SCRIPTING REALITY IN THE LEGAL WORKPLACE: WOMEN LAWYERS, LITIGATION PREVENTION MEASURES, AND THE LIMITS OF ANTI-DISCRIMINATION LAW

Susan Bisom-Rapp[*]

I. INTRODUCTION

During my third year of legal practice, a single spoken sentence led me to consider at length the position of women attorneys in Wall Street law firms. Commenting on my recent announcement that I was pregnant, a male partner assured me, "In this department you will be treated as an attorney, *not* as a pregnant woman." I puzzled over this dichotomy, wondering about the choice the partner had imposed on himself. Although I was pregnant *and* an attorney, he preferred not to see me as a pregnant attorney.[1] This

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* Visiting Assistant Professor, Thomas Jefferson School of Law: J.S.D. candidate, Columbia University School of Law; LL.M. 1994, Columbia University School of Law; J.D. 1987: University of California, Berkeley, Boalt Hall School of Law; B.S. 1983, Cornell University, N.Y.S. School of Industrial and Labor Relations. An earlier version of this Article was presented at a Columbia Law School conference, Women in the Legal Profession, on November 11, 1995. Funding for this work was provided in part by a Dissertation Grant in Women's Studies from the Woodrow Wilson National Fellowship Foundation. This Article was written in partial fulfillment of the requirements for the degree of Doctor of the Science of Law in the Faculty of Law, Columbia University.

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[1] Pregnant attorneys do indeed make some of their male colleagues uneasy. First Lady Hillary Rodham Clinton recently related an anecdote about the disconcerting effect she had on her colleagues by being a practicing, pregnant lawyer. "A judge looked me straught in the eye and said 'Hillary...you just can't have this baby in this courtroom.' I said 'Judge, I'm not planning on doing that.'" Allison Mitchell, Banking on Family Issues, Clinton Seeks Parents' Votes, N.Y.Times, June 25, 1996, at A19 (quoting Hillary

required a linguistic move, a kind of figurative bifurcation, that would appear positively bizarre if executed in reference to my male counterparts. My professional status was severed from my sex and physical condition.[2]

The partner's choice of words was undoubtedly influenced by the dichotomous analytic framework of employment discrimination law, the area in which he practices.[3] The prototypical discrimination case, the so-called single motive case, assumes that there is one "true" reason for an adverse employment action such as a discharge or failure to promote: either a good legitimate reason or a bad, discriminatory one.[4] While effective in rooting out blatantly discriminatory actions, this model cannot accommodate decisions resulting from a complex mix of reasons that defy disaggregation.[5] Yet it is routinely employed in just this sort of case.[6]

Rodham Clinton).

[2] Rand Jack and Dana Crowley Jack argue that women lawyers by definition are divided against themselves. Because legal culture devalues feminine attributes, many women experience "an internal tension of 'me/not me' when they define themselves as feminine yet try to negate within themselves" the characteristics that discount them in the legal world. Rand Jack and Dana Crowley Jack, Women Lawyers: Archetype and Alternatives, 57 Fordham L. Rev. 933,936 (1989). This tension is made manifest by advice given to aspiring women attorneys in a recently published guide to major law firms by the Harvard Women's Law Association: "...act like a man and time your pregnancies appropriately." Harvard Women's Law Association, Presumed Equal: What America's Top Women Lawyers Really Think About Their Firms, 35, (1995); Wade Lambert, Women Lawyers Talk About Double Standard at Work, in New Book, Wall St. J., Oct. 16, 1995, at B5. For a woman attorney, acting like a man is invariably compromised by the planning, timing, and execuion of pregnancy.

[3] Title VII of the Civil Rights Act of 1964 (Title VII) prohibits employers with 15 or more employees from discriminating on the basis of race, color, religion, sex or national origin. 42 U.S.C. §§ 2000e–2000e-17 (1988 & Supp. V 1993). There are two major theories of discrimination under Title VII: disparate treatment and disparate impact. The former encompasses acts of intentional discrimination. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). The latter addresses facially neutral employment policies that have an adverse impact on protected groups and cannot be justified on the basis of business necessity. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

[4] See Price Waterhouse v. Hopkins, 490 U.S. 228, 247 (1989) (plurality opinion noting that the premise of the prototypical case "is that either a legitimate or illegitimate set of considerations led to the challanged decision.") See also, Martha S. West, Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty, 67 Temp. L. Rev. 67, 102–03 (1994) (discussing as "unrealistically simple" the assumption that "there was only a single employer motivation behind [the] adverse treatment of the plaintiff: either a good, legitimate motive or an illegal, discriminatory motive."). Single motive cases are disparate treatment cases.

[5] Another disparate treatment theory, mixed motive theory, attempts to account for

Recent sex discrimination suits filed by women attorneys against law firms are illustrative.[7] In those cases, the question is whether the firm's decision-makers relied on the plaintiff's performance (a legitimate factor) *or* her sex (a prohibited, discriminatory factor) in making their decision.[8] The separation of possible factors, which plays a heuristic role in assessing motivation and causation,[9] both semantically and analytically severs gender from other traits of the plaintiff. One then focuses on those other traits and asks, hypothetically, what would have happened had she been a man.[10] As

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multiple causal factors. These cases are conceptualized as occurring when there is sufficient proof that the employer acted with both impermissible (discriminatory) and legitimate reasons. Susan Bisom-Rapp, Of Motives and Maleness: A Critical View of Mixed Motive Doctrine in Title VII Sex Discrimination Cases, 1995 Utah L. Rev. 1029, 1030. Under this approach, a plaintiff establishes Title VII liability by demonstrating by a preponderance of the evidence that discrimination played a role in an employment decision. The burden then shifts to the employer at the remedial stage to prove that notwithstanding the discrimination, it would have made the same decision based on the legitimate factor. The employer's argument, if successful, bars the court from awarding compensatory and punitive damages, and equitable relief, such as reinstatement, hiring, promotion, and back pay. Id. at 1036. I have previously argued that the dichotomous framework of mixed motive analysis disadvantages plaintiffs, particularly those who are women. Id. at 1038.

[6] In an excellent recent article, Michael Zimmer argues that a new uniform disparate treatment analysis has emerged, which may replace the distinction between single and mixed motive cases described above. Michael J. Zimmer, The Emerging Uniform Structure of Disparate Treatment Discrimination Litigation, 30 Ga. L Rev. 563 (1996).

[7] See, e.g., Neuren v. Adduci, Mastriani, Meeks & Schill, 43 F.3d 1507 (D.C. Cir. 1995); Ezold v. Wolf, Block, Schorr and Solis-Cohen, 751 F. Supp. 1175 (E.D. Pa. 1990), rev'd, 983 F.2d 509 (3d Cir. 1992), cert. denied, 114 S.Ct. 88 (1993); Johnson v. Cooper, Deans & Cargill, 884 F. Supp. 43 (D.N.H. 1994); Masterson v. LaBrum and Doak, 846 F. Supp. 1224 (E.D. Pa. 1993); Byrd v. Ronayne, 61 F.3d 1026 (1st Cir. 1995). The Supreme Court held that Title VII applies to law firm partnership decisions in Hishon v. King & Spalding, 467 U.S. 69 (1984).

