

Summer 2005

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Recommended Citation

Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 Val. U. L. Rev. 859 (2005).

Available at: <https://scholar.valpo.edu/vulr/vol39/iss4/3>

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SEX DISCRIMINATION IN THE LEGAL PROFESSION: HISTORICAL AND CONTEMPORARY PERSPECTIVES

Audrey Wolfson Latourette*

I. INTRODUCTION

The legal and cultural barriers that confronted nineteenth century American women with respect to obtaining entrance to the legal profession were onerous. In an era in which religious mandates and cultural norms proscribed any role for women other than the proper sphere of mother and wife, and legal obstacles to owning property, voting, and keeping one's wages existed, the notion that a woman would depart from the sanctity of the home and enter the combative and powerful legal profession was viewed as anathema. The male bastion of jurisprudence overwhelmingly rejected the idea that the weaker, submissive sex could successfully undertake legal training and competently engage in advocacy in a public arena. While avocations such as teaching, nursing, and even medicine garnered some support as an extension of a woman's allegedly inherent nurturing qualities, the law, termed as "hard, unpoetic and relentless"¹ by nineteenth century attorney Clara Foltz, served as the antithesis of the acceptable feminine endeavor. Would be Portias, therefore, were generally excluded from law schools and found the alternate route to becoming lawyers, i.e., apprenticeships, difficult to obtain as well. Even when women successfully passed the bar exam, courts refused to grant them licenses and admit them to the profession. Women such as Lavinia Goodell, Belva Lockwood, and Clara Foltz exhibited extraordinary drive, tenacity, and wit as they engaged in a variety of legislative and litigation strategies designed to gain entry into the profession of law, despite being advised that such behavior was unseemly, even shocking, and unfit for the female character. Myra Bradwell, the esteemed editor of the *Chicago Legal News*, suffered an onslaught of legal rationales as to why she would be denied permission to practice law in Illinois: She was a married woman, and thus, deemed incompetent to contract. She was a woman

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¹ KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638-1986*, at 65 (1986).

for whom any civic duty and public performance was beyond the pale. Finally, in the inimitable language of United States Supreme Court Justice Bradley, her “natural and proper timidity and delicacy” rendered her unfit to pursue the profession.²

While some assert that the significant numbers of women in law school and in the profession commencing in the 1970s suggests that equality in the profession has been attained, a review of contemporary studies addressing sex discrimination in law and of recent litigation suggests otherwise. While unquestionably the sheer numbers of women attorneys in the courtroom, the classroom, and the boardroom exert a significant presence, gender bias in the profession persists. Cases encompassing sexual harassment claims, such as that evidenced in Barbara Denny’s lawsuit against Judge Edward J. Seaman, formerly of the New Jersey Superior Court, indicate that vestiges of gender stereotypes continue to deter women’s ascent in the legal profession.³ Issues of sex discrimination arise with respect to partnership decisions, such as that asserted in Nancy Ezold’s lawsuit against the Philadelphia firm of Wolf, Block, Schorr & Solis-Cohen.⁴ A recently growing trend of gender bias litigation addresses the glass ceiling that continues to pervade the profession and the law firms’ failure to afford equality with respect to attaining partnership, comparable compensation with that of male colleagues, and management positions within the firms. At the same time, contemporary women attorneys face the ageless dilemma of balancing professional commitment and responsibilities with the demands of family life. It is noteworthy that while the rigid nineteenth century doctrine of separate spheres is no longer espoused as the desired norm in society, remnants of it remain as both men and women express stereotypical thinking with regard to assumption of family responsibilities. Just as their forbearers served as leaders in the effort to surmount the ridicule and contempt afforded any “hysterical” and “sexless” woman who dared to aspire to enter into the legal profession, so, too, are contemporary female attorneys acting as trailblazers to secure gender equality for women, in terms of compensation and partnership, and to ultimately transform the profession into one that departs from its male profile and comports with the realities of both women and men

² *Bradwell v. Illinois*, 83 U.S. 130, 141 (1873).

³ *In re J. Seaman*, 627 A.2d 106 (N.J. 1993). Also note on July 6, 2004, the Senate confirmed the appointment to a federal judgeship of J. Leon Holmes, an Arkansas lawyer who has written publicly that women should be subordinate to their husbands. See Sumana Chatterjee, *Split Senate Approves Ark. Lawyer for Federal Judgeship*, PHILA. INQUIRER, July 7, 2004, at A5.

⁴ *Ezold v. Wolf*, 983 F.2d 509 (3d Cir. 1992).

who seek balance in their personal and professional lives. Those espousing what is sometimes deemed a feminization of the culture of the profession today confront, however, more than the entrenched vestiges of male ideologies or patriarchal attitudes. They must also contend with the current substantial economic and competitive constraints within which law firms must operate, including the extraordinary growth in the number of attorneys and its concomitant impact upon the profession. Thus, it is both cultural ideologies and economic realities that pose serious impediments to the attainment of any genuine transformation of the legal profession.

II. NINETEENTH CENTURY CULTURAL NORMS

The cultural context within which nineteenth century women lived provided the necessary justification to oppose the entry of women into law, premised solely on their gender. In a manner somewhat predictive of the emphasis on the rigidly demarcated roles of the nuclear family prompted by President Truman's containment policies regarding Cold War threats,⁵ the home was viewed as the bulwark against the enormous economic and political changes wrought by the nineteenth century.⁶ In this era the doctrine of separate spheres divided the world into public and private sectors, affording men and women distinct gender related roles. His "greatness and power" could be exhibited abroad among the public; her "exalted" sphere encompassed only the domestic duties of the home.⁷ This cult of domesticity or the cult of true womanhood, as the movement was known, regarded women as morally superior beings whose social role mandated confinement to domestic duties, lest they be contaminated by the realities of the brutal marketplace. Moreover, the law had established the framework within which women's rights could be constrained and separate spheres could be enforced. Cultural perceptions were reinforced by the applicable law of coverture, or the legal principle of marital unity, which regarded the woman's being as merged with that of her husband, subject to his authority and control. As embodied in Sir William Blackstone's *Commentaries*, "the very being or legal existence of the woman is suspended during marriage."⁸

⁵ ELAINE TYLER MAY, *HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA* (1999). May notes that a traditional domestic ideology with rigid gender roles was endorsed by the cold war generation, whose own parents ironically had challenged the sexual standards of the day. *Id.* at xvii, 22.

⁶ *From Colonial Times to the New Deal, WOMEN IN AMERICAN LAW* 140 (Marlene Stein Wortman ed.) (1985).

⁷ *Id.* at 53-54.

⁸ *Id.* at 14, 27.

Pursuant to this doctrine, the husband provided protection from the harsh world in exchange for total dominion over her person and her assets, including her wages, her property, and her children. The “civil death” or legal disability arising from coverture deprived a woman of the relative autonomy with respect to her resources that she as a single woman would have enjoyed. The burdens of coverture were captured in a popular British rhyme:

Thus although when you’re a spinster
You your own affairs may rule
Yet with vows pronounced at ‘Minster
You’ve become a helpless fool.⁹

Accepted theories regarding women’s limited intellectual capacity and physiological incapability fueled societal resistance to formal or professional education for women. Dr. Charles Meigs, a noted professor at Jefferson Medical College in Philadelphia, provided support for the philosophy of true womanhood, asserting that women were naturally religious, pious, timid, modest and dependent. Comparing woman with the robust masculinity of the Apollo of the Belvidere, he observed “she has a head almost too small for intellect, but just big enough for love.”¹⁰ The “scientific facts” regarding Meigs’ small brain theory were further reinforced by medicine’s posture that women were physiologically incapable of undertaking rigorous study. The popular 1873 *Sex in Education* by Dr. Edward H. Clarke espoused the firm belief that women could not function simultaneously in both an intellectual and reproductive manner. Clarke asserted that excessive study diverted vital bodily fluids from the uterus to the brain and arrested development of the “reproductive apparatus,” causing mental strain for women and serious health consequences for both mother and child.¹¹ A story written by a Connecticut attorney and printed in the nineteenth century law journal, *The Green Bag*, provided evidence that some individuals in the law profession had fully adopted the theories of Dr. Clarke.¹² In the tale, an unmarried woman attorney suffered ill health as she endeavored to build a practice. While skilled in drafting documents, her weak constitution was no match for her toughened competitors in court. Warned by a male colleague that she was overworking, she ultimately fainted in court, and requested that she be taken away. Diagnosed with

⁹ MORELLO, *supra* note 1, at 109 (quoting *Women Lawyers Journal* (July 1928)).

¹⁰ IMAGES OF WOMEN IN AMERICAN POPULAR CULTURE 10 (Angela G. Dorenkamp et al. eds., 1995) (quoting MEIGS, WOMAN, HER DISEASES AND REMEDIES (1859)).

¹¹ *Id.* at 16 (quoting CLARKE, SEX IN EDUCATION (1873)).

¹² Charles C. Moore, *The Woman Lawyer*, 26 THE GREEN BAG 525 (Dec. 1914).

brain fever, she relinquished her courtroom career, married a lawyer, and helped him with the office aspects of his practice.¹³ Thus, consistent with true womanhood precepts, the chastened female, out of the public eye, modestly and appropriately worked under the tutelage and protection of her spouse.

A. *Admission to the Bar in the Nineteenth Century*

Armed with the law of coverture and the civil death doctrine, together with the separate spheres doctrine and supportive medical theories, the legal profession through its courts was fully prepared to rebuff attempts by women to enter “a professional culture steeped in masculinity.”¹⁴ Arguments advanced by the courts in denying licenses to practice included the expected: Such a role directly conflicts with the notion of womanhood expressed in the cult of true womanhood. Women’s health would be threatened, their delicate systems could not handle the type of degrading issues that arise in court, and they were not competent to engage in analytical thought. Others urged that a jury would be unduly swayed by the feminine appeal of a woman attorney. Underlying much of the opposition was the fear that women’s entry into law would set the precedent for their obtaining the right to vote or fulfilling other civil offices.

What motivated this small number of women to surmount seemingly impenetrable cultural and institutional barriers in order to obtain legal training and admission to the bar? There were just five women lawyers in 1870 and seventy-five in 1880, in sharp contrast to the sixty-four thousand male lawyers.¹⁵ Just as the black civil rights movement of the 1960s engendered a striving for equality among women, so did the nineteenth century reform movements of abolition, temperance, and suffrage cause women “to see the limitations of their own existence, to apply emerging doctrines of human rights to their own situations, and to embark on self-conscious reformism in their own

¹³ Virginia G. Drachman, *Women Lawyers and the Quest for Professional Identity in Late Nineteenth-Century America*, 88 MICH. L. REV. 2414, 2438 (1990).

¹⁴ Carol Sanger, *Curriculum Vitae (Feminae): Biography and Early American Lawyers*, 46 STAN. L. REV. 1245, 1250 (1994) (reviewing JANE M. FRIEDMAN, *AMERICA’S FIRST WOMAN LAWYER: THE BIOGRAPHY OF MYRA BRADWELL* (1993)).

¹⁵ Barbara Allen Babcock, *Feminist Lawyers*, 50 STAN. L. REV. 1689, 1695 (1998) (reviewing VIRGINIA DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* 253 (1998)).

interest.”¹⁶ Many of the nineteenth century women attorneys viewed admission to the bar and to the right to vote as inextricably intertwined.¹⁷ Moreover, the restrictions imposed by coverture and the separate spheres philosophy, they felt, reduced women to a legal status related to that of slavery. In 1848, the Seneca Falls Declaration, authored by Elizabeth Cady Stanton, Lucretia Mott, Martha C. Wright, Jane Hunt and Mary Ann McClintock, vividly expressed women’s discontent with the domestic sphere and deprivation of constitutional liberties.¹⁸ This infamous document, which reflected the birth of the feminist movement, contained two clauses specifically addressed to the practice of law. In the list of injuries inflicted by man, it noted:

He has monopolized nearly all the profitable employments, and from those she is permitted to follow, she receives but a scanty remuneration. He closes against her all the avenues to wealth and distinction which he considers most honorable to himself. As a teacher of theology, medicine, or law, she is not known.¹⁹

Further, a resolution in the document asserts:

Resolved, That the speedy success of our cause depends upon the zealous and untiring efforts of both men and women, for the overthrow of the monopoly of the pulpit, and for the securing to women an equal participation with men in the various trades, professions, and commerce.²⁰

¹⁶ JoEllen Lind, *Women Trailblazers: The Changing Role of Women in American Legal History*, 7 THE AMICUS 12 (Valparaiso University School of Law) (Winter 1994), available at <http://www.law.stanford.edu/library>.

¹⁷ Babcock, *Feminist Lawyers*, *supra* note 15, at 1695. Barbara Babcock views the nineteenth century attorneys as feminists at their core; Virginia Drachman, in contrast, portrays them as leaders of the more narrowly drawn women’s lawyers movement, separate and apart from the suffrage movement.

¹⁸ Carolyn S. Bratt, *The Sesquicentennial of the 1848 Seneca Falls Women’s Rights Convention: American Women’s Unfinished Quest for Legal, Economic, Political, and Social Equality: Introduction*, 84 K. L. J. 715, 720, note 6, (Summer 1995/1996) (citing ELEANOR FLEXNER, CENTURY OF STRUGGLE 71-72 (1975)).

¹⁹ Declaration of Sentiments, Seneca Falls Convention (1848) reprinted in IMAGES OF WOMEN, *supra* note 10, at 68-71.

²⁰ IMAGES OF WOMEN, *supra* note 10, at 71.

1. "Zealous and Untiring Efforts" of Myra Bradwell

The extraordinary efforts of the nineteenth century trailblazers to defeat sex discrimination in the legal profession can be epitomized by those of Myra Bradwell, sometimes termed America's first woman lawyer.²¹ In actuality, Arabella Mansfield was, in 1869, the first woman to be admitted to the practice of law in the United States. After passing the Iowa state bar, Mansfield was fortunate to confront Justice Francis Springer who broadly interpreted the restrictive gender language in the Iowa admissions statute to not impliedly deny the right to female admission.²² The preeminence of Bradwell, who passed the Illinois bar with high honors several weeks after Mansfield, resulted from her role as publisher and editor in chief of the widely regarded *Chicago Legal News*, her advocacy of women's rights issues and support of other women's attempts to secure bar admission, and her litigation challenging the interpretation of the Fourteenth Amendment privileges and immunities clause as inclusive of a woman's right to practice law. Her leadership was crucial to the subsequent efforts of women who sought to practice law in other states.

