HE MAKES *WHAT*!?

FILLING GENDER PAY DISPARITY AND PROMOTION GAPS LEFT BEHIND BY TITLE VII AND THE FEDERAL EQUAL PAY ACT

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Emily A. Shivetts[1]

I: INTRODUCTION

Husband and Wife went to the same law school and got the same grades. They are now both Partners at the same law firm. They drive into work together and leave together every day. They work in the same practice group, and they often team up on the same matters together for client Big Fish because the CEO is a mutual friend. Administrative firm records reflect that Husband is the Billing and Responsible Attorney for Big Fish. Husband and Big Fish's CEO play on the same flag football team every Saturday, so it is easy to maintain and grow their professional relationship. Wife completes most substantive work for the client and frequently works all day on Saturday to stay on top Big Fish's active matters. Because Husband gets "credit" for bringing in the business, he makes 44% more[2] even though Wife logs 500 more hours per year.

Wife does not have a legally cognizable gender discrimination claim.[3]

Olivia is a brilliant, eager seventh-year Associate. Olivia's counterpart Brian is part of the same Associate class and sits in the office across the hall. Brian does adequate (not

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[1] This essay is dedicated in memory of Bob Reif, in honor of his integrity, wisdom, and fairness. A very special "thank you" to his wife Amy, and to Epstein, Becker and Green for stewarding his legacy with care and for empowering the next generation of lawyers to pick up Bob's torch. Many thanks also to Anne Mahoney with the Attorneys' Liability Assurance Society Program ("ALAS") for her inspiration, encouragement, and exemplary excellence.

[2] *See, e.g.*, Lizzy McLellan, *Male Partners Make 44 Percent More Than Women, Survey Shows*, LAW.COM (Oct. 12, 2016); Elizabeth Olson, *A 44% Pay Divide for Female and Male Law Partners, Survey Says*, THE N.Y. TIMES (Oct. 12, 20116).

[3] More, she probably doesn't even have standing under civil rights statutes because she will not be recognized as an "employee" entitled to protection if she is a firm Equity Partner. *See supra* note 20 and accompanying text.

outstanding) work, but he is well-liked and is frequently invited to happy hour by their male supervising Partner, Rick, especially during March Madness. Olivia and Rick do not have as many shared hobbies or interests in common, so Rick does not think to invite her along (plus, *someone* needs to be in the office, and Oliva is always happy to stay late). Because Olivia is the only Associate there most evenings, she often receives rush assignments from three other Partners in the same practice group desperate to find an Associate with her light on. Olivia bills 1,000 more hours per year than Brian. Both Olivia and Brian receive the same compensation because their firm has no minimum hours requirement and distributes a flat bonus. With backing from Rick, Brian is promoted to Of Counsel the following year. Olivia receives feedback that she needs to work on building relationships and marketing the firm.

Olivia does not have a legally cognizable gender discrimination claim.

There are two ways that gender discrimination claims play out in law firms: 1) pay equity claims and 2) promotion claims. Both pay equity and promotion claims are typically brought under the same two federal statutes: the Federal Equal Pay Act (FEPA) and Title VII of the Civil Rights Act of 1964 (Title VII).[4] While the scope of protection afforded and the specific elements a plaintiff must prove vary slightly under the FEPA and Title VII, both provide parallel defense opportunities to responding law firms. Even if a plaintiff successfully overcomes her initial burden of proof, law firms may dodge liability for gender discrimination if they demonstrate that a "pay discrepancy is due to a differential based on any factor other than sex" to

[4] Comprehensive coverage of each state's and municipality's individual gender discrimination statutes is beyond the scope of this Essay.

rebut an FEPA claim or show there is a "legitimate, nondiscriminatory reason for pay differential" to rebut a Title VII claim.[5]

These defenses to gender discrimination claims under both the FEPA and Title VII offer law firms too big of an escape hatch. A facially nondiscriminatory, non-pretextual pay and promotion differential can still be inextricably related to, even if not the exclusive result of, gender differences. Thus, while victims of *explicit* gender bias may have access to legal course, victims of *implicit* gender bias do not.[6]

Even accepting, *arguendo*, that narrowly-available legal protection for gender discrimination cases is socially desirable, implicit gender bias is heavily problematic because it imposes significant costs on 1) female attorneys both in their capacities as working professionals and family earners, 2) law firms seeking to optimize talent, and 3) law firms and their management liability insurers interested in preventing unnecessary and exorbitant claims costs.

