

Articles

And Miles To Go Before I Sleep:¹ The Road to Gender Equity in the California Legal Profession

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AS WE APPROACH the millennium in California, we can point with considerable pride to the progress women have made in the legal profession since Clara Shortridge Foltz was first admitted to the California Bar in 1878.² Three of the seven justices on the California Supreme Court are women.³ Nearly fifty percent of students in law schools are women,⁴ and women now comprise approximately twenty-three percent of lawyers in California.⁵ California has the largest number of women lawyers in the nation, and ranks second in percentage of women lawyers.⁶ Approximately thirteen percent of judges sit-

1. ROBERT FROST, *Stopping by the Woods on a Snowy Evening*, in COLLECTED POEMS OF ROBERT FROST (Halcyon House, 1932).

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2. For a history of Clara Foltz, see Barbara Allen Babcock, *Clara Shortridge Foltz: Constitution Maker*, 66 IND. L.J. 849 (1991).

3. Justice Joyce Kennard, appointed in March 1989, Justice Kathryn Werdegar, appointed in May 1994, and Justice Janice Brown, appointed in May 1996. See SOUTHERN CALIFORNIA JUDICIAL PROFILES, Vol. IV (1998) at 93-3, 96-3, 96-2.

4. See AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION, UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR (1995) at 5 [hereinafter UNFINISHED BUSINESS]. See also American Bar Association Section of Legal Education and Admissions to the Bar (visited 10/26/99) <<http://www.abanet.org/legaled/femstats.html>> As of 1998, 46% of law school graduates were women. See *id.*

5. As of 1991, California had 24,226 women lawyers. See BARBARA A. CURRAN & CLARA N. CARSON, LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990s (1994) at 46. According to State Bar of California figures, as of September 30, 1997, California had 123,714 attorneys. See State Bar of California (visited 10/26/99) <<http://www.calbar.org>>.

6. See CURRAN & CARSON, *supra* note 5, at 45-48.

ting in California are women.⁷ Women lawyers are employed in a myriad of professional capacities, from law professors to managing partners of major law firms.⁸ However, despite these impressive gains, there is a long road ahead before we can honestly contend that women in the legal profession in California have achieved true equality.

This article chronicles the tremendous achievements women have made in gaining access to and equity in the legal profession in California, and argues that now is not the time for complacency. Rather, we need to acknowledge that impediments remain to women's ability to achieve parity with their male counterparts. While acts of overt discrimination have lessened in number, more subtle forms of discrimination now occur. Despite their growing numbers in the legal profession, women are not reaching the highest echelons of legal practice as partners in law firms, judges, or law school deans to nearly the same degree as men.⁹ The protection of the federal and state anti-discrimination laws will not, in and of themselves, end discrimination. We are in danger of losing hard-won ground.¹⁰

In spite of a growing body of evidence showing that all is not well for women in the law,¹¹ California continues to be a national leader in terms of providing opportunities for women in the legal profession and for devoting resources to the study of gender bias in the profession.¹² California was one of the first states to allow women to practice

7. See JUDICIAL COUNCIL OF CALIFORNIA ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, *ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE CALIFORNIA COURTS* (1996) at 107 [hereinafter JUDICIAL COUNCIL OF CALIFORNIA]. See also AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION, *WOMEN IN THE LAW: A LOOK AT THE NUMBERS*, at 52 (1995) [hereinafter *WOMEN IN THE LAW*]:

Women in the judiciary have made remarkable strides but still lag behind numerical parity in almost every court in the country. Overall, the proportion of judges who were female more than doubled between 1980 and 1991 to 9% of all judges. Despite this growth, women lawyers continue to be underrepresented among judges at all age levels. The Supreme Court enjoys the distinction amongst federal courts of most closely reflecting the actual female lawyer population with its two female members providing 22% representation.

Id. at 51.

8. See UNFINISHED BUSINESS, *supra* note 4; *WOMEN IN THE LAW*, *supra* note 7.

9. See *infra* Section II.A.

10. See, e.g., Steven Keeva, *Standing Up for Women*, A.B.A. J., Apr. 1995, at 118 (describing testimony before the ABA Commission of Women in the Profession regarding the fear of a rollback in advances). The author also quotes former ABA President William Falsgraf, who saw evidence of backlash while conducting a focus group of men, as saying, "In other words, the feeling is that the pendulum has swung past neutral, and it's time to bring it back." *Id.*

11. See UNFINISHED BUSINESS, *supra* note 4.

12. See *infra* Section III., regarding the work of the California Judicial Council's Access and Fairness Advisory Committee. See also *infra* Section II.A., regarding percentage of

law, and to require state law schools admit women.¹³ California has more women lawyers than any other state, and California's large cities have a better than average percentage of women partners in major law firms.¹⁴

Part I of this article provides a history of women in the legal profession, including initial efforts to gain admission to the bar and the experience of the first women law school students. This part also includes a brief review of the laws, both state and federal, which guarantee women the right to be free from discrimination in the workplace and which make possible the current level of successful participation by women in this profession.

Part II of this article discusses the current status of women in the legal profession generally, and in California in particular. This part argues that while state and federal laws prohibiting gender discrimination in the workplace have certainly remedied a broad range of unequal treatment toward women in the legal profession, these laws alone have not eradicated gender bias or discrimination against women lawyers.¹⁵ Societal forces and the culture of the legal profession continue to prevent women lawyers from realizing their full potential. Although instances of bias have decreased as women enter the legal field in greater numbers, time and increased numbers alone will not entirely eradicate the existence of gender bias.¹⁶

Part III reviews the landmark work of the California Judicial Council in exposing gender bias in the California courts and legal profession, and summarizes the recommendations of the Judicial Council for eradicating this pervasive problem. This part also highlights studies and reports of other jurisdictions and bar organizations including the groundbreaking report of the Ninth Circuit Gender

women partners in large California firms. See also The Ninth Circuit Gender Bias Task Force, *The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 745 (1994) [hereinafter *Final Report of the Ninth Circuit*]. California has the most women lawyers in the nation. See CARSON, *supra* note 5.

13. See *infra* notes 25–28.

14. See *infra* notes 135–39; see also Carol McHugh Sanders, *Survey: Chicago Lags Other Cities in Women, Minority Law Partners*, CHI. DAILY L. BULL., Mar. 31, 1995, at 1 (reporting that the number of women partners in San Francisco and Los Angeles were well above the national average).

15. Women of color and lesbians often face discrimination on the basis of race, ethnicity and sexual orientation in addition to gender. These topics are beyond the purview of this article. However, the Judicial Council of California's Access and Fairness Advisory Committee has established subcommittees to address issues relating to women of color and sexual orientation bias in the California courts.

16. See *Final Report of the Ninth Circuit*, *supra* note 12, at 786 ("Change has not occurred thus far simply by virtue of the passage of time.").

Bias Task Force on gender bias in the courts and in the legal profession.

Part IV concludes with recommendations for steps that need to be taken to continue the road toward guaranteeing true gender equity for women in the California legal profession.

I. History of Women in the Legal Profession

A. The First Women Lawyers

In the oft-cited case of *Bradwell v. Illinois*,¹⁷ the United States Supreme Court upheld an Illinois decision denying women the right to practice law. Justice Bradley, in a concurring opinion, stated that “[t]he paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother.”¹⁸ Other courts in the country have echoed these sentiments.¹⁹

Women made their way into the legal profession substantially after they began entering other professions in significant numbers.²⁰ While women comprised a significant percentage of teachers and social workers, and were beginning to enter the medical and scientific fields in more than token numbers, in 1920 only slightly more than one percent of the country’s lawyers were women.²¹ Although institutional barriers to entry into the profession had been eliminated by the early twentieth century, women tended to graduate from bottom-tier law schools and were denied entry into the powerful world of the corporate law firm.²² As one author noted, “most women lawyers joined

17. 83 U.S. (16 Wall.) 130 (1872).

18. *Id.* at 141 (Bradley, J., concurring).

19. *See, e.g.*, *Matter of Goodell*, 39 Wis. 232 (1876); *see also*, VIRGINIA G. DRACHMAN, *SISTERS IN LAW*, at 12 (1998). Between 1869 and 1901, women filed lawsuits to gain the right to practice in at least 17 states, sought to practice before the United States Supreme Court, and succeeded in getting legislation passed allowing them to practice. *See id.*

20. For an excellent discussion of the early years of women in the law, *see* DRACHMAN, *supra* note 19, at 12.

21. *See id.* at 2.

But numbers do not tell the whole story. There were reasons unique to the legal profession that made it so impenetrable to women. Unlike medicine, in which women founded their own all-women’s schools and hospitals in the mid-nineteenth century, until the very end of the century law had no separate all-women’s institutions to ease women’s entry into the legal profession. Instead, access to the legal profession was obtained through male-controlled institutions: courts, bar associations, law schools, and law firms.

Id. (footnote omitted).

22. *See id.* at 4.

ethnic and racial minorities on the lower rungs of the professional ladder.”²³

California, however, was less reluctant to accept women into the legal profession than were most of its eastern sister states.²⁴ Clara Foltz successfully lobbied for a bill to allow women to become lawyers in California in 1878, only twenty-nine years after California achieved statehood.²⁵ She was admitted to the bar in that same year.²⁶ The California Supreme Court decided in 1879 that women could not be denied access to the state’s public law schools.²⁷ California women were allowed to become lawyers substantially before they obtained suffrage in 1911.

While it no longer seems strange to students or faculty that nearly half of law students today are women, a very short time ago women were an unusual sight in the law school classroom. As one woman who entered Boalt Hall in 1966 and graduated in 1969²⁸ commented,

[t]oday, the presence of women on law school campuses seems normal. But not long ago, when the old order of the sexes was just beginning to come apart, the presence of women was not at all common In 1965, for example, women accounted for 6 percent of the graduating class at UC Berkeley’s Boalt Hall School of Law, 5 percent at UCLA’s School of Law, and 4 percent at Hastings College of the Law For women who laid the groundwork for the later influx of female law students, there was no escape from the lack of mentors, the discrimination, and the loneliness.²⁹

Women initially entering the legal profession faced overt discrimination. One law professor greeted his class as, “[L]adies and [G]entlemen,” and then added, “Let me amend that. There certainly are no ladies, or they wouldn’t be here.”³⁰ Women had difficulty obtaining interviews, were questioned about whether they were on birth control, and received rejection letters stating that firms did

23. *Id.* at 6.

24. For a general discussion of the history of women lawyers in the western states, see Barbara Allen Babcock, *Western Women Lawyers*, 45 *STAN. L. REV.* 2179 (1993). The author states that, “[t]he quiet acceptance that women found in most Western states contrasts with a resistance in many other locations revealed in brutish high court opinions casting aspersions on women’s capacity and competence.” *Id.* at 2180.

25. *See id.* at 2181.

26. *See id.*

27. *See Foltz v. Hoge*, 54 Cal. 28 (1879).

28. Of the 20 women who graduated from Boalt that year, three became judges, only four had children, and nine never married. *See Aurora Mackey, Turning Point*, *CAL. LAW.*, Mar. 1998, at 30, 32.

29. *Id.* at 31.

30. *Id.* at 34–35.

not hire women.³¹ Even Justice Sandra Day O'Connor, who graduated near the top of her class from Stanford Law School, was offered a clerical position with a large California law firm.³² No law firm would hire Justice Ruth Bader Ginsburg after she graduated first in her class from Columbia.³³ Firms would simply tell graduates they were not going to hire women.³⁴

Once employed, the situation was no better for many women lawyers throughout the nation. Women's advancement to the upper levels of the profession was virtually non-existent; few made partner, pay was unequal, sexual harassment frequent, and dissatisfaction prevalent.³⁵ In fact, women lawyers were made to feel as though they were "second-class citizens."³⁶ One woman tells that she was suffering complications relating to pregnancy, but was hesitant to cut back on her work schedule because she was the first woman at the firm to become pregnant.³⁷ Another tells of being the only woman partner in a forty-member firm and recounts that she gave birth on a Friday and was back in the office on the following Monday.³⁸

During the years when women began entering the field in significant numbers, biased behavior by male attorneys and even bench officers was not limited to the workplace or the courtroom.³⁹ Professional associations, such as bar groups, were not particularly welcoming. One woman, who attended a California state bar convention while still a law student, recounts that she was appalled to see the manner in which women attorneys were treated at the meetings. She

31. See *id.* at 77-78, 80.

32. See KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT* 194 (1986).

33. See *id.* at 207.

34. See *id.* at 194. One lawyer interviewed recalled interviewing for attorney positions in Orange County, California and receiving no offers despite excellent credentials. Reasons offered for not hiring her included: 1) our wives would not like it, especially if we had to travel together; 2) we often use "rough" language, and you would be embarrassed; 3) our clients would never tolerate having a woman work on their case; and 4) our secretaries would be jealous. This attorney opened her own firm. See *infra* note 40.

35. See generally, Mark S. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners*, 46 *HASTINGS L.J.* 17, 31-36 & nn. 62-78 (1994).

36. See *id.* at 31.

37. See Ingrid Becker, *The Reluctant Pioneer*, *CAL. LAW.*, Mar. 1998, at 37, 38.

38. See DEBORAH L. RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* 152-53 (1997).

39. In researching this article, the author conducted extensive interviews with women lawyers in Orange County, California, with a bar association of approximately 6,800 members. Many of the women interviewed are extremely prominent attorneys and leaders of the local bar. Some of the women were among the first to practice in the county, having obtained their licenses to practice law 25 to 30 years ago.

remembers that the men listened attentively to each other, but whenever a woman attorney spoke, many of the men completely ignored the woman, using the time to chat amongst themselves.⁴⁰ However, she was in for an even greater surprise. Later that day she overheard these women expressing their pleasure with the progress they had made, as they reminisced about the “old” days when men would actually leave the room when women spoke.⁴¹

As of 1960, only three percent of the lawyers in this country were women.⁴² This number remained constant for many years.⁴³ It was not until 1972 that all law schools admitted women, with Washington and Lee being the last.⁴⁴ By 1980, the number of women lawyers began to increase noticeably—eight percent of the country’s lawyers were women.⁴⁵ That figure rose to thirteen percent by 1985, and twenty-three percent by 1995.⁴⁶

B. The Legal Road to Ending Discrimination

1. Federal Laws

a. Title VII

The primary federal statute protecting women against sex discrimination in employment is Title VII of the Civil Rights Act of 1964⁴⁷ (“Title VII”). The Equal Employment Opportunity Commission (“EEOC”) is the federal agency charged with enforcement of Title VII.⁴⁸ Filing a claim with the EEOC is a jurisdictional prerequisite to initiating litigation under Title VII.⁴⁹

Title VII prohibits discrimination based upon sex in hiring as well as in all terms and conditions of employment.⁵⁰ Title VII makes it an unlawful employment practice to fail to hire or to discharge or to otherwise discriminate against a person regarding any terms or condi-

40. Interview with a prominent Orange County attorney (who was licensed to practice law in the middle 1970s), in Orange County, Cal. (April 28, 1999).

