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Not All Lawyers Are Equal: Difficulties That Plague Women and Women of Color

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NOT ALL LAWYERS ARE EQUAL: DIFFICULTIES THAT PLAGUE WOMEN AND WOMEN OF COLOR

Theresa M. Beiner[†]

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INTRODUCTION

According to the American Bar Association, as of 2006, women made up 30.2% of the legal profession,¹ and as of 2000, non-whites made up 11.2% of the legal profession.² While there is much discussion about the difficulties facing modern lawyers, studies of women lawyers and women lawyers of color reveal that these two groups (which have overlapping members)³ have unique problems in law practice. In their recent book, *How Lawyers Lose Their Way: A Profession Fails its Creative Minds*, Law Professors Jean Stefancic and Richard Delgado attempt to account for the widespread professional misery experienced by many of today's lawyers.⁴ Stefancic and Delgado lay blame for the current dissatisfaction with the practice of law in formalism, the predominant jurisprudential theory in

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1. A.B.A. COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 2006, at 1 (2006), <http://www.abanet.org/women/CurrentGlanceStatistics2006.pdf> [hereinafter A CURRENT GLANCE].

2. A.B.A., LAWYER DEMOGRAPHICS 1 (2006), http://abanet.org/marketresearch/lawyer_demographics_2006.pdf.

3. See A.B.A. COMM'N ON WOMEN IN THE LEGAL PROFESSION, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS, EXECUTIVE SUMMARY 9 (2006), <http://www.abanet.org/women/VisibleInvisibility-ExecSummary.pdf> (reporting that attorneys of color make up 15% of the associates in private law firms and women make up almost half of associates).

4. See JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS 48-51 (2005).

which lawyers currently are trained and use in practice.⁵ Is formalism part of the problem for women lawyers and lawyers who are members of minority groups?

Many learned authors and organizations have tackled the problems facing women lawyers generally and lawyers of color specifically.⁶ Have these efforts borne fruit for women and minority group members of the legal profession? Stefancic and Delgado likewise address the part large firms play in the misery of the lawyers who work for them. I will begin by considering some of their observations. Then I will look at studies, including some very recent ones, focusing on women lawyers and women lawyers of color to see if they provide insight into how these lawyers are faring. And, to the extent that they are having difficulties, I will consider Stefancic and Delgado's position that formalism is part of the problem. My particular focus will be on large law firm practice; the so-called elite of the profession. While many lawyers practice in other settings, this group of lawyers was the focus of much of Stefancic and Delgado's critique.⁷ These lawyers also are, arguably, among the most influential in the profession.

I. FORMALISM AND LAW FIRMS

Stefancic and Delgado posit that formalism plays a role in making large law firm life miserable for the lawyers who practice in such firms.⁸ As they sum-up well:

Just as legal education and the judiciary have rigidified, the structure of legal practice has followed suit. The routinization that put off the intellectually adventurous MacLeish has increased manifold. Lawyers specialize, and even within specialties (such as securities, real estate, or corporate law), big-firm lawyers carve cases up into small parts, so that few attorneys have much client contact or get a chance to see the big picture. A young associate fresh out of law school can spend months, even years, in the back corner of the library researching damages in a single big case, or going through thousands of pages of documents

5. *Id.* at 48.

6. *See, e.g.*, A.B.A. COMM'N ON WOMEN IN THE PROFESSION & COMM'N ON OPPORTUNITIES FOR MINORITIES IN THE PROFESSION, *THE BURDENS OF BOTH, THE PRIVILEGES OF NEITHER* (1994); DEBORAH L. RHODE, A.B.A. COMM'N ON WOMEN IN THE PROFESSION, *BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE* (2001), <http://www.abanet.org/women/balancedlives.pdf> [hereinafter RHODE, *BALANCED LIVES*]; DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* (2000).

7. *See* STEFANCIC & DELGADO, *supra* note 4, at 64-71. They also briefly consider whether life is better in smaller firms. *Id.* at 71.

8. *See id.* at 48-61.

obtained in the course of discovery, organizing the material and looking for patterns. Pressure to generate billable hours has increased, while competition for partnership has become even keener than before. Lawyers have little leisure time to think about their cases, much less for family or recreational pursuits. The days of the attorney as a wise counselor have largely passed. Law is a business. And that business is to sell technical advice at the highest price possible.⁹

What role does formalism play in this? Formalism “[i]n legal practice . . . appears in the form of narrow specialization, hierarchical organization of the law firm, the relentless pursuit of billable hours, and elephantine briefs addressing every conceivable eventuality and line of authority.”¹⁰ While they acknowledge the job dissatisfaction prevalent specifically among women and minority lawyers,¹¹ they do not take it on in too much detail. They identify long hours and the repetitive nature of modern legal work, along with other factors, such as specialization, the impersonal nature of law firms, the lack of interesting work (including pro bono opportunities), competitiveness and the increasingly business-like nature of law firm work as some additional manifestations of formalism in law firms.¹²

The links between these law firm problems and formalism appears somewhat elusive. Certainly, if the practice of law is simply cutting and pasting the current client’s fact pattern into the general legal rule and spitting out an answer (in other words, formalism), one can see how this would result in the type of dreary repetitive work that Stefancic and Delgado identify as formalism in practice.¹³ But a lawyer’s tasks are inevitably varied. Sometimes a lawyer will be making an interesting argument in court or trying a precedent-setting case, and other times an attorney is reviewing documents in a large and complex case. The latter type of work (the “grunt work”) is inevitable in practice. I do not see the link between having to review documents and formalism. Eventually, attorneys need to figure out what the facts are, and sometimes the most compelling evidence will be the needle in that haystack of documents. The real question for me is who ends up doing the grunt work and who gets the

9. *Id.* at 46. When I practiced law, I described this phenomenon as an odd combination of stress and boredom; it felt like being stressed about boring stuff.