This battle is *not* being zealously[7] fought in court rooms.[8] It is being silently glared between spouses in their living rooms, resentfully whispered between attorneys after receiving their firm's annual promotion e-mail, and confidentially arbitrated by liability insurers.[9] You,

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[5] Nesheba Kittling, *#MeToo? Harassment, Pay Equity, and Promotion Claims Against Law Firms Webcast Summary*, ALAS LOSS PREVENTION J. 23, 25 (Winter 2018) (summarizing the legal landscape surrounding sexual harassment, pay equity, and promotion claims from the law firm-side defense perspective).

[6] *Infra* Part III.

[7] MODEL RULES OF PROF'L CONDUCT r. 1.3 cmt. (AM. BAR ASS'N 2018) (committing lawyers to act in their client's interests with "zeal in advocacy").

[8] *#MeToo? Harassment, Pay Equity, and Promotion Claims Against Law Firms: ALAS Live Webcast*, ALAS 1, 3 (December 14, 2017, 1:00 PM) (http://alas.com/public/video_materials/webcast/written_189.pdf) (stating "[w]e are not aware of *any* published decisions on the merits of a gender pay equity claim against a law firm.") (emphasis added) (hereafter, ALAS WEBINAR).

[9] *See generally* Craddock v. LeClairRyan, 668 Fed.Appx. 453 (Mem), No. 16-1423 (Aug. 26, 2016) *and* Ribeiro v. Sedgwick LLP, 2016 WL 6473238 No. C-16-04507 WHA (Nov. 2, 2016) (two high profile cases in which defendant law firms won motions to compel arbitration).

Managing Partner, may indeed be so "pleased to announce," but firms must first rigorously re-examine their pay determination and promotion procedures. This is a problem that matters—to everyone.

Part II of this Essay discusses the statutory and jurisprudential framework surrounding gender discrimination claims, including the newly-amended Massachusetts Equal Pay Act (MEPA), and identifies the opportunity for states to address gender pay and promotion differentials through their state ethics rules vis-a-vie updated Model Rule 8.4. Part III analyzes this framework and posits that existing legal mechanisms do not adequately address harm caused by implicit gender bias and suggests three reforms: 1) states should adopt the amended 2016 Model Rule 8.4 and its commentary, 2) Rule 8.4 should be updated to include the MEPA's current best practices, and 3) commentary to Rule 8.4 should suggest alternative partnership compensation models. Part IV briefly concludes.

PART II. BACKGROUND

Three relevant sources of law provide a basis for gender pay and promotion disparity claims: 1) federal law, 2) state law, and arguably, 3) the ABA's Model Rules of Professional Conduct (Model Rules). All three schemes are addressed in turn.

A. Federal

Federal legislation supplies two potential sources of legal recourse for gender discrimination plaintiffs: Title VII and the FEPA.

Title VII protects employees from unfair treatment based on "race, color, religion, sex, or national origin."[10] Because this protection extends broadly to "compensation, terms, conditions, or privileges of employment,"[11] victims of gender discrimination may rely on Title VII as the basis for either an unfair pay or promotion suit.

Theoretically, plaintiffs may pursue one of two types of Title VII discrimination claims: disparate treatment or disparate impact. Disparate treatment claims require a showing of *intent* to discriminate against the plaintiff because of a protected class feature, including gender. The defendant law firm may rebut a surviving claim by merely demonstrating a legitimate, nondiscriminatory reason for the disparate treatment.[12] The plaintiff must then prove the firm's proffered nondiscriminatory reason was a pretextual, in violation of Title VII.

Alternatively, gender discrimination plaintiffs bringing a disparate *impact* Title VII claim must preliminarily prove: "1) she is a member of a protected class, 2) she is qualified for the position, 3) she suffered an adverse employment action by the firm, and 4) one or more similarly-situated men were treated more favorably."[13] Critically, discriminatory intent is irrelevant; however, the defendant law firm may defeat a *prima facie* showing by demonstrating that the alleged discriminatory practice "is job related for the position in question and consistent with business necessity."[14] Notably, statistical evidence, without more, is wholly insufficient to establish a valid disparate impact claim and is unlikely to independently support a disparate treatment claim.

