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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 Comment.

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COMMENTARY

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

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I. INTRODUCTION

In 1949, India Edwards, executive director of the Women's Division of the Democratic National Committee, buttonholed President Harry Truman and lobbied fiercely for a woman to be appointed to fill at least one of the vacancies on the United States Supreme Court.[1] President Truman seemed amenable to the idea,[2] but when the dust settled, the nominations went to Tom C. Clark and Sherman Minton.[3] Apparently, President Truman deferred to the sentiments of the Chief Justice and his colleagues, who had complained that a woman on the Court would prevent them from taking off their robes, putting up their feet, and discussing cases the way they always had in the past.[4]

The law firm, much like the Justices' chamber, has long been a symbol of the power and prestige of the legal profession.[5] Unfortu-

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1. *E.g.*, KAREN BERGER MORELLO, THE INVISIBLE BAR 234–35 (1986); JEANETTE E. TUVE, FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN 163 (1984) (quoting I. EDWARDS, PULLING NO PUNCHES; MEMOIRS OF A WOMAN IN POLITICS 171-72 (1977)); Beverly B. Cook, *Women As Supreme Court Candidates: From Florence Allen to Sandra Day O'Connor*, 65 JUDICATURE 314, 325 (1982). The two vacancies were created by the deaths of Justice Frank Murphy and Justice Wiley Blount Rutledge. WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 87 (1987).

2. *See* JEANETTE E. TUVE, FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN 163 (1984) (stating that President Truman approved of proposed candidate, Judge Florence Allen, who was often considered one of most qualified candidates ever available for Supreme Court seat); *see also* KAREN BERGER MORELLO, THE INVISIBLE BAR 235 (1986) (opining that Judge Allen would have been appointed except for her sex); Beverly B. Cook, *Women As Supreme Court Candidates: From Florence Allen to Sandra Day O'Connor*, 65 JUDICATURE 319-21 (1982) (asserting that Florence Allen held higher national reputation, higher status of judicial service, and broader scholastic and professional background than Sandra Day O'Connor).

3. JEANETTE E. TUVE, FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN 164 (1984); WILLIAM H. REHNQUIST, THE SUPREME COURT: HOW IT WAS, HOW IT IS 87–88 (1987).

4. *See* KAREN BERGER MORELLO, THE INVISIBLE BAR 235 (1986) (reporting Truman's conversation with India Edwards in which he described Justices' objections); JEANETTE E. TUVE, FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN 164 (1984) (quoting India Edwards's memoirs); Beverly B. Cook, *Women As Supreme Court Candidates: From Florence Allen to Sandra Day O'Connor*, 65 JUDICATURE 314, 325 (1982) (indicating that Justices in 1949 were opposed to appointment of woman). India Edwards also complained that she was "certain that the old line about there being no sanitary arrangements for a female Justice was also included in their reasons." JEANETTE E. TUVE, FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN 164 (1984).

5. *See, e.g.*, CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 176 (2d ed. 1993) (asserting that large law firms essentially "make" law); JOHN HAGAN & FIONA KAY, GENDER IN PRACTICE: A STUDY OF LAWYERS' LIVES 73 (1995) (observing that becoming partner in

nately, women attorneys through the years have found that the decisionmakers in law firms often hold views similar to those of the Truman-era Justices.[6] In fact, the earliest decisions of the United States Supreme Court to confront the subject of women in the legal profession seem to have colored the attitudes of law firms up to the present day.[7] While it cannot be denied that the Supreme Court has profoundly influenced the struggle to eradicate the lingering effects of gender discrimination[8] in modern law firms, the Court's decisions nonetheless suggest a reluctance to lead the tide of social change.[9]

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law firm is often most important event in lawyer's professional life); ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM 231 (1988) (arguing that law firm is embodiment of power in legal system); ERWIN O. SMIGEL, THE WALL STREET LAWYER 7 (1969) (observing that practices of large law firms gradually become practices of law itself); JAMES B. STEWART, THE PARTNERS: INSIDE AMERICA'S MOST POWERFUL LAW FIRMS 15-17 (1983) (noting that elite firms carry tradition and permanence of law); S. Elizabeth Foster, Comment, *The Glass Ceiling in the Legal Profession: Why Do Law Firms Still Have So Few Female Partners?*, 42 UCLA L. REV. 1631, 1636 (1995) (determining that "position of greatest power, prestige and economic reward" is that of law firm partner).

6. *See, e.g.*, CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 107 (2d ed. 1993) (reporting that women attorneys make many employers and clients nervous); Joan E. Baker, *Employment Discrimination Against Women*, 59 A.B.A. J. 1029, 1031 (1973) (commenting on law firms' fear that women cannot perform competently or that women will be offensive to clients or wives of male partners); Beatrice Dinerman, *Sex Discrimination in the Legal Profession*, 55 A.B.A. J. 951, 951 (1969) (observing that law firms are suspect of dedication and demeanor of women attorneys); Doris L. Sassower, *Women in the Law: The Second Hundred Years*, 57 A.B.A. J. 329, 332 (1971) (reporting that law firms have been known to tell women they are not wanted or that they cannot do same work as men); Patricia M. Wald, *Women in the Law: Stage Two*, 52 UMKC L. REV. 45, 47 (1983) (accusing law firms of fearing that women are not acceptable firm representatives).

7. *See* Bradwell v. Illinois, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (asserting that woman's nature makes her unfit for many occupations); *In re* Lockwood, 154 U.S. 116, 118 (1894) (holding that states may determine whether women are competent to practice law); *see also* Donald L. Hollowell, *Women and Equal Employment: From Romantic Paternalism to the 1964 Civil Rights Act*, 56 WOMEN LAW. J. 28, 29 (1970) (explaining that Supreme Court encouraged discrimination by "protecting" women).

8. Justice Ginsburg suggests "gender" is a better term than "sex" because it avoids any lurid connotations. Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 1. However, the Supreme Court uses the words interchangeably, and this Commentary follows that lead. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (stating that when gender is factor, decision has been made on basis of sex).

9. *See* Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 22 (noting Court prefers approaching such decisions on case by case basis rather than confront need for change in pervasive social policy).

The last quarter of this century, like the final quarter of the last century, has been a critical period of Supreme Court influence on the status of women in the legal profession generally and, in particular, in that most exclusive of all clubs, the law firm. Yet, despite significant gains by women in the legal profession, numerous obstacles still remain. Specifically, while the number of women enrolling in law schools and practicing in private law firms has increased dramatically, women remain seriously underrepresented in the ranks of law firm partners.[10] This last, and perhaps most important, vestige of bias should not be tolerated, especially in a profession that is entrusted with promoting and protecting the system of justice in America.[11]

This Commentary examines the effect of Supreme Court decisions on sex discrimination in the legal profession. Part II presents a historical overview of women's struggle to gain access to law schools and admission to the bar. Part III describes changes in law firm employment practices, and Part IV discusses Supreme Court decisions involving discrimination in partnership decisions of professional firms. Part V concludes that while the Supreme Court has prohibited the most overt forms of sex discrimination in professional partnership decisions, subtle and unconscious bias still exists in the legal profession.

II. HISTORICAL OVERVIEW

A. *Women's Admission to the Bar*

The rapidly increasing number of women entering the legal field is a relatively recent phenomenon.[12] Unbeknown to many, how-

10. *See* A.B.A. COMM'N ON WOMEN IN THE PROF., WOMEN IN THE LAW: A LOOK AT THE NUMBERS 26 (1995) (reporting that "women continued to be seriously underrepresented among law firm partners in all age groups in 1991").

11. *See* Mark L. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners*, 46 HASTINGS L.J. 17, 79 (1994) (observing that law firm partners represent justice system).

12. A.B.A. COMM'N ON WOMEN IN THE PROF., WOMEN IN THE LAW: A LOOK AT THE NUMBERS 8 (1995) (explaining that female lawyers have increased in number from 3% of legal population in 1960 to 13% in 1985, and are expected to be 23% in 1995); Darrell Jordan, *Just a Little Perspective, Please*, 53 TEX. B.J. 8, 8 (1990) (reporting that figures from 1970 show that only 3% of lawyers were women). In 1980, 62.7% of all women in the legal profession had begun practice between 1975 and 1979. BARBARA A. CURRAN ET AL., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S 10 (1985).

ever, women have participated in legal proceedings to some extent since colonial times. Margaret Brent is believed to be the first woman formally allowed to practice law in the American colonies.[13] In 1648, while serving as executor for the estate of Governor Calvert, Lord Proprietor of Maryland, Brent was declared by the provincial court of Maryland to be "his Lordship's attorney."[14] Following the lead of Margaret Brent, a number of other women also appeared before the early courts of this country, including the newly-formed Supreme Court, primarily on behalf of their own personal causes.[15] Unfortunately, it is impossible to estimate the exact number of these women lawyers who practiced in the early years of the new nation, primarily because practice at the local level did not always require admission to the state bar.[16]

1. Breaking the Barrier in State Court

Although several females "broke the barrier" and practiced the law early in U.S. history, women next faced the significant obstacle of obtaining formal recognition as practicing attorneys by the various state laws. Their early efforts met with mixed results. On the positive side, the first woman lawyer in the United States to be

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13. KAREN BERGER MORELLO, THE INVISIBLE BAR 5 (1986); *see* Kathleen E. Lazarou, *"Fettered Portias": Obstacles Facing Nineteenth-Century Women Lawyers*, WOMEN LAW. J., Winter 1978, at 21, 21.

14. KAREN BERGER MORELLO, THE INVISIBLE BAR 8 (1986); Kathleen E. Lazarou, *"Fettered Portias": Obstacles Facing Nineteenth Century Women Lawyers*, WOMEN LAW. J., Winter 1978, at 21, 22 (stating that Margaret Brent was admitted to court for Lord Proprietor of Maryland). One contemporary newspaper reported that Brent had a habit of calling for a jury trial and paying those jurors out of her own court costs when she felt that was the proper course of action for her client. KAREN BERGER MORELLO, THE INVISIBLE BAR 21 (1986).

15. *See* KAREN BERGER MORELLO, THE INVISIBLE BAR 8 (1986) (noting that women pled cases in colonial courts, including Elizabeth Freeman, who won her own release from slavery); Linda Grant DePauw, *Women and the Law: The Colonial Period* (observing that colonial courts ignored common law, allowing women to act on their own behalf and as agents for their husbands), *in* WOMEN, THE LAW, AND THE CONSTITUTION: MAJOR HISTORICAL INTERPRETATIONS 259, 262–63 (Kermit L. Hall ed., 1987).

16. KAREN BERGER MORELLO, THE INVISIBLE BAR 11 (1986). For example, an Iowa attorney, Mary Magoon, became prominent enough on the local level to rate mention in the *Chicago Legal News* without ever being listed as a member of the Iowa Bar. *Id.* This distinction is probably not as surprising as it sounds since Myra Bradwell, an avid champion of women in the legal profession, was creator and publisher of the *Chicago Legal News*. *See* Carol Sanger, *Curriculum Vitae (Feminae): Biography and Early American Women Lawyers*, 46 STAN. L. REV. 1245, 1259–60 (1994) (book review) (explaining that Illinois did not allow women to become members of bar until 1872).

formally admitted to the practice of law as a member of a state bar was Arabella A. Mansfield.[17] Her license was approved by Justice Francis Springer of the Iowa Supreme Court in 1869 despite an Iowa admissions statute that limited applications to "any white male person."[18] A majority of state courts followed Iowa in admitting women to the bar, if not without some protest, at least without protracted battle.[19]

Hopeful female attorneys in many other states, however, were not greeted with such encouragement. For example, in the same year that Belle Mansfield was welcomed in Iowa, Myra Bradwell applied for admission to the State Bar of Illinois.[20] The Illinois bar admissions statute, unlike the Iowa statute, did not refer specifically to males, but to "persons," although the pronouns used in various phrases were masculine.[21] Despite this arguably gender-neutral language, Bradwell received a polite letter from the clerk of the Illinois Supreme Court informing her that, because a married woman had no legal right to contract in her own name,[22] she

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17. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 49 (2d ed. 1993); KAREN BERGER MORELLO, THE INVISIBLE BAR 11 (1986); BETSY COVINGTON SMITH, BREAKTHROUGH: WOMEN IN LAW 2 (1984); Barbara Allen Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 ARIZ. L. REV. 673, 698 n.134 (1988); Louis A. Haselmayer, *Belle A. Mansfield*, 55 WOMEN LAW. J. 46, 46 (1969); Shirley M. Hufstedler, *Crinolines, Courts and Cleavers*, 55 WOMEN LAW. J. 136, 136 (1969); Kathleen E. Lazarou, *"Fettered Portias": Obstacles Facing Nineteenth-Century Women Lawyers*, WOMEN LAW. J., Winter 1978, at 21, 22.

18. KAREN BERGER MORELLO, THE INVISIBLE BAR 12 (1986); Louis A. Haselmayer, *Belle A. Mansfield*, 55 WOMEN LAW. J. 46, 47 (1969); Kathleen E. Lazarou, *"Fettered Portias": Obstacles Facing Nineteenth Century Women Lawyers*, WOMEN LAW. J., Winter 1978, at 21, 22.

19. Kathleen E. Lazarou, *"Fettered Portias": Obstacles Facing Nineteenth Century Women Lawyers*, WOMEN LAW. J., Winter 1978, at 21, 28 n.23. Those states included Iowa, Missouri, Michigan, Utah, District of Columbia, Maine, Ohio, Wisconsin, Indiana, Kansas, Connecticut, Nebraska, and the Washington Territory. *Id.*

20. KAREN BERGER MORELLO, THE INVISIBLE BAR 14 (1986); Shirley M. Hufstedler, *Crinolines, Courts and Cleavers*, 55 WOMEN LAW. J. 136, 139 (1969); Kathleen E. Lazarou, *"Fettered Portias": Obstacles Facing Nineteenth Century Women Lawyers*, WOMEN LAW. J., Winter 1978, at 21, 23. For an in-depth review of Myra Bradwell's contributions to the promotion of women's issues, particularly in the legal profession, *see* Jane M. Friedman, *Myra Bradwell: On Defying the Creator and Becoming a Lawyer*, 28 VAL. U. L. REV. 1287 (1994).

21. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 131 (1872) (quoting from Illinois statute that "no person shall be admitted to practice as an attorney . . . without having previously obtained a license for that purpose").

22. KAREN BERGER MORELLO, THE INVISIBLE BAR 16–17 (1986). *Feme covert*, or the law of coverture, dictated that once a woman married, she lost all capacity to act on her own behalf in legal matters. Linda Grant DePauw, *Women and the Law: The Colonial*

could not be admitted to the practice of law.[23] Bradwell immediately petitioned the Illinois court for reconsideration while attacking its decision publicly, by publishing a protest letter in the local newspapers.[24] When the Illinois Supreme Court handed down a formal opinion, Bradwell was again denied admission.[25] This time the court simply stated that she was a woman, and the sphere of law belonged exclusively to men.[26]

Undaunted, Bradwell appealed to the United States Supreme Court, arguing for equal treatment under the Fourteenth Amendment of the United States Constitution.[27] Again, it was not to be. A majority of the Justices ruled that the right to practice law was not one of the privileges and immunities protected by the Fourteenth Amendment,[28] and, thus, found that the Illinois decision was not unconstitutional. Chief Justice Chase dissented without opinion,[29] but Justice Bradley, while agreeing with the majority's holding, felt the need to express further reasons for Bradwell's re-

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Period (describing how legal existence of woman disappeared upon marriage), *in* WOMEN, THE LAW, AND THE CONSTITUTION: MAJOR HISTORICAL INTERPRETATIONS 259, 260-61 (Kermit L. Hall ed., 1987); Wendy D. Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 176 (1982) (stating that upon marriage, woman's legal rights merged into her husband's rights, leaving wife civilly dead).

