

# “IT’S ONLY DISCLOSURE”<sup>1</sup>: A MODEST PROPOSAL FOR PARTNERSHIP REFORM

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Over the past several years, as a new corporate governance or accounting scandal seemed to appear in the headlines every week, legislators, policymakers, and corporations alike recognized the need for significant change. The Sarbanes-Oxley Act of 2002<sup>2</sup> marked a watershed development in corporate securities and governance laws; it enabled the Securities and Exchange Commission (SEC) to promulgate rules leading to widespread reform.<sup>3</sup> The SEC passed a series of rules in late 2003 requiring companies to disclose director independence to their shareholders, and to describe how the current board handles nominations for board seat candidates.<sup>4</sup> Designed “to make the nomination process easier to understand and more open, giving shareholders detailed information on corporate policies and board nominees,”<sup>5</sup> the rules appear to have enjoyed a significant degree of success—at least in their first year—restoring investor confidence in companies and in the market as a whole.<sup>6</sup>

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1. Daniel Nasaw, *Opening the Board*, WALL ST. J., Oct. 27, 2003, at R8 (quoting Sarah Teslik, Executive Director, Council of Institutional Investors).

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2. 15 U.S.C. §§ 7201–7266 (West Supp. 2004).

3. 15 U.S.C. § 7202(a), (West Supp. 2004) (“The Commission shall promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of this Act.”).

4. Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors, Exchange Act Release No. 33-8340, 81 SEC Docket 2132-83 (Nov. 24, 2003) [hereinafter *SEC Board Disclosure Rule*]. See also Judith Burns, *SEC Sets New Rules on Boards*, WALL ST. J., Nov. 20, 2003, at C15.

5. Judith Burns, *SEC Gives Preliminary Approval to Rules on Board Nominations*, WALL ST. J., Aug. 7, 2003, at C9.

6. See Judith Burns, *Is Sarbanes-Oxley Working?*, WALL ST. J., June 21, 2004, at R8 (“Judging by public opinion, the law is a hit . . .”).

In many respects, the same elements that necessitated corporate governance reform—lack of transparency and accountability, and the attendant plummets in investor confidence in the market and willingness to invest further—are present in another area: gender discrimination in the workplace. While sex discrimination touches nearly every industry and affects women (and men) in all manners and levels of employment, this Note focuses on one particular problem that has had remarkable staying power: the “glass ceiling” in law firms,<sup>7</sup> the phenomenon wherein firm partnerships remain predominantly male even as women now enter law school and become associates in numbers roughly equal to men. Implementation of disclosure requirements for law firm partnership committees analogous to those imposed upon public corporations would be a significant step in mitigating the continuing male dominance of firm partnerships, as they would provide a much-needed way to address the cognitive biases underlying firm practices as well as the practices themselves.

Part I of this Note introduces the possibility of requiring SEC-type disclosure with respect to firms’ systems for evaluating partnership candidates and admitting associates to the partnership. Part I also explains the potential benefits of such disclosure. Part II initially provides an explanation of the scope of the problem facing women in law firms, and explores the potential roots of this problem. Part II(b) highlights the successes and failures of plaintiffs in bringing claims under Title VII of the Civil Rights Act of 1964, and suggests the need for a new approach to Title VII litigation in the promotion discrimination context. Part III(a) offers one such approach: adoption in the law firm context of disclosure rules based upon the SEC’s model, which is explained in detail in Part III(a)(i). In addition, Part III(b) suggests several potential ways of implementing and enforcing such rules, as well as the limitations to the law firm-public corporation analogy. Part IV further examines the costs and benefits of disclosure, to companies and firms as well as to investors and associates. Finally, Part V concludes that, taking all tradeoffs into account, the idea of disclosure requirements in the law firm partnership setting not only is viable, but also harmonizes with Congress’ original goals in enacting Title VII.

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7. See generally Cynthia Fuchs Epstein, et al., *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291 (1995) (providing detailed and insightful discussion of “glass ceiling” problem facing women in law firms).

## I.

## RESPONSES TO A NEED FOR CHANGE

Several key parallels between the corporate governance problems that the SEC rules were designed to address and the barriers facing women in law firms make this idea promising. First, some form of mandatory disclosure of partnership candidate evaluation systems would allow potential associates—like investors—to make better-informed decisions as to where they wish to begin their careers, allowing women to enter the job market with greater confidence in their knowledge of what lies ahead. Second, a disclosure requirement would force firms—like public corporations—to face increased accountability for their decisions and to give greater thought to their partnership evaluation systems, including whether these systems have a disproportionately negative impact on women.

Law firms, like public companies under the November 19, 2003 SEC rules,<sup>8</sup> should be required to disclose nomination and evaluation procedures for partnership candidates, or at least to subject the candidate evaluation process to some sort of independent, third-party audit—analogue to the independent auditor requirement of public companies under Sarbanes-Oxley<sup>9</sup>—the results of which would then be disclosed to the public. The key questions, then, are (1) how could such a requirement best be implemented and enforced? and (2) what consequences (apart from public knowledge) could be imposed on non-compliant firms?

The SEC requires national exchanges such as the NYSE and NASDAQ to de-list companies that do not comply with its disclosure and audit rules;<sup>10</sup> law firms face no similar consequences. And there is no threat of a shareholder class action for breach of fiduciary duty to strike fear among law firm partnerships as it does among directors of public companies.

Instead, two classes of people who stand to benefit from the regulation of partnership evaluations can make firms accountable: potential associates (law students and lateral associate hires), and current associates (employees) at the firms. Given the omnipresent desire on the part of law firms to recruit and to keep the best attorneys, this market for human capital may be enough to inspire at least some firms to follow the regulations. At the very least, disclosure requirements

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8. See *SEC Board Disclosure Rule*, *supra* note 4 and accompanying text.

9. See 15 U.S.C. § 7213 (West Supp. 2004).

10. Standards Relating to Listed Company Audit Committees, Exchange Act Release No. 33-8220, 79 SEC Docket 2876-2 (Apr. 9, 2003).

will likely have a signaling effect; ideally, they will alert courts, potential plaintiffs, and employers alike to the need to examine the cognitive motivation behind certain policies. This in turn will encourage judges to evaluate facially neutral selection systems actively instead of deferentially, aiming to excavate the underlying biased notions on which these systems might be based. By subjecting the law firm partnership structure to closer scrutiny at such a fundamental level, women may just be able to open its doors a little wider.

## II.

### WOMEN IN THE LEGAL PROFESSION: AT A PLATEAU ON THE UPHILL BATTLE

#### A. *The Scope of the Problem*

While the number of women enrolling in law schools and practicing in private firms has increased dramatically [in recent years], women remain seriously underrepresented in the ranks of law firm partners. 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.<sup>11</sup>

Many view the law firm as “a symbol of the power and prestige of the legal profession;”<sup>12</sup> its members—and especially its partners— influence aspects of our society ranging from civil rights litigation to the activity of major public companies and organizations. The absence of women exerting that influence, therefore, is a glaring and significant one. By 1991, though females accounted for 32% of all associates nationwide, women only comprised 10% of all partners.<sup>13</sup> The number of female partners increased to 14% by 1999.<sup>14</sup> “[A] study of eight large New York City firms [conducted in 1995] showed that seventeen percent of all men who entered firm practice after 1981 had been named partner, while only five percent of [their female counterparts] had similarly advanced;”<sup>15</sup> sadly, these numbers reflected the

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11. Nancy L. Farrer, 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*, 28 ST. MARY'S L.J. 529, 532 (1997).

12. *Id.* at 530.

13. BARBARA A. CURRAN, A.B.A. COMM'N ON WOMEN IN THE PROFESSION, *WOMEN IN THE LAW: A LOOK AT THE NUMBERS* 25, 27 (1995).

14. Joan C. Williams, *Canaries in the Mine: Work/Family Conflict and the Law*, 70 FORDHAM L. REV. 2221, 2222 (2002).

15. Farrer, *supra* note 11, at 555 (citing A.B.A. COMM'N ON WOMEN IN THE PROFESSION, *UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR* 11 (1995)).

same disparity as an analogous survey conducted in 1980.<sup>16</sup> Historical underrepresentation (i.e., the fact that women have not participated in firms in large numbers for as long as men) cannot explain this stagnancy, which makes it even more puzzling.

