the primary focus behind the podcast has been your first-hand insight into law school in real-time, what are your plans for the podcast after graduation?

"This is definitely a work in progress but we are not going anywhere" Sam explained; "We have projects in process to get us to our next step with the brand, and frankly we knew at one point we would have to pivot if we wanted to continue to have a successful business."

As Sam and Haylie's law school journey is coming to an end as they are approaching their final semester this coming Spring of 2022 and are quickly immersed in bar prep, they explained how they are finally at a point in their business where they can begin to hire out and build their team around the brand.

Haylie explained, "This [business journey] has been a learning experience for us since day one, but honestly that's the true beauty in it. Not only [over the past three years] have we grown in our legal education and careers, but we have also become businesswomen and learned an entirely new set of skills that we never even imagined."

As Sam and Haylie reflected back on their journey to where they are today, they mentioned that they never imagined that Ladies Who Law School, LLC would be where it is today. They explained that they have found a true passion for their business, helping and empowering women in the legal field, and fostering an environment of female collaboration across the nation.

Haylie ended with "We never imagined we could create this 'LWLS world' that has helped so many, and for that reason, although we do have to grow and pivot at this point in our lives, we are not going anywhere. We are excited to continue this journey with you all and so excited for our growth to come."

Written By Madison R. Flareau
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Q & A

DAPHNE DELVAUX

The Mamattorney

Daphne Delvaux
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Interviewed By Kirtana Kalavapudi

Recently, I had the opportunity to speak to Daphne Delvaux, a senior trial attorney at Gruenberg Law in San Diego and the creator of **The Mamattorney**, an online platform providing legal education regarding workplace rights. Daphne is an advocate for women's rights, specifically mothers' rights in the workplace. She has an impressive track record of successfully representing employees in lawsuits against companies that violate workers' rights. As a mother of two young boys, Daphne truly understands the challenges of being a working mom and the importance of creating a village to support one another.

Could you tell us what inspired you to pursue a career in employment law with a focus on women's rights?

As a young woman, I experienced discrimination in the workforce. I was sexually harassed, paid less than men, and wrongfully terminated after I spoke up. Because I was so young, I thought that was just life as a working woman. **When I studied the law and became a lawyer, I learned that the law is a powerful tool to fight discrimination at work. It is the great equalizer.**

My client, an employee and usually broke has as much power compared to a multinational corporation. They can both win. They can both lose. But if my client wins, she wins big. This creates a deterrent effect on companies and generally makes sure they follow the rules. Our legal system is not perfect, but I do find that litigation is one of the greatest American systems. **Our system allows women to enforce their rights in courts and tell their stories to a jury. We give women their voices back.**

Once I became a mother, I learned how important it is for women to be supported during this stage of their lives. Often they have spent years working hard for an employer, and when they need their employer the most, their loyalty is not rewarded and they are left hanging. Women are frequently pushed out of the workplace, subtly or not so subtly after becoming mothers. Babies are a fact of life. Bosses just have to accept that. But becoming a mother does not render a woman useless. It often makes her more patient, resilient, and effective.

What are your thoughts on why law firms continue to face issues recruiting and retaining female lawyers?

The main issue in law is the system of billable requirements. I do not have billable requirements as a contingency lawyer. I do my job when I want to and I do it as efficiently as possible. **The system of billable hours incentivizes slow work and redundant work.** This is time that could have been spent with the family. It is an especially oppressive system for new mothers who need to take time for prenatal appointments, maternity leave, and pumping as well as mothers who need to take time off to bond with an adopted or foster child, to support a partner or surrogate through pregnancy, or to undergo IVF treatment. Often, women are punished for being a mother, so many of these women leave their firms at that time. When you think about it, this system is a form of gender discrimination. **The entire system of billable requirements needs to be uprooted.**

What are your thoughts on why law firms continue to face issues recruiting and retaining female lawyers?

When representing female clients, there are certain factors that female attorneys will pick up on. When a woman is terminated right after birth, I know how this impacts her emotional state, how this taints her bonding experience, how she will mourn the stress-free maternity leave she was entitled to. I know that it may affect her milk production and she may need to stop breastfeeding because of stress and the time it takes to show up for interviews for new jobs, which then takes her away from her newborn child.

Other clients take time off for miscarriage, IVF treatments, or to meet with an adoption agency. Too often, employers do not accommodate these time-off requests, and reprimand these women under strict attendance policies, often resulting in termination. I know that she will forever think back on that time as being betrayed during her most vulnerable moment. This is a narrative that I can encourage my client to tell, that male attorneys may not be able to because they have never had this direct experience. They may have had some exposure by watching their wives or relatives go through it, **but exposure is not experience.**

This experience is important because clients want to hire lawyers who understand them. Recently, a client hired me over a male attorney even though he had a much more impressive trial history than me. She explained that he just did not understand some of her experiences and that she felt like she was just a source of income for him, instead of a whole human being with complex needs. **When our clients come to us, they do not just want a big verdict or settlement, they want to be validated, they want to be guided. They want someone who can counsel them through a stressful litigation process.** When they are mothers, they want to make sure the process does not cause them so much anxiety that they have nothing left for their children. Many times, mothers feel overwhelmed by the legal process, which is yet another thing to add to their already long list of to-dos and stressors. Women lawyers are often the bridge between these clients and the firm. We soften the experience, we shield them from some of the aggression and conflict, and we listen to them. I am not saying men cannot do this, because often, they do. But I am often the lawyer hired over male attorneys because I am the first one to tell the client, "I'm so sorry this happened."

