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## **Beyond the Glass Ceiling: Panes of Equity Partnership**

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# BEYOND THE GLASS CEILING: PANES OF EQUITY PARTNERSHIP

Rachel Arnow-Richman\*

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## I. INTRODUCTION

The proverbial “glass ceiling” is both an enduring metaphor and a persistent phenomenon for working women.<sup>1</sup> Kerri Lynn Stone’s recent book, *Panes of the Glass Ceiling*, deconstructs this “ceiling,” revealing its overlapping “panes”—each the legacy of an ancient and increasingly taboo gender stereotype—and shows how they continue to influence employer expectations and behavior today.<sup>2</sup>

Unsurprisingly, many of Stone’s rich examples involve attorneys. Within the legal profession, the gender “attainment gap,” as I refer to it, is both widely known and well documented.<sup>3</sup> This is especially true in elite large firm practice. Women fare worse than men by almost every marker, most notably attrition: though they make up close to half of associates, they are only thirty-two percent of non-equity partners and twenty-two percent of equity partners.<sup>4</sup>

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<sup>1</sup> See generally Kerri Lynn Stone, *Panes of the Glass Ceiling: Introduction*, 17 FIU L. REV. 739.

<sup>2</sup> KERRI LYNN STONE, PANES OF THE GLASS CEILING: THE UNSPOKEN BELIEFS BEHIND THE LAW’S FAILURE TO HELP WOMEN ACHIEVE PROFESSIONAL PARITY (2022).

<sup>3</sup> See generally Joyce S. Sterling & Nancy Reichman, *Navigating the Gap: Reflections on 20 Years Researching Gender Disparities in the Legal Profession*, 8 FIU L. REV. 515 (2013).

<sup>4</sup> See NAT’L ASS’N OF WOMEN LAWS., IT’S TIME TO MOVE BEYOND THE NUMBERS 5 (2021), <https://irp.cdn-website.com/2df22e83/files/uploaded/2021%20NAWL%20Survey%20Report.pdf> [hereinafter “NAWL 2021 Report”].

Somewhat less attention has been paid to the way in which the exceptional women who achieve equity status continue to lag behind their male peers. However, a rare spate of pay discrimination suits brought by women equity partners in the late 2010s against prestigious law firms sharply reveals this truth. Here, I briefly explore that “case congregation,”<sup>5</sup> or what I call “Women v. BigLaw,” in light of Stone’s work. I argue that the same “unspoken beliefs” that underlie the law firm glass ceiling operate above it, placing women partners at the bottom of a new compensation hierarchy.<sup>6</sup>

Part II describes the Women v. BigLaw litigation. Part III shows how the compensation practices of elite firm partnerships embed and sustain the tainted beliefs about women that Stone identifies. Part IV suggests that the Women v. BigLaw phenomenon may spur firms to remediate bias through structural change. In *Panes of the Glass Ceiling*, Stone speaks not only to lawmakers but to businesses: employers can take concrete steps toward dismantling the glass ceiling. Law firms have the potential to be a case in point.

## II. WOMEN V. BIGLAW

Between 2016 and 2019, women lawyers filed at least ten lawsuits alleging severe pay discrepancies and other forms of gender discrimination by some of the most venerable firms in the profession.<sup>7</sup> Strikingly, most were brought by equity partners. Despite their position, these women pleaded gaping disparities in their dollar value take home pay, and the credit allocation on which such pay is based, as compared to males holding identical titles and positions.

The Women v. BigLaw litigation is notable for two reasons. First, it represents an unprecedented use of the court system contravening the tacit professional understanding that “lawyers don’t sue.”<sup>8</sup> Second it involved largely apples-to-apples comparisons between men at the top of their field and women who had ostensibly broken through the glass ceiling.

From this perspective, the Women v. Big Law complaints offer a painful, personal illustration of a sobering statistical reality. At the

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<sup>5</sup> See generally Marc Galanter, *Case Congregations and Their Careers*, 24 L. & SOC’Y REV. 371 (1990).