In 1868, Bradwell, married to attorney James, initiated the *Chicago Legal News*, which became the most widely circulated law paper in the country. Notably, Bradwell initially had to obtain a special charter that would permit her to run the business free of the normal disabilities attributable to the marriage state.²³ Due to an arrangement she had negotiated with the Illinois legislature and courts, she was able to provide her readers timely access to recent legislative enactments and case law. Not content with merely reporting the news, Bradwell used her paper as a vehicle to address sex discrimination in a variety of contexts, with significant emphasis on the efforts of women to gain entry to the bar.²⁴ In 1869, Bradwell passed the Illinois bar exam and submitted her application to practice law accompanied by a brief which

²¹ JANE M. FRIEDMAN, *AMERICA'S FIRST WOMAN LAWYER: THE BIOGRAPHY OF MYRA BRADWELL* (1993). Friedman does note that Arabella Mansfield was, in fact, the first woman attorney. Morello suggests that Margaret Brent in the seventeenth century, who served as the administrator of the Maryland Governor's estate, and engaged in substantial litigation, was the first lawyer. MORELLO, *supra* note 1, at 3. The American Bar Association Commission on Women established the Margaret Brent Award in 1991 to recognize the achievements of women lawyers who have excelled in their discipline and paved the way for other women lawyers. See American Bar Association Commission on Women in the Profession, available at <http://www.abanet.org/women> (last visited Oct. 20, 2004).

²² MORELLO, *supra* note 1, at 12.

²³ FRIEDMAN, *supra* note 21, at 77.

²⁴ *Id.* at 12.

directly raised the issue of gender discrimination: did being a woman disqualify her from obtaining a law license?²⁵ The Illinois Supreme Court denied her application based on the disability imposed by Bradwell's married state, which arose from the law of coverture.²⁶ In short, a married woman deemed civilly dead could not, as an attorney, be bound by the contractual obligation that would exist between her and her client. In response to her brief, citing an erosion of coverture through a variety of Married Women's Property Acts and citing Mansfield's admission to the Iowa bar, the court denied her application a second time, grounding the decision in the fact that her status as a woman was not designed to occupy the public sphere, which constituted a sufficient barrier to admittance to the practice of law, as inherited from the common law in England.²⁷ Likening this "annihilation" of women's political rights to the infamous *Dred Scott*²⁸ decision, Bradwell then filed a writ of error to the United States Supreme Court, hoping to set a precedent that would afford other women a federal right to practice law.²⁹ In the interim, Ada Kepley, a graduate of the University of Chicago Law, and Alta Hulett, who had trained for the law via an apprenticeship, were also denied admittance to the Illinois bar. Bradwell joined their efforts to propose a revision to the Illinois statute, which eliminated gender as a basis for refusing admittance to the bar or any occupation or employment. Under that statute, which was passed, Hulett in 1872 became the first woman attorney in Illinois admitted to practice.³⁰

It is with the United States Supreme Court case *Bradwell v. State of Illinois*³¹ that Myra Bradwell's groundbreaking reputation has primarily been intertwined. In her appeal to the Court, Bradwell, via her attorney Matthew Carpenter, urged that the Fourteenth Amendment prohibited state interference with federal privileges and immunities, which included the right to admission to practice law in the courts of a state. The Court, consistent with the *Slaughterhouse Cases*³² decided one day earlier in which the Court denied a similar claim by those seeking to argue that a monopoly impeded their ability to engage in the butchering trade, held that practicing law also did not constitute a federal privilege.

²⁵ *Id.*

²⁶ MORELLO, *supra* note 1, at 16.

²⁷ *In re Bradwell*, 55 Ill. 535 (1869).

²⁸ *Scott v. Sanford*, 60 U.S. 393 (1856).

²⁹ MORELLO, *supra* note 1, at 18.

³⁰ *Id.* at 21.

³¹ 83 U.S. 130 (1873).

³² 83 U.S. 36 (1873).

What is most damaging about the case is the concurring opinion of Justice Bradley (who had dissented in the *Slaughterhouse Cases*), which unequivocally delivered the Court's view on women's rights. It is the matchless language regarding women's "natural timidity and delicacy," as enumerated by Justice Bradley, which provoked Bradwell's scorn and eviscerated the Fourteenth Amendment as applied to women's efforts to obtain equality in a variety of arenas, including the bar, for the next century:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. . . . It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.³³

Although the Court did not concur with Bradwell's claim and failed to regard the right to practice law as a privilege and immunity encompassed by the Fourteenth Amendment, her case had a profound impact upon succeeding female advocates. *Bradwell* raised the consciousness of women and inspired them to seek state legislative measures that would remove impediments to bar admission. It is interesting to note that despite the new 1872 Illinois statute, which prohibited exclusions from professions premised on gender, and under which Bradwell could have sought admission to the bar, she chose not to use the statute; instead, she pursued her championship of women's rights through her newspaper advocacy. In 1890, as she approached

³³ *Bradwell*, 83 U.S. at 141.

death, her spouse arranged for the Illinois Supreme Court to admit Myra to the bar on its own motion.³⁴

2. Lavinia Goodell Enjoys Her Blackstone

A New Yorker who established a career in publishing, Goodell knew that her goal of being an attorney was not a likely one in the East, which was particularly resistant to the efforts of women to attend law school or apprentice with a firm. Moving to Wisconsin in 1871 with her parents, Goodell established an apprenticeship with local attorneys and in 1874 opened her own office and was admitted to practice on the circuit court level.³⁵ As an unmarried woman, Goodell did not labor under the disability of coverture and sought admission to the Wisconsin Supreme Court. Her arguments were essentially twofold in nature: She urged a statutory construction, similar to that afforded Arabella Mansfield in Iowa, which argued that the word “he” in the Wisconsin admissions statute should be construed to include females. Secondly, inasmuch as the legislature approved women attending the law department of the University of Wisconsin, she urged that they would approve such students practicing law upon graduation.³⁶ The patriarchal fervor, with which Justice Edward Ryan articulated the court’s denial, made Justice Bradley’s ode to domesticity in *Bradwell* seem temperate in comparison:

This is the first application for admission of a female to the bar of this court. And it is just matter for congratulations that it is made in favor of a lady whose character raises no personal objection: something perhaps not always to be looked for in *women who forsake the ways of their sex for the ways of ours*.³⁷

Urging that to follow the Iowa court’s analysis in the Mansfield case would “emasculate the constitution itself and include females in the constitutional right of male suffrage,”³⁸ the court revealed its extremely strong antifeminist stance:

The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all

³⁴ Sanger, *supra* note 14, at 1262.

³⁵ MORELLO, *supra* note 1, at 22.

³⁶ *Id.* at 23.

³⁷ *In re Goodell*, 39 Wis. 232, 240-41, 1875 Wisc. LEXIS 240, at 1, 14-15 (1875) (emphasis added).

³⁸ *Id.* at 242, 1875 Wisc. LEXIS 240, at 18.

life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. The cruel chances of life sometimes baffle both sexes, and may leave women free from the peculiar duties of their sex. These may need employment, and should be welcome to any not derogatory to their sex and its proprieties, or inconsistent with the good order of society. But it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours. There are many employments in life not unfit for female character. The profession of law is surely not one of these. The peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field.³⁹

Two years later the Wisconsin legislature enacted an admissions statute patterned after the law Hulett and Bradwell had successfully lobbied for in Illinois, which barred sex discrimination.⁴⁰ In 1889, Goodell was finally admitted to practice before the Supreme Court of Wisconsin, despite the protest of Justice Ryan in his dissent. Sharing a partnership with a student at the University of Chicago, Goodell served as an effective advocate in several cases.⁴¹ While she successfully carved out a career in the male discipline of law, Goodell remained sensitive to the importance of displaying some conformity with the expectations of public propriety for a woman:

The community looks at me a little doubtfully as not knowing what kind of woman I may be, but as [I] develop no other alarming eccentricity than a taste for legal studies, wear fashionable clothes, attend an orthodox church, have a class in the Sunday school, attend the benevolent society, and make cake and preserves like other women, I am tolerated. Meantime, I enjoy my Blackstone and Kent even more than anticipated, only feel lonesome having no one to talk them over with.⁴²

³⁹ *Id.* at 245, 1875 Wisc. LEXIS 240, at 21-23.

⁴⁰ HEDDA GARZA, *BARRED FROM THE BAR: A HISTORY OF WOMEN AND THE LEGAL PROFESSION* 46 (1996).

⁴¹ *Id.*

⁴² Sanger, *supra* note 14, at 1266-67 (quoting Catherine B. Clearly, *Lavinia Goodell, First Woman Lawyer in Wisconsin*, 74 WIS. MAG. HIST. 243, 249 (1991)).

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Notwithstanding Lavinia Goodell's success and ready adaptation to the rigors of the law profession, her untimely death at age forty-one, allegedly from sciatic rheumatism, prompted a commentary whose author typified an adherent of the small brain, separate spheres philosophy. *The Chicago Journal* queried whether the early death of Goodell suggested women are unable "to endure the hard usage and severe mental application incidental to a legal professional career," which was quoted in an article by lawyer Lelia Robinson in *The Green Bag*.⁴³ *The Chicago Independent* responded, "Miss Goodell was forty-one years of age. Henry Armitt Brown, the noted young lawyer of Philadelphia, died recently at thirty-two. We would like to suggest the query whether men are able to endure the hard usage, etc. One swallow does not make a summer."⁴⁴

3. Belva Lockwood, the Indefatigable Warrior

An attorney whose endurance for overcoming inordinate obstacles in attaining her goal of practicing in both state and federal courts, Belva Lockwood served as a role model for her peers. The intransigency of the judicial system with respect to female attorneys compelled Lockwood to threaten, lobby, and litigate each step in order to gain full access to the profession. Married with children, she initially sought acceptance at Georgetown University and Howard University, where she received denials. In response to her application to Columbian College, now George Washington University Law School, the president informed her that the faculty found such an admission "would not be expedient as it would be likely to distract the attention of the young men."⁴⁵ In 1870, Lockwood was admitted to the newly formed National University Law School, whose male student body exhibited deeply held prejudice against the idea of female classmates. At graduation, the men refused to share commencement ceremonies with the two women; the school dutifully excised the women's names from the program, and withheld Lockwood's diploma and that of the one other female, Lydia Hall.⁴⁶ Unable to obtain admission to the District of Columbia's courts without a

⁴³ Lelia J. Robinson, *Women Lawyers in the United States*, in 2 THE GREEN BAG 10 (1890), available at <http://www.law.stanford.edu/library/wlhbhp/articles/greenbagreal> (alterations in original).

⁴⁴ *Id.* at 24.

⁴⁵ MORELLO, *supra* note 1, at 71.

⁴⁶ WORTMAN, *supra* note 6, at 260. In her account of this episode, Lockwood noted that Lydia solaced herself by marrying a man named Grafan and leaving the city. She wrote "[I] suppose she became 'merged,' as Blackstone says, in her husband. I was not to be squelched so easily." *Id.*

law degree, Lockwood expressed her indignation in the following note to President Ulysses S. Grant, who also served as the law school's president:

Sir -

You are, or you are not, President of the National University Law School. If you are its president, I desire to say to you that I have passed through the curriculum of study at this school, and am entitled to and demand my diploma. If you are not its president, then I ask that you take your name from its papers, and not hold out to the world to be what you are not.

Very respectfully,

Belva A. Lockwood⁴⁷

The diploma arrived shortly thereafter with no accompanying note, and Lockwood was duly admitted to the D.C. bar. Her travails did not cease, as one of her cases required an appeal to the Court of Claims, an appellate court with its own admission requirements. In her recounting of the admission hearing, Lockwood observed that after her male colleagues moved for her admission:

There was a painful pause. Every eye in the court-room was fixed first upon me, and then upon the court, when Justice Drake, in measured words, announced 'Mistress Lockwood, you are a woman.' For the first time in my life I began to realize that it was a crime to be a woman, but it was too late to put in a denial, and I at once pleaded guilty to the charge of the court.⁴⁸

Ultimately, the court ruled women were without legal capacity to serve as an attorney. She next appealed to the United States Supreme Court, which refused to admit her to its court, premised on the belief that there was no English precedent for the admission of women.⁴⁹ Myra Bradwell's *Chicago Legal News* heartily denounced the decision, caustically urging that English precedent is not always so slavishly

⁴⁷ MORELLO, *supra* note 1, at 72.

⁴⁸ WORTMAN, *supra* note 6, at 262.

⁴⁹ GARZA, *supra* note 40, at 44.

followed, as the Court does not compel the wearing of gowns and wigs deemed a requisite to practice in England.⁵⁰

Lockwood next engaged in a two-year pursuit to have federal legislation enacted to provide for the admission of women to the federal courts, while simultaneously maintaining a thriving law practice and supporting her family. She drafted two bills, lobbied legislators, purposely garnered media attention, and obtained the support of two senators who strenuously advocated the admission of women to the bar. On February 7, 1879, the bill entitled "An Act to Relieve Certain Legal Disabilities of Women" was passed and signed into law by President Rutherford B. Hayes. Lockwood subsequently was admitted to the Court of Claims, and she then became the first woman to appear before the Supreme Court of the United States.⁵¹ Her inexorable determination to fight the prejudice against women in the legal profession succeeded in opening the doors for all women to the federal courts.

4. Clara Shortridge Foltz, the "Portia of the Pacific"

To attain her dream of being a lawyer, Clara Foltz initially sought an apprenticeship with a well-known attorney; he responded that such a foolish undertaking would "invite nothing but ridicule if not contempt."⁵² She eventually secured an apprenticeship with a willing male attorney. Following the course charted by Bradwell, Goodell, and Lockwood in their legislative battles, Foltz lobbied for a Woman Lawyer's Bill to remove gender as a qualification for the bar. The legislatures in Illinois, Wisconsin, and the District of Columbia, among others, had deemed women attorneys less objectionable than did the courts. In California, Foltz contended with opposition from supporters of the tenets of true womanhood. Some argued women lawyers would be "unsexed," would forsake domestic duties, or would wilt under the rigors of engaging in cross-examination.⁵³ With five children and an absent spouse, however, a determined Foltz, with ally Laura De Force Gordon, secured its passage and was admitted to the bar in 1878, becoming the first female attorney in California.

⁵⁰ *Id.*

⁵¹ *Id.* at 45.

⁵² Barbara Allen Babcock, *Clara Shortridge Foltz: First Woman*, 28 VAL. U. L. REV. 1231, 1245 (1994) (quoting Clara Shortridge Foltz, *The Struggles and Triumphs of a Woman Lawyer*, THE NEW AMERICAN WOMAN, June 1916).

⁵³ *Id.* at 1250-51.