To examine the scope and cause of the problem, the New York City Commission on Human Rights conducted an investigation in the early 1990s of ten major New York law firms, and “ultimately agreed that a pattern of sexual discrimination existed in the ‘recruitment, hiring, promotion and treatment of women lawyers.’”<sup>17</sup> The American Bar Association (ABA)’s 1995 report suggested that the firms’ methods of partnership evaluation and selection was at least partly to blame; the traditional emphasis on billable hours, for example, puts women at a disadvantage by according less weight to “results, efficiency and client satisfaction.”<sup>18</sup> Indeed, women reported that they were “subject to a variety of discriminatory practices that consciously or unconsciously prevent[ed] their accomplishments from being evaluated on an equal basis . . . .”<sup>19</sup> Moreover, women noted that they “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.”<sup>20</sup> As one law firm partnership study revealed, “women must meet a higher standard for promotion, ‘either because of male lawyers’ preference for male business associates, or because of the preferences of clients for male lawyers, or both.’”<sup>21</sup>

Admission to a law firm partnership is not a function of mere time or effort expended at the associate level; each law firm utilizes a unique selection system when deciding whom to promote. The consequence, therefore, is that partnership committees frequently rely on criteria that are difficult to pinpoint or to isolate, and on evaluations fraught with uses of personal discretion or sentiment. As a result, courts often are reluctant to judge this reliance, preferring to defer to

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16. *Id.* (citing BARBARA A. CURRAN ET AL., *THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE US LEGAL PROFESSION IN THE 1980s* 46 (1985)) (stating that one-third of women who joined firms prior to 1971 had become partners, whereas one-half of similarly situated men had become partners).

17. *Id.* at 549 (quoting KAREN BERGER MORELLO, *THE INVISIBLE BAR* 211 (1986)).

18. A.B.A. COMM’N ON WOMEN IN THE PROFESSION, *UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR* 12 (1995).

19. Farrer, *supra* note 11, at 556.

20. *Id.* at 556 (citing series of ABA reports).

21. Theresa M. Beiner, *Do Reindeer Games Count as Terms, Conditions or Privileges of Employment Under Title VII?*, 37 B.C. L. REV. 643, 651 (1996) (quoting Stephen J. Spurr, *Sex Discrimination in the Legal Profession: A Study of Promotion*, 43 INDUS. & LAB. REL. REV. 406, 413 (1990)).

the committees' final decisions.<sup>22</sup> Academic commentary and common sense suggest that, "[w]hen a decision is subjective, the decision maker has the most leeway to let personal influences . . . inform the decision making process."<sup>23</sup> "Personal influences" undoubtedly include the type of cognitive biases each of us harbor—unconscious though they may be—and shape not only partnership decisions themselves, but the selection of criteria to use (and how much weight to accord each criterion) in making such decisions.

### B. Title VII as a Remedy for Sex Discrimination

Enacted with the primary goal of ending employment discrimination based on race,<sup>24</sup> Title VII of the Civil Rights Act of 1964<sup>25</sup> has since become a powerful force for eradicating gender-based discrimination as well. In the four decades since its passage, the legislation has opened up a myriad of employment opportunities to women—from certain types of jobs within a given company or industry, to entire professions previously comprised only of men.<sup>26</sup> In the partnership context, Title VII has allowed female candidates, and the courts, to make significant progress towards eradicating overt discrimination in promotion decisions.<sup>27</sup> Partnership selection committees must now recognize that they cannot base their decisions on facially gender-biased criteria, nor can they accord weight to evaluations that contain discriminatory remarks.<sup>28</sup>

Today, however, more subtle and covert barriers remain in place, stalling the advancement of women to the top of the legal profes-

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22. See, e.g., *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509 (3d Cir. 1992).

23. Beiner, *supra* note 21, at 653.

24. See, e.g., Editorial, *Review and Outlook: Power*, WALL ST. J., Oct. 2, 1984, at 30 (describing 1964 Civil Rights Act as "moral commitment this country made to racial equality 20 years ago"). See also *Price Waterhouse v. Hopkins*, 490 U.S. 228, 243 n.9 (1989) (noting focus on race as primary Title VII concern).

25. 42 U.S.C. §§ 2000e–e-3 (West 2003).

26. See, e.g., *Berkman v. City of New York*, 705 F.2d 584 (2d Cir. 1983) (concluding that Fire Department entrance examination had disparate impact on women); *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir. 1979) (discussing sex discrimination in Police Department based on height requirements and physical abilities test).

27. See, e.g., *Price Waterhouse*, 490 U.S. at 258 (finding employer liable for sex discrimination under Title VII after plaintiff established that sex stereotyping played part in her partnership candidacy, even though such stereotyping was not sole determinant); *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101–02 (2003) (holding that direct evidence of discrimination is not required for plaintiff to succeed in mixed-motive case under Title VII).

28. See *Price Waterhouse*, 490 U.S. 228.

sion.<sup>29</sup> It is time for the profession to adopt a new approach towards eradicating them. If women want to break through the glass ceiling into the highest echelons of the profession, they need a way to challenge these practices that will be more successful and reliable than Title VII alone.

### 1. *The Tools At Hand: Disparate Impact and Disparate Treatment*

Title VII supplies courts with two modes of analysis for claims brought under the statute: disparate treatment and disparate impact.<sup>30</sup> Disparate treatment theory addresses employment rules or decisions that treat an employee less favorably than his or her peers explicitly because of that employee's race, sex, religion, or national origin. To establish a prima facie case of disparate treatment, the plaintiff must prove that: (a) s/he was qualified to receive or maintain the employment position at issue; (b) s/he was not in fact hired for, or got fired or demoted from, this position; and (c) someone with roughly equivalent qualifications was hired instead of or to replace him/her.<sup>31</sup> Disparate treatment cases may be brought either as individual claims, or as "pattern or practice" claims of systematic disparate treatment of women (or another class listed in the statute).<sup>32</sup>

Under disparate impact theory, a plaintiff must show that a facially neutral job requirement or policy has a disproportionate impact on women (or another listed class), and that this requirement or policy is not related to job performance.<sup>33</sup> Unless the employer either proves that the employment practice at issue is not the cause of the disparate impact, or demonstrates that the challenged practice is related to the job and is consistent with business necessity, the employer will be in violation of Title VII.<sup>34</sup>

### 2. *Title VII and the Firm*

A threshold question is the extent to which Title VII regulates the employment practices of partnerships (including law firms). In *Hishon v. King & Spalding*,<sup>35</sup> the Supreme Court settled the question

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29. See, e.g., Joan C. Williams, *Litigating the Glass Ceiling and the Maternal Wall: Using Stereotyping and Cognitive Bias Evidence to Prove Gender Discrimination*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 287 (2003) (discussing discrimination against mothers and other family caregivers).

30. 42 U.S.C. § 2000e-2.

31. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

32. See *Price Waterhouse*, 490 U.S. at 265–67.

33. 42 U.S.C. § 2000e-2(k).

34. *Id.* § 2000(e)-2(k)(1)(A)(i)–(ii).

35. 467 U.S. 69 (1984).

of whether law firms generally are subject to the statute, holding that the decision by a private law firm as to whether to offer partnership to an employee does fall under Title VII, because partnership is a “term, condition, or privilege” directly linked with a person’s status as an employee.<sup>36</sup> Plaintiff Elizabeth Hishon had been hired as an associate with the law firm King & Spalding in 1972; her employment was terminated in 1979 after the firm considered and rejected her application for partnership two years in a row. Hishon alleged that “the prospect of partnership was an important factor in her initial decision to accept employment” with the firm, and that the firm used the possibility of ultimate partnership as a recruiting device, “represent[ing] that advancement to partnership after five or six years was ‘a matter of course’ for associates ‘who receive[d] satisfactory evaluations,’ and that associates were promoted to partnership on a ‘fair and equal basis.’”<sup>37</sup> The district court dismissed her complaint, on the ground that Title VII was inapplicable to the selection of partners by a partnership; the Eleventh Circuit Court of Appeals affirmed. From its inception until the time Hishon filed her lawsuit, King & Spalding had never admitted a female partner.<sup>38</sup>

Upon examination of the statute itself, however, the Supreme Court reversed the lower courts’ dismissal. The majority opinion noted that 42 U.S.C. § 2000e-2(a) states:

*“It shall be an unlawful employment practice for an employer—(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.”*<sup>39</sup>

The Court held that consideration for partnership, “though not a contractual *right* of employment, may qualify as a ‘privileg[e]’ of employment under Title VII.”<sup>40</sup> Displaying the first spark of willingness to criticize partnership selection systems rather than merely defer to them, Justice Powell emphasized in his concurrence that, when law firms make partnership decisions, “in fact neither race nor sex is relevant.”<sup>41</sup>

The Supreme Court’s next landmark decision in the partnership discrimination context came five years later, in *Price Waterhouse v.*

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36. *Id.* at 76.

37. *Id.* at 71–72.

38. *Id.* at 71.

39. *Id.* at 73 (citing 42 U.S.C. § 2000e-2(a)).

40. *Id.* at 75 (alteration in original).

41. *Id.* at 81 (Powell, J., concurring).