<sup>6</sup> STONE, *supra* note 2.

<sup>7</sup> See, e.g., *Craddock v. LeClairRyan*, No. 3:16-CV-11, 2016 U.S. Dist. LEXIS 49408, at \*4–5 (E.D. Va. Apr. 12, 2016); *Complaint at 1–2, Bertram v. Proskauer Rose, LLP*, No. 1:17-CV-00901-ABJ (D.D.C. May 12, 2017); *Campbell v. Chadbourne & Parke, LLP*, No. 16-CV-6832, 2017 U.S. Dist. LEXIS 233166 (S.D.N.Y. Oct. 25, 2017); *Complaint, Knepper v. Ogletree*, No. 3:18-CV-00303 (N.D. Cal. Jan. 12, 2018); *Complaint, Moore v. Jones Day*, No. A155159 (Cal. Super. Ct. 2018).

<sup>8</sup> See Nancy Levit, *Lawyers Suing Law Firms: The Limits on Attorney Employment Discrimination Claims and the Prospects for Creating Happy Lawyers*, 73 U. PITT. L. REV. 65, 72 (2011).

partnership level, men currently earn thirty-four percent more than women do.<sup>9</sup> Astonishingly, this represents a vast improvement over recent years when the differential has been as high as fifty-three percent.<sup>10</sup> Even so, it translates to a pay gap that exceeds the gap for law firm associates and for the profession overall.<sup>11</sup> The irony is plain: as women achieve more, they receive less.

### III. STRUCTURE AND STEREOTYPE IN PARTNERSHIP PAY

Unpacking the partnership pay gap requires an understanding of how firms allocate compensation generally. Firms grant their partners a designated number of shares, entitling each to a percentage of the firm's profits.<sup>12</sup> This share allocation is determined by the firm's compensation committee based on individual performance gauged through various metrics.<sup>13</sup>

The key factor in that calculus is so-called "origination," a measure of how much revenue a partner brings to the firm.<sup>14</sup> Male partners report dollar value originations that are fifty percent higher than women's.<sup>15</sup> If this were a neutral statistic, and men indeed outpaced women in business generation, then any resulting pay differential would be legally defensible: law firms can avoid federal Equal Pay Act liability by demonstrating that a pay gap is attributable to a "factor other than sex."<sup>16</sup> But the entitlement to and allocation of origination offers an acute example of how the stereotypes Stone identifies interact with personnel practices to entrench gender inequality.

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<sup>9</sup> JEFFERY A. LOWE, MAJOR, LINDSEY & AFRICA, 2022 PARTNER COMPENSATION SURVEY 30 (2022), <https://www.mlaglobal.com/en/about-us/press-releases/2022-partner-compensation-survey> [hereinafter "MLA 2022"].

<sup>10</sup> JEFFERY A. LOWE, MAJOR, LINDSEY & AFRICA, 2018 PARTNER COMPENSATION SURVEY 18 (2018), <https://www.mlaglobal.com/en/insights/research/2018-partner-compensation-report#:~:text=Male%20partners%20earned%20%24959%2C000%20on,firm%20partners%20in%20the%20U.S.> [hereinafter "MLA 2018"].

<sup>11</sup> 2021 *Median Weekly Earnings*, BUREAU OF LAB. STATS. 3 (2021), <https://www.bls.gov/cps/cpsaat39.pdf> (reporting that male lawyers earn \$2,495 on average per week compared to female lawyers at \$1,912 per week); NAWL 2021 Report, *supra* note 4, at 7 (reporting that entry-level female associates earn ninety-five percent of what males earn).

<sup>12</sup> MITT REGAN & LISA ROHRER, BIGLAW: MONEY AND MEANING IN THE MODERN LAW FIRM 129 (2021).

<sup>13</sup> *Id.* at 130–32.

<sup>14</sup> *Id.* at 129.

<sup>15</sup> MLA 2022, *supra* note 9, at 34.

<sup>16</sup> See 29 U.S.C.S. § 206(d)(1) (2022); Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17, 57–61 (2010) (describing courts' broad interpretation of this defense).