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[10] 42 U.S.C. § 2000e-2(a)(1) (2012).
[11] *Id.*
[12] *See, e.g.*, Texas Dept. of Housing & Comm'y v. ICP, 135 S. Ct. 2507, 2515 (2015) (equating the Fair Housing Act's disparate impact theory with Title VII's approach).
[13] Kittling, *supra* note 5.
[14] 42 U.S.C. § 2000e-2(k)(1)(A) (2012).

In addition to Title VII, Federal law also offers targeted protection against discriminatory compensation practices in the form of the FEPA.[15] In comparison, narrower FEPA protection specifically prohibits gender pay disparity for "equal work" involving "equal skill, effort, and responsibility, and which [is] performed under similar working conditions."[16] Although a plaintiff does not need to prove discriminatory intent, a defending law firm may escape liability by demonstrating that the pay differential resulted from: 1) a seniority system, 2) a merit system, 3) a system which measures earnings by quantity or quality of production, or 4) a differential based on *any other factor other than sex*.[17] Legitimate factors other than sex have been held to include, amongst others, experience,[18] education, skills an employer deems useful to the position, and amount of revenue generated by the employee.[19]

Of upmost importance, female law firm Partners often have *no* legal recourse under federal law for discriminatory pay and promotion practices because they are not considered "employees" for the purposes of Title VII and the FEPA.[20] Cornerstone case *Clackamas*

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[15] The FEPA amended the Fair Labor and Standards Act of 1938 prohibiting gender discrimination in wage determination practices. *See generally*, Timothy J. Nichols, *Closing the Wage Gap: Cities' and States' Prohibitions Against Prior Salary History Inquiries and the Implications Moving Forward*, 49 SETON HALL L. REV. 411 (2019).

[16] 29 U.S.C. § 206(d) (2012).

[17] 29 U.S.C. § 206(d)(1) (2012) (*emphasis added*).

[18] *See e.g.*, Suter v. Univ of Tex. at San Antonio, 495 Fed.Appx. 506, 511-12 (5th Cir. 2012); Hicks v. Concorde Career Coll., 449 Fed.Appx. 484 (6th Cir. 2011); Negley v. Judicial Council of Cal., 458 Fed.Appx. 682 (9th Cir. 2011).

[19] *See generally*, Akerson v. Pritzker, 980 F. Supp. 2d 18, 20 (D. Mass. 2013).

[20] *See, e.g.*, Solon v. Kaplan, 398 F.3d 629 (7th Cir. 2005) (holding that a small law firm's prior managing partner was not an "employee" entitled to protection); Kirleis v. Dickie, McCamey & Chilcote PC, No. 06-1495, 2009 WL 3602008, 2009 U.S. Dist. LEXIS 100326 (W.D. Pa. Oct. 28, 2009) (aff'd by Kirleis v. Dickie, McCamey & Chilcote PC, 2010 WL 2780927, at *2, 2010 U.S. App. LESIX 14530, at *4 (3rd cir. July 15, 2010)) (determining a Class A law firm shareholder was not an "employee," despite having no say in firm compensation decisions, because she controlled her work environment, could hire and fire other shareholders, and could only be terminated by a supermajority vote of the Class A shareholders).

Gastroenterology Associates, P.C. v. Wells[21] judicially sanctioned the Equal Employment Opportunity Commission (EEOC) Compliance Manual's existing 6-factor test for determining whether a person alleging discrimination is actually an "employer" rather than an "employee," thus, without standing to file a statutory discrimination claim.[22] Problematically, the application of *Clackamas* factors to law firm Partners—particularly Non-Equity Partners—is far from settled: every discrimination case that has survived preliminary motions for dismissal and summary judgment has subsequently settled before being heard on the merits.[23]

While federal law seems at first glance seems to provide female attorneys a fair chance to challenge discriminatory pay and compensation practices, sweeping affirmative defense opportunities and a scarcity of opinions on the merits often leave women to fend for themselves. And while a female Associate's likelihood of success at her Day in Court is accordingly slim, female Partners never even make it through the door.

B. State

In conjunction with federal protection, state-level antidiscrimination and equal pay laws play a critical role in addressing gender-disparate law firm pay and promotion outcomes.

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[21] 538 U.S. 440 (2003).