Although a successful practitioner, Foltz sought the status and approval she would obtain were she to receive the imprimatur of a law school education. During the same legislative session at which the gender neutral bar admission statute was passed, the legislature had created Hastings College of Law as part of the University of California system. After receiving no response to her application, she and Laura Gordon descended upon Hastings and began taking classes. Foltz later described the mature reaction of the “little fellows” in her class:

The first day I had a bad cold and was forced to cough. To my astonishment every young man in the class was seized with a violent fit of coughing. You would have thought the whooping cough was a raging epidemic. . . . If I turned over a leaf in my notebook every student in the class did likewise. If I moved my chair—hitch went every chair in the room. I don't know what ever became of the members of that class. They must have been an inferior lot, for certain it is, I have never seen nor heard tell of one of them from that day to this.⁵⁴

The founder of the law school, Judge Hastings, had expressed concern that the male students would be distracted by the women's “rustling garments.”⁵⁵ When the board of Hastings directed that the two women be removed, they commenced a lawsuit against Hastings, petitioning for a writ of mandamus compelling the law school to admit them. Commentators suggest they reluctantly employed this alternative, inasmuch as they were well aware of the courts' disinclination to favor women attorneys in the cases brought by Bradwell, Goodell, and Lockwood.⁵⁶ Foltz's arguments were three pronged: (1) She satisfied the requirements for admission. (2) The policies of Hastings as part of the California university system could not contradict that of the other departments which permitted female students. (3) The same legislature that allowed females admission to the bar could not have intended their exclusion from its law schools.⁵⁷ Hastings responded that it was privately founded and not subject to University of California regulations and that the laws of nature prohibited this enlargement of the women's sphere. Hastings also relied as precedent on the expansive opinion of Judge Ryan regarding a woman's place, which he issued in the Lavinia

⁵⁴ *Id.* at 1265.

⁵⁵ *Id.*

⁵⁶ *Id.* at 1266.

⁵⁷ *Id.* at 1276.

Goodell case.⁵⁸ Newspaper comments focused upon the physical appearance of the women as they argued their case in court, rather than their rhetorical ability, noting Clara Foltz had “profuse hair done in braids which fell backward from the crown on her head like an Alpine glacier lit by a setting sun.”⁵⁹

The trial court ruled for Foltz and Gordon, and directed that the women be admitted to Hastings. Notwithstanding delays and appeals initiated by the law school, the women emerged victorious before the California Supreme Court. While Foltz gained admission to Hastings, due to financial and family obligations, she was unable to attend law school and personally benefit from her achievement. She did, however, value her role as a trailblazer and regarded the Hastings case as the most significant one in her fifty years of practice.⁶⁰ This “Portia of the Pacific,” as she was termed, in the end obtained her degree. On December 3, 1990, the Hastings law faculty voted to award Foltz a posthumous juris doctorate degree, which was accepted by her biographer, Stanford Law Professor Barbara Babcock, on behalf of the family.⁶¹

B. Apprenticeships, Law Schools and Sex Discrimination

As was observed by the experiences of Myra Bradwell, Lavinia Goodell, and Clara Foltz, during the nineteenth century would-be attorneys typically trained for the profession by serving apprenticeships with established lawyers until such time as they were regarded as possessing the necessary knowledge and skills to seek admission to the bar. The apprenticeship system afforded women a vehicle for pursuing a place in the profession, particularly when a husband, father, or brother was able and willing to incorporate them into their practice. Many women, in a fashion similar to that employed by Bradwell, were trained by their relatives and were described as such in *The Women's Journal*: “Nebraska’s first lady lawyer was Mrs. Ada Bittenbender, of Lincoln. She read law in the office of her husband”; “Mrs. Winona S. Sawyer, wife of the Hon. A.J. Sawyer She began the study of law under his direction While she is not actively engaged in practice, she assists her husband in the preparation of his cases”; and “Mrs. Mary W. Lucas, wife of Judge J.N. Lucas, of McCook, Neb., was admitted to practice as an attorney-at-law She read law under the direction of her husband . . . and goes regularly to the office each day to assist in the preparation

⁵⁸ *Id.* at 1277.

⁵⁹ MORELLO, *supra* note 1, at 62.

⁶⁰ GARZA, *supra* note 40, at 57.

⁶¹ FRIEDMAN, *supra* note 21, at 152 n.9.

and trial of cases.”⁶² The benefits to both the women and their husbands were substantial. The men obtained a partner who would be a helpmate, and the women were viewed as possessing more legitimacy and credibility due to their association with a male relative. For married women, a partnership with their lawyer-husband further reduced the amount of sex discrimination they faced. Such a partnership “not only shielded them from public disapproval but provided them with a secure and welcoming place to work.”⁶³ The affiliations, however, appear in many cases to have perpetuated gender roles, with men assuming trial responsibilities and women relegated to office work including wills, real estate contracts, and paper preparation for trial.

In the latter part of the nineteenth century, in response to complaints issued among attorneys and judges that the standards for training were insufficiently professional and intellectual, a movement toward viewing a law school education as a prerequisite to bar admission commenced.⁶⁴ Women seeking admission to law school confronted a nonreceptive attitude in most instances, akin to that experienced by Belva Lockwood, particularly in the East where patriarchal and discriminatory attitudes were deeply embedded. In 1869, Lemma Barkaloo achieved the distinction of being the first woman to attend law school at Washington University in St. Louis, then known as St. Louis Law School, although she cannot claim to be the first law school graduate, as she left school after her first year. She nonetheless obtained admission to the Missouri bar in 1870, because law school training was not yet established as necessary for admission to the bar. A native New Yorker, Barkaloo preferred to attend law school in the East, particularly at one of the elite institutions whose degrees then, as today, carried more weight. She applied to Harvard University and Columbia University in 1868 and was denied admission. George Templeton Strong, a prominent New York attorney who served on the board of trustees at Columbia, tartly observed that the law school had received applications from “three infatuated young women.” He further stated, “No woman shall degrade herself by practicing law in New York especially if I can save her.”⁶⁵ Washington University accepted Barkaloo’s petition for admission, and professors and fellow students described her as a woman of “talents and

⁶² Mary Erickson, *Women Lawyers “Legitimized” by Alluding to Their Male-Lawyer Connections* (1998), available at <http://www.stanford.edu/library/wlhbpa/articles/legitimized.pdf>.

⁶³ Drachman, *Women Lawyers*, *supra* note 13, at 2434.

⁶⁴ MORELLO, *supra* note 1, at 41.

⁶⁵ GARZA, *supra* note 40, at 50.

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resolution" who possessed "true moral courage."⁶⁶ She became the first woman lawyer in Missouri and the second in the country, following Arabella Mansfield of Iowa. Barkaloo also achieved the distinction of becoming the first woman lawyer in the United States to try a case in court.⁶⁷ Barkaloo, unfortunately, succumbed to typhoid fever in September of 1870. Although she garnered praise among her colleagues, her death engendered the same type of belittling commentary applied to Lavinia Goodell upon her early demise, with one authority questioning whether Barkaloo's death was attributable to "over-mental exertion."⁶⁸

The hostility toward women applicants at Columbia was expressed equally vehemently by Yale, the University of Pennsylvania, and Harvard Law Schools. In 1872, a Yale alumnus wrote a recommendation favoring the admission of women if they were ugly.⁶⁹ Alice Jordan's attendance in 1885 and graduation from Yale proved to be an anomaly. Armed with a University of Michigan degree, one year at its law school and admission to the Michigan bar, Jordan argued her admission was not precluded by Yale as nothing in its catalog specifically excluded female attendance. Although Yale endeavored to deter her, she insisted on attending classes and taking her examinations and was awarded a degree.⁷⁰ Ironically, Yale was awarded plaudits for taking such a seemingly great step. The *Chicago Legal News* observed, "It may be said with truth that the world moves, when old conservative Yale opens the doors of her law department for the admission of women."⁷¹ Yale, evidently not persuaded by any such accolades, promptly amended its catalog to clarify that the law school would be open solely to male students. Dean Wayland personally sent a note confirming this to Lelia J. Robinson, the first woman attorney in Massachusetts, who compiled an article entitled "Women Lawyers in the United States" for *The Green Bag*, stating to Robinson that "the marked paragraph on page 25 [of the catalog] is intended to prevent a repetition of the Jordan incident."⁷²

In that same article by Robinson regarding women lawyers, she noted that Mrs. Carrie B. Kilgore was "one of the first women in the

⁶⁶ Karen L. Tokarz, *A Tribute to the Nation's First Women Law Students*, 68 WASH. U. L.Q. 89, 91 (1990).

⁶⁷ *Id.* at 92.

⁶⁸ *Id.* at 93.

⁶⁹ MORELLO, *supra* note 1, at 90-91.

⁷⁰ GARZA, *supra* note 40, at 72.

⁷¹ *First Woman Student at Yale*, CHICAGO LEGAL NEWS, Sept. 1885-1886, at 59, available at <http://www.law.stanford.edu/library/wlhb/articles/yale.htm>.

⁷² Robinson, *supra* note 43, at 13.

country to ask for admission to the bar, and one of the last to gain it."⁷³ In addition to the typical impediments to a female law career in Pennsylvania (Carrie sought admission to the state bar in 1872 but did not obtain it until 1886), Kilgore encountered deeply rooted gender prejudice at the University of Pennsylvania Law School. When her first application in 1870 was refused, she approached individual professors and attempted to attend the lectures of E. Spencer Miller. Professor Miller reportedly responded, according to Kilgore: "I do not know what the Board of Trustees will do, but as for me, if they admit a woman I will resign for I will neither lecture to niggers nor women."⁷⁴ Ten years later she was granted admission and graduated from Penn in 1883. As Supreme Court Justice Ruth Bader Ginsburg recently observed, however, once granted admission to law schools, "women were not greeted by their teachers and classmates with open arms and undiluted zeal."⁷⁵

[She noted that in 1911 the student body of the University of Pennsylvania Law School] held a vote on a widely supported resolution to compel members of the freshman class to grow mustaches. A twenty-five-cents-per-week penalty was to be imposed on each student who failed to show substantial progress in his growth. Thanks to the eleventh hour plea of a student who remembered the lone woman in the class, the resolution was defeated, but only after a heated debate.⁷⁶

Perhaps no law school was as deeply entrenched in its opposition to the admittance of women as Harvard Law School. It was, in fact, in 1950, one of the last law schools to do so.⁷⁷ Judith Richards Hope, a 1964 Harvard Law graduate, found that the archives of the institution revealed that the members of the Harvard Corporation (the President and Fellows) repeatedly opposed any faculty notion of admitting women. Purportedly, Harvard did not know whether "female students could handle the rigorous intellectual challenge of law school," nor did it have confidence that "the male students could control themselves with

⁷³ *Id.* at 28.

⁷⁴ MORELLO, *supra* note 1, at 67 (quoting *My Application*, WOMEN LAW. J. Dec. 1915).

⁷⁵ *Shining a Lamp for Women Everywhere: Remarks of United States Supreme Court Justices Ruth Bader Ginsburg and Sandra Day O'Connor*, THE PHILADELPHIA LAW., Winter 2004, at 30, 31.

⁷⁶ *Id.*

⁷⁷ JUDITH RICHARDS HOPE, PINSTripES AND PEARLS: THE WOMEN OF THE HARVARD LAW CLASS OF '64 WHO FORGED AN OLD-GIRL NETWORK AND PAVED THE WAY FOR FUTURE GENERATIONS 17 (2003).

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young women close by.”⁷⁸ In the 1870s, the applications of Ellen Martin and M. Fredrika Perry to Harvard were denied, as it was deemed impractical to simultaneously permit young men and women to the law library.⁷⁹ After a succession of rejections of female applicants through the late 1880s, Harvard Corporation, in 1915, denied the applications of fifteen women from the Seven Sisters of the Ivy League schools as “contrary to the best interests of the law school.”⁸⁰

In contrast to the experience of the other law schools that excluded or ostracized women upon admission, the University of New York Law School, now New York University Law School, exhibited an unusual commitment to encouraging women to attend its law school.⁸¹ In 1890, it began admitting women and continued to serve as a leader in this area until it gradually grew more conservative in the 1930s and 1940s.⁸² To offer an alternative to ensure women had the opportunity to study law, Emma Gillett and Ellen Spencer Mussey, both graduates of Howard University’s law school, in 1896 created the first coeducational law school, Washington College of Law (now affiliated with American University).⁸³ It was important that they did so, for by 1895, eighty percent of the country’s law schools still had not admitted women. Notwithstanding the passage of the nineteenth Amendment in 1920, many schools still refused women admission, including Harvard and Columbia.⁸⁴

⁷⁸ *Id.* at 12.

⁷⁹ FRIEDMAN, *supra* note 21, at 130 (quoting Kelly D. Weisberg, *Barred from the Bar: Women and Legal Education in the U.S. 1870-1890*, 28 J. LEGAL EDUC. 485, 485-86 n.8 (1977)).

⁸⁰ HOPE, *supra* note 77, at 14.

⁸¹ MORELLO, *supra* note 1, at 80-81.

⁸² *Id.* at 82-85.

⁸³ GARZA, *supra* note 40, at 81. The sole law school founded exclusively for the education of women was created in 1908 by Massachusetts attorney Arthur Winfield MacLean. It was named Portia Law School, in honor of Shakespeare’s heroine in “The Merchant of Venice” who disguised as a man, successfully advocated the defense of Antonio in Shylock’s lawsuit to demand payment on a defaulted loan. The law school became coeducational in 1938 and was subsequently renamed New England School of Law in 1969. See The History of NESL, at <http://www.nesl.edu/about/history.cfm> (last visited Mar. 30, 2005).

⁸⁴ *Id.* Columbia Law School did admit its first female law students in 1927. Evidently the administrative fear that male law students would flock to single sex Harvard Law was dissipated by the efforts of Virginia Gildersleeve, dean of Barnard College, who successfully advocated the admission of women with Columbia Law Dean Huger W. Jervy, who succeeded the intractably opposed former Dean Harlan Fiske Stone. See Whitney S. Bagnall, *A Brief History of Women at CLS: Part 1*, Columbia Law School, at http://www.law.columbia.edu/law_school/communications/reports/Fall2002/brief (last visited Feb. 4, 2005).

C. *The Equity Club, a Complement Not a Competitor*

The number of female attorneys resulting from women's efforts to gain admission to law school, secure apprenticeships, and challenge statutory and judicial barriers to admission to the bar remained small.⁸⁵ Dispersed throughout the country, these women experienced a sense of isolation as they sought to reconcile their professional roles with their family responsibilities and traditional identities as women. Lavinia Goodell baked cookies in order to appear less alien; Lelia Robinson seriously debated whether she should wear her hat in court to comport with existing standards for appropriate feminine attire or discard it so as to satisfy courtroom courtesy of removing one's hat.⁸⁶ In 1886, when the number of U.S. women lawyers approached two hundred, a group of women lawyers and law students at the University of Michigan founded the Equity Club, a correspondence organization devoted to sharing experiences and support, discussing women lawyers' roles, and balancing professional and private duties.⁸⁷ Significantly, Virginia Drachman observed that the name of the club was chosen specifically to deny the notion it was a women's bar association seeking "pure equality with male lawyers, nor did they wish to sacrifice their ties to female culture."⁸⁸ Striving to complement, rather than compete with men, the women in the Equity Club did not publicly raise the banner of sex discrimination. Unable to risk the alienation of supportive male colleagues in the profession, they instead focused upon reconciling private duties with public aspirations. It is notable, however, that many of the women explicitly rejected the prevailing stereotypes that served to underlie existing discrimination. Thus, the women overwhelmingly concurred that the female health limitations articulated by Dr. Edward Clarke were erroneous, concluding "it was the material conditions of women's lives, rather than a weakness inherent to women's reproductive

⁸⁵ Babcock, *Feminist Lawyers*, *supra* note 15, at 1694-95.