41. *See id.*

42. *See WOMEN IN THE LAW, supra note 7, at 8.*

43. *See id.*

44. *See CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 50 (2nd ed. 1993).*

45. *See WOMEN IN THE LAW, supra note 7, at 8.*

46. *See id.*

47. 42 U.S.C. §§ 2000e–2000e-17 (1994). For a more comprehensive discussion of the laws concerning gender bias, see MARCIA MOBILIA BOUMIL et al., *LAW AND GENDER BIAS* (1994).

48. *See* 29 C.F.R. § 1601.1 (1998).

49. *See Zipes v. Trans World Airlines, Inc.*, 445 U.S. 385, 387 (1982).

50. *See id.*

tions of employment because of race, color, religion, sex, or national origin.⁵¹ It is also an unlawful employment practice to segregate or classify employees or applicants in a way that would deprive a person of employment opportunities because of race, color, religion, sex, or national origin.⁵² An exception is made only if sex is a bona fide occupational qualification.⁵³ Pregnancy is now covered by Title VII,⁵⁴ and a plaintiff can also sue under Title VII for sexual harassment.⁵⁵

Title VII prohibits two broad categories of conduct or policies by employers. The first category prohibits facially neutral policies having a disparate impact on women. A good example of this can be seen in *Dothard v. Rawlinson*,⁵⁶ where the Court struck down the employer's height and weight requirements that operated to keep women from certain jobs.⁵⁷ The second category prohibits disparate treatment of women based upon their gender. For example, the Court struck down a policy requiring women to contribute more to the employer's pension plan, solely because they tend to live longer.⁵⁸

Title VII represents an enormous step forward in the fight for equality in employment. As Justice Brennan stated in *Price Waterhouse*

51. See 42 U.S.C. § 2000e-2(a)(1) (1994).

52. See 42 U.S.C. § 2000e-2(a)(2).

53. See 42 U.S.C. § 2000e-2(e). As a bona fide occupational qualification ("BFOQ") is generally not employed in Title VII cases regarding the legal profession, it is beyond the purview of this article and will not be discussed. For representative cases in this area, see *Jennings v. New York State Office of Mental Health*, 786 F. Supp. 376 (S.D. N.Y. 1992), *aff'd*, 977 F.2d 731 (2d Cir. 1992); *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346 (D. Del. 1978), *aff'd*, 591 F.2d 1334 (3d Cir. 1979).

54. Section 701(k) of Title VII, added in 1978, prohibits discrimination on the basis of pregnancy, childbirth or related medical conditions. See 42 U.S.C. § 2000e (k).

55. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (defining what constitutes sexual harassment sufficient to state a claim under Title VII).

56. 433 U.S. 321 (1977).

57. For establishing liability under the disparate impact theory, see *Griggs v. Duke Power*, 401 U.S. 424 (1971) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975). The recent Civil Rights Act of 1991 codified disparate impact requirements. See 42 U.S.C. § 2000e-2 (k) (1994).

58. See *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 (1977) ("Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes"). For a discussion of the prima facie case under Title VII, see *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); Civil Rights Act of 1991, Pub. L. No 102-166, 105 Stat. 1072 (1991). The *Price Waterhouse* case and the Civil Rights Act clarified the law in "mixed motives" cases. Essentially, a plaintiff can still prevail, with limited remedies, if discrimination was a motivating factor in an employment decision, even if the employer can show that it would have reached the same decision in the absence of the unlawful factors. See 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).

v. Hopkins,⁵⁹ Title VII's prohibition of sex discrimination in employment "mean[s] that gender must be irrelevant to employment decisions."⁶⁰ In holding that different treatment based upon gender stereotypes constitutes actionable discrimination under Title VII, the Court said, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group"⁶¹

Price Waterhouse is a landmark case because for the first time in its history the United States' Supreme Court acknowledged that sex stereotyping is an impediment to the advancement of women in the workplace.⁶² The Court found as evidence of sex stereotyping comments by male partners in an accounting firm that a woman applicant for partnership should dress more femininely, wear make-up and jewelry, and have her hair styled.⁶³

b. Civil Rights Act of 1991

The Civil Rights Act of 1991 ("Act") amended Title VII to extend coverage to "mixed motives" cases, wherein the employer utilizes both discriminatory as well as non-discriminatory factors in arriving at the employment decision.⁶⁴ The Act makes it an unlawful employment practice for the employer to use sex as a motivating factor in an employment decision, even if other nondiscriminatory factors also motivated the decision.⁶⁵ This provision is particularly important in analyzing employment decisions relating to upper level employees, where several individuals may have input into the decisions, and a multitude of factors are taken into account.⁶⁶

59. 490 U.S. 228 (1989).

60. *Price Waterhouse*, 490 U.S. at 240.

61. *Id.* at 251.

62. *See id.* at 250. *Price Waterhouse* is also significant in that the Court recognized that "mixed motives" cases (where employment decisions are based on both legitimate and illegitimate considerations) are actionable under Title VII. *See id.* at 241.

63. *See id.* at 235 (citing *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

64. *See* 42 U.S.C. § 2000e-2(m) (1994); *see also Price Waterhouse*, 490 U.S. at 241.

65. *See* 42 U.S.C. § 2000e-2(m). This section of the Act specifically abolishes a loophole for the employer that was available under the *Price Waterhouse* framework. Under *Price Waterhouse*, an employer could prevail in a mixed motives case if it demonstrated by a preponderance of the evidence that it would have reached the same decision even in the absence of discriminatory factors. *See Price Waterhouse*, 490 U.S. at 252.

66. However, at least one author has argued that the *Price Waterhouse* mixed motives framework does not really remedy Title VII's inadequacy in dealing with subtle or unconscious instances of bias, as liability is still premised upon the presence of conscious discriminatory animus. *See* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias*

Title VII has been held to apply to partnership decisions by law firms,⁶⁷ and continues to be the chief statutory means of fighting impermissible gender discrimination in the legal profession. The landmark case of *Hishon v. King & Spaulding*⁶⁸ clearly established that law firms are prohibited by Title VII from making gender-based partnership decisions. The Supreme Court rejected the firm's argument that the partners' constitutionally guaranteed right of freedom of association would be violated by application of Title VII to partnership decisions.⁶⁹

Title VII continues to be a powerful weapon in fighting sex discrimination. In a recent gender discrimination case, an attorney sued her former law firm when the firm terminated her upon her return from maternity leave.⁷⁰ The case settled just prior to the jury deliberation.⁷¹ While the firm reportedly settled for considerably less, the jury, in interviews following the trial, reported that they were prepared to award the plaintiff between one and two million dollars.⁷²

While Title VII initially provided only equitable remedies for violation, the statute was amended in 1991 to allow for compensatory and punitive damages as well.⁷³

c. Other Federal Statutes

The Equal Pay Act, which became effective in 1964, is an amendment to the Fair Labor Standards Act,⁷⁴ and is administered by the EEOC.⁷⁵ The Equal Pay Act's purpose is similar to Title VII in that it prohibits gender-based discrimination in compensation.⁷⁶

The Act provides that an employer shall not discriminate between employees on the basis of sex by paying . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires

Approach to Discrimination and Equal Employment Opportunity, 47 STAN. L. REV. 1161, 1171-73 (1995).

67. See *Hishon v. King and Spaulding*, 467 U.S. 69, 77 (1984).

68. 467 U.S. 69 (1984).

69. See *id.* at 78.

70. See Edward A. Adams, *Coudert Settles Gender Discrimination Suit*, N.Y.L.J., Aug. 8, 1996, at 1.

71. See *id.*

72. See *id.*

73. See Pub. L. No. 102-166 § 102, 105 Stat. 1072 (1991).

74. See 29 U.S.C. § 201 (1994).

75. See 29 C.F.R. §§ 1620-21 (1998).

76. See 29 U.S.C. § 206 (d) (1994).

equal skill, effort, and responsibility, and which are performed under similar working conditions.⁷⁷

The only defenses available under the Equal Pay Act are for pay differences based upon a seniority system, a merit system, a piecework system, or differential bases determined by factors other than sex.⁷⁸ The Equal Pay Act only applies to discrimination based upon gender, and not to pay differentials based upon race, ethnicity, or other forms of discrimination.⁷⁹ Violations of the Equal Pay Act are enforceable through the EEOC or by bringing a private law suit.⁸⁰

Another federal statute, § 1983,⁸¹ establishes no substantive right, but provides a remedy for deprivation of federally protected rights. Thus, it is the federal Constitution and other federal statutes, such as Title VII, that provide the underlying substantive rights that give rise to a § 1983 cause of action. Section 1983, by its very terms, applies only if there is state action. Thus, § 1983 will not generally be useful to the scores of women employed in private law firms.

Finally, Congress passed the Family and Medical Leave Act,⁸² which became effective in 1993, allowing women as well as men employees to take up to twelve weeks of unpaid leave per year for, among other things, the birth or illness of a child.⁸³

2. State Laws

The California Constitution provides that a person may not be disqualified from entering a business or profession on the basis of sex.⁸⁴ California Government Code Section 12940⁸⁵ makes it an unlawful employment practice⁸⁶ for an employer to refuse to hire, discharge or discriminate in terms of compensation and employment because of sex.⁸⁷ This section also prohibits harassment on the basis of

77. 29 U.S.C. § 206 (d)(1).

78. *See id.*

79. *See id.*

80. *See* 29 U.S.C. §216(b) (1994).

81. *See* 42 U.S.C. § 1983 (Supp. III 1998).

82. 5 U.S.C. §§ 6381-87 (1994).

83. *See* 5 U.S.C. §§ 6381-82

84. *See* CAL. CONST. art. I, § 8.

85. CAL. GOV'T CODE § 12940 (Deering Supp. 1999).

86. Except if based upon a bona fide occupational qualification or if based upon a federal or state security regulation. *See id.*

87. *See* CAL. GOV'T CODE § 12940(a). This section is referred to generally as the California Fair Employment and Housing Act ("FEHA"). *See* CAL. GOV'T CODE § 12900 (Deering 1997). California courts have held that cases interpreting federal Title VII are applicable to Government Code Section 12940 cases. *See* *University of So. Cal. v. Superior Court*, 272 Cal. Rptr. 264 (Ct. App. 1990). For a general discussion on establishing a prima

sex, and includes sexual harassment as well as harassment based on medical conditions relating to pregnancy and childbirth.⁸⁸ The statute also creates an administrative enforcement mechanism, the Department of Fair Employment and Housing, which is similar in operation to the federal EEOC.⁸⁹ In addition, the California Labor Code prohibits wage discrimination on the basis of sex.⁹⁰

California's Unruh Civil Rights Act⁹¹ ("Unruh Act") provides, *inter alia*, that individuals may not be denied full and equal accommodations, facilities, privileges, or services in any type of business establishment in California.⁹² The purpose of the Unruh Act is broader in scope than Title VII, and aims to eliminate all arbitrary discrimination by businesses.⁹³ The Unruh Act provides for a variety of remedies, including exemplary damages, injunctive relief, and attorney fees.⁹⁴ California courts construe the term "business" broadly, as it is used in the Unruh Act.⁹⁵ Plaintiffs have successfully used the Unruh act to allow women access to businesses that had previously been open only to men.⁹⁶ This is an extremely important provision, particularly in terms of women's ability to engage in rainmaking activities, which are essential to success in the legal profession.

facie case of discrimination under California Government Code § 12940, see *Sada v. Robert F. Kennedy Med. Ctr.*, 65 Cal. Rptr. 2d 112 (Ct. App. 1997). A distinct statute extends Title VII's protections to the California Civil Service. See CAL. GOV'T CODE § 19702.1 (Deering 1993).

88. See CAL. GOV'T CODE § 12940(h)(3)(C). Similar to the federal law of sexual harassment, the California statute has been construed to prohibit both quid pro quo harassment as well as hostile work environment. See *Mogilefsky v. Superior Court*, 26 Cal. Rptr. 2d 116 (Ct. App. 1993). For discrimination based upon pregnancy and childbirth, see CAL. GOV'T CODE § 12945 (Deering 1997).

89. See CAL. GOV'T CODE § 12960 (Deering 1997).

90. See CAL. LAB. CODE § 1197.5(a) (Deering 1997) (applies to work done in the "same establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility . . ."). An employer may be civilly liable, and, for a willful violation, criminally liable, for violation of the act. See CAL. LAB. CODE §§ 1197.5 (f) & (g), 1199.5 (Deering 1997).

91. CAL. CIV. CODE § 51 (Deering Supp. 1999).

92. See *id.* A separate section of the Unruh Act provides for civil liability for sexual harassment in any business, service or professional relationship. See CAL. CIV. CODE § 51.9 (Deering Supp. 1999).

93. See *Harris v. Capital Growth Investors XIV*, 278 Cal. Rptr. 614 (Ct. App. 1991).

94. See CAL. CIV. CODE § 52 (Deering Supp. 1999).

95. See *Harris v. Mothers Against Drunk Driving*, 46 Cal. Rptr. 2d 833 (Ct. App. 1995); *Kirsh v. State Farm Mut. Auto Ins. Co.*, 284 Cal. Rptr. 260 (Ct. App. 1991).

96. See, e.g., *Warfield v. Peninsula Golf and Country Club*, 262 Cal. Rptr. 890 (Ct. App. 1989) (requiring a country club to reinstate a divorced woman's membership despite its policy of issuing family memberships only to adult males).

The foregoing section, though an extremely brief overview of relevant statutory provisions, provides a sense of the large number of legal protections available to today's women in the workplace. Formal barriers to full participation have essentially been eradicated by the laws discussed above. However, it has been over thirty years since Title VII was enacted, and as will be discussed below, gender bias in the legal field is far from being relegated to the annals of history.