There are multiple dimensions to this problem, starting with the baseline: men hold (and guard) most clients. In many firms, the first partner to bring a client to the firm is considered the “originator,” entitling that individual to credit for all revenue subsequently generated from that client.<sup>17</sup> This is true even if other lawyers perform work for or generate new business from that client.<sup>18</sup> Given the historical exclusion of women from the profession, this arrangement necessarily privileges men.

But this is just the baseline. The unspoken beliefs that Stone identifies operate to lock in the preexisting allocation. Originators receive substantial deference in matters such as who works for and has access to their clients, including discretion to “pass on” client relationships upon retirement.<sup>19</sup> As Stone explains, men see women differently than men, often perceiving them as lacking in agency.<sup>20</sup> Such assumptions, along with forces like in-group favoritism, means men tend to see men as more suited to assuming client responsibility. Thus, origination not only provides men a first-in-time advantage, it operates as a “legacy” credit to them and their chosen (male) successors.

Similarly, the way firms foster attorneys’ professional development is fraught with subjectivity and the potential for further bias. As Stone explains, beliefs about women’s suitability for market work subtly inform personnel choices.<sup>21</sup> Informal assignment and mentoring practices lead to disparate opportunities when it comes to business generation. Women are less likely to be chosen for key assignments, “pitch” meetings, and other opportunities where they can gain client exposure and enhance their business development prospects.<sup>22</sup> In the wake of the MeToo movement, they are also less likely to be taken under the wing of powerful male partners who fear “temptation,” accusations of sexual misconduct, or simply the optics of close relationships with women.<sup>23</sup> The consequence is that women lose out on valuable mentoring and the opportunity to make essential connections.<sup>24</sup>

Finally, the same biases affect firms’ evaluation of women partners. Annual performance assessments are conducted by a small committee of powerful partners who determine each partner’s share of the profit pool. Not surprisingly, these committees are male dominated. The members enjoy

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<sup>17</sup> REGAN & ROHRER, *supra* note 12, at 129.

<sup>18</sup> *Id.*

<sup>19</sup> Joan C. Williams & Veta Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, 62 HASTINGS L.J. 597, 646 (2011).

<sup>20</sup> STONE, *supra* note 2, at 105–30.

<sup>21</sup> STONE, *supra* note 2, at 29–34.

<sup>22</sup> Williams & Richardson, *supra* note 19, at 628–29, 644.

<sup>23</sup> STONE, *supra* note 2, at 131–38.

<sup>24</sup> *Id.* at 110 (describing how professional women are “over-mentored but under-sponsored”).

significant discretion with little to no accountability, enabling stereotype and in-group favoritism. In awarding compensation, such committees are more likely to view men's roles in client development as substantial and reliable, while seeing women's roles as secondary or aberrational, effectively holding them to a higher standard.<sup>25</sup>

In sum, the unspoken beliefs Stone describes not only comprise a glass ceiling. In the world of BigLaw, they oppress those who break through. Combined with the ways in which law firms develop their attorneys, evaluate their work, and structure compensation, these stereotypes enable and perpetuate a cycle of kingmaking that keeps women at the bottom and men in control.

#### IV. EQUAL PAY AS A LEGAL IMPERATIVE

Of course, law firms and antidiscrimination scholars alike have long known this. But the structures described above have largely remained in place, even as most firms have professed commitments to diversity. If anything, firms are increasingly deferential to powerful, high-originating male partners in the face of increased competition in the legal market.<sup>26</sup> Yet until now, achieving gender equity has been framed primarily as a professional value—one that might justifiably take a backseat to economic concerns—and not as a legal imperative. This makes *Women v. BigLaw* a potential gamechanger.

Most of the *Women v. BigLaw* cases settled amidst litigation over preliminary issues, such as whether the plaintiffs were statutory “employees” or the applicability of partnership agreement arbitration clauses.<sup>27</sup> And it is beyond the scope of this essay to evaluate the legality of any particular law firm’s pay practices.<sup>28</sup> But success on the merits is not always the goal of litigation, nor is it necessary to achieve meaningful results. In the case of BigLaw, the resort to legal process itself represented a serious deviation from the status quo. Regardless of any particular outcome, the *Women v. BigLaw* phenomenon could well move the needle in ways that mere attention to the issue within the profession has not.