[22] *Id.* at 449-450 (applying *Skidmore* deference in substantially adopting the EEOC's existing factor test to determine whether a person is a statutory employee for the purposes of civil rights law: 1) whether the organization can hire or fire the individual or set the rules and regulations for the individual's work; 2) whether and to what extent the organization supervises the individual's work; 3) whether the individual reports to someone higher in the organization; 4) whether and to what extent the individual is able to influence the organization; 5) whether the parties intended that the individual be an employee, as expressed in written agreements or contracts; and 6) whether the individual shares in the profits, losses, and liability of the organization.

[23] *See, e.g.*, EEOC v. Sidley Austin Brown & Wood LLP, 315 F.3d 696 (7th Cir. 2002) (settling for $27.5 million after Sidley Austin stipulated that the thirty-two complaining lawyers were "employees" under the ADEA).

However, states promote varying degrees of assailability against unfair employment terms and conditions.[24] For example, nearly every state has adopted broadly-applicable antidiscrimination employment laws;[25] but shockingly, some courts have limited prohibition against discriminatory policies and practices to state actors *only*, leaving private section employees without legal recourse.[26]

Many states have also promulgated equal pay legislation, specifically targeted to prohibit employers from paying women lower wages than men for the same (or better) work.[27] Maryland recently enacted its first equal pay law in 2016 that broadly encompasses all forms of compensation, rather than wages only, and expressly prevents employer retaliation against employees who inquire about or discuss wages with another employee.[28] While a more comprehensive discussion of state equal pay legislation is beyond the scope of this Essay, two states merit additional attention for their progressive stance: Massachusetts and California.

Massachusetts has instituted the most progressive and innovative anti-discriminatory promotion and pay legislation to date. Massachusetts's Act to Establish Pay Equity statute, effective July 1, 2018, amended the original 1945 Massachusetts Equal Pay Act, itself the first

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[24] *See e.g.*, NATIONAL CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/research/labor-and-employment/equal-pay-laws.aspx (last visited Apr. 4, 2019).
[25] Westlaw 50-State Comparison Chart.
[26] Hon. John Alvin Henderson, *The #MeToo Movement and Recent Developments in Employment Law*, 52 MD. B.J. 1, 4 (Winter, 2019) (discussing *Burning Tree Clud*, 501 A.2d at 827 (citing *Lugar v. Edmonston Oil Co.*, 457 U.S. 922, 937 (1982)). Unsurprisingly, Maryland's Equal Rights Amendment has very infrequently served as the basis for an employment discrimination challenge. *Id.* at 3.
[27] Westlaw 50-State-Comparision Chart (overviewing and comparing antidiscrimination employment laws by state as of November 2018).
[28] Henderson, *supra* note 16 at 5.

state law of its kind requiring equal pay for equal work.[29] The 2018 amendment involved six major changes to existing Massachusetts equal pay law: 1) it clarified the meaning of "comparable work;" 2) it now prohibits employers from requesting prior salary history prior to issuing a formal job offer[30] and from punishing employees who discuss wage amongst each other; 3) it increased the statute of limitations from one to three years; 4) it expressly precludes employer retaliation against employees who assert their equal pay rights under the MEPA; 5) it allows for more generous damage awards (including attorney's fees, even without compensatory damages); and 6) it eliminated preliminary administrative hurdles by allowing plaintiffs access to Article III courts without first filing with state regulatory employment agency MCAD.[31]

To balance out the MEPA's broadened protective umbrella, the 2018 amendment also extended enhanced affirmative defenses for defendant employers, including law firms.[32] Mimicking, but expanding upon the detail of pre-existing FEPA defenses,

> [V]ariations in wages shall not be prohibited if based upon: (i) a system that rewards seniority with the employer; provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family, and medical leave, shall not reduce seniority; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production, sales, or revenue; (iv) the geographic location in which a job is performed; (v) education,

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[29] Bogin-Farber, et. al., *Gender Discrimination*, MASSACHUSETTS CONTINUING LEGAL EDUCATION, INC. 16 (4th Ed. Supp. 2017).
[30] Massachusetts is the first state to do so by legislative action, approving the amendment in 2016. *See* Bogin-Farber, et. al., *supra* note 29 at 18. Only a handful of states have subsequently followed suit.
[31] *See generally id.* at 16.
[32] *Id.*