10. *Id.* at 48-49.

11. *Id.* at 52 (citing MONA HARRINGTON, *WOMEN LAWYERS: REWRITING THE RULES* (1994); John P. Heinz et al., *Lawyers and Their Discontents*, 74 *IND. L.J.* 735, 739 (1999); Laurie Albright et al., *Whatever Happened to the Class of 1983?*, 78 *GEO. L.J.* 153, 163 (1989)).

12. STEFANCIC & DELGADO, *supra* note 4, at 53-60.

13. *See id.* at 55-56.

opportunity to do more interesting and often more career-advancing work. As the studies discussed below indicate, women and women of color believe that their career opportunities are limited because they are more likely to receive “grunt work” assignments. Thus, if this is indeed a manifestation of formalism, they disproportionately feel the effects of it.

I would like to suggest that a different type of formalism may be at play in large law firm practice. It encompasses some of the structural problems Stefancic and Delgado identify, including specialization and the routine nature of some of the work (although I am still not certain that lawyers would not be doing document review if, for example, legal realism reigned), but also encompasses additional characteristics. The way law firms are structured is incredibly narrow. There is, when it comes to large firms, one basic model: partners, dominated by white males, earning high salaries by leveraging off the high billable hours of their associates. The associates, meanwhile, vie against each other for a reward that few will ultimately receive: partnership.¹⁴ Law firms, like Stefancic and Delgado argue with respect to legal practice generally,¹⁵ are simply not creative in using or even trying different structural formations that may make law practice more hospitable to women and women of color. That does not mean that many academics and some organizations concerned about these issues have not suggested a variety of changes.¹⁶ Indeed, there are all kinds of things law firms specifically could do to increase the success of women lawyers and women of color.¹⁷ The real problem appears to be law firms’

14. See Amy L. Wax, *Family Friendly Workplace Reform: Prospects for Change*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 36, 44 (2004). Amy Wax describes law firms as tending “to be run as ‘up-or-out’ tournaments in which a few winners garner the top prize of a lucrative partnership, and many losers remain at the firm with lower pay and responsibility or are forced out altogether.” *Id.*

15. See STEFANCIC & DELGADO, *supra* note 4, at 56-57.

16. See CATALYST, WOMEN IN LAW: MAKING THE CASE, EXECUTIVE SUMMARY 13-14 (2001), <http://womenlaw.stanford.edu/law.inside.fixed.pdf>; JANET E. GANS EPNER, COMM’N ON WOMEN IN THE PROFESSION, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 37-40, available at <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 91-95 (2006); Heidi Hartmann, *Policy Alternatives for Solving Work-Family Conflict*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 226, 228-31 (2004); see also Wax, *supra* note 14, at 36-37 (describing the “wish list” of family friendly policies suggested by researchers); JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT *passim* (2000).

17. Catalyst recommended, among other things, creating formal structures of support “for retention and advancement of women,” developing effective accountability for good management practices and supporting flexible and reduced work schedules. CATALYST, *supra* note 16, at 13-14. The American Bar Association suggests specifically for women of color such approaches as integrating women of color into existing measurement efforts, the firm’s professional and social fabric, and supporting their internal and external support systems. EPNER, *supra* note 16, at 38-39, <http://www.abanet.org/media/nosearch/Visible>

recalcitrance in making these changes. And, when they make changes, they do not take them seriously, often resulting in harm to the careers and resulting opportunities of women and women of color. Law firms, in short, are resistant to real change.

This should come as no surprise either to those in practice or those in academia. Legal feminists and critical race theorists have been complaining about law firm practices (some suggesting changes) for a number of years now.¹⁸ Law firms work perfectly for those who designed them: elite white males with a spouse at home who can take care of their personal lives.¹⁹ The hierarchy in law firms reflects patriarchy, traditional gender roles and heterosexism. It reflects class as well; a working spouse is often a necessity for the less affluent. Given those in power in large law firms, it is not surprising that there has been little real change.²⁰ The results of the studies I describe below reflect these power dynamics as well as the formalism that results.

II. WOMEN LAWYERS

Women lawyers leave large law firm practice in droves. In a recent study of Massachusetts lawyers at the top 100 firms, a group of researchers from MIT found that “[a]mong junior or non-equity partners . . . a third of the women leave firm practice, compared to only 15% of the men.”²¹ Of women who are in private practice, they comprised only 17.3% of partners

Invisibility.pdf, at 92-95.

18. One of the earlier looks at women in modern practice is Cynthia Fuchs Epstein’s *Women in Law*, which canvassed the conditions of women in legal practice. CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* (1981). Fuchs Epstein describes problems for these lawyers, including experiencing discrimination and feeling like an outsider. *See id.* at 96, 265, 283-86.

