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Some Thoughts on the State of Women Lawyers and Why Title VII Has Not Worked for Them

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ARTICLES

SOME THOUGHTS ON THE STATE OF WOMEN LAWYERS AND WHY TITLE VII HAS NOT WORKED FOR THEM

THERESA M. BEINER*

INTRODUCTION

I graduated from law school in 1989—over twenty years ago. At the time I graduated, my law school class was close to 50% female, which was a fairly common phenomenon at the time across the country.¹ Today, first-year law school classes also generally consist of roughly half female and half male students.² When I graduated, I thought that with such numbers, the women who were my classmates would do extraordinarily well practicing law. We would rise in the ranks through the large national law firms. The law firms with which I interviewed touted their family-friendly policies and atmospheres. Certainly, the future for women lawyers was very bright. So, I sit here over twenty years later and am dismayed to hear that women have not been successful. They have struggled in large firms, dropping out at alarming rates.³ Certainly, the sheer numbers of women graduating from law schools and the existence of anti-discrimination civil rights laws, such as Title VII of the Civil Rights Act of 1964,⁴ should have made a difference by now.

This essay discusses why women lawyers have not been as successful in large firms. It begins by giving a snapshot of the state of women lawyers, including

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1. In the 1988-89 school year, 42.9% of first year enrollees were female, and 42.2% of enrollees overall were female. AM. BAR ASS'N, FIRST YEAR AND TOTAL J.D. ENROLLMENT BY GENDER 1947-2008, at 1 (2010), available at <http://www.abanet.org/legaled/statistics/charts/stats%20-%206.pdf>. The enrollment of women overall hit a high of 50.4% in the 1992-93 school year. *Id.* It has hovered close to 50%, i.e., 45% or higher, since the 1997-98 school year. *Id.*

2. For the 2009-10 school year, the overall female law school enrollment was 47.2%. *Id.*

3. Vivian Chen, *Looking into the Equity Box*, AM. LAW., Sept. 1, 2010, at 13.

4. Pub. L. No. 88-352, Tit. VII, § 703, 78 Stat. 255 (codified at 42 U.S.C. § 2000e-2(a) (2006)).

women lawyers of color. Part I includes stories and studies of women's struggles at these firms. Part II describes why Title VII has not worked to solve the problems associated with being a successful woman in a law firm. Finally, Part III suggests some potential solutions that may help women be more successful in these environments.

I. A SNAPSHOT OF THE STATE OF WOMEN LAWYERS

A. *The Statistics*

The statistics on the success of women lawyers at the largest and most prestigious firms in the United States are not good. According to Department of Labor estimates from 2009, women make up 32.4% of the lawyers in the United States.⁵ Yet according to a recent *American Lawyer* survey of the top 200 law firms, women make up only 17% of the partners at the firms surveyed.⁶ A survey by the National Association of Women Lawyers placed the number of female partners at the 200 largest law firms at 18%.⁷ Women's low partnership rates, according to the *American Lawyer*, occur despite women being "about 51 percent of law school graduates in the last 20 years."⁸

Another telling statistic from the survey is the status of the women who are partners at these firms. Of those women partners who work at firms with multi-tier partnerships, only 45% of them have equity status.⁹ This compares to 62% of male partners having equity status. Thus, the majority of the women partners occupy a lower tier of partnership. And it appears that women are taking a tougher hit in terms of employment opportunities due to the recent recession in the United States. The *American Lawyer* recently reported that for the first time since the National Association for Law Placement (NALP) began collecting demographic employment data, diversity in law firm hiring fell. Thus, while women were 32.9% of attorneys in the firms NALP surveyed in 2009, they made up 32.69% of attorneys in 2010.¹⁰

5. U.S. BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES 206 (2009). The American Bar Association places the percentage at 31%. AM. BAR ASS'N, A CURRENT GLANCE AT WOMEN IN THE LAW 2009, at 1 (2009), available at <http://www.americanbar.org/content/dam/aba/migrated/women/reports/CurrentGlanceStatistics2009.authcheckdam.pdf>.

6. Chen, *supra* note 3, at 13.

7. INST. OF MGMT. & ADMIN. INC., NEW DATA ON MAJOR LAW FIRMS FIND WOMEN LAWYERS EARN LESS THAN THEIR MALE PEERS 1 (2008) [hereinafter NEW DATA].

8. Chen, *supra* note 3, at 13. However, the National Association of Law Placement (NALP) put the percentage of women graduates in the class of 2009 at 46%. NAT'L ASS'N OF LAW PLACEMENT, CLASS OF 2009 NATIONAL SUMMARY REPORT 1 (2009), available at <http://www.nalp.org/uploads/NatlSummaryChartClassof09.pdf>.

9. Chen, *supra* note 3, at 13.

10. Dimitra Kessenides, *Law Firms + Diversity = Declines in Diversity?*, AM. LAW., Nov. 4, 2010, available at <http://www.law.com/jsp/tal/PubArticleFriendlyTAL.jsp?id=1202474473956>.