What are some immediate actions or steps that law firms can implement to encourage female lawyers to stay? And what are some mid and long-term actions or steps?

The most important action is to trust them. Let them set their own hours. Do not expect them to be at the office at 8 am. Allow them to finish the work when they have the time. We have seen during the pandemic that most of our job duties can be done remotely. Some firms did not like their employees no longer being in their control. While other firms were accommodating and transitioned their lawyers seamlessly. I have received many calls from female attorneys who received comments about children being home due to school closures and that those children are a distraction. Even during the lockdowns when the children were home, these women were held to the 9-5 mentality.

Parents and non-parents experienced the pandemic much differently. In many ways, the friction was exacerbated because parents had no access to childcare. Because of the school closures, many parents were forced to quit law. However, at the same time, online appearance and remote depositions made it also easier for others lawyers to balance their jobs with caregiving responsibilities. Because there was less time spent commuting or chit-chatting in the office kitchen, it was a true experiment in how our work can be done more efficiently.

Many law firms learned they do not actually need the expensive highrise office spaces, and that their staff is just as productive at home. This, in the long run, will make it easier for parents to succeed at their jobs, as it allows them more control and flexibility over their schedules.

Further, firms can set up an anonymous tip box to obtain suggestions from their associates to improve workplace practices e.g., propose a one-week flexibility trial period where associates can set their own hours to balance life with work.

On a long-term basis, firms need to rethink the mentality that more time at the office means the employee is a better and more committed worker. I am not able to spend all of my time at the office, but my work is done efficiently and competently. I usually log on after 7 pm to finish up my work. When women have children, the 3:30 pm through 7 pm timeframe is quite demanding. Children need to be picked up, fed, bathed, and put to bed. It is often the only time we can spend with them. Even if women leave at 5 pm, arrive home between 5:30 pm and 6 pm, they may only have an hour with their children. **To many women, this is not worth the bargain and they may leave the firm to open their own practice so they can choose when to work.** When mothers are given flexibility, they will work early hours, late nights, and generally whenever to get the job done. But do not ask them to spend all of their children's awake window at the office. Even though this is industry practice, it can be an impossible choice for many mothers.

Further, firms need to encourage men to take parental leave. One of the reasons men are hired more than women, and women are fired more than men, is because employers assume they will take maternity leave. If men take time off in equal measure, it will make it easier for women not to feel pressured to return to work right after having a baby. Men should also be encouraged to care for sick children. In the legal field, many men will only take a few days off for bonding leave. This needs to change. Often the firm culture does not allow men to be equal caretakers of the children. Make sure men are empowered to care for their children as much as women.

Lastly, when organizing networking activities or firm events, be mindful of family responsibilities. The classical mixer timeframe (5 pm - 8 pm) conflicts with family time. Hold events during office hours, or allow parents to bring their children.

What legislative or policy changes can we pursue to better support working parents?

We need to implement parental policies in courts. I was surprised to learn that judges have no obligation towards me, as a working mother. When I gave notice of my need for maternity leave, many judges did not move my trial date to accommodate my leave. Instead, they told me to just find another lawyer. This is unfair. It is essentially an adverse action because I am having a baby. If the case is about to go to trial, it is a case I am invested in and that is important to my career. The client also wants me to represent her at trial. **As a result, many women have to try cases right after birth. There should be a court rule that a trial can be continued on the basis of a request for parental leave.**

Generally, a policy we need is not only paid parental leave but flexibility upon return from leave. When the parent returns to work, the baby is not suddenly easier. In fact, the baby may become even more demanding. Expecting early morning appearances and perfect attendance at this stage is unreasonable and unhealthy. Allow parents to set their own hours within the first year of the baby's birth. When the children are school age, allow for flexibility during school breaks.

What are a few things that we can do to catalyze these legislative or policy changes?

Voting for the pro-labor side is the most important thing. File gender discrimination cases. These stories need to be told. The laws need to be enforced. Assert your own rights. We may be attorneys, but we are employees too. As a business owner, talk about changes in the law and have a collaborative environment where employees do not feel scared to be honest about their limitations.

Interviewed By Kirtana Kalavapudi
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2021 ANNUAL AWARDEES

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Vice Chairman, External Affairs and Chief Legal Officer,
AbbVie

Leadership Award

Shawn Ray White

Executive Vice President-General Counsel,
The Barack Obama Foundation

Public Service Award

Cheryl Thomas

Founder & Executive Director,
Global Rights for Women

Arabella Babb Mansfield Award

Nikaela B. Jacko Redd

Vice President, Legal and Compliance
Morgan Stanley

Virginia S. Mueller Outstanding Member Award

Su K. Suh

Pro Bono Racial Justice Counsel,
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Virginia S. Mueller Outstanding Member Award

Nicole Duckett

General Counsel & Vice President,
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M. Ashley Dickerson Diversity Award

Michael K. Hurst

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Lead By Example Award

Starbucks

President's Award

NAWL Welcomes New Members

Membership in the National Association of Women Lawyers has many advantages, among them, opportunities for continuing legal education, a subscription to the *Women Lawyers Journal*, leadership development, and professional networking with other members. **NAWL welcomes over three hundred new members as of June 2021** who joined to take advantage of these and many other member benefits.

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