19. Tellingly, in their study of University of Michigan law school graduates, Noonan and Corcoran describe their “base” lawyer (for purposes of comparison) as “a white male who is married with children, has an average GPA, 13.5 years of private practice experience, no leave, no part-time experience, a mentor, is satisfied with his work-family balance, and has a spouse who is not a lawyer.” Mary C. Noonan & Mary E. Corcoran, *The Mommy Track and Partnership: Temporary Delay or Dead End?*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 142 (2004).

20. Amy Wax suggests other economic incentives for lack of change, including the initial costs to the organization. *See Wax, supra* note 14, at 48. In particular, she cites the benefits of relying on easily measured signs of productivity (such as billable hours and face time), “incentive wage structures” (which should maximize worker output), and “tournament reward systems” (those who bill the most win) as creating a lack of incentive for change. *See id.*

21. MONA HARRINGTON & HELEN HSI, *WOMEN LAWYERS AND OBSTACLES TO LEADERSHIP* 8 (2007), available at http://web.mit.edu/workplacecenter/docs/law-report_4-07.pdf.

in 2006.²² Meanwhile, women make up 30.2% of lawyers in the country and 44.1% of associates.²³ Further, of the women who left law firm practice, 22% were unemployed, compared to only 3% of the men.²⁴ The situation is even worse for women of color. According to the National Association of Law Placement, “By 2005, 81% of minority female associates had left their law firms within five years of being hired.”²⁵ As one researcher summed-up past research:

[S]ex strongly predicted exits from law firms and promotion to partnership even when controlling for law school quality, academic distinction in law school, *potential* work experience (i.e., years since called to the bar, years since law school graduation), legal specialization, having taken a leave for child care, marital status, children, current work hours, and measures of social capital.²⁶

Interestingly, in their study of University of Michigan Law School graduates, Noonan and Corcoran found no significant relationship between women leaving law firms and marriage, children, time-out, and part-time work.²⁷ Instead, women either do not find large law firms to be institutions in which they would like to practice or are unsuccessful for other reasons. Whatever the cause, current statistics on women and women of color in large firms do not reflect large rates of success in these settings.

A. Working Moms and Spouses

Studies suggest that women lawyers’ lives become more complex when they marry and have children.²⁸ Yet, marriage and children have a positive effect on women lawyers’ overall satisfaction.²⁹ Unfortunately, although a source of potential satisfaction, studies suggest that women lawyers are less likely to be married or have children than their male counterparts.³⁰ An involved family life does not appear to mesh well with

22. A CURRENT GLANCE, *supra* note 1, at 2. (citing data from the National Association of Law Placement).

23. *Id.* at 1-2.

24. HARRINGTON & HSI, *supra* note 21, at 10.

25. EPNER, *supra* note 16, at 18, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 71.

26. Noonan & Corcoran, *supra* note 19, at 132.

27. *Id.* at 139.

28. See EPNER, *supra* note 16, at 34-35, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf> at 81-85; HARRINGTON & HSI, *supra* note 21, at 12, 16; David L. Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 L. & SOC. INQUIRY 251, 257-58 (1989) (citing research).

29. See Noonan & Corcoran, *supra* note 19, at 139.

30. *Id.* at 137 (discussing their study of University of Michigan Law School classes graduating from 1972 to 1985).

a large law firm practice.

Studies on the effects of marriage and relationships on lawyers are somewhat mixed. In a study of 1976-1979 graduates of the University of Michigan Law School, David Chambers found that married and cohabitating respondents, regardless of gender, were much more satisfied with their family lives than those who were single.³¹ This is consistent with Noonan and Corcoran's study of 1972-1985 University of Michigan Law School graduates, which found that "for women, having children, taking time out of work, and working part-time are all positively associated with work-family satisfaction."³² Yet, in another study of Washington State lawyers, Beck et al. found that lawyers were less satisfied with their relationships than the general population.³³ "Of those that [had] a primary relationship, a significant number of lawyers [found] these relationships unsatisfactory."³⁴ Specifically, "female lawyers report[ed] significantly less satisfaction with their relationships than [did] the normal population."³⁵ In their study of women lawyers, doctors and academics, Cooney and Uhlenberg found that for the group of women lawyers ages thirty-five to thirty-nine they studied, marriage resulted in a 19% decrease in income compared to women living alone.³⁶ This study found that women lawyers tended to have less stable marriages: they have twice the divorce rate of doctors and about a 25-40% higher divorce rate when compared to postsecondary school teachers.³⁷

While marriage might be a mixed blessing for women lawyers, children appear to have a positive effect. Indeed, in a study of women lawyers, women with children were the most satisfied group of those studied, which included single women without children.³⁸ In addition,

31. Chambers, *supra* note 28, at 264.

32. Noonan & Cocoran, *supra* note 19, at 139.

33. Connie J.A. Beck, et al., *Lawyer Distress: Alcohol-Related Problems and Other Psychological Concerns Among a Sample of Practicing Lawyers*, 10 J.L. & HEALTH 1, 30 tbl. 9, 58 (1995).

34. *Id.* at 58 (footnote omitted).

35. *Id.* at 30. Marriage also may have implications for income. An interesting factor in the Beck et al. study was the enormous standard deviation for women lawyers regarding relationship satisfaction. The mean satisfaction score for women lawyers was 90.87, whereas the mean for the general population was 104.26. *Id.* at 30 tbl. 9B. However the standard deviation for women lawyers on this finding was 30.90, whereas the standard deviation for the general population was 9.73. *Id.* This suggests that women lawyers are essentially "all over the map" when it comes to satisfaction with their primary relationship.