In addition, studies show that women leave law firm practice at higher rates than their male counterparts. To take an example from a study in a distinct market, researchers at the Massachusetts Institute of Technology studied the top one hundred law firms in Massachusetts. They found that among junior and non-equity partners, one third of women left law firm practice, whereas only 15% of men left practice.¹¹ This was more than double the rate for women than men.¹² The study also showed that one third of women associates left law practice entirely, whereas less than 20% of male associates did so.¹³ Even women who had “made it,” i.e., who had become partners, were more likely to leave their partnerships than male partners—15% of women partners left, whereas only 1% of men did.¹⁴ As one article summed up, “sex 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 . . . legal specialization, having taken a leave for child care, marital status, children, current work hours, and measures of social capital.”¹⁵

It’s not that these women are leaving the workforce. Only 22% of the women in the Massachusetts study who left law firm practice described their status as “unemployed”; thus, the vast majority continue to work.¹⁶ In addition, there is considerable evidence that those who do leave do not “opt out,” but instead are “pushed out.”¹⁷ The National Association of Women Lawyers’s (NAWL) study of the 200 largest law firms in the United States shows the nature of this attrition. Women start at a high of 47% of associates, drop to 30% of “of counsel” lawyers, drop further to 26% of non-equity partners, and bottom out at 16% of equity partners.¹⁸ As one female associate described:

I once heard someone describe their position as a junior associate at a large law firm as the best paying dead-end job they have ever had, and I thought that it was the most accurate description. For the most part associates, particularly female associates, have no interest in becoming

The representation of minority attorneys among associate ranks likewise declined from 12.59% in 2009 to 12.4% in 2010. *Id.*

11. MONA HARRINGTON & HELEN HSI, MIT WORKPLACE CTR. & SLOAN SCH. OF MGMT., WOMEN LAWYERS AND OBSTACLES TO LEADERSHIP 8 (2007).

12. *Id.*

13. *Id.*

14. *Id.*

15. Mary C. Noonan & Mary E. Corcoran, *The Mommy Track and Partnership: Temporary Delay or Dead End?*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 132 (2004).

16. HARRINGTON & HSI, *supra* note 11, at 10.

17. See generally JOAN C. WILLIAMS ET AL., CTR. FOR WORKLIFE LAW, “OPT OUT” OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT: THE UNTOLD STORY OF WHY WOMEN LEAVE THE WORKFORCE 3 (2006).

18. NEW DATA, *supra* note 7, at 1; see also Noonan & Corcoran, *supra* note 15, at 137 tbl.1 (showing career paths for University of Michigan Law School graduates over time and the gender gap in lawyers in private practice due to attrition).

a partner at the firms we are currently employed with. But in reality, there are plenty of exit opportunities. I've watched friends and former coworkers go in-house or move to smaller firms. The trouble is, they typically don't pay as well as the large firm.¹⁹

Minority women lawyers are very likely to drop out of firm practice. A NALP study found that "[b]y 2005, 81% of minority female associates had left their law firms within five years of being hired."²⁰

Along with these status gaps go pay gaps. As the NAWL study showed, "[a]t each level of promotion, male lawyers earn more than their female peers."²¹ This is consistent with other studies of female partner compensation.²² A recent study by Marina Angel, Eun-Young Whang, Rajiv Banker, and Joseph Lopez looked at data collected from the Am Law 100 and 200 study and the Vault/MCCA Law Firm Diversity Programs study.²³ They concluded that "women partners are paid less despite the fact that they are not less productive than men partners in generating RPL [revenue per lawyer] for their firms."²⁴ I remember back in my practice days taking the most senior female partner out for drinks on her fortieth birthday. I now understand why she was so depressed by her status at the firm.

Given that women do not necessarily leave the workforce, it is unsurprising that women are over-represented in lower-paying segments of the legal community. In addition to occupying what amount to "pink ghettos" in law firm practice,²⁵ women occupy lower-paying jobs in law generally. For example, when it comes to public interest law, according to NALP, 31% of female respondents were public interest lawyers, whereas only 21% of male respondents practiced in this area.²⁶ In addition, while 9% of women responded that they worked in civil legal services or public defender offices, nonprofits or education, and public interest, only 4% of men reported working in this sector. Percentages

19. HARRINGTON & HSI, *supra* note 11, at 8.

20. AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, *VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 1* (2006) [hereinafter *VISIBLE INVISIBILITY*]. For an interesting assessment of the state of Latina lawyers, see HISPANIC NAT'L BAR ASS'N, *FEW AND FAR BETWEEN: THE REALITY OF LATINA LAWYERS* (2009).

21. NEW DATA, *supra* note 7, at 2.

22. See Audrey Wolfson Latourette, *Sex Discrimination in the Legal Profession: Historical and Contemporary Perspectives*, 39 VAL. U. L. REV. 859, 897-98 (2005).

23. Marina Angel et al., *Statistical Evidence on the Gender Gap in Law Firm Partner Compensation 2* (Temple Univ. Beasley Sch. of Law, Paper No. 2010-24), available at <http://ssrn.com/abstract=1674630> (discussing data collected from 2002 to 2007); see also Noonan & Corcoran, *supra* note 15, at 144 (discussing a study of University of Michigan Law School graduates showing that male partners' earnings were on average 32% higher than those of female partners).

24. Angel et al., *supra* note 23, at 3.

25. Chen, *supra* note 3, at 13.

26. Katie Dilks, *Why Is Nobody Talking About Gender Diversity in Public Interest Law?*, NALP BULL., June 2010, at 1.

for government employment were the same—roughly the same number of men and women reported working for the government.²⁷ Thus, women lawyers tend to be over-represented in many lower-paying, lower-status jobs.