II. Women in the Legal Profession Today

A. Have We Arrived?

Since the enactment of the various aforementioned anti-discrimination laws, women are participating in the legal profession in both California and the nation as a whole in greater numbers.⁹⁷ This growth has unquestionably impacted the legal profession. As Catharine MacKinnon stated:

Although women are still only a small percentage of the total number of lawyers, and a little over 10 percent of the partners in law firms and tenured professors on prestigious law faculties . . . their presence, their perspectives, and their advocacy for women has nonetheless impelled a major questioning of male dominance in law.⁹⁸

Women are participating in every facet of the legal profession, including the upper echelons—law firm partners, federal and state judges, law school deans, United States Attorney General, members of the California Supreme Court, and the United States Supreme Court. If the current rate of women enrolling in law school continues, women will comprise forty percent of the profession by the year 2010.⁹⁹

Women entering the legal profession today no longer face the seemingly insurmountable obstacles faced by their predecessors just thirty years ago. In addition to legal protections, women enjoy more support from the first day they enter law school. There are nearly as many women as men students in law school classes.¹⁰⁰ Many of these women students will be taught by women law professors.¹⁰¹ There are

97. See UNFINISHED BUSINESS, *supra* note 4, at 5, 7 (reporting that as of 1995 approximately 45% of law students are women, and women are approximately 23% of the bar nationwide).

98. Catharine A. MacKinnon, *Engendering Change*, CAL. LAW., Mar. 1998, at 40, 41.

99. See WOMEN IN THE LAW, *supra* note 7, at 6. "Perhaps most discouraging of all the numbers, because it represents the image of the profession that is projected to the next generation of lawyers, is that women are not represented well on law school faculties. Women comprise only 8% of the deans of laws schools, and 17% of professors." *Id.* at 51.

100. See UNFINISHED BUSINESS, *supra* note 4, at 7.

101. See *id.* Approximately 19% of tenured faculty are women. See *id.*

women's organizations on campus.¹⁰² When these students join the bar, they may join national, state, and local organizations devoted to women in the legal profession.¹⁰³ They will comprise nearly one-third of practicing lawyers,¹⁰⁴ a percentage that will continue to rise. They will enjoy significant opportunities in government employment as well as in corporate legal departments.¹⁰⁵ They will even find some employers with family-friendly policies.¹⁰⁶

There seems to be consensus that change has been substantial since women began entering the legal profession in greater numbers in the 1960's. One respondent in a survey conducted by the Illinois Task Force on Gender Bias in the Courts opined that "[t]hings have improved *vastly* Before . . . I was pinched, patted, asked for dates, dismissed as incompetent and harassed by judges and attorneys alike."¹⁰⁷ Many believe behavior that demonstrates the existence of biased or stereotypical attitudes will continue to decline as the numbers of women attorneys and judges increase.¹⁰⁸

Despite the incredible gains, as one author has quipped, "All is not well for women in law."¹⁰⁹ Women continue to be dramatically

102. Boalt Hall formed a women's law student organization in 1970. See Mackey, *supra* note 28, at 81.

103. At the national level, the ABA has a Commission on Women in the Profession. California has a statewide organization called California Women Lawyers. A variety of county bar organizations exist, such as the Queen's Bench in San Francisco, Orange County Women Lawyers, Fresno County Women Lawyers, and Women Lawyers Association of Los Angeles. If a woman becomes a judge, she may join the National Association of Women Judges ("NAWJ"), an organization with approximately 1200 members, both men and women. For a discussion of the NAWJ, see Hon. Judith M. Billings and Hon Brenda Murray, *Introduction to the Ninth Circuit Gender Bias Task Force Report: The Effects of Gender*, 67 S. CAL. L. REV. 739, 739-40 (1994).

Some commentators have expressed concern, however, about the diminishing numbers of members in organizations dedicated to women's issues, such as the National Organization of Women ("N.O.W."). Professor Deborah Rhode attributes this disturbing fact, in part, to the perception on the part of many that gender inequality is not a serious problem. She notes that the perception that no problem exists has itself become the major obstacle to moving toward equality. See RHODE, *supra* note 38, at 2.

104. See UNFINISHED BUSINESS, *supra* note 4, at 5.

105. See *id.* at 13-14. Women comprise 35% of federal executive branch lawyers and 55% of junior attorneys in corporate law departments. See *id.* at 14.

106. See *id.* The United States Department of Justice provides for part-time work, job-sharing, flexible schedules and on-site day care. See *id.*

107. Stephanie Riger et al., *Gender Bias in Courtroom Dynamics*, 19 LAW & HUM. BEHAV. 465, 471 (1995) (citing from Illinois Task Force on Gender Bias in the Courts survey).

108. See *id.* at 478-79.

109. Deborah L. Rhode, *Women Haven't Arrived*, NAT'L L.J., Mar. 18, 1996; see also Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163 (1988); EPSTEIN, *supra* note 44.

under-represented at the highest echelons of the profession.¹¹⁰ According to the American Bar Association ("ABA") Commission on Women in the Profession, women comprise approximately forty-five percent of entering law school classes,¹¹¹ and twenty-three percent of the bar,¹¹² but only nineteen percent of tenured faculty,¹¹³ thirteen percent of law firm partners,¹¹⁴ ten percent to twelve percent of judges,¹¹⁵ and eight percent of law school deans.¹¹⁶ Women tend to be over-represented in certain areas of the law practice, and continue to earn significantly lower incomes than male attorneys at all levels.¹¹⁷ As one author noted, there certainly has been progress, "But progress is not parity."¹¹⁸ For many women lawyers, the "glass ceiling" is a harsh reality.¹¹⁹ Recent empirical evidence suggests there is occupational

110. See, e.g., A.B.A. J., Nov. 1996, at 24 (reporting that women represented 37% of all lawyers in 1985, but only 13.6% were partners in law firms, and only a tiny fraction of those were managing or equity partners). The article goes on to point out that while more women are becoming managing partners of large firms, the position of managing partner is not considered to be the power position it once was. See *id.*

111. See UNFINISHED BUSINESS, *supra* note 4, at 7. For further information, the Commission maintains an e-mail address at <<http://www.abacwp@abanet.org>>.

112. See *id.* at 5.

113. See *id.* at 7.

114. See *id.* at 11.

115. See *id.* at 16.

116. See *id.* at 8.

117. Women enter government practice at a higher proportion than their male counterparts. Approximately 35% of attorneys in the executive branch of the federal government are women, although only 18.5% are supervisors. See *id.* at 13.

Large numbers of women attorneys work in Bay Area District Attorney and Public Defenders Offices. Women comprise 45% of the attorneys in the San Mateo County District Attorneys Office, 51% of that county's Public Defenders, and 36% of the attorneys in the San Joaquin County Public Defenders Office. Legal aid offices and public defense programs continue to steadily hire women lawyers. See Josh Richman, *Women Chase Law Careers*, OAKLAND TRIBUNE, Aug. 2, 1998, at 8 NEWS. See also WOMEN IN THE LAW, *supra* note 7, at 18. Women tend to have a greater presence in government jobs, family law, domestic violence work and personal injury law than in fields such as securities, organized crime, violent crime, and malpractice. See Deborah Pines, *Fed'l, State Judges Discuss Women in the Courtroom*, N.Y.L.J., Feb. 28, 1997, at 1 (discussing findings of panel of state and federal judges entitled, "How Women Are Perceived in the Courtroom: Views from the Bench"). As for pay differential, see UNFINISHED BUSINESS, *supra* note 4, at 9-14.

118. RHODE, *supra* note 38, at 8.

119. The federal government has recognized the so-called "glass ceiling." The Federal Glass Ceiling Commission was created in 1991. See 42 U.S.C. § 2000e (1994). See also U.S. DEP'T OF LABOR, A REPORT ON THE GLASS CEILING INITIATIVE (1991) (discussing the barriers to women and minorities in attaining management-level positions in the workplace).

segregation in the legal profession—men and women experience different career patterns, compensation, and benefits.¹²⁰

B. Evidence of Gender Bias

Gender bias begins early in the career of women lawyers. In fact, it begins in law school.¹²¹ The ABA Commission on Women in the Profession, established in 1987, conducted a series of hearings in 1994 and 1995 to study gender discrimination in the nation's law schools.¹²² It found that although law schools are generally more hospitable to women than they were in the past, many women today "still experience debilitating instances of gender bias and discrimination in law school."¹²³ Women at nearly all schools are less likely to participate in class discussion than their male counterparts, and students themselves are responsible for many of the acts of bias.¹²⁴

During the hearings, a law school dean admitted there is gender bias in the classroom, in faculty hiring and promotion, and in the choice of teaching materials that tend to perpetuate gender stereotypes.¹²⁵ As is discussed in more detail below, women's experiences in law school are repeated outside in the legal profession.¹²⁶

Once out of law school, a woman has a much lower chance of reaching the highest echelons of the profession¹²⁷ and will earn less

120. See Wynn R. Huang, *Gender Differences in the Earnings of Lawyers*, 30 COLUM. J. L. & SOC. PROBS. 267, 298 (1997) (empirical study of lawyer earnings based upon input from 950 respondents).

121. For a thorough discussion of this issue, see AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION, *THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION* (1996); see also Mairie N. Morrison, *May It Please the Court?: How Moot Court Perpetuates Gender Bias in the "Real World" of Practice*, 6 U.C.L.A. WOMEN'S L.J. 49, 52 (1995).

122. See *THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION*, *supra* note 121, at 1.

123. *Id.* at 2-3. The Commission heard evidence of faculty members referring to women students as "little girl" or "sweetie," male law students denigrating the comments of women students, women faculty who believed their work was marginalized, and a lack of respect for women law faculty. See *id.* See also UNFINISHED BUSINESS, *supra* note 4, at 6 (discussing the continued existence of discriminatory conduct by professors as well as male law students, concluding that the experience of today's law students is substantially the same as that of earlier graduates).

124. See *id.* at 3. See also Elizabeth Mertz et al., *What Difference Does Difference Make? The Challenge for Legal Education*, 48 J. OF LEGAL EDUC. 1 (1998). For a discussion of the Yale Study, documenting that women participate less than their male counterparts, see *id.* at 28-30.

125. See *id.* at 4. See also Morrison, *supra* note 121, at 50 (arguing that moot court perpetuates gender bias by indoctrinating students in the "rules" of personal appearance, argument styles, and a narrow, male-oriented vision of success).

126. See *Final Report of the Ninth Circuit*, *supra* note 12, at 799-800.

127. See UNFINISHED BUSINESS, *supra* note 4.

than her male classmates.¹²⁸ She is less likely to make partner in her firm, and once there, will receive less compensation than men.¹²⁹ She is more likely to work in government and public interest jobs than her male counterparts, and more likely to specialize in fields that are comparatively less lucrative, such as family law.¹³⁰ She is unlikely to work in bankruptcy, securities, and criminal cases involving narcotics and organized crime.¹³¹ She will not succeed in the legal academy to the same extent as her male colleagues.¹³² The longer she is out of law school, the greater the wage gap will be.¹³³ She will perform two-thirds of all domestic chores in the home.¹³⁴ She will share the harsh realities of the glass ceiling with her women colleagues in the corporate world.¹³⁵

Despite impressive gains, California is not exempt from the conclusion that gender bias continues to impair the progress of women in the legal profession. The California Judicial Council Advisory Committee on Gender Bias in the Courts stated in its 1996 report:

The information received by the advisory committee demonstrated that while women compose a substantial number of practicing lawyers and that while their numbers are increasing in positions of leadership, the discrepancy between the number with leadership roles and the number with subordinate roles is great. The progress of change in this regard is too slow. Moreover, the committee found that women lawyers have a series of growing concerns that may contribute to their inability to achieve full and equal participation in the profession.¹³⁶

128. See Huang, *supra* note 120, at 298.

129. See *id.* at 268-69; but see Hon. Richard Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1315 (1989) (arguing that disparity in wages is not due to discrimination, but rather to women taking time out of the workforce to raise children).

130. See EPSTEIN, *supra* note 44, at 97-99, 101-02. See also MONA HARRINGTON, *WOMEN LAWYERS: REWRITING THE RULES* (1994). In the federal sector, the Ninth Circuit Gender Bias Task Force found that women tend to be concentrated in the U.S. Attorney's Office and Federal Public Defender's Office as opposed to private practice. See *Final Report of the Ninth Circuit*, *supra* note 12, at 778.

131. See Pines, *supra* note 117.

132. See Robert F. Seibel, *Do Deans Discriminate?: An Examination of Lower Salaries Paid to Women Clinical Teachers*, 6 U.C.L.A. WOMEN'S L.J. 541 (1996); UNFINISHED BUSINESS, *supra* note 4.

133. See Huang, *supra* note 120, at 282.

134. See RHODE, *supra* note 38, at 142.

135. See Mary Deibel, *Glass Ceiling Gets Higher*, SAN FRAN. EXAMINER, Mar. 7, 1999, at B-1, B-6 (citing a recent survey by Catalyst, Inc., which found that women hold only 83 of the top corporate jobs in America while men hold 2,184 of these jobs, that women executives earn 68 cents for every dollar earned by men executives, and that women hold only 6% of the so-called "line jobs" that traditionally lead to the top corporate jobs).

136. JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 7, at 102.

As one author has noted,

So far as facts and figures go, especially comparative ones, the Ninth Circuit looks good in historical perspective for women in the law . . . [However,] even though there are no tangible barriers, no statutes or local rules, no customs or traditions that stand in women's way, we still worry about gender bias.¹³⁷

In the Ninth Circuit, of which California is by far the largest and most populous state, approximately forty percent of the circuit's law school graduates are women, but only twenty percent practice in the federal courts.¹³⁸ While the Ninth Circuit has a greater percentage of women judges at all levels than the other circuits,¹³⁹ there remain some districts with few or no women judges.¹⁴⁰ Furthermore, there is a greater percentage of women magistrates and bankruptcy judges as opposed to Article III judges.¹⁴¹

In terms of large law firms, California is ahead of many other states in hiring and promoting women.¹⁴² San Francisco is one of the perennial leaders in women and minority hiring and promotion.¹⁴³ Los Angeles is just behind San Francisco.¹⁴⁴ In fact, 15.06 percent of partners in Los Angeles law firms are women.¹⁴⁵ According to a 1994 National Association for Law Placement Examination of 900 large law firms, women comprise 12.9 percent of partners.¹⁴⁶ This study, compiled from the 1994 *Directory of Legal Employers*, provides a perspective on how partnership statistics vary from city to city. San Francisco ranks highest in the fourteen city sample with women as 17.92 percent of the partners.¹⁴⁷

In a national survey of women lawyers in large law firms,¹⁴⁸ women were asked to rate their firm on possibility for advancement,

137. Babcock, *supra* note 24, at 2181.

138. See Victoria Slind Flor, *The Talk of the 9th: Gender Bias*, NAT'L L. J., Aug. 17, 1992, at 43.

139. See *Final Report of the Ninth Circuit*, *supra* note 12, at 774.

140. See Slind Flor, *supra* note 138, at 3.

141. See *Final Report of the Ninth Circuit*, *supra* note 12, at 773.

142. See Carol McHugh Sanders, *Survey: Chicago Lags Other Cities in Women, Minority Law Partners*, CHI. DAILY L. BULL., Mar. 31, 1995, at 1 (citing National Association for Law Placement figures).