⁸⁶ Drachman, *Women Lawyers*, *supra* note 13, at 2429.

⁸⁷ *Id.* at 2415. Subsequent to the establishment of the Equity Club, women law students and lawyers soon founded similar organizations to provide a mechanism for networking and sharing professional and private concerns and in response to their exclusion from associations of male lawyers. The founding of the Women Lawyers' Club in New York in 1899, for example, was prompted by the prohibition of women members by the New York City Bar Association. See Majorie L. Girth, *UB's Women in Law: Overcoming Barriers During Their First Hundred Years*, 9 BUFF. WOMEN'S L.J. 51, 71 (2000/2001).

⁸⁸ Drachman, *Women Lawyers*, *supra* note 13, at 2426. Drachman notes that "embedded within their budding professional identity lay the early signs of a deep and enduring tension between their traditional roles as women and their new roles as lawyers." *Id.* at 2443.

physiology” that prompted physical problems.⁸⁹ Further, these nineteenth century pioneers correctly identified the tension between feminine identity and professional roles, a conflict that continues to pervade the profession in contemporary society.

III. THWARTED EXPECTATIONS IN EARLY TWENTIETH CENTURY

The first generation of women attorneys, the nineteenth century precedent setters, attained significant achievements by overcoming legislative and judicial barriers to the bar, negative societal commentaries, inhospitable receptions at law schools, and stereotypical assumptions regarding women’s allegedly inherent passivity, delicacy, and lack of mental aptitude for the rigors of law. They envisioned that their assumption of the role of a woman attorney would serve to clear the path for others in the profession and, coupled with the vote, would help accelerate the demise of the confining restrictions of true womanhood. While some scholars differ as to whether the women were feminists in the larger sense or part of a narrower women attorney movement,⁹⁰ the characterization is less important than the substance of what they accomplished. While some clearly advocated suffrage and expansion of women’s rights, it was their ability to establish a presence in the male stronghold of law, in itself, that contributed to an enlarged notion of a woman’s place. With the bar of every state now open through judicial challenges or legislative enactment, with 1,010 female lawyers by 1900,⁹¹ and with most law schools accepting women, even if in small numbers, there existed optimism and expectations that gender integrated law firms and true equality of treatment would be attained.⁹² The reality, however, during the first decades of the twentieth century was far different. Some law schools may have opened their doors, and admission to the bar was attainable, but jobs outside of those associated with a relative were not available.

Drachman notes that in 1920, a study was done to assess women’s place in the law profession.⁹³ The study revealed thirty-eight percent of the women lawyers did not practice at all, large corporations provided none of the lucrative work for women, and sexual discrimination seemed

⁸⁹ *Id.* at 2440.

⁹⁰ Babcock, *Feminist Lawyers*, *supra* note 15, at 1698.

⁹¹ Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5, 7 (1991).

⁹² Virginia G. Drachman, *The New Woman Lawyer and the Challenge of Sexual Equality in Early Twentieth-Century America*, 28 IND. L. REV. 227, 229-30 (1995) [hereinafter Drachman, *The New Woman Lawyer*].

⁹³ *Id.* at 229.

indigenous to the marketplace throughout the country.⁹⁴ In the late nineteenth century, women attorneys, in a fashion similar to that of their male peers, served as general practitioners handling all types of legal matters, but with limited exposure to trial work, as the courtroom posed an arena in which women continued to face more resistance from both potential clients and male attorneys. The late 1800s and thereafter, due to the rise of big business, witnessed the creation of both large, elite corporate law firms and specialization in the practice of law.⁹⁵ Pursuant to this restructuring, gender distinctions in the practice of law became further emphasized; corporate law and litigation were the domain of the white male lawyer, and women in the 1910s and 1920s were relegated to domestic relations, trusts and estates, and real estate, all areas more compatible with the nurturing stereotypes of the nineteenth century. Theron G. Strong, a bar leader, wrote in his 1914 memoirs:

It is now more than thirty years since Mrs. Lockwood was admitted, and the right of women to practice was established, but I have never yet seen a woman plead a case of any kind in court, and I have never met with a woman lawyer except . . . concerning the settlement of some unimportant litigation, and I think it may be safely asserted that there is no prospect that women will be seen except as a *rara avis* in the ranks of the legal fraternity.⁹⁶

Significantly, sixteen percent of women polled said sex discrimination was the primary reason they were not involved with the law; thirty-four percent attributed the demands of marriage and motherhood as barriers to the practice.⁹⁷ If women were offered jobs in large firms, it often consisted of a library or clerical staff position.⁹⁸

Notwithstanding women's ability to gain bar admittance to practice law, many of the bar associations remained impervious to requests for female attorney admissions. The American Bar Association did not admit a woman as a member until 1917, and she dishearteningly stated law was a man's field and would remain so.⁹⁹ In response to the sex

⁹⁴ *Id.* at 229-30.

⁹⁵ MORELLO, *supra* note 1, at 179.

⁹⁶ *Id.* at 176 (quoting THERON STRONG, LANDMARKS OF A LAWYER'S LIFETIME [Dodd, Mead 1914]).

⁹⁷ Drachman, *The New Woman Lawyer*, *supra* note 92, at 235.

⁹⁸ MORELLO, *supra* note 1, at 179.

⁹⁹ Drachman, *The New Woman Lawyer*, *supra* note 92, at 256-57.

discrimination that permeated the profession, the National Association of Women Lawyers was formed in 1923.¹⁰⁰ Echoing the refrain of their Equity Club predecessors, women also addressed the continuing dilemma of managing a career and family. Some advocated relinquishing one's career for the sanctity of the home; others insisted that with the proper companionate spouse both could be achieved. All decried the fact that women would never be afforded the freedom to pursue one's occupation that their male colleagues enjoyed.¹⁰¹ In short, while access to the profession in every state was evident by 1930, the deeply entrenched resistance to women in law and its concomitant acts of sex discrimination ensured that women's optimistic aspirations of professional equality with men were not to be attained.¹⁰²

IV. 1930-1970: THE POSTFEMINIST PHASE

The numbers of women attorneys for the forty year period from 1930 until 1970 remained small, comprising at best one to three percent of the profession for most of that duration.¹⁰³ These figures were enlarged during the World War II era because of the depleted ranks of available male candidates for legal study. Thus, given the absence of prospective males, schools felt compelled to temporarily increase the enrollment of women students, attaining "an unprecedented twelve percent in the fall of 1942."¹⁰⁴ Some schools, like Baylor, chose to close and others, like Harvard, fervently resisted the admittance of women with its president avowing in 1943 that it was not doing "as bad as we thought. We have [seventy-five] students, and we haven't had to admit any women."¹⁰⁵

Scholars concur that subsequent to the attainment of the right to vote in 1920, a period of post feminism began and the small number of women attorneys, like other feminists of that era, no longer regarded themselves as part of a movement.¹⁰⁶ With suffrage achieved, no consensus existed among women with regard to the manner in which the vote could be implemented to attain equality in other arenas. When the vote failed to afford women lawyers equality in the profession, women sought "assimilati[on] to the male model of a lawyer,"¹⁰⁷ much

¹⁰⁰ *Id.* at 247.

¹⁰¹ *Id.* at 253.

¹⁰² *Id.* at 256.

¹⁰³ Kay, *supra* note 91, at 7.

¹⁰⁴ *Id.* at 8.

¹⁰⁵ *Id.*

¹⁰⁶ Barbara Allen Babcock, *Foreword: A Real Revolution*, 49 U. KAN. L. REV. 719, 730 (2001) [hereinafter Babcock, *Real Revolution*].

¹⁰⁷ *Id.*

as Leila Robinson had pronounced in the nineteenth century, “Do not take sex into the practice. Don’t be ‘lady lawyers.’ Simply be *lawyers* and recognize no distinctions—no existence of any distinction between yourselves and the other members of the bar.”¹⁰⁸ Thus, these women, who still tackled the struggle to balance family and work duties, would not “ask for individual favors or even collective recognition.”¹⁰⁹

It was not until the civil rights movement of the 1960s, coupled with Betty Friedan’s consciousness raising work in 1963, *The Feminine Mystique*, that the demographics of women in the legal profession began to change and did so, strikingly, in the 1970s.¹¹⁰ In a fashion similar to nineteenth century women who viewed the status of slaves as inescapably intertwined with their own, as property to be possessed and unilaterally controlled by men, women in the 1960s were inspired by the black civil rights movement to examine the constraints in their own lives. They especially examined those constraints imposed as a consequence of the political ideology of containment in the 1950s, which sought to limit the worldwide expansion of Communism and domestically encouraged women to return to the strict gender roles of domesticity in order that the home become a bulwark against the threats of the Soviet Union.¹¹¹ Friedan’s work, particularly, inspired the rebirth of the women’s movement and encouraged women to pursue nontraditional careers such as the law.¹¹² Even the unyielding Harvard reluctantly opened its doors to women in 1950 and Washington and Lee did so in 1973.¹¹³ Judith Richards Hope, a member of the Harvard class of 1964, which contained fifteen women, recounts the way in which sex discrimination continued to pervade the landscape. Firms were reluctant to hire women; only a few years prior, Sandra Day O’Connor, third in her class at Stanford, could only secure a position as a clerk. Hope noted that the law placement office at Harvard did not buck the de facto discrimination practiced by the firms and interpreted its role as explaining to female law students why applying to such firms was fruitless.¹¹⁴ Further, there were only two women’s toilets on all of Harvard’s campus; this “potty problem” was often proffered by schools as a rationale for avoiding the admittance of women. Even in the midst of six-hour exams, women

¹⁰⁸ Drachman, *Women Lawyers*, *supra* note 13, at 2429.

¹⁰⁹ Babcock, *Real Revolution*, *supra* note 106, at 730.

¹¹⁰ *See infra* notes 111-119.

¹¹¹ *See MAY*, *supra* note 5, at 14.

¹¹² Kay, *supra* note 91, at 11.

¹¹³ *Id.* at 11 n.33.

¹¹⁴ HOPE, *supra* note 77, at 71.

were compelled to leave the building to find a bathroom.¹¹⁵ Blatant discrimination occurred in the form of “Ladies Day,” where a professor would only call on women to recite a few days a year, with the intent, at least in part, to embarrass the women and amuse the men.¹¹⁶ Moreover, most law firms, if they condescended to hire a woman, only wanted the symbolic “one.” No affirmative action existed in the workplace; Philadelphia law firms unhesitatingly announced they did not hire women, and male associates were paid more than female associates.¹¹⁷

The impending changes, however, originating in the early 1970s, were extraordinary. The fifteen women in the Harvard Law class of 1964 comprised three percent of the class. By 2003, women constituted forty-eight percent of the student body there and more than fifty percent of law students nationwide.¹¹⁸ Law schools discarded the quotas regarding women’s admissions in response to a number of factors, including pressure from the women’s burgeoning feminist movement, affirmative action mandates, and from litigation. The law profession in 1964 was ninety-seven percent male, and by 2003, it was nearly half female.¹¹⁹ In light of these compelling figures, many are tempted to conclude equality has been achieved in the legal profession, or that the sheer weight of such numbers will exert an inexorable path to equality. Statistics regarding partnership, managerial responsibility, drop out rate, and sex discrimination litigation with regard to women attorneys suggest otherwise. For many, the real revolution of feminizing the profession has just begun.

V. A SEARCH FOR EQUAL OPPORTUNITY IN THE 1970S AND BEYOND

The women of the 1970s and 1980s endeavored to extend the achievements of their counterparts of the nineteenth century. These contemporary women had the elite law degrees that Lemma Barkaloo and Lavinia Goodell had sought; further, there were no impediments to bar admission such as those faced by Belva Lockwood or Myra Bradwell. What they now sought was to address inequality of treatment in the workplace. Title VII of the 1964 Civil Rights Act served as the basis for lawsuits that challenged the rampant sex discrimination practiced by law firms, both with respect to initial hiring and later, as related to the awarding of partnership. In the 1973 case *Kohn v. Royall, Koegel &*

¹¹⁵ *Id.* at 83.

¹¹⁶ *Id.* at 98.

¹¹⁷ *Id.* at 153, 161, 166.

¹¹⁸ *Id.* at 257.

¹¹⁹ *Id.*

Wells,¹²⁰ the plaintiff, a second year law student at Columbia University, alleged in a class action on behalf of all women lawyers similarly situated, that she was not hired by the law firm due to its continuous pattern of discrimination. What is significant is that the court, while recognizing that many subjective factors contribute to an applicant's qualifications that extend beyond quantifiable academic credentials, still asserted that this does not immunize discriminatory practices in professional fields from attack.¹²¹ Ultimately Margaret Kohn prevailed on the issue of sex discrimination and the defendant law firm agreed to award a certain percentage of the associate positions to women.¹²² In a similar fashion, a third year law student, Diane Serafin Blank, claimed the firm of Sullivan & Cromwell had engaged in sex discrimination in denying her employment.¹²³ In this action, also premised on Title VII, the defendant employed defense tactics that were self-defeating, and ironically illustrative of the stereotypical prejudices it held regarding women.¹²⁴ Sullivan & Cromwell raised the "unclean hands" defense, asserting Blank had set the firm up and really had no intention of joining the firm.¹²⁵ Sullivan & Cromwell then tried to have the judge disqualified premised on her presumed bias based on her race, sex, and former advocacy for the NAACP, all of which they argued would make her prejudiced against the defendant.¹²⁶ This case concluded with a settlement guaranteeing a three year review of the hiring, assignments, promotion, and salary schedules of Sullivan & Cromwell to assure the plaintiff and her counsel that no employment policies and practices premised on sex discrimination would persist.¹²⁷

A case that established a valuable precedent for those seeking freedom from employment discrimination premised on gender in the legal marketplace was *Hishon v. King & Spalding*,¹²⁸ where the United States Supreme Court declared Title VII applicable to the selection of partners in a law partnership.¹²⁹ Elizabeth Anderson Hishon, a Harlan Fiske Stone Scholar at Columbia Law,¹³⁰ worked for the firm from 1972

¹²⁰ 59 F.R.D. 515 (S.D.N.Y. 1973).