23. KAREN BERGER MORELLO, THE INVISIBLE BAR 16 (1986).

24. *Id.* at 17.

25. *In re* Bradwell, 55 Ill. 535, 541–42 (1869) (stating that court found itself "constrained" to deny application).

26. *Id.* at 539. Since women attorneys were unknown in England, the Illinois Supreme Court held that the Illinois legislature could not have possibly contemplated such an astonishing development in that state. *Id.* at 538-39. Bradwell could not resist writing an editorial which predicted that English barristers would soon be as used to women attorneys practicing beside them as they were to having a "queen rule over them." KAREN BERGER MORELLO, THE INVISIBLE BAR 18 (1986).

27. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 138 (1872).

28. *Id.* at 139. This ruling was consistent with the *Slaughter-House Cases* decided in the same term. The Court held that restrictions on certain trades by the states were not violations of the Constitution because an occupation was not one of the rights or privileges that the Fourteenth Amendment was designed to protect. *Slaughter-House Cases*, 83 U.S. 36, 80-81 (1982). But since *Bradwell* was pending at the time the *Slaughter-House Cases* were decided, it has been suggested that the Court was influenced by the possibility that any other decision would effectively broaden the status of women. Joan Hoff Wilson, *The Legal Status of Women in the Late Nineteenth and Early Twentieth Centuries*, *in* WOMEN, THE LAW, AND THE CONSTITUTION: MAJOR HISTORICAL INTERPRETATIONS 357, 361 (Kermit L. Hall ed., 1987).

29. *Bradwell*, 83 U.S. at 142. It is an interesting side note that Chief Justice Chase was a distant relative of Bradwell. Carol Sanger, *Curriculum Vitae (Feminae): Biography and Early American Women Lawyers*, 46 STAN. L. REV. 1245, 1258–59 (1994).

jection.[30] Justice Bradley's concurrence gave the *Bradwell* decision its now infamous "law of the Creator" label.[31]

Justice Bradley reasoned that women were unfit for many occupations, especially those, like the law, which required confidence and responsibility.[32] He viewed the common law restrictions giving a husband sole legal control over his wife's affairs and property as a valid means to ensure that women fulfilled their "paramount destiny . . . of wife and mother."[33] Any woman who remained unmarried and thereby legally qualified to contract in her own name was obviously an exception, and, according to Justice Bradley, the law could not be based upon such exceptions.[34]

Technically, the *Bradwell* opinion, rendered in December of 1872, was moot even before issued. The Illinois legislature had revised the state's admission statute earlier in 1872 to allow the entry of women, and Alta Hulett already had become the first woman attorney licensed in that state.[35] Regardless, a number of state

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30. *Bradwell*, 83 U.S. at 139-42 (Bradley, J., concurring) (writing to detail his disagreement with majority's reasons). Justices Field and Swayne joined Justice Bradley's concurrence. *Id.* at 142.

31. *Id.* at 141 (Bradley, J., concurring); *see* Doris L. Sassower, *Women, Power, and the Law*, 62 A.B.A. J. 613, 613 (1976) (explaining that Justice Bradley managed to enshrine prejudice as "the law of the Creator").

32. *Bradwell*, 83 U.S. at 141–42 (1872) (Bradley, J., concurring). Justice Bradley's opinion in *Bradwell* was diametrically opposed to his dissent in the *Slaughter-House Cases*. In that dissent, he argued that a "law which prohibits a large class of citizens from adopting a lawful employment" was depriving them of constitutionally protected rights. *Slaughter-House Cases*, 83 U.S. at 122 (Bradley, J. dissenting). Obviously, Justice Bradley did not equate citizens with women. Joan Hoff Wilson, *The Legal Status of Women in the Late Nineteenth and Early Twentieth Centuries*, *in* WOMEN, THE LAW, AND THE CONSTITUTION: MAJOR HISTORICAL INTERPRETATIONS 357, 362 (Kermit L. Hall ed., 1987). Myra Bradwell was quick to challenge the inconsistency in Justice Bradley's two opinions. Jane M. Friedman, *Myra Bradwell: On Defying the Creator and Becoming a Lawyer*, 28 VAL. U. L. REV. 1287, 1299 (1994). In contrast, although she obviously disagreed with the holding of the majority in her case, Bradwell praised Justice Miller for having confined his analysis "strictly to the points at issue" and resisting the temptation to espouse his personal views on "women's rights." *Id.*

33. *Bradwell*, 83 U.S. at 141.

34. *Id.*; *see also* Shirley M. Hufstedler, *Crinolines, Courts and Cleavers*, 55 WOMEN LAW. J. 136, 140–41 (1969) (explaining that Justice Bradley confused natural law with man-made myth).

35. KAREN BERGER MORELLO, THE INVISIBLE BAR 21 (1986); Jane M. Friedman, *Myra Bradwell: On Defying the Creator and Becoming a Lawyer*, 28 VAL. U. L. REV. 1287, 1301 (1994). Myra Bradwell never reapplied for admission to the bar. Instead, she devoted herself to her journalistic endeavors at the *Chicago Legal News*, one of the foremost legal publications of the day. Barbara Allen Babcock, *Clara Shortridge Foltz: "First Wo-*

courts followed Justice Bradley's lead. Chief Justice Ryan of the Wisconsin Supreme Court, for example, described the rigors of law practice as so obscene and shocking that to expose a woman to such horrors would endanger not only her purity, but the public's sense of decency as well.[36]

Oddly enough, many state legislatures of that period proved more progressive than their courts. In several states, as swiftly as the courts rejected women applicants, the legislatures enacted remedial laws to ensure women were admitted to the bar.[37] Moreover, at least one member of the judiciary, Chief Justice John D. Park of the Supreme Court of Connecticut, was more attuned to the legislative thinking than some of his brethren. He rejected the notion that statutes must be interpreted to exclude women from practice merely because the notion of a woman attorney would have been unthinkable at the time the statute was passed.[38] Specifically, Chief Justice Park questioned:

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man," 30 ARIZ. L. REV. 673, 702 (1988); Jane M. Friedman, *Myra Bradwell: On Defying the Creator and Becoming a Lawyer*, 28 VAL. U. L. REV. 1302–03 (1994); Carol Sanger, *Curriculum Vitae (Feminae): Biography and Early American Women Lawyers*, 46 STAN. L. REV. 1245, 1260 (1994). James Bradwell reapplied for his wife's admission to the bar in 1890, when Myra was terminally ill. The Illinois Supreme Court responded by admitting her nunc pro tunc as of 1869, the date of her original application. *Id.* at 1262; Barbara Allen Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 ARIZ. L. REV. 673, 703 n.160 (1988).

36. *In re* Goodell, 39 Wisc. 232, 245–46 (1875). Justice Ryan's opinion has been described as making Justice Bradley's position in *Bradwell* sound progressive. Barbara Allen Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 ARIZ. L. REV. 673, 703–04 (1988).

37. Kathleen E. Lazarou, *"Fettered Portias": Obstacles Facing Nineteenth Century Women Lawyers*, WOMEN LAW. J., Winter 1978, at 21, 27 (indicating that just as Illinois legislature had revised its bar admission statute in year following Myra Bradwell's rejection, Wisconsin wasted no time in taking legislative action). In 1879, when Lavinia Goodell was admitted by the Wisconsin Supreme Court under the new statute, Justice Ryan dissented. KAREN BERGER MORELLO, THE INVISIBLE BAR 26 (1986). Lelia J. Robinson was denied admission to the state bar by the Massachusetts Supreme Court only to be admitted under a new statute the following year. *See* Robinson's Case, 131 Mass. 376, 382–83 (1881) (concluding that court may not infer that women are included in statute simply because legislature uses term "person" rather than "male"); *see also* KAREN BERGER MORELLO, THE INVISIBLE BAR 37 (1986) (reporting that first woman admitted in Massachusetts was Lelia Robinson in 1882); Kathleen E. Lazarou, *"Fettered Portias": Obstacles Facing Nineteenth Century Women Lawyers*, WOMEN LAW. J., Winter 1978, at 21, 27 (explaining that Massachusetts law was revised in 1882 to admit women to state bar). Other states that revised their admissions statutes to overrule court decisions were California, Minnesota, Oregon, Ohio, and New York. *Id.* at 28 n.25.

38. *In re* Hall, 50 Conn. 131, 132 (1881).

> [W]here shall we draw the line? All progress in social matters is gradual. We pass imperceptibly from a state of public opinion that utterly condemns some course of action to one that strongly approves it. . . . When the statute we are now considering was passed it probably never entered the mind of a single member of the Legislature that black men would ever be seeking for admission under it.[39]

If this statement offers any indication, then perhaps Justice Park could foresee that by the turn of the century, thirty-three of our now fifty states would admit women to the bar.[40]

2. Breaking the Barrier in Federal Court

While her colleagues did battle at the state level,[41] Belva Lockwood entered the fray in the federal courts. An increasingly active federal claims practice spurred Lockwood to apply for admission to the United States Court of Claims.[42] Her application was repeatedly denied,[43] even over the protests of her client.[44] Frustrated by the Court of Claims, Lockwood applied for admission before the Supreme Court of the United States in 1876.[45] She was convinced that the gender-neutral wording of the federal admission statute would support her acceptance.[46]

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39. *Id.*

40. *See* KAREN BERGER MORELLO, THE INVISIBLE BAR 37–38 (1986) (listing first woman admitted to bar of each state). The remaining states all admitted women to the bar by 1923, except Alaska, which did not do so until 1950. *Id.*

41. *Id.* at 31; *see* Kathleen E. Lazarou, *"Fettered Portias": Obstacles Facing Nineteenth-Century Women Lawyers*, WOMEN LAW. J., Winter 1978, at 11–31 (describing women's struggle for admissions to bar in Iowa, Illinois, Wisconsin and Oregon).

42. KAREN BERGER MORELLO, THE INVISIBLE BAR 31 (1986); Kathleen E. Lazarou, *"Fettered Portias": Obstacles Facing Nineteenth Century Women Lawyers*, WOMEN LAW. J., Winter 1978, at 21, 25–26.

43. Robinson's Case, 131 Mass. 376, 383 (1881) (quoting from *Lockwood's Case*, 9 Ct. of Claims 346, 356 (1873)) (stating that "a woman is without legal capacity to take the office of an attorney"). Of her running battle with the Court of Claims, Lockwood would later say, "[f]or the first time in my life I began to realize that it was a crime to be a woman, but it was too late to put in a denial, so I pled guilty." KAREN BERGER MORELLO, THE INVISIBLE BAR 31-32 (1986).

44. KAREN BERGER MORELLO, THE INVISIBLE BAR 33 (1986). Lockwood's hapless client was threatened with contempt and told to find himself a "capable lawyer." *Id.*

45. Robinson's Case, 131 Mass. 376, 383 (1881) (detailing Lockwood's efforts seeking admittance to United States Supreme Court in October of 1876).

46. KAREN BERGER MORELLO, THE INVISIBLE BAR 32–33 (1986). The admission statute for the Supreme Court referred only to "any attorney" in good standing. *Id.*

Chief Justice Waite presented the opinion of the Court after just one week of deliberation.[47] The Court noted that a woman had never been admitted before the bar of England or the United States Supreme Court and, on that basis, ruled that Lockwood would not be the first until public opinion or legislation declared otherwise.[48] Outraged and armed with a petition signed by one hundred and fifty attorneys in the Washington, D.C., area, Lockwood lobbied Congress for just such legislation.[49] Two years later, President Rutherford B. Hayes signed into law a bill specifically providing for the admission of women attorneys before the federal courts.[50] Thereafter, Belva Lockwood became the first woman admitted to the federal bar and the first woman to argue before the Supreme Court.[51]

Lockwood's practice continued to grow and thrive. However, in 1894 she found herself in the all-too-familiar position of arguing before the United States Supreme Court for admission to the bar—this time to the State Bar of Virginia.[52] The Supreme Court of Virginia had denied Lockwood's application, notwithstanding language in Virginia's admission statute allowing "any person" who was already authorized to practice in any state or territory, including the District of Columbia, to practice in the Virginia courts.[53] Although its prior decisions denying Lockwood admission to the federal bar had been overturned by an act of Congress, the

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47. *Id.* at 33. The decision was rendered orally and was taken down in the record of the Court, but was never officially published. *See Robinson's Case*, 131 Mass. at 383 (describing Supreme Court opinion).

48. Robinson's Case, 131 Mass. at 383; KAREN BERGER MORELLO, THE INVISIBLE BAR 33 (1986).

49. KAREN BERGER MORELLO, THE INVISIBLE BAR 34–35 (1986); *see* Kathleen E. Lazarou, *"Fettered Portias": Obstacles Facing Nineteenth Century Women Lawyers*, WOMEN LAW. J., Winter 1978, at 21, 26 (reporting that Lockwood spent three years lobbying Congress).

50. KAREN BERGER MORELLO, THE INVISIBLE BAR 35 (1986); Kathleen E. Lazarou, *"Fettered Portias": Obstacles Facing Nineteenth Century Women Lawyers*, WOMEN LAW. J., Winter 1978, at 21, 26; *see* CHARLES WARREN, 2 THE SUPREME COURT IN UNITED STATES HISTORY 550 n.1 (1935) (noting that Congress enacted legislation in 1879 admitting women to practice in federal courts).

51. KAREN BERGER MORELLO, THE INVISIBLE BAR 35 (1986); Barbara Allen Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 ARIZ. L. REV. 673, 705 (1988).

52. *See In re* Lockwood, 154 U.S. 116, 117 (1894) (asserting that Virginia's refusal to accept Lockwood's application violated Fourteenth Amendment).

53. *Id.* at 116.

Supreme Court followed *Bradwell v. Illinois*[54] and held that the federal government had no right to control state issuance of licenses to practice law.[55] If the Supreme Court of Virginia determined that "person," as construed in that state's statutes, meant "male," then Lockwood was bound by that interpretation.[56]

B. *Barriers to Legal Education*

1. Women's Admission to Law School

Not only have women struggled historically to gain admission to state bars, they have also faced similar obstacles when applying for law schools to attain their legal educations. In 1869, St. Louis Law School became the first law school to accept women.[57] The next year, Union College of Law in Chicago graduated the first woman to receive an accredited law degree.[58] In fact, like St. Louis Law School and Union College, a majority of the earliest law schools open to women were located in the Western and Midwestern states.[59] While a spirit of frontier independence may have distinguished these schools from their English-influenced counterparts in the East, a lack of male students was probably a more compelling reason to admit women.[60]

An early impetus toward admitting women to law schools is likely found in one of the few sexual discrimination suits to be

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54. 83 U.S. (16 Wall.) 130, 139 (1872) (holding that right to practice law in state is not among "privileges or immunities of citizens of the United States" protected by Fourteenth Amendment).