> training or experience to the extent such factors are reasonably related to the particular job in question; or (vi) travel, if the travel is a regular and necessary condition of the particular job.[33]

Distinctively, the MEPA does *not* broadly consider "any other factor other than sex" adequate to defeat a *prima facie* showing of potentially violative compensation policies or practices.[34]

In California, conversely, it is the judiciary leading the charge against gender pay discrimination. In 2015 the Eastern District of California denied the defendant school district's motion for summary judgment in *Rizo v. Yovino* (Rizo I),[35] holding that sole reliance on prior wages to determine an employee's current salary violates the FEPA.[36] While the Ninth Circuit initially held on appeal that use of prior salary was not a per se FEPA violation and remanded the case (Rizo II),[37] the issue was ultimately reheard en banc (Rizo III).[38] In Rizo III, the Ninth Circuit determined that reliance on a female employee's prior salary to justify paying her lower wages was not a valid "factor other than sex;" thus, does not constitute an affirmative defense against an FEPA claim. The effect of Rizo III was to rearticulate the court's previous FEPA by overruling *Kouba v. Allstate Ins. Co.*,[39] which by the Ninth's Circuit's own rules, can only be done by the Ninth Circuit sitting en banc or by the Supreme Court.[40]

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[33] 2016 Mass. Acts c. 177, § 2(b).
[34] *Compare with* the FEPA affirmative defenses. *Supra* note 17 and accompanying text.
[35] 2015 WL 13236875 No. 1:14-cv-0423-MJS *1 (E.D. Cal., Dec. 4, 2015).
[36] *Id.*
[37] Rizo v. Yovino, 854 F.3d 1161 (9th Cir. 2017).
[38] Rizo v. Yovino, 887 F.3d 452 (9th Cir. 2018).
[39] 691 F.2d 873 (1982).
[40] See Naruto v. Slater, 888 F.3d 418, 421 (9th Cir. 2018).

In a stunning twist of fate, Ninth Circuit Judge Stephen Reinhardt, who fully authored the Rizo III majority opinion before his death, passed away on March 29, 2018,[41] eleven days before the final decision was filed.[42] On appeal from the defendant, the Supreme Court granted certiorari and just issued a per curiam opinion on February 25, 2019 vacating Rizo III, nearly chastising the Ninth Circuit's surviving members for counting the vote of a deceased judge. The brief four-page opinion is punctuated, ". . . federal judges are appointed for life, not for eternity."[43]

C. Model Rules of Professional Conduct

Despite, or perhaps because of, legislative and judicial turmoil surrounding equal pay and compensation claims, the Model Rules offer hereto untapped opportunity to address this ongoing problem. Though the Model Rules do not explicitly address gender pay and promotion disparity, in 2016 the American Bar Association (ABA) amended prior Rule 8.4's narrow proscription against discriminatory misconduct that is "prejudicial to the administration of justice."[44] The updated black-letter Model Rule 8.4 now broadly states that it is an ethics violation for a lawyer to "*in conduct related to the practice of law*, harass or knowingly discriminate against persons on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status."[45] As a result, discriminatory pay and

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[41] David G. Savage, *Supreme Court Overturns 9th Circuit Equal-Pay Decision Because of Judge's Death*, LA TIMES (Feb. 25, 2019) (https://www.latimes.com/politics/la-na-pol-court-reinhardt-20190225-story.html).
[42] *See generally*, Rizo III, 887 F.3d 452 (9th Cir. 2018) (including notation on the opinion reading, "Prior to his death, Judge Reinhardt fully participated in this case and authored this opinion. The majority opinion and all concurrences were final, and voting was completed by the en banc court prior to his death.").
[43] Yovino v. Rizo, 139 S. Ct. 706 (Feb. 25, 2019).
[44] Ann Ching; Lisa M. Panahi, *Rooting Out Bias in the Legal Profession: The Path to ABA Model Rule 8.4(g)*, 53 ARIZ. ATT'Y 34 (January, 2017).
[45] MODEL RULES OF PROF'L CONDUCT r. 8.4(g) (AM. BAR ASS'N 2018) (*emphasis added*).

promotion practices could potentially be pursued as ethics violations[46]—even if they are not actionable under Title VII or the FEPA—in states that adopt Model Rule 8.4.[47]

PART III: THE FUTURE IS (50.999385%) FEMALE[48]