¹²¹ *Id.* at 521.

¹²² MORELLO, *supra* note 1, at 212.

¹²³ Blank v. Sullivan & Cromwell, 418 F. Supp. 1 (S.D.N.Y. 1975).

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ MORELLO, *supra* note 1, at 213.

¹²⁸ Hishon v. King & Spalding, 467 U.S. 69 (1984).

¹²⁹ *Id.* In 1972 Congress had extended Title VII to include university employment practices. See Kay, *supra* note 91, at 12.

¹³⁰ MORELLO, *supra* note 1, at 119.

until 1979, at which time she was denied partnership.¹³¹ Hishon filed with the Equal Employment Opportunity Commission, asserting that the firm had discriminated against her based on her gender in violation of Title VII of the Civil Rights Act.¹³² After the EEOC issued a notice of right to sue, she filed in federal district court.¹³³ The trial court and the Court of Appeals ruled for the defendant, arguing that Title VII was inapplicable to the selection of partners by a partnership, with Federal District Judge Newell Edenfield urging that coercing an unwanted partnership was the equivalent of a shotgun wedding.¹³⁴ The United States Supreme Court concluded, however, that professional partnerships did come within the purview of federal antidiscrimination laws and Title VII scrutiny.¹³⁵ While applauded by women's bar associations, others skeptically opined that the consequences would not be more partnerships; instead, it was expressed by some that greater scrutiny would be afforded women attorneys in order to justify why they did not merit partnerships.¹³⁶

Judge Edenfield of the Federal District Court in *Hishon* had remarked that a professional partnership was in a very real sense like a marriage.¹³⁷ While his ruling was not ultimately upheld, his analogy did correctly allude to the subjectivity that is inherent in such a partnership decision. The characteristics one seeks in a law partner—intelligence, analytical ability, drive, writing ability, rainmaking prowess, oral communication skills, and commitment to the profession—are not always objectively quantifiable in the sense that three book publications, seven refereed articles, and six prestigious presentations might be deemed worthy of tenure and promotion for a professor. In *Ezold v. Wolf, Block, Schorr and Solis-Cohen*,¹³⁸ the issue of whether the partners' subjective determination of Ezold's potential for partnership masked discriminatory intent, and the extent to which the court afforded

¹³¹ *Hishon*, 467 U.S. 69.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Hishon v. King & Spalding*, No. C80-326A, 1980 U.S. Dist. LEXIS 16179, at *6-7 (N.D. Ga. Nov. 26, 1980).

¹³⁵ It should be noted that while the Court in *Hishon* held that an associate's allegation that a law partnership discriminated against her is cognizable under Title VII, Justice Powell, in a concurrence, specifically stated that the decision should not be construed as extending Title VII to the management of a law firm by its partners. Hence, the relationship among partners and shareholders would not properly be characterized as employment. *Hishon*, 467 U.S. at 79-80.

¹³⁶ MORELLO, *supra* note 1, at 217.

¹³⁷ 1980 U.S. Dist. LEXIS at *6.

¹³⁸ 983 F.2d 509 (3d Cir. 1992).

deference to the partners' rationale for denial of such partnership was at the core of the case.¹³⁹ Nancy Ezold, while successful at the trial court level, ultimately lost her sex discrimination lawsuit that was based on a Title VII violation.¹⁴⁰ The appellate court found that the firm had made a bona fide subjective assessment of her analytical ability, which the court did not deem a pretext for discrimination.¹⁴¹ Ezold had been a lateral hire who had graduated in the top third of her Villanova University School of Law class. Lacking a law review background and an Ivy League pedigree, she was advised her position as an associate in the partnership track would not be an easy one. Throughout her tenure, she was regularly reviewed pursuant to various criteria. While she garnered good reviews in some areas, her assessment was not strong in the area of legal analysis. Ezold was able to convince the trial court in her disparate treatment claim against Wolf that the employer's articulated reason for denial of partnership, insufficient analytical skills, was mere pretext or "coverup"¹⁴² for discrimination.¹⁴³ The trial court reached the conclusion that the proffered rationale of Wolf was unworthy of credence, in part by comparing Ezold's candidacy to that of her peers who were afforded positive recommendations in their quest for partnership.¹⁴⁴ The Third Circuit Court of Appeals, in reversing, noted that Wolf's denial of partnership was based on a "subtle and subjective consensus among the partners" that she lacked the analytical ability for

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 526-27.

¹⁴² *Bowles v. City of Camden*, 993 F. Supp. 255, 262 (D.N.J. 1998) (quoting *Loeb v. Textron*, 600 F. 2d 1003, 1012 (1st Cir. 1979)).

¹⁴³ The formulation and shifting burden of proof for a discrimination case have been set forth by the United States Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Pursuant to this enunciated framework, a plaintiff in a discrimination case must establish a prima facie case for failure to promote, by illustrating she is a member of a protected class, is qualified for the position, and was rejected while non-members received more favorable treatment. *Ezold*, 983 F.2d at 522. After establishing a prima facie case, the defendant has the burden to produce a legitimate basis for its decision. *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248 (1981). The plaintiff must demonstrate at that point by a preponderance of the evidence that the proffered rationale is a mere pretext for discrimination. *Reeves v. Sanderson Plumbing Prods, Inc.*, 530 U.S. 133 (2000). A disparate treatment claim may also be premised upon the theory of "mixed motives" where the employee must provide more direct evidence of discrimination than is required for a pretext case. *See Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221 (3d Cir 1994). Employment discrimination cases under Title VII may also be grounded upon a claim of disparate impact liability whereby seemingly neutral business practices negatively impact employees in a protected class. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In those cases, the employer must demonstrate the challenged employment practice serves a legitimate business goal.

¹⁴⁴ *Ezold*, 983 F.2d at 526.

their complex litigation.¹⁴⁵ Further, the court stated Wolf reserved the power to decide the issue by consensus.¹⁴⁶ Notably, the Third Circuit held that the trial court may not substitute its subjective judgment for that of the law firm partnership.¹⁴⁷

Where promotions are dependent upon an employer's assessment of various subjective criteria, as in law partnerships, rather than objective quantifiable factors, it makes it more difficult for a plaintiff to compare herself to similarly situated employees and to demonstrate pretext. The *Ezold* case engendered significant criticism among women attorneys who believe it created a viable defense to sex discrimination lawsuits under the rubric of subjective criteria for assessment and further strengthened the glass ceiling. One author asserts it created a "road map" for employers to avoid liability.¹⁴⁸ The Third Circuit's *Ezold* decision, in concluding Wolf's tendered explanation was not pretextual and was applied fairly, was also criticized for exhibiting undue deference to the law firm's assertion that excellent analytical ability was deemed the crucial requisite to the awarding of partnership status. The court reasoned that it was extending the same deference and avoidance of unwarranted intrusion that it exhibits in analogous situations pertaining to academic tenure.¹⁴⁹ Some assert the court failed to scrutinize the validity of Wolf's criteria for partnership and why the firm valued that single criteria more than any other indicia of achievement it reviewed.¹⁵⁰

Yet *Ezold* need not be construed as an assault upon the tenets of Title VII prohibitions against disparate treatment premised on pretext or as an overly deferential acceptance of the wisdom of law firm partnership decisions. Legal analytical ability was always a touted characteristic of Wolf, and associates were apprised of its significance. Notwithstanding *Ezold*'s laudable achievements with respect to other lawyerly qualities and personal characteristics, she was advised continuously and repeatedly of her shortcomings in this area. Pretext is not established by virtue of the fact that an employee has received some favorable comments or good evaluations.¹⁵¹ Her most ardent supporters among

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 512-13.

¹⁴⁸ Steve French, *Of Problems, Pitfalls and Possibilities: A Comprehensive Look at Female Attorneys and Law Firm Partnership*, 21 WOMEN'S RIGHTS L. REP. 189, 209 (2000).

¹⁴⁹ *Ezold*, 983 F.2d at 527.

¹⁵⁰ French, *supra* note 148, at 208.

¹⁵¹ *Ezold*, 983 F.2d at 528; *see Schwaller v. Squire Sanders & Dempsey*, 671 N.Y.S.2d 759 (N.Y. App. Div. 1998) (holding the defendant law firm demonstrated legitimate, nondiscriminatory reasons for its decision to discharge the attorney plaintiff).

the partners concurred as to the deficiency and requested the partnership standards be relaxed in order to admit her, which the partnership declined to do. The firm did, in fact, practice complex litigation that rendered superior analytical ability an imperative. Under these circumstances, while one may urge that underlying gender discrimination propelled the ultimate denial, one can arguably conclude Wolf's proffered defense did not lack credibility or legitimacy.

In a subsequent sex discrimination case filed by a female attorney against her law firm, the plaintiff successfully proved pretext for discrimination under Title VII. What distinguished *Masterson v. LaBrum and Doak*¹⁵² from *Ezold* was twofold in nature: the law firm exhibited obvious discriminatory practices as applied to Masterson to which no court would offer deference, and the firm had a documented history of discrimination toward females. Despite her excellent reviews in terms of her legal abilities, client relations, billable hours, and trial experience, Masterson was denied partnership for failing to satisfy the partnership criterion of client development, a criteria of which she, unlike her male peers, had not been apprised prior to consideration of her candidacy.¹⁵³ Given these rather egregious circumstances, the court deemed the firm's proffered reason of failure to develop business as pretextual, in that Masterson was assessed pursuant to a standard she was not afforded the opportunity to meet.¹⁵⁴

The *Ezold* and *Masterson* cases suggest that in order to prevail in a sex discrimination case, one must present rather compelling evidence of patently unfair behavior and distinct differences in the treatment of males and females, with historical discriminatory policies toward women providing supporting evidence of an employer's discriminatory intent. Yet, it would appear that notwithstanding the difficulty of pursuing a discrimination claim, *Ezold* and its progeny have not served as absolute deterrents to potential plaintiffs. There exists a recently growing body of gender bias litigation where female attorneys seek to be afforded equal treatment with regard to attaining partnership and its concomitant benefits and compensation.¹⁵⁵ Further, attorneys who specialize in these cases discern an increased willingness on the part of

¹⁵² 846 F. Supp. 1224 (E.D. Pa. 1993).

¹⁵³ *Id.* at 1228-29.

¹⁵⁴ *Id.* at 1232-33.

¹⁵⁵ MichaelAnn Knotts, *Putting Up with Gender Bias or Suing: Female Attorneys Go for Broke*, 12 N.J. LAW 1801 (2003). The author notes that while women lawyers are pursuing with vigor partnership, equal compensation, and family leave issues, clearly they view the preferable route for resolution of these matters to be in the nonpublic route of negotiation.

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women attorneys to discard a “suffer in silence” approach and to challenge the law firm.¹⁵⁶

Sexual harassment, a form of sex discrimination actionable under Title VII, as recognized by the United States Supreme Court in *Meritor v. Vinson*,¹⁵⁷ evidently occurs with marked frequency in the law firm context. Indeed, studies demonstrate that more than fifty percent of female attorneys experience sexual harassment.¹⁵⁸ A national study conducted in 2001 by the American Bar Association Commission on Women entitled *The Unfinished Agenda*, indicated that despite the progress achieved toward gender equity in the law profession, sexual harassment remains an obstacle to true equality of treatment.¹⁵⁹ Complaints of sexual harassment, whether defined as “quid pro quo” claims¹⁶⁰ or “hostile working environment” claims¹⁶¹ or a combination of both,¹⁶² may find law firms particularly vulnerable, research suggests, due to the influx of many female associates coupled with the mandates of the profession involving long hours, travel, and partner autonomy.¹⁶³ Others assert that the fear of sexual harassment claims or appearance of

¹⁵⁶ *Id.*

¹⁵⁷ 477 U.S. 57 (1986).

¹⁵⁸ Lisa Pfenninger, *Sexual Harassment in the Legal Profession: Workplace Education and Reform, Civil Remedies, and Professional Discipline*, 22 FLA. ST. U. L. REV. 171, 176 (1994).

¹⁵⁹ ABA Commission on Women in the Profession & Deborah L. Rhode, *The Unfinished Agenda: A Report on the Status of Women in the Legal Profession*, (2001).

¹⁶⁰ See *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 281-82 (3d Cir. 2000) (holding that to establish quid pro quo sexual harassment, a plaintiff must show that her response to unwelcome sexual advances, or other verbal or physical conduct of a sexual nature, was subsequently used as a basis for a decision about compensation, terms, conditions, or privileges of employment).

¹⁶¹ See *Richardson v. N.Y. State Dep’t of Corr. Serv.*, 180 F.3d 426, 436 (2d Cir. 1999). Pursuant to a hostile work environment standard, the plaintiff must demonstrate conduct that would be considered sufficiently severe or pervasive to alter the condition of employment and create an abusive working environment, and must establish that a specific basis exists for imputing the conduct that created the hostile environment to the employer.

¹⁶² See *Frederick v. Glanton*, No. 92-0592, 1994 U.S. Dist. LEXIS 1809 (E.D. Pa. Feb. 18, 1994) (explaining that the female associate at the law firm of Reed Smith Shaw & McClay asserted that both forms of sexual discrimination in violation of Title VII had been committed by the defendant, a partner in the law firm). Although the jury found Glanton liable on the claim for hostile work environment, and found that Frederick suffered actual mental or emotional injury, it awarded no damages to her. On the quid pro quo harassment issue, the jury did not find that she was terminated from her employment for refusing to continue a sexual relationship with the defendant. Frederick did receive one hundred thousand dollars in compensatory damages for defamation and twenty-five thousand dollars in punitive damages. Reed Smith was absolved of any liability with respect to all claims asserted.

¹⁶³ Pfenninger, *supra* note 158, at 173.

impropriety serves as a chilling effect upon some partners' wishes to mentor a female associate.¹⁶⁴

The perceived vulnerability of the law firm to sexual harassment charges primarily arises from the following two additional factors: the firm's structural composition of many partners, all of whom serve in some supervisory capacity over other employees, and the firm's ethical responsibility to uphold the law. The United States Supreme Court in *Faragher v. City of Boca Raton*¹⁶⁵ held that employers face potential vicarious liability for the creation of unlawful hostile work environments by supervisors. Jonathan H. Kurens observes that such "[l]iability takes root in an organization's supervisory apparatus; and law firms are fertile grounds, as they have many ostensible 'supervisors,'"¹⁶⁶ including many partners who arguably are akin to CEOs of a corporation. Clearly, a law firm may prove vicariously liable for an individual partner's sexual harassment of an associate, but Title VII has thus far not been afforded a broader interpretation that would encompass a definition of partner or shareholder as sharing an employment relationship.¹⁶⁷ Further, it is incumbent upon lawyers as guardians of the law and officers of the court to uphold the integrity of the law. In *Pryor v. Seyforth*,¹⁶⁸ the Court of Appeals, while noting that the defendant partner's innocuous and mildly flirtatious conduct did not rise to the level of Title VII sexual harassment, admonished that "of all employers, lawyers can be expected to be most sensitive to charges of employment discrimination."¹⁶⁹ Although there exists other publicized accounts of instances or assertions of sexual harassment in law firms,¹⁷⁰ it would appear that such claims are often settled rather than litigated in an effort to avoid cost and time expenditures indigenous to litigation and to avoid publicity for both parties.