143. See *id.*

144. See *id.*

145. See *id.*

146. See *id.*

147. See *id.* See also *WOMEN IN THE LAW*, *supra* note 7, at 27.

148. SUZANNE NOSSEL & ELIZABETH WESTFALL, *PRESUMED EQUAL: WHAT AMERICA'S TOP WOMEN LAWYERS REALLY THINK ABOUT THEIR FIRMS* xiii (1998). "The choice to focus on large law firms was also rooted in a recognition that they exert a significant influence on the broader legal community in a variety of ways." *Id.*

quality of assignments, power in the firm, family leave, mentoring opportunities, and job satisfaction.¹⁴⁹ Some California firms fared quite well. In one San Francisco firm of 210 attorneys, most respondents opined that women are as likely as men to advance in the firm, and that the firm is an excellent place for women.¹⁵⁰ One woman partner said, "On paper and in concept, this is a decent place for women to work."¹⁵¹ Others stated that the firm is "very open to people of all types,"¹⁵² and the tone is "no tolerance for discrimination."¹⁵³ While it was cited that the balance between family and career was difficult, the firm was generally deemed "better than most."¹⁵⁴

However, women lawyers have rated some of California's major law firms particularly harshly in terms of gender issues.¹⁵⁵ In one Los Angeles firm of approximately 200 lawyers, only eighteen were women partners.¹⁵⁶ Most of the women responding to a survey indicated that women with children have less chance for partnership because single-minded devotion to the firm was essential.¹⁵⁷ Mentoring was not equally available to women.¹⁵⁸ Business development, essential to partnership, occurred mostly in male-oriented settings.¹⁵⁹ One woman commented that the firm's reputation as a fraternity or "boys' club" is well earned.¹⁶⁰ Another spoke of subtle exclusion from social interaction.¹⁶¹ The hours required were reported as brutal, between 2,250 and 2,500, with little opportunity for a family life.¹⁶²

Similarly, survey respondents rated a large San Francisco firm as equally lacking from the standpoint of women lawyers.¹⁶³ Again, respondents perceived that women must sacrifice family life to make

149. *See id.* at 391.

150. *See id.* at 233-36 (referring to Morrison and Foerster).

151. *Id.* at 235.

152. *Id.*

153. *Id.* at 234.

154. *Id.*

155. *See id.* at xxix-xxxi (listing law firms from highest to lowest rated). For a discussion of the book's findings, see Frederick P. Gabriel, *Top Law Firms Rated for Woman-Friendliness*, NAT'L L.J., Nov. 3, 1997, at A7; Daniel Wise, *City Firms Get Poor Grades In Survey on Women Lawyers*, N.Y.L.J., Oct. 27, 1997, at 1.

156. *See* Nossel & Westfall, *supra* note 148, at 203.

157. *See id.* Two of the female partners who responded to the survey were more positive about the firm than were the associates who responded. One partner described the firm as a true "meritocracy," and noted that 40% of the newest partners were women. *See id.* at 204.

158. *See id.* at 203.

159. *See id.*

160. *See id.* at 204.

161. *See id.* at 204-05.

162. *See id.* at 205.

163. *See id.* at 41.

partner, that there was insufficient mentoring available, and that women did not have the same prospects for advancement as men.¹⁶⁴ In this particular firm, where approximately eight of the sixty-nine partners are women,¹⁶⁵ there was a belief among the associates that the women who did achieve partnership did little to promote the opportunities and quality of life of other women at the firm.¹⁶⁶ The legal profession is an uneven playing field. Women are under represented as law firm partners, are less influential in firm leadership decisions, and do not receive the same economic rewards as their male counterparts.¹⁶⁷

In general, despite impressive gains, gender inequity continues to be pervasive in the profession.¹⁶⁸ In her comments to the ABA Commission on Women in the Profession in 1995, then President of California Women Lawyers, Dawn Shock, stated that the glass-ceiling problem cited by the Commission in its report seven years earlier still exists in California.¹⁶⁹ While time will certainly ameliorate the effects of decades of bias, as women become an increasingly greater percentage of practicing lawyers, gender bias will not disappear without profound changes in both society in general and the legal profession in particular.¹⁷⁰

164. See *id.* at 41–42. As in the survey results from the large Los Angeles firm, the partner responding to the survey had a more positive view of women's opportunities at the firm than did the associates who responded. See *id.* at 42.

165. See *id.* at 41.

166. See *id.* at 44.

167. See *WOMEN IN THE LAW*, *supra* note 7, at 28.

168. See Lorraine Dusky, *Male Chauvinist Piggery Still Reigns*, Nat'l L.J., Dec. 23, 1996, at A17. The same conclusion applies to lawyers of color. See David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 496–497 (focusing on "an uncomfortable reality. Despite a substantial increase in the number of black students attending law school over the last forty years, African Americans still constitute only a tiny percentage of the associates and partners working in the nation's largest corporate firms.").

169. See David Bailey, *Women's Gains Minimal, Panel Hears*, CHI. DAILY L. BULL., Feb. 13, 1995, at 1.

170. See *WOMEN IN THE LAW*, *supra* note 7, at 51.

If enrollment of women continues at the current rate, women will comprise 40% of the profession in the year 2010, still short of women's 53% representation in the general population Not only will women's full and equal participation in the practice of law be a long time in coming, it is by no means assured. While overt discrimination appears to be less evident in 1995 than ever before, statistical contrasts in women's and men's professional status remains significant.

Id. at 6–7.

C. Causes of Continued Disparity

1. Court Interpretation of Laws Prohibiting Discrimination

Some commentators and scholars have argued that Title VII has not lived up to expectations and that the law's goals have not become reality.¹⁷¹ While Title VII certainly opened doors to women in the legal profession, it has failed to eradicate those forms of discrimination that prevent women from reaching the heights of their profession.¹⁷² The primary reason given is that courts have consistently used lower levels of scrutiny under Title VII when reviewing upper-level management decisions.¹⁷³

While courts have applied Title VII rigorously to lower-level employment decisions, courts tend to give the employer's decision greater deference in cases involving upper-level management.¹⁷⁴ Lower-level employment decisions are more likely to be based upon objective criteria, making it easier for a court to second guess the employer's decision.¹⁷⁵ However, courts are less willing to interfere with upper-level management decisions in which employers have relied upon more subjective criteria.¹⁷⁶ Although courts have stated that decisions regarding employment at the highest echelons are not "insulated from judicial review,"¹⁷⁷ a review of federal case law would indicate otherwise.

171. See generally Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*, 92 MICH. L. REV. 2541 (1994) (arguing that using community norms in Title VII cases perpetuates discrimination); see also D. Marvin Jones, *No Time For Trumpets: Title VII, Equality, and the Fin de Siecle*, 92 MICH. L. REV. 2311 (1994) (discussing Title VII analysis in the context of discrimination based upon race); Tracy Anbinder Baron, Comment, *Keeping Women Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267 (1994).

172. See generally S. Elizabeth Foster, Comment, *The Glass Ceiling in the Legal Profession: Why Do Law Firms Still Have So Few Real Partners*, 42 U.C.L.A. L. REV. 1631 (1995) (discussing the existence of a "glass ceiling" in the legal profession and how it prevents women from reaching the highest positions in law firms).

173. See *id.* at 1668-70; see also Baron, *supra* note 171.

174. See *id.*; see also Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947 (1982).

175. See *id.*; see also Wilkins & Gulati, *supra* note 168, at 585-90 (discussing the difficulty in applying Title VII to high-level job decisions because of their inherent subjectivity); Martha S. West, *Gender Bias in Academic Robes: Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67 (1994) (discussing the inadequacy of anti-discrimination laws in academic promotion decisions).

176. See *id.*

177. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 527 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 28 (1993). For a discussion of the *Ezold* case as well as subsequent decisions citing it with approval, see Foster, *supra* note 172.

The most noteworthy example of this disparity in the legal profession is *Ezold v. Wolf, Block, Schorr, and Solis-Cohen*,¹⁷⁸ wherein the Third Circuit Court of Appeals reversed a lower court ruling that a law firm had discriminated against a female associate by denying her partnership. Despite its declaration that these types of subjective decisions are indeed subject to judicial scrutiny,¹⁷⁹ the court discounted all of the district court's findings of discriminatory intent and deferred to the law firm's partners, recognizing that society is committed to "free decision-making by the private sector in economic affairs."¹⁸⁰

The plaintiff in *Ezold* introduced evidence that she was treated differently from the males applying for partnership. The firm made partnership decisions based upon largely subjective criteria of its expectations from associates with given experience levels.¹⁸¹ The district court found sex stereotyping had invaded the decision-making process.¹⁸² The plaintiff was told when she was hired that she was not likely to fit in because she was a woman.¹⁸³ She was given inferior work assignments,¹⁸⁴ was criticized for being too demanding,¹⁸⁵ and for being too concerned with women's issues.¹⁸⁶ The district court found that the firm had promoted men with similar or inferior credentials to the plaintiff.¹⁸⁷ The district court further determined that the firm's contention that the plaintiff was denied partnership due to her lack of analytical abilities was a pretext for discrimination.¹⁸⁸

The Third Circuit reversed the district court decision, finding no evidence of pretext, and concluding that there was no evidence of prohibited discrimination.¹⁸⁹ Because the court found that the partnership criteria were subjective, the district court was required to de-

178. 751 F. Supp. 1175 (E.D. Pa. 1990), *rev'd*, 983 F.2d 509 (3d Cir. 1992), *cert denied*, 114 S. Ct. 88 (1993). For a discussion of *Ezold*, see Foster, *supra* note 172. It should be noted that the *Ezold* case was not brought as a mixed-motives case as discussed in section I.B. While it is impossible to determine whether this would have affected the outcome, one can certainly argue that there are benefits to utilizing a mixed motives approach in cases such as this.

179. *See Ezold*, 983 F.2d at 527.

180. *Id.* at 531.

181. *See* 751 F. Supp. 1175, 1180 (E.D. Pa. 1990).

182. *See id.* at 1177-92.

183. *See id.* at 1177.

184. *See id.* at 1178.

185. *See id.* at 1189.

186. *See id.* at 1188.

187. *See id.* at 1191.

188. *See id.* at 1191-92.

189. *See* 983 F.2d at 547.

fer to the employer's decision.¹⁹⁰ The Third Circuit admonished the district courts to avoid invading a company's right to make business judgments based upon subjective factors that the company deems essential to a given position.¹⁹¹ The United States Supreme Court denied certiorari in the case, allowing it to be followed in other jurisdictions.¹⁹²

Although *Ezold* cannot eradicate the gains made in the Supreme Court cases of *Price Waterhouse*¹⁹³ and *Hishon*,¹⁹⁴ it demonstrates the difficulty women in the legal profession have in relying on the courts to impose equality at the upper echelons of the profession. Absent direct evidence of discriminatory intent, plaintiffs in these cases have little chance of success because often there is no "smoking gun."¹⁹⁵ Most cases will have neither the quantity nor quality of evidence that the plaintiff in *Price Waterhouse* had, and will thus have great difficulty overcoming courts' reluctance to step in and question senior management promotion decisions.¹⁹⁶

Discrimination remains difficult to prove. It is often impossible to obtain direct evidence of the employer's discriminatory motives underlying an employment decision. Lacking obvious evidence of discrimination, courts tend to defer to the employer and validate the subjective bases offered by the employer as the reason for the decision.¹⁹⁷ Accordingly, the status quo is perpetuated, and decisions af-

190. See *id.* at 529.

191. See *id.* at 527.

192. See 114 S. Ct. 88 (1993).

193. 490 U.S. 228 (1989). See discussion *supra* Part II.B.1.a.

194. 467 U.S. 69 (1984). See discussion *supra* Part II.B.1.a.

195. One author has opined that Title VII jurisprudence fails to give full effect to the statute. See Krieger, *supra* note 66. "[T]he way in which Title VII jurisprudence constructs discrimination, while sufficient to address the deliberate discrimination prevalent in an earlier age, is inadequate to address the subtle, often unconscious forms of bias that Title VII was also intended to remedy." *Id.* at 1164.

196. In *Price Waterhouse* the Court found the evidence sufficient to establish that gender stereotyping played a role in the decision. At the time plaintiff applied for partnership, there were only seven women partners out of 662 at the firm, and she was the only woman proposed for partnership that year. She had the best record of all candidates for bringing in new business. There was evidence that male partners had referred to her as "macho," suggested she go to charm school, suggested she dress more femininely and wear make-up, and that she was overcompensated for a woman. See 490 U.S. 228, 234-36 (citing *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)). See also discussion *supra* Part II.B.1.a.

197. See, e.g., *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88 (1993).

fecting women's careers, which are based upon deeply subconscious stereotypes, go unchallenged in the courts.¹⁹⁸

2. Societal Reasons

Society discriminates against women, in large part, due to gender-based stereotyping. Women are subordinate to men in these stereotypes, and women are assigned the primary role of family caregiver, while men are seen as the primary wage earners.¹⁹⁹ Although these notions would seem to be remnants of the nineteenth century, a time when women were initially beginning to break into the legal profession,²⁰⁰ evidence abounds that these stereotypes are alive and well in modern American society.²⁰¹ As one author observed, "patriarchy persists."²⁰² Unfortunately, such stereotypical characteristics of women are not compatible with those characteristics commonly attributed to successful lawyers in this society.²⁰³ Many women who have achieved the highest rewards the legal profession has to offer have generally done so by conforming to the male-oriented paradigm of lawyers—competitive, aggressive, objective, with a single-minded dedication to one's career.²⁰⁴

There is overwhelming evidence that women are still primarily responsible for child rearing and taking care of the home.²⁰⁵ In not-

198. Men tend to fail to recognize that gender stereotyping invades employment decisions. In the Ninth Circuit study, for example, men surveyed tended to believe that judicial appointments and promotion decisions in law firms were made solely on merit, whereas women tended to believe that other factors played an important role. See *Final Report of the Ninth Circuit*, *supra* note 12, at 786.

199. See, e.g., *infra* note 202. See also Rebecca Korzec, *Working on the "Mommy-Track": Motherhood and Women Lawyers*, 8 HASTINGS WOMEN'S L.J. 117, 121-23 (1997) (chronicling the evolution of American family life from the Colonial period through the nineteenth century).

