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### Cover Page Footnote

A partner at Vladeck, Waldman, Elias & Engelhard, P.C. Mrs. Vladeck litigates employment cases on behalf of plaintiffs, and represented Nancy Ezold in *Ezold v. Wolf, Block, Schorr and Solic-Cohen*, 983 F.2d509 (3d Cir. 1992), cert. denied, 510 U.S. 826 (1993), a case claiming sex discrimination in the denial of partnership. Mrs. Vladeck has represented employees in individual and class action cases challenging race, age and sex bias. She has also served as counsel to numerous labor unions and non-profit organizations.

# RESPONSE TO *GLASS CEILINGS AND OPEN DOORS*: A MODEST PROPOSAL FOR CHANGE

Judith P. Vladeck\*

## OVERVIEW

WITH the publication of the Glass Ceilings Report,<sup>1</sup> a moratorium should be declared on studying the obstacles to the advancement of women in the legal profession. There have been committees on committees on the status of women in the legal profession for entirely too long. We do not need to study the problem any longer. It has been described, analyzed, and deplored for long enough. If we are simply going to recommit the questions to more committees as an excuse for doing nothing, we should at least have the grace to admit that we are perpetuating the status quo by doing so. Continued "study" implies that there is an open question—*e.g.*, is the earth round?

It is now long past time to concentrate on remedies. Energy should be focused on practical measures that draw on the excellent Report to the Committee, as well as the prior work of the ABA's Commission on Women in the Profession, the New York State Bar Association, other bar associations and organizations of women at many law schools.

Most of the findings of the Glass Ceilings Report have been known to the profession for years. A sense of urgency to implement any change is what is lacking, probably because those in power really like it the way it is. Women fear the consequences of being seen as advocates of change, particularly if such advocacy places them at odds with the males who control their future career opportunities. Women who have "made it" in the large firms are often apologists for the system. It therefore becomes the obligation of the organized bar, as a professional society, to accept the overwhelming evidence that there is a se-

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This paper was written with Suja A. Thomas. Ms. Thomas, prior to coming to joining Vladeck, Waldman, was an associate in a large New York City firm, and provided a resource from which to draw material.

1. Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *Fordham L. Rev.* 291 (1995) [hereinafter *Glass Ceilings*].

rious problem of sex bias within law firms, and to agree that further study will not make it go away. It is essential to developing a remedy that the bar, once and for all, declares that gender bias within the profession is unacceptable, and the profession is prepared to do what is necessary to eliminate its effect on the advancement of women. If we fail to act now, the only hope is that brave women willing to risk their futures in the establishment firms will bring lawsuit after lawsuit until we get it right.<sup>2</sup>

What we do is important because, as a profession, we set standards and act as role models to clients and other segments of society. The profession produces judges and political leaders who have a profound effect on every other part of our society. We are believed to be people of integrity and intelligence. When lawyers go wrong, the ripple effect touches every other institution.

### I. FIRST PRINCIPLES

If we are to develop an action plan, we must start with certain bed-rock principles that have been drawn from the various studies conducted over the years. If we accept these principles and do not act, we are all complicitous.

*Principle 1:* The status quo is not right. In law, as in any occupation, merit and gender are not synonymous. There are no women's jobs or men's jobs, any more than there are black jobs or white jobs. There are no women lawyer positions, any more than there are white lawyer positions.<sup>3</sup> To the extent that we permit women's advancement in the profession to be determined by gender, not only are we behaving unlawfully, but we are condoning waste.

*Principle 2:* The status quo is perpetuated by stereotyping women, as to their skills and their commitment to law.<sup>4</sup> Such stereotyping excludes women from partnership and policy-making roles in law firms, denies them opportunities to reach those positions, and ultimately bars them from the judicial and political establishment.

*Principle 3:* Law firms are not entitled to maintain the fiction that they are private clubs insulated from the application of the laws bar-

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2. In *Kohn v. Royall, Koegel & Wells*, plaintiff sued on behalf of a class of recent female law school graduates who had been denied interviews by the defendant firm. 59 F.R.D. 515, 520 (S.D.N.Y. 1973), *appeal dismissed*, 496 F.2d 1094 (2d Cir. 1974). Judging by the number of female associates hired after *Kohn*, the success of that action had a salutary effect on the recruiting and hiring practices of New York law firms. Unfortunately, as shown in the studies, no such improvement seems to have followed in the area of partnership promotions.

3. Concurring in *Hishon v. King & Spalding*, Justice Powell stated: "In admission decisions made by law firms, it is now widely recognized—as it should be—that in fact neither race nor sex is relevant. . . . Law firms—and, of course, society—are the better for these changes." 467 U.S. 69, 81 (1984) (Powell, J., concurring).