Statistics estimate that by 2023 174.27 million out of a total 341.71 million people in the United States will be female, comprising nearly 51% of the total population.[49] As of October 2017, women accounted for 46% of entry- and mid-level law firm lawyers.[50] Only 19% of law firm Equity Partners were women.[51]

A. The Problem

To be clear, explicit gender bias is *not* the problem at issue here. While explicit gender bias is obviously bad—to put it bluntly—it is also explicitly prohibited, and thus assailable, under civil rights laws. In the introductory hypothetical for example, if Partner Rick documented in Olivia's annual review that he cannot recommend her for promotion because she likes "girl things," therefore he prefers mentoring Brian who also played college basketball, Olivia's case is won before the ink dries. But that is not what happens (or maybe that is exactly what happens, but it may not happen consciously, and it is certainly not documented).

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[46] *Id.* at r. 8.4 cmt. 4 ("Conduct related to the practice of law includes . . . operating or managing a law firm or practice").
[47] Thus far, only Vermont has adopted the updated Model Rule 8.4 black-letter language.
[48] *Total Population in the United States by Gender from 2010 to 2023 (in Millions)*, STATISTICA.COM (last visited Apr. 4. 2019) (https://www.statista.com/statistics/737923/us-population-by-gender/). Frustratingly, United States Census Bureau data available online only reports statistics on gender specifically related to the country's aging population and fertility projections. *See generally*, https://www.census.gov/en.html (last visited Apr. 4, 2019).
[49] *Id.*
[50] Brodherson, et. al., *Women in Law Firms*, MCKINSEY & COMPANY (October 2017) (https://www.mckinsey.com/~/media/mckinsey/featured%20insights/gender%20equality/women%20in%20law%20firms/women-in-law-firms-final-103017.ashx).
[51] *Id.*

So what *is* the problem? The problem is the qualitative judgment call about how to distribute origination credit to Partners working in concert to bring in new clients.[52] It is consistently putting a male Associate forward for networking events and subject-matter conferences while his female counterpart hangs back at the firm to handle movement on their co-chaired case.[53] In the opening hypotheticals, it is the feeling that even though none of the actors are doing anything explicitly wrong (either by legal definition or in a moral sense), something just smells off. When a woman works twice as hard and reaps only half the rewards of her male colleague, that can't be right . . . right?

This problem is called *implicit* gender bias. Implicit bias is, most basically, the subconscious prejudiced beliefs that affect attitudes and decision-making in ways that produce disparate treatment.[54] In-depth race-based implicit bias studies have triggered a long-overdue hard look into jury selection, prosecutorial discretion, and sentencing decisions over the last three decades.[55] More recent scholarship demonstrates that this phenomenon is very much alive and well in the gender pay and promotion disparity context as well.[56] While implicit bias may

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[52] See generally, Kathryn Rubino, *Biglaw Firm Battling a Gender Discrimination Lawsuit Will Have to Fight on a New Front*, ABOVETHELAW (Jan. 24, 2019) (https://abovethelaw.com/2019/01/biglaw-firm-battling-a-gender-discrimination-lawsuit-will-have-to-fight-on-a-new-front/?rf=1) (explaining that division of original credit and equally providing opportunity for advancement and business development are two common sources of current gender discrimination claims against law firms).

[53] *Id.*

[54] *See* Linda Hamilton Krieger; Susan T. Riske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1034 (2006).

[55] Washington College of Law's own Professor Angela Davis has written extensively on implicit (and explicit) racial bias and its profound effect on subverting the criminal justice system. *See., e.g.*, Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998-1999).

[56] See Justin D. Levinson; Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL'Y 1 (2010) (outlining an empirical study

not be evil or shameful like its explicit bias counterpart, it nonetheless produces anomalous, and patently unfair results. University of California at Berkeley's Law Professor Linda Hamilton Krieger and Princeton University's Professor of Psychology Susan T. Riske articulated the legal challenge presented by implicit bias best: "Even if people want to conform their behavior to the norms underlying antidiscrimination law, full compliance with the law's prescription is unlikely if the relevant legal doctrines fail to capture accurately how and why discrimination occurs, how targets respond to it, and what can be done to prevent it from occurring."[57]