Interestingly, Irene Segal Ayers recently has suggested that law schools are also part of the problem when it comes to the success of women, and particularly women lawyers of color, in large law firm practice.²⁸ While others have criticized the use of the Socratic method and the competitive nature of law schools' impact on the educational opportunities of women,²⁹ Ayers's approach takes on the nearly exclusive focus of law schools on legal analysis that was criticized in the Carnegie Report.³⁰ Relying on the narratives of African-American women lawyers, Ayers highlighted how many of these lawyers found their law school experiences dull and disengaging.³¹ In addition, because these lawyers were put off by the narrow curriculum and competitive nature of law school, they disengaged from not only classes, but also other law school-related activities.³² Ayers now argues that students buy into the common law school myth of "effortless genius"—essentially, that a small group of law students just naturally "have it."³³ These are the "A" students, and the rest are never going to "get it." Once students decide they are not among the "haves," they disengage. Thus, opportunities created by law review participation and other aspects of law school (including the training that does occur by taking coursework seriously) were lost on these students. Instead, many of these women lawyers of color owed their success to excellent mentoring opportunities.³⁴ Interestingly, most of the women she studied who started out in traditional law firm settings had little to no mentoring opportunities, which greatly affected their progress at their firms.³⁵ For those who had a good experience, mentoring appeared to be the key. Unfortunately, large law school classes do not offer those mentoring opportunities, and, as I describe below, women and members of minority groups often do not have that relationship in practice. Ayers's argument is that law

27. *Id.*

28. Irene Segal Ayers, *The Undertraining of Lawyers and Its Effect on the Advancement of Women and Minorities in the Legal Profession*, 1 DUKE F.L. & SOC. CHANGE 71, 71 (2009).

29. One of the best known works on this topic is LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997). See also CARRIE YANG COSTELLO, *PROFESSIONAL IDENTITY CRISIS: RACE, CLASS, GENDER, AND SUCCESS AT PROFESSIONAL SCHOOLS* (2005); see generally Sari Bashi & Maryana Iskander, *Why Legal Education Is Failing Women*, 18 YALE J.L. & FEMINISM 389 (2006); Sarah Berger et al., "Hey! There's Ladies Here!!," 73 N.Y.U. L. REV. 1022 (1998) (reviewing several studies and hypotheses concerning gender differences in legal education).

30. See WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* 5-7 (2007).

31. Ayers, *supra* note 28, at 84-89.

32. See *id.* at 87-89.

33. *Id.* at 87.

34. *Id.* at 92-96.

35. *Id.* at 89-92.

schools' failure to sufficiently train women and lawyers of color exacerbates problems they already experience resulting from the lack of mentoring in law firms.

B. The Intangibles

Other surveys of women lawyers have focused on the qualitative nature of their practices in terms of opportunities, experiences, and quality of work.³⁶ The American Bar Association's Commission on Women in the Profession has identified several obstacles to women's success in the profession, including gender stereotypes, lack of mentoring and support networks, inflexible work structures, sexual harassment, and gender bias in the justice system itself.³⁷ Many women lawyers complain about receiving less desirable assignments—essentially grunt work or “easy” work such as document review and cases no one else wanted.³⁸ They also note that they have fewer mentoring opportunities with partners and more senior lawyers than their male colleagues.³⁹ In addition, they are asked to participate less in rainmaking opportunities than their male colleagues.⁴⁰ In a survey by the American Bar Association, 43% of women of color and 55% of white women complained that they had limited client contact and client development opportunities, whereas only 3% of white males surveyed had similar complaints.⁴¹

Women still face considerable work/life balance issues that their male

36. I will not canvass all the research on this subject because it is vast. Instead, I will provide a summary.

37. DEBORAH L. RHODE, AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 14-22 (2001) [hereinafter RHODE, UNFINISHED AGENDA] (describing these obstacles); see also VISIBLE INVISIBILITY, *supra* note 20, at 12-17 (describing the experiences of women of color with respect to the lack of mentoring opportunities); Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2273-76 (2010) (dividing stereotypes applied to women in large law firms into three categories).

38. See VISIBLE INVISIBILITY, *supra* note 20, at 21-23; Steve French, Note, *Of Problems, Pitfalls and Possibilities: A Comprehensive Look at Female Attorneys and Law Firm Partnership*, 21 WOMEN'S RTS. L. REP. 189, 202-03 (2000).

39. See RHODE, UNFINISHED AGENDA, *supra* note 37, at 16. Interestingly, some studies suggest that women receive more mentoring, but commentators have opined that women perceive mentoring more than their male colleagues. Thus, male associates will not perceive a relationship with a senior partner as mentoring, whereas women will. See French, *supra* note 38, at 200. Yet women perceive that they do not have the same mentoring opportunities as their male counterparts. See *id.* at 200-01.

40. See VISIBLE INVISIBILITY, *supra* note 20, at 19-21 (describing the experience of women lawyers of color).

41. *Id.* at 19. Men of color likewise complained less of this than did women attorneys. Only 24% of men of color complained of limited access to client development opportunities. *Id.*

colleagues either do not face or face to a much lesser degree.⁴² In the Massachusetts survey, the most common (over 60% reported this) reason women gave for leaving firm practice, whether they were associates, junior partners, or partners, was “difficulty integrating work with family/personal life.”⁴³ Family obligations also affected perceptions of lawyers. In an ABA national survey of 920 lawyers who had at some point in their careers worked in firms of twenty-five or more lawyers,⁴⁴ 72% of women surveyed said that their career commitment was questioned when they gave birth to or adopted a child, whereas only 15% of men of color and 9% of white men responded yes to this.⁴⁵ The Massachusetts survey found that for men, the most common reasons for leaving practice were “long work hours” and “work load pressures.”⁴⁶ Family reasons ranked third.⁴⁷

One would think that part-time work options would help women lawyers with significant family obligations. However, where flexible arrangements exist, few take part in them.⁴⁸ Even when women choose part-time work to accommodate busy home lives, they often sacrifice prestige and quality in work assignments.⁴⁹ As one woman lawyer study respondent explained, taking part-time status “completely, utterly and irreversibly altered my future, my practice, my reputation and my relationships.”⁵⁰

II. WHY TITLE VII HASN'T RESULTED IN MATERIAL GAINS FOR WOMEN LAWYERS

Many commentators have discussed why Title VII has not solved retention and promotion problems encountered by women lawyers.⁵¹ Some opine that the

42. See *id.* at 33-34 (describing the experiences of women lawyers); French, *supra* note 38, at 197-99.

43. HARRINGTON & HSI, *supra* note 11, at 12-13.

44. VISIBLE INVISIBILITY, *supra* note 20, at 5-6.

45. *Id.* at 33-34.