55. *Lockwood*, 154 U.S. at 117.

56. *Id.* at 118. Apparently Lockwood, or else the Virginia legislature, was not bound to the Supreme Court's interpretation. Lockwood became the first woman admitted to the bar in Virginia in 1894, the same year the decision was issued. KAREN BERGER MORELLO, THE INVISIBLE BAR 38 (1986).

57. KAREN BERGER MORELLO, THE INVISIBLE BAR 44 (1986). Today, the St. Louis Law School is known as Washington University Law School. Karen L. Tokarz, *A Tribute to the Nation's First Women Law Students*, 68 WASH. U. L.Q. 89, 89 (1990).

58. RONALD CHESTER, UNEQUAL ACCESS: WOMEN LAWYERS IN A CHANGING AMERICA 87 (1985). That woman's name was Ada Kepley. *Id.*; CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 50 (2d ed. 1993). Union College of Law is now known as Northwestern University School of Law.

59. Notably, the University of Michigan at Ann Arbor Law School, open to women in 1870, had by 1890 achieved the dubious honor of having graduated more female students than any other law school. KAREN BERGER MORELLO, THE INVISIBLE BAR 52 (1986).

60. KAREN BERGER MORELLO, THE INVISIBLE BAR 43 (1986).

brought against a law school, which arose in California in 1878.[61] Justice Serranus Clinton Hastings funded Hastings College of Law, a full-time, three-year school intended to help raise the standards of the California bar.[62] Clara Foltz and Laura DeForce Gordon both applied for admission.[63] When the Hastings Board of Trustees tabled their applications indefinitely, Foltz and Gordon took it upon themselves to attend class.[64] This action prompted the Board to establish a formal policy refusing the admittance of women, and both ladies were ejected from the school.[65]

Foltz and Gordon, unable to study law, began to practice it instead, and both women filed suit against Hastings College.[66] Hastings claimed that, as a privately-funded school, it was not subject to state control of its admissions policy.[67] Foltz and Gordon pointed out that the California legislature had authorized Hastings as a branch of the University of California, and argued that as such the school could not exclude an entire class of citizens.[68] The California Supreme Court agreed with the two women and ruled that Hastings could not establish a discriminatory admissions policy in-

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61. *See* Mortimer D. Schwartz et al., *Clara Shortridge Foltz: Pioneer in the Law*, 27 HASTINGS L.J. 545, 552 (1976) (detailing Clara Foltz's attempt to enter Hastings College of Law because she believed formal education would enhance her practice).

62. KAREN BERGER MORELLO, THE INVISIBLE BAR 57 (1986). Hastings was intended to be the Western equivalent of the prestigious Eastern law schools. *Id.*

63. Mortimer D. Schwartz et al., *Clara Shortridge Foltz: Pioneer in the Law*, 27 HASTINGS L.J. 545, 552 (1976).

64. KAREN BERGER MORELLO, THE INVISIBLE BAR 60 (1986); Mortimer D. Schwartz et al., *Clara Shortridge Foltz: Pioneer in the Law*, 27 HASTINGS L.J. 545, 551 (1976).

65. KAREN BERGER MORELLO, THE INVISIBLE BAR 60 (1986); Mortimer D. Schwartz et al., *Clara Shortridge Foltz: Pioneer in the Law*, 27 HASTINGS L.J. 545, 551 (1976). The Board must have been quite alarmed because it took only three days before the women were banished. Barbara Allen Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 ARIZ. U. L. REV. 673, 700 (1988).

66. KAREN BERGER MORELLO, THE INVISIBLE BAR 60–61 (1986). Foltz filed with the Fourth District Court in San Francisco while Gordon filed directly with the Supreme Court of California. *Id.* at 61. The two suits were consolidated for trial and pursued under Clara Foltz's name. *Id.*; *see* Foltz v. Hoge, 54 Cal. 28, 29 (1879) (considering action for mandamus to compel directors of Hastings College of Law to admit women). For a detailed account of the legal wrangling, arguments, and even the attire of the parties in *Foltz*, *see* Barbara Allen Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 ARIZ. L. REV. 673, 705–15 (1988).

67. *Foltz*, 54 Cal. at 29 (arguing that Hastings's directors may be presumed to best understand and promote school's interests).

68. *Id.* at 30.

consistent with that of the university system.[69] Clara Foltz and Laura DeForce Gordon went on to attend classes even though each had already established a reputation as a skilled advocate.[70]

In light of the *Foltz* decision, and bowing to the tide of social change, law schools on the East Coast reluctantly began opening their doors to female law students. By 1900, a number of Eastern schools began to admit women, some more readily than others. Columbia succumbed to public pressure in 1928,[71] while Harvard remained steadfastly all male until 1950.[72] A 1922 Harvard graduate pled her case directly to Harvard's Dean Harlan Stone, later to become Chief Justice of the United States Supreme Court, and asked why Harvard refused to admit women. The Dean succinctly replied: "We don't because we don't. . . ."[73] Notre Dame began to admit women in 1969, while Washington and Lee waited until 1972.[74] Also in the early 1970s, the American Association of Law Schools adopted an equal opportunity policy regarding women seeking admission to its member schools.[75] In 1973, the American Bar Association took its first major stand on equality of women's admissions, adding a provision prohibiting sexual discrimination to its accreditation standards.[76]

Despite significant inroads, admission policies continued to be much more liberal in theory than practice.[77] Even though law schools were technically open to women after the turn of the cen-

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69. *Id.* at 35 (holding that same state policy that opens doors of university to women applies equally to college of law).

70. KAREN BERGER MORELLO, THE INVISIBLE BAR 64 (1986); Mortimer D. Schwartz et al., *Clara Shortridge Foltz: Pioneer in the Law*, 27 HASTINGS L.J. 545, 555 (1976).

71. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 50 (2d ed. 1993).

72. *Id.*

73. *Id.* at 51.

74. *Id.* at 50.

75. Donna Fossum, *Women in the Legal Profession: A Progress Report*, 67 A.B.A. J. 578, 580 (1981).

76. *Id.*

77. *See* Beatrice Dinerman, *Sex Discrimination in the Legal Profession*, 55 A.B.A. J. 951, 951 (1969) (reporting that some schools admit that women are more closely scrutinized than men for ability and motivation in admission process); Donna Fossum, *Women in the Legal Profession: A Progress Report*, 67 A.B.A. J. 578, 579 (1981) (noting that women comprised minute fraction of law school classes). *Compare* Virginia G. Drachman, *The New Woman Lawyer and the Challenge of Sexual Equality in Early Twentieth Century America*, 28 IND. L. REV. 227, 227 (1995) (reporting that by 1920, all but twenty-seven law schools admitted women), *with* CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 51 (2d ed. 1993) (noting that law classes with only two or three women were common).

tury, they remained inaccessible to most.[78] Proportions of women in law school remained at a constant three to four percent throughout the 1950s and 1960s.[79] Even New York University, once criticized for its policy of encouraging women to enter law, became as conservative as other elite schools.[80] The prevailing attitude was that a woman in law school was usurping the rightful place of a man.[81] In response to this attitude and other barriers to increased enrollment, beginning in the early 1970s, women students and alumni formed groups to actively solicit female applicants.[82] This activity has contributed to an explosion of women in the law school population in the last twenty-five years.[83] Between 1969 and 1973, total law school applications tripled while, in comparison, female

78. *See* CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 52–53 (2d ed. 1993) (indicating that percentages of women at Harvard remained below 5% even though applications "skyrocketed"); Donna Fossum, *Women in the Legal Profession: A Progress Report*, 67 A.B.A. J. 578, 579 (1981) (asserting that low quotas and higher standards for female applicants have kept women out of law schools).

79. *See* CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 53 (2d ed. 1993) (reporting that 1968 was first year women's enrollment in law schools topped 5%).

80. *See* KAREN BERGER MORELLO, THE INVISIBLE BAR 85 (1986) (noting that post-World War II enrollment of women at New York University Law School returned to low levels of other urban schools through 1950's). One applicant was asked why she wanted a law degree if she already had children. *Id.*

81. *See* Doris L. Sassower, *Women in the Law: The Second Hundred Years*, 57 A.B.A. J. 329, 332 (1971) (reporting that women literally took men's places in law schools during years of Korean War); CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 53 (2d ed. 1993) (stating that percentage of women at Columbia rose from 4% to 10% and fell back to 4% when Korean conflict ended); Donna Fossum, *A Lawyer-Sociologist's View on Women's Progress in the Profession* (noting Korean War was only period prior to Vietnam conflict that women made up more than 4% of law school population), *in* WOMEN LAWYERS: PERSPECTIVES ON SUCCESS 247, 258 (Emily Couric ed., 1984). Dean Griswold of Harvard University hosted a yearly reception for incoming women where he placed them in a circle and asked each one why she was "at Harvard occupying the seat of a man." JILL ABRAMSON & BARBARA FRANKLIN, WHERE THEY ARE NOW: THE STORY OF THE WOMEN OF HARVARD LAW 1974, at 10 (1986).

82. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 56-57 (2d ed. 1993); Doris L. Sassower, *Women, Power, and the Law*, 62 A.B.A. J. 613, 615 (1976).

83. Because women have not benefited from the type of affirmative action programs that brought larger numbers of other minorities into law schools, these groups remain a primary source of recruitment. *See, e.g.*, CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 56–57 (2d ed. 1993) (writing that Women's Law Association at Harvard is given high marks for recruitment activity); KAREN BERGER MORELLO, THE INVISIBLE BAR 86 (1986) (explaining that Women's Rights committee of NYU worked for substantial proportions of women students); Shirley R. Bysiewicz, *Women Penetrating the Law*, TRIAL, Nov./Dec. 1973, at 27, 28 (reporting that women's groups at most schools fill active recruiting role).

applications increased fourteen times.[84] By 1995, women constituted approximately forty-four percent of all first-year law students.[85]

2. Barriers in the Classroom

If women had difficulty getting into law school, they had an equally difficult time getting through it. Often, their tiny numbers made them conspicuous and easy targets for both their male peers and male professors.[86] Many professors were convinced that women who attended law school never truly intended to practice law.[87] "Ladies' Day," a practice dedicated to singling out women students, existed in some schools into the late sixties.[88] Having

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84. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 56 (2d ed. 1993); Shirley R. Bysiewicz, *Women Penetrating the Law*, TRIAL, Nov./Dec. 1973, at 27, 27; *see* James P. White, *Is That Burgeoning Law School Enrollment Ending?*, 61 A.B.A. J. 202, 203–04 (1975) (reporting that even as total growth in law school populations declined in mid-seventies, enrollment of women continued to increase).

85. A.B.A. COMM'N ON WOMEN IN THE PROF., BASIC FACTS FROM WOMEN IN THE LAW: A LOOK AT THE NUMBERS 1 (1995); Darrell Jordan, *Just a Little Perspective, Please*, 53 TEX. B.J. 8, 8 (1990); Charles Kaufman, *Diversity—Then and Now: The Views of Some Who Led the Way*, 59 TEX. B.J. 876, 879 (1996). The criticism remains, however, that women's experiences in law school are tainted by lingering discrimination, including, among other things, the fact that law school faculties remain the bastion of white males. Valerie Fontaine, *Progress Report: Women and People of Color in Legal Education and the Legal Profession*, 6 HASTINGS WOMEN'S L.J. 27, 28, 30 (1995).

86. *See, e.g.*, JILL ABRAMSON & BARBARA FRANKLIN, WHERE THEY ARE NOW: THE STORY OF THE WOMEN OF HARVARD LAW 1974, at 7 (1986) (describing isolation as feeling like "drowning in a sea of men"); CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 61–62 (2d ed. 1993) (commenting that being one of only few women was exceedingly conspicuous); BETSY COVINGTON SMITH, BREAKTHROUGH: WOMEN IN LAW 4 (1984) (explaining that it was common knowledge that unspoken admission quotas preserved male dominated law school classes); Barbara Moses, *As Law Student: Drawings on the Bathroom Wall* (observing that rewards for "thinking like a man" made it difficult for few women students to band together for support), *in* WOMEN LAWYERS: PERSPECTIVES ON SUCCESS 233, 241 (Emily Couric ed., 1984).

87. *See, e.g.*, *Columbia Women's Practice*, WOMEN LAW. J., Winter 1950, at 33 (reporting that contrary to popular opinion, 70% of Columbia women law graduates remain in practice, comparing well with 77.5% of all law alumni who have "stuck to their briefs"); Beatrice Dinerman, *Sex Discrimination in the Legal Profession*, 55 A.B.A. J. 951, 953 (1969) (asserting that presumption that women are more likely to leave school or practice for marriage and motherhood is unsupported by facts); James J. White, *Women in the Law*, 65 MICH. L. REV. 1051, 1090 (1967) (analyzing statistical data which disproves common belief that there is vast difference between percentages of women and men who cease practicing law).

88. *E.g.*, JILL ABRAMSON & BARBARA FRANKLIN, WHERE THEY ARE NOW: THE STORY OF THE WOMEN OF HARVARD LAW 1974, at 11 (1986); CYNTHIA FUCHS EPSTEIN,

been ignored all year, women students would be called upon to recite on Ladies' Day, when the questions invariably fell into one of three categories: impossibly difficult, designed to embarrass, or so easy as to be humiliating.[89]

Even without harassment, the isolation felt in law school could be overwhelming to women.[90] The essence of law school learning to this day is discussion and communication. Professor Karl Llewellyn once expressed this idea when he told his students, "A lone wolf in law school is either a genius or an idiot."[91] Without the acceptance of their male counterparts, including professors, many female law students likely found themselves unwillingly relegated to this undesirable position of "lone wolf."

Of course, not all male students and professors actively contributed to the discrimination against women in the law schools.[92] Many female graduates note that some of their male classmates tried to be helpful and supportive.[93] Still, one of the most common

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WOMEN IN LAW 66–67 (2d ed. 1993); KAREN BERGER MORELLO, THE INVISIBLE BAR 103–04 (1986).

89. A Harvard graduate of 1967 recalled that some professors on Ladies' Day would very gently lead their female victims through the day's discussion. JILL ABRAMSON & BARBARA FRANKLIN, WHERE THEY ARE NOW: THE STORY OF THE WOMEN OF HARVARD LAW 1974, at 11 (1986). The point was to show the gentlemen of the class that if these "dumb women" could do it, then they certainly could. *Id.* The demise of Ladies' Day at Harvard was certainly quickened by the creative thinking of the women of the class of 1968. *Id.* Professor Barton Leach had chosen a property case for the women to recite in which the chattel at issue was ladies' underwear. *Id.* The women appeared in class dressed in black, with horn rim glasses and briefcases. *Id.* As they answered the final query, "What was the chose in question?", they opened up their briefcases and threw fancy lingerie at the class. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 67 (2d ed. 1993).