36. Teresa M. Cooney & Peter Uhlenberg, *Family-Building Patterns of Professional Women: A Comparison of Lawyers, Physicians, and Postsecondary Teachers*, 51 J. MARRIAGE & FAM. 749, 756 tbl. 6 (1989).

37. *Id.* at 751.

38. Chambers, *supra* note 28, at 274. Chambers studied graduates of the University of

married lawyers were more satisfied with the balance of work and family than were unmarried lawyers.³⁹ Single persons were the least satisfied group, and women with children the most satisfied group.⁴⁰ One 1994 study of lawyers in Canada suggested that women with pre-school age children actually have less strain-based conflict.⁴¹ The author of this study suggested that access to resources for childcare and help with household duties might reduce the conflict for these women.⁴² This is consistent with other studies of successful women. Sylvia Ann Hewlett recounts studies that show, "women are happiest when they are able to have both a career and a family."⁴³ So, having children appears to add to a working lawyer-mom's happiness, but that does not mean life is easy.

There is a potential caveat on data concerning working mothers. Some research suggests that working mothers fare better in part-time work. Hewlett recounts a 2000 study by University of Chicago sociologists Qin Chen and Ye Luo suggesting that mothers who work long-hour jobs tend to be significantly less happy than mothers who work reduced-hour jobs, because long hours (i.e., fifty to sixty hour work weeks) heighten conflict between work and family.⁴⁴ In addition, many studies indicate that "part-time employees are more efficient than their full-time counterparts, particularly those with oppressive schedules."⁴⁵ Thus, part-time options should be a win-win situation for attorneys seeking family time as well as for legal employers. However, part-time lawyers do not appear to fare well in large law firms.

Part-time work presents a conundrum for women lawyers. While

Michigan Law School from the classes of 1976 to 1979. *Id.* at 260. See also Kathleen E. Hull, *The Paradox of the Contented Female Lawyer*, 33 L. & SOC'Y REV. 687, 696 (1999) (discussing "[t]he positive effect of children on women's but not men's context satisfaction" in a sample of Chicago attorneys).

39. See Chambers, *supra* note 28, at 264.

40. *Id.* at 272.

41. Jean E. Wallace, *Work-to-Nonwork Conflict Among Married Male and Female Lawyers*, 20 J. ORGANIZATIONAL BEHAV. 797, 804, 811 (1999). "Strain-based conflict refers to the extent to which an individual is preoccupied with one role when attempting to meet the demands of another role." *Id.* at 799. A study by Jacquelyn Slotkin found that a more recent sample of women lawyers in San Diego, while still experiencing role conflict, experienced less than a sample twenty years ago. Jacquelyn H. Slotkin, *You Really Have Come a Long Way: An Analysis and Comparison of Role Conflict Experienced by Women Attorneys Today and by Educated Women Twenty Years Ago*, 18 WOMEN'S RTS. L. REP. 17, 38 (1996).

42. See Wallace, *supra* note 41, at 812-13.

43. SYLVIA ANN HEWLETT, *CREATING A LIFE: WHAT EVERY WOMEN NEEDS TO KNOW ABOUT HAVING A BABY AND A CAREER* 292 (2002).

44. *Id.* at 293.

45. RHODE, *BALANCED LIVES*, *supra* note 6, at 21 (citing numerous studies).

part-time work may make their lives more manageable, their legal careers may suffer. Noonan and Corcoran showed, based on their study of University of Michigan Law School graduates, that working part-time for forty-two months reduces a woman's predicted chance of making partner from .35 to .28.⁴⁶ Studies suggest that women lawyers are far more likely to take advantage of part-time options.⁴⁷ The "mommy-track," with its connotations that women drop out of the workforce once they have children, has pervasive force with employers.⁴⁸ As one source notes, "Mommy-tracking" can be viewed as leading to second-class status. In a survey of three thousand women in the nation's largest law firms, sixty-seven percent of the respondents reported that part-time work results in lesser opportunities.⁴⁹ For women lawyers, part-time work often means losing quality assignments and harming advancement opportunities.⁵⁰

In their recent study on women lawyers of color, the ABA provided valuable information about the impact of motherhood on the careers of women of color and white women. One telling statistic: 72% of women of color and white women answered yes to the question of whether others questioned their career commitment when they gave birth or adopted a child.⁵¹ Only 15% of men of color and 9% of white men answered yes to this question.⁵² Yet nearly 75% of women of color and 61% of the white women were "sole breadwinners in their household."⁵³ Some recounted that women in their firm waited until making partner to have children and that others never married.⁵⁴ Others found it difficult to have time to meet people who could lead to a relationship or marriage because of the heavy time commitments.⁵⁵ One woman of color recounted how the majority of

46. Noonan & Corcoran, *supra* note 19, at 143.

47. *See id.* at 137 (indicating that 47% of mothers had worked part-time, whereas only 19 of 1,574 fathers surveyed had worked part-time).