46. HARRINGTON & HSI, note 11, at 12-13.

47. *Id.*

48. DEBORAH L. RHODE, AM. BAR ASS'N COMM'N ON WOMEN IN THE PROFESSION, *BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE* 15-16 (2001) [hereinafter RHODE, *BALANCED LIVES*] (noting that few lawyers take advantage of part-time programs when they are provided).

49. See *id.* at 16 (recounting study responses); RHODE, *UNFINISHED AGENDA*, *supra* note 37, at 17-18; Hope Viner Samborn, *Higher Hurdles for Women*, 86 A.B.A. J. 30, 32 (2000) (finding that 46% of women surveyed believed that taking part-time status after becoming a parent would very likely have an adverse impact on advancement and 35% of women thought it somewhat likely).

50. RHODE, *BALANCED LIVES*, *supra* note 48, at 16 (quoting WOMEN'S BAR ASS'N OF MASS., *MORE THAN PART-TIME: THE EFFECT OF REDUCED-HOURS ARRANGEMENTS ON THE RETENTION, RECRUITMENT, AND SUCCESS OF WOMEN ATTORNEYS IN LAW FIRMS* 32 (2000)).

51. See, e.g., Susan Bisom-Rapp, *Scripting Reality in the Legal Workplace: Women Lawyers*,

structure of Title VII makes it difficult for plaintiffs to challenge more subtle and unconscious forms of bias, such as mentoring opportunities, assignments, and outside activities, which become the basis for more opportunities in the law firm long-term.⁵² The studies suggesting that women receive uninteresting assignments and grunt work and do not have the same mentoring opportunities support this. Others suggest that the burden of proof under Title VII is too difficult for women employee-plaintiffs to meet.⁵³ In addition, some have asserted that the problem in law firm reform has both cultural and economic dimensions.⁵⁴ It is not my intention to rehash the arguments of these commentators. Instead, I will focus on what I consider to be the problems that most affect women's successes in these cases.

One of the most significant problems is that courts are very deferential to law firm decisionmaking. In general, courts do not like interfering with or second-guessing high level discretionary and subjective employment decisions.⁵⁵ One of the classic cases involving a woman lawyer is *Ezold v. Wolf, Block, Schorr & Solis-Cohen*.⁵⁶ In *Ezold*, plaintiff Nancy O'Mara Ezold was denied partnership at her firm, Wolf, Block, Schorr & Solis-Cohen ("Wolf, Block"). After a trial on the merits, the district court judge held for Ezold on her claim that the firm had

Litigation Prevention Measures, and the Limits of Anti-Discrimination Law, 6 COLUM. J. GENDER & L. 323 (1996); Nancy J. Farrer, *Of Ivory Columns and Glass Ceilings: The Impact of the Supreme Court of the United States on the Practice of Women Attorneys in Law Firms*, 28 ST. MARY'S L.J. 529 (1997); Latourette, *supra* note 22, at 884-93; LeeAnn O'Neill, *Hitting the Legal Diversity Market Home: Minority Women Strike Out*, 3 MOD. AM. 7 (2007); 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 (2006); Eyana J. Smith, Comment, *Employment Discrimination in the Firm: Does the Legal System Provide Remedies for Women and Minority Members of the Bar?*, 6 U. PA. J. LAB. & EMP. L. 789 (2004).

52. See, e.g., Audrey J. Lee, Note, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV C.R.-C.L. L. REV. 481, 487-88 (2005).

53. See, e.g., Smith, *supra* note 51, at 806-07.

54. See, e.g., Latourette, *supra* note 22, at 861; French, *supra* note 38, at 194-95 (explaining how economic changes to the business of law have affected partnership requirements).

55. See 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, 268, 288-301 (1994) (describing cases); Latourette, *supra* note 22, at 886-89. For reasons why courts are so deferential to this type of employer decisionmaking, see Baron, *supra*, at 301-04.

56. 983 F.2d 509 (3d Cir. 1992). The court in this case acknowledged that it was the first case in which a discrimination claim arising in the context of law firm partnership required appellate review. *Id.* at 512. Thus, it is not surprising that commentators have found it significant. Many have discussed problems with this case. See, e.g., Baron, *supra* note 55, at 299-301; Latourette, *supra* note 22, at 886-89; French, *supra* note 38, at 206-08; Rachel B. Grand, Note, *"It's Only Disclosure": A Modest Proposal for Partnership Reform*, 8 N.Y.U. J. LEGIS. & PUB. POL'Y 389, 405-06 (2005); Lee, *supra* note 52, at 500; Eunice Chwenyen Peters, Note, *Making It to the Brochure but Not to Partnership*, 45 WASHBURN L.J. 625, 637-39 (2006).

discriminated based on sex in denying her partnership.⁵⁷ Interestingly, the Third Circuit Court of Appeals reversed, holding that the trial court's factfinding was "clearly erroneous" and that Ezold had not shown that the firm's reason for denying her partnership was a pretext for sex discrimination.⁵⁸ In many ways, the experiences of Nancy Ezold reflect those described in studies of women lawyers.