90. JILL ABRAMSON & BARBARA FRANKLIN, WHERE THEY ARE NOW: THE STORY OF THE WOMEN OF HARVARD LAW 1974, at 7 (1986); CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 61–62 (2d ed. 1993); BETSY COVINGTON SMITH, BREAKTHROUGH: WOMEN IN LAW 4 (1984); *see* Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1322 (1988) (describing surroundings at Yale Law School in 1984: "The pictures, the furniture, the male professor—all indicated that the place had always belonged to white men.").

91. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 61 (2d ed. 1993).

92. *See* KAREN BERGER MORELLO, THE INVISIBLE BAR 101 (1986) (describing shock of male graduate of Harvard when, in 1945, he witnessed Dean Pound eject woman from classroom, refusing to allow her to stay even though she was just visitor).

93. *See, e.g.*, CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 65 (2d ed. 1993) (reporting that male classmates were sometimes supportive); KAREN BERGER MORELLO, THE INVISIBLE BAR 97 (1986) (describing some professors as "unexpected friends" who lent support along way); Janet Taber et al., *Project: Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209,

complaints was, and continues to be, that men are not aware of their own unintentional discriminatory behavior.[94] Recent criticisms of law schools focus on these subtler forms of discrimination: patronizing attitudes, casebooks portraying women as frivolous or simpleminded, percentages of women faculty and administrators that lag far behind the numbers of female enrollment, and sexist comments and attitudes tolerated or ignored by men who would never think of expressing such comments or attitudes themselves.[95] Although the number of women in law school has increased dramatically, these more discrete forms of discrimination serve both as reminders of obstacles that have been overcome and as lingering barriers to the success of female law students.

1242–43 (1988) (reporting that differences in male and female satisfaction with law school were disappearing by 1986 when nearly 46% of students were female).

94. *See* CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 67 (2d ed. 1993) (reporting that Dean Robert McKay of New York University Law School acknowledged legal educators were prone to "unconscious sexism"); Robert B. McKay, *Women and the Liberation of Legal Education*, 57 WOMEN LAW. J. 139, 143 (1971) (admitting that New York University School of Law, which practices nondiscrimination, had still been guilty of unconscious sexism).

95. *See, e.g.*, Valerie Fontaine, *Progress Report: Women and People of Color in Legal Education and the Legal Profession*, 6 HASTINGS WOMEN'S L.J. 27, 28–30 (1995) (asserting that discrimination lingers in subtler forms); Ruth Bader Ginsburg, *The Progression of Women in the Law*, 28 VAL. U.L. REV. 1161, 1165–70 (1994) (advancing need for changes in law school curriculum to reflect women's issues and contributions); Charles Kaufman, *Diversity—Then and Now: The Views of Some Who Led the Way*, 59 TEX. B.J. 876, 878 (1996) (quoting St. Mary's University School of Law Dean Barbara Bader Aldave as saying that women are still underrepresented in upper echelons of law schools); Robert B. McKay, *Women and the Liberation of Legal Education*, 57 WOMEN LAW. J. 139, 143 (1971) (describing New York University School of Law faculty session with women students in which they were "sensitized" to many practices that were objectionable to women, but were recognized by faculty members only after being voiced by students); Debra Cassens Moss, *Would This Happen to a Man?*, A.B.A. J., June 1988, at 50, 53–54 (reporting that women students tend to be treated differently, including being interrupted more often and not listened to as intently); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1325–26 (1988) (describing women being either totally ignored or painstakingly scrutinized but never simply accepted). Women's participation in law school classes tends to be less than that of their male counterparts, however, why this discrepancy occurs is not clear. Theories include: (1) women are less comfortable speaking in public, (2) professors tend not to call on women, and (3) women do not feel compelled to dominate a discussion as much as men. Cynthia L. Rold, *Women and Law*, 1995 U. ILL. L. REV. 105, 107 (citing Janet Tabor et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1238 (1988)).

III. Law Firm Hiring: Getting in the Door

For those women who struggled their way through law school, finding a firm to hire them presented the next hurdle.[96] Many of the earlier state bars required some sort of clerk or apprenticeship experience before admission to the bar could be granted.[97] A few women had access to family political connections or were lucky enough to practice with a husband or brother,[98] but many others were not so lucky. Many of these women simply persisted until they found a firm that would take them, usually at a salary much lower than male clerks.[99] For example, one early female lawyer, Mary Siegel, recalled that she eventually found a clerking position in 1921 for four dollars a week,[100] only a dollar more than she made as an inexperienced immigrant laborer in her first sweatshop job and eleven dollars less than the male clerks who worked with her.[101]

In addition to lacking connections with practicing attorneys, women coming out of law school traditionally were channeled away from law firm positions and into government jobs or legal aid work.[102] Well into the 1970s, women law school graduates who

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96. *See* Mary G. Siegel, "Crossing the Bar": A "She" Lawyer in 1917, 7 Women's Rts. L. Rep. 357, 359–60 (1982) (describing women's difficulty of finding even nonpaying clerkship); *see also* Virginia G. Drachman, *The New Woman Lawyer and the Challenges of Sexual Equality in Early Twentieth-Century America*, 28 Ind. L. Rev. 227, 230-33 (1995) (chronicling difficulties of women lawyers in early twentieth century).

97. *See* Mary G. Siegel, *"Crossing the Bar": A "She" Lawyer in 1917*, 7 Women's Rts. L. Rep. 357, 359 (1982) (describing requirement of one year clerkship for admission to New York Bar in 1921).

98. *See* Betsy Covington Smith, Breakthrough: Women in Law 5 (1984) (concluding lucky women were those with family connections); Cynthia L. Rold, *Women and Law*, 1995 U. Ill. L. Rev. 105, 107 (reporting that even in 1994 women were more likely to begin practice with very small firms or very large ones); James J. White, *Women in Law*, 65 Mich. L. Rev. 1051, 1060 (1967) (attributing overrepresentation of women in very small firms to tendency of women to practice with another family member).

99. James J. White, *Women in Law*, 65 Mich. L. Rev. 1051, 1057, 1087 (1967). Professor White's survey disclosed enormous income differences between male and female attorneys that he was convinced could only be attributed to discrimination by employers. *Id.*

100. Mary G. Siegel, *"Crossing the Bar": A "She" Lawyer in 1917*, 7 Women's Rts. L. Rep. 357, 360 (1982) (noting job came after working for "free" experience with practicing friend).

101. *Id.*

102. *See* Jill Abramson & Barbara Franklin, Where They Are Now: The Story of the Women of Harvard Law 1974, at 21 (1986) (observing that in 1956 doors of private law firms were closed to female Harvard Law graduates); Cynthia Fuchs Epstein, Women in Law 89-90 (2d ed. 1993) (stating government legal jobs were less dis-

wished to practice with private firms generally found that their experiences paralleled Mary Siegel's.[103] The story is often told that Sandra Day O'Connor's only job offer after graduating third in her class at Stanford Law School was as a legal secretary.[104] Similarly, future vice-presidential candidate, Geraldine Ferraro, withstood five call-back interviews with one Wall Street firm only to be told they were not hiring any women that year.[105] Supreme Court Justice Ruth Bader Ginsburg could not find a single law firm that would hire her when she graduated in a tie for first place in her class from Columbia.[106] Justice Ginsburg finally found a position clerking for a federal district judge.[107]

Even those lucky few women who managed to find jobs with firms faced substantial resistance. In 1972, for instance, Rita Hauser was invited to join New York City's Stroock & Stroock & Lavan as a partner, but only after some fast talking by Charles

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criminatory and therefore relatively open to women); BETSY COVINGTON SMITH, BREAKTHROUGH: WOMEN IN LAW 8 (1984) (reporting that, by early 1970s, government and public service jobs were easier to acquire); Donna Fossum, *A Reflection on Portia*, 69 A.B.A. J. 1389, 1390 (1983) (noting that government, being more hospitable, absorbed disproportionate share of nation's women lawyers). *But see* Sophie Douglass Pfeiffer, *Women Lawyers in Rhode Island*, 61 A.B.A. J. 740, 741 (1975) (concluding that survey of all women lawyers in Rhode Island belied old adage that most female attorneys take government jobs); Janet Taber et al., Project, *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1247-48 (1988) (indicating that women lawyers may have more access to all areas of practice than in past). The Stanford Project was quick to note, however, that Stanford's recognition as an "elite" school may mean that these findings are not applicable to women graduates of other law schools. *Id.*

103. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 79–84 (2d ed. 1993). A survey taken by the Harvard Law Record in 1963 asked law firms to rank, from -10 to +10, some characteristics that might be found in job applicants. *Id.* at 83. Of all negatively ranked characteristics, the lowest of all, beating out being black and being in the lower half of the class, was being a woman. *Id.* The same preconceptions used to justify barring women from law schools showed up in firms' reasons for not hiring women: that women will leave practice for marriage and children and that clients will resent having their work handled by women attorneys. Janette Barnes, *Women and Entrance to the Legal Profession*, 23 J. LEGAL EDUC. 276, 293 (1971); *see* Charles Kaufman, *Diversity—Then and Now: The Views of Some Who Led the Way*, 59 TEX. B.J. 876, 876 (1996) (reporting that male managing partner in 1950 consulted one of his female colleagues about how to find female associate who would not get married, have children and leave).

104. Laurence Bodine, *Sandra Day O'Connor*, 69 A.B.A. J. 1394, 1396 (1983).

105. KAREN BERGER MORELLO, THE INVISIBLE BAR 194 (1986).

106. *Id.* at 207.

107. *Id.*

Moerdler, a partner in the firm.[108] In spite of Hauser's impressive credentials, which included twelve solid years of practice in international law and her former position as the United States Representative to the United Nations Commission on Human Rights, Moerdler had difficulty convincing the senior partners that a woman could be aggressive enough to build a large firm practice.[109]

With the passage of Title VII of the Civil Rights Act of 1964,[110] women, like other minorities, began to assert their demands for equal treatment and opportunity in the work place.[111] Yet, judicial decisions specifically affecting women attorneys were rare in the 1960s and 1970s. Two such decisions did evolve, however, from complaints by women students at New York University and Columbia University contending that firms either refused to interview qualified women or, at best, offered them limited positions with lower salaries than men and with no potential for advancement.[112] The New York City Commission on Human Rights investigated these complaints, which focused on ten major New York law firms.[113] The Commission ultimately agreed that a pattern of sexual discrimination existed in the "recruitment, hiring, promotion and treatment of women lawyers."[114]

Following the Commission report, Margaret Kohn filed a complaint with the Equal Employment Opportunity Commission (EEOC) against the firm of Royall, Koegel & Wells.[115] With EEOC permission, Kohn then filed a class action suit in a New York federal court.[116] Royall, Koegel & Wells defended on a

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108. *Id.* at 207–08.

109. *Id.*

110. 42 U.S.C. § 2000e-2(a) (1994).

111. *See* LEO KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 106 (1969) (commenting that in its first year of operation, EEOC reported that over one third of processed complaints involved sex discrimination); Joan E. Baker, *Employment Discrimination Against Women*, 59 A.B.A. J. 1029, 1030 (1973) (concluding that 1972 amendments to Title VII mean stronger remedies for women against law firm discrimination).

112. *See* CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 184–86 (2d ed. 1993) (detailing experiences of women law students at New York University and Columbia Law Schools which led to EEOC complaints); KAREN BERGER MORELLO, THE INVISIBLE BAR 209–13 (1986) (describing history of complaints by women law students which resulted in two lawsuits against major Wall Street law firms).

113. KAREN BERGER MORELLO, THE INVISIBLE BAR 211 (1936).

114. *Id.*

115. *Id.* at 212.

116. *Id.*

number of procedural grounds.[117] Among other things, the firm alleged that Kohn's original EEOC complaint was not timely filed and that Kohn was not a proper class representative.[118] The court refused to dismiss the suit,[119] and the United States Court of Appeals for the Second Circuit dismissed the firm's subsequent appeal.[120] The case was then tried and decided against the firm, but no opinion was published.[121] Royall, Koegel & Wells (now Rogers & Wells) eventually agreed to a solution that amounted to an affirmative action policy in hiring female law students.[122]

Shortly after Margaret Kohn began to pursue her case, Diane Blank filed a similar class action suit against another New York firm, Sullivan & Cromwell.[123] The litigation took a bizarre twist that seemed to personify the very attitudes at issue in the case. Judge Constance Motley, the first African-American woman appointed to the federal judiciary and the only female district court judge in New York, was assigned to hear the dispute.[124] Sullivan & Cromwell moved for Judge Motley's disqualification, alleging that her background as a civil rights advocate caused her to "identify" with Blank's discrimination cause.[125] Judge Motley wrote a stinging opinion denying the recusal motion:

> The assertion, without more, that a judge who engaged in civil rights litigation and who happens to be of the same sex as a plaintiff in a suit alleging sex discrimination on the part of a law firm, is, there-

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117. *See* Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 519, 520 (S.D.N.Y. 1973) (denying defendant's motion to dismiss for lack of timely filing and granting plaintiff's motion to proceed as class action), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974).

118. *Id.* at 519, 520.

119. *Id.* at 519. On motion for reargument, the firm argued not only that Kohn was not a proper class representative, but also that she had no standing to sue individually because she was never employed and did not then seek employment with the firm. *Id.* at 523. The court held that to deny Kohn's status would result in "a waste of time and money for all interested parties." *Id.* at 524 (quoting *Carr v. Conoco Plastics, Inc.*, 423 F.2d 57 (5th Cir. 1970)).

120. *Kohn*, 496 F.2d at 1101.

121. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 185 (2d ed. 1993). The law firm agreed to offer female graduates over 25% of its positions each year. Jim Drinkhall, *Ladies of the Bar: Women Attorneys, Now over 9% of Profession, Keep Making Gains in All Areas of Legal Work*, WALL ST. J., May 31, 1978, at 46.

122. *See* CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 185 (2d ed. 1993) (reporting that law firm agreed to offer over 25% of available positions to female graduates each year).

123. *Discrimination Based on Sex*, 62 WOMEN LAW. J. 40, 40, 42 (1976).

124. *Id.* at 42.

125. Blank v. Sullivan & Cromwell, 418 F. Supp. 1, 4 (S.D.N.Y. 1975).

> fore, so biased that he or she could not hear the case, comes nowhere near the standards required for recusal. Indeed, if background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case, or many others, by virtue of the fact that all of them were attorneys, of a sex, often with distinguished law firm or public service backgrounds.[126]

In light of this initial setback, Sullivan & Cromwell eventually settled the suit, agreeing, as did all the firms in the original Commission complaint, to establish new nondiscriminatory hiring guidelines for male and female applicants.[127]

Spurred by Title VII and the successes in the New York cases, other actions and complaints against firms were introduced across the country.[128] Some were filed as suits; some were actions by law school placement offices to bar recruitment by firms shown to have engaged in discriminatory hiring practices.[129] Still other changes

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126. *Id.* at 4. The idea that somehow a female judge, more than her male colleagues, could be so outraged by the accusations against a party that her impartiality is suspect has not died a well deserved death. In 1994, a motion was filed in the 290th District Court of Bexar County, Texas, to recuse the female judge based on the fact that the defendant (who was accused of capital murder) espoused the view that women must obey and cannot judge, direct or even address men. The motion noted that the judge "has had to overcome views such as Defendant's at all stages of her career." Defense counsel then argued that the defendant could not conduct a defense without revealing his views and that those views, "being so outside mainstream believes [sic] and so opposed to those of [the judge] will prevent [the judge] from being fair and impartial" in the case. The motion was reviewed by another judge and denied. The accused was convicted of murder. Richard R. Orsinger & Hon. Ann C. McClure, *Gender Issues in the Everyday Practice of Law: Is the Gap Narrowing?* 37-38, Presentation at the State Bar of Texas 13th Annual Advanced Women and the Law Course (Mar. 22, 1996) (on file with the *St. Mary's Law Journal*).

127. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 186 (2d ed. 1993); KAREN BERGER MORELLO, THE INVISIBLE BAR 213 (1986).

128. *See* CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 167 (2d ed. 1993) (describing suit by women law students at University of Chicago against their own placement office); KAREN BERGER MORELLO, THE INVISIBLE BAR 213–14 (1986) (listing antidiscrimination initiatives taken by women lawyers in California, Illinois, Texas and District of Columbia).

129. *See, e.g.*, JILL ABRAMSON & BARBARA FRANKLIN, WHERE THEY ARE NOW: THE STORY OF THE WOMEN OF HARVARD LAW 1974, at 24 (1986) (noting that women brought pressure on placement offices to ban discriminatory firms from recruiting on campus); Janette Barnes, *Women and Entrance to the Legal Profession*, 23 J. LEGAL EDUC. 276, 294 (1971) (reporting that some placement offices resorted to refusing on campus interview space); Donna Fossum, *A Reflection on Portia*, 69 A.B.A. J. 1389, 1390 (1983) (concluding that law schools were forced to take action to avoid being perceived as endorsing firms' discriminatory conduct).

were accomplished through public pressure and the media.[130] But none of these discriminatory practices by law firms reached the United States Supreme Court for consideration.[131] Further, women soon found that even if they were hired by a law firm, it still did not always mean an opportunity to compete in practice on equal footing with men.

IV. PARTNERSHIP DECISIONS: A WOMAN'S CHANCES FOR ADVANCEMENT

A. *Current Hiring Practices*

Once admitted into law firms, women often found themselves steered in specific directions. Certain specialties were considered to be appropriate for women.[132] At the top of the list were library work and research, brief writing, "blue sky" work, and the specialties of trusts and estates, wills, and domestic relations.[133] Male at-

130. *See* KAREN BERGER MORELLO, THE INVISIBLE BAR 213 (1986) (describing media coverage of one firm's practice of holding luncheons at private club which excluded women).

131. A number of sexual discrimination issues were considered by the Supreme Court in the 1970s that did not directly impact the status of women lawyers. Many commentators have written about the Supreme Court's rulings in gender discrimination cases. *See generally* Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 22 (summarizing Supreme Court's decisions on sex discrimination through 1974 and concluding the Court is reluctant to develop new doctrine); John D. Johnston, Jr. & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.L. REV. 675, 737 (1971) (surveying cases involving sex discrimination through 1971 and concluding "in the absence of a definite shift of position on the part of the Supreme Court" there is no "clear trend toward judicial recognition of women's rights"); Doris L. Sassower, *Women, Power, and the Law*, 62 A.B.A. J. 613, 614 (1976) (commenting on failure of Supreme Court to hold that sex, like race, is "suspect" classification).

132. *See* JILL ABRAMSON & BARBARA FRANKLIN, WHERE THEY ARE NOW: THE STORY OF THE WOMEN OF HARVARD LAW 1974, at 24 (1986) (relating experience of woman law student told that interviewing firm hired women only for trust and estate work); BETSY COVINGTON SMITH, BREAKTHROUGH: WOMEN IN LAW 5 (1984) (commenting in 1984 that, until recently, women who were hired were given "women's work such as researching and brief writing"); Janette Barnes, *Women and Entrance to the Legal Profession*, 23 J. LEGAL EDUC. 276, 296 (1971) (commenting that even writers who support women tend to categorize women as suited for certain specialties); James J. White, *Women in Law*, 65 MICH. L. REV. 1051, 1062 (1967) (reporting that large numbers of women practice in what have been considered women's specialties, such as trusts and estates, and domestic relations).

133. *See, e.g.*, CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 102 (2d ed. 1993) (noting that 1958 government publication went so far as to recommend that women lawyers look to certain areas of practice); BETSY COVINGTON SMITH, BREAKTHROUGH: WOMEN IN LAW 5 (1984) (explaining that proper specialties for women kept them out of courtroom and in

torneys seemed to think that women naturally preferred these areas of practice in which client contact was minimal and courtroom appearances were virtually unknown except for ministerial tasks.[134] Women, on the other hand, more often explained that, while they may have been bold enough to go into the practice of law, they weren't crazy. That is, they realized that specializing in an "appropriate" area made them more acceptable to their male colleagues.[135] Unfortunately, the tradeoff for this acceptance was usually significantly less pay and no opportunity for advancement.[136]

This practice of steering women toward "appropriate" practice areas, coupled with the traditional hiring patterns of most firms,[137] also resulted in a peculiar hiring pattern for women. Women were, and still are, overrepresented in very small firms and very large

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back rooms); Donna Fossum, *Women in the Legal Profession: A Progress Report*, 67 A.B.A. J. 578, 580 (1981) (indicating that "back room" specialties with no client contact were suitable for women); Laurel Sorenson, *A Woman's Unwritten Code for Success*, 69 A.B.A. J. 1414, 1415 (1983) (explaining that firms tend to place women in backwater assignments).

134. *See* CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 107–08 (2d ed. 1993) (reporting that many law firms believed that concentration of women in some specialties indicated women's preferences); Nancy Blodgett, *Whatever Happened to the Class of '81?*, 74 A.B.A. J. 56, 60 (1988) (describing experience of one woman associate who recalled sitting in rear of courtroom during trial for which she prepared briefs and research). Wendy Dorman heard that the clients were very pleased with her work, but, in spite of the fact that she attended trial every day, she was never introduced. *Id.* The judge finally asked one of the partners if the lady in the back was his secretary. *Id.*

135. *See* CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 109 (2d ed. 1993) (observing women lawyers could avoid antagonizing men by practicing in "feminine" law specialties); Laurel Sorenson, *A Woman's Unwritten Code for Success*, 69 A.B.A. J. 1414, 1415 (1983) (noting that women were "accepted" in areas such as estate planning and domestic relations).

136. *See* CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 101–11 (2d ed. 1993) (discussing concentration of women lawyers in "low-ranking" legal specialties); Lisa Hill Fenning & Patricia M. Schnegg, *Progress of Women Lawyers in Los Angeles: A Foot in the Door, but a Long Way to Go*, Speech in National Conference of Woman's Bar Associations, ABA Mid-Year Meeting (Feb. 11, 1984) (reporting income disparity between women and men lawyers), *in* THE WOMAN LAWYER WITHIN THE FIRM: EXPECTATION AND FULFILLMENT 37, 51 (LawLetters, Inc. ed., 1985). *But see* Bill Winter, *Survey: Women Lawyers Work Harder, Are Paid Less, But They're Happy*, 69 A.B.A. J. 1384, 1385 (1983) (attributing difference between $53,000 median income of male lawyers and $33,000 median income of female lawyers to fact that women lawyers were younger and less experienced).

137. *See supra* notes 96–109 and accompanying text.

ones.[138] Past discrimination seems to have established this pattern. First, blocked from other opportunities, many women entered practice with a husband or other relative.[139] Even today a significant number of women in firms practice with their husbands.[140] Second, very large firms could afford to hire a woman for her talents and keep her hidden away so that she did not come into contact with clients.[141] In other words, these large firms had the resources available to allow them to hire women to work in the aforementioned "appropriate" practice areas. In contrast, midsize firms needed every man out front, so to speak, and could not afford the luxury of hiring a woman, no matter how competent she was, since she was not seen as an acceptable public representative of the firm.[142]

B. Associates v. Partners

Recent studies indicate that the practice of pigeonholing women into particular specialties is on the decline.[143] Women increasingly

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138. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 98 (2d ed. 1993); Cynthia L. Rold, *Women and Law*, 1995 U. ILL. L. REV. 105, 107.

139. CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 168–70 (2d ed. 1993) (reporting that, until 1970s, many women practiced law with their husbands because they couldn't otherwise get work); BETSY COVINGTON SMITH, BREAKTHROUGH: WOMEN IN LAW 5 (1984) (concluding that prior to 1980s legal jobs were so difficult for women to find that luckiest were those whose husbands or fathers had law practices they could join); James J. White, *Women in Law*, 65 MICH. L. REV. 1051, 1060 (1967) (observing that, through 1960s, it was common for women to enter law practice with husbands or fathers).

140. James J. White, *Women in Law*, 65 MICH. L. REV. 1051, 1060 (1967).

141. *See* CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 104–05 (2d ed. 1993) (reporting that large firms' specialization of functions allowed them to hire women and assign them to do research); *cf.* Donna Fossum, *A Reflection of Portia*, 69 A.B.A. J. 1389, 1391 (1983) (noting that some large firms have influence to insist that female associates be taken seriously); Laura Sorenson, *A Woman's Unwritten Code for Success*, 69 A.B.A. J. 1414, 1415 (1983) (advising women to interview with firms which already employ women and give them responsibility).

142. James J. White, *Women in Law*, 65 MICH. L. REV. 1051, 1060 (1967) (observing that, unlike large firms, medium size firms could not afford to employ lawyers who could only do research and other functions not requiring client contact or court appearances, and, therefore, were less likely to hire women).

143. *See* Laurel Sorenson, *A Woman's Unwritten Code for Success*, 69 A.B.A. J. 1414, 1415 (1983) (reporting in 1983 that, although women were still overrepresented in specialties such as family law, they were working in every specialty including litigation and corporate work); Janet Taber et al., Project, *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1247 (1988) (reporting that survey of Stanford Law School graduates indicated that "women participate with men in all areas of legal practice").

practice in a wide variety of areas, including litigation, for which they were once considered unfit.[144] Directly reflecting the growing number of women in law school, the overall number of women in law firms also is increasing rapidly.[145] For example, the number of women associates increased from fifteen percent in 1980[146] to thirty-two percent in 1991.[147]

In stark contrast to the increased representation of female associates in law firms, however, only a relatively small number of women have attained partner status. By 1991, women made up only ten percent of all partners, a serious underrepresentation.[148] A survey in 1980 showed that only one-third of women practitioners who joined firms before 1971 had become partners, while one-half of similarly situated men had become partners.[149] More recently, a study of eight large New York City firms showed that seventeen percent of all men who entered firm practice after 1981 had been named partner, while only five percent of women had similarly advanced.[150]

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144. Bill Winter, *Survey: Women Lawyers Work Harder, Are Paid Less, But They're Happy*, 69 A.B.A. J. 1384, 1385 (1983) (reporting results of 1983 survey which found that litigation was second only to family law as predominant area of practice for women lawyers); *see also* CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 108 (2d ed. 1993) (reporting that for some lawyers, stereotype that women are too frail to be litigators has been replaced with stereotype that some women are too argumentative not to be litigators).

145. BARBARA A. CURRAN ET AL., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s 10 (1985) (reporting that three-quarters of all women lawyers in 1980 had entered profession since 1971). In 1991, almost 94% of all women lawyers had entered the profession since 1971. A.B.A. COMM'N ON WOMEN IN THE PROF., WOMEN IN THE LAW: A LOOK AT THE NUMBERS 8 (1995).

146. BARBARA A. CURRAN ET AL., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s 41 (1985).

147. A.B.A. COMM'N ON WOMEN IN THE PROF., WOMEN IN THE LAW: A LOOK AT THE NUMBERS 27 (1995). The Commission also reports that women made up 20% of all lawyers in 1991 and that percentage was expected to rise to 23% by 1995. *Id.*

148. A.B.A. COMM'N ON WOMEN IN THE PROF., WOMEN IN THE LAW: A LOOK AT THE NUMBERS 25 (1995). In 1980, two percent of partners in law firms were women. BARBARA A. CURRAN ET AL., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s 41 (1985).

149. BARBARA A. CURRAN ET AL., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s 46 (1985).

150. A.B.A. COMM'N ON WOMEN IN THE PROF., UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR 11 (1995). Surprisingly, and discouraging for those who predicted that time might cure some of the discrepancies between male and female success, the current numbers are unchanged from a 1980 survey, which found that of those who entered practice after 1971, 17% of male associates have become partners compared to 6%

Admittedly, women have not had the opportunity to participate in firms in large numbers for as long as men. But the above statistics indicate that this historical underrepresentation only partially explains the slow advancement of women to top positions in firms. For instance, women report that they are subject to a variety of discriminatory practices that consciously or unconsciously prevent their accomplishments from being evaluated on an equal basis with the achievements of male associates.[151] Women often receive easier or less important work assignments, so that even if their work is superior, it is not comparable to work done by male associates.[152] And, to some extent, women continue to labor under a presumption of incompetence.[153] While men are generally considered to be

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of females. BARBARA A. CURRAN ET AL., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980S 46 (1985).

151. *See* A.B.A. COMM'N ON WOMEN IN THE PROF., UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR 12 (1995) (suggesting that traditional billable hours method of selection and evaluation disfavors women's advancement in firms by failing to value "results, efficiency and client satisfaction"); Linda Liefland, *Career Patterns of Male and Female Lawyers*, 35 BUFF. L. REV. 601, 610–11 (1986) (reporting that due to "unconscious discrimination" people rate behaviors by disfavored group lower than identical behaviors in favored group). For example, screening committees were asked to evaluate identical resumes, some with female names, some with male names. The resumes with women's names consistently ranked lower. *Id.*; *see also* Robert B. McKay, *Women and the Liberation of Legal Education*, 57 WOMEN LAW. J. 139, 143 (1971) (observing that subtle discrimination becomes obvious only when pointed out by victim); Doris L. Sassower, *Women in the Law: The Second Hundred Years*, 57 A.B.A. J. 329, 332 (1971) (reporting overtly-discriminatory remarks made by law firm representatives to female applicants in 1970).

152. *See* Nancy Blodgett, *Whatever Happened to the Class of '81?*, A.B.A. J., June 1, 1988, at 56, 60 (reporting experience of one woman associate who had to volunteer for assignments in hopes of securing extra client contact); Beatrice Dinerman, *Sex Discrimination in the Legal Profession*, 55 A.B.A. J. 951, 952 (1969) (explaining belief that women attorneys are less capable than men results in women being assigned less challenging tasks); Laurel Sorenson, *A Woman's Unwrittened Code for Success*, 69 A.B.A. J. 1414, 1415 (1983) (asserting that women must insist on responsibility and nontraditional assignments); Bill Winter, *Survey: Women Lawyers Work Harder, Are Paid Less, But They're Happy*, 69 A.B.A. J. 1384, 1386 (1983) (revealing that male associates receive more responsibility); 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, 273–74 (1994) (observing that common impediment to women's success at executive level in all professions is inferior work assignments).