That said, Title VII and the FEPA are woefully unequipped to handle implicit gender bias. Article VII protection is inadequate because it anticipates and can respond only to documented, systematic discrimination. Even in a disparate treatment claim, where a plaintiff has proven her employer actually *intended* to discriminate against her because of her gender, a defendant law firm can thwart liability by proving any other legitimate reason for disparate treatment. The employee is then saddled with the near-impossible evidentiary task of proving that the legitimate reason proffered was pretextual—without overreliance on statistical evidence— and that an alternative, equally-effective policy is more narrowly tailored to avoid the offending discriminatory conduct. In addition, plaintiffs are similarly, if not more, disadvantaged in a disparate impact claim, which a defendant law firm can win in pretrial briefing by conjuring essentially any half-reasonable excuse—in the parlance, "business necessity."[58]

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demonstrating that both male and female law students associated judges with men rather than women, and associated women with the home and family).

[57] Krieger & Riske, *supra* note 54 at 1001.

[58] Tellingly, as of December 2017, law firm management and liability insurer ALAS was aware of zero disparate impact law firm gender pay and promotion claims that survived to argument on the merits. ALAS WEBINAR, *supra* note 8 at 3.

The FEPA fails to extend Article VII's reach because it leaves the same exact emergency eject button available to defendant law firms that can pin the rationale behind their offending policy on, literally, "any other factor other than sex." But that's exactly the problem with implicit bias: it is slippery and elusive. It is implicit because by its nature it masquerades as some—to parallel the FEPA's language, *any*—other "legitimate" reason to demote, suppress, underpay, overwork, discourage, hold back, turn down, and shut up. Functionally, both Article VII and the FEPA have built-in black-letter implicit bias *defenses*.

Most states add little to gender discrimination victims' litigation arsenals. Many states with antidiscrimination laws extend them only to state actors. Those that actually have separate, specific equal pay laws often mimic the mile-wide affirmative defense exit door created by Article VII and the FEPA. Additionally, female law firm Partners typically have no legal recourse, state or federal, because they are often not considered "employees" under civil rights laws. However, they are some of the most frequent victims of gender pay discrimination at law firms.[59] Again, the legal tools available in this space provide carve outs for the *exact behavior* most in need of correction. While Massachusetts's MEPA has far out-stripped other states in addressing gender pay and promotion disparities, it represents an outlier in this barren legal wasteland.

Lack of progress bears out this claim of insufficiency. The National Association of Women Lawyers released a disturbing 2015 survey demonstrating that the "gender gulf" had

[59] *Report of the Ninth Annual Survey*, NATIONAL ASSOCIATION OF WOMEN LAWYERS (https://www.nawl.org/2015nawlsurvey) (last visited Apr. 4, 2019) (reporting that female Partners, on average, made 80% of their male peers' salaries).

actually *increased* over the prior decade.[60] Staggeringly, <u>*not one*</u> of the responding seventy-three law firms reported having a woman as its highest earner.[61]

B. What's a ~~Girl~~ Woman to Do?

The first step towards effectively evaluating and implementing change is to identify the goal. For example, reform ideas proffered in response to "The Future is Female" are likely to deviate significantly from solutions suggested to "The Future is Fully-Actualized Appreciation and Optimization of Individual Talents and Abilities in Service to a Shared Collective Goal." While the latter makes for a pretty lame t-shirt, this Essay assumes it is the best place to begin 1) in order to balance the needs of all stakeholders in this issue, 2) to accord with current social science research indicating that implicit bias is best addressed when selection processes are gender *blind* (not gender-plus),[62] and 3) zero-sum gender war tactics have arguably led to factionalization and retrenchment of gender-based issues in law firms.

The Model Rules and state ethics laws are the perfect vehicle for gender pay and promotion disparity reform because implicit bias is, almost by definition, relational rather than legalistic. In that vein, ethics rules do not carve-out exceptions for ill-treatment merely because a lawyer has an ownership stake in the firm. Ethics rules are also designed to be flexible and fact-specific compared with brittle, entrenched civil rights statutes and their many attendant defenses unsuited to fully address the problematic fallout of implicit gender bias in law firms.

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[60] *Id.*
[61] *Id.*
[62] Claudia Goldin; Cecilia Rouse, *Orchestra Impartiality: The Impact of "Blind" Auditions on Female Musicians*, AMERICAN ECONOMIC REVIEW Vol. 90, No. 4 (Sept. 2000) (concluding that blind auditions bolstered impartiality, resulting in increased hiring of female musicians).