*Hopkins*.<sup>42</sup> While the D.C. Circuit Court of Appeals had held that an employer may prove it did *not* violate Title VII by demonstrating through clear and convincing evidence that it would have made the same decision in the absence of an impermissible motive,<sup>43</sup> the Supreme Court held that the employer must carry this burden by a preponderance of the evidence,<sup>44</sup> thereby expressing the necessity for a closer examination of the selection process. According to the Court, Price Waterhouse's emphasis on interpersonal skills in the promotion decision may indeed have been legitimate. The majority noted that Title VII's language and history evidence "[t]he statute's maintenance of employer prerogatives,"<sup>45</sup> moreover, "[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision."<sup>46</sup> But because the firm consciously accorded weight to comments borne of sex discrimination during this process (thereby actually relying on her gender in making its decision),<sup>47</sup> it had unlawfully discriminated against plaintiff Anne Hopkins on the basis of sex.<sup>48</sup>

The Court concluded that, under 42 U.S.C. § 2000e-2(a)(1), an employer could still avoid a finding of liability by proving that it would have made the same decision had gender not played a role.<sup>49</sup> The justices divided, however, over the predicate question of *when* the burden of proof shifts to the employer to prove that affirmative defense. The plurality held that,

when a plaintiff in a Title VII case proves that her gender played a *motivating* part in an employment decision, the defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account.<sup>50</sup>

But the opinion did not "suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision."<sup>51</sup> Justice O'Connor, in contrast, would have required the plaintiff to show that an illegitimate consideration was a "substantial factor" in the employment decision, and would have shifted the

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42. 490 U.S. 228 (1989).

43. See *Hopkins v. Price Waterhouse*, 825 F.2d 458, 471 (D.C. Cir. 1987).

44. 490 U.S. at 258.

45. *Id.* at 242.

46. *Id.* at 251.

47. See *id.*

48. *Id.* at 256.

49. *Id.* at 242.

50. *Id.* at 258 (emphasis added).

51. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93 (2003) (quoting *Price Waterhouse*, 490 U.S. at 251-52).

burden regarding the question of causation to the employer only where the plaintiff had already shown by *direct evidence* that an illegitimate criterion was a substantial factor in the decision.<sup>52</sup>

Justice O'Connor's concurrence, and the "direct evidence" it seemed to require, became the source of much interpretation and debate among the circuit courts,<sup>53</sup> as well as scholars.<sup>54</sup> Courts immediately began to implement this requirement as law, creating substantial difficulties for plaintiffs who lacked the type of "smoking gun" evidence Anne Hopkins had been able to offer. Aiming to settle this debate, Congress passed the 1991 Amendment to the Civil Rights Act;<sup>55</sup> Section 107(a) "modified Title VII to specifically recognize a mixed-motive analysis,"<sup>56</sup> settling the *Price Waterhouse* evidentiary debate with two new statutory provisions. The new sections codified an alternative means of proving that an "unlawful employment practice" occurred: such proof is "established when the complaining party demonstrates that . . . sex . . . was a motivating factor for any employment practice, even though other factors also motivated the practice."<sup>57</sup> In addition, the Act now provides that, with respect to claims in which the plaintiff proves a violation under § 2000e-2(m), the employer has a limited affirmative defense that does not absolve it of liability, but does restrict the remedies available to declaratory relief, certain types of injunctive relief, and attorney's fees.<sup>58</sup> To avail itself of the affirmative defense, an employer must "demonstrat[e] that [it]

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52. *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring).

53. See, e.g., *Jackson v. Harvard Univ.*, 900 F.2d 464, 467 (1st Cir. 1990); *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992); *Starceski v. Westinghouse Elec. Corp.*, 54 F.3d 1089, 1096 (3d Cir. 1995); *Fuller v. Phipps*, 67 F.3d 1137, 1142 (4th Cir. 1995); *Brown v. E. Miss. Elec. Power Ass'n*, 989 F.2d 858, 861 (5th Cir. 1993); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991); *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997); *Schleiniger v. Des Moines Water Works*, 925 F.2d 1100, 1101 (8th Cir. 1991); *Heim v. Utah*, 8 F.3d 1541, 1547 (10th Cir. 1993); *EEOC v. Alton Packaging Corp.*, 901 F.2d 920, 923 (11th Cir. 1990).

54. See, e.g., Michael A. Zubrensky, Note, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed-Motives Employment Law After Price Waterhouse v. Hopkins*, 46 STAN. L. REV. 959 (1994); Tristin K. Green, Comment, *Making Sense of the McDonnell Douglas Framework: Circumstantial Evidence and Proof of Disparate Treatment Under Title VII*, 87 CAL. L. REV. 983 (1999); Joseph J. Ward, Note, *A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 ALB. L. REV. 627 (1997).

55. Pub. L. No. 102-166, 105 Stat. 1071 (1991). See also 42 U.S.C. § 2000e-2(m) (2000).

56. Farrer, *supra* note 11, at 565.

57. 42 U.S.C. § 2000e-2(m) (2000).

58. *Id.* § 2000e-5(g)(2)(B).

would have taken the same action in the absence of the impermissible motivating factor.”<sup>59</sup>

The 1991 Amendment, however, ultimately added more fuel to the ongoing debate over burdens of proof in mixed-motive cases. After its passage, the circuit courts divided over the question of whether a plaintiff must prove by *direct* evidence that an impermissible consideration was a motivating factor behind the employer’s action. Several courts answered in the affirmative, following O’Connor’s concurrence. But the Supreme Court made it clear in *Desert Palace v. Costa* that the statute does not require such a heightened showing. In order to obtain a mixed-motive jury instruction under § 2000e-2(m), “a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that ‘. . . sex . . . was a motivating factor for any employment practice.’”<sup>60</sup> Noting that “direct evidence of discrimination is *not* required in mixed-motive cases,”<sup>61</sup> the Court held in *Desert Palace* that the plaintiff was entitled to a mixed-motive instruction, even though she had presented merely circumstantial evidence to establish her case. The direct-circumstantial evidence distinction is a significant one for plaintiffs seeking to withstand an employer’s motion for summary judgment, particularly as the most common form of discrimination has changed from “bold and unequivocal” employer comments and policies to subtler practices;<sup>62</sup> plaintiffs, therefore, often must base their cases chiefly upon circumstantial evidence. Writing for the majority, Justice Thomas noted that the language of Title VII itself imposes no special or heightened evidentiary burden on plaintiffs in mixed-motive cases; instead, these plaintiffs must only prove such cases by a preponderance of the evidence—whether that evidence is direct or circumstantial.<sup>63</sup> Indeed, the Court noted that circumstantial evidence may be not only

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59. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 94–95 (2003) (quoting 42 U.S.C. § 2000e-5(g)(2)(B)).

60. *Id.* at 101 (citing 42 U.S.C. § 2000e-2(m)).

61. *Id.* at 101–02 (emphasis added).

62. *See, e.g.*, Barbara K. Bucholtz, *Father Knows Best: The Court’s Result-Oriented Activism Continues Apace: Selected Business-Related Decisions from the 2002-2003 Term*, 39 TULSA L. REV. 75, 92 (2003) (“If the Court had [insisted] upon direct evidence in Title VII cases, a large number of cases could have been terminated on summary judgment motions because employment discrimination rarely asserts itself in the bold and unequivocal ways it did before *McDonnell Douglas Corp. v. Green*.”). *See also* Zubrensky, *supra* note 54, at 961 (explaining that, because of the hidden nature of much discrimination in the workplace, producing direct evidence of an improper motive is often quite difficult; courts that required “smoking gun” evidence had therefore “undermined the plaintiff-favorable mechanism promised by *Price Waterhouse*”).

63. *Desert Palace*, 539 U.S. at 99.

sufficient, but also more certain, satisfying, and persuasive than direct evidence in many cases.<sup>64</sup> Because Title VII does not specify what types of evidence a plaintiff may use,<sup>65</sup> the Court saw no reason to depart from the conventional rules of civil litigation by requiring a heightened showing. However, while *Desert Palace* made it clear that plaintiffs bringing disparate treatment claims could use circumstantial as well as direct evidence to prove discrimination, the Court did not address disparate impact theory, leaving open the question of whether plaintiffs bringing disparate impact cases must still present direct evidence to bring a sufficiently persuasive claim. As described below, this is only one of the many hindrances of bringing a disparate impact case under current law.

### 3. *Obstacles to Challenging Partnership Policies Under Disparate Impact*

In theory, disparate impact allows plaintiffs to challenge facially neutral employer practices, such as subjective partnership candidate evaluations, under the rubric of Title VII. But as a litigation tool, disparate impact theory is saddled with two major hindrances: employers' ease of establishing defenses to a challenge, which many courts appear eager to accept, and plaintiffs' heavy burden of proof even in the absence of a valid affirmative defense.

For example, once a plaintiff has established a prima facie case of disparate impact, an employer may argue that the allegedly discriminatory policy or practice was justified by a business necessity.<sup>66</sup> For a law firm, knowledge of the availability of this "business necessity" defense provides security in exercising a good deal of discretion ex ante. The firm may credibly argue, for instance, that its success is dependent—at least in part—on the "rainmaking" of its attorneys. Therefore, a selection system which heavily emphasizes an associate's potential to bring in major clients should be considered acceptable even if this emphasis has a disparate impact on women (e.g., because women of childbearing age, on average, do not have as much spare time as their male counterparts to attract business while engaging in

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64. *Id.* at 99–100 (noting that Court has "often acknowledged the utility of circumstantial evidence in discrimination cases").