153. *See, e.g.*, A.B.A. COMM'N ON WOMEN IN THE PROF., UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR 11 (1995) (quoting woman partner contending that women must still spend time disproving stereotypes and proving their own competence and worth); Louise Bernikow, *We're Dancing As Fast As We Can*, SAVVY, Apr. 1984, at 40, 42 (reporting women professionals' experience that they not only have to prove themselves

capable until they prove themselves unfit, women often are scrutinized with suspicion until they prove themselves competent in a traditionally "male" profession.[154] In addition, women commonly confront a catch-22 in regard to their personalities. A woman who is aggressive and forthright often finds herself labeled as "pushy" or "bitchy," while the woman who adopts a more "feminine" style is considered too soft or weak.[155] These sexual stereotypes have

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but also have to disprove negative presumptions about women), *in* THE WOMAN LAWYER WITHIN THE FIRM: EXPECTATION AND FULFILLMENT 303, 304 (LawLetters, Inc. ed., 1985); Nancy Blodgett, *"I Don't Think That Ladies Should Be Lawyers"*, A.B.A. J., Dec, 1986, at 48, 49 (opining that women have to prove their competence with every new assignment); Laurence Bodine, *Sandra Day O'Connor*, 69 A.B.A. J. 1394, 1396 (1983) (quoting Justice O'Connor as saying that women have to be better than their male coworkers to succeed).

154. Beatrice Dinerman, *Sex Discrimination in the Legal Profession*, 55 A.B.A. J. 951, 952 (1969) (arguing that women must work harder than men to gain acceptance in legal profession); Laurel Sorenson, *A Woman's Unwritten Code for Success*, 69 A.B.A. J. 1414, 1414–15 (1983) (asserting that women traditionally were perceived to be competent only in limited areas of law); 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, 274 (1994) (noting that stereotypes regarding women's abilities cause discrimination in upper-level jobs). Women judges have particularly criticized the conduct of male judges and attorneys who undermine the effectiveness of women litigators in court through the use of sexist remarks or endearing language. *See* KAREN BERGER MORELLO, THE INVISIBLE BAR 208-09 (1986) (noting that Judge Margaret Taylor ignored sexist conduct directed toward herself but was infuriated by damage this conduct had on court's perception of female attorneys); Betty Roberts, *Sexism and the Courts: Speech to Metropolitan Judges, Lewis and Clark College, August 19, 1983*, 9 WOMEN'S RTS. L. REP. 125, 127 (1986) (suggesting that women attorneys are entitled to expect judges to correct discriminatory conduct when it occurs in their courtrooms). Increasingly, male judges are beginning to recognize bias against women in their courts. *See* Deborah L. Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39, 70 (1994) (quoting male judge commenting ironically on his own change in attitude after co-chairing the California Gender Bias Task Force: "[U]ntil I was on this . . . Task Force, there never was any gender bias in my court.").

155. *See* Nancy Blodgett, *"I Don't Think That Ladies Should Be Lawyers"*, A.B.A. J., Dec. 1, 1986, at 48, 50 (commenting that men need only consider whether they appear competent while women have to worry about how they will be perceived as women); Karen Czapanskiy, *Symposium: Solidarity, Inclusion, and Representation: Tensions and Possibilities Within Contemporary Feminism*, 2 VA. J. SOC. POL'Y & L. 13, 19–20 (1994) (citing gender bias task force reports from the Florida Supreme Court, the Massachusetts Supreme Court, and Kansas Bar Association for the "double bind" women attorneys find themselves in: if they are not aggressive they are "too timid" and "ineffective;" if they are aggressive, they are "bitch[es]"); Laurel Sorenson, *A Woman's Unwritten Code for Success*, 69 A.B.A. J. 1414, 1414–16 (1983) (observing that developing professional style, while maintaining touch with her own personality is one of most difficult adjustments for women); 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, 274–76 (1994) (noting that to succeed, woman must be perceived as "better" than women

made it difficult for women associates to compete with the men for partnership positions.[156]

C. *Selected Supreme Court Decisions*

1. Discrimination in Promotion

Elizabeth Hishon offers a prime example of one of these women who was denied partnership status.[157] Ultimately, her case became the first instance of sexual discrimination against female attorneys to be heard by the United States Supreme Court in decades. Like many young attorneys, Hishon had been recruited by the Atlanta firm of King & Spalding with promises that she would be promoted to partner after a certain number of years if her performance as an

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as group, but not unfeminine (citing ANN M. MORRISON ET AL., BREAKING THE GLASS CEILING 54–55 (1992))).

156. *See* Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1188 (1988) (explaining that unconscious bias affects our perception of correct image for particular job as well as appropriate personal characteristics and conduct for given situations); Patricia M. Wald, *Women in the Law: Stage Two*, 52 UMKC L. REV. 45, 47-48 (1983) (opining that present generation of women face real obstacles to acquiring positions of power in legal profession). Women lawyers are also hampered by the lack of mentors in firms. Deborah Graham, *It's Getting Better, Slowly*, A.B.A. J., Dec. 1, 1986, at 54, 58. Male partners are not always comfortable in that role and the too few senior women are often still struggling to cope with their own careers. *Id.* Women attorneys do not have equal access to the "good ol' boy" networks, the private clubs, and the traditional business organizations essential to "making rain" for law firms. Lisa Hill Fenning & Patricia M. Schnegg, *Progress of Women Lawyers in Los Angeles: A Foot in the Door, but a Long Way to Go*, Speech to National Conference of Woman's Bar Associations, ABA Mid-Year Meeting (Feb. 11, 1984), *in* THE WOMAN LAWYER WITHIN THE FIRM: EXPECTATION AND FULFILLMENT 37, 48-50 (LawLetters, Inc. ed., 1985). Additionally, if women lawyers want to have families, they are expected to do so without interruption in the billable hours they provide for the firm. *See* Deborah Graham, *It's Getting Better, Slowly*, A.B.A. J., Dec. 1, 1986, at 54, 56 (giving examples of firms penalizing women for wanting flexible hours). At the same time, many women want careers which still allow them to have a family life. *See* Patricia M. Wald, *Women in the Law: Stage Two*, 52 UMKC L. REV. 45, 55 (1983) (arguing that if nation truly reveres family, women can change legal (and other) professions to allow conciliation between career and home). New York Superior Court Judge Edward McLaughlin urged more flexible policies for both men and women. Debra Cassens Moss, *Progress for Women? Yes, But . . . : ABA Hearings Show Bias Remains But in More Subtle Form*, A.B.A. J., Apr. 1, 1988, at 18, 19. The number of hours required by firms for advancement were outrageous in his opinion: "You couldn't take care of a fish, much less a baby." *Id.* A similar opinion has been voiced by Chief Justice Rehnquist. A.B.A. COMM'N ON WOMEN IN THE PROF., UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR 10 (1995).

157. *See* Hishon v. King & Spalding, 467 U.S. 69, 72 (1984) (alleging sex-based discrimination was motive for denial of partnership status).

associate was satisfactory.[158] Hishon felt she had every reason to be optimistic about her future with the firm.[159] Her work received favorable evaluations and she had assurances that she was performing at the top of her class of associates.[160] In 1979, when King & Spalding declined to invite Hishon as a partner, she alleged it was because of her sex.[161]

Hishon took her complaint to the EEOC and then filed suit under Title VII of the Civil Rights Act of 1964[162] which prohibits discrimination in employment on the basis of sex.[163] Both the trial court and the United States Court of Appeals for the Eleventh Circuit held that Title VII did not apply to partnership decisions.[164] The courts ruled that since partnerships are voluntary associations, decisions about partners could not be considered employer/employee relations.[165] The trial court analogized the choice of a law partner to the choice of a spouse, saying that to allow "Title VII to coerce a mismatched or unwanted partnership too closely resem-

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158. *See* Stanley J. Brown & Michael L. Stevens, *Assessing Lawyer Evaluation and Partnership Decisions After* Hishon v. King & Spaulding [sic] (explaining that zealous recruiters often tell applicants that partnership is automatic with satisfactory performance), *in* ASSESSING LAWYER EVALUATION AND PARTNERSHIP DECISIONS AFTER HISHON V. KING & SPAULDING [sic], at 49 (PLI Comm. L. & Practice Course Handbook Series No. 359, 1985).

159. *See* KAREN BERGER MORELLO, THE INVISIBLE BAR 215 (1986) (noting that Hishon was confident of advancing); James B. Stewart, *Fairness Issue: Are Women Lawyers Discriminated Against at Large Law Firms?*, WALL ST. J., Dec. 20, 1983, at A1 (reporting that Hishon claimed her evaluations were "encouraging"), *in* THE WOMAN LAWYER WITHIN THE FIRM: EXPECTATION AND FULFILLMENT 277, 277 (LawLetters, Inc. ed., 1985).

160. KAREN BERGER MORELLO, THE INVISIBLE BAR 215 (1986).

161. *Hishon*, 467 U.S. at 72.

162. *Id.* at 72.

163. Title VII provides that :

> (a) It shall be an unlawful employment practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1994).

164. Hishon v. King & Spalding, 678 F.2d 1022, 1030 (11th Cir. 1982) (affirming dismissal by district court for Northern District of Georgia).

165. *Hishon*, 678 F.2d at 1024.

bles a statute for the enforcement of shotgun weddings."[166] The United States Supreme Court unanimously disagreed.[167]

The Supreme Court reasoned that the partnership itself may be an employer for purposes of Title VII and that Hishon was certainly its employee.[168] The Court found that King & Spalding's promise to its associates that they would be considered for partnership on specific terms was a condition or privilege of associate employment with the firm.[169] Because King & Spalding chose to offer partnership consideration as a benefit of employment, it was also required to review partnership candidates without regard to their sex.[170] The Supreme Court's decision did not actually reach the merits of Hishon's case but, instead, focused strictly on the applicability of Title VII to partnership evaluations.[171] Justice Powell's concurrence narrowed the scope of the decision even further, noting that Title VII would not be applicable to management decisions made among partners.[172]

Despite its narrow scope, *Hishon* was widely acclaimed, even though many suspected it would have little impact on the actual practices of firms.[173] First, Title VII itself applies only to employers with fifteen or more employees.[174] Since partners are not consid-

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166. Paul Zarefsky, *How Will the* Hishon *Decision Affect Your Firm?*, A.B.A. J., Sept. 1984, at 58, 59.

167. *See Hishon*, 467 U.S. at 79 (reversing court of appeals decision). Eight Justices joined the majority opinion, with Justice Powell concurring. *Id.*

168. *See id.* at 73–74 (observing that, under Title VII, "partnership" may be employer).

169. *Id.* at 74.

170. *Id.*

171. *See id.* at 78–79 (declaring that petitioner is entitled to "her day in court"); *see also* Thomas L. Largey, Comment, *Women Lawyers and Legal Partnerships: Will Title VII Open the Door?* Hishon v. King & Spalding, 19 NEW ENG. L. REV. 647, 669 n.207 (1984) (reporting that Hishon withdrew her suit on remand and settled for undisclosed amount of money).

172. *Hishon*, 467 U.S. at 79 (Powell, J., concurring).

173. *See* Paul Zarefsky, *How the* Hishon *Decision Will Affect Your Firm*, A.B.A. J., Sept. 1984, at 58, 59 (discounting "parade of horribles" predicted by some commentators); Susan Wubberhorst, Note, *Law Partnership Decisions: Title VII Applies—Will It Make a Difference?*, 53 UMKC L. REV. 468, 483 (1985) (explaining that *Hishon* alone cannot change longstanding attitudes); Mary S. Johnson, Recent Case, Hishon v. King & Spalding: *Equal Justice Under Law*, 30 LOY. L. REV. 1008, 1023 (1984) (stating that *Hishon* will not solve discrimination in practice).

174. 42 U.S.C. § 2000e(b) (1994); *see also* Paul Zarefsky, *How the* Hishon *Decision Will Affect Your Firm*, A.B.A. J., Sept. 1984, at 58, 58 (acknowledging likelihood that Title VII will only be applicable to minority of law firms); Susan Wubberhorst, Note, *Law Part-*

ered employees but co-owners, a majority of law firms are not subject to Title VII provisions.[175] Second, as a practical matter, many women attorneys will be reluctant to file suit for fear of damaging their prospects in the profession.[176] Finally, and most insidious, is the fear that firms will simply be more careful to justify their actions with acceptable reasons.[177] Still, despite its shortcomings, many attorneys agree that *Hishon* was at least a step in the right direction.[178]

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nership Decisions: Title VII Applies—Will It Make a Difference?, 53 UMKC L. REV. 468, 478–79 (1985) (indicating that many law firms are not subject to Title VII).

175. Burke v. Friedman, 556 F.2d 867, 869 (7th Cir. 1977) (construing partners as employers and not employees). Justice Powell's concurrence makes it clear that he views partners as owners rather than employees of the firm. *See Hishon*, 467 U.S. at 79–80 (Powell, J., concurring) (explaining that relationship between law partners is based on common agreement or consent and is markedly different from that of employer and employee). In 1988, almost 90% of private law firms were made up of 10 or fewer attorneys; these firms employed about 47% of attorneys working for law firms. BARBARA A. CURRAN & CLARA N. CARSON, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1988, 21–22 (1991). Approximately 54% of attorneys in private practice work for law firms; the remaining 46% are in solo practices. *Id.*

176. *See* Janette Barnes, *Women and Entrance to the Legal Profession*, 23 J. LEGAL EDUC. 276, 296 (1971) (predicting that woman attorney is unlikely to jeopardize her professional standing by suing prospective employer); Donald L. Hollowell, *Women and Equal Employment: From Romantic Paternalism to the 1964 Civil Rights Act*, WOMEN LAW. J., Winter 1970, at 28, 31 (noting that many women who sue under Title VII have legitimate fears of retaliation). Additionally, many women attorneys still believe that if they simply work hard enough, acceptance will come with time. *See* Jerome N. Frank, *Women Lawyers*, WOMEN LAW. J., Winter 1945, at 4, 5 (suggesting women lawyers could compete better if they stopped trying to be imitations of men); Bertha L. MacGregor, *Women Can Make Their Own Status*, 55 WOMEN LAW. J. 8, 8–9 (1969) (opining that women will gain more by hard work and sacrifice than through benevolence of government and courts).

177. *See* KAREN BERGER MORELLO, THE INVISIBLE BAR 217 (1986) (writing that real result may be that firms simply become more careful to justify their decisions); Paul Zarefsky, *How the* Hishon *Decision Will Affect Your Firm*, A.B.A. J., Sept. 1984, at 58, 61 (suggesting law firms establish formal evaluation procedures for associates as basis for partnership decisions); Susan Wubberhorst, Note, *Law Partnership Decisions: Title VII Applies—Will It Make a Difference?*, 53 UMKC L. REV. 468, 482 (1985) (observing that law firms may respond to *Hishon* not by compliance with letter and intent of Title VII, but with "careful documentation" of partnership decisions).