48. *See* Rebecca Korzec, *Working on the "Mommy-Track": Motherhood and Women Lawyers*, 8 HASTINGS WOMEN'S L.J. 117, 126 (1997); *see also* DRI, A CAREER IN THE COURTROOM: A DIFFERENT MODEL FOR THE SUCCESS OF WOMEN WHO TRY CASES 14-15 (2004), http://www.dri.org/dri/webdocs/Women_in_the_Courtroom.pdf (noting that, in a study of female defense lawyers, one lawyer interviewed stated the attitude of firms toward women lawyers as "why bring you along when you're just going to leave anyway or work will no longer be a priority?").

49. Korzec, *supra* note 48, at 127.

50. *Id.*

51. EPNER, *supra* note 16, at 33-34, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 83.

52. *Id.* at 34, <http://www.abanet.org/media/ncsearch/VisibleInvisibility.pdf>, at 83.

53. *Id.*

54. *See id.* at 33, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 81.

55. *Id.* at 33, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 82.

attorneys she worked with were white men who were married.⁵⁶ They viewed her single status as beneficial: "It allows me to work without feeling bad about neglecting anyone."⁵⁷

The ABA's Commission on Women in the Profession summarized well the status of part-time work in their 2001 report:

Research by a broad array of organizations including Catalyst, the National Association for Law Placement, and the Program on Gender, Work, and Family at American University's Washington College of Law consistently finds a "huge gap between what [part-time] policies say on paper and what people feel free to use." Most lawyers do not believe that their workplaces truly support flexibility or that they could work an alternative schedule without career risks. . . . National surveys of leading law firms recount multiple variations on the same theme: part-time arrangements are "the kiss of death," a "fast track to obscurity," a "professional dead end," and an invitation to end up "permanently out to pasture."⁵⁸

The more recent ABA study focused on women lawyers of color supports this conclusion.⁵⁹ Yet, a survey that tracked client satisfaction with part-time attorneys suggests that part-time status does not hurt client relations.⁶⁰

Taking time off to care for children likewise can have significant long-term career effects. Noonan and Corcoran found that a partner's earnings drop by 2.3% for each month of family leave taken.⁶¹ In a recent study of Massachusetts lawyers at the top 100 firms, for women who left law firms, "the most cited reason [was] 'difficulty integrating work and family/personal life.'"⁶²

This may be why, when compared to other professionals, more women lawyers are not married and do not have children. In their study of

56. EPNER, *supra* note 16, at 33, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 82.

57. *Id.*

58. RHODE, *BALANCED LIVES*, *supra* note 6, at 16 (citing, inter alia, SUZANNE NOSSEL & ELIZABETH WESTFALL, *PRESUMED EQUAL: WHAT AMERICA'S TOP WOMEN LAWYERS REALLY THINK ABOUT THEIR FIRMS* 168 (2d ed. 1998)) (additional citations and footnotes omitted).

59. EPNER, *supra* note 16, at 33-34, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 81-83.

60. *Firm Feedback on Part-Time Lawyering*, MASS. LAW. WKLY., April 22, 1996, at 1676.

61. Noonan & Corcoran, *supra* note 19, at 144. Part-time work experience had no effect on women partners' earnings in this study, but had an effect on men's earnings. *Id.* However, very few men in this study (19 of 1,574) worked part-time at some point. *Id.* at 137.

62. HARRINGTON & HSI, *supra* note 21, at 12 (internal quotation marks omitted).

women doctors, lawyers and academics, Cooney and Uhlenberg found that 31% of white women lawyers in the thirty-five to thirty-nine age group range did not have children.⁶³ As they explain, "Between 20% and 30% of the ever-married professional women aged thirty-five to thirty-nine are childless, compared to only 9% in the general population."⁶⁴ In addition, "Almost half of women in legal practice are currently unmarried, compared with 15% of men, and few women have partners who are primary caretakers."⁶⁵ Noonan and Corcoran's study supports this finding in partnership ranks, specifically. They found that, "Women partners are less likely than men partners to be married and more likely to be childless."⁶⁶ Once their first marriages end, women lawyers are the least likely of three groups studied by Cooney and Uhlenberg (doctors, lawyers and postsecondary school teachers) to remarry.⁶⁷ This becomes a self-fulfilling prophecy, as the demands on women lawyers often leave them little time to develop meaningful outside of work relationships that could lead to marriage. As one ABA Report notes, "As unmarried associates in a recent law firm survey noted, they end up with a disproportionate amount of work because they have no acceptable reason for refusing it."⁶⁸

On the other hand, in their study of data gathered from Chicago lawyers, Heinz et al. found no gender differences in overall work satisfaction, but instead found that women were more dissatisfied with certain aspects of their jobs, including "their level of responsibility, recognition for work, content of work, chances for advancement, salary" and control over the amount and manner of work.⁶⁹ Married and/or childless women aside, women are less likely to be promoted to partnership than their male counterparts. One might assume that women might have

63. Cooney & Uhlenberg, *supra* note 36, at 756 (17% of women physicians and 27% of women academics had no children in this age group).

64. *Id.* at 757.

65. RHODE, *BALANCED LIVES*, *supra* note 6, at 17 (citing Deborah Arron, *Connection Gaps*, A.B.A. J., Oct. 1999, at 60; accord Nancy E. Dowd, *Resisting Essentialism and Hierarchy: A Critique of Work/Family Strategies for Women Lawyers*, 16 HARV. BLACKLETTER L.J. 185, 198 (2000) (citing similar statistics)).