4. See, e.g., *Glass Ceilings*, *supra* note 1, at 365-67, 378 (explaining some of the common stereotypes uncovered in legal practice).

ring discrimination in employment. Law firms are employers, and the courts have repeatedly rejected claims of associational rights or rights of free expression as excuses for exemption from the equal employment laws.<sup>5</sup>

To spend any more time questioning these principles means deferring again, for yet another generation or two, the end of exclusion of women from the upper echelons of the profession. These principles can easily be tested by looking at the make-up of the partnerships in the large law firms, a system almost totally controlled by white males. If we do not accept women's inherent inferiority as lawyers, then their lack of success in breaking through the "ceilings" is either a matter of their choice, or is imposed on them. If it is a matter of choice, and different career paths of women lawyers are consensual, then why all the fuss, and why are women protesting?<sup>6</sup> If it is not a matter of inherent inferiority, or of choice, then are there any benign explanations?

Since it is too late for the "pipeline" excuse, and too late for the "clients won't accept" notion, what is left? My view is that the profession, both as a reflection of and shaper of American society, and as the most powerful force in protecting the *status quo*, still subscribes to the *Bradwell* idea that the "natural and proper timidity and delicacy which belongs to the female sex evidently unfits it" for the practice of law.<sup>7</sup>

## II. THE MODERN TWO TIER SYSTEM

The modern version, I am convinced, is now found in the odious notion that women as mothers or potential mothers, are unworthy of law firms' investment in their training and professional development.

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5. In *Hishon*, the Supreme Court held that Title VII prohibits law firms from discriminating on the basis of an associate's race, religion, sex or national origin when the firm considers the associate for partnership. *Hishon*, 467 U.S. at 78. The Court said, "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections." *Id.* at 78 (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).

6. The experience of women in law firms is similar to that of women employed by corporations, or other employers. Congress, in the Glass Ceiling Act, declared in part:

- (1) despite a dramatically growing presence in the workplace, women and minorities remain underrepresented in management and decisionmaking positions in business; [and]
- (2) artificial barriers exist to the advancement of women and minorities in the workplace

The Glass Ceiling Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified at 42 U.S.C. § 2000).

7. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring). The Supreme Court denied Myra Bradwell's Fourteenth Amendment claim for admission to the bar of Illinois. *See id.* at 138-39. Justice Bradley's concurrence expressed the sentiment of the time. *See id.* at 139-42.

All young women, whatever their plans for family, child bearing, or child raising, are viewed as potential drop-outs, unlikely to have the same long term commitment to the practice of law as their male peers. Even worse, at the time they do have children, female associates are viewed as having no future value.

Until the profession is prepared to abandon its resistance to the idea that women, even those who are potential or actual mothers, are capable of commitment to law and of providing continuing economic returns to the firms that support them, we will get nowhere.

In the conventional analysis of work place discrimination, the notion of investment in human capital is often used to explain differences in levels of achievement—in terms of position or compensation. Regression analyses and other statistical tests, which are favored tools for analyzing workplace discrimination, ascribe predictive value to certain employee characteristics, such as education, related work experience, etc. Frequently, law firms treat military service, government service, service to charitable organizations, or the like, as valuable additions to human capital.<sup>8</sup> Nevertheless, law firms almost uniformly treat child bearing or child rearing as a deficit.<sup>9</sup>

Unless law is now to be seen as largely mechanical, people with a wide range of interests and skills inevitably will be more useful as lawyers than those who are more limited. Experience has taught us that our leaders at the bar are not one-dimensional automatons. How can we say that the experience of childbirth, managing a family, or shaping the growth of children, is not an enhancement of a woman's value as a human being and as a lawyer? If we acknowledge that such experience is a valuable attribute, can we be so limited in our ingenuity that we can find no accommodation for child bearing in law firm practice?

Since it would be a highly romantic idea to expect that profit-driven law firm managers will be persuaded to take the lead in pressing for acceptance of social values they may privately endorse, I would not rely on voluntary educational programs; I would require that law firms abide by the law that regulates all other American employers, and mandate participation in the programs described below.

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8. In a sex discrimination class action against an advertising agency, where men were found in higher paying, more prestigious positions, a regression analysis variable showing the "contribution to salary" of military service was found by the trial court to be appropriate, even though military service was almost a perfect match to maleness. See *Rossini v. Ogilvy Mather, Inc.*, 615 F. Supp. 1520, 1532-33 (S.D.N.Y. 1985), *rev'd on other grounds*, 798 F.2d 590 (2d Cir. 1986). The Court of Appeals sustained the trial court's approval of military experience as a permissible variable, although there was no evidence to indicate that military experience was actually considered in the defendant's job decisions. See *Rossini*, 798 F.2d at 603-04.

9. I may be particularly angry about this view. Perhaps making too personal a point, I can't avoid referring to my own three children as having contributed significantly to my education as a human being and making valuable contributions to society in their own work. My passion for law was in no way reduced or deflected by these three "career interruptions" (as the statisticians would call them).

Having had the benefit of the many studies that identify the mechanisms by which law firms perpetuate white male domination and exclusion of women from equal opportunity, we can focus on appropriate remedial action. The programs described here are directed at eliminating those obstacles most frequently described in the studies as blocking women's progress.