65. 42 U.S.C. § 2000e-2(m) states that a plaintiff need only demonstrate that an employer used a forbidden consideration with respect to any employment practice; it makes no mention of a heightened showing using direct evidence.

66. 42 U.S.C. § 2000e-2(e) (2000). *See also* *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) ("The touchstone is business necessity. If an employment practice which operates to exclude [members of the class at issue] cannot be shown to be related to job performance, the practice is prohibited.").

leisure activities, such as golf or tennis with clients). While the fact that disparate impact analysis does not require the claimant to show discriminatory intent can be useful to plaintiffs,<sup>67</sup> the statute's requirement that the employer must fail to demonstrate "that the challenged practice is job related for the position in question"<sup>68</sup> before a plaintiff may succeed makes disparate impact a challenging claim for plaintiffs to mount in the law firm partnership context. As the Supreme Court explained in *Griggs v. Duke Power Co.*, if an employer can demonstrate that its facially neutral job requirement is justified by a business necessity, it will escape liability.<sup>69</sup> And due to the generally accepted need for partners' rainmaking for their firms, this demonstration rarely will be difficult for a law firm to make.

Compounded with the ease of demonstration for employers is perhaps a more troubling aspect of this defense: many promotion criteria, notwithstanding their classification as "business necessities," in reality stem from unconscious biases or assumptions. Moreover, "business necessity" is never defined in the legislation,<sup>70</sup> allowing courts more leeway to accept an employer's argument that the criterion at issue falls under the business necessity umbrella.

The defense should remain available; indeed, it is important for firms to retain some degree of discretion in determining what employee characteristics it deems most desirable in a potential partner. A requirement that all firms utilize the same, entirely gender-neutral evaluation systems could have a homogenizing effect among law firms, erasing the characteristics that allow firms to distinguish themselves and retain the personality that drew many to work there in the first place. But coupled with this consideration should be a recognition that when discretion becomes discretion to discriminate, this is unacceptable no matter how much of a "necessity" the firm may believe its system to be.

The "lack of interest" defense has presented a similar obstacle for many disparate impact plaintiffs.<sup>71</sup> Employers use this defense by as-

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67. See *Griggs*, 401 U.S. 424.

68. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000).

69. 401 U.S. at 431-32.

70. According to Congress, "courts should give such weight, if any, to such evidence as is appropriate under the meaning of 'business necessity' as used in *Griggs v. Duke Power Co.*" H.R. REP. NO. 102-40(I), at 38 (1991) (citation omitted), 1991 WL 70454 (Leg. Hist.).

71. Lack of interest is also an available defense in disparate treatment cases. Perhaps the best-known example of an employer's successful use of the lack of interest defense comes from *EEOC v. Sears*, 628 F. Supp. 1264, *aff'd* 839 F.2d 302 (7th Cir. 1988). Despite evidence that Sears—the second-largest employer of women in the United States at the time—had consistently failed to hire women to sell large-commis-

serting that a disparity in gender in a given job class is due to lack of interest on the part of one group rather than from discriminatory promotion criteria.<sup>72</sup> For example, employers may argue that women's simple lack of interest in the employment in question—as opposed to any behavior on the part of the employer—is the true explanation for a disparity in numbers between men and women in the given position. If accepted by the court, such a defense essentially dismisses statistical evidence that the plaintiff might offer; the court, therefore, will refuse to infer discrimination from numbers alone, no matter how striking these numbers may be. Indeed, one author has noted that the lack of interest defense “runs directly counter” to “realizing Title VII’s purpose of eliminating job segregation,” precisely because it negates the very sort of statistical evidence which “judges have recognized . . . plays a critical role in ‘uncover[ing] clandestine and covert discrimination.’”<sup>73</sup>

Finally, even when the employer cannot establish an adequate affirmative defense, the plaintiff still carries the ultimate burden of persuasion that the employer acted with a discriminatory motive—a burden that becomes insurmountable when disparate impact results from unintentional cognitive errors, such as assumptions and stereotyping. The influence of cognitive bias creates the problem, for example, that many attorneys may be more likely to remember when working mothers leave early than when they stay late, because the former reinforces their own stereotyped notions of working mother behavior, and this memory will then be reflected in a partnership candidate’s evaluation. Likewise, partners may assume that a mother of young children would not have time or would not be interested in joining a social outing on a Saturday morning, thereby depriving this woman of the opportunity for valuable access to potential mentors or

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sion items, the court absolved Sears of Title VII liability on the grounds that women were largely uninterested in these sales positions, and this was the true explanation for the gender disparity. 628 F. Supp. at 1305. The outcome of the *Sears* case also demonstrates the difficulty of succeeding on a group systemic disparate treatment claim, in part because the plaintiff cannot solicit the testimony of individual women, which might be more difficult for a court (or a jury, if the case even makes it to trial) to dismiss than statistics alone.

72. See, e.g., *Sears*, 628 F. Supp. 1264, *aff’d* 839 F.2d 302 (7th Cir. 1988).

73. Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1075–76 (1992) (quoting *Int’l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977) (citations omitted)).

advocates in the selection process.<sup>74</sup> Assumptions such as these have a very real impact on the women who become their subjects, but are extremely difficult to document.

Adding to this evidentiary obstacle is the inconsistency among courts' approaches in assessing "stray remarks" in candidate evaluations.<sup>75</sup> Many courts will tend to aggregate all evidence presented by both parties, thereby diluting the significance of plaintiff's pieces of evidence (which—though incriminating when taken alone—may be small in number). At least one study has found that judges in sex discrimination cases tend to demand a higher level of proof than in race discrimination suits, insisting on direct or anecdotal evidence of discrimination against the *individual* rather than presuming existence of past discrimination against the plaintiff's class.<sup>76</sup> "[C]ourts have been reluctant," the authors observed, "to attribute sex segregation to employer discrimination" without "proof that the employer took concrete actions to prevent individual women from realizing their already-formed aspirations for such work . . . ."<sup>77</sup> Comparing case histories of race and sex discrimination, the authors noted that, in the former, "evidence that the employer relied on a subjective selection system substantially increased plaintiffs' chances of winning . . . . Many judges were suspicious of employers who failed to develop clear, objective hiring criteria . . . ."<sup>78</sup> In sex discrimination cases, however, "courts

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74. For further description of how such assumptions, and the gender gap in attendance at extra-office activities that stems from them, tend to benefit male associates over females, see Beiner, *supra* note 21. As the author argues, these outside activities generally give the participating employee a "leg up" from increased exposure to the boss or others in power. . . . [E]ven if a non-participating employee is given an opportunity to participate, he or she may have no interest in the particular activity involved. This may lead the boss to think the employee is "not a team player . . . ." A decision not to play golf, however, obviously has no effect on an employee's ability . . . .

*Id.* at 645-46.

75. See, e.g., Heim v. State of Utah, 8 F.3d 1541, 1547 (10th Cir. 1993) (determining "stereotypical" statements by plaintiff's supervisor did not constitute direct evidence of discrimination, as plaintiff failed to demonstrate that such statements were connected to employment decision); Ramsey v. City and County of Denver, 907 F.2d 1004, 1008 (10th Cir. 1990) (statements by male supervisor were "expressions of . . . personal opinion," and therefore did not constitute discriminatory employment policy); cf. Wright v. Southland Corp., 187 F.3d 1287, 1289 (11th Cir. 1999) (Title VII plaintiff simply has "burden of presenting evidence from which the trier of fact could conclude, more probably than not, that the defendant-employer took an adverse employment action against the plaintiff on the basis of a protected personal characteristic.").

76. See Schultz & Petterson, *supra* note 73, at 1125.

77. *Id.* at 1125-26.

78. *Id.* at 1128.

have failed to exhibit the same suspicion . . . .”<sup>79</sup> Noting that evaluation-based selection systems “provide as much opportunity for sexual bias as for racial bias,” the authors argue that “the courts’ failure to attach importance to the nature of the selection process in sex discrimination cases suggests that judges were simply less inclined to perceive sex segregation as the product of potentially discriminatory processes.”<sup>80</sup>

When judges combine this disinclination with the tendency to aggregate all evidence before making a determination and to disregard isolated incriminating remarks, they leave employers relatively free to act with unfettered discretion—as long as they avoid obvious displays of discriminatory intent. Convincing courts to accept documentation of “reindeer games” in the workplace as admissible evidence is, therefore, an extremely difficult task. One district court went so far as to hold that, even though a plaintiff’s evidence of these games in her workplace tended to show a “general predilection on the part of the employer to discriminate,” the games themselves were simply not “all that important, and [were] not likely, in and of themselves, to be actionable.”<sup>81</sup> While patterns of behavior that include such games could support a case of systemic disparate impact, individual instances with no obvious link to another adverse employer action are much more difficult to tie to something that clearly falls under Title VII’s scope of protection. The cognitive biases at play in these games, therefore, remain largely unreachable by disparate impact theory.