66. Noonan & Corcoran, *supra* note 19, at 144.

67. Cooney & Uhlenberg, *supra* note 36, at 752. Laura Gatland cites another disturbing statistic; according to one study, women lawyers who worked more than forty-five hours per week were three times more likely to suffer a miscarriage than those who worked less than thirty-five hours per week. Laura Gatland, *Dangerous Dedication*, A.B.A. J., Dec. 1997, at 28.

68. RHODE, *BALANCED LIVES*, *supra* note 6, at 17 (citing NOSSEL & WESTFALL, *supra* note 58, at 90, 259, 270).

69. John P. Heinz et al., *Lawyers and their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735, 746 (1999).

opted out of the partnership track. However, the Noonan and Corcoran study of University of Michigan Law School graduates found that women who remained at least four years at firms were less likely to make partner than men, even controlling for “GPA, race, years practiced law, months part-time, months nonwork, marital status, number of kids, mentorship, and satisfaction.”⁷⁰ They found no evidence of a marriage or parenthood penalty for this group; indeed, “marriage and children [were] *positively* associated with the probability of becoming partner when experience measures are included.”⁷¹ However, “Part-time work significantly decreases the likelihood of becoming a partner.”⁷² Thus, retention and advancement prospects for women in large law firms are not as promising as their male colleagues.

B. Women Lawyers of Color

The ABA Commission on Women in the Legal Profession recently released a report covering the condition of women of color in the legal profession.⁷³ The report presents a disturbing picture of how women of color are faring in legal practice. Using a combination of surveys and focus groups, the Commission sought to describe the conditions of work for women of color in law firms as well as how their position compared to other lawyers, including white males, white females and males of color.⁷⁴ In both subtle and more overt ways, these women experience differing and discriminatory treatment in terms of harassment, denial of opportunities (including promotions), and ultimately job retention.⁷⁵ Reviewing just a few of the statistics paints the picture:

- 29% of women of color and 25% of men of color reported missing out on desirable assignments because of race.
- 49% of women of color and 31% of men of color reported that they were denied informal or formal networking opportunities because of race.
- 35% of women of color and 24% of men of color reported having missed client development and client relationship opportunities because of race.

70. Noonan & Corcoran, *supra* note 19, at 140.

71. *Id.* at 141.

72. *Id.* While the same effect was not shown for men, the sex difference was not statistically significant. *Id.*

73. EPNER, *supra* note 16.

74. *See id.* at 5, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 12.

75. *See id.* at xi-xiii, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 12-13.

- 16% of women of color and 19% of men of color reported that they were denied advancement and promotion opportunities because of race.
- . . .
- 32% of women of color and 39% of white women reported missing out on desirable assignments because of gender.
- 46% of women of color and 60% of white women reported that they were denied informal or formal networking opportunities because of gender.
- 32% of women of color and 55% of white women reported having missed client development and client relationship opportunities because of gender.
- 14% of women of color and 28% of white women reported that they were denied advancement and promotion opportunities because of gender.⁷⁶

Perhaps more telling are the comparative statistics for white males. “Less than 5% of white men reported ever having career-damaging experiences,” and less than 1% of white men and women attributed these experiences to race.⁷⁷ Likewise, less than 3% of white men and men of color attributed career-damaging experiences to gender.⁷⁸

With experiences like these, it should not be surprising that women of color have lower career satisfaction. When asked to rate their satisfaction with law as a profession, “[i]f their average rankings were expressed as grades . . . women of color [would have given their career satisfaction] a B-/C+.”⁷⁹ This compares to career satisfaction rankings of white men who would have ranked their experiences as an A, and those of white women and men of color, who would have assessed their career satisfaction at a B.⁸⁰ This is somewhat reflected in retention rates of survey respondents. The retention rate for women of color in law firms was 53%.⁸¹ The retention rates for white men and white women were 72% and 67%,

76. *Id.* at 9, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 34-35.

77. *Id.*, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 35.

78. EPNER, *supra* note 16, at 9, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 35.

79. *Id.* at 30, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 76.

80. *Id.* Studies suggest that African American lawyers are more dissatisfied as well. See Heinz et al., *supra* note 69, at 752 (revealing that 17.9% of Black lawyers in their sample were dissatisfied or very dissatisfied whereas only 6.1% of white lawyers responded likewise). Thus, perhaps dissatisfaction with practice is more of a problem for women and members of minority groups.

81. EPNER, *supra* note 16, at 30, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 76.

respectively.⁸²

Many of the problems of large firm practice that Stefancic and Delgado highlight in their book seem to fall disproportionately on women and women of color. For example, 44% of women of color and 39% of white women reported they were passed over for more desirable assignments.⁸³ Many told stories of getting the marginal routinized work (document productions, legal research, etc.) while others got the plum assignments (such as trial work or depositions).⁸⁴ Specialization in law firms likewise led to decreased opportunities for women of color, with women being “tracked” into certain specialties, such as family law.⁸⁵ Thus, specialization in less interesting (and often stereotypical) practice areas as well as the “grunt work” type of assignments appear to fall disproportionately on women and women of color.