200. As the paradigmatic public profession, law had little connection with the domestic sphere, the world of nurturance and tender feeling that nineteenth century women were supposed to inhabit. Lawyers were ideally thought to be bold, brilliant, aggressive, incisive, and ruthless in the interests of justice—or the client. Nothing could be more inconsistent with the social image of the 'true' woman in the nineteenth century. See Babcock, *supra* note 24, at 2180.

201. See *id.* See also Foster, *supra* note 172, at 1645-48.

202. Edward J. McCaffrey, *Equality, of the Right Sort*, 6 U.C.L.A. WOMEN'S L.J. 289, 290 (1996) (opining that the federal Equal Rights Amendment was defeated in large part due to societal attitudes about women).

203. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 74 (1987).

204. See Rhode, *supra* note 109, at 1182-83.

205. See RHODE, *supra* note 38, at 149-54; see, e.g., Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979); Suzannah Bex Wilson, *Eliminating Sex Discrimination in the Legal Profession: The Key to Widespread Social Reform*, 67 IND. L.J. 817 (1992). See also *Final Report of the Ninth Circuit*, *supra* note 12, at 850

ing that our society, even at this late date, is not supportive of working women with children, one author stated “[c]hild rearing continues to be viewed primarily as ‘mother’s work’ even if ‘mother’ is a lawyer.”²⁰⁶ Because women have primary responsibility for child rearing, women lawyers tend to feel more pressure in balancing career and family than their male counterparts.²⁰⁷

Evidence shows that when a child is ill, the mother remains at home with the child seventy percent of the time.²⁰⁸ Women are said to work a “second shift” when they return home each day after work.²⁰⁹ Evidence suggests that once a woman becomes a mother, others in the workplace have qualms about her commitment.²¹⁰ Accordingly, many of those women who do succeed in the profession remain single and childless.²¹¹ The Ninth Circuit Gender Bias Task Force found that “[i]ronically . . . women are less likely than men to choose marriage and parenthood, but appear more likely to suffer negative professional consequences when they do.”²¹²

(male attorney stated that “men are still expected to put their careers first and generally they do”).

This phenomenon is not unique to the legal profession. Other professions also create a tension between the workplace and the home for women employees. For example, in Orange County, the highest-paid female executive in the county, Ms. Kathryn Braun, recently resigned as CEO of Western Digital Corp., a major computer company. Ms. Braun, who had been with the company for 20 years, left in order to spend more time with her family. Ms. Braun stated, “This company has been my family and its staff a substitute for having children.” P.J. Huffstutter, *Western Digital Executive Gives Kingdom for a Life*, L.A. TIMES (ORANGE COUNTY), Aug. 21, 1998, at A28.

206. Kozec, *supra* note 199. This article provides an excellent discussion of the historical and sociological nature of motherhood in American society.

207. See *Final Report of the Ninth Circuit*, *supra* note 12, at 843.

208. See RHODE, *supra* note 38, at 8.

209. Kozec, *supra* note 199, at 118 (citing Milton C. Regan, Jr., *Divorce Reform and the Legacy of Gender*, 90 MICH. L. REV. 1453, 1459 (1992)). The Ninth Circuit Gender Bias Task Force found that about half of the women respondents said that it was “very difficult” to balance work and home, as opposed to 28% of the male respondents. See *Final Report of the Ninth Circuit*, *supra* note 12, at 848.

There is some evidence to suggest, however, that men are beginning to take more of an active role in child care, at least in two-parent households. However, women still perform the greater percentage of child care tasks. See, e.g., Marilyn Elias, *Today’s Daddies Make More Room for Child Care*, USA TODAY, June 10, 1999, at D-1.

210. See Adams, *supra* note 70. During a gender discrimination trial brought by a former associate against a law firm who terminated her upon her return from maternity leave, testimony revealed that a partner had stated that women who have children do not return with the same level of commitment to their careers. See *id.* at 2.

211. See Rhode, *supra* note 109, at 1187. See also Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law: Changes in Economics, Diversification and Organization of Lawyering*, 44 CASE W. RES. L. REV. 621, 648 (1993).

212. *Final Report of the Ninth Circuit*, *supra* note 12, at 837.

Additionally, gender-based stereotypes continue to hamper women's efforts to rise to the upper echelons of the profession.²¹³ As upper-level management decisions tend to be based on more subjective criteria, as discussed above, these forms of unconscious bias are even more detrimental to women's efforts to succeed. Women who have young children are particularly affected. As one commentator observed:

[W]omen's efforts have subsidized the cost of parenting for men. Men can enjoy the status of parenting while remaining "ideal" traditional workers who may devote all efforts to professional advancement. In fact, the joint status of husband and father increases a man's desirability as a worker as he is regarded as more stable and mature than his childless bachelor counterpart. Conversely, the mere status of motherhood diminishes the value of women employees in the eyes of employers. Motherhood thus exacts high career costs for women.²¹⁴

Given that women continue to be assigned the role of primary caregiver for the family, and given that society values this role less than that of primary wage earner, women continue to be negatively impacted in their careers. Accordingly, it should come as no surprise that most women judges and women partners at large law firms are unmarried and childless.²¹⁵ Not only do societal stereotypes continue to work to prevent women from shattering the glass ceiling, there is even some speculation that the gains women have made thus far are threatened by erosion.²¹⁶

3. Culture of the Legal Profession

The American Bar Association is on record opposing discriminatory behavior by lawyers. At its annual meeting in 1995, the ABA adopted a resolution condemning "the manifestation by lawyers in the course of their professional activities . . . [of] bias or prejudice against clients, opposing parties and their counsel, other litigants, witnesses,

213. See generally Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L. J. 471 (1989); Rhode, *supra* note 109, at 1182. This gender-based stereotyping is exacerbated by the tendency to promote those who are similar in most respects to the person or persons doing the promoting. For a good discussion of this phenomenon, see Baron, *supra* note 171, at 271-73.

214. Korzec, *supra* note 199, at 126 (citations omitted).

215. See NOSSEL & WESTFALL, *supra* note 148, at xx. See also *Final Report of the Ninth Circuit*, *supra* note 12, at 772.

216. See, e.g., SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991).

judges and court personnel, jurors and others based upon . . . sex.”²¹⁷ Furthermore, the resolution went on to state the ABA’s opposition to “discrimination by lawyers in the management or operation of a law practice in hiring, promoting, discharging or otherwise determining the conditions of employment.”²¹⁸ Despite these lofty statements by the nation’s largest association of lawyers, the very culture of the legal profession, steeped in years of tradition, is itself responsible for women’s failure to achieve true parity in the profession.

Law firm culture has indeed changed dramatically in the past twenty years.²¹⁹ However, many aspects of the law firm paradigm, which reflect societal gender-based stereotypes, continue to impede women’s ability to succeed at the highest levels. As pointed out by the authors of a comprehensive survey of what women lawyers think of their firms:

Despite marked progress, survey respondents reported difficulties in every area covered in the questionnaire. On the whole, respondents did not think that the problems they faced would be remedied over time through existing approaches and attitudes. Instead, respondents commented that systemic forces hold back women’s progress and will continue to do so until institutional and societal changes are made.²²⁰

In its groundbreaking reports, the ABA Commission on Women in the Profession concluded that law firms discriminate against women in a number of ways.²²¹ For example, women have fewer mentoring opportunities than do their male counterparts in the law firm setting.²²² Furthermore, women are at a disadvantage in the rainmak-

217. American Bar Association, *Summary of Action of the House of Delegates*, 1995 Annual Meeting, Chicago, Illinois (Aug. 8–9, 1995).

218. *Id.*

219. See *WOMEN IN THE LAW*, *supra* note 7, at 1. Approximately 80% of women lawyers have entered the profession since 1970. See *id.* at 9.

220. NOSSEL & WESTFALL, *supra* note 148, at xvii.

221. See American Bar Association Commission on Women in the Profession, *Report to the House of Delegates* (1988), and *UNFINISHED BUSINESS*, *supra* note 4. The lack of mentoring also impedes the progress of lawyers of color. See also Wilkins & Gulati, *supra* note 168, at 568.

222. The focus of this section is on women in law firm settings, as 70% of women lawyers are in private practice as of 1991. See *WOMEN IN THE LAW*, *supra* note 7, at 18. As the anecdotal evidence in Nossel and Westfall’s book clearly demonstrates, the importance of mentoring to women achieving professional success cannot be overstated. Irrespective of the field, women and men are not as likely to attain the top jobs without the benefit of mentoring. See generally NOSSEL & WESTFALL, *supra* note 148. For example, Lucent Technology’s Carly Fiorina, whom Fortune Magazine identified as the most powerful businesswoman in America, was mentored by Bill Marx, retired president of AT&T’s Network Systems. See Joseph R. Perone, *Queen of the Business World*, *SAN FRAN. EXAMINER*, Mar. 7, 1999, at B-6.

ing department, which impedes advancement to the top levels of large law firms.²²³ Additionally, women are less likely to be included in the social events that build collegiality within the firm.²²⁴ Women often receive inferior assignments.²²⁵ Finally, sexual harassment "remains a destructive problem."²²⁶

Law firm policies tend to assume that attorneys are not primarily responsible for family and children.²²⁷ Billing an excess of 2,000 hours per year is simply unrealistic for many women with children.²²⁸ In order to bill this many hours, the work week far exceeds forty hours, leaving virtually no time for family life, let alone business and professional development activities. Although men are also affected by this culture, which is essentially hostile to facilitating parenthood, women are affected disproportionately. As discussed above, women remain the primary caregivers in the family. Furthermore, women lawyers as a group tend to be younger than the men in the profession, since women have come to the law in large numbers only relatively recently.²²⁹ Thus, most women lawyers are between thirty and forty years of age and still in their childbearing years.²³⁰

Few firms have family-friendly policies regarding maternity leave, childcare, reduced hours or part-time work.²³¹ Firms continue to see only the "traditional" lawyer, who works in excess of 2,000 billable hours per year and who is not hindered by outside responsibilities, as the best economic choice.²³² Even in firms that do have policies that

223. See NOSSEL & WESTFALL, *supra* note 148, at xviii. See also *Final Report of the Ninth Circuit*, *supra* note 12, at 807 (overwhelming majority of respondents opined that men had a significant advantage in rainmaking).

224. See *Hishon v. King and Spalding*, 467 U.S. 69 (1984) (plaintiff denied partnership, *inter alia*, for failing to socialize with the lawyers in the firm).

225. See UNFINISHED BUSINESS, *supra* note 4.

226. *Id.* at 18-19 (noting that most firms now have written policies against sexual harassment and there is certainly more awareness of the issue. However sexual harassment, though less blatant, remains a substantial problem for the profession).

227. See generally NOSSEL & WESTFALL, *supra* note 148. See also Foster, *supra* note 172, at sections I and III (arguing that law firms have a one-dimensional paradigm of attorneys that creates a glass ceiling for women, and that by altering this paradigm, law firms will gain a competitive advantage).

228. For an overview of national billing-requirement trends, see Foster, *supra* note 172, at 1652 (noting that some firms actually require 3000 billable hours per year, which requires the attorney to actually work approximately 4000 hours).

229. See Korzec, *supra* note 199, at 124.

230. See *id.*

231. See *id.*; see also Foster, *supra* note 172.

232. See Korzec, *supra* note 199, at 127-28.

Since law firms are basically economic entities, they are more likely to make employee innovations and accommodations which are compelled by workplace reali-

are advantageous to women attorneys with families, many women are reluctant to take advantage of them.²³³ Part-time work or “mommy-track” options tend to penalize women in terms of pay and promotion.²³⁴ There is also evidence to suggest that women pay a penalty for taking time out of the profession.²³⁵ The combined effects of the inability to attain partner status and smaller overall incomes has been seen as a contributing factor to women leaving private practice.²³⁶

Finally, women are often excluded, either inadvertently or intentionally, from those relationships among members of a law firm that are so critical to success and the ultimate attainment of partnership. Women are often not mentored, and are frequently not included in important informal and social contacts. This is particularly true in firms with few women.²³⁷ This subtle form of alienation prevents women from realizing their full potential in private law firms. There is also a sense that the failure to include women in these relationships impedes women’s ability to secure judicial appointments.²³⁸

Women are guaranteed entry through the front door of the profession, but are hampered in their efforts to succeed because of the reasons discussed above. As one lawyer observed, “[O]ur presence does not by itself constitute ‘integration.’”²³⁹ The continued “numerical dominance” of men in the prestigious jobs in the legal profession sends a message of “exclusion and subordination” to women law-

ties. Only traditional workers, who are able and willing to work the hours necessary to bill twenty-five hundred hours a year will be considered economically efficient. Under such a risk-benefit analysis, non-traditional lawyers may be forced out of firms altogether.

Id.

233. See NOSSEL & WESTFALL, *supra* note 148, at 206. At one large Los Angeles firm, survey respondents concluded that while the firm had a part-time work policy, it was not utilized, largely because top management at the firm expressed displeasure with the policy, and those who did take advantage of this option found it to be unworkable. *See id.*

234. See Korzec, *supra* note 199, at 127.

235. See Huang, *supra* note 120, at 297–98.

236. *See id.*

237. See NOSSEL & WESTFALL, *supra* note 148, at xix.

238. See *Final Report of the Ninth Circuit*, *supra* note 12, at 786. *See also* WOMEN IN THE LAW, *supra* note 7, at 31 (finding that as of 1991, approximately 7% of federal judges and 9% of state judges nationwide are women). “According to the Federal Judicial Center History Office, the number of women judges sitting on federal courts as of September 1995 were as follows: two Supreme Court Justices (22% of the Court); 32 U.S. Court of Appeals judges (13% of the court); 109 U.S. District Court Judges (12% of the court); and three U.S. Court of Claims judges (17% of the court).” *Id.* at 29.

239. Mary C. Dunlap, *Are We Integrated Yet? Pursuing the Complex Question of Values, Demographics and Personalities*, 29 U.S.F. L. REV. 693, 694 (1995).

yers.²⁴⁰ Thus, unless courts analyze partnership decisions under Title VII differently, society radically alters its view of women, or law firms change the way they do business, change will be incremental, at best.