[8] The attorney discrimination suits cited above are single motive disparate treatment cases.

[9] The central factual inquiry in a disparate treatment case is whether the employer intentionally discriminated; the employer must have had an illegal state of mind. See U.S. Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 715-17 (1983). Moreover, the discriminatory intent or animus must actually motivate the contested decision; a protected trait must actually have played a role in decision-making and "had a determinative influence on the outcome." Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993).

[10] See Martha Chamallas, Listening to Dr. Fiske: The Easy Case of Price Waterhouse v. Hopkins, 15 Vt. L. Rev. 89, 104 (1990) (noting that the comparative

Martha Chamallas notes, however, gender is a central social fact that affects both self-image and the responses of others to an individual.[11] A legal standard that erases gender may well neglect the difference that gender makes in the assessment of a female attorney's performance.[12]

With this in mind, I argue that the way one linguistically frames explanations of what happens to women in the workplace is consequential, bearing significantly on the problems discerned and solutions proffered.[13] People make sense of the world and construct reality through the words they

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standard embodied in Title VII, whereby the plaintiff is compared to similarly situated males, "asks us to perform the mental feat of taking away (or changing) the gender of a person and then determining what would have happened.").

[11] Id.

[12] The same may be said of many other characteristics, including race, class, sexual orientation, and disability. Still, I believe one can theorize about women by acknowledging their commonalities as well as their differences. Gender is a pervasive social and legal construct that affects all women, though not necessarily all of the time. See Martha Albertson Fineman, The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies 52–53 (1995) (arguing that the extensiveness in society of gender stereotypes provides a basis for women to work together across their differences); see also Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory, and Anti-Racist Politics, 1989 U. Chi. Legal F. 139 (noting that black women sometimes experience discrimination in ways similar to white women, sometimes similarly to black men, and sometimes uniquely as black women); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581, 608 (1990) (arguing that African American women experience a "multiplicitous" self in which differences are "relational rather than inherent"). In this Article, I will attempt to address instances in which gender is undoubtedly relevant to the position in which women find themselves.

[13] The focus of this Article is primarily on women, both white and of color. Thus, when I discuss "women," I will implicitly be referring to both groups. This does not mean that minority women necessarily experience discrimination in the same way as white women. Nor does it foreclose the possibility that in some analyses minority women might be more appropriately grouped with minority men, or considered alone. Rather, it is a hopeful assertion that all women have enough in common to be considered as a class for the purpose of many contextually specific analyses.

choose to describe what they see.[14] In this sense, law is a discourse that can profoundly affect one's conceptualization of social phenomena.

This Article critically evaluates law as a narrative vehicle by using women attorneys as an example of the difference that language can make. To this end, it juxtaposes two articles about law firms and discrimination: sociologist Cynthia Fuchs Epstein's recently published report on women's integration into large law firm practice;[15] and a discrimination defense attorney's article on the difficulty of defending non-discriminatory termination and partnership decisions.[16] Each author examines that venerable institution, the large law firm, and presents a different version of reality. That the authors use different language to describe and assign meaning to what they see is not surprising, since each draws on a different disciplinary discourse. Those differing interpretations then serve as a foundation for discussing the limits of anti-discrimination law as a tool for fully integrating the legal profession. They also provide an opportunity for extensive consideration of a little explored reason for why anti-discrimination law is unable to combat systemic inequality in the American workplace: the strategic interventions of defense attorneys.

Professor Epstein's report is the subject of Part II of this Article. For her study, Epstein and her colleagues interviewed 174 attorneys from eight large firms in New York City.[17] Although hardly unexpected, the report's

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[14] See Jane Flax, Thinking Fragments: Psychoanalysis, Feminism, & Postmodernism in the Contemporary West 36 (1990) (noting that language is not a neutral vehicle for reporting reality because we learn socially and historically specific "language games" in order to communicate); Martha Minow, When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference, 22 Harv. C.R.-C.L. L. Rev. 111, 175 (1987) (arguing "reality is not discovered but constructed and invented"). This postmodern understanding of reality most likely resonates with many attorneys. A legal dispute is easily conceptualized as a conflict between competing, post hoc versions of what actually happened. Bisom-Rapp, supra note 5, at 1037.

[15] Cynthia Fuchs Epstein et al., Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession, 64 Fordham L. Rev. 291 (1995). This study was commissioned by the Committee on Women in the Profession, a standing committee of the Association of the Bar of the City of New York.

[16] Ellen M. Martin, Discrimination Claims Against Law Firms, N.Y.L.J., July 24, 1995, at 7. The advice proffered in the article is standard litigation prevention strategy. Because I do not wish to single out Ellen Martin in any way, I will not refer to her by name in this Article.

[17] Epstein, supra note 15, at 307. One of the more disturbing observations about the firms is the lack of minority representation. Lawyers in the firms studied are overwhelmingly white. Id. at 324. Epstein reports that 94% of the male attorneys and

conclusions are sobering: while increasing numbers of women attorneys continue to make partner, overall progress is slow.[18] Stereotypes about women's roles as mothers, their ability to attract new clients to the firm, their commitment to the profession, and their personality characteristics abound.[19] These beliefs, which adversely affect women's career development, are held by many male and female attorneys and influence their behavior toward and reactions to one another.[20] Operating along with those stereotypes are structural hurdles; most female associates who balance work and family obligations through part-time practice, for example, are knocked off the partnership track, [21] and increased billable hour standards adversely affect women who are primary caretakers of children.[22] Additionally, women attorneys with children report experiencing outside pressures—from spouses, family, and others— regarding their family and career decisions.[23]

By examining the effects of social processes,[24] institutional norms, and cultural beliefs on women attorneys, Epstein demonstrates that the systemic disadvantage experienced by women as a class is complex and interactive. Disadvantage—which translates into not one, but multiple glass ceilings—is produced by decisions made and rules promulgated by the gatekeepers of the profession, and from pressures on women that emanate from both the firm and the culture at large.[25]

86% of the female attorneys are Caucasian. Id. The study did attempt to ascertain the experiences of minority attorneys. However, there are so few minority partners and senior associates that "no analysis could be reasonably executed." Id. Epstein and her colleagues were able to interview no more than five minority attorneys. This very small group included Asian-Americans, Latinos and African-Americans. Id. at 308. Tellingly, almost all of the minority attorneys are 40 years old or younger. Id. at 325. Firm governance, lawyering skills, and experience are strongly correlated with age. Id. Thus, the minority lawyers are part of the least powerful, least experienced, and least skilled group in the firms studied.

[18] Id. at 304.

[19] Id. at 302–05.

[20] Id.

[21] Id. at 304–05.

[22] Id. at 302.

[23] Id. at 428–29.

[24] Epstein notes that three social processes act as a backdrop to the study: traditionalism, the belief that traditional organizational forms are natural or functional; stereotyping, the process of categorizing individuals according to stereotypical views; and ambivalence, the often unconscious process whereby people hold inconsistent or even contradictory views. Id. at 311.

[25] Id. at 309.