III. NON-FORMALISTIC SOLUTIONS

The studies discussed above suggest that women lawyers are happiest living full lives. These lives include children and, at least in some cases, partners. It is reasonable to assume that happier lawyers will be more productive lawyers. So, there should be benefits to law firms and their practices in accommodating a fuller private life for these women lawyers. Yet, law firms are remarkably resistant to meaningful change. While law firms have paid lip service to more family-friendly policies such as part-time work and time off for the birth of a child, there are often significant career costs for women who take advantage of these programs. What could be a win-win situation becomes a losing proposition for women lawyers, as is evidenced by their mass exodus from large law firm practice. The question remains as to how to bring about meaningful change in law firm structure so that women and women of color will flourish. My approach will be fundamentally non-formalistic. I will be looking at extra-legal arguments, although most often made by law professors, about what creates real institutional reform in workplaces in terms of diversity.

I will begin my suggestion for reform in an unlikely place. Amy Wax, focusing on economic analysis, suggests that there are two possible

82. *Id.*

83. *Id.* at 21, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 59.

84. *Id.* at 21-23, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 59-60. This compares to only 2% of white men responding that they were passed over for desirable assignments. *Id.* at 21, <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 59.

85. *Id.* at 23-24., <http://www.abanet.org/media/nosearch/VisibleInvisibility.pdf>, at 62-63.

ways to achieve change in organizations: either by use of “[s]ome type of outside intervention” (i.e., regulation by the government) or by “the development of a stable and robust internal norm” that permits alternative work arrangements.⁸⁶ While I am skeptical of using economic analysis in this context,⁸⁷ her insight provides a starting point for considering what might influence law firms actually to change and adopt policies and practices that will make law firm practice more accessible to all kinds of people and not just the white males for whom they work well. Of course, these changes will not be easy.

Title VII, in theory, provides the type of regulation to which Wax alludes as her first means for achieving change. Title VII, through both its private enforcement by individuals and public enforcement by the EEOC,⁸⁸ is a form of government regulation that should open workplaces, including law firms, to nontraditional employees. Yet, Title VII has not been all that helpful in combating discrimination by law firms.⁸⁹ Other authors have

86. Wax, *supra* note 14, at 45; *see also id.* at 59.

87. Indeed, Stefancic and Delgado point out that one of the most formalistic fad theories in law right now is the law and economics movement, which limits creativity in legal analysis and yet has caught hold in judicial decision making. *See* STEFANCIC & DELGADO, *supra* note 4, at 80. Their analysis on this point is well-taken. *See generally* JAMES ARNT AUNE, *SELLING THE FREE MARKET: THE RHETORIC OF ECONOMIC CORRECTNESS* 55-56 (2001) (arguing that the law and economics approach of judges such as Richard Posner does not do justice to the human condition).

88. The EEOC issued a report on the status of diversity in law firms. Examining EEO-1 reports of law firms who employ 100 or more people, the EEOC concluded that “the most pressing issues have probably shifted from hiring and initial access to problems concerning the terms and conditions of employment, especially promotion to partnership.” U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *DIVERSITY IN LAW FIRMS* 26 (2003), <http://www.eeoc.gov/stats/reports/diversitylaw/lawfirms.pdf>.

89. One notable exception to this is *Hishon v. King & Spalding*, 467 U.S. 69, 77 (1984), in which the Supreme Court held that consideration for partnership was a term, condition, or privilege of employment that was covered by Title VII. Other lawyers turned Title VII plaintiffs have not fared so well. *See, e.g.*, Audrey Wolfson Latorourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 VAL. U. L. REV. 859, 884-893 (2005) (canvassing Title VII cases involving women lawyers, which met with mixed results); Amanda J. Albert, Note, *The Use of MacKinnon's Dominance Feminism to Evaluate and Effectuate the Advancement of Women Lawyers as Leaders within Large Law Firms*, 35 HOFSTRA L. REV. 291, 314-15 (2006) (arguing that the “application of Title VII to the intricacies of law firm life demonstrates that the relevant legal concepts may fall short of representing women lawyers’ true injuries in seeking partnership”). Tristin Green argues that modern Title VII cases have the potential to cause the type of institutional reform that will make diversity more possible in large workplaces. *See* Tristin K. Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 FORDHAM L. REV. 659, 682-90 (2003). Michael Selmi, on the other hand, argues that settlements resulting from large class actions frequently produce little to no substantive change within corporations. Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249,

canvassed how Title VII does not provide the relief, for example, that one might expect for sexually discriminatory partnership decisions.⁹⁰ As one commentator noted after canvassing cases, these cases “suggest that in order to prevail in a sex discrimination case, one must present rather compelling evidence of patently unfair behavior and distinct differences in the treatment of [male and female lawyers], with historical discriminatory policies toward women providing supporting evidence of an employer’s discriminatory intent.”⁹¹ Certainly, even when a lawyer who is a woman or woman of color believes she has experienced discrimination at the hands of her law firm, she likely will be reluctant to sue, lest she gain the reputation of being a trouble maker.⁹² Thus, it is not surprising that the private enforcement mechanism provided by Title VII, though a type of regulation, has not brought about real reform in legal workplaces.

Several legal scholars in the employment discrimination area have emphasized the importance of what amounts to Wax’s second agent for reform: creation of a “stable and robust internal norm.”⁹³ For example, in her article assessing whether class action employment discrimination lawsuits bring about real workplace reform, law professor Nancy Levit identifies work cultures where such reform took place.⁹⁴ While questioning whether class actions are the best way to bring about meaningful inclusion of diverse peoples in the American workplace, Professor Levit canvasses several large class action suits, describing settlements that appear to have brought about diversity and those that did not.⁹⁵ One success story is that of Coca-Cola. Coca-Cola settled a large class action lawsuit brought by current and former African American employees.⁹⁶ As part of the settlement, Coca-Cola implemented many

1249-50 (2003).