III. Statewide Efforts to Eliminate Gender Bias in the Legal Profession

A. The Work of the California Judicial Council

1. Background of the 1996 Report

The California Judicial Council, pursuant to constitutional authority, promulgates rules for the entire California state court system to improve the administration of justice.²⁴¹ In other words, the Judicial Council sets policy for the entire California court system. California Rule of Court 1001 makes the Judicial Council responsible for, *inter alia*, advancing accessible administration of justice.²⁴² In its long-range strategic plan for the state judicial system, the Council identified access, fairness and diversity as one of its five primary goals.²⁴³

In 1987, then Chief Justice Rose Bird appointed the Judicial Council Advisory Committee on Gender Bias in the Courts.²⁴⁴ Later that year, Chief Justice Malcolm M. Lucas charged the committee with investigating and documenting instances of gender bias throughout the courts.²⁴⁵ After comprehensive hearings and surveys throughout the state, the committee issued a draft report in 1990, considered to be truly groundbreaking. A final report was issued in 1996 entitled *Achieving Equal Justice for Women and Men in the California Courts*.²⁴⁶ The report cited the Committee's findings of significant gender bias in the state court system and in the legal profession, and culminated in sixty-eight recommendations, all adopted by the Judicial Council.²⁴⁷

240. See *Final Report of the Ninth Circuit*, *supra* note 12, at 790.

241. See CAL. CONST. art. VI, § 6.

242. See CAL. CT. R. 1001.

243. See Judicial Council of California, *Leading Justice into the Future*, (visited 10/26/99) <<http://www.courtinfo.ca.gov>> (Online Bookshelf on the Judicial Branch Web site).

244. See JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 7, at 33. The Gender Bias Committee is now called the Gender Fairness Subcommittee of the Judicial Council Access and Fairness Advisory Committee.

245. See *id.* at 3.

246. See JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 7.

247. See *id.* The Report defines gender bias as "behavior or decision-making in the justice system which is based on or reveals (1) stereotypical attitudes about the nature and roles of women and men; (2) cultural perceptions of their relative worth; or (3) myths and misconceptions about the social and economic realities encountered by both sexes." See *id.* at 5.

In collecting data, the Committee conducted five public hearings throughout the state, sent a survey to the state's judges, heard testimony from 200 attorneys at statewide meetings, surveyed women's bar groups, and visited women's correctional facilities.²⁴⁸ While the report does address issues relating to women lawyers and court personnel, it also deals with substantive law areas of family law, domestic violence, criminal law and juvenile law.²⁴⁹ The report goes beyond findings and sets an agenda for the future.²⁵⁰

2. Findings of the Judicial Council

The portion of the 1996 report germane to the focus of this article is dealt with under the rubric of civil litigation and courtroom demeanor. Specifically, the report addresses gender bias in the courtroom environment, and points to evidence of gender bias by judges, arbitrators, commissioners, and attorneys.²⁵¹ In chronicling the instances of both overt and subtle gender bias by judges, the committee noted that "[i]n the final analysis, a judge is simply a former law student and a former lawyer. A judge often reflects the accepted social and ethical rules of the legal culture."²⁵² Although the committee documented instances of gender bias by bench officers, it found that examples of gender biased conduct by attorneys abound, both more frequently and more severely than those involving members of the judiciary.²⁵³

Regarding the judiciary, the Committee found conduct evidencing gender bias occasionally resulted in discipline by the Commission on Judicial Performance.²⁵⁴ More often, however, the overt as well as

248. *See id.* at 5.

249. *See id.* at 6.

250. *See id.*

251. *See id.* at 17-18.

252. *Id.* at 51. Former California State Bar President Margaret Morrow, who at the time of the hearings was president of the Los Angeles County Bar Association, explained why the report must focus on judicial behavior: "It is they who set the tone. It is they who control the participants. It is they who define the boundaries of appropriate and inappropriate conduct, and they, who in many cases, make the ultimate decision as to the rights and responsibilities of the litigants." *Id.* at 53.

253. *See id.* at 18. Although beyond the scope of this article, the Judicial Council also studied gender bias directed against court staff. There continues to be evidence that court staff is not immune from gender discrimination in employment. There have been allegations of sexual harassment brought by court staff against California bench officers. *See, e.g.,* Matthew Heller, *The Lonesome Quest*, CAL. LAW., June 1999, at 51 (discussing a sexual harassment complaint by a court administrator against two judges).

254. *See id.*

subtle acts of gender bias go unpunished.²⁵⁵ Examples of biased behavior by members of the bench included openly hostile behavior toward women, a focus on the personal appearance of women in the courtroom, failure to extend common courtesies to women, sexual innuendo and dirty jokes, failure to intervene when others in the courtroom engage in conduct constituting gender bias, and use of terms of endearment to refer to women in the courtroom.²⁵⁶

The findings of gender biased conduct of bench officers resulted in five recommendations to the Judicial Council.²⁵⁷ A central theme of the recommendations is the need for judicial education.²⁵⁸ The recommendations also urge other organizations, such as the California Judges Association and the State Bar, to enact rules prohibiting judicial manifestations of gender bias, and mandating that judges prohibit such conduct by those under the judge's control.²⁵⁹ The Committee is implementing these recommendations, and much progress has already been achieved.

With regard to attorney behavior, the Committee found it more egregious and offensive than judicial conduct.²⁶⁰ The Committee found examples of gender biased conduct which focused on the personal appearance of women in the courtroom, use of gender issues as a trial tactic, expressions that women should not be lawyers and are inferior advocates, and discrimination against women in bar activities.²⁶¹ Many of these acts were "committed with the encouragement or participation of the judge."²⁶² The Committee also found that the profession had failed to respond adequately to the "difficulties of balancing home and family"²⁶³ resulting in women perceiving they had less advancement opportunities than men.²⁶⁴

The Committee made five recommendations to the Judicial Council regarding gender-biased conduct by attorneys.²⁶⁵ The recom-

255. *See id.*

256. *See id.* Other examples include reliance upon stereotypes about women, adopting a fatherly tone toward women, hostility or impatience toward causes of action such as sexual discrimination or harassment, unequal extension of professional courtesies, and imposition of unequal standards of advocacy. *See id.*

257. *See id.* at 55-81.

258. *See id.* at 20.

259. *See id.* at 55-74.

260. *See id.* at 83.

261. *See id.*

262. *Id.*

263. *Id.* at 84.

264. *See id.*

265. *See id.* at 84-106.

mendations range from suggestions that appropriate agencies engage in attorney education and promulgate rules of professional responsibility prohibiting gender bias, to the use of gender-neutral language in court papers and instructions, to adoption of rules insuring women attorneys are not discriminated against in court appointments.²⁶⁶

Although the focus of the Judicial Council report is on gender bias in the courtroom and in the decision-making process, the Committee found that bias in the employment context is an overriding concern for women throughout the state. Accordingly, the report addresses this issue in both its findings and recommendations.²⁶⁷ In addition to the results of the Committee's surveys and hearings, the Committee reviewed studies by both the ABA as well as local bar associations throughout California.²⁶⁸ The Committee found that although women compose a substantial number of practicing lawyers and have made gains in terms of acquiring leadership positions within the profession, there remains too great a discrepancy between the number with leadership roles and the number with subordinate roles, with a slow rate of progress in closing this gap.²⁶⁹

In reviewing statistical data compiled by local bar associations in California, the Committee found that women lawyers in California are generally faring better than the rest of the nation, but still are underrepresented at the partner level in firms.²⁷⁰ This situation is much worse outside of major urban areas. In Fresno, for example, the committee reported only one woman made partner among the 168 attorneys in large firms.²⁷¹ Furthermore, women tended to be overrepresented in public sector employment (although not in leadership positions) and in small firms.²⁷²

The Committee identified three primary reasons which contribute to women's inability to achieve equal participation in the legal profession: (1) fewer opportunities for advancement and promotion for women than for men due to lack of mentors, difficulties in rain-making, gender stereotyping, and lack of participation in firm management; (2) difficulties in balancing home and career; and (3) sexual harassment in the workplace.²⁷³ Citing other statistical surveys,

266. *See id.*

267. *See id.* at 99-105.

268. *See id.* at 100-02.

269. *See id.* at 102.

270. *See id.* at 100-02.

271. *See id.* at 101.

272. *See id.* at 101-02.

273. *See id.* at 102.

the Committee noted that ninety-six percent of California women surveyed believed they had more difficulty than their male counterparts in balancing work and family responsibilities, sixty-two percent believed that they had fewer chances for advancement than did men, and eighty-nine percent said that their employer did not provide child care benefits.²⁷⁴ Of the women surveyed, twenty-five percent had been harassed in a previous job, and believed sexual harassment exists in the profession in general.²⁷⁵

One woman at the Los Angeles hearings testified as follows:

The final straw for me came when I was informed in substance that there were no complaints about the number of hours I billed for the firm, but the firm objected to me spending time away from the office and performing duties away from the office when my daughter, who has a severe health problem, was hospitalized or ill. In substance my long days and my long nights were not enough. I was offered a choice, neglect my daughter's needs or leave the firm. I chose the latter.²⁷⁶

As a result of its hearings and surveys, the Committee recommended that the State Bar adopt a Rule of Professional Responsibility relating to sexual harassment and sexual discrimination in employment, and that the State Bar adopt the recommendations of the Women in Law Committee.²⁷⁷ The Committee also recommended that the State Bar discourage attorneys from using clubs for business purposes that practice invidious discrimination.²⁷⁸

In its concluding comments, the Committee noted that the evidence gathered "pointed to one, inescapable conclusion: substantial amelioration of the problem of gender-biased conduct in the courtroom would be accomplished if more women were appointed to the bench."²⁷⁹ The Committee stated that the percentage of women judges in the state fails to approximate the percentage of women in the legal profession or in society.²⁸⁰ Citing anecdotal evidence from the hearings and surveys, scholarly literature, and the results of a Cali-

274. *See id.* The Committee also heard evidence that women were discriminated against in local bar association activities. *See id.* at 90.

275. *See id.* at 102.

276. *Id.* at 103.

277. *See id.* at 99.

278. *See id.* at 105.

279. *Id.* at 106. Women tend to be underrepresented on both the federal as well as state bench. For example, as of 1996, only 12 of the 109 judges of the Third Circuit were women. *See Report of the Third Circuit Task Force on Equal Treatment in the Court*, 42 VILL. L. REV. 1355, 1369 (1997) [hereinafter *Report of the Third Circuit Task Force*].

280. *See id.* at 107.

ifornia Judge's Survey,²⁸¹ the Committee stated that "women bring different attitudes and perceptions to the bench," and that "society is entitled to the benefits of those different perceptions."²⁸²

In addition to the comprehensive report and implementation plan, in May 1997 the Chief Justice of the California Supreme Court requested all presiding judges in the state to offer broad-based fairness courses focusing on gender, race, ethnicity, sexual orientation and disabilities to all bench officers and staff.²⁸³ A curriculum has been prepared and is now available.²⁸⁴ Furthermore, a sexual harassment awareness and prevention curriculum has been prepared for bench officers and staff, and pilot training sessions have begun.²⁸⁵ To date, the Committee has substantially implemented the report's recommendations.²⁸⁶

B. Reports of Other Jurisdictions and Organizations

As noted in the preceding section, the findings of the Judicial Council are certainly reinforced by the findings of other jurisdictions and organizations. Although anecdotal evidence abounded, courts and bar organizations did not begin to study gender bias in earnest until the 1980's.²⁸⁷ State gender bias task forces took the lead, with federal circuits following.²⁸⁸ The methodology employed by most of these task forces, including surveys, public hearings and empirical studies, has produced a vast amount of information documenting the existence of gender bias.²⁸⁹

Most states, and federal circuits, have conducted comprehensive studies of gender bias within their jurisdictions, with findings similar to those of California.²⁹⁰ The Ninth and Third Circuits have published

281. *See id.* at 106-09.

282. *Id.* at 109.

283. *See* Judicial Council of California, Administrative Office of the Courts, *Year in Review: Keeping California Courts Fair and Accessible*, ANN. REP. Vol. III, at 18 (1998).

284. *See id.* at 18.

285. *See id.* at 23.

286. *See id.* at 18. *See also* Minutes of the Judicial Council as well as the minutes of the Access and Fairness Advisory Committee and Gender Fairness Subcommittee (on file with the Administrative Office of the Courts in San Francisco).

287. For a discussion of the history of the efforts by courts and other organizations to study gender bias in the courts and legal field, see Billings & Murray, *supra* note 103, at 739-42.

288. *See id.* at 739-42. New Jersey was the first state to create a task force. New York, Rhode Island, and Arizona were next. *See id.* at 740.

289. *See id.* at 741.

290. For a discussion of state and federal gender bias reports, including a discussion of the impetus for the original federal studies, see Vicki C. Jackson, *What Judges Can Learn from*

significant reports documenting gender bias in their respective circuits.²⁹¹ Additionally, national and local bar associations conducted studies of their own. For example, in 1989, the State Bar of California's Committee on Women in the Law conducted a comprehensive survey of women lawyers and the practice of law in California.²⁹² The findings painted a picture of widespread bias in the profession, despite notable recent gains.²⁹³ Even county bar associations have conducted studies. For example, the Santa Clara County Bar Association conducted a survey of its members in 1991.²⁹⁴ Universities have also funded studies.²⁹⁵

Gender Bias Task Force Studies, 81 JUDICATURE 15, July-Aug. 1997, noting that most of the states and over half of the federal circuits have published gender bias reports. Professor Jackson stated, "Society is pervasively organized around gender categories, and we can all harbor stereotypes of which we may be unconscious. The best of the task force reports help readers come to a better awareness of this possibility and thereby permit them to work harder towards objectivity and impartiality." *Id.* at 18. See also Lynn Hecht Schafran, *Will Inquiry Produce Action? Studying the Effects of Gender in the Federal Courts*, 32 U. RICH. L. REV 615 (1998).

In analyzing the data of the Illinois Task Force on Gender Bias in the Courts, which showed that 74% of women lawyer survey participants answered that they had experienced some form of gender bias in the courtroom over the previous 12 month period, authors Stephanie Riger, Pennie Foster-Fishman, Julie Nelson-Kuna and Barbara Curran concluded that women consistently perceive bias more than men. See Riger et al., *supra* note 107, at 476-78.

For examples of other reports, see, e.g., *Gender Committee Report to D.C. Circuit Task Force on Gender, Race and Ethnic Bias*, 84 GEO. L. J. 1657 (1996); *Florida Supreme Court Gender Bias Study*, 42 FLA. L. REV. 803 (1990); *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L. J. 11 (1986).

291. See *Final Report of the Ninth Circuit*, *supra* note 12; *Report of the Third Circuit Task Force*, *supra* note 279.

292. See LAIDLAW & KIPNIS ASSOCIATES, *WOMEN LAWYERS AND THE PRACTICE OF LAW IN CALIFORNIA* (1989). (survey conducted for the State Bar of California, Committee on Women in the Law, in conjunction with the Legal Aid Society of San Francisco). See also Billings & Murray *supra* note 103, at 742-43 (1994).

[A]lthough judges were willing to acknowledge that gender bias might exist in other states, they asserted that gender bias was not an issue in their own state. It became necessary to establish task forces in almost every state, notwithstanding that the ultimate findings and conclusions of each task force were almost identical to those of earlier reports.