At least one Circuit Court of Appeals has noted, albeit very recently, the need to recognize unconscious biases as potential contributors to discrimination. In *Back v. Hastings on Hudson Union Free School District*,<sup>82</sup> the Second Circuit vacated the lower court’s grant of summary judgment and allowed the plaintiff teacher to proceed to trial, noting that:

[While her employers] might have believed their stereotypes not to be gender discriminatory, but rather, to be *true*—that is, they may have believed that women with young children in fact should not or would not work long hours . . . such a belief can not serve as a refuge in the discrimination context, for it cannot be considered “objectively reasonable.”<sup>83</sup>

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79. *Id.*

80. *Id.*

81. Beiner, *supra* note 21, at 666 (discussing *EEOC v. Shelby County Gov’t*, 707 F. Supp. 969, 986 (W.D. Tenn. 1988)).

82. 365 F.3d 107 (2d Cir. 2004).

83. *Id.* at 130.

The remarkable departure of *Back* from its predecessor cases<sup>84</sup> demonstrates the significance of a court's willingness to scrutinize employer subjectivity, and highlights the need for reforms that will push more courts to engage in such scrutiny.

#### 4. *Limits of the Law*

Use of circumstantial evidence may cast a wider “evidentiary dragnet” for plaintiffs,<sup>85</sup> but it leaves unsolved the problem of judicial deference to close-to-the-vest decisions of firm partnership committees—the gatekeepers of the highest echelons of the profession. The Third Circuit's analysis in *Ezold v. Wolf, Block, Schorr and Solis-Cohen*<sup>86</sup> demonstrates just how prohibitive such deference can be to Title VII claims. In *Ezold*, plaintiff Nancy Ezold sued her employer under Title VII, alleging that the firm “intentionally discriminated against her on the basis of her sex . . . when it decided not to admit her to the firm's partnership.”<sup>87</sup> Denying Ezold's claim, the Third Circuit “deferr[ed] to the firm's subjective decision-making process,” cautioning future courts “against ‘unwarranted invasion or intrusion’ into [matters involving] ‘professional judgments’” about their employees' qualifications for employment.<sup>88</sup> The court held that the lower court “had erred by examining the evaluations of Ezold and the male candidates in areas other than the deficiency noted by Wolf, Block, namely, Ezold's analytical shortcomings.”<sup>89</sup> In addition, the court ruled that even the “sexist remarks” Ezold offered as evidence of discrimination—evidence that the trial court had accepted—were “too remote and isolated to have tainted the partnership decision.”<sup>90</sup> The Third Circuit's decision has since drawn its own fair share of criticism, including the argument that “subjective standards more easily allow unconscious bias to affect the decision-making process,” and that even

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84. Within the Second Circuit, see *Fisher v. Vassar Coll.*, 114 F.3d 1332 (2d Cir. 1997) and *Weinstock v. Columbia Univ.*, 224 F.3d 33 (2d Cir. 2000). For examples from other circuits, see *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509 (3d Cir. 1992) and *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, *aff'd* 839 F.2d 302 (7th Cir. 1988).

85. *The Supreme Court, 2002 Term—Leading Cases*, 117 HARV. L. REV. 226, 409 & n.69 (2003).

86. 983 F.2d 509 (3d Cir. 1992).

87. *Id.* at 512. The firm's evaluations of partnership candidates were based on two broad categories of criteria—legal performance and personal characteristics—assessed by partners “regardless of the extent of the evaluating partner's contact or familiarity with the associate's work.” *Id.* at 515.

88. Farrer, *supra* note 11, at 567 (citing *Ezold*, 983 F.2d at 527).

89. Bradley H. Schleier, *Sex Discrimination in Partnership Decisions*, 32 ARIZ. ATT'Y 16, 18 (1995).

90. *Id.*

seemingly unbiased evaluation criteria may “serve as a screen for unconsciously discriminatory attitudes.”<sup>91</sup>

However, despite academic criticism, courts continue to display a willingness to accept defenses such as business necessity for the use of gender-biased criteria,<sup>92</sup> further highlighting the need for transparency in partnership selection processes. Such transparency will have three significant results: first, courts will be able to place the burden on employers to demonstrate the extent to which they rely on these factors, and why the factors are so important to their business; second, plaintiffs will have at their disposal more hard evidence of whether and how reliance on these factors has a disparate impact on women; and third, employees can enjoy greater awareness of how they will be evaluated, and respond accordingly. The key question is how best to achieve these goals.

### III.

#### A POTENTIAL SOLUTION: ADOPTION OF DISCLOSURE RULES USING SEC MODEL

##### A. *Why this Analogy Works*

The fact that women in business—pick any business—face this kind of sex discrimination and/or harassment today is appalling. To put an end to such behavior requires the proactive leadership of chief executive officers and their executives in charge of business divisions—up to and including personal accountability for what occurs on their watch.

Sound drastic? It is only when individuals in the executive suite are held publicly accountable for the actions of those they employ that such behavior will cease to be tolerated. Then no employee—male or female—will have to endure the improprieties of a “Boom-Boom Room.”<sup>93</sup>

The concepts of accountability and transparency have long been recognized as the cornerstones of a successful corporate governance model. Unfortunately, the events of the last few months have demonstrated all too clearly that basic ethics, something that we

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91. Farrer, *supra* note 11, at 568-69 (citing Tracy Anbinder Baron, Comment, *Keeping Women Out of the Executive Suite: The Court's Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 292 & n.124, 293 n.126, 296-98 (1994)).

92. See, e.g., *Lanning v. S.E. Penn. Transp. Authority*, 308 F.3d 286 (3d Cir. 2002); *Birmingham Fire Fighters Ass'n 117 v. Jefferson County*, 290 F.3d 1250 (11th Cir. 2002).

93. Holly Sraeel, Commentary, *Morgan Bias Case Settled. Will this Stop Abuses?* 114 U.S. BANKER 8 (2004).

may have all taken for granted, must also be a concern for today's investors.<sup>94</sup>

The subjects of the quotes above may diverge, but the sentiment is the same: both recognize the need to address a troublesome state of affairs, and both point to increased public accountability as an integral part of the solution.

1. *Disclosure of Nominating Committee Functions: SEC Rule 33-8340*

The landscape of regulation surrounding the corporate director nomination process appears quite different today from barely a year ago, in the wake of SEC demands for a significantly higher level of disclosure and transparency. The Securities and Exchange Commission summarizes Rule 33-8340, "Final Rule: Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors," as follows:

We are adopting new disclosure requirements and amendments to existing disclosure requirements to enhance the transparency of the operations of boards of directors. Specifically, we are adopting enhancements to existing disclosure requirements regarding the operations of board nominating committees . . . . These rules require disclosure but do not mandate any particular action by a company or its board of directors; rather, the new disclosure requirements are intended to make more transparent to security holders the operation of the boards of directors of the companies in which they invest.<sup>95</sup>

As of January 1, 2004, any proxy or information statements that public companies send to their shareholders must comply with Rule 33-8340, adopted by the SEC on November 19, 2003.<sup>96</sup> Compliance includes disclosure of processes for nominating corporate directors as well as those for communications between boards of directors and the company's shareholders.<sup>97</sup>

The Commission proposed, developed, and ultimately adopted these rules after considering "the input of members of the investing, business, legal, and academic communities. The majority, reflecting concern over corporate director accountability and recent corporate scandals, generally urged [the SEC] to adopt rules that would grant

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94. *The Corporate and Auditing Accountability, Responsibility and Transparency Act of 2002: Hearing on H.R. 3763 Before the House Comm. on Fin. Servs.*, 107th Cong. 14 (2002) (statement of Ted White, Dir. of Corporate Governance, Cal. Pub. Employee's Ret. Sys.).

95. *SEC Board Disclosure Rule*, *supra* note 4.