In Part III of this Article, I offer as a foil to Epstein's assessment the defense attorney's article, which addresses the subject of law firms and discrimination from a very different perspective. That author's discourse is anti-discrimination law, and her concern is defending non-discriminatory partnership and termination decisions.[26] The attorney's goal is to encourage law firms to "take steps not only to help ensure their compliance with the law but also to minimize their exposure in the event of litigation."[27] She details the factors that render law firm employment decisions vulnerable to discrimination claims,[28] analyzes relevant case law,[29] and offers strategic advice.[30]

The attorney advises adopting a written performance review system to insulate law firm employment decisions from effective challenge.[31] Such systems produce documentary evidence that the reasons for a given decision were legitimate. She also argues that oversight of this formal procedure can ferret out biased decision-makers, thereby eliminating discrimination from law firm decision-making.[32] Animated by Title VII's dichotomous analysis, this view implies that a rigorous evaluation process enables one to disaggregate discriminatory reasons for a decision from performance-based justifications.

After examining the attorney's perspective, Part IV attempts to disrupt the legal understanding of discrimination that she proffers and speculates about the possible results of a general embrace by employers of her strategy. My thesis is that such litigation prevention strategies encourage employers to use a new discourse to describe the decisions they make — a discourse of gender and racial neutrality. However, I worry that adopting this new language may alter the story's telling, and even its comprehension, without changing the story's outcome at all. In fact, systematic adoption of this discourse may alter substantive results in discrimination suits and simultaneously mask continuing conditions of inequality.

To underscore this point, I first place the attorney's advice in context, describing at length the proliferation in society of litigation prevention discourse. Here the discussion is aided by the results of my content analysis

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[26] Martin, supra note 16, at 7. While concerned about potential discrimination suits brought by associates on the basis of any protected category, the cases the attorney discusses and cites to support her arguments are all sex discrimination suits.

[27] Id. at 11.

[28] See infra notes 107–13 and accompanying text.

[29] See infra notes 246–305 and accompanying text.

[30] See infra notes 114–22 and accompanying text.

[31] Martin, supra note 16, at 11.

[32] Id.

of advice and training materials published by the employment bar and management consultants.[33]

Part IV then offers an analysis of three recent attorney sex discrimination suits discussed in the defense attorney's article. The cases highlight the potential effectiveness of her suggested strategy in securing employer victory, and demonstrate how poorly the dichotomous analytic framework of anti-discrimination law doctrine captures the systemic disadvantage of women attorneys that Epstein's study describes.

Other commentators have noted the limits of using anti-discrimination law in professional settings, focusing in large part on the difficulty of proving intentional discriminatory treatment.[34] Sustained scholarly attention has not been paid, however, to the role that defense attorneys may play in restricting the effectiveness of anti-discrimination law.[35] Considering how those legal actors use and react to employment discrimination law is essential for understanding why legal regulation may falter.[36]

By critically examining litigation prevention strategies, this Article reveals how defense attorneys try to "capture" discrimination doctrine by strategically using its dichotomous framework, and exposes the limitations of anti-discrimination law.[37] Those limitations may to a certain extent be

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[33] Shulamit Reinharz offers the following definition of content analysis: "People who do content analyses study a set of objects (i.e. cultural artifacts) or events systematically by counting them or interpreting the themes contained in them." Shulamit Reinharz, Feminist Methods in Social Research 146 (1992).

[34] See Deborah Rhode, Perspectives on Professional Women, 40 Stan. L. Rev. 1163, 1193 (1988); Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 Vand. L. Rev. 1183, 1232–33 (1989); see also Mary F. Radford, Sex Stereotyping and the Promotion of Women to Positions of Power, 41 Hastings L.J. 471, 532 (1990) (arguing that stereotyping can affect employer perception of professional women's performance).

[35] This Article constitutes my first in-depth examination of employment discrimination law practice. In it my focus is on defense strategy. Subsequent articles will analyze the strategic maneuvers of plaintiffs' attorneys.

[36] See Doreen McBarnet, Legal Creativity: Law, Capital and Legal Avoidance, in Lawyers in a Postmodern World: Translation and Transgression 73, 74 (Maureen Cain & Christine B. Harrington eds., 1994) (arguing that analyses of why legal regulation fails have ignored the problem of "how those on the receiving end *use* and manipulate it.").

[37] Socio-legal scholars have written about the "capture of law" by "those who comply with the law and yet have the capacity to avoid, resist, or redirect the law." Frank Munger, Sociology of Law for a Postliberal Society, 27 Loy. L.A. L. Rev. 89, 96 (1993); see Stewart Macaulay, Law and the Behavioral Sciences: Is There Any There

insuperable. Nevertheless, Part V recommends that factfinders take notice of how employment discrimination law is practiced in everyday life. Factfinders should scrutinize employer documentation very carefully, instead of uncritically accepting business records as accurate reflections of the truth.

The limitations of anti-discrimination law discussed in this Article also indicate that full participation of women in the profession is not likely to be forced on law firms by successful disparate treatment discrimination law suits. However, this need not mean that integration will not occur at all. As I conclude in Part V, there are compelling moral and economic reasons for law firms to commit themselves to greater diversification.[38]

II. A SOCIOLOGICAL VIEW OF THE LEGAL WORKPLACE

Women's battle for access to the elite enclaves of the profession—large law firms—has been won.[39] Yet law remains a prototypical example of an occupation where equality has failed to follow admission.[40] Recent studies demonstrate significant gender disparities in the number of attorneys elevated to partnership. For example, although the number of women attending law school has increased dramatically in the last twenty years,[41]

There?, 6 Law & Pol'y 149, 152-55 (1984) ("People, acting alone and in groups, cope with law and cannot be expected to comply passively.").

[38] See infra notes 320–23 and accompanying text.

[39] Up until the 1970s, elite firms made it clear that women need not apply. See Mary Becker et al., Feminist Jurisprudence: Cases and Materials 825–26 (1994); Cynthia Fuchs Epstein, Women in Law 79–95 (2d ed. 1993). The American Bar Association Commission on Women in the Profession now characterizes overt discrimination in hiring as largely a thing of the past. See ABA Commission on Women in the Profession, Unfinished Business: Overcoming the Sisyphus Factor 8–10 (1995) (describing women's hiring opportunities as "entry-level parity"). While few would say that overt discrimination never occurs, gender bias today is most likely to manifest itself subtly, as women attorneys advance through the professional hierarchy. Id.

[40] See Leslie Bender, Sex Discrimination or Gender Equality? 57 Fordham L. Rev. 941, 945 (1989) (arguing that there is "an important distinction between including more women lawyers in law firms and affirming gender equality"); John Hagan & Fiona Kay, Gender in Practice: A Study of Lawyers' Lives 187 (1995) ("Women in the profession are caught in a series of cross-pressures that constrain their opportunities for occupational success and personal happiness."); cf. Jo Dixon & Carroll Seron, Stratification in the Legal Profession: Sex Sector, and Salary, 29 Law & Soc'y Rev. 381 (1995) (describing and offering an explanation for the gender gap in the incomes of male and female attorneys).