178. *See* Paul Zarefsky, *How the* Hishon *Decision Will Affect Your Firm*, A.B.A. J., Sept. 1984, at 58, 61 (asserting that *Hishon* mandates all aspects of partnership selections and procedures comply with Title VII requirements); Thomas L. Largey, Comment, *Women Lawyers and Legal Partnerships: Will Title VII Open the Door?*, 19 NEW ENG. L. REV. 647, 669–70 (1984) (concluding that Court must take steps to ensure women's rights to compete in legal profession); Susan Wubberhorst, Note, *Law Partnership Decisions: Title VII Applies—Will It Make a Difference?*, 53 UMKC L. REV. 468, 482-83 (1985) (stating that "no ground was lost" in this battle); Mary J. Johnson, Hishon v. King & Spalding,

Five years after *Hishon*, the Supreme Court again faced the issue of sexual discrimination in partnership decision-making.[179] *Price Waterhouse v. Hopkins* took the next crucial step beyond *Hishon* by inquiring into the merits of an allegation of sexual discrimination in a partnership decision.[180] A sharply divided Court undertook the task of defining the burden of proof necessary for a partnership candidate to establish her sexual discrimination claim.[181] Ann Hopkins had been employed by the Washington, D.C., office of the national accounting firm of Price Waterhouse for five years when the partners in that office submitted her name for partnership evaluation.[182] Hopkins had an exceptional achievement record with the firm,[183] and had played a key role in obtaining a multi-million dollar contract with the Department of State.[184] Partners in her office, and clients, many of whom were State Department officials, described her as intelligent, creative, and energetic.[185] Testimony also revealed that Hopkins worked long hours and demanded perfection from herself and her staff.[186] Unfortunately, Hopkins was not without her flaws. It seems that the very traits that made her successful also tainted her chances for partnership.[187] On several occasions she had been counseled about poor interpersonal skills.[188] Hopkins also had experienced some difficulty in getting along with her staff, several of whom described her as impatient, abrasive, and demanding.[189]

Equal Justice Under Law, 30 LOY. L. REV. 1008, 1024 (1984) (opining that *Hishon* is beneficial step toward full utilization of all human resources).

179. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 231-32 (1989) (detailing female partnership candidate's allegation of sex discrimination by firm).

180. *See Price Waterhouse*, 490 U.S. at 232 (resolving conflicts among courts of appeal concerning burden of proof when plaintiff shows illegitimate motive was factor in employment decision).

181. *Id.* The plurality opinion was written by Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens; Justices White and O'Connor concurred separately, and Justice Kennedy dissented, joined by Chief Justice Rehnquist and Justice Scalia. *Id.* at 231.

182. *Id.* at 233.

183. *Id.* at 233-34.

184. *Id.* at 233.

185. *Price Waterhouse*, 490 U.S. at 234.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 235.

Undoubtedly, the Policy Board for Price Waterhouse seriously considered Hopkin's shortcomings in the area of interpersonal skills when it decided to put her partnership on hold.[190] Clearly, however, an additional barrier to Hopkins's advancement in the firm was her gender.[191] Following the decision, one member of the Policy Board responsible for evaluating partnership candidates gave Hopkins some advice for improving her chances of advancement.[192] Hopkins was told that she needed to walk and dress more femininely and that she should wear makeup, restyle her hair, and wear jewelry.[193] At trial, Dr. Susan Fiske, a social psychologist, testified that Hopkins was a victim of social stereotyping and that Price Waterhouse based its evaluation on a narrow vision of how a "woman partner" should look and behave.[194] Justice Brennan, writing for the plurality, commented that "[it did not] require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism."[195]

Both the trial court and the court of appeals found that Price Waterhouse had allowed impermissible sex-based considerations to influence its partnership decision process.[196] The court of appeals went on to rule that Price Waterhouse could avoid liability if it proved that the firm would have made the same decision if gender had not been considered.[197] The Supreme Court affirmed both lower courts.[198]

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190. *See Price Waterhouse*, 490 U.S. at 236 (commenting that trial court found Price Waterhouse properly considered interpersonal skills in its evaluation process).

191. *See id.* at 251 (agreeing with district court that partners' comments showed sexual stereotyping at work). One partner said Hopkins was too "macho," a second that she "overcompensated for being a woman." *Id.* at 235. When some partners objected to her swearing, another suggested the objection was only because Hopkins was a woman. *Id.*

192. *Id.* at 235.

193. *Id.*

194. *Id.* at 235–36.

195. *Price Waterhouse*, 490 U.S. at 256.

196. *Id.* at 236–37.

197. *See id.* at 237 (holding that employer must come forward with clear and convincing evidence of nondiscriminatory considerations).

198. *Id.* Although it affirmed the lower court decisions, the Supreme Court held that the employer's burden is only preponderance of the evidence. *Id.* at 253. The plurality also indicated that the employer should carry this burden by the production of objective evidence. *Id.* at 252. Justice White's concurring opinion emphasized his belief that the

Price Waterhouse was the first "mixed-motive" case considered by the Supreme Court.[199] "Mixed-motive" refers to cases in which gender is only one of several motivating factors influencing an employer's decision rather than the only factor.[200] In addressing the "mixed-motive" issue, a majority of the *Price Waterhouse* Justices agreed that gender may not play *any* role in employment decisions.[201] This decision represented a change from previous Supreme Court decisions in sex discrimination cases, which had shifted the burden of production, but not the burden of persuasion, to the employer.[202] In *Price Waterhouse*, the Court shifted the burden of persuasion, holding that when a plaintiff establishes that gender was a motivating factor in an employment decision, the employer may avoid liability only by proving by a preponderance of the evidence that the decision would have been the same if gender had not been a factor.[203] Furthermore, *Price Waterhouse* height-

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objective standard should not be required. *Id.* at 261 (White, J., concurring). The employer should be able to present proof through any credible testimony. *Id.*

199. *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, 285 n.97 (1994) (describing *Price Waterhouse* as first case in which Court addressed "mixed-motive" sex discrimination).

200. *See Price Waterhouse*, 490 U.S. at 241 (plurality opinion) (observing that "Title VII was meant to condemn even those decisions based on a mixture of legitimate and illegitimate factors.").

201. *See id.* at 240 (opining: "We take [Title VII] to mean that gender must be irrelevant to employment decisions."); *id.* at 259 (White, J., concurring) (agreeing that employer was motivated in part by illegitimate factors); *id.* at 265 (O'Connor, J., concurring) (writing: "There is no doubt that Congress considered reliance on gender or race in making employment decisions an evil in itself.").

202. *See id.* at 270–71 (explaining that prior cases assumed plaintiff would always bear burden of persuasion). Once the employee presented a prima facie case of discrimination, the employer was required to produce some evidence of a legitimate nondiscriminatory reason for its conduct. *Id.* at 270. Then the burden of persuasion would require the plaintiff to come forward and prove that the conduct at issue was in fact motivated by discrimination and not the employer's proffered reason. *Id.* at 270–71; *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (determining that employer's burden of production begins only after plaintiff shows prima facie discrimination); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 250 (1981) (deciding that plaintiff carries burden of persuasion while burden on employer is only one of production).

203. *Price Waterhouse*, 490 U.S. at 258. This judgment left a loophole for some employers, since a showing that the decision would have been the same, absent the improper gender considerations, totally avoids liability. *Id.* A standard such as the one adopted by the United States Court of Appeals for the Eighth Circuit would have established liability but limited the remedy with such a showing. *See* Bibb v. Block, 778 F.2d 1318, 1319 (8th Cir. 1988) (establishing two-step process which would establish liability upon plaintiff's proof that race was "discernible factor," but limit remedy if employer met his burden of

ened the employer's burden, by requiring it to prove that the decision would *actually* have been the same, not merely that the decision would have been justified.[204] Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia in his dissent, disagreed with the shift in the burden of persuasion established by *Price Waterhouse*.[205] However, only two years later, Congress modified Title VII to specifically recognize a mixed-motive analysis.[206]

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proving that race was not "but for" cause of decision). *Price Waterhouse* did not leave open the possibility of any equitable remedy, such as injunction, when the employer meets his burden of proof. *See* Cheryl A. Pilate, Comment, Price Waterhouse v. Hopkins: *A Mixed Outcome for Title VII Mixed-Motive Plaintiffs*, 38 U. KAN. L. REV. 107, 141 (1989) (opining that any employer who is proven to have considered gender in decision-making should at least be subject to injunction to prevent future wrongful conduct); Bonnie H. Schwartz, Note, Price Waterhouse v. Hopkins, *57 U.S.L.W. 4469 (U.S. May 1, 1989) (No. 87-1167): Causation and Burdens of Proof in Title VII Mixed Motive Cases*, 21 ARIZ. ST. L.J. 501, 541 (1989) (concluding that *Price Waterhouse* goes too far by allowing employer to escape liability completely).

204. *Price Waterhouse*, 490 U.S. at 251. Justice O'Connor agreed with the judgment, but she viewed it as a break with previous decisions that should be viewed in a narrow context. *Id.* at 270 (O'Connor, J., concurring). Justice O'Connor analogized the *Price Waterhouse* type of case to a class action suit in which the plaintiff class had already established an element of discrimination in the employer's practices. *Id.* at 266. To avoid liability, the burden should shift to the employer to prove that each individual employee's treatment was based on legitimate reasons. *Id.* Similarly, Justice O'Connor reasoned that where an individual plaintiff proves that gender played a substantial role in her employment treatment, "the employer may [fairly] be required to convince the factfinder that despite the smoke, there is no fire." *Id.* at 266. Justice O'Connor expressed concern that in such cases, the plaintiff, despite overwhelming evidence, might not be able to precisely pinpoint discrimination as the cause of her injury. *Id.* at 266–67. The employer, having created this uncertainty by illegitimate conduct, could no longer be entitled to a presumption of good faith, but should be required to prove its actions would have been the same without the forbidden considerations. *Id.* at 269.

205. *Price Waterhouse*, 490 U.S. at 288 (Kennedy, J., dissenting) (suggesting Court should adhere to established framework which places burden of persuasion on plaintiff). Justice Kennedy argued that the shift in the burden of production set forth in the earlier cases properly left the ultimate burden on the plaintiff. *Id.* at 287. Beyond his disagreement with the propriety of the majority decision, Justice Kennedy foresaw significant confusion in the trial courts as they wrestled with the proper application of this new burden shift. *Id.* at 291–92. Finally, the dissent expressed concern with the majority's reliance on evidence of sexual stereotyping, saying that Title VII was never intended to wipe out such comments. *Id.* at 294. Justice Kennedy observed that, under the plurality's reasoning, Title VII could be manipulated "into an engine for rooting out sexist thoughts." *Id.*

206. *See* 42 U.S.C. § 2000e-2(m) (making unlawful employment practice use of "sex . . . [as] a motivating factor for any employment practice, even though other factors also motivated the practice"); *see also* S. Elizabeth Foster, Comment, *The Glass Ceiling in the Legal Profession: Why Do Law Firms Still Have So Few Female Partners?*, 42 UCLA L. REV. 1631, 1662 (1995) (describing 1991 amendment to Title VII).

Although *Price Waterhouse* did not specifically concern women attorneys, its effect on the legal profession was undeniable. Like *Hishon* before it, the most immediate impact may have been to force discriminatory practices underground as firms set up procedures to disguise improper employment actions.[207] Justice Brennan suggested that one of Price Waterhouse's failures was not having counseled its partners on the impropriety of sexually discriminatory remarks.[208] Not only did Price Waterhouse fail to address the issue, but it also allowed those discriminatory remarks to be included in evaluation factors for partnership consideration.[209] Ultimately, Justice Brennan explained that the whole intent of Title VII was to force employers to focus on an employee's qualifications, rather than race, sex, religion, or national origin.[210] The decisions in *Hishon* and *Price Waterhouse* may not have forced all employers to follow the intent of Title VII as espoused by Justice Brennan, but, if nothing else, these decisions at least focused attention on the need to eliminate sexual discrimination within firms and to apply gender equality principles in partnership evaluation decisions.[211]

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207. *See* KAREN BERGER MORELLO, THE INVISIBLE BAR 217 (1986) (opining that real result may be that firms become more careful in justifying their decisions not to promote women); Paul Zarefsky, *How the* Hishon *Decision Will Affect Your Firm*, A.B.A. J., Sept. 1984, at 58, 61 (stating that *Hishon* may spur development of permanent associate positions); Susan Wubberhorst, Note, *Law Partnership Decisions: Title VII Applies—Will It Make a Difference?*, 53 UMKC L. REV. 468, 481 (1985) (observing that more prestigious positions remain essentially closed to women).

208. *See Price Waterhouse*, 490 U.S. at 256 n.16 (agreeing with district court's comments regarding Price Waterhouse's failure to "'sensitize' partners to the dangers of sexism").

209. *Id.* at 234–35.

210. *Id.* at 243; *see* Joan E. Baker, *Employment Discrimination Against Women Lawyers*, 59 A.B.A. J. 1029, 1030 (1973) (observing that purpose of Title VII is to prohibit subtle, as well as overt, forms of discrimination).

211. *See* Robert MacCrate, *What Women Are Teaching a Male-Dominated Profession*, 57 FORDHAM L. REV. 989, 994 (1989) (suggesting that when Court struggles with differences between women and men, it benefits all). Of course, feminists disagree on what the standard for gender equality actually should be. *See* CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 33 (1987) (commenting on different paths to equality). Still, many authors predict that as women fight for equality in the legal profession, the profession itself may be profoundly changed. *See* Leslie Bender, *Sex Discrimination or Gender Inequality?*, 57 FORDHAM L. REV. 941, 945 (1989) (suggesting that women must redefine practice of law in order to achieve true gender equality); Jerome N. Frank, *Women Lawyers*, WOMEN LAW. J., Winter 1945, at 4, 23 (opining that women will bring more humanity to profession); Rand Jack & Dana Crowley Jack, *Women Lawyers:*

Five years after *Price Waterhouse*, the Supreme Court would deny certiorari in the case of a female attorney suing her firm over an employment decision.[212] Nancy Ezold sued her employer, Wolf, Block, Schorr & Solis-Cohen, over its decision not to promote her to partner.[213] Although she had a number of positive evaluations throughout her five year tenure with the firm, Ezold was told that she lacked the requisite analytical ability for partnership promotion.[214] Ezold thereupon filed suit under Title VII, claiming that the firm's stated reason for its decision was a pretext for gender discrimination.[215]

The trial court considered the totality of the firm's conduct.[216] Then, even though Wolf, Block met its burden of production by showing uncomplimentary evaluations of Ezold's analytical ability, the court found liability because the firm had promoted men with *overall* evaluations lower than Ezold's and because the evidence showed "the plaintiff was treated differently because of her gender."[217]

The United States Court of Appeals for the Third Circuit reversed, deferring to the firm's subjective decision-making process.[218] The Third Circuit cautioned against "unwarranted invasion or intrusion" into "professional judgments about an employee's qualifications for promotion within a profession."[219] Essentially,

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Archetypes and Alternatives, 57 FORDHAM L. REV. 933, 938 (1989) (asserting that women's values clash with current standards of what it takes to be successful lawyer). Catherine MacKinnon notes that, although "men's differences from women are equal to women's differences from men," men's differences have set the standards by which women's achievements are measured. CATHERINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 37 (1987).

212. Ezold v. Wolf, Block, Schorr & Solis-Cohen, 751 F. Supp. 1175 (E.D. Pa. 1990), *rev'd*, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 510 U.S. 826 (1994).