Even before she was hired, Ezold was told by the assigning attorney in the litigation department, Seymour ("Sy") Kurland, "that it would not be easy for her at Wolf, Block because she did not fit the Wolf, Block mold since she was a woman, had not attended an Ivy League law school, and had not been on law review."⁵⁹ Although Ezold handled cases at all stages of litigation and eventually supervised junior associates, she was primarily assigned to "small cases" by the firm's standards.⁶⁰ Ezold became aware of the informal assignment process, whereby partners would choose to work with associates directly, bypassing the formal assignment structure.⁶¹ She complained about both the quality of her assignments and the small number of partners for whom she had the opportunity to work.⁶² Indeed, one partner explained that Ezold was in a classic "Catch 22":

[T]he perception that she is not able to grasp complex issues or handle complex cases . . . appears to be a product of how Sy Kurland viewed Nancy's role when she was initially hired. For the first few years Sy would only assign Nancy to non-complex matters, yet, at evaluation time, Sy, and some other partners would qualify their evaluations by saying that Nancy does not work on complex matters. Nancy was literally trapped in a Catch 22. The [c]hairman of the [l]itigation [d]epartment would not assign her to complex cases, yet she received negative evaluations for not working on complex cases.⁶³

The trial court agreed with Ezold's contention that her "lack of opportunity to work with a significant number of partners seriously impaired her opportunity to be fairly evaluated for partnership."⁶⁴

The reason provided by the firm for not promoting Ezold to partnership was her lack of skills in legal analysis.⁶⁵ This was not, however, the only criteria for partnership. Candidates were also evaluated on "legal writing and drafting, research skills, formal speech, informal speech, judgment, creativity, negotiating and advocacy, promptness and efficiency."⁶⁶ Personal characteristics were

57. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 751 F. Supp. 1175, 1191-92 (E.D. Pa. 1990), *rev'd*, 983 F.2d 509 (3d Cir. 1993).

58. *Ezold*, 983 F.2d at 512-13.

59. *Ezold*, 751 F. Supp. at 1177.

60. *See id.* at 1178.

61. *Id.*

62. *Id.*

63. *Id.* at 1179.

64. *Id.*

65. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 512 (3d Cir. 1992).

66. *Id.* at 515.

evaluated as well, including “reliability, taking and managing responsibility, flexibility, growth potential, attitude, client relationship, client servicing and development, ability under pressure, ability to work independently, and dedication.”⁶⁷ As is obvious from the nature of these criteria, they are quite subjective.

The trial court concluded that Wolf, Block had discriminated based on sex in failing to promote Ezold to partnership.⁶⁸ However, the Third Circuit Court of Appeals reversed, finding the trial court’s factfinding “clearly erroneous.”⁶⁹ Essentially, the two courts disagreed about whether Wolf, Block’s legitimate nondiscriminatory reason for denying Ezold full partnership—that she lacked the requisite legal analytical skills—was a pretext for sex discrimination. The trial court reviewed evidence that revealed Ezold’s strengths as a partnership candidate.⁷⁰ For example, Sy noted in Ezold’s evaluations that she was particularly good at trial work—an area in which the firm needed people with such skills.⁷¹ In addition, during the period leading up to her partnership consideration, partners for whom Ezold had performed substantial work rated her quite positively.⁷² The trial judge canvassed the many positive evaluations Ezold received from partners regarding her courtroom skills and dedication.⁷³ The trial judge then made a detailed comparison of males who made partner and found that “[m]ale associates who received evaluations no better than the plaintiff and sometimes less favorable than the plaintiff were made partners.”⁷⁴ The judge reviewed the evaluations of eight male associates in reaching this conclusion.⁷⁵

Yet the Third Circuit concluded that the trial judge’s factfinding was clearly erroneous. The main problem the court of appeals had with the trial judge’s reasoning was with respect to his analysis of comparator male associates who became partner. The court of appeals concluded that the trial judge looked at the male associates’ overall evaluations without honing in on the factor that prevented Ezold from making partner—her lack of analytical skills.⁷⁶ Even though partnership determinations took into account a host of factors, as described above, and Ezold compared quite favorably to (and in some instances better than) the males who made partner on some of the criteria, the court of appeals limited its factual analysis to this one factor. In doing so, it focused on a single tree without seeing the forest. The court of appeals went through an associate-by-associate analysis of the evaluations, essentially redoing the trial

67. *Id.*

68. *Ezold*, 751 F. Supp. at 1192.

69. *Ezold*, 983 F.2d at 547.

70. *Ezold*, 751 F. Supp. at 1180.

71. *Id.*

72. *Id.* at 1182.

73. *Id.* at 1182-83.

74. *Id.* at 1184.

75. *Id.* at 1185-87.

76. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 524-25 (3d Cir. 1992).

court's factfinding.⁷⁷ Some of the male associates who made partner had problems that were quite significant. For example, one associate was criticized by several partners for his work habits.⁷⁸ As one partner explained about this associate, "There has been a recurrent problem where he simply disappears without notice, sometimes for a couple of days, and sometimes on extended vacations."⁷⁹ Another partner called him "lazy," and still another partner noted that he needed to "apply himself diligently."⁸⁰ Yet this associate made partner. Another male associate who made partner lacked language skills.⁸¹ And in one situation that bordered on malpractice, a male associate actually did not respond to a complaint in a timely manner and still made partner.⁸² Thus, it is understandable why the trial court could conclude that something was amiss with denying Ezold partnership while these other male associates were promoted.