96. *Id.*

97. For an overview of the content of these Rules, see 1443 PLI/Corp. 681, 701-03.

security holders greater access to the nomination process . . . .”<sup>98</sup> Explaining the rationale behind its new rules, the SEC argued that “specific, detailed disclosure requirements are necessary and appropriate to assure that investors are provided with disclosure that presents the desired degree of clarity and transparency.”<sup>99</sup>

Moving towards this goal, the SEC now requires that companies provide in their proxy statements to shareholders descriptions of “any specific, minimum qualifications that the nominating committee believes must be met” by nominees for a board position, as well as “any specific qualities or skills that the nominating committee believes are necessary for one or more of the company’s directors to possess,” plus an additional description of “the nominating committee’s process for identifying and evaluating nominees for director.”<sup>100</sup> The latter requirement goes the furthest towards providing shareholders with insight into the director selection process—a process that the investing community had previously thought the purview of a “real incestuous, closed network.”<sup>101</sup> One *Wall Street Journal* reporter noted that “[f]or years, chief executives handpicked their directors, showing a particular yen for those who wouldn’t seriously challenge them. Through social and professional connections, they found plenty of candidates willing to serve under those terms . . . .”<sup>102</sup> Not only did investors lack a voice as to the selection criteria that members of a company’s nominating committee should use, but also, they frequently were unable to learn which criteria were even *in* use. This shroud of secrecy naturally fostered investor cynicism and a pervasive default sense that nominations put forward by the company’s committee would be self-interested selections. And once these selections became the company’s new directors, another cycle of less-than-candid corporate governance was free to begin. As the executive director of the Council of Institutional Investors explained: “As long as boards are chosen by the people they’re supposed to oversee, oversight won’t happen. It’s really simple.”<sup>103</sup>

Aiming to restore investor confidence in the director nomination process, the Rule targets not only the transparency of this process, but

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98. *SEC Board Disclosure Rule*, *supra* note 4.

99. *Id.*

100. *Id.*

101. Nasaw, *supra* note 1 (quoting Richard Koppes, former general counsel at Cal. Pub. Employees’ Ret. Sys.).

102. *Id.*

103. *Id.* (quoting Sarah Teslik, executive director, Council of Institutional Investors (a Washington group representing over 130 pension funds, with assets totaling more than \$3 trillion)).

also the independence of those involved. Under Rule 33-8340, every company must disclose whether the members of its nominating committee are independent;<sup>104</sup> the SEC includes specific definitions of “independence,” preventing companies from circumventing this requirement through technicalities.<sup>105</sup> Additionally, the company must state in its disclosure materials precisely which definition it uses, and must apply the same definition to all committee members.<sup>106</sup> With these detailed requirements, the Commission again emphasized that companies will not be able to avoid questions of independence through creative machination, but will have to confront them head-on. Moreover, shareholders will be able to take a company’s assurance of committee independence at face value, eradicating some of the justifiable skepticism with which many investors have come to view corporate statements in the recent past. The SEC, in effect, provides a sort of “quality seal” to company disclosures, on which investors at last may comfortably rely.

The support for reform—to “raise the bar as high as you can so there are no real or perceived conflicts”<sup>107</sup>—came from all types of investors, from large institutional investors to retail and individual shareholders.<sup>108</sup> However, some expressed concern that, while “[t]he

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104. Rule 33-8340 also expands proxy statement disclosure requirements to include information as to whether a company has a standing nominating committee for its board of directors; if the corporation does not have such a committee, the board must explain why it feels this is appropriate, and in either case must identify the directors who participate in the nominee consideration process. Proxy statements must also now include many more details regarding this process. If a nominating committee is in place, the company must either post that committee’s charter on its website and provide shareholders with the web address, or include a copy of the charter with its proxy statement at least once every three years. If such a charter does not exist, the company must state this fact explicitly; in essence, companies are not forced to adopt and publicize these charters, but the fact that they must call attention to their failure to do so presumably influences this decision. *SEC Board Disclosure Rule, supra* note 4.

105. Listed issuer companies, for example, must apply the same definition used in the listing standards applicable to that issuer (i.e., those of the national securities exchange or national securities association to which the company belongs). Non-listed issuers must disclose whether each member of its nominating committee is independent, and must use the definition of an SEC-approved and registered national securities exchange or association. *See id.*

106. *Id.*

107. Nasaw, *supra* note 1 (quoting Roger W. Raber, president and chief executive of the Nat’l Ass’n of Corporate Dirs., a Washington-based corporate board educational and consulting group).

108. Interestingly, of the 147 contributors during the SEC comment period for the disclosure rules (from August to November of 2003), the majority of unions, pension funds, institutional investors and related associations, and individuals supported the proposed disclosure rules, while the majority of law firms, individual attorneys, and corporations did not. *See* Summary of Comments In Response to the Commission’s

transparency proposals are a good start . . . whether such rules will be effective depends on how board members respond to shareholder concerns.”<sup>109</sup> Counterbalancing the rules’ anticipated creation of an “embarrassment” or “shame factor” that would “force all but the most malfeasant boards” to realize the risk of running a suspect director nomination process<sup>110</sup> was the fear that “directors will become overly reliant on [the rules] rather than adhere to fiduciary principles.”<sup>111</sup> Investor groups expressed concern that boards might “inadvertently become more complacent because they can fall back on the rules.”<sup>112</sup> But in general, such hesitations were trumped by the sense of a need for greater transparency and accountability in the director nomination process.<sup>113</sup>

## 2. *Disclosure of Law Firm Partnership Candidate Committee Functions*

This need for transparency clearly exists in the law firm partnership candidate evaluation process as well. An analogous approach to that which the SEC has taken could prove quite effective. Opening up the evaluation process to greater oversight and scrutiny would create two significant motivations for firms to actually reduce the degree of gender bias in their evaluation processes. First, before making written public statements of their policies, firms would almost certainly want to give serious thought to their contents. The firm’s management would therefore have to discuss how the evaluation process currently works—which factors the committee examines, how it weighs these

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Proposed Rules Relating to Disclosure Regarding Nominating Committee Functions and Communications Between Security Holders and Boards of Directors, Exchange Act Release No. 34-48301 (Nov. 24, 2003), at <http://www.sec.gov/rules/extra/s71403summary.htm> (last modified Dec. 1, 2003).

109. Nasaw, *supra* note 1 (citing remarks of Sarah Teslik, Council of Institutional Investors).

110. *Id.*

111. *Id.*

112. *Id.* (quoting Patricia C. Dunn, vice chairman of Barclays Global Investors).

113. The SEC’s initial formulation of the Rule included “a plan to require boards to spell out their reasons for rejecting nominees,” but this plan was “scrapped . . . for fear that it might chill frank discussion in corporate boardrooms.” Now, therefore, while boards “may say why they turned down a prospect,” they do not have to do so. Burns, *supra* note 5, at C15. The adopted proposal instead “require[s] companies to disclose . . . who makes nomination decisions; . . . a description of minimum director qualifications; how candidates are identified and evaluated; and whether nominees were recommended by management, other directors, shareholders, a search firm or someone else.” Andrew Countryman, *SEC Adopts Nomination Disclosure Regulations*, CHI. TRIB., Nov. 20, 2003, at 1. The Commission felt that these disclosures struck a balance between addressing investors’ concerns and maintaining the degree of confidentiality that directors believed was essential. *See id.*

factors, and from whom and regarding what the committee will accept comments on regarding individual candidates. They would need to consider seriously the import and impact of each of their decisions. Forcing firms to think and talk about these subjects could lead to productive and enlightening dialogue within and among firms, and even with non-attorneys. Second, if active discussion did not provide sufficient impetus for firms to amend their promotion systems, the “shame factor” alluded to in the corporate governance arena would have a similar effect in the legal profession. The reality of disclosure means that, even if a firm does not feel particularly fair-minded and does not itself harbor a desire to reduce gender discrimination and disparities at the partnership level, it cannot deny the fact that not all of its employees and potential employees will share its views. And competition to recruit and keep the best associates may be sufficient motivation on its own to devise selection systems that the firm will be proud to disclose.

Future litigants who wish to bring claims challenging their firms’ policies and practices under Title VII may benefit as well. Today, most professional employers are acutely aware of the risk of a sex discrimination claim, and are therefore much less likely to engage in the kind of blatantly discriminatory behavior on which plaintiffs such as Hopkins and Costa relied upon to succeed.<sup>114</sup> This often creates an insurmountable problem for current Title VII plaintiffs unable to make the same showing.<sup>115</sup> But a requirement of full disclosure on the part of the firm would provide automatic evidence of exactly what actions the firm takes when it considers a candidate for partnership. Litigants could thereby make their discovery more narrowly focused—and ultimately more productive—by using what is already in the public domain as a base upon which to build, rather than struggling to start from scratch and spending valuable time searching, possibly in vain, for a “smoking gun” among whatever documentation the firm may have of its decisionmaking. Additionally, firsthand knowledge of partner selection processes would also allow an employee to bring a claim when she believes her firm has deviated from its stated procedures. A court could find that this deviation was based on discriminatory intent or a mixed motive, in which case the plaintiff would prevail on her Title VII claim; even in the absence of such a finding, however,

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114. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that professional accounting partnership had “unlawfully discriminated against [female proposed for partnership] on the basis of sex by consciously giving credence and effect to partners’ comments about her that resulted from sex stereotyping”); *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (involving female warehouse worker’s Title VII claim that sex discrimination created adverse work conditions).