[41] In 1994–95, women law students comprised 44% of all first-year law students.

they are still significantly under-represented in the partnership ranks of the nation's largest law firms. Women make up just 12–13 percent of partners, despite representing approximately forty percent of the associates.[42] Cognizant of this gap, scholars have turned to economics, the social sciences, and feminist theory to help explain the continuing difficulties facing women professionals generally and women attorneys specifically. To this end, sociology has provided a powerful language for describing the barriers that remain.

A key insight of this literature is that psychological, institutional and cultural factors combine to stymie the progress of women professionals on many fronts. Stereotypes about female competence may affect a supervisor's perception of a subordinate's performance, and impact the subordinate's actual performance as well.[43] Norms that prescribe "Herculean" and unpredictable time commitments disadvantage primary caretakers of children, who are most likely to be women.[44] Cultural beliefs about desirable feminine traits and roles may place women in conflict with

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See Barbara A. Curran & Clara N. Carson, The Lawyer Statistical Report: The U.S. Legal Profession in the 1990's (American Bar Foundation, 1995).

[42] Edward A. Adams, Survey Shows Diversity at Firms Still Lagging, N.Y.L.J. March 29, 1995, at 1; Eleanor Kerlow, Mirroring Economy, Hiring and Promotion of Women Remains Flat, Of Counsel May 2–16, 1994, at 25. See generally ABA Commission on Women in the Profession, supra note 37 (demonstrating that women attorneys reach positions of power and prestige much less frequently than men do in virtually every sector of the legal profession).

An equally important but more specific issue concerns the status of minority women practicing in law firms. A recent American Bar Association task force report notes that minority women attorneys face the double burden of gender and racial stereotypes. They also enter private practice far less frequently than other groups of lawyers, although the reasons for this disparity remain unclear. See ABA Multicultural Women Attorneys Network, The Burdens of Both, The Privileges of Neither (1994); Edward A. Adams, ABA Finds Minority Women in Law Face Twice the Hurdles, N.Y. L.J., Aug. 8, 1994, at 1.

[43] See Deborah Rhode, Gender and Professional Roles, 63 Fordham L. Rev. 39, 65-69 (1994) (discussing "lingering skepticism about female competence"); Rhode, supra note 32, at 1188–90 (noting that unconscious gender bias affects the evaluation of performance as well as the performance itself); Mona Harrington, Women Lawyers: Rewriting the Rules 125 (1993) (noting that black women attorneys fail to be recognized as "potential equals").

[44] See Abrams, supra note 34, at 1227; Mary Jane Mossman, Challenging "Hidden" Assumptions: (Women) Lawyers and Family Life, in Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood 289, 291 (Martha Albertson Fineman & Isabel Karpin eds. 1995); Rhode, Gender and Professional Roles, supra note 43, at 60–63; Bender, supra note 40, at 942–43.

the ideal professional persona. Lawyers are supposed to be aggressive, competitive, professionally dedicated, and emotionally detached, while women are viewed ideally as cooperative, deferential, sensitive, and self-sacrificing.[45]

Cynthia Fuchs Epstein's recent study is part of the continuing scholarly effort to assess the extent to which these factors hinder women attorneys.[46] While not beyond critique,[47] it represents an illuminating sociological analysis of the difficulties women attorneys confront. The study does not pronounce any particular employment decision or practice as discriminatory. Instead, it illustrates the complexity of social reality for women lawyers. Women's career aspirations and progress are dependent upon numerous factors, some influenced by conscious and unconscious stereotyping, some the product of biased institutional constraints and norms, others related to outside social pressures, and others entirely unrelated to gender,[48] such as the economic condition of the firms in which they practice.[49] Nevertheless, as compared with their male counterparts, Epstein does conclude that women in the law firms that she studied are at a significant disadvantage.

Can this disadvantage adequately be captured by the current legal approach to discrimination? This Article will go beyond the valuable insights of commentators who note that discrimination is hard to prove in professional settings.[50] I will argue that law may fail to comprehend systemic disadvantage due to the strategic maneuvers of defense attorneys and employers attempting to capitalize on Title VII's dichotomous framework. By creating evidence to support legitimate, performance-based reasons for an adverse action, defense attorneys and employers may obscure the difference that sex made in the evaluation process. Before

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[45] See Rhode, supra note 34, at 1182.

[46] Epstein's book, Women in Law, is a pioneering work in this area. See generally Epstein, supra note 39. Epstein began studying women lawyers in the mid-1960s, when there were very few women attorneys. Cynthia Fuchs Epstein, Faulty Framework: Consequences of the Difference Model for Women in the Law, 35 N.Y.L. Sch. L. Rev. 309, 327–28 (1990).

[47] See, e.g., infra notes 77, 78, 82, 86 and accompanying text.

[48] While biases such as race, sexual orientation and class may undoubtedly play a role in disadvantaging some women, Epstein's main focus was differentiation based on gender. As noted above, she was unable to draw conclusions about race due to the lack of minority partners and senior associates in the firms she studied. See supra note 15, at 324. Epstein did not examine the effects of sexual orientation and class on lawyers' experiences.

[49] Id. at 309.

[50] See supra notes 34, 40 and accompanying text.

demonstrating the power and potential effects of defense maneuvers, however, a look at the results of Epstein's study is necessary.

A. Women Lawyers and the New Economic Environment of the 1990s

Epstein's study comes at a time of momentous change in the profession. Business slow-downs, beginning in 1990, have resulted in large firm contraction and in some cases, failure.[51] Consequently, firms are increasingly concerned with billable hours and increasingly intolerant of attorneys who fail to meet prevailing norms.[52] These factors bode ill for professional women, particularly those who are mothers. Thus, a central question addressed by the study is how women are faring in this new economic environment.

An issue of particular interest to Epstein was whether men in the eight firms studied attained partnership at a rate higher than women. To answer it, she tracked the progress of the firms' first-year associates, beginning in 1973-74 and ending in 1994. Epstein concludes that "[w]omen have fared poorly under the 'up and out' system" of promotion at those large law firms.[53] For the entire time period, nineteen percent of the men made

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[51] See Colleen McMahon, Forward to Cynthia Fuchs Epstein et al., Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession, 64 Fordham L. Rev. 291, 295 (1995) (discussing the effects on law firms of the 1990 business slow down). The potential for large law firm failure perhaps dawned on the legal consciousness two years earlier with the 1988 dissolution of Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson and Casey, a 700-attorney firm. See Edward A. Adams, For Firms, Breaking Up is Hard to Do, N.Y.L.J., Oct. 26, 1995, at 1. More recent law firm casualties include the 1994 dissolutions of Shea & Gould (250 attorneys), Bower & Gardener (191 attorneys), and Lord Day & Lord, Barret Smith (125 attorneys), as well as the 1995 dissolution of Mudge Rose Gutherie Alexander & Ferdon (191 attorneys). See id.

[52] See McMahon, supra note 51, at 295 (noting that in 1990, "firms focused more closely on how many hours associates and partners worked, and those who did not conform to prevailing norms became expendable"); see also Epstein, supra note 15, at 313 (noting that the early 1990s were a period of "economic downturn" for firms in which they "turned greater attention to their [associates'] business-getting potential"); ABA Commission on Women in the Profession, supra note 39, at 12 (describing today's firm culture as a "bottom line" system).