Id.

293. See *id.* Many of these findings are cited in the Judicial Council Report. SEE Judicial Council of California, *supra* note 7.

294. See State Bar of California (visited 11/4/99) <<http://www.calbar.org/2pub/3bibgend.htm>> (*Survey of all Attorneys in Santa Clara County Regarding Gender Bias*, SANTA CLARA COUNTY B. ASS'N (Winter 1991)).

295. See, e.g., Riger et al., *supra* note 107 (study funded by the Office of Social Science Research, University of Illinois at Chicago, constituting a second analysis of the data collected by the Illinois Task Force on Gender Bias in the Courts).

The Ninth Circuit's gender bias study was viewed as truly groundbreaking. The study by the nation's largest federal circuit was the first of its kind by a federal circuit, though many states had already conducted studies of their own.²⁹⁶ The survey found pervasive gender bias in the circuit, from selection of judges, to the majority of the circuit's women lawyers who suffered sexual harassment, as well as the makeup of the federal bar.²⁹⁷ The majority of women surveyed believed that their gender impeded their ability to make partner in their firms.²⁹⁸

The findings of the Ninth Circuit Gender Bias Task Force were consistent with those of the California Judicial Council, in that overt acts of gender bias by bench officers were infrequent, but more subtle forms of bias persisted, particularly in informal settings such as in-chambers conferences.²⁹⁹ One woman stated that "[g]ender bias is alive and well. It has just gone underground."³⁰⁰ Male lawyers were found to engage in more overt and egregious acts of gender bias than were male judges.³⁰¹ The report made many recommendations, all of which were adopted by the Judicial Council.³⁰² Implementation of the report's recommendations has begun in earnest.³⁰³

The Third Circuit Task Force surveyed court employees, judges, and attorneys and found that, while progress had been achieved in the Circuit, a significant number of respondents perceived differential treatment based upon gender.³⁰⁴ Respondents agreed that judges

296. For a general discussion of the Ninth Circuit study, see Slind Flor, *supra* note 136, at 3; Judith Resnick, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1693 (1991).

297. See Slind Flor, *supra* note 138; see also Ninth Circuit Task Force on Gender Bias, *Executive Summary of the Preliminary Report of the Ninth Circuit Task Force on Gender Bias*, 45 STAN. L. REV. 2153, 2171-72 (1993). "Gender can have an effect on one as litigant, witness, lawyer, employee, or judge with regard both to process and substantive outcome. Gender plays a role—in the appointments process, in interactions in and outside the courtroom, in the work one does, and in federal adjudication." *Id.*

298. See *Final Report of the Ninth Circuit*, *supra* note 12, at 803.

299. See Hon. Dorothy W. Nelson, *Introduction to the Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force*, 67 S. CAL. L. REV. 731, 733 (1994).

300. Ninth Circuit Task Force on Gender Bias, *supra* note 297, at 2173.

301. See Nelson, *supra* note 299, at 733 (citing Lynn Hecht Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, TRIAL, Feb. 1990, at 28-32) (instances include demeaning forms of address, sexist remarks and jokes, unwanted touching, verbal and physical sexual harassment, and inappropriate commentary on appearance).

302. See Schafran, *supra* note 290, at 637.

303. See *id.* at 637-38.

304. See *Report of the Third Circuit Task Force*, *supra* note 279, at 1380-87. The authors noted that women were increasingly well-represented among bankruptcy judges, magistrates and law clerks. However, as of 1996, only 12 of the 109 Article III judges were women. See *id.* at 1369.

treat men attorneys slightly better than women attorneys, and women attorneys were more likely than men attorneys to have recognized judges behaving in a demeaning or disparaging manner toward women.³⁰⁵ Further, a number of respondents believed that judges at all levels of the court system were less respectful to women attorneys than men attorneys.³⁰⁶ The Report recommended, *inter alia*, education for all levels of court personnel, publication by each court of the procedures for resolving complaints of unequal treatment, and an examination of the manner in which court appointments are made.³⁰⁷

Some of the most seminal work in this area has been conducted under the auspices of the American Bar Association. The ABA Commission on Women in the Profession was established in 1987 to "identify barriers to their advancement, and make recommendations on how to eliminate those barriers."³⁰⁸ In 1988, the ABA Commission on Women in the Profession issued its first report.³⁰⁹ The report found that discrimination is still widespread, and that most discrimination today is subtle and a reflection of co-workers' attitudes.³¹⁰ It found that women were more likely than men to perceive sex discrimination, and that women were under-represented in the judiciary, law faculty and law firm partnerships.³¹¹ Unfortunately, not a great deal had changed between the time when the Committee issued its first report and its second report in 1995.³¹²

Even the federal government has begun to study these issues in earnest. As part of the Civil Rights Act of 1991, the federal government created the Federal Glass Ceiling Commission to study bias in corporate America.³¹³ A report issued by the Department of Labor showed dramatic statistical evidence that the glass ceiling continued

305. *See id.* at 1399-1407.

306. *See id.*

307. *See id.* at 1391-93. For a compendium of recommendations by the various federal gender bias task forces, see Schafran, *supra* note 290, 636-37 (recommending ongoing training for judges and court personnel, adopting court rules making biased conduct unacceptable, improving grievance procedures for complaints against judges and court personnel for biased conduct, striving for diversity in appointments, adopting sexual harassment policies, and establishing Circuit-wide committees on fairness).

308. Robert A. Stein, *Advancing Women's Opportunities*, A.B.A. J., May 1998, at 96.

309. *See* Stephanie Benson Goldberg, *Gender Bias: ABA Commission Issues First Report*, A.B.A. J., Oct. 1, 1988, at 144.

310. *See id.*

311. *See id.*

312. *See* UNFINISHED BUSINESS, *supra* note 4.

313. *See* Pub. L. No. 102-166, 105 Stat. 1072 (1991) (codified at 42 U.S.C. § 2000e (1994)).

to be a reality for women, with women representing less than seven percent of upper-level management.³¹⁴

These reports, collectively, demonstrate the pervasiveness of gender bias. Documenting the existence of bias is the first step. As the reports make clear, men do not perceive the problem to exist to the same extent as women, if they acknowledge that it exists at all.³¹⁵ Without these reports, and others like them, we would still very much be at the starting gate, for until a problem is identified, there can be no solution.

There is certainly no shortage of gender bias studies. For over a decade, federal and state courts as well as national and local bar associations have studied gender bias and issued comprehensive reports. While the findings show varying degrees of gender bias, the universal conclusion is that we will continue to have a problem with gender bias in the courts and in the profession generally, and that time alone will not eradicate the problem.³¹⁶ Now the challenge is to implement the findings in the reports and continue to take remedial action. Fortunately, the California Judicial Council and the Ninth Circuit have made implementation of the gender bias report recommendations a priority. While progress has been steady, the task is far from over.

IV. The Road to Equality

To move beyond today's achievements and to ensure the fear of backsliding does not become a reality,³¹⁷ changes need to continue in many facets of the legal profession.³¹⁸ While not all women have the same goals, several themes have emerged as being of paramount im-

314. See U.S. DEP'T OF LABOR, REPORT ON THE GLASS CEILING INITIATIVE (1991) at 6; see also U.S. DEP'T OF LABOR, PIPELINES OF PROGRESS: AN UPDATE ON THE GLASS CEILING INITIATIVE (1992).

315. See generally Rhode, *supra* note 109, at A19 (reviewing three recent reports on gender bias in the legal profession, Professor Rhode notes that denial by lawyers that there is a serious problem is itself a serious problem); see also JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 7, at 110-11 (demonstrating graphically that women judges perceive biased behavior by judges and other lawyers much more frequently than do men judges).

316. See Rhode, *supra* note 109, at A19. "[I]f time alone is viewed as the answer, we are in for a very long wait." *Id.*

317. Some commentators argue that backsliding is already occurring in some fields. See, e.g., Dunlap, *supra* note 239, at 703 (pointing out that women broke into many traditionally male jobs in the 1970's, but are no longer there). The author argues that Title VII allowed women to get hired, but pervasive sexual harassment resulted in many women quitting. See *id.*

318. In her introduction to the 1995 Report entitled "Note from the Chair," Laurel G. Bellows, Chair of the ABA Commission on Women in the Profession, stated:

portance in ensuring women are treated equally and achieve satisfaction in the legal profession.

In the absence of a significant and rapid societal change, which is unlikely,³¹⁹ or a reversal of the direction in the way in which federal courts analyze Title VII claims involving upper-level management decisions,³²⁰ change will have to occur in the profession itself. Changing the ways in which the legal profession does business in this country will not only allow women to reach their full potential, but will also have the salutary effect of making the profession as a whole more humane to both men and women.³²¹

Since legal careers begin in law school, legal educators are in a unique position to influence how we think about our profession. The American Bar Association Commission on Women in the Profession's seminal report on bias in law schools states, "Future generations of our profession are molded in law school The legal academy should represent the highest standards of our profession."³²² The American Bar Association has called on law schools to evaluate their schools in terms of the environment for women.³²³

Societal change is seldom welcome But change in the status of women in the legal profession is imperative. In the intervening seven years since the Commission's last report, the professional life of women lawyers has not materially improved. Neither the sheer number of female law school graduates, nor the mere passage of time, nor even the elevation of individual women to positions of prominence has dramatically enhanced opportunities for women as partners, law professors or judges.

UNFINISHED BUSINESS, *supra* note 4, at 2.

319. One author has observed that, "We seem, as a society, a remarkably complacent lot. We are forever slow to recognize problems and forever fast to write them off. We like things the way they are, by and large, and we don't like change, certainly not the kind of change sought by some disgruntled faction" McCaffrey, *supra* note 202, at 289.

320. See, e.g., Rhode, *Perspectives on Professional Women*, *supra* note 109; see also Baron, *supra* note 171, at 268-269 (arguing that the inherent difficulty in assessing upper-level management decisions does not justify the court's abdication of its review role in these cases).

321. See UNFINISHED BUSINESS, *supra* note 4, at 17.

The 1988 status report emphasized that balancing work and family was an issue of concern to all people, not just women Yet, seven years have passed and little change is evident. The Commission still believes that, philosophically, these issues relate to everyone; in reality, women bear the greater burden of prioritizing work and family. And, women suffer the most from this daily balancing act.

Id.

322. AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION, ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION EXECUTIVE SUMMARY AND RECOMMENDATIONS, at 7 (1996) [hereinafter ELUSIVE EQUALITY].

323. See American Bar Association Commission on Women in the Profession, Don't Just Hear It Through the Grapevine: Studying Gender Questions at Your Law School (Jan. 1998).

Many commentators have suggested we reevaluate the prevailing method of teaching law students.³²⁴ We might adopt casebooks sensitive to bias issues. Each law student should receive training in the elimination of bias.³²⁵ Other suggestions include: each dean creating a Committee on Gender, improving career services, creating more co-curricular opportunities for women, and reforming faculty hiring, evaluation and promotion.³²⁶ Furthermore, schools should take steps to ensure harassment or biased conduct by fellow students is not tolerated.³²⁷

As far as private law firm employment is concerned, firms should begin to institute family-friendly policies, such as emergency childcare provisions and parental leave policies.³²⁸ In its seminal report, the Ninth Circuit Gender Bias Task Force found that “[w]hether or not men and women can comfortably raise families while employed outside the home depends significantly on the presence of policies that support family life: parental leave, child-care availability, acceptance of part-time employment, and flexible work schedules.”³²⁹ Given the demographics of the profession, with the overwhelming majority

324. In *Engendering Change*, Catharine A. MacKinnon states that “[t]he so-called Socratic method has been found to differentially silence women students and, through humiliation and abuse, to school all law students in hierarchy and authoritarian thinking rather than in the ability to bring their lives to their work and to think for themselves.” MacKinnon, *supra* note 98, at 91.

325. See RHODE, *supra* note 38, at 167.

326. See ELUSIVE EQUALITY, *supra* note 322, at 6–7; see also Mertz et al., *supra* note 122 (finding that race and gender impact student inclusion in law school classes, and that law schools can modify what goes on in the classroom to ensure inclusion).

327. One professor has opined that her school’s more “humane” law school environment has contributed to the fact that women and minorities fare particularly well at that school. Some of the institutional attributes that contribute to such an environment include the existence of a mentoring program for students, a low student-faculty ratio, a diverse faculty, and a faculty that is available to students. See Judith D. Fischer, *Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Law Students*, 7 U.C.L.A. WOMEN’S L.J. 81, 82–83 (1996).

328. This is particularly important in large firms, as work and family pressures are considered to be worse in large firms than in small firms. See *Final Report of the Ninth Circuit*, *supra* note 12, at 844. The report also found that only eight percent of employers provide child care assistance. See *id.* at 843.

While some firms experimented with the so-called “mommy-track,” discussed *supra* Part II.C.2., there is a growing consensus that the “mommy-track” is a poor solution to the problem, as it is the result of stereotypical notions of a woman’s role in society and the workplace, and in fact perpetuates those notions. See Korzec, *supra* note 199; Heidi Hookman Brodsky, *Women Struggle to Make it to the Top*, LEGAL TIMES, Oct. 19, 1992, at S39; see also Rhode, *supra* note 109, at A19 (“All three [gender bias] reports describe, in deadening and depressing detail, the sweatshop hours expected of full-time attorneys and the second-class status imposed on part-time practitioners.”).

329. *Final Report of the Ninth Circuit*, *supra* note 12, at 837.

of women lawyers under fifty, law firm support of family life is particularly critical in retaining women.³³⁰

Several governmental agencies have already implemented family-friendly policies, making government work an attractive option for many women.³³¹ Only in making firm life less onerous for women with families will the profession alter the status quo in large firms where those women who make partner are "overwhelmingly single and childless."³³² In addition to enacting policies, the firm management must, by word and deed, assure those who take advantage of the policies that they will not be penalized for doing so.³³³ As more firms develop and implement these policies, it is likely that more men will take advantage of them as well as the women in the firm.

Firms should also avoid the so-called "mommy-track." As discussed above, the "mommy-track" creates a category of second-class firm citizens. Studies have shown that women who opt for the "mommy-track" suffer considerably in terms of assignments, promotions and opportunities, leading to low self-esteem and, often, departure from the firm.³³⁴ One commentator has stated that the "mommy-track" will reinforce exploitation of women lawyers, resulting in a top rung of managers who are either men or women without children and a "pink collar ghetto of lawyers who are mothers."³³⁵

Furthermore, significant changes are more likely to occur with women in leadership positions.³³⁶ More women must seek the posi-

330. *See id.* The report also found that only a tiny percentage of men (1%–4%) said that they experienced professional problems, such as delay in promotion, pressure to return to work from parental leave and pressure to work during parental leave. A much larger percentage of women (5%–29%) stated that they had experienced these problems. *See id.* at 849.