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<sup>25</sup> See Williams & Richardson, *supra* note 19, at 648–51, 667 (describing the “prove-it-again” phenomenon and other ways in which subjectivity in law firm evaluation practices favors men).

<sup>26</sup> REGAN & ROHRER, *supra* note 12, at 134–35.

<sup>27</sup> See, e.g., *Campbell v. Chadbourne & Parke LLP*, 16-CV-6832 (JPO), 2017 WL 2589389, at \*3–11 (S.D.N.Y. June 14, 2017) (rejecting firm’s motion to dismiss based on plaintiffs’ title as “partners”); *Ramos v. Superior Court*, 28 Cal. App. 5th 1042, 1046, 1069 (2018) (denying firm’s motion to compel arbitration).

<sup>28</sup> I explore this question further in a work in progress, Rachel Arnow-Richman & Eli Wald, *Women v. BigLaw: The Impact of Equal Pay Litigation on the Legal Profession* (unpublished manuscript) (on file with author).

There is some evidence to suggest that it has. First, the partnership pay gap has improved since the *Women v. BigLaw* litigation: 2022 marked the first time in ten years that the disparity dropped below forty-four percent.<sup>29</sup> Second, women are now twenty-two percent of equity partners after hovering below the twenty percent threshold for over a decade.<sup>30</sup> Finally, and most importantly, women appear to be breaking into the ranks of firm leadership. As of 2020, women comprise twenty-eight percent of governing committee members—exceeding their representation in equity partnership—and twelve percent of managing partners.<sup>31</sup> The latter is a marked departure from the past fifteen years during which women held a mere five percent of these roles.<sup>32</sup> It is also an especially propitious development given what scholars know about organizational change. One of the most effective ways to break the cycle of male control is to do precisely that: put more women in charge.<sup>33</sup>

## V. CONCLUSION

Of course, much more needs to be done. And as Stone notes, it is impossible to fully remove stereotype from the workplace.<sup>34</sup> Yet employers can interrupt bias, eradicating the practices that allow it to flourish.<sup>35</sup> The question is what it will take to spur such change. Stone sees potential on multiple fronts, offering advice to judges and litigants who can push the law, as well as to companies and workers who can promote change internally.

This is wise given the various and sometimes surprising ways that change unfolds. It bears noting that the *Women v. BigLaw* phenomenon gained traction alongside the MeToo movement. In the case of MeToo, media attention to sexual harassment seemed to motivate employers in a way that the mere risk of liability for unlawful harassment previously had not. In the case of *Women v. BigLaw*, the opposite may be true: the risk of legal accountability may prompt law firms to act where mere attention to gender

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<sup>29</sup> The pay differential reported by MLA in its biennial survey ranged from forty-four percent to fifty-three percent for the years 2012–2020. See MLA 2022, *supra* note 9, at 30; MLA 2018, *supra* note 10, at 51.

<sup>30</sup> NAWL 2021 Report, *supra* note 4, at 5.

<sup>31</sup> *Id.* at 6.

<sup>32</sup> *Id.*

<sup>33</sup> See generally FRANK DOBBIN & ALEXANDRA KALEV, GETTING TO DIVERSITY: WHAT WORKS AND WHAT DOESN'T (2022); cf. Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 48 (2018) (describing link between gender segregation and discriminatory harassment).

<sup>34</sup> STONE, *supra* note 2, at 53.

<sup>35</sup> See generally Tristin K. Green & Alexandra Kalev, *Discrimination-Reducing Measures at the Relational Level*, 59 HASTINGS L.J. 1435 (2008) (reviewing social science literature on effective techniques for reducing both biased decision making and inter-organizational behavior that reinforces stereotype).

equity within the profession has had only negligible effect. The data so far offer reason to hope.