[53] Epstein, supra note 15, at 358. By "up and out" system, Epstein refers to the process by which associates are "weeded out" as they rise through the law firm hierarchy. A central component of that process is the traditional law firm practice of asking an associate to leave the firm if he or she is denied partnership. See id. at 311.

partner, compared with only eight percent of the women. Indeed, Epstein not only discerned "a disparity between the rates of partnership for men and women," she noted that there was a sharp drop-off in the number of women making partner in 1990 and thereafter. The rate of promotion for men in the period from 1990–94 dropped to seventeen percent (from 21.5 percent in the preceding years), while the rate for women plummeted to five percent (from a promotion rate of 15.25 percent).[54]

Epstein also examines the attitudes and institutional constraints that affect women lawyers' professional advancement. Consonant with the sociologically-based literature on professional women,[55] she concludes that a variety of factors combine to hinder full integration of women into large firm culture. The following subsections briefly discuss four of those factors: the problems women have in business development—known in the legal profession as "rainmaking"; the stereotype that women are less committed to legal practice than men; the difficulties women have in attracting mentors; and the prevalence of stereotypes regarding women's personality characteristics and lawyering style.[56]

In Part IV, these factors will help unsettle the facile conclusions of several courts that have recently considered attorney sex discrimination claims. Bringing these phenomena to the surface in the text of the cases, reveals how Title VII's dichotomous framework, along with defense attorneys' understanding of how to exploit that paradigm, can eclipse the systemic disadvantage that women attorneys face.

B. Problems in Business Development

Epstein found that several factors place many women at a disadvantage to men regarding business development. This is an important finding because actual or potential ability to generate clients plays a significant role in partnership decisions, and can impact the career paths of those who are already partners. One constraint women confront is stereotyping about their abilities to develop business relationships.[57] Epstein reports that women "are not regarded to be as good rainmakers as men by both men and

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[54] Id. at 358–59.

[55] See supra notes 34, 43 and accompanying text.

[56] The report is quite lengthy and detailed, running 148 printed pages in the Fordham Law Review. What I offer here is my distilled interpretation of several of the topics that the report addresses. Deviations between the conclusions offered herein and the actual report are attributable to me, not to Professor Epstein and her colleagues.

[57] See Epstein, supra note 15, at 338.

themselves."[58] Many women attribute this to their lack of access to the social networks traditionally used by men to generate business;[59] men have college friends and sports buddies who end up running companies, while women do not.[60]

Lack of time to develop business relationships is also a factor. Epstein notes that both women and men agree that "men have more time to devote to client development, frequently taking clients out for breakfasts, lunches, and dinners."[61] Female junior partners, who are under significant pressure to bring in business, are especially disadvantaged.[62] Many have young children, which exerts a significant counter pressure on their lives.[63]

The powerful mix of constraints is exacerbated by the actions of male senior partners who do not expose women attorneys to the opportunities that might lead to client development.[64] Some women partners complain that "senior men with whom they work are unwilling to share contacts or credit for client development."[65] One female partner noted that male partners are the primary beneficiaries of client inheritance; rarely does the firm pass on to women the clients of retiring partners.[66] Moreover, Epstein found some evidence that women associates may be assigned a disproportionate share of pro bono work which, as compared with billable work, leads less frequently to networking opportunities.[67] In short, the report demonstrates that the disadvantage women face in rainmaking is complex and interactive.

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[58] Id. at 332.

[59] Id. at 332–33.

[60] Id. Women attorneys are making efforts to establish their own networks. For example, in December of 1993 the Association of the Bar of the City of New York's Committee on Women in the Profession launched Lawyers Advancing Alternative Work Solutions ("LAAWS") Network. This group provides a forum for attorneys who work flexible or part-time schedules. The LAAWS Network has a mailing list of over 350 members. Committee on Women in the Profession, A Report on the Need for, Availability and Viability of Flexible Work Arrangements in the New York Legal Community, 50 The Record 522, 523 (1995). The group currently meets bimonthly.

[61] Epstein, supra note 15, at 334.

[62] Id. at 334–35.

[63] Id.

[64] Id. at 342–43.

[65] Id. at 334.

[66] Id.

[67] Id. at 336–37.

C. The Stereotype that Women are Less Committed to Legal Practice

The stereotype that women are less committed to legal practice than men also significantly limits their career development.[68] This stereotype is linked to an institutional norm that equates time spent at the office with career commitment.[69] Epstein notes that women with families complain about their inability to meet that standard:

> Many women complain that they try to use their time efficiently so that they can go home and have dinner with their families, but that male associates waste time earlier in the day, or perhaps spend lunch hours at the gym and then start working in earnest in the afternoons and evenings. They further suggest that men do this intentionally, so that senior partners will regard them as especially industrious when they know they are working late into the night.[70]

It is not simply stereotyping and the prevailing work norms that hinder the careers of women attorneys, however. Cultural beliefs about mothering, which regard that enterprise as an absorbing role that inevitably conflicts with one's professional role,[71] adversely affect women attorneys in at least three ways. First, those beliefs may create outside pressures—from, for example, spouses, friends, and children's teachers—on women attorneys' family and career decisions.[72] A number of women described incidents involving the judgmental comments of neighbors who are stay-at-home mothers, the underlying message being that a working mother is either selfish or irresponsible.[73] One female associate noted that her child's teacher was aghast upon hearing the associate's work schedule.[74] Still others complained that stay-at-home mothers would not arrange play dates with the children of working mothers, "because they did not want to socialize with the child's paid caretaker."[75]

Second, the beliefs when held by women attorneys may lead them to eschew workplace norms.[76] The study discerned a generational split in this

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[68] Id. at 423–25.

[69] Id. at 379, 406.

[70] Id. at 379.

[71] Id. at 417.

[72] Id. at 428–29.

[73] See id.

[74] Id.

[75] Id. at 429.

[76] Id. at 442–43.

regard: "Although most women partners are married and a large number of them have children, a good number of younger women in their firms do not regard them as positive role models."[77] Women associates view women partners as either "superwomen," whom they do not wish to emulate, or as martyrs, who sacrificed their family and personal life for their career.[78] As one associate noted: "Maybe I'm asking for too much, but I don't think my children should have to raise themselves so that I can be successful here."[79]

Finally, cultural beliefs about mothering affect the degree of collegial support women receive from senior partners, colleagues, and clients, a factor Epstein describes as crucial for managing work and family responsibilities.[80] Support conveys to the woman associate or partner that her contributions are valued. It also affects the types of family accommodations available and may "buffer[] her from being perceived as less committed."[81] Yet, Epstein reports that "[m]any older men have stereotyped views of women's roles as mothers and give them approval for leaving a partnership track rather than encouraging them to combine career with family."[82] These men do not understand how their beliefs impact the

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[77] Id. at 443. Epstein attributes the generation gap to the "more conventional view of child care" that she argues women associates display. Id. She regards younger women as "conventional" because "they believe 'hands on' mothering is important for their children and for their own gratification." Id. This seems a highly normative characterization. Rather than label them as "conventional," one could describe women associates as opposing conventional notions of professionalism. They are saying that there is a different way to be a professional—one that departs substantially from the old, traditional male view of professionalism. Evidence for this may be found in the following quote from a part-time associate who was interviewed for the report: "...I don't regret the decision [to go part-time], but I do regret having had to make it. I resent the fact that my male colleagues and other people here who don't have family commitments can work eighty hours a week, and all they do is work." Id. at 408.