This Essay suggest a three-fold Model Rules reform response: 1) states should adopt the amended Model Rule 8.4, thereby providing ethics recourse against lawyers engaging in discriminatory pay and promotion practices, 2) Model Rule 8.4 should be updated to include the current best practices reflected in Massachusetts's newly-amended MEPA, and 3) commentary to Model Rule 8.4 should suggest alternative law firm Partner compensation models that reflect a concern for equal pay for equal work.

1. States Should Adopt Amended Black-Letter Rule 8.4

First, individual states—besides Vermont, which has already done so—should adopt the 2016 amended Model Rule 8.4 and its attendant commentary. This change builds off of existing framework and language that would create a brand new, substantial avenue for attorneys who fall victim to unfair pay and promotion practices. Discriminatory behavior that is otherwise irredressible under Title VII, the FEPA, or state law (either on the merits, because the victim lacks standing, or because the law firm has proffered an affirmative defense), may still constitute a Rule 8.4 ethics violation; thus, the offending party could be sanctioned. Additionally, because some civil rights statutes preclude individuals from being named as defendants, this solution provides recourse against offending *individual* lawyers, thereby increasing accountability standards for the firm's Management or Executive Committee both one-by-one and in the aggregate.

2. Rule 8.4 Should be Updated to Include the MEPA's Current Best Practices

Second, the Model Rules should adopt Massachusetts's amended equal pay guidelines as best practices. Most significantly, Rule 8.4 should encourage law firms to stop requesting prior salary information prior to issuing a formal offer. This change would most directly impact lateral hires, who are typically Partners or other senior level attorneys. As a result, incoming

female lawyers would not be handicapped by underpayment at previous positions, which would ultimately result in raising the female Partner compensation water table overall (it is obviously harder to catch up to their male counterparts if women start with a 20% deficit). Additionally, this change may allow or encourage female Partners facing discriminatory compensation practices to seek employment at another firm with hopes of bolstering her salary without being forced to file a discrimination lawsuit.

Besides responding to progressive legislative movement, this Model Rule change anticipates reform brewing in the 9th Circuit, which recently held that reliance on prior salary information is a per se discriminatory rationale for paying women lower wages. While the Circuit Court must now rehear the case (and count votes only from judges who are alive), the original decision in conjunction with recent Massachusetts statutory amendments anticipates progressive reform in this area.

3. Commentary to Rule 8.4 Should Suggest Alternative Partnership Compensation Models

Last, Rule 8.4 should consider amending its commentary to include alternative compensation models that align with equal pay for equal work values and social science research concluding that blind gender evaluations result in higher success rates for female candidates. Although partnerships are flexible and relational by nature; thus, there will always be some subjective considerations in assessing pay and promotions, safeguards could be included to hedge against systematic underpayment and underpromotion of women. Ideas might include transparent Partnership compensation policies, expansion of Executive Committees (ECs) often solely responsible for making compensation and promotion decisions, increased bonuses for more hours worked at all seniority levels, and third-party blind review, conducted by Partners unfamiliar with the promotion candidates under consideration, of the candidates' work product

files. States ultimately adopting this Model Rule change could elect to provide a safe harbor from ethical sanctions and/or civil rights law liability for law firms that 1) demonstrate they included the recommended practices in their written employment procedures and 2) produce written documentation that the procedures were indeed followed. At bottom, the mere existence of alternative compensation and promotion procedures in the Model Rules could bolster a Title VII plaintiff's rebuttal to an affirmative defense by providing evidence of a more narrowly-tailored policy that achieves the same business goals.

The beauty of these three suggested reforms, working in concert, is hopefully that it could someday be irrelevant whether Wife and Olivia have cognizable legal claims. In a perfect world, the unfair practices and attendant harm would be avoided in the first place and legal recourse rendered obsolete. That is what this Essay aims to accomplish.

IV. Conclusion

Regrettably, the legal sector is far from the only industry still struggling to pay and promote women fairly. The ABA has an opportunity to press ahead of the status quo and adopt truly innovative reform measures representative of the ethical standard, dignity, and professionalism synonymous with the practice of law.

There are two laws discrete,
Not reconciled,—
Law for man, and law for thing;
The last builds town and fleet,
But it runs wild,
And doth the man unking.

- Ralph Waldo Emerson