In disagreeing with the trial court's evaluation of the evidence, the court of appeals applied a high standard for plaintiffs to meet in cases involving subjective criteria. As the court explained, "In a comparison of subjective factors such as legal ability, it must be *obvious or manifest* that the subjective standard was unequally applied before a court can find pretext."⁸³ It also acknowledged its reluctance to second-guess this type of employer decisionmaking. The court explained that "a company has the right to make business judgments on employee status, particularly when the decision involves subjective factors deemed essential to certain positions."⁸⁴ Noting that, like cases involving tenure, decisions about who becomes partner are subjective, the court explained that the "cautions against 'unwarranted invasion or intrusion' into matters involving professional judgments about an employee's qualifications for promotion within a profession inform[ed]" its analysis of Ezold's case.⁸⁵

Ezold's experience is not uncommon. As one commentator summed up after reviewing case law involving women lawyers: "[C]ases suggest that in order to prevail in a sex discrimination case, one must present rather compelling evidence of patently unfair behavior and distinct differences in the treatment of males and females, with historical discriminatory policies toward women providing supporting evidence of an employer's discriminatory intent."⁸⁶ Who makes partner and who gets assigned to a case are the types of employment decisions with which courts are uncomfortable. Indeed, the Third Circuit accepted that Wolf, Block did not assign Ezold to complex cases at first because of her academic credentials, even though she had been practicing law for a number of

77. *Id.* at 533-38.

78. *Id.* at 535.

79. *Ezold*, 751 F. Supp. at 1185.

80. *Id.* at 1185-86.

81. *Ezold*, 983 F.2d at 535.

82. *Id.* at 536.

83. *Id.* at 534 (emphasis added).

84. *Id.* at 527 (quoting *Billet v. CIGNA Corp.*, 940 F.2d 812, 825 (3d Cir. 1991)).

85. *Id.*

86. Latourette, *supra* note 22, at 889.

years at the time they hired her.⁸⁷

Another problem for women lawyers wishing to use Title VII is that many women lawyers do not work at firms that would be covered by Title VII—the primary federal anti-discrimination law that covers sex discrimination. Title VII only covers employers of fifteen or more.⁸⁸ Most lawyers work in small firms that have fewer than fifteen lawyers and therefore fewer than fifteen employees,⁸⁹ which means many will not be covered by Title VII.⁹⁰ In addition, Title VII generally does not cover discrimination aimed at partners, who are not always considered employees.⁹¹ For these reasons and others,⁹² Title VII has not provided significant relief to women who seek partnership.

III. POTENTIAL SOLUTIONS

In order for women to be successful in legal practice in large firms, change must come from a variety of sources. Clearly, the law alone will not bring about the type of change that will significantly increase women's numbers in the partnership ranks at large firms. Instead, I am suggesting change in three areas. First, large law firms themselves must lead the way. Second, law schools have a role to play. Finally, the courts also can contribute to the progress of women in these firms.

A. *How to Effect Change in Law Firms*

Many have suggested solutions to the various problems women have encountered in legal practice.⁹³ Yet even though such prestigious groups as the

87. *Ezold*, 983 F.2d at 541.

88. See 42 U.S.C. § 2000e(b) (2006).

89. Note that support staff would be included in this calculation.

90. As of 2000, 76% of firms consisted of two to five lawyers, 13% of six to ten lawyers, and 6% of eleven to twenty lawyers. AM. BAR ASS'N, LAWYER DEMOGRAPHICS (2009), available at http://new.abanet.org/marketresearch/PublicDocuments/Lawyer_Demographics.pdf. According to another report commissioned by the ABA in 2000, nearly 70% of lawyers worked in firms of ten lawyers or less. CLARA N. CARSON, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000, at 29 (2004).

91. See *Solon v. Kaplan*, 398 F.3d 629, 633-34 (7th Cir. 2005) (granting summary judgment in Title VII retaliation lawsuit because partner was not an "employee" for purposes of Title VII); see also Lauren Winters, *Partners Without Power: Protecting Law Firm Partners from Discrimination*, 39 U.S.F. L. REV. 413, 418-20 (2005) (describing problems with partners suing); see generally *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 449-50 (2003) (setting out factors used to determine whether physician who was director-shareholder could be considered an "employee" for purposes of the Americans with Disabilities Act).

92. See, e.g., Alison I. Stein, *Women Lawyers Blog for Workplace Equality: Blogging as a Feminist Legal Method*, 20 YALE J.L. & FEMINISM 357, 372-73 (2009) (suggesting that women lawyers have abandoned courts as a means to social change); French, *supra* note 38, at 212; Smith, *supra* note 51, at 807-08.

93. See, e.g., RHODE, *BALANCED LIVES*, *supra* note 48, at 22-25; Megan Erb, Note, *Red*

American Bar Association have taken on the issues facing women lawyers, little has changed.⁹⁴ Organizational change can be difficult. However, it is possible for organizations, including law firms, to change under the right circumstances. There are two factors that consistently appear necessary for organizational change. The first is buy-in from top-level management. The second is holding accountable those assigned to implement the change.