[78] Id. at 431–32. The report takes the position that "motherhood . . . can also be an advantage for many women, or, minimally not a deterrent to one's career." Id. at 418. This is supported by noting that 73% of ever-married women partners have children. Id. However, given Epstein's numerous insights about the problems of women partners, particularly her conclusion that there are multiple glass ceilings in firms, Id. at 309, I question whether the statistic supports the conclusion about the effect of motherhood on career.

[79] Id. at 432.

[80] Id. at 420–22.

[81] Id. at 420–21.

[82] Id. at 442. Clearly, more is necessary than simply "encouraging [women] to combine a career with family." Decreasing the cost to women associated with combining motherhood and career advancement is a necessary prerequisite to a fully integrated profession. Women attorneys should not be required either to give up their dreams of

career decisions of women attorneys. Indeed, Epstein posits that they "may produce a self-fulfilling prophecy;"[83] that is to say, when partners hold preconceived conceptions about new mothers' lack of career commitment, they may produce the very phenomenon they anticipate.[84]

Ultimately, the interaction of those factors can result in women receiving less challenging assignments,[85] an especially prominent concern of those who work part-time or alternative schedules.[86] In addition to

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equality or to hire other women to perform entirely the caretaking that child-rearing requires. See Martha L.A. Fineman, Masking Dependency: The Political Role of Family Rhetoric, 81 Va. L. Rev. 2181, 2209 (1995); see also Bender, supra note 40, at 945 ("Women should demand no less than an opportunity to redefine the meanings of lawyering, law firm practice, professionalism, and professional success, all of which were created without our input, insights, needs and gender culture taken into account."). Epstein notes in a less direct fashion that "movement towards diversity can only be achieved when older practices, appropriate to another time and demographic situation, are altered." Epstein, supra note 15, at 446.

[83] Epstein, supra note 15, at 443.

[84] See Rhode, supra note 34, at 1189–90.

[85] Epstein, supra note 15, at 377.

[86] Id. at 405–06. The report sometimes discusses part-time or flexible practice options as "special accommodations to respond to family needs," terminology I find troubling. Id. at 433. Use of the terminology seems appropriate where the interview subjects themselves use it. However, validating it in the report's narration is problematic.

The difficulty, generally speaking, is that by framing the debate about flexible work options as equal treatment vs. special treatment, women are disadvantaged no matter which side of the binary opposition they select. My thinking here is greatly influenced by the work of Martha Minow and Joan Scott. See Martha Minow, Making All the Difference: Inclusion, Exclusion, and American Law 19–21 (1990) (discussing the way in which the stigma of difference may be perpetuated by either ignoring or focusing on it); Joan W. Scott, Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism, 14 Feminist Stud. 33, 38–39 (1988) (arguing for examination of how the dichotomous pairing of equality and difference constrains and constructs meaning). To select equal treatment is to embrace a formal notion of equality that perceives the status quo as neutral and fails to account adequately for women's different social position. Put somewhat differently, an equal treatment stance removes from scrutiny institutional norms that are really designed for the "ideal worker"; a person who has traditionally been a man with a stay-at-home wife. See Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 822 (1989); Joan Williams, Gender Wars: Selfless Women in the Republic of Choice, 66 N.Y.U. L. Rev. 1559, 1596–97 (1991).

On the other hand, to weigh in on the side of "special treatment" for women only highlights their deviance from the norm, without challenging the norm itself. This can lead to devaluation of women's career paths, a subject discussed by Epstein in the

providing women with less opportunity to display their intellectual abilities, dull or routine assignments may lead to boredom or frustration. The stereotype that women are less professionally committed may also prevent female attorneys from engaging in "informal interactions necessary to learn the intricacies of professional roles, and to establish relationships necessary for career mobility."[87]

D. The Difficulty of Attracting Mentors

Epstein discerned gender-specific problems regarding women attorneys' ability to attract mentors. This is significant because "experienced elders and gatekeepers"[88] groom future partners. Assistance may take many forms; for example, mentors may act as teachers[89] or trusted advisors.[90] One of the most important roles they play, however, is that of career advocates, providing their proteges with high visibility work that allows them to display and develop their talents.[91]

The study found that many senior partners—the majority of whom are men—are ambivalent about mentoring young women. They expressed concern about developing close ties with female associates, fearing both the appearance of impropriety and charges of sexual harassment.[92] One male partner reported, for example, that these fears lead him to avoid taking business trips with women, even though such trips are important opportunities to develop mentoring relationships.[93]

Female partners also exhibited mixed feelings about mentoring.[94] Many reported feeling a lack of power to be an adequate mentor.[95] Others noted that they faced significant time constraints that prohibited playing such a role.[96] Ironically, it appears that these gender-related disadvantages—lack of power and time constraints—not only disadvantage women partners directly, they disadvantage women associates by removing many women partners from the universe of potential mentors.

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report. See Epstein, supra note 15, at 406 (discussing the stigma of part-time work).

[87] Id. at 378.

[88] Id. at 355.

[89] Id. at 344–45.

[90] Id. at 345.

[91] Id.

[92] Id.

[93] Id.

[94] See Id. at 353-55.

[95] Id.

[96] Id. at 354.

E. The Prevalence of Stereotypes Regarding Women's Personality Characteristics and Lawyering Style

Epstein notes that stereotyping plays a significant role in partnership decisions.[97] In this regard, both men and women may engage in stereotyping about themselves and one another.[98] Despite this, most lawyers interviewed for the study denied that they generalize about men and women.[99] Yet many who denied generalizing, did indeed express stereotypical differences.[100]

One important area where stereotypes manifested themselves was in views about lawyering styles. Men were sometimes characterized as combative, women as more practical.[101] This can translate into notions about women's fitness (or lack thereof) for certain practice specialties. One male partner described the culture of corporate mergers and acquisitions as aggressive, and posited that women have more difficulties in this area.[102] Others described litigation in similar terms.[103]

Nevertheless, some of those interviewed expressed stereotypes in contradictory ways. A few male attorneys characterized women lawyers as "more argumentative than males," and therefore tougher negotiators.[104] A few others stereotyped women as less confrontational negotiators and therefore well-suited to corporate practice.[105]

III. A LEGAL VIEW OF THE LEGAL WORKPLACE

The defense attorney's article assesses the problem of discrimination in law firms much differently than Epstein's report. Her consideration of the legal workplace is directly responsive to Title VII's dichotomous analytic framework, which assesses the "true" reason for an employment decision by separating the possible factors into categories: either legitimate or discriminatory.[106] The attorney's concern is that the law firm decision-

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[97] Id. at 365.

[98] Id.

[99] Id.

[100] Id. at 366.

[101] Id. at 368.

[102] Id. at 369.