90. See Latorourette, *supra* note 89, at 888; Albert, *supra* note 89, at 320-23.

91. Latorourette, *supra* note 89, at 889.

92. One telling example of this is a lawsuit brought by women law students and lawyers against two law firms for sex discrimination. The plaintiffs wished to sue under fictitious names because they believed using their names would “leave them vulnerable to retaliation from their current employers, prospective future employers and an organized bar that does not like lawyers who sue lawyers.” *S. Methodist Univ. Ass’n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979). The plaintiffs ultimately were unsuccessful in protecting their identities. *Id.*

93. Wax, *supra* note 14, at 45; see, e.g., Nancy Levit, *Mega-Cases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. (forthcoming 2008), available at <http://papers.ssrn.com/sol3/papers.cfm?abstractid=1017539>.

94. See Levit, *supra* note 93, at 37-57.

95. *Id.* at 17-37.

96. *Id.* at 32.

practices designed to diversify meaningfully its employees.⁹⁷ The key to its success was a combination of accountability and support from the highest levels of the organization.⁹⁸ In particular, a task force was set up that helped develop best practices for the company's human resource management.⁹⁹ Included in these practices was the development of job descriptions that reflected the actual job duties for positions, instead of reliance on subjective factors.¹⁰⁰ The company also linked diversity to business goals, including making diversity a factor in management bonuses.¹⁰¹

The second major factor in achieving positive results was the dedication of the company's CEOs to implementing real reform. As one Coca-Cola CEO explained, "This is not about settling a lawsuit, about complying with a court order. This is just what we need to do as a business."¹⁰² Likewise, the district judge who handled the case and settlement remarked that the "settlement stopped being a way to end litigation."¹⁰³ The buy-in by corporate executives of the need for diversity seemed to be key in transforming the corporate culture. Apparently, as studies of workplace sexual harassment have shown, corporate culture is created in part from the top down.¹⁰⁴ Thus, it comes as no great surprise that the greatest successes in diversifying the workforce were experienced by companies that had this executive support.

While class actions and lawsuits may not be the best way to bring about actual diversity reform in workplaces,¹⁰⁵ there is much to learn from successful class action settlements such as that of Coca-Cola. Like

97. *Id.*

98. *See id.* at 45,47-54.

99. Levit, *supra* note 93, at 32.

100. *Id.* at 33, 48-49.

101. *Id.* at 34.

102. *Id.* at 35 (quoting Duane D. Stafford, *Coke's Diversity Case Closed*, ATLANTA J. & CONST., Dec. 2, 2006, at C1) (internal quotation marks omitted).

103. *See id.* at 36 (quoting Interview with Hon. Richard Story, Mar. 27, 2006) (internal quotation marks omitted).

104. *See* THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW 154-157 (2005) (describing studies). *See generally* Cheryl L. Wade, *Transforming Discriminatory Corporate Cultures: This is Not Just Women's Work*, 65 MD. L. REV. 346 (2006) (describing the influence of corporate executives over corporate culture).

105. *See* Levit, *supra* note 93, *passim*; Selmi, *supra* note 89, *passim*. One interesting example of lawsuit failures is individual sexual harassment cases. Anne Lawton convincingly argues that employers' (and courts') propensity to see sexual harassment as the result of one bad apple rather than as an institutional problem results in little institutional reform that would actually lessen sexual harassment. *See* Anne Lawton, *The Bad Apple Theory in Sexual Harassment Law*, 13 GEO. MASON L. REV. 817, 821, 837-54 (2005).

corporations subject to class action settlements, law firms can play lip service to diversity without providing any meaningful reforms to make diversity happen. In creating the kind of institutional change that will provide lawyers, and women and women of color in particular, with a meaningful opportunity to live fuller lives while practicing law, the two key components appear to be accountability and the buy-in by those who run the firm that the types of reforms being implemented are necessary for the good of the institution.¹⁰⁶ Others have discussed what those reforms should be; some examples are meaningful part-time work and time off for child bearing and rearing that does not result in parents being perceived as “less committed.” The problem lies in implementing these reforms rather than merely paying lip service to them.

For real change to occur, law firms must abandon the formalistic model of practice under which they currently operate. Thus, no longer would the typical lawyer be a full-time employee with little to no at-home obligations. Instead, this new lawyer would have significant obligations outside the workplace that the law firm would honor. Once the managing partners and the most influential partners buy into the reforms, setting up systems of accountability becomes much easier. It will require, for example, developing accountability tools that hold partners feet to the fire about how they assign work to associates. It means really using formal mechanisms for assignments instead of buddy systems so that all attorneys, whether they are part-time or full-time, obtain career-sustaining work opportunities. It also means that firms will have to come up with objective measures of lawyer performance, instead of relying on subjective judgments. Once realistic accountability measures are implemented, the contributions of women and women of color should become recognized and valued, making law firms more hospitable for nontraditional lawyers. This is what law firms must do if they really want to maintain a diverse workforce. Whether they have the will to do so is another issue entirely.

106. See Levit, *supra* note 93, at 45, 47-54.