Nancy Levit, in her insightful article about the efficacy of class actions in eliminating or remedying discrimination, found both of these factors present in situations where change actually was successful as a result of class action litigation.⁹⁵ When corporations had a true desire to diversify their workforce, which was reflected in the will of top-level management, and that management held lower-level managers accountable for accomplishing this, there was positive change.⁹⁶ Levit's findings with respect to class actions that did result in diversity in the workplace and those that did not are consistent with organizational research.⁹⁷

How does this apply to women in law firms? While women can no longer be considered newcomers to legal practice, they are newcomers in terms of being partners at top law firms. Increasing the percentage of women of influence in law firms means diversifying the partnership ranks. Thus, the problems with accomplishing this diversification parallel the cases described by Levit. In order to truly gender-diversify law firms, it will take commitment by the firm's leaders—influential partners, management committees, managing partners, etc. However, that likely will not be enough. There must be accountability as well. This could include considering whether a partner uses a diverse group of associates or non-equity partners to staff his or her cases in setting compensation. Indeed, in-house corporate counsels have led the way on diversifying their staff and have used compensation as a means to reward diversity efforts.⁹⁸ Some firms have set up diversity committees to create policies and procedures to help firm management effectuate diversity goals.⁹⁹

Light, Green Light: Assessing the Stop and Go in the Advancement of Women in the Legal and Business Sectors, 14 WM. & MARY J. WOMEN & L. 393, 407-20 (2008).

94. See Kathleen Wu, *What's Changed for Women Lawyers in the Past Decade? Not a Whole Lot, Frankly*, 49 ADVOCATE 21, 21 (2009) (noting that there was only a 6% jump in the percentage of women partners according to NALP data in the fifteen years between 1993, when NALP began tracking this, and 2008).

95. Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 392-93 (2008).

96. *Id.* at 414. For an explanation of the importance of commitment of corporate executives, see *id.* at 417-18, 424. For an explanation of the importance of accountability, see *id.* at 418-24.

97. See *id.* at 420-24 (discussing studies).

98. See Kara Mayer Robinson, *Beyond the Basics: Three Corporate Legal Departments Take Diversity Efforts to the Next Level*, DIVERSITY & THE BAR (2007), available at <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=1395> (describing in-house counsel program at Lucent Technologies/Alcatel-Lucent that includes ties to compensation).

99. See Judith S. Kaye & Anne C. Reddy, *The Progress of Women Lawyers at Big Firms:*

In addition, some of the changes must take on the intangibles that keep women from succeeding. Mentoring must be universal and institutionally encouraged¹⁰⁰—not just left to happenstance occurrence. While women lawyers have noted that the best mentoring relationships occur naturally,¹⁰¹ in an ABA survey, women of color and white women disproportionately responded that they wanted more and better mentoring.¹⁰² Thus, it appears that lack of or insufficient mentoring is a significant problem for these women. In addition, work assignments must be given out fairly. From the studies of women lawyers, lack of mentoring and the unfair distribution of more interesting assignments are clearly hampering the development of women lawyers' skills.¹⁰³ This certainly was the case for Nancy Ezold. If partner compensation were tied in part to the use of a diverse group of lawyers, it is reasonable to believe that assignments would be spread around all the lawyers and not just the favored few, who often do not include women.

Finally, firms must be flexible for women who have child care or other family care responsibilities. Because work/family conflict appears to play a role in why women leave large law firm practice, firms will have to adopt and actually encourage creative strategies to get at this problem if they want to retain women lawyers. The existence of an underused part-time program is not enough. The program actually must operate in a fair manner and not create a perception (or a reality) that those who take advantage of it are no longer taken seriously as lawyers at the firm. Joan Williams and Cynthia Thomas Calvert have written extensively about effective part-time policies.¹⁰⁴ Thus, there are already

Steadied or Simply Studied?, 76 FORDHAM L. REV. 1941, 1966-67 (2008) (describing such law firm efforts).

100. See Noonan & Corcoran, *supra* note 15, at 141-43 (discussing a study showing that having a mentor is related to increased chances of women making partner and to making it less likely that a lawyer will leave).

101. VISIBLE INVISIBILITY, *supra* note 20, at 13.

102. *Id.* at 12. "Sixty-seven percent of women of color in the survey wanted more and better mentoring," as did 55% of white women, whereas only 32% of white men surveyed made this statement. *Id.* Interestingly, this was also common of men of color, 52% of whom wanted more and better mentoring. *Id.*

103. Anita Hill's experience as a new associate provides an excellent example. As she explains:

There were some exciting projects at Wald's, but none were included among my assignments, many of which were in the area of banking law. This was not considered the most interesting or extensive part of the firm's practice, so there wasn't much competition among associates to do it. . . . I did not receive the "choice assignment," but rather was assigned to work with partners like the banking expert, who was thought to be difficult. Certainly, no other partner stepped in to take me under his or her wing or to teach me about functioning in what was for me a completely new environment.

ANITA HILL, SPEAKING TRUTH TO POWER 56, 58 (1997).

104. See, e.g., Joan Williams & Cynthia Thomas Calvert, *Balanced Hours: Effective Part-Time Policies for Washington Law Firms: The Project for Attorney Retention*, 8 WM. & MARY J.

guidelines out there for firms to follow; they need not reinvent the wheel when it comes to effective part-time programs.