[103] Id. at 370.

[104] Id.

[105] Id. at 369–70.

[106] The attorney does not discuss the mixed motive theory of discrimination. See supra note 5.

making process itself may make truly non-discriminatory decisions difficult to legally defend.[107] She argues that four attributes of the process complicate a straightforward defense, and "can at first blush make non-discriminatory decisions seem suspect."[108]

First, associates are generally evaluated on the basis of subjective factors, such as legal analysis, creativity, ability to work under pressure, attitude, and potential client development.[109] Next, firm decisions are made by consensus, often reflecting compromises rather than the view of any single evaluator.[110] Third, partnership decisions may be affected by factors other than a candidate's merit, such as firm economics.[111] Finally, circumstances at the firm may change from year to year, so that "credentials that warranted elevation to partnership one year may be insufficient at a later date or vice versa."[112]

The attorney warns that discrimination plaintiffs will compare their treatment to that of favorably-treated majority group members. To bolster their cases, they look for evidence of improper stereotyping or that their qualifications are "equal or superior to those of preferred comparables."[113]

To protect themselves from suit, ensure legal compliance, and promote non-discriminatory decision-making, she suggests a litigation prevention strategy, adoption of a comprehensive performance review system, that implicitly draws from the behavioral assumptions of disparate treatment anti-discrimination law doctrine.[114] In a recent article, Linda Kreiger outlined those assumptions: first, discrimination results from an employer's discriminatory motive or intent; second, in the absence of discriminatory animus, decision-makers will act rationally, judging employees on the basis of neutral criteria; third, discrimination is a phenomenon that occurs at the

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[107] See Martin, supra note 16, at 7.

[108] Id.

[109] Id. Interestingly, it is just such subjective factors that social psychologists and sociologists find are most prone to the influence of stereotyping. See Epstein, supra note 15, at 365; see also Rhode, supra note 34, at 1193–95.

[110] See Martin, supra note 16, at 7. Because women make up such a small percentage of firm partners, the evaluating groups are overwhelmingly male. Social psychologists have found that the presence of men in evaluating groups tends to trigger anti-female bias. See infra notes 259–64 and accompanying text.

[111] Id. at 7,11. Recall that Epstein concludes that the highly competitive legal marketplace of the 1990's works to the detriment of women lawyers. See Epstein, supra note 15, at 363.

[112] See Martin, supra note 16, at 11.

[113] Id.

[114] As noted above, disparate treatment theory encompasses acts of intentional discrimination. See supra notes 3, 4, 9, 10 and accompanying text.

moment an employment decision was made; and finally, decision-makers can identify the reasons for the decisions they make.[115]

Krieger argues that these assumptions, while adequate for addressing the overt discrimination prevalent in the past, greatly constrain the ability of anti-discrimination law to address unconscious bias, "today's most prevalent type of discrimination."[116] I would add that the assumptions enable

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[115] Linda H. Krieger, The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity, 47 Stan. L. Rev. 1161, 1166-67 (1995). Each of these assumptions is grounded in the anti-discrimination jurisprudence of the Supreme Court. The conceptualization of discrimination as a product of illegal motive and intent is central to this doctrine. See Hazen Paper Co. v. Biggins, 507 U.S. 604, 610 (1993) ("In a disparate treatment case, liability depends on whether the protected trait . . . actually motivated the employer's decision . . . and had a determinative influence on the outcome.")

The implicit assumption that when employers ignore protected categories, they inevitably act rationally and on the basis of neutral criteria is also a theme of the jurisprudence. See Price Waterhouse v. Hopkins, 490 U.S. 228, 243 (1989) ("When an employer ignored the attributes enumerated in the statute, Congress hoped, it naturally would focus on the qualifications of the applicant or employee."); Griggs v. Duke Power Co., 401 U.S. at 434 ("[T]he very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color.") (quoting 110 Cong. Rec. 7247 (1964)).

The final two assumptions—that discrimination occurs at the moment of decision and that decision-makers can give conscious voice to the reasons for their decisions—find support in Justice Brennan's plurality opinion in Price Waterhouse v. Hopkins. See 490 U.S. at 241 ("The critical inquiry . . . is whether gender was a factor in the employment decision at the moment it was made."); 490 U.S. at 250 ("In saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman.").

[116] Krieger, supra note 115, at 1164. Krieger bases her critique on recent empirical and theoretical research in cognitive psychology. She argues that many biased decisions result "from a variety of categorization-related judgment errors characterizing normal human cognitive functioning." Id. at 1165. Other scholars have discussed in different terms the difficulty of rooting out unconscious discrimination with a legal doctrine that considers motive its touchstone. See, e.g., Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Discrimination, 39 Stan. L. Rev. 317 (1987) (relying on Freudian psychology to argue that intent model fails to capture the unconscious nature of discrimination); D. Marvin Jones, The Death of the Employer: Image, Text, and Title VII, 45 Vand. L. Rev. 349, 364–65 (1992) (describing how unconscious discrimination fails to fit conventional discrimination law paradigm); Rhode, supra note 34, at 1193–94 (discussing law's focus on motivation and difficulty of obtaining evidence of unconscious bias).

employers to preemptively shield many employment decisions from attack. One can greatly decrease the likelihood of a finding of discriminatory animus—a finding of fact[117]—by creating evidence that carefully attends to the second, third, and fourth assumptions. By arguing that employers create evidence, I do not imply that they fabricate it or that employment discrimination attorneys advise them to do so. My argument is that by recommending written documentation in the form of performance reviews, defense attorneys initiate the creation of what in a trial will be called "evidence." This evidence will memorialize the views of the decision-makers, most of whom will consider themselves to be unbiased. Those who actually see themselves as prejudiced are unlikely to document that fact on paper.[118] To demonstrate this point, let us consider the attorney's preventative strategy.

The attorney advises that firms implement and administer carefully a written performance review system for the lawyers they employ. These evaluations should then be scrutinized for evidence of stereotyping or bias. If a given review appears biased, the firm can either exclude the biased individual from decision-making or, if it concludes that there actually is no bias, "have the evaluator expand upon or clarify the review."[119]

She encourages evaluators to provide candid assessments of performance, with specific examples where the review is negative. These examples "improve and add weight to the evaluator's judgment where it is challenged."[120] She also suggests, for strategic reasons, allowing the attorney being evaluated to comment on the review. If disagreement is not expressed, a plaintiff's subsequent claim that the review was inaccurate can be attacked as lacking credibility. If complaints are registered, the firm can take remedial action before it is faced with a discrimination claim.[121]

Finally she advises that law firms inform associates in writing that good or even excellent performance does not ensure promotion to partnership or even continued employment. Associates must be warned that many other factors beyond merit may impact an adverse decision.[122]

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[117] Marty West notes that by declaring intentional discrimination a finding of fact, not a conclusion of law, the Supreme Court has limited the power of judicial review of discrimination cases. West, supra note 4, at 110. Findings of fact may be reversed on appeal only if they are clearly erroneous. Id. In contrast, a conclusion of law may be reviewed freely by a court of appeal. Id. at 111.

[118] See infra notes 179–245 and accompanying text (arguing that evidence is "created" rather than simply "found").