The mechanisms, which produce the two tier system, most often cited—apart from the *Bradwell* mythology about where women fit—are:

*Environment:* Women are not encouraged to consider partnership as a possibility.<sup>10</sup> Nor are they encouraged by having to work in an atmosphere that tolerates classic ways of putting young women in their place, such as unwelcome sexual advances, harassment, or paternalistic attitudes.<sup>11</sup>

*Assignments:* Women are assigned work that limits their opportunity for partnership, e.g., document discovery, privilege logs, etc., while newly hired males are given career enhancing assignments with earlier client contact, and are provided with partner mentoring, etc.<sup>12</sup>

*Channeling:* Women are directed into fields other than lucrative corporate or commercial practice and instead are encouraged to choose fields like domestic relations, which are then devalued as less desirable because they are women's fields.<sup>13</sup>

*Pregnancy Discrimination:* Women are faced with the Hobson's Choice: forego having children (or unnaturally defer childbirth) or give up on partnership. Men do not have to make the choice. This is not equal opportunity.

### III. REMEDIES

#### A. *Mandatory Continuing Legal Education*

It is proposed that the bar association make participation in programs devised by experts in discrimination law mandatory for lawyers in New York. Giving law firms the benefit of the doubt, that is, accepting that the exclusion of women from partnership, or positions as practice leaders, or from opportunity for achieving those positions, is

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10. See *Glass Ceilings*, *supra* note 1, at 361-64.

11. See *id.* at 371-78.

12. See *id.* at 365-67, 373.

13. In *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, after the plaintiff was informed that she would not be recommended for partnership in general litigation, she was told that if she agreed to head the firm's domestic relations practice she would be made a partner in that area in one year. See 751 F. Supp. 1175, 1189 (E.D. Pa. 1990), *rev'd*, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 510 U.S. 826 (1993). The Third Circuit overruled a fact-specific trial court finding of sex discrimination in the denial of partnership to plaintiff. The appellate court said that substantial deference had to be paid to the decisionmakers (not the trial court!) in discrimination cases involving professional employment. See *Ezold*, 983 F.2d at 524-48.

not deliberate, but simply the result of ignorance, mandatory continuing legal education is an appropriate first effort to remedy the situation.

Attendance at these courses should be monitored, and the firm's managers required to attend. The courses should cover, at a minimum:

*Statutory Obligations:* An overview of the various laws barring discrimination based on sex, including the Pregnancy Discrimination Act, and the Family and Medical Leave Act should be provided.

*Ethical Obligations:* Law firms that otherwise are punctilious in adherence to ethical rules may not even be aware that some of their treatment of their female employees violates the disciplinary rules.<sup>14</sup>

*Diversity Training:* No responsible lawyer advising a corporate client as to its obligations to maintain a discrimination-free workplace (or as to methods of avoidance of litigation) would omit a recommendation for diversity training for its managers. Law firms should now be required to provide such training to its own employees.

### B. *Mandatory Tracking*

Large law firms should be required to adopt a tracking program. Tracking involves charting the work assignments and evaluations of each associate. The work assignments should be designated "documents," "privilege log," "interrogatories," "depositions," "trial preparation," "drafting," and so on.

At mid-year and year-end, the types of work and evaluations that associates have received should be reviewed. Any differences between men and women thus identified should be examined, and a plan developed to eliminate those differences.

### C. *Reporting Requirements*

Along with publicizing pro bono activity, the Association should issue annual reports listing those firms that have complied with the various requirements. Failure to participate or to cooperate should result in a separate listing that should be published and forwarded to all American law schools.

### D. *Bar Association Hot Lines and Dispute Resolution Procedures*

Over the years, bar associations have provided hot line service for the answering of ethical questions, and have encouraged the assembling of volunteer counsel for clients with special needs. The shoe-

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14. It is a violation of the disciplinary rules governing attorneys to "[u]nlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment, on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation." N.Y. Jud. Law. § 1200.3 (McKinney 1993).

maker's children have been neglected, and it is time to create hot lines, and panels, to assist young women who are suffering what they perceive as discriminatory treatment by law firms, but are afraid to go outside the establishment to seek help.

#### E. *Judging the Judges*

While litmus tests for judicial candidates are to be deplored, fitness for office can be determined by adherence to the ethical standard of non-discrimination. Candidates who declare themselves impatient with or unsympathetic to claims of discrimination as litigation issues should not be deemed "qualified."<sup>15</sup>

#### F. *Appointments of More Women to the Bench*

Women judges are still very much in the minority. They serve, as do their male counterparts, as symbols of achievement. Their position on the bench encourages women lawyers to believe that the barriers to women's attainment of positions of responsibility and power are not insurmountable.

### CONCLUSION

Whether we regard law as a learned profession which draws together men and women who believe that law is the best vehicle for providing service and leadership in our society or whether we accept the modern view of it as a business, the barriers to advancement of women in law must be surmounted. If we do not accept the obvious—that discrimination based on gender is both unlawful and in violation of our ethical codes—we should be persuaded that in the long run it is not sound business and, indeed, is wasteful.

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15. A recent example of this rejection of public policy, congressional enactments, ethical code requirements, and the oath of office, was found in an op-ed piece by a district court judge when he left the bench. He strongly suggested that there are no meritorious claims of discrimination; that there are only venal plaintiffs' lawyers. He urged that the federal courts be reserved for important matters: patent, antitrust, banking, finance, etc. No response to the piece came from any representative of the organized bar.