B. The Role of Law Schools

If Ayers is correct, law schools need to train students differently. Ayers's approach is consistent with the Carnegie Report and suggests a more collaborative, mentoring-based approach to law school classes.¹⁰⁵ Ayers identified several common themes in the lawyers' stories she examined. She argues that law schools should focus on improvement, including regular assessment, rather than on the myth of fixed legal ability.¹⁰⁶ Another feature of the stories of successful African-American women lawyers Ayers describes was the egalitarian relationship they had with their mentors and/or teachers.¹⁰⁷ These young lawyers and students were permitted to question their teachers and were treated as equals. There was also an emphasis on collaboration and teamwork.¹⁰⁸ In addition, being permitted to engage in legal creativity and small group learning likewise contributed to the positive experiences of these women.¹⁰⁹ While creative legal thinking could be emphasized and encouraged in the current law school classroom, small groups might be more difficult, given the resources it takes to teach in a small group environment. At the least, though, law schools could make sure that students have some small class experiences that emphasize small group collaboration. In addition, using small groups in larger classes could likewise replicate this kind of experience. If, from these experiences, women are armed with the knowledge and skills they need to hit the ground running at law firms, they will feel and be more competent and confident.

C. The Role of the Courts

There is little doubt that women lawyers have not been very successful as plaintiffs in courts. This and fear of retaliation from the legal community¹¹⁰ has led some women lawyers to abandon the courts altogether in seeking relief.¹¹¹ As one commentator has argued, women lawyers "have rejected the viability of the law as a means of personal advocacy and are instead using blogging—an

WOMEN & L. 357 (2002).

105. See Ayers, *supra* note 28, at 92-96.

106. *Id.* at 97.

107. *Id.* at 98.

108. *Id.*

109. *Id.* at 99.

110. See French, *supra* note 38, at 212; Smith, *supra* note 51, at 807-08. In one telling lawsuit, women law students challenging the employment practices of a law firm sued as "Does" to avoid identification. *S. Methodist Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707 (5th Cir. 1979).

111. Stein, *supra* note 92, at 372-73 (suggesting that women lawyers have abandoned courts as a means to social change).

alternative, informal, and often anonymous form of engagement—to advocate for their rights and interests in the workplace.”¹¹² While blogging is one way to raise awareness and advocate for the rights of women lawyers, I’m reluctant to give up on the courts. Case law tells powerful stories;¹¹³ women lawyers should not give up on participating in creating these stories without a fight.

It appears that judges’ deference to law firm decisionmakers is a significant problem. Judges need to look at Title VII sex discrimination cases involving women lawyers more closely and critically. One commentator has suggested that employers should carry the burden of persuasion to demonstrate that their decisionmaking process is “neither arbitrary nor overly subjective.”¹¹⁴ To encourage law firms to develop more objective standards by which to assess the performance of women lawyers, law firms that adopted objective systems of evaluation would receive a more deferential standard under Title VII.¹¹⁵ This commentator suggested several factors that courts could use in deciding whether a law firm has adopted an objective system, including its efforts to eliminate gender stereotyping at the firm, whether it monitored the distribution of work assignments, whether it limited evaluations to persons truly familiar with the attorney’s work, and whether it took steps to eliminate vagueness in the evaluation process.¹¹⁶ Indeed, the American Bar Association has recognized difficulties for women attorneys inherent in the evaluation process and has suggested improvements in the evaluation systems that law firms use.¹¹⁷ These are some good suggestions.

Another interesting proposal is aimed more at lawyers who represent plaintiffs in these cases. One commentator has suggested that plaintiffs use expert witnesses to help judges and jurors alike understand how unconscious forms of bias as well as stereotyping might lead to the type of more subtle

112. *Id.* at 361. One commentator proposed another interesting proposal to improve the partnership chances of women lawyers—the use of SEC-type disclosures regarding law firms’ systems of evaluating associates for partnership. *See Grand, supra* note 56, at 407-10.

113. As Linda Hamilton Krieger and Susan Fiske put well,

Although civil litigation is in many ways highly technical, at the end of the day, lawsuits tell stories. Because judicial opinions incorporate popular, taken-for-granted assumptions about the common nature of things, they function as a society’s core stories; they offer an interpretation of experience and provide the participants of future lawsuits a narrative comprising a set of easily recognized plots, symbols, themes, and characters.

Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CAL. L. REV. 997, 1024 (2006).

114. Baron, *supra* note 55, at 309.

115. *See id.* at 309-10.

116. *Id.* at 311-13.

117. *See generally* JOAN C. WILLIAMS & CONSUELA A. PINTO, AM. BAR ASS’N COMM’N ON WOMEN IN THE PROFESSION, FAIR MEASURE: TOWARD EFFECTIVE ATTORNEY EVALUATIONS (2d ed. 2008).

discrimination that women lawyers experience.¹¹⁸ Thus, plaintiffs' lawyers in these cases should use creative strategies to help factfinders understand the significance of evidence of bias—such as Ezold's assigning partner's statements that she would have a hard time at the firm because she was a woman without an Ivy League degree. However, without buy-in from the courts that this type of evidence reveals something about the attitudes of the firm about women and the courts' questioning of subjective criteria, little will change.

CONCLUSION

Women lawyers continue to struggle in large law firms in the United States. This persists even after years of being close to (and some years more than) 50% of law school graduates. Law firms have been remarkably resistant to real change that will have a significant effect on the success of women lawyers. Yet Title VII of the Civil Rights Act of 1964 has prohibited sex discrimination for more than forty years now. Title VII has not proven to be as helpful to the prosperity of women lawyers as one might expect. There are a variety of reasons for this, but one significant problem is the subjective nature of law firm promotion processes and the courts' unwillingness to subject the processes to real scrutiny. For women to really succeed in this environment, change will have to come on multiple fronts. This essay discusses three of those fronts—law firms, law schools, and the courts. This essay is the just the beginning of the discussion, however. Convincing these three differing entities that change is necessary and, indeed, in the best interest of their firms, schools and institutional authority, will have to wait for another day.

118. See Lee, *supra* note 52, at 500-01.