213. *Ezold*, 751 F. Supp. at 1176.

214. *Id.* at 1189.

215. *Id.* at 1176. Unlike *Price Waterhouse*, which was a "mixed-motive" case, Ezold based her claim on a "pretext" theory. *Id.* at 1191–92. The court was faced with an either/or decision: Either the stated reason for the firm's decision was a pretext for discrimination or it was not. *Price Waterhouse*, on the other hand, turned on whether improper discrimination was a factor in the decision. *Price Waterhouse*, 490 U.S. at 250–52.

216. *See Ezold*, 751 F. Supp. at 1174–89 (listing court's findings of fact regarding Ezold's performance and firm's evaluation thereof).

217. *Id.* at 1191–92.

218. Ezold v. Wolf, Block, Schorr & Solis-Cohen, 983 F.2d 509, 526–27 (3d Cir. 1992), *cert. denied*, 510 U.S. 826 (1994).

219. *Ezold*, 983 F.2d at 526–27.

the appellate court found that if the firm wanted to make analytical ability its top factor for promotion, then the courts should not interfere.[220] By refusing to hear a further appeal, the Supreme Court effectively agreed.

The Third Circuit's decision has drawn fire for being overly deferential to an employer's subjective standard for advancement.[221] Critics argue that subjective standards more easily allow unconscious bias to affect the decision-making process.[222] Other commentators, however, suggest that subjective criteria, while not helpful to Nancy Ezold, may be better for women and minorities in the long run because they allow for a more flexible approach to evaluation.[223] This latter argument assumes, of course, that the law firm is genuinely interested in quality rather than partners of a certain type,[224] and that the evaluating partners can recognize crite-

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220. *Id.* at 527.

221. *See* Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 948 n.1 (1982) (arguing that groups historically subject to discrimination have made limited progress in obtaining "upper level" positions); 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, 292–93 (1994) (asserting that courts are more deferential to employers' subjective decision-making process in cases involving upper-level jobs than for lower-level jobs). Since *Ezold*, courts have split on how to view subjective criteria for upper-level promotions. *Id.* at 292. Some have questioned whether the subjective criteria is a disguise for discriminatory conduct, while others look to whether the stated factors are applied even-handedly without much question as to the validity of the factors themselves. *Id.*

222. *Ezold* may be a prime example of how subjective criteria can shelter discriminatory attitudes even when the criteria are applied impartially. One of the Wolf, Block partners admitted that Ezold's supervising attorney only assigned her to non-complex cases. *Ezold*, 983 F.2d at 540–41. When evaluation time came, other partners perceived that Ezold did not have the analytic ability to handle demanding litigation. *Id.* at 539; Tracy Anbinder Baron, *Keeping Women out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 273 (1994). Thus, the question of her ability became something like the proverbial chicken and the egg—was Ezold not assigned to handle complex matters because she lacked the ability or was she seen to lack ability because she had never been given the opportunity to prove otherwise?

223. Recent Case, 106 HARV. L. REV. 2039, 2043 (1993) (suggesting that subjective criterion such as analytic ability might be better for women and minorities than requirement that all partners have graduated from Ivy League schools or clerked for certain courts).

224. S. Elizabeth Foster, Comment, *The Glass Ceiling in the Legal Profession: Why Do Law Firms Still Have So Few Female Partners?*, 42 UCLA L. REV. 1631, 1672–73 (1995) (arguing that law firms must shift away from focus on assimilation into predominately male-defined model of the profession).

ria that serve as a screen for unconsciously discriminatory attitudes.[225]

Price Waterhouse and *Ezold* may mark the zenith of Title VII as a tool to eliminate gender discrimination in the law firm. As Justice Powell noted in his concurrence in *Hishon*, Title VII is self-limiting to employer/employee relationships.[226] However, recent trends indicate that Title VII may not be the only approach for women to redress a law firm's gender discrimination. For example, one commentator has suggested that breach of a common law duty for partners not to discriminate offers one potential avenue for redress.[227] Alternatively, it is possible that existing codes of lawyer conduct may be amended to include sexual harassment and sexual discrimination as breaches of professional ethics.[228] Whatever avenue is chosen, it is clear that the legal profession should be peculiarly subject to court scrutiny because it is the profession that most closely symbolizes the justice system.[229]

2. Sexual Harassment

The Supreme Court has not written on the subject of law firm employment practices since *Hishon*, but no review of the status of women in law firms would be complete without some discussion of the Court's most recent decision in the area of sexual harass-

225. For instance, associates may be evaluated for honesty or the ability to communicate. However, an employer may find the white male candidate more forthright or articulate without being aware of sexual stereotypes that have influenced that evaluation. Tracy Anbinder Baron, *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, 296-98 & n.152 (1994) (noting that examinations of unconscious stereotyping in racial bias apply equally to analysis of gender bias (citing Charles R. Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 328-44 (1987))).

226. *Hishon*, 467 U.S. at 79 (Powell, J., concurring); *see* Mark L. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners*, 46 HASTINGS L.J. 17, 21 (1994) (observing that Title VII does not protect partners from discrimination).

227. Mark L. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners*, 46 HASTINGS L.J. 17, 63–67 (1994).

228. Lisa Pfenninger, *Sexual Harassment in the Legal Profession: Workplace Education and Reform, Civil Remedies, and Professional Discipline*, 22 FLA. ST. U. L. REV. 171, 211–12 (1994) (recommending Model Judicial Code as potential model for ethical canons of lawyer conduct).

229. Mark L. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners*, 46 HASTINGS L.J. 17, 79 (1994).

ment.[230] As previously alluded to in this Commentary, the proliferation of sexist attitudes in the workplace, which, in its most severe form, rises to the level of sexual harassment, stands out as one of the subtle barriers to the advancement of women attorneys. Therefore, increased public recognition and court attention to the issue of sexual harassment likely will have some influence in the overall battle women attorneys wage against forces of gender discrimination.

In *Harris v. Forklift Systems, Inc.*,[231] the Court attempted to more clearly define the standards for a sexual harassment claim.[232] Teresa Harris was a manager at Forklift Systems, Inc., until she resigned because of what she described as repeated and offensive sexual harassment.[233] The district court held that Harris failed to prove her claim because she could not show that the abusive con-

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230. A.B.A. COMM'N ON WOMEN IN THE PROF., UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR 18-19 (1995) (reporting that more than half of women attorneys experience sexual harassment on job); Peter Jan Honigsberg et al., *When the Client Harasses the Attorney: Recognizing Third-Party Sexual Harassment in the Legal Profession*, 28 U.S.F. L. REV. 715, 726–27 (1994) (discussing recent sexual harassment cases by female attorneys against their firms); Danielle L. Hargrove & Cynthia L. Young, *Law Firms and Employment Law: We're Not Above the Law*, 59 TEX. B.J. 436, 439 (1996) (noting increase in sexual harassment actions against law firms); Lisa Pfenninger, *Sexual Harassment in the Legal Profession: Workplace Education and Reform, Civil Remedies, and Professional Discipline*, 22 FLA. ST. U. L. REV. 171, 176 (1994) (emphasizing that number of reported cases of sexual harassment by firms does not accurately reflect magnitude of problem); Kim Horner, *Women's Work*, TEX. LAW., Sept. 30, 1996, at 1 (discussing settlement of sexual harassment case against Fulbright & Jaworski's Dallas office).

231. 114 S. Ct. 367 (1993).

232. *Harris*, 114 S. Ct. at 369. Specifically, the Court undertook to define the parameters of a "hostile work environment" claim. *Id.*; *see* Stuart L. Bass & Eugene T. Maccarrone, *Supreme Court Reaffirms* Meritor *and Refines Requirements for Hostile Work Environment in Sexual Harassment Suits: The Impact of* Harris v. Forklift Systems, Inc., 16 WOMEN'S RTS. L. REP. 53, 57 (1994) (commenting that *Harris* Court did not require plaintiff to prove "serious psychological injury" in order to prevail on hostile work environment claim). The Court first addressed the two types of sexual harassment claims in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). The Court recognized both quid pro quo sexual harassment and hostile work environment sexual harassment as actionable under Title VII. *Id.* at 65. Quid pro quo harassment occurs when an employer promises or withholds employment benefits based upon the employee's response to sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature. *Id.* Certainly, the quid pro quo claim has not generated the debate over standards that has accompanied the hostile environment claim.

233. *See* Harris v. Forklift Sys., Inc., 1991 WL 487444, at *2-3 (M.D. Tenn. Feb. 4, 1991) (detailing "a continuing pattern of sex-based derogatory conduct"), *aff'd*, 976 F.2d 733 (6th Cir. 1992), *rev'd*, 114 S. Ct. 367 (1993).

duct was "so severe as to . . . seriously affect [Harris's], psychological well-being" or that it caused her to "suffe[r] injury."[234] The Supreme Court held that the district court applied an incorrect analysis when it required psychological harm or injury.[235] Instead, the Supreme Court reasoned that a hostile environment claim is established when the claimant can show "discriminatory intimidation, ridicule, and insult . . . sufficiently severe or pervasive to alter the conditions of . . . employment" and create a working environment that would be "reasonably perceived as hostile or abusive."[236]

Justice Ginsburg, in a concurring opinion, emphasized that the focus should be on whether the wrongful conduct "has unreasonably interfered with the plaintiff's work performance."[237] According to Justice Ginsburg, proof of unreasonable interference would not require a decline in productivity, but only a showing that the harassment made it more difficult for the worker to do the job.[238] Justice Ginsburg's remarks undoubtedly reflect her belief that gender-specific classifications are unnecessary to ensure equal rights for women.[239] In fact, the reasonable person standard espoused by Justice Ginsburg, and apparently adopted by the Supreme Court, has been praised for examining the conduct of the harasser and how it alters the conditions of the victim's employment, rather than

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234. *Harris*, 114 S. Ct. at 369–70.

235. *Id.* at 371.

236. *Id.* at 370-71. The Court's use of the "reasonable standard" without further explanation has led some to speculate that there is still a debate over whether the "reasonable woman" standard is still appropriate in such cases. *Compare* Sharon J. Bittner, Note, *The Reasonable Woman Standard After* Harris v. Forklift Systems, Inc.: *The Debate Rages On*, 16 WOMEN'S RTS. L. REP. 127, 134 (1994) (reporting both sides of reasonable person/reasonable woman debate claim victory after *Harris*), *with* Stuart L. Bass & Eugene T. Maccarrone, *Supreme Court Reaffirms* Meritor *and Refines Requirements for Hostile Work Environment in Sexual Harassment Suits: The Impact of* Harris v. Forklift Systems, Inc., 16 WOMEN'S RTS. L. REP. 53, 56 (1994) (asserting *Harris* held that sexual harassment is established when victim alleges conduct that reasonable *woman* would consider hostile or abusive).

237. *Harris*, 114 S. Ct. at 372.

238. *Id.*

239. *See* Sharon J. Bittner, Note, *The Reasonable Woman Standard After* Harris v. Forklift System, Inc.: *The Debate Rages On*, 16 WOMEN'S RTS. L. REP. 127, 136 (1994) (reporting Justice Ginsburg's questions at oral argument focused on effect of conduct rather than needless standards (citing Linda Greenhouse, *Ginsburg at Fore in Court's Give-and-Take*, N.Y. TIMES, Oct. 14, 1993, at B1)).

focusing on whether the victim reacted like a "reasonable woman."[240]

The Court's apparent move away from a gender-specific standard in the area of sexual harassment may have broader implications for the field of gender relations in general. By adopting a "reasonable person" standard in a case arising in the employment context, the Court impliedly sends an important message to employers. Specifically, the Court seems to reinforce the view that women employees should be judged not as "women" but solely as "employees." Obviously, such an interpretation of *Harris* would benefit female attorneys in their quest for partnership status. Even if *Harris* cannot be read so broadly, the decision still signifies a significant step forward for professional women seeking to advance their careers. By doing nothing more than drawing public attention to the problem of sexual harassment in the workplace, *Harris* increases awareness of lingering problems involving gender discrimination and spotlights the need to address the issue.

V. CONCLUSION

There can be little doubt that the Supreme Court has had a profound influence on the practice of women in the legal profession. Certainly, the ranks of the law firms have been as difficult for women to infiltrate as the chambers of the Court itself. Supreme Court decisions like *Bradwell* and *Lockwood* frustrated women attorneys for over a century. *Hishon*, and later, *Price Waterhouse*, applied Title VII protections to the evaluation of potential law firm partners, a process that had been closed and unassailable for most of the history of the legal profession.[241] More recently, *Harris* rein-

240. *See* Sharon J. Bittner, Note, *The Reasonable Woman Standard After* Harris v. Forklift Systems, Inc.: *The Debate Rages On*, 16 WOMAN'S RTS. L. REP. 127, 136 (1994) (arguing that if reasonable woman standard is necessary, it appears that woman, by definition, is not reasonable person). The criticism of the reasonable woman standard is that it gives the male perpetrator an excuse to say that he, not being a woman, did not know his conduct was offensive. *Id.* Sexual harassment ought to be recognizable to all reasonable working people. *Id.* at 135, 137.

241. *See* Mark L. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners*, 46 HASTINGS L.J. 17, 33 (1994) (pointing out that even word "partner" suggests intimacy not usually associated with business decisions). Informal networking and referrals within organizations like law firms tend to exclude women and minorities. Ramona L. Paetzold & Rafael Gely, *Through the Looking Glass: Can*

forced the need for sexual harassment prevention policies.[242] Still, discrimination against women appears to be alive and well in the legal profession.[243]

In recent years the Justices of the Supreme Court have had the opportunity to act on issues that affect the hopes and ambitions of women attorneys across the nation. Their decisions acknowledge that gender discrimination does exist, often in very subtle forms, at the upper echelons of law firms and other professional organizations. Furthermore, those decisions give notice that partners are not protected from liability when they allow discrimination to motivate employment decisions. While the Court may yet have the opportunity to rule on new applications for contractual and tort causes of action in the employment context, the most important function the Supreme Court may perform is to continue to remind all who go before the bar that discrimination is insidious and destructive, not only for the women whose careers are affected, but also for the legal profession, which stands to lose not only dedicated and talented professionals, but the respect of the public it exists to represent.

Title VII Help Women and Minorities Shatter the Glass Ceiling?, 31 HOUS. L. REV. 1517, 1525 (1995).

242. *See* Lisa Pfenninger, *Sexual Harassment in the Legal Profession: Workplace Education and Reform, Civil Remedies, and Professional Discipline*, 22 FLA. ST. U. L. REV. 171, 192 (1994) (noting that Supreme Court considers failure to adopt and follow through with sexual harassment policy factor in employer's liability exposure); *see also* Meritor Savings Bank v. Vinson, 477 U.S. 57, 71-73 (1986) (determining that employer's antidiscrimination policy and grievance procedure are relevant to employer's liability for acts of employees).

243. Barbara Pfeffler Billauer, *A False Prophet of Profits*, PERSPECTIVES, Winter 1995, at 12 (criticizing *The American Lawyer*'s unsubstantiated conclusion that law firm profits drop with rise in female lawyers).