¹⁶⁴ Cynthia Fuchs Epstein, Robert Saute, Bonnie Oglensky & Martha Gever, *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession: A Report to the Committee on Women in the Profession, The Association of the Bar of the City of New York*, 64 FORDHAM L. REV. 291, 355-56 (1995-96).

¹⁶⁵ 524 U.S. 775 (1998).

¹⁶⁶ *Cause for Alarm: Employment Practices Liability Claims Can Sink a Law Firm*, 228 N.Y. L.J. 5 (Nov. 19, 2002).

¹⁶⁷ See *supra* note 135 (describing Title VII as inapplicable to a sexual harassment lawsuit filed by a partner against another partner).

¹⁶⁸ 212 F.3d 976 (7th Cir. 2000). Interestingly, while the dismissal of the sexual harassment count by the district court was affirmed, the dismissal of a count addressing retaliatory firing of the plaintiff by the law firm was reversed. *Id.* at 980.

¹⁶⁹ *Id.*

¹⁷⁰ Pfenninger, *supra* note 158, at 179-81.

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Sexual harassment conducted by judges is regulated and disciplined under the American Bar Association's Model Code of Judicial Conduct,¹⁷¹ which requires judges to comport themselves without gender bias or prejudice and specifically prohibits sexual harassment. In the 1993 case of *In the Matter of Judge Edward J. Seaman*,¹⁷² Judge Seaman's law clerk, Barbara Denny, alleged that the judge violated several canons of the *Code of Judicial Conduct*, including Canons 1, 2, 2A, 3A(3) and 3A(4),¹⁷³ by engaging in various kinds of sexual harassment. The jurist's pattern of abusive behavior included making remarks to her of a sexual nature and repeatedly touching her, including reaching under her calf length skirt to touch her knees. The court found clear and convincing evidence that the judge's misconduct was demonstrated by "a pattern of behavior that was offensive and inimical to the employee."¹⁷⁴ Deeming sexual harassment of women by men among the most pervasive, serious, and debilitating forms of gender discrimination, the court held that sexual harassment of a law clerk by a judge warranted a sixty-day suspension without pay.¹⁷⁵ Judge Seaman subsequently resigned.

Currently, testimony is being presented before the New Jersey Supreme Court's Advisory Committee on Judicial Conduct regarding allegations of sexual harassment on the part of Superior Court Judge Randolph M. Subryan. Judicial clerk Jennifer Breaton's allegations include incidents involving a forced kiss and an offer to share racy photos.¹⁷⁶ Purportedly, the judge told his law clerk she was "going to turn me into Judge Seaman," a reference she did not initially understand.¹⁷⁷ The judge's attorney has focused on presenting evidence that portrays the tone and atmosphere of the judge's office as one of fun

¹⁷¹ *Id.* at 211, 212-14 (citing examples of judicial violations of the code as it pertains to sexual harassment); see also Marina Angel, *Sexual Harassment by Judges*, 45 U. MIAMI L. REV. 817 (1991).

¹⁷² 627 A.2d 106 (1993).

¹⁷³ The Supreme Court of New Jersey noted specifically that Canon 1 proclaims that a judge must uphold the integrity and independence of the judiciary; Canon 2 states judges should avoid impropriety and the appearances of impropriety; Canon 2A advises that a judge must respect and comply with all laws in a manner that promotes public confidence in the integrity and impartiality of the judiciary; Canon 3A(3) instructs a judge to be courteous and dignified to all with whom he or she interacts in an official capacity, and Canon 3A(4) states specifically that a judge should not discriminate due to "race, color, religion, age, sex, sexual orientation, national origin, marital status, socioeconomic status, or handicap." *Id.* at 109.

¹⁷⁴ *Id.* at 120.

¹⁷⁵ *Id.* at 124.

¹⁷⁶ Robert G. Seidenstein, *He Grabbed Me and Kissed Me*, 13 N.J. LAW 1117 (2004).

¹⁷⁷ Robert G. Seidenstein, *Judge Says He's Wrongly Accused*, 13 N.J. LAW 1361 (2004).

and camaraderie.¹⁷⁸ Breaton, in fact, chuckled at some memories of her dealings with the judge, acknowledging under questioning that the judge was committed to expanding opportunities for women and minorities, that she had worn a clown nose along with others in the office, and that she had purchased a t-shirt for him while she was on vacation.¹⁷⁹ Witnesses supportive of the judge all asserted the respected jurist cultivated a relaxed atmosphere in chambers. The case has not yet been decided, but it points to the difficulties inherent in a sexual harassment lawsuit. It often involves, firstly, the classic “he said, she said” scenario. More importantly, as noted by Cynthia Fuchs Epstein:

Because women today expect equality, they have low tolerance for sexist behavior, particularly disrespectful comments and jokes, and no tolerance for sexual harassment. Because of the subtle form of this behavior and the fuzzy boundaries between friendliness, joking, hostility and discrimination—as well as of the generational differences in interpretations of harmful intent—there are considerable problems in identifying sources of sexual discrimination and sexual harassment.¹⁸⁰

Unquestionably, sexual harassment and sex discrimination, which employ gender stereotypes and regard women as a group rather than as individuals, “provide serious obstacles to mobility” and hence contribute to the glass ceilings.¹⁸¹

VII. REMAINING GENDER INEQUITIES IN THE LEGAL PROFESSION

The extraordinary inroads made by women in terms of the numbers participating in the legal profession have been duly noted in a 2003 report by the U.S. Equal Employment Opportunity Commission (“EEOC”).¹⁸² This report, entitled *Diversity in Law Firms*, notes that in 1970, Ivy League white Protestant males dominated the elite law firms, with an almost total exclusion of women. By 1990, 36.2% of all associates in such firms were women. Supreme Court Justice Ruth Bader Ginsburg

¹⁷⁸ Robert G. Seidenstein, *Judge's Lawyer: He Set a Friendly Office Climate*, 13 N.J. LAW 1169 (2004).

¹⁷⁹ *Id.*

¹⁸⁰ Epstein, *supra* note 164, at 371.

¹⁸¹ *Id.* at 303-04.

¹⁸² *Diversity in Law Firms*, at www.eeoc.gov/stats/reports/diversitylaw/index.html (last visited May 10, 2004).

observes that women are more than fifty percent of the law school population, forty-one percent of new associates at large firms, twenty-three percent of full professors with tenure, hold nearly twenty-five percent of all federal judgeships, and have served in nearly every state as president of state bar associations.¹⁸³ Given these figures, coupled with the fact that firms were partnering women and exhibiting responsiveness to the work-family issues, Epstein asserts that in the late 1980s, it “appeared that the sheer number of women entering the profession would lead to fundamental changes in certain long-prevailing professional paradigms.”¹⁸⁴ Yet, inequities do exist despite the popular belief that women are no longer discriminated against in the legal profession, or as Deborah Rhode terms this, the “‘No problem’ Problem.”¹⁸⁵ The facts show that the odds of a woman being made partner is less than one third of the odds for a man being named partner.¹⁸⁶ The economics of the 1990s, which included a reduction in business with a concomitant downsizing of law firms, drastically reduced the opportunity for hiring and promotion of women.¹⁸⁷ Further, studies of attrition of women from the profession suggest that a smaller proportion of women law graduates engage in law practice and a greater proportion of them depart the profession than do their male colleagues.¹⁸⁸

The 2003 EEOC report indicates that the most pressing equal employment issue in large national law firms is no longer hiring, but rather the conditions of employment, particularly promotion to partnership.¹⁸⁹ Under the “up and out” system utilized by the large firms (whereby generally one’s partnership potential is formally assessed at about eight to ten years subsequent to a first year associateship, with a negative determination resulting in the termination of any relationship with the firm), women fare poorly. In a study whereby cohorts of first year associates for the years 1973-1974 and 1985-1986 were tracked for ten years, for the entire period nineteen percent of the men gained partnership, while only eight percent of the women did so.¹⁹⁰ Thus,

¹⁸³ *Shining a Lamp*, *supra* note 75, at 32.

¹⁸⁴ Epstein, *supra* note 164, at 295.

¹⁸⁵ Aliza Anvari, *Rhode: Sex Discrimination in Legal Profession Still Problem*, THE NEBRASKA TRANSCRIPT 11 (2001).

¹⁸⁶ *Diversity in Law Firms*, *supra* note 182, at 16.

¹⁸⁷ Epstein, *supra* note 164, at 295.

¹⁸⁸ Fiona M. Kay, *Flight from Law: A Competing Risks Model of Departures from Law Firms*, 31 LAW & SOC’Y REV. 301, 302 (1997).

¹⁸⁹ *Diversity at Law Firms*, *supra* note 182, at 15-16.

¹⁹⁰ *Id.* at 4.

women have a “distinctly unequal position” among lawyers.¹⁹¹ The lack of women partners as evidence of gender bias in the legal profession is a refrain echoed in much of the literature. Many note that women are disproportionately represented among associates and underrepresented as partners.¹⁹² Hagan and Kay observe that women enter law firms in large numbers, yet with prospects of partnership uncertain, many leave within the first few years of practice.¹⁹³ While some of the disparity is attributable to individual preferences, constraints continue to affect women’s professional career opportunities.¹⁹⁴

Rhode challenges the “myths of meritocracy,” which assert women attorneys have equality of opportunity. Citing studies promulgated by the 1995 American Bar Association’s Commission on the Status of Women, a Harvard Women’s Law Association study, and the “Glass Ceilings” study released in 1996 by the Bar Association of New York City, Rhode observes that proportionate representation is lacking not only in numbers of partners but in tenured law school faculty and law school deans as well.¹⁹⁵

Another symptom of disparate treatment of women in the law profession is that women, to some extent, still appear to be concentrated in areas that are related to stereotypical gender roles, such as family law and trusts and estates, in contrast to the “hard” corporate law or litigation inhabited by males. Hull and Nelson conclude that there is evidence of both “horizontal and vertical gender segregation within the practice of law despite women’s rapid numerical integration into the profession since the early 1970s.”¹⁹⁶ They assert that data shows women are underrepresented in the private practice or law firm setting and overrepresented in government and public trust law.¹⁹⁷ The EEOC report indicates, for example, that 20.7% of white women attorneys are employed by the government or the judiciary, in contrast to 7.6% of

¹⁹¹ *Id.* at 16.

¹⁹² Fiona M. Kay & John Hagan, *Cultivating Clients in the Competition for Partnership: Gender and the Organizational Restructuring of Law Firms in the 1990s*, 33 *LAW & SOC’Y REV.* 517, 521 (2000).

¹⁹³ *Id.* at 522.

¹⁹⁴ Kathleen E. Hull & Robert L. Nelson, *Assimilation, Choice, or Constraint? Testing Theories of Gender Differences in the Careers of Lawyers*, 79 *SOC. FORCES* 229 (2000).

¹⁹⁵ Deborah L. Rhode, *Myths of Meritocracy*, 65 *FORDHAM L. REV.* 585, 586-87 (1996).

¹⁹⁶ Hull, *supra* note 194, at 233.

¹⁹⁷ *Id.* at 233.

white men.¹⁹⁸ The percentages of African-American lawyers and Hispanic lawyers in government and the judiciary are higher, 43.8% and 37.5%, respectively.¹⁹⁹ Moreover, women occupy less prestigious and less remunerative positions that deal with “personal plight, and that can be held on a part time basis.”²⁰⁰ Fiona Kay even goes so far as to characterize the legal profession as a ghettoizing occupation, rather than an integrating field, due to the manner in which women are “more highly represented among positions of lower authority, lower supervisory powers and lower prestige.”²⁰¹

Because women have not attained genuine integration, are relegated to less remunerative specialties, and are partnered at a lower rate, women are also overrepresented in what has sometimes been termed “flight from the law.” The EEOC report, citing the 2003 National Association for Law Placement Foundation Study of entry level hiring and attrition, notes that as compared to men as a whole, minority males, minority females and white females are more likely to have departed their employer within fifty-five months of their start date.²⁰² One study indicated that forty-six percent of men leave their firms, while fifty-nine percent of women do so, thus perpetuating the glass ceiling as to partnership.²⁰³ The problem of flight from the profession appears particularly acute for minority women associates. In 2004, the National Association of Law Placement observed data that suggested that within eight years of joining a large firm, nearly one hundred percent of minority women attorneys depart from the firms compared with attrition rates of 73.3% for all associates and 74.6% for white women associates.²⁰⁴

¹⁹⁸ *Diversity in Law Firms*, *supra* note 182, at 2-3 (quoting Monique R. Payne and Robert L. Nelson, *Shifting Inequalities: Stratification by Race, Gender, and Ethnicity in an Urban Legal Profession, 1975-1995*, 2003, unpublished manuscript)

¹⁹⁹ *Id.* at 3.

²⁰⁰ Kay & Hagan, *supra* note 192, at 522 (quoting Richard L. Abel, *Comparative Sociology of Legal Professions*, in *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* 118 (R. L. Abel & P.S. C. Lewis eds., 1989)).

²⁰¹ Kay, *Flight*, *supra* note 188, at 307.

²⁰² *Diversity in Law Firms*, *supra* note 182, at 3.

²⁰³ Kay & Hagan, *supra* note 192, at 537.

²⁰⁴ Jeff Blumenthal, *ABA to Examine Career Paths of Minority Women Lawyers*, 230 *THE LEGAL INTELLIGENCER* 3 (2004). Philadelphia statistics, however, reflect a 64% attrition rate for women minority attorneys. See Alex Dubilet, *Percentage of Women Minority Partners Rises but Numbers Still Low, Recruitment Study Says*, 231 *THE LEGAL INTELLIGENCER* 7, 16 (2004). Dubilet notes that despite efforts to recruit, retain and promote minority attorneys in Philadelphia, women minority partners comprise less than one percent of all partners in the city. Scant attention has been afforded the experience of minority women, who

Kay notes that even with emerging firm policies on part-time work and maternity leave, all women confront continuing tension between the demands of their careers and their families, and such conflicts prompt their departures.²⁰⁵ When queried why they change jobs, male lawyers respond that it is motivated by an attractive opportunity; women indicate it arises as a result of disaffection with one's current position and the difficulty of balancing all tasks.²⁰⁶ It is possible, however, that with the current restructuring in law firms, which offers a departure from the traditional up and out option through a variety of positions encompassing nonequity partner, special counsel, and permanent associate, the flight of women and of men might be stemmed.