115. See *supra* Parts II(b)(ii), (iii).

the court could censure the firm for failing to adhere to its stated policies.<sup>116</sup>

Enhanced transparency would also allow for greater *ex ante* understanding of law firm policies on the part of law students and associates—the very people who will ultimately be the object of a partnership committee’s attention. Knowledge of the firm’s selection system will not only assist law students and lateral associates in determining which firm best suits them as a future employer, but will also allow current associates at the firm to determine their priorities at work in alignment with their goals, and to form more reasonable expectations of what lies ahead in their careers. An associate at a firm which places particular importance on an attorney’s socialization with clients, for example, could make a fully-informed decision as to whether she wishes to meet these expectations because making partner is an important goal of hers, or in contrast recognize that these activities are not something she wants to prioritize, and explore other law firms as options if she does still wish to make partner. Likewise, a law student choosing among several firms could take each firm’s selection system policies into account during the process. All of these informed decisions, ideally, would lead to lower associate attrition, and fewer misunderstandings or feelings of betrayal after having devoted years to a firm only to find that one’s contributions were not valued to the extent expected.

### B. Implementation

Bringing this type of mandate for disclosure into the law firm and Title VII context might not be as difficult as it first appears. The Supreme Court has already expressed a willingness to apply disparate impact analysis, even in cases where subjective criteria inform employment decisions.<sup>117</sup> The main question, therefore, is who would be responsible for promulgating and enforcing these disclosure rules—in other words, what is the law firm arena’s most promising analogy to the Securities and Exchange Commission? While no one agency or regulatory body is a perfect fit, several possibilities deserve exploration.

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116. See discussion *infra* Part III(b).

117. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (stating that, under Title VII, “practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained” if they are conducted with disparate impact); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 991 (1988) (“[S]ubjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases.”).

One potential means of establishing and enforcing these disclosure rules is for the American Bar Association to create a new Model Rule, or to build upon an existing Rule. ABA Model Rule 5.1, for example, already “makes it explicit that partners have a duty to make reasonable efforts to see that no violations of the ethical rules occur in the law firm.”<sup>118</sup> To incorporate disclosure rules into this arena, first the ABA would specifically need to categorize Title VII discrimination as a violation of the Rules of Professional Conduct. Model Rule 8.4 already classifies as “professional misconduct” the commission of “a criminal act that reflects adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects;”<sup>119</sup> if acts that give rise to criminal liability constitute professional misconduct, then why should similar acts giving rise to civil liability (such as employment discrimination) not be included?

Another possibility is for the National Association for Law Placement (NALP) to create an additional section of its existing guidelines. Describing itself as the “premier source of information for legal career planning and recruitment,” NALP’s self-proclaimed mission is “to meet the needs of all participants in the legal employment process for information, coordination and standards.”<sup>120</sup> Through its body of “Principles and Standards,” NALP currently provides guidelines for law schools, individual candidates, and law firms to observe during the recruitment process.<sup>121</sup> Though compliance with NALP rules is voluntary,<sup>122</sup> most firms do in fact adhere to the guidelines, in order to avoid conflict with law school career offices and other firms. NALP explicitly states, for example, that a “law school may deny use of its career services facilities to students and employers who fail to adhere to [NALP’s] *Principles and Standards*”<sup>123</sup>—a risk not many firms want to run.

Incorporating mandatory disclosure of partnership selection systems into its guidelines would in fact further NALP’s original goal in

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118. Stephen R. Volk et al., *Law Firm Policies and Procedures in an Era of Increasing Responsibilities: Analysis of a Survey of Law Firms*, 48 BUS. LAW. 1567, 1578 (1993) (citing ABA Model Rule 5.1).

119. AMERICAN BAR ASSOCIATION, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 350 (1984), available at [http://www.abanet.org/cpr/mrpc/rule\\_8\\_4.html](http://www.abanet.org/cpr/mrpc/rule_8_4.html).

120. <http://www.nalp.org/about/index.htm> (last visited Apr. 2, 2005).

121. See NATIONAL ASSOCIATION FOR LAW PLACEMENT, PRINCIPLES AND STANDARDS FOR LAW PLACEMENT AND RECRUITMENT ACTIVITIES, at <http://www.nalp.org/pands/pands.htm> (last visited Apr. 2, 2005).

122. *Id.* (“Nothing in the *Principles and Standards* is intended to alter any legal relationships among the participants, but participants are urged to carry out all obligations in good faith.”).

123. *Id.*

promulgating the guidelines. “Underlying these guidelines for ethical behavior,” the organization explains, is the “fundamental commitment to the accessibility of the legal profession to all individuals of competence and requisite moral character.”<sup>124</sup> NALP’s firmly stated opposition to discrimination in the profession<sup>125</sup> suggests that it may indeed be eager to expand into the realm of partnership selection, particularly as it affects the flow of information between law firms and students (and their law schools) during recruitment.

The influence of NALP’s non-binding principles indicates the competitive market for law students and lateral associates, which in turn fuels most firms’ desire to maintain good will within this market. In the corporate governance context, the marketplace itself may be the biggest agent for change.<sup>126</sup> According to one Managing Director at Goldman Sachs, shareholder pressure has resulted in an increased focus by executives on corporate governance reform. Institutional shareholders can have a particularly strong effect on governance changes, not only because of their large portfolios but because of their responsibility to investors.<sup>127</sup>

#### IV.

##### COSTS VS. BENEFITS OF PROMOTION POLICY DISCLOSURE/AUDIT

###### A. *Costs to Companies: A Worthwhile Tradeoff*

Under SEC Rule 33-8340, companies must disclose any material changes to their nomination procedures on the first form 10Q or 10K it files (after January 1, 2004) for the reporting period in which the material change occurs.<sup>128</sup> The SEC’s inclusion of this provision suggests its anticipation that many companies would in fact make material changes to the ways in which they nominate and select future directors. But the question that lingers in the wake of any significant change is whether, in hindsight, the result was worth the cost.

“Everywhere I go, I hear from the [Sarbanes-Oxley] bill’s supporters and its detractors,” remarked House Financial Services Com-

124. *Id.*

125. *See id.* (“NALP is strongly opposed to discrimination which is based upon gender, age, race, color, religious creed, national origin, physical disability, marital, parental or veteran status, sexual orientation, or the prejudice of clients related to such matters.”).

126. Judith Burns, *Everything You Wanted to Know About Corporate Governance . . . But Didn’t Know To Ask*, WALL ST. J., Oct. 27, 2003, at R6.

127. *Id.*

128. Detailed instructions for companies regarding compliance with the new rules are available at <http://www.sec.gov/rules/final/33-8340.htm> (last visited Apr. 2, 2005).

mittee Chairman Michael Oxley in the summer of 2004.<sup>129</sup> Among investors, the Act has proven quite popular; a Harris poll of investors in early 2004, for example, found that 59% believe that it will “help safeguard their stock investments” by ensuring better corporate governance and reducing the risk of fraud and deception.<sup>130</sup> Supporters view the Act as a “key factor” in the process by which “investors are regaining their faith in markets.”<sup>131</sup> Moreover, 57% of these investors said that they would be “very unlikely to invest in a company that didn’t comply with the law.”<sup>132</sup> While Rep. Oxley (among others) has heard complaints from companies about the expense of compliance since the Act’s passage, he maintains two years later that this cost is “eminently reasonable,” citing a study from the Financial Executives Institute that “pegs the first-year costs of compliance with the internal-controls requirements at less than 1% of a company’s revenue.”<sup>133</sup> Not only does the cost of compliance fail to amount to a significant portion of the average company’s revenue, but recent studies also suggest that compliance itself may help increase a company’s capital. In a 2002 study, McKinsey & Co. found that “institutional investors are willing to pay a 14% premium, on average, for shares of well-governed U.S. companies.”<sup>134</sup>

## B. Potential Costs to Firms: A Worthwhile Tradeoff?

### 1. Same Balancing Act

In many ways, law firms face the same cost-benefit balancing issues as public companies regarding disclosure and documentation. The time and resources that a firm would need to devote to compliance efforts could be substantial, depending on how much material change is necessary. Part of the very purpose of instituting disclosure rules is to force firms to rethink their current selection systems; unfortunately, the more thought that a firm puts into these decisions, the more cost that firm will bear. Notably, however, courts have consistently refused to recognize a cost-justification defense for discriminatory practices,<sup>135</sup> suggesting that a firm would not be able to avoid compliance by claiming financial hardship.

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129. Judith Burns, *supra* note 6, at R8.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. Burns, *supra* note 126 (emphasis added).

135. See, e.g., *Ariz. Governing Comm. v. Norris*, 463 U.S. 1073 (1983); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

Ideally, employers will also embrace the cost-saving potential of these regulations as a means to avoid Title VII liability. After losing his case for client Desert Palace, attorney Mark Ricciardi cautioned employers to “take every step possible to prevent claims of discrimination,” advising them, among other things, to “have a written policy in place.”<sup>136</sup> While protection from liability may not be the ideal motive for combating discrimination, the means—here, increased transparency, documentation, and disclosure—may, at least in the short run, justify the employer’s own ends.