331. *See UNFINISHED BUSINESS*, *supra* note 4, at 14, 17 (noting that even if a firm has policies in place, they are not being used, and that the profession stands almost exactly where it did when the Commission issued its report in 1988).

332. NOSSEL & WESTFALL, *supra* note 148, at xx. The Ninth Circuit Task force found that women judges are also less likely to be married and less likely to have children than their male colleagues. *See Final Report of the Ninth Circuit*, *supra* note 12, at 772.

333. *See NOSSEL & WESTFALL*, *supra* note 148, at 206. Associates at a large Los Angeles firm indicated that the firm had a part-time policy, but few took advantage of it because of upper management's negative attitude about it. *See id.*

334. *See Korzec*, *supra* note 199, at 127 nn.56–58.

335. *Id.* at 127 (citing Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 828 (1989) (quoting Mary C. Hickey, *The Dilemma of Having it All*, WASH. LAW., May–June 1988, at 59)).

336. *See NOSSEL & WESTFALL*, *supra* note 148, at xxii (noting that very few women are powerbrokers in their firms).

tion of managing partner, despite the drawbacks of this position.³³⁷ From this position, women can help create family-friendly flexible working environments and make the workplace more friendly for women associates. Women managing partners can accomplish this change by leading with a less authoritarian or dictatorial style than their male counterparts and by consensus building.³³⁸

Additionally, as technology advances, so do the opportunities to work from home through laptop computers and e-mail. Increased utilization of these technological improvements would save time spent commuting, and allow lawyers to spend more time with their families and pursuing personal interests. The requirement of spending over 3,000 hours per year at the workplace can be substantially reduced without a concomitant reduction in productivity.

Firms should institute mentoring programs. While some already have, others have not. For example, at Latham & Watkins, a firm which women lawyers ranked seventy-second out of seventy-seven law firms,³³⁹ a former managing partner eschewed the idea of assigning mentors, stating that "[o]ur experience is that mentoring has to happen naturally."³⁴⁰ However, some argue that even an involuntary mentoring relationship is important in that it assists women by providing an opening to opportunities.³⁴¹ By contrast, the firm that ranked first in the nation, Chicago's Sonnenschein Nath & Rosenthal, has made mentoring of its women lawyers a priority.³⁴² Mentoring is as critical to advancement in law as it is in any other profession.

Additionally, firms must carefully monitor the quality of assignments that women associates receive. An associate who is given less-than-desirable assignments is at a distinct disadvantage in the competition for partnership. Women must be given the same opportunity as men to demonstrate their abilities. While we are a long way from the days when firms did not allow women attorneys to go to court and relegated them to probate and family law departments, there is evi-

337. See Patricia G. Barnes, *From Outsider to Insider: More Firms are Appointing Women Managing Partners*, A.B.A. J., Nov. 1996, at 24 (reporting that more women are becoming managing partners, but that the position isn't as powerful as it used to be, and that the enormous administrative duties detract from billable hours and practice of law).

338. See *id.* at 24-25.

339. See NOSSEL & WESTFALL, *supra* note 148, at 203.

340. Gabriel, *supra* note 155, at A7.

341. See *id.*

342. See *id.*

dence that women associates often receive fewer desirable assignments than men associates.³⁴³

Firms must understand that in the long run these changes will be enormously beneficial if they result in the retention of qualified women lawyers. There is no doubt reduced hours, childcare and other accommodations will be costly to the firms. However, as the California Judicial Council found, firms are already suffering from the drain of trained associates who leave to have families.³⁴⁴ Similarly, a recent survey of women at large law firms revealed that attrition is perceived as a widespread problem.³⁴⁵ Firms should accommodate associates during childbearing years to assure continuity over the long-term.³⁴⁶ Additionally, alternatives to the billable hour model may assist firms in retaining both qualified men and women without sacrificing the bottom line.³⁴⁷

Firms must recognize that gender bias can indeed be detrimental to business. As Justice Sandra Day O'Connor observed, "gender bias is depriving us of the talent and skills that otherwise qualified women

343. See NOSSEL & WESTFALL, *supra* note 148, at xviii.

Some respondents reported full satisfaction with the level of work they have been assigned, but others suggested that women litigators do research and writing while men do depositions and court appearances, and women corporate lawyers work on due diligence while their male peers are negotiating deals. In some cases, the disparity was attributed to partners' perceptions of women's capabilities and their ability to win the confidence of clients.

Id. See Rhode, *supra* note 109, at A19 (reviewing three comprehensive gender bias reports that document the fact that women lawyers often receive inferior assignments); see also *Ezold v. Wold, Block, Schorr & Solis-Cohen*, 751 F. Supp. 1175, 1178-79 (E.D. Pa. 1990), *rev'd*, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88 (1993). The district judge noted that the partners' perception that Ms. Ezold could not grasp complex issues or handle complex cases was attributable to the fact that she was assigned only to non-complex matters. See *id.*

344. See JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 7, at 103; see also Deborah K. Holmes, *Structural Causes of Dissatisfaction Among Large-Firm Attorneys: A Feminist Perspective*, 12 WOMEN'S RTS. L. REP. 9, 23-24 (1990) (noting that women are twice as likely as men to think about leaving an associate position with a large firm).

345. See NOSSEL & WESTFALL, *supra* note 148, at xix.

346. However, the "mommy-track" is not the solution. Those women are treated as second class citizens at the firm, and the entire concept reinforces the concept of women as primarily responsible for home and children. See Holmes, *supra* note 344, at 34.

347. Fixed fee billing and value billing (fee established taking into account result, time expended, expertise of the attorney, etc.) are alternatives which some authors suggest as viable alternatives to the billable hour model. See Foster, *supra* note 172, at 1681; Korzec, *supra* note 199, at 136-37; see also UNFINISHED BUSINESS, *supra* note 4, at 12 (noting that the billable hour criterion for assessing performance "negatively impacts on women who carry a greater proportion of responsibilities at home").

could be contributing.”³⁴⁸ Not only will firms lose the expertise of these talented women lawyers, they may well lose clients, such as women and minority owned businesses who would rather retain a firm that has women and minorities in leadership positions.

The profession should undertake a thorough review of its rules of professional responsibility, and where not inconsistent with the First Amendment, subject lawyers to disciplinary proceedings for engaging in conduct exhibiting bias while performing official duties as members of the bar. These rules would provide judges and lawyers with mechanisms for dealing with biased behavior.³⁴⁹ Additionally, local bar associations should establish gender equity committees to mediate and attempt to informally resolve instances of gender bias by local judges or lawyers.³⁵⁰

Furthermore, efforts to educate lawyers on issues of bias should be paramount. While the California judiciary has made such education the centerpiece of its efforts to eliminate bias from the court system, the practicing bar should follow suit. Law schools, law firms, bar associations, bar sections and continuing education providers should educate law students and lawyers not only about the laws prohibiting discrimination, but also about the more subtle, subconscious stereotyping which prevents true equality among lawyers.³⁵¹ As Deborah Rhode has pointed out, these “[u]nconscious gender stereotypes work in similar ways to prevent women from breaking through the glass ceiling and to prevent men from seeing that any ceiling exists.”³⁵²

348. Hon. Sandra Day O'Connor, *The Quality of Justice*, 67 S. CAL. L. REV. 759, 760 (1994).

349. For a discussion of the need for rules in this area, see Jackson, *supra* note 290, at 19–20.

350. For example, in Orange County, California, the local bar association has in place such a process, with a standing committee of the bar to receive, investigate and attempt to resolve issues of gender bias in the local legal community.

351. See *Final Report of the Ninth Circuit*, *supra* note 12, at 965 (finding that education is critical in eradicating bias, and should be directed at law students as well as the bench and bar).

352. RHODE, *supra* note 38, at 145. Professor Rhode concludes that these unconscious stereotypes prevent accurate assessment of work performance, because people tend to interpret data in such a way so as to support preconceived notions about the characteristics of the group to whom the person being evaluated belongs. See *id.*

See also *Final Report of the Ninth Circuit*, *supra* note 12, at 964 (finding that since male judges, as men, are not generally victims of gender bias, they fail to recognize its existence as it occurs).

Similarly, Justice Sandra Day O'Connor, in commenting on the failure of women to attain partnership, opined that “most partners believe they are making gender neutral decisions. They simply do not realize that their image of as [sic] ‘partner’ may work to exclude women.” O'Connor, *supra* note 348, at 760.

Efforts must be redoubled to diversify the bench.³⁵³ Women lawyers will gain acceptance in the courtroom as more women join the bench.³⁵⁴ One commentator, in remarking that women judges are powerful role models for all court participants, stated that “[t]he increasing numbers of women judges in most of the nation’s court systems . . . itself has the potential to change societal stereotypes of what women do.”³⁵⁵

It is more critical than ever that organizations such as the California Judicial Council, California Women Lawyers, the State Bar of California and local women’s bar organizations continue to undertake systematic studies in this area, publicize results, and make recommendations for improvement. Justice Ruth Bader Ginsburg, in noting the important role of these types of studies and reports, stated that self-study “heightens appreciation that progress does not occur automatically, but requires a concerted effort to change habitual modes of thinking and acting.”³⁵⁶

As manifestations of gender bias become more subtle, the necessity for studies and reports on gender increases. It is important to present a macro view of the status of women in this profession, as the facts of isolated cases, standing alone, do not necessarily tell the full story. One woman associate’s denial of partnership may be explainable with reference to that individual attorney’s lack of analytical ability, failure to engage in rainmaking activity, or other factors. However, evidence that a tiny percentage of women achieve partnership in a given locale is much more telling.

Finally, and perhaps most importantly, women must resist complacency. It is a mistake to think that time alone will result in gender parity in the profession. The presence of increasingly greater numbers of women in the profession will certainly have a positive effect,³⁵⁷ but

353. See JUDICIAL COUNCIL OF CALIFORNIA, *supra* note 7, at 107–12. For a general discussion, see Julie Gould, *Experience with Gender Bias Sparks Mission of New Judicial-Group Chair*, Chi. Daily L. Bull., Sept. 24, 1993, at 1; see also UNFINISHED BUSINESS, *supra* note 4, at 14 (noting that 31% of President Clinton’s appointees have been women, as a result of which women now comprise 12% of the federal bench).

354. See Pines, *supra* note 117.

355. Jackson, *supra* note 290, at 21.

356. *Id.* at 16 (citing Justice Ruth Bader Ginsburg, *Foreword*, 84 GEO. L. J. 1651, 1652 (1996)); see also Dunlap, *supra* note 239, at 694 (noting the critical nature of conducting periodic demographic studies: “Who is on the bench? Who is in the jury box? Who is litigating, and who is representing them? Who is testifying? Who is the expert? . . . [W]ho is being excluded? What voices are being silenced, muted or distorted . . . ?”).

357. In fact, by the year 2010, it is predicted that 40% of the nation’s lawyers will be women. See WOMEN IN THE LAW, *supra* note 7, at 6.

will not solve the underlying reasons for women's failure to shatter the glass ceiling.³⁵⁸ As one author stated, "In some sense, the American women's movement is a victim of its own success. Its accomplishments have undercut the urgency of further struggle."³⁵⁹ She argues that the progress women have made is in itself an obstacle to further change in that there is a sense that we have solved the problem with gender inequity.³⁶⁰ Thus, "[u]nless women take control of their own professional destiny, successive generations will replay the uphill struggle of Sisyphus."³⁶¹

Conclusion

Despite unprecedented gains during the past thirty years, women lawyers in California have failed to achieve true parity with their male counterparts, particularly at the upper echelons of the profession. Women comprise half of law school classes, but relatively small percentages of partners in large firms, judges, law school faculty and deans, and practitioners in certain fields. Time, greater numbers, and legal protections have all worked to dramatically improve the abilities of women to gain acceptance in this profession. However, these factors alone will not totally eradicate gender bias in the legal field.

Societal reasons contribute to the slow rate of progress by women in the legal field. As a society, we continue to view women as primarily responsible for the home and family while viewing men as wage earners. We also see characteristics normally attributed to successful lawyers—aggressive, determined, single-minded in dedication to career—as incompatible with characteristics of women. These stereotypes, naturally, invade the workplace.

The culture of the legal profession itself impedes women lawyers' ability to succeed in the legal field to the same degree as men. The requirement of 2000 to 2400 billable hours per year, lack of child and

358. Similarly, it is wrong to assume that the younger generation who will eventually populate the profession will behave in radically different ways. A leading expert on bias in the court system, Lynn Hecht Schafran, stated that it is a misconception to believe that today's youth will solve the gender bias problem, citing a study showing that men under and over forty years of age share the same attitudes toward women. See M.A. Stapleton, *Gender Bias in the Courts Not Going Away Anytime Soon, Experts Warn*, CHI. DAILY L. BULL., Dec. 5, 1994, at 3.

359. RHODE, *supra* note 38, at 14.

360. See *id.* at 1. The author goes on to state that this attitude that there is no longer a problem with gender inequity prevents us "from noticing that on every major measure of wealth, power, and status, women still are significantly worse off than men." *Id.* at 2.

361. UNFINISHED BUSINESS, *supra* note 4, at 3.

family friendly policies, lack of mentoring opportunities and the importance of rainmaking all make it difficult for women associates, particularly those who wish to have families, to achieve partnership.

The Judicial Council of California, federal gender bias task forces, as well as task forces of other states and bar associations, have contributed to a greater understanding of the realities of life for women lawyers. A thorough understanding of these issues is critical to achieving solutions. Progress has been made in implementing the reports. All jurisdictions must continue to implement the existing reports, and begin to plan to update the reports, as many are now nearly a decade old.

In spite of the laudable efforts of these organizations, now is not the time to sit back and compliment one another on a job well done. Much work remains ahead. The hope for the future is in new lawyers. As one California lawyer recently stated, "The new generation of women lawyers is young, brash, confident, and smart. They are not about to make the sacrifices that earlier generations of female professionals often made, such as foregoing personal relationships and motherhood [T]hey merely want the same thing their male colleagues take for granted."³⁶² In bringing about these much needed changes for women lawyers, one can only hope that the result will be a more humane profession for all lawyers.³⁶³

362. Becker, *supra* note 37, at 37.

363. The notion that the women lawyers could alter the existing model of the legal profession to one that is far more humane was the subject of Carrie Menkel-Meadow's article entitled, *Portia in a Different Voice: Speculation on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985).