The gender gap in wages for lawyers has traditionally been cited as persuasive evidence of the discrimination seemingly indigenous to this male-modeled profession. The EEOC report, for example, in examining law school graduates from 1972 to 1978 and 1979 to 1985, states that the gender gap remained constant; and fifteen years after graduating, women in both time cohorts earned approximately sixty-nine percent of

confront discrimination premised both on race and gender, in the law profession. This is due, in part, to the lack of such women entering law school until the 1990s. Drachman recounts the "paltry" numbers of black women lawyers that existed during various time periods; in 1940, for instance, while there were 4,146 white women lawyers in the country, only thirty-nine female African American attorneys existed. See Drachman, *The New Woman Lawyer*, *supra* note 92, at 234. In 1990, census figures indicate there were eleven thousand black women lawyers as contrasted with 161,044 white women lawyers. See REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS 77, 297 Appendix C (J. Clay Smith, Jr. ed., 1998). Epstein observes in her "Glass Ceilings" report that she had hoped to analyze the experience of female minority attorneys, but that there were so few minority senior associates and partners in the large firms that the meager data would not support a reasonable analysis. See Epstein, *supra* note 164, at 324. In the eight large corporate law firms which comprised the study, there existed in 1992 one black female partner in stark contrast to the fifty-eight white female partners and twenty-four black female associates, as compared to 281 white female associates. See Epstein, *supra* note 164, at 324, Table II.10. Thus, while there exists much anecdotal information regarding female minority attorneys, such as the accounts of Charlotte E. Ray, the first African American woman lawyer in the United States, or the achievements of Sadie Alexander, the first black female recipient of a Ph.D. and the first black woman to receive a law degree from the University of Pennsylvania, there exists insufficient hard data regarding female minority attorneys. See GARZA, *supra* note 40, at 65; MORELLO, *supra* note 1, at 145-48; REBELS IN LAW, *supra*, at 17. The prospect for more definitive data is encouraging, as the American Bar Association in 2004 announced its intention to examine the experience of minority women in the law profession through a Research Project on the Retention and Advancement of Women of Color. See Blumenthal, *supra*, at 3.

²⁰⁵ Kay, *Flight*, *supra* note 188, at 328.

²⁰⁶ Katharine T. Bartlett, *Women in the Legal Profession: The Good News and the Bad*, at <http://gos.sbc.edu/b/bartlett.html> (last visited Nov. 29, 2003).

men's earnings.²⁰⁷ Although initially there exists no disparity in earnings at the entry level in large firms, the gap develops early and widens with time.²⁰⁸ The issue of differences in salaries, however, is a complex one that results from sex discrimination but is also impacted by the number of hours an attorney works, the number of billable hours charged to clients, and the amount of billable hours actually collected from clients. Further, compensation is determined by one's status of full-time or part-time and one's rainmaking abilities. The EEOC study suggests that the most significant factors negatively influencing earnings are the differences in hours worked and whether one assumes responsibility for childcare.²⁰⁹ Clearly, with the increased emphasis on billable hours witnessed in large law firms, with firms expecting fifty to sixty hours of work per week, with minimum annual billables of 2000 to 2300 hours, it becomes difficult for a woman bearing family responsibilities to compete. An increasingly significant indicator of success, important to attaining partnership, is one's ability to attract and maintain new business from both new and existing clients. Women have not yet achieved success in this area, and reasons for this deficiency include a lack of mentoring by senior partners, a failure to receive quality work assignments from male partners, shortages of time to devote to marketing and engendering business due to family responsibilities, and perceived stereotypical assumptions by peers that they will not be successful in rainmaking.²¹⁰ Further, women are perceived as being at a disadvantage in rainmaking, because they lack necessary networks of business acquaintances. Yet it should be noted that women do not always feel they are particularly suited for rainmaking, and thus, stereotypes with regard to women's lack of aptitude for business matters that are projected onto women are sometimes "embraced" by women themselves, who believe that developing business is an intrinsic ability for which men have an innate skill.²¹¹ Women are also perceived as being at a disadvantage in rainmaking because the business network they do possess lacks sufficient numbers of women in positions of authority to give business to women lawyers. Some women do, in fact, resent rainmaking, particularly those who sought a large firm precisely

²⁰⁷ *Diversity in Law Firms*, *supra* note 182, at 3.

²⁰⁸ Bartlett, *supra* note 206.

²⁰⁹ *Diversity in Law Firms*, *supra* note 182, at 3; see also Kathleen Kunkle Gilbert, *Northwestern University School of Law's Two Year Work Requirement and Its Possible Effects on Women: Another Tile in the Glass Ceiling?* 12 AM. U. J. GENDER SOC. POL'Y & L. 69, 95 (2004).

²¹⁰ Jacob H. Herring, *Can They Do It?: Can Law Firms, Corporate Counsel Departments, and Governmental Agencies Create a Level Playing Field for Women Attorneys?*, in *THE DIFFERENCE "DIFFERENCE" MAKES: WOMEN AND LEADERSHIP* 76 (Deborah L. Rhode ed., 2003).

²¹¹ Epstein, *supra* note 164, at 338.

due to its institutional client base, which typically would render rainmaking unnecessary.²¹² These women construe their roles as solely one of servicing client needs and believe the profession is degraded by moves to make it more business oriented. Rainmaking, however, in today's highly competitive economy, with reduced client loyalties, increased expenses, lateral movement of attorneys, and an ever increasing supply of lawyers, is a crucial component of making partner and should not be deemed a discretionary activity for one who desires that status and its accompanying wages.

The timeless problem of balancing commitment to one's profession and to one's family is a burden that predominantly confronts women in the legal profession and underlies gender inequality in a variety of ways. Women attorneys in the nineteenth century, such as Clara Foltz and Belva Lockwood, required a supportive structure in order to pursue their professional lives; Clara's mother helped care for her five children and Belva's adult daughter engaged in housekeeping for her mother.²¹³ While contemporary attorneys do not have to surmount the enormous hurdles and societal criticisms these women faced in trying to balance private and professional concerns, one arguably can say the demands of the profession today are increasingly more onerous. The average billable hours expected at major law firms in 1990 was about 1600 hours a year; now it is approximately 2300 hours per year, and that figure reflects a trend among firms to increase the target figure.²¹⁴ In a legal culture typified by a traditionally male profile, which encompasses "continuous employment, inflexible hours of labor and minimal workplace support in response to demands of parenting," and rainmaking, the demands of the profession contribute to sex segregation.²¹⁵ This affords women, who assume greater family responsibilities than do their male peers, little time for pregnancy and parenting, and may subject them to differential treatment in the workplace by partners who perceive their ability to perform as being limited by family circumstances.²¹⁶ As a result of the "sweatshop" hours expected of full-time attorneys, a second-class status is imposed upon the practitioner who cannot fulfill these standards.²¹⁷

Faced with these demands, women feel compelled to make a choice in balancing a career and family. Some choose to work only a few years

²¹² *Id.* at 342.

²¹³ Babcock, *Clara Shortridge Foltz*, *supra* note 52, at 1260; Sanger, *supra* note 14, at 1254.

²¹⁴ Kay & Hagan, *supra* note 192, at 525 n.4.

²¹⁵ *Id.* at 526.

²¹⁶ *Id.* at 525.

²¹⁷ Rhode, *supra* note 195, at 592-93.

and purposefully relinquish any hope of attaining partnership, thus fueling the noted attrition rate. Others utilize family oriented policies adopted in recent years which typically permit what is deemed part-time work that encompasses a daily routine of nine to five, or four days, and have earned the moniker of mommy track. Underlying these choices, however, is the awareness that one cannot expect to rigidly adhere to reduced hours when the necessities of work require one's presence and participation during allegedly "off" days. Still others opt for extended leaves to accommodate pregnancy and childcare. Those who adopt these alternatives necessarily confront accompanying reduced wages, may incur resentment by their colleagues, and may witness a reduced chance of partnership status. The unspoken premise underlying the mommy track is that it is incompatible with advancement.²¹⁸ These various forms of flexible work hours are occupied almost solely by women and lead to another gender specific stereotype that women are less ambitious than men.²¹⁹ Rhode suggests that many lawyers assume women prioritize family commitments, which serve to constrain professional achievement and leads to gender inequalities.²²⁰ While she concurs that there is merit in the proposition that some women have a different life preference, she disputes that this is the cause of sex discrimination, for only about four percent of female associates choose part-time work or a flexible schedule, and gender disparities exist among lawyers in similar full-time positions.²²¹ Women, in short, do not choose positions with fewer demands on time and travel because of some genetically predisposed preference. Instead, they "choose" part-time alternatives and career sacrifices because, lacking men's support in shouldering family responsibilities and male colleagues' support of alternative arrangements for practicing law, there really is no choice for women at all.²²² As observed by Epstein in her report for the New York City Bar Association, both women, who have adopted stereotypical views of themselves, and men share the expectation that women will not be as professionally committed once they incur family responsibilities.²²³ By accepting this view, women succumb to glass ceilings imposed by the gatekeepers or the senior members of the partnership, who establish firm practices, policies and perspectives on what constitutes commitment and

²¹⁸ Epstein, *supra* note 164, at 296.

²¹⁹ *Id.* at 339.

²²⁰ Rhode, *supra* note 195, at 591.

²²¹ *Id.*

²²² *Id.*

²²³ Epstein, *supra* note 164, at 298.

professionalism pursuant to a male model, and those imposed by themselves that reflect cultural and familial expectations.²²⁴

A new trend in law school admissions is becoming evident, and if adopted by a significant number of law schools, could arguably exacerbate the tension that exists between commitments to family and profession. For most women attorneys, the decade subsequent to law school graduation is a time within which the hopeful ascendancy toward partnership will occur; at the same time women are aware that with age decreasing chances of pregnancy, it makes a decision imperative in that area as well. Many women seek to attain partnership status first, as family commitments clearly restrain upward mobility. Northwestern University School of Law has instituted a strategic plan which mandates that applicants possess a minimum of two years of work experience in a non law-related area, with such experience reflecting substantial responsibilities. Kathleen Kunkle Gilbert queries whether women "have truly advanced past separate spheres ideology" as evidenced by this plan which "ignores the fact that women have only a finite amount of time to have children."²²⁵ The plan also disregards the fact that in recent years law firms have lengthened the time requisite to attaining partnership from approximately five years to a current associateship of nine years. Coupled with the two-year work experience mandate, women may indeed find that their family planning is significantly burdened.

The rationale underlying this plan is that it will produce more successful students who are more conversant with a competitive business world. Northwestern anticipates their applicants will be more mature and thus, better law graduates. Gilbert contends this plan will make childbearing decisions for women attorneys more difficult.²²⁶ They will be older when they matriculate, when they pursue partnership and parenthood, and will be dealing with a compressed period of time within which to balance professional and private commitments. Gilbert asserts that Northwestern's "oversight is inherently founded upon an ideal male student and worker," and will adversely impact female law students, possibly discouraging them from pursuing law as a profession.²²⁷ This reliance upon the ideal male profile for prospective students would seem to further reinforce the traditional masculine

²²⁴ *Id.* at 309.

²²⁵ Gilbert, *supra* note 209, at 73-75.

²²⁶ *Id.* at 75.

²²⁷ *Id.* at 76.

norms of the legal profession. Interestingly, research suggests the new mandatory two-year requirement may not, in fact, achieve its intended result of producing better lawyers. A recent study by the National Association for Law Placement, entitled *Second Career Lawyers*, indicates that while the subject lawyers perceive themselves as bringing maturity, a strong work ethic and experience with clients to the firm, their professional achievements as compared to those who went directly to law school after college were not discernibly different.²²⁸ Those who had work experience prior to law school took just as long to achieve partnership, were accorded very similar bonuses, and it was rare for them to receive seniority or salary credit for prior work.²²⁹ Thus, a requirement designed to produce superior attorneys may accomplish little more than having a disparate effect on women attorneys, further burdening their ability to balance family and career demands, as well as their ability to attain partnership.

VI. WOMEN'S FUTURE IMPACT ON THE PROFESSION

The nineteenth century women attorneys overcame formidable legislative, judicial and cultural obstacles to gain entry into the exclusively male profession. The second wave of trailblazers, beginning in the 1970s, entered law schools and the profession in remarkable numbers, ultimately establishing a presence even in the elite law firms, but still confronting the difficulty in achieving equity within those firms and addressing the timeless issue of satisfactorily balancing gender and professional roles. Many commentators, such as Cynthia Fuchs Epstein, assert that women now seek a "paradigm shift" that would move beyond seeking equality in the profession and would transform the culture of the law firm.²³⁰ Barbara Babcock of Stanford Law urges that the next step, the "real revolution," should witness women "preparing to claim the pioneer legacy but not by continuing the balancing act. Instead, the new lawyers are gearing to change the profession so that it truly accommodates women."²³¹ Those who seek what is sometimes viewed as the feminization of the profession assert the timeliness of the proposed revolution: the esteem of the profession is low, the hours are extraordinarily demanding, the profession is permeated with greed, disaffection within the profession is high, and they decry the fact law has become a bottom line business.²³² In short, it is believed that the

²²⁸ *New NALP Research on Second-Career Lawyers*, NALP 1 (2004).

²²⁹ *Id.*

²³⁰ Epstein, *supra* note 164, at 299.

²³¹ Babcock, *Real Revolution*, *supra* note 106, at 730-31.

²³² *Id.* at 731.

confluence of these factors and the impressive numbers of women and their sympathetic male colleagues can effect this goal.

In her research, Epstein noted that older female attorneys exhibit “markedly different attitudes toward glass ceiling issues,” and view younger women’s belief that “firms should change to accommodate the reality of working caregivers” as unrealistic.²³³ As a member of the older generation of women attorneys who benefited from the newly created access to law school in the 1970s, one is sympathetic to the desire of women and men to transform the profession by departing from its historic male model; it is, indeed, a profession that in the words of Clara Foltz, is hard and relentless.²³⁴ There exist serious impediments and constraints to such a dramatic proposition, however, that may make such change very difficult to attain in the near future.

Researchers and commentators continually stress the critical mass of women in the profession, alluding to the power that can be exerted by this force. Rarely do they stress the incredible growth the legal profession as a whole has experienced in the last fifty years, nor the practical consequences of such growth. The supply of lawyers has soared: there were approximately two hundred thousand in 1950, seven hundred thousand in 1988 and by 2000, the number of lawyers had exceeded one million.²³⁵ Given the U.S. Census figures for those years of populations of 151 million, 244 million, and 281 million,²³⁶ respectively, this translates into one lawyer for every 755 people in 1950, one lawyer for every 350 people in 1988, and one lawyer for every 281 people in the year 2000. Research that addressed the rate of growth for thirty professions and technical occupations concludes that the legal profession grew faster than the average profession and expanded twice as fast as medicine and three times as fast as the experienced civilian labor force.²³⁷ While the 1980s economy, coupled with expansion of major corporations, and governmental regulations, fueled growth, the last decade has witnessed heretofore rare occurrences, including dismissal of partners, and closing of major firms, and the increase in lateral movement for purposes of obtaining enhanced opportunities, all of

²³³ Epstein, *supra* note 164, at 299.