## 2. *Getting—and Keeping—Good Employees*

The cost of implementing policies designed to reduce attrition at law firms often pales in comparison to the cost firms bear when they lose employees. While this notion may seem obvious—indeed, many firms would not be concerned with developing attractive part-time or other flexible policies if they were not cost-effective—both statistical and anecdotal evidence demonstrates just how great an impact associate attrition has. To that extent, if new disclosure policies make associates less likely to leave a firm, firms will have strong incentives to adopt or comply with them.

The effect on a firm of associate attrition “is a multiplier of the initial costs—an attorney who leaves after a year has not only cost the firm a substantial amount of money in recruiting and training, but hurts external reputation and internal morale, and puts the firm back into the market for an entry-level associate.”<sup>137</sup> Moreover, attrition has become an increasing phenomenon over the last few decades, with levels rising from about half of all associates leaving before partnership in the 1970s, to two-thirds leaving within five years in the mid-1990s.<sup>138</sup> Authors have placed the cost of losing one associate in the range of \$200,000 to \$500,000,<sup>139</sup> suggesting that “retaining even a

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136. Paula Santonocito, *In Light of Desert Palace Ruling, Mixed Motive Cases Now a Gamble for Employers*, 20 No. 23 EMP. ALERT 5 (2003).

137. Tom Ginsburg & Jeffrey A. Wolf, *The Market for Elite Law Firm Associates*, 31 FLA. ST. U. L. REV. 909, 912 (2004) (comparing studies completed in 1998 and late 1970s). The authors also note that “[t]hese statistics are particularly troubling given that most firms *lose* money on associates for the first two to three years, because of training costs and more intensive supervision.” *Id.*

138. *Id.* at 911–12.

139. See Joan Williams & Cynthia Thomas Calvert, *Balanced Hours: Effective Part-Time Policies for Washington Law Firms: The Project for Attorney Retention, Final Report*, 8 WM. & MARY J. WOMEN & L. 357, 366 (2002) (citing Wendy Davis, *Associate Flight Leads to New Look at Pyramid*, N.Y. L. J., May 22, 2000, at 1; Lisa Gold, *How to Improve Associate Retention: Old Reward System No Longer Effective*, LEGAL INTELLIGENCER, Apr. 19, 1999, at 7).

few of the ‘regretted losses’ suffered when good employees leave can increase the bottom line.”<sup>140</sup> And the cost of dissipating productivity that occurs when associates begin to seek other employment, while difficult to quantify, is also difficult to ignore. As one departing attorney confided in an interview with the Project for Attorney Retention, “I feel like saying to them, you know, you really don’t want me doing this anymore.”<sup>141</sup>

### C. *The Role of Title VII Litigation*

Sex discrimination litigation forces companies either to go public with all of their employment practices by allowing the case to proceed to trial, or to settle; either way, these lawsuits—particularly those against high-profile companies such as the major investment banks—receive an enormous amount of media attention and interest, both within and beyond the business community. Regardless of their outcomes, these cases’ presence in the public discourse serves several important functions.

First, large awards to plaintiffs, whether from a verdict or a settlement, inevitably “catch other firms’ attention.”<sup>142</sup> Firms’ subsequent actions to avoid similar liabilities or even threats of litigation are often as beneficial to their employees as they are to the employers. As part of its sex discrimination settlement, for example, Morgan Stanley agreed to provide diversity training to its employees, and to make an effort to increase its percentage of women employees.<sup>143</sup> Another bonus in the Morgan Stanley case was the fact that, because the Equal Opportunity Employment Commission was a party to the settlement, the settlement document was made public and therefore may serve as “a road map for firms to look to if they want to try to ensure that they are doing everything they can reasonably do to retain and recruit women.”<sup>144</sup> Second, the idea of suing one’s own firm (particularly a law firm) may seem incredibly daunting to many employees, no mat-

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140. Joan Williams et al., *Better on Balance? The Corporate Counsel Work/Life Report*, 10 WM. & MARY J. WOMEN & L. 367, 378 (2004). The authors identify additional costs incurred when an attorney leaves as lost institutional knowledge, lost relationships with clients and colleagues, negative effects on morale, and lost productivity as the associate looks for a new position and the employer looks for a replacement. *Id.* at 379.

141. *Id.*

142. Carrie Mason-Draffen, “*Watershed*” *Bias Suit May Only Ripple on Wall Street*, ORLANDO SENTINEL, Jul. 18, 2004, at H1 (describing Morgan Stanley’s \$54 million settlement with Title VII plaintiff Allison Schiefflin), 2004 WL 85665947.

143. *Id.*

144. *Id.* (quoting Pearl Zuchlewski, Chair, Labor and Employment Law Section, New York State Bar Association).

ter how strong they feel their case may be.<sup>145</sup> Witnessing the successes of others will therefore provide encouragement at a vitally important moment. Even Nancy Ezold, whose favorable judgment against her firm was ultimately overturned by the Third Circuit,<sup>146</sup> has expressed her satisfaction in gaining “the opportunity to speak all over the country on the issue, and know[ing] that just bringing the suit has had a positive result for women and others in the law because it has led to changes in some firms.”<sup>147</sup>

Finally, Title VII’s reinstatement remedy (which permits the plaintiff to return to the position from which she was fired, or assume the position for which she was denied promotion)<sup>148</sup> is an important element of achieving the statute’s larger goal—that of “reshaping the workforce in an attempt to end discrimination in employment decisions.”<sup>149</sup> The landscape of the workforce itself will only truly change when women not only call attention to its faults, but simultaneously remain a part of it. As one scholar has noted,

the promotion of women into the upper ranks of business, including law firm partnerships, has been linked to the success of other women within that same organization. . . . [M]ore women at a business or in a particular job reduces the effects of tokenism, which leads to members of less dominant groups . . . being treated as symbols representing the characteristics of their particular group rather than being treated as individuals.<sup>150</sup>

Furthermore, “men who have had experience with women in authority positions tend to be more accepting of women in the work place than men who have not.”<sup>151</sup> To the extent that publicity of Title VII lawsuits encourages other victims of sex discrimination to take on their employers as well, the reinstatement remedy will benefit employees in ever-growing numbers of firms.

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145. See, e.g., Richard C. Reuben, *Suing the Firm*, 81 A.B.A. J. 68, 71–72 (1995) (noting that this type of litigation involves “the kind of public vetting of competence that few lawyers would want to experience,” and “can leave even victors severely battered”).

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

147. Reuben, *supra* note 145, at 72 (quoting Nancy Ezold).

148. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–45 n.10 (1989).

149. Stacey B. Chervin, *Employment Discrimination: Breaking Through the Partnership Barrier in Hopkins v. Price Waterhouse*, 1992/1993 ANN. SURV. AM. L. 203, 223 (1994).

150. Beiner, *supra* note 21, at 652 (citations omitted).

151. *Id.*

V.  
CONCLUSION

Combating employment discrimination requires the involvement and determination of as many actors as possible. The barriers women still face in reaching the top of the legal profession signal a need not only for new approaches to solving this problem, but also for participation on the part of firms and legal organizations as well as legislators and courts.

Shortly after finalizing Rule 33-8340, SEC Commissioner Paul Atkins explained, “I’m very comfortable with asking companies to provide this new and, I think, important disclosure . . . . Information powers the marketplace, so this is clearly a step in the right direction.”<sup>152</sup> Atkins’ observation easily translates into the firm context: just as corporate information powers the investor marketplace, so too would law firm partnership information power the job market for lawyers. Moreover, the implementation of disclosure rules could assist the revival of disparate impact theory under Title VII—not by asking judges to apply the theory with greater rigor, but instead by pushing both employers and employees to evaluate workplace policies using disparate impact analysis.<sup>153</sup> Finally, the greater transparency and accountability envisioned by the SEC would be a step in the right direction for firms as well.

Recommending the 1991 Amendments to the Civil Rights Act of 1964, the House Committee on Labor and Education urged that, “[t]ogether, we can make a significant contribution to the advancement of equal employment opportunity in our nation.”<sup>154</sup> If these proposals may bring about even a small change—indeed, if only the inspiration of more discussion of these issues among law firm managers—they are worth attempting as part of this contribution.

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152. Andrew Countryman, *SEC Adopts Nomination Disclosure Regulations*, CHI. TRIB., Nov. 20, 2003, at 1.

153. The revival of disparate impact theory is an important consideration at a time when disparate treatment—the other mode of Title VII claim analysis—receives the bulk of judicial attention due to the recent Supreme Court decision in *Desert Palace, Inc., v. Costa*, 539 U.S. 90 (2003). The Court’s decision in *Desert Palace* was an important victory for future Title VII plaintiffs who will have enough evidence (direct or circumstantial) to support a disparate treatment claim; however, it is of little help to those operating in workplaces with facially neutral policies that have a disproportionately negative impact on women, such as partnership candidate evaluation systems which emphasize criteria—not always legal performance-based—at which men can more easily excel. See *supra* Part II(b).

154. Civil Rights and Women’s Equity in Employment Act of 1991, H.R. REP. NO. 102-40(I), at 16 (1991).