²³⁴ See *supra* note 1.

²³⁵ Charlotte Chiu & Kevin T. Leicht, *When Does Feminization Increase Equality? The Case of Lawyers*, 33 LAW & SOC. REV. 557, 565-66 (1999).

²³⁶ U.S. CENSUS BUREAU, POPULATION, HOUSING UNITS, AREA MEASUREMENTS AND DENSITY: 1790 TO 1990 (GPO 1991); U.S. CENSUS BUREAU, PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 (GPO 2001).

²³⁷ Chiu, *supra* note 235, at 565.

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which place a new emphasis on “production and tangible results.”²³⁸ Kaye notes that it is not unusual to find law firms with lawyers numbering in the hundreds. Entering classes of associates numbering thirty-nine and up, “must know that the odds are overwhelmingly against lifetime association.”²³⁹ Moreover, it is ironic that notwithstanding the recorded disaffection observed in the profession,²⁴⁰ applicants to law schools are doing so in record numbers. For the fall 2003 matriculated class of Boston University School of Law, which comprises 267 seats, 7246 individuals applied. The University of Pennsylvania Law School for that same year received 5140 applications for a class of 260. In 2003, George Washington University Law School received 11,687 applications for a class of 536 students.²⁴¹

Thus, the growth in the numbers of lawyers intensifies the highly competitive atmosphere and alters the nature of the practice; what is already an inherently adversarial and demanding occupation becomes even further characterized by those traits. Billable hours keep increasing, and more importantly, the degree to which those hours generate collections receives more rigorous scrutiny. The partner to associate ratio has also increased, as has the length of time in the partnership track deemed requisite for attaining partnership, and the criteria for partnership has been raised. Firms compete for a diminishing client base, which has prompted, in part, the perceived overly aggressive, crass behavior that has earned the scorn of its critics both within and without the profession.²⁴² Clients no longer have the same

²³⁸ Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 FORDHAM L. REV. 111, 114 (1988).

²³⁹ *Id.* at 113.

²⁴⁰ *For Some Attorneys, the Law's a Downer*, 13 N.J. LAW. 1449 (2004). The article reports that on any given day, approximately forty-one percent of the members of the legal profession were actively seeking an alternative livelihood. Poor advancement chances, billable hours pressure, family obligations and pressure to solicit new business were cited as reasons for the dissatisfaction. It should be noted that the article observes that for many attorneys becoming a lawyer has not been a lifelong interest to them; they have “defaulted into it” and became attorneys not out of passion, but rather a desire to continue their education. *Id.* at 1487.

²⁴¹ See Boston University School of Law, *Admissions*, available at www.bu.edu/law/admissions/profile/index.html (last visited Aug. 28, 2004); University of Pennsylvania Law School, *Class Statistics*, available at www.upenn.edu/prospective/jd/classstatistics.html (last visited Aug. 28, 2004); George Washington University Law School, *GW Law at a Glance*, available at www.law.gwu.edu/welcome/glance.asp (last visited Aug. 28, 2004).

²⁴² Geoffrey C. Hazard, Jr., a professor and ethics expert at the University of Pennsylvania Law School, observes that conflict of interest lawsuits filed by clients against law firms emerge as a consequence of the “intense competition for new business.” Karen Donovan, *When Big Law Firms Trip over Their Own Clients*, N.Y. TIMES, Oct. 3, 2004 at BU 5. In such cases, clients assert that the law firm has violated its duty of loyalty to them by

loyalty to the firm; they farm out work to several firms and are susceptible to the entreaties of competitor firms offering incentives. They no longer accept bills that simply state, "for services rendered" as they did through the 1980s; now bills must be fully described in six minute or fifteen minute intervals. Moreover, the lack of client loyalty and the need to be accessible to those clients only exacerbates the problem of the work hours deemed requisite to an attainment of partnership in a firm. There exists, due to the inordinate number of attorneys, great competition for clients, and those clients want ready access to their lawyers. Those who espouse the idea that partners use "client expectancy" as a pretext for sex discrimination give insufficient weight to the reality of client demand. Many clients of large firms do not function within a nine to five framework themselves, and expect their attorneys to be similarly inclined. This factor will continue to pose a stigma problem for those women and men who choose part-time work. Even a female attorney working for a corporation who fully supports the idea of a flexible schedule for lawyers indicates "having a part-time attorney working on a matter of which she is in charge is impractical and thus undesirable."²⁴³ Eve B. Burton opines that long hours may not be necessary in a law firm, that a "Cadillac" work performance is not a requisite for a client who will be content with a "Ford" that gets the job done.²⁴⁴ While clearly clients are more cost conscious today, those clients of the large, elite firms expect a superior product—so, too, does the corporate counsel who hires a particular law firm and remains ultimately responsible for the performance of that firm. Moreover, it is the billable hours that, in major part, remain crucial to a firm's profitability, and hence, an attorney's efforts to reduce his or her hours will be regarded as reflective of a lack of commitment to the firm. The unalterable bottom line is that lawyers' compensation and profitability are premised on the fees they generate.

Several commentators suggest that part-time and flex-time be more liberally employed and that such reduction in time not be regarded as inconsistent with advancement.²⁴⁵ Others urge that all firms demand less hours, with the result that short-hour attorneys would be dispersed

simultaneously representing clients with potentially adverse interests. With the advent of mergers and pressure to acquire new business, the likelihood of such conflicts may increase.

²⁴³ Epstein, *supra* note 164, at 339.

²⁴⁴ Eve B. Burton, *More Glass Ceilings Than Open Doors: Women as Outsiders in the Legal Profession*, 65 *FORDHAM L. REV.* 565, 567 (1996).

²⁴⁵ Sheila Wellington, *Making the Case: Women in Law*, in *THE DIFFERENCE "DIFFERENCE" MAKES: WOMEN IN LEADERSHIP* 90, 93 (2003).

throughout firms, prejudicing no firm competitively.²⁴⁶ In this manner, women, who are now among the top law school graduates and who bring a unique set of relational skills to the bargaining table,²⁴⁷ would be deterred from engaging in “firm flight,” and the firms would not be burdened with the costs of attrition. While it is true that turnover is costly to a large firm, as associates are not very profitable in their early years while they are at the same time commanding formidable wages, the fact remains that fixed overhead costs per each attorney, including very high rents in metropolitan areas, support staff, computer systems, and insurance rates which are skyrocketing due to a rise in malpractice claims, remain unaltered. One must not merely balance the costs of attrition versus the costs of offering part or flex time; one must consider the costs of all these alternatives against the substantial fixed costs associated with each attorney and the fact that the generation of fees is crucial to both one’s individual compensation and firm profit. Others proffer ideas regarding alternative forms of compensation that would end reliance on the “time famine” associated with the emphasis on billable hours.²⁴⁸ Mechanisms such as value billing, fixed fee billing, and mixed compensation models are touted as affording release from the ubiquitous billable hours.²⁴⁹ There are difficulties inherent in each approach. Value billing is rather impractical for some disciplines and has been discarded by most law firms. Litigation, for example, is valued at its conclusion, and it is unrealistic to saddle a client with a large bill at the end of a case even if the result and the fee are meritorious. Further, a firm depends on continuous and monthly billings in order to meet its financial obligations. Fixed fee is not acceptable to many, as attorneys very often unknowingly understate the magnitude of their services that will be required. Moreover, pursuant to a fixed fee, a client is free to make unlimited calls with no concern for incurring added costs. Mixed compensation, a reduction of compensation in exchange for more discretionary time, fails to resolve the issue of the fixed costs associated with each attorney or the overall profitability of the firm. Potential

²⁴⁶ Note, *Why Law Firms Cannot Afford to Maintain the Mommy Track*, 109 HARV. L. REV. 1375, 1380 (1996) [hereinafter Note, *Why Law Firms*].

²⁴⁷ See MARIE C. WILSON, CLOSING THE LEADERSHIP GAP 71, 108 (2004). The view that women bring a “softer side,” better client service skills, and a more conciliatory approach to dispute resolution is echoed in the literature. Caution must be exercised, it is submitted, in overemphasizing this perceived strength to the detriment of women, in order that it not serve as a replacement for the nineteenth century stereotypes with regard to women’s inherent nurturing natures. Further, many litigation clients do not seek a settlement conclusion; they desire a tough advocate who will achieve both retribution and monetary rewards.

²⁴⁸ Note, *Why Law Firms*, *supra* note 246, at 1378-79.

²⁴⁹ *Id.* at 1386.

transformation of the law profession to accommodate women and men, who are desirous of reduced billable hours accompanied by a realistic chance at partnership, always confronts the reality of the fact that law is a business operating in an intensely competitive and costly environment.

Some commentators bemoan the fact that law has been degraded, in their view, from a profession to a business and state, for example, that “the bottom line mentality representative of most firms today is a major problem.”²⁵⁰ Critics see it not merely as a question of survival of a firm in a competitive atmosphere but attribute the business orientation as one that is fueled by the insistence on maintaining and expanding very high incomes for senior partners.²⁵¹ It is precisely those senior partners, however, who usually are the major rainmakers that attract the client base, which supports the wages of others and upon which the firm relies. Others urge that movement toward diversity must necessarily embrace more unconventional attitudes and discard the rigid structure that currently exists in firms. Indeed, many firms have incorporated departures from the up and out system in the form of permanent associates and part-time attorneys,²⁵² but often with a concomitant reduction in pay unless it is an extremely large firm of several hundred attorneys which can afford defining specialized core competencies and compensating for levels of expertise. And other commentators assert that firms must transform to better accommodate women because law firm growth has exceeded the supply of the elite students from which large firms typically draw²⁵³ and that women are an increasing percentage of the declining pool.²⁵⁴ While the first statement may have been true several years ago, today that no longer remains the case, as the abundant supply of law students has caused students from the elite schools, who ordinarily would have sought the highest paying positions in New York, to compete for jobs in the smaller markets.²⁵⁵ The vast

²⁵⁰ See Epstein, *supra* note 164, at 446.

²⁵¹ *Id.*

²⁵² Marie C. Wilson reports that major law firms in San Francisco and Houston, Texas are transforming the structure of the firms to comply with the demands for diversity by corporate counsel. Flex-time is gender neutral in these firms and mentoring programs have been established, with the goal of attaining a certain percentage of female partners and an equalization of attrition rates for men and women. See WILSON, *supra* note 247, at 137-41.

²⁵³ See Note, *Why Law Firms*, *supra* note 246, at 1382.

²⁵⁴ Wellington, *supra* note 245, at 91.

²⁵⁵ MichaelAnn Knotts, *Starting Salaries: No Big Thing*, N.J. LAWYER: THE WEEKLY NEWSPAPER, Oct. 11, 2004, at p.1. The author states that “Hotshot law school graduates are learning firsthand that New Jersey law firms aren’t upping the ante to bring them aboard. . . . And that, say hiring partners and recruiters at New Jersey firms, is because

numbers of attorneys in the marketplace as compared to population figures and the continuing addition of thousands more per year serve to intensify competition and strengthen the business orientation that law has increasingly adopted. The high costs incurred by a firm for wages of attorneys, staff, and overhead must be supported by client retention and client recruitment, both of which require lengthy hours and a sensitivity to that bottom line. Rainmaking can no longer be deemed the sole province of the senior partners and other "stars" as it was in the 1970s and 1980s, where other attorneys could still be partnered if they excelled in solely servicing the existing client base. Today, being an excellent attorney will generally be regarded as insufficient to merit equity partnership without an accompanying successful effort in acquiring business.

What does this portend for the anticipated next stage in transforming the profession from one grounded in a male model to one that encompasses the realities of women's lives? Can, in fact, the profession modify its demands of total commitment of hours devoted to creating billables and rainmaking in order to embrace the needs of women, many of whom wish to balance family demands with a realistic prospect of partnership, and to address the desires of those men and women who aspire to a quality of life that affords them more time, and still maintain law firms that are profitable? The *Glass Ceilings* report indicates that the interest in alternative schedules among female and male associates who desire a better balance between personal and professional lives is "not merely idiosyncratic but bespeaks a pattern of changing value and expectations."²⁵⁶ Yet, the young men and women who share such aspirations are presently not in a position to wield the power that would effectuate such change. And at the same time the young associates express a desire for flexibility and accommodation to balance their lives, they "accept the idea that the demands of a harsh economic environment justify the pressures on them for long hours and client development after work."²⁵⁷ Senior partners at law firms, the *Glass Ceilings* report demonstrates, while advocating the advancement of women, are at the same time committed to the established criteria for determining partnership.²⁵⁸ Senior women in law firms express the belief that the young attorneys do not seem to understand that law is

there seems to be no lack of new talent ready and willing to accept what firms are offering." *Id.*

²⁵⁶ Epstein, *supra* note 164, at 408.

²⁵⁷ *Id.* at 441.

²⁵⁸ *Id.* at 440.

simply a difficult and demanding profession. And all who espouse such a transformation and advocate part-time, flex-time, mentoring, and variations in billing that depart from the billable hour standard, must address the practical and inevitable reality that the fixed overhead costs per lawyer remain substantial and that lawyers' compensation and a law firm's profit is premised on one essential: the fees they generate. They further must acknowledge that it is not solely the male driven model which propels the legal profession to demand unfettered loyalty that is inconsistent with the needs of women and men who seek to balance private and professional lives. It is also the impact of the intensely competitive atmosphere emanating from the increased numbers of attorneys which has contributed enormously to the changes witnessed in the profession, including: a demand for more billables, increased rainmaking, longer associateships, higher partner to associate ratios, and increasingly scrutinized standards for partnership. Women have attained marked success in the law profession, penetrating barriers to participation in the nineteenth century and establishing a vital presence in nearly every indicia of achievement the profession reveres in contemporary society. The effort to further expand the boundaries of women lawyers, to attain complete equity in terms of partnership, to shed remaining stereotypical gender perspectives on women's ability and commitment, and to restructure the profession in order to achieve flexibility for both sexes are praiseworthy goals. One must caution, however, that the reality of the depth of economic and competitive constraints within which the law profession operates, the burgeoning number of attorneys that only continues to escalate, further engendering a harsh, competitive atmosphere, and the entrenched posture of those empowered may pose formidable obstacles, at least in the near future, to the attainment of a genuine transformation of the profession.