[119] Martin, supra note 16, at 11.

[120] Id.

[121] Id.

[122] Id.

Several aspects of the attorney's strategy benefit from the behavioral assumptions of anti-discrimination law. Systematizing the evaluation of employees enhances the appearance of rationality in the decision-making process. Scrutinizing reviews for stereotypical comments, and then altering them through expansion and clarification when such comments are found, produces documents which demonstrate that the evaluation was based upon neutral criteria. Encouraging partners to provide extensive examples of performance aids in proving the decision-makers knew and clearly identified the reasons for the decision.

Additionally, barring a biased evaluator from decision-making implies that discrimination occurs only at the moment the decision is made; it assumes away two possible causal effects: that working with a biased partner affects an associate's performance for other partners; and that the biased partner's judgment, where known to other partners, affects their evaluations of the associate.

Moreover, the attorney's suggestions are very much informed by a legal understanding that conceptualizes discrimination as discrete, aberrant actions or wrongs that are inflicted upon specific victims by misguided perpetrators.[123] She implies that firms can smoke out the malefactors by carefully administering a written performance review policy. Stereotypical comments in an evaluation constitute a red flag, triggering an investigation. If bias is found, one ignores the review and counsels the perpetrator. If no bias is discerned, one asks the reviewer to rephrase and elaborate on his or her insights. These actions are meant to neutralize discrimination, allowing only performance-based concerns to enter into the decision's calculus. In short, the position of women attorneys is seen in the dichotomous terms of discrimination law doctrine. By removing stereotypical remarks, either by excluding the review or by asking for expansion and clarification of it, one ensures that the individual is being viewed as an attorney and *not* as a woman.

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[123] Alan Freeman calls this the "perpetrator perspective." See Alan David Freeman, Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine, 62 Minn. L. Rev. 1049, 1052–53 (1978). He advocates a paradigm shift to what he terms the "victim perspective," which sees discrimination as a broad societal phenomenon, manifesting itself in a lack of job, housing, money and choice. Id. Kimberlé Crenshaw would label the attorney's understanding a "restrictive vision of equality." Kimberlé Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-Discrimination Law, 101 Harv. L. Rev. 1331, 1342 (1988). This "vision" conceptualizes wrongdoing as isolated, individual actions, and focuses on the prevention of future wrongdoing rather than the eradication of conditions of oppression. Id.

The difficulty with this view is that it takes an "I know it when I see it" approach to discrimination.[124] The evaluation scrutinizers—presumably employment attorneys or those trained by them—function like an anti-discrimination policing authority, seeking out and destroying workplace discrimination and purifying law firm decisions in the process. Is it likely that they will accomplish those goals? Social scientists note that discrimination often functions at an unconscious level.[125] Thus, studies have found that men and women have difficulty discerning sex bias in individual cases.[126] Indeed, Epstein's study found gender-based stereotyping by both male and female attorneys, and noted that these individuals often did not recognize their prejudices.[127]

The question arises, however, that if most employment attorneys are not social scientists trained in discerning gender stereotyping,[128] what

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[124] This is reminiscent of Justice Stewart's approach to identifying pornographic materials in obscenity cases. See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[125] See Krieger, supra note 115, at 1190–1216 (reviewing at length social cognition theory literature attributing prejudice to categorization and related cognitive biases that operate independent of motivation).

[126] See, e.g., Faye J. Crosby et al., The Denial of Personal Disadvantage Among You, Me, and All the Other Ostriches, in Gender and Thought: Psychological Perspectives 79, 80 (Mary Crawford & Mary Gentry eds., 1989); see also Beth L. Green and Nancy Felipe Russo, Work and Family Roles: Selected Issues, in Psychology of Women: A Handbook of Issues and Theories 685, 695 (Florence L. Denmark & Michele A. Paludi eds. 1993) (women fail to recognize that they are personally disadvantaged by their gender).

[127] See Epstein, supra note 15, at 365–66.

[128] It is unclear whether attorneys could be effectively trained in social science techniques to recognize and combat cognitive biases and other causes of discrimination. See, e.g., Timothy D. Wilson & Nancy Brekke, Mental Contamination and Mental Correction: Unwanted Influences on Judgments and Evaluations, 116 Psychol. Bull. 117, 130-35 (1994) (discussing potential techniques for correcting cognitive bias and the difficulties associated with that endeavor). One complicating factor in developing such a training program is identifying the relative influences of possible causes of bias. Robert Dipboye describes a possible approach:

> If faulty stereotypes are indeed the cause, then one might train raters to think with more complexity about ratees or provide relevant information on the ratee to counteract these stereotypes. One also might focus the attention of raters on job relevant information through the use of behaviorally based rating scales and instructions to avoid biases in using these scales, although these two approaches appear somewhat ineffective in improving the accuracy of ratings. If discrimination is rooted in the personal needs and feelings of raters, then "cognitive approaches" such as these may be ineffective, and one may need to make raters aware of their own prejudice and provide them with self-insight into

might they be expert in discerning? My answer is that they are expert in discerning the kind of evidence that makes a legal finding of discrimination likely. This is precisely why the attorney's suggestions are so troubling. In recommending extensive performance documentation, she increases the likelihood that law firm decisions can be defended, without altering the factors that contribute to women's systemic disadvantage. Still remaining are the underlying psychological processes that categorize women as different, as well as the gender-biased norms and institutional constraints that prevent women attorneys from succeeding in numbers comparable to their male counterparts.[129]

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its causes.

> Biases in the evaluations of performance resulting from biased treatment of the ratee may require training to improve the skill and sensitivity with which raters communicate verbally and nonverbally with female, minority, handicapped, and older employees . . . . Intercultural training, in which the supervisor is instructed in the norms of the subordinate group, also may prove effective in eliminating biases in the supervision of subordinates. Finally, to the extent that unfair discrimination results from social pressures, management needs to counteract these pressures by clearly communicating equal opportunity policies and by rewarding raters for compliance.

Robert L. Dipboye, Some Neglected Variables in Research on Discrimination in Appraisals, 10 Acad. Mgmt. Rev. 116, 123–24 (1985) (citations omitted). Dipboye's description makes clear the complexity of the task.

[129] The author of the strategic advice noted in a telephone conversation that client counseling and training constitute an important part of her practice, one aimed at purging the workplace of discrimination. Telephone Conversation with Ellen M. Martin (Nov. 1, 1995). However, the effectiveness of such efforts remains uncertain. One commentator has noted that diversity training can produce backlash effects. See Timothy Egan, Teaching Tolerance in Workplaces: A Seattle Program Illustrates the Limits, N.Y. Times, Oct. 8, 1993, at A18. Law firm partners' increased awareness about sexual harassment is an example of this phenomenon. Many firms have promulgated formal policies against harassment and have undertaken efforts to educate firm personnel. See Martin, supra note 16, at 7. Indeed, Epstein notes that a number of firms in her study have hired sensitivity training experts to inform their attorneys about the seriousness of sexual harassment. See Epstein, supra note 15, at 376. Unfortunately, this training not only provides male partners with important information, "it has also made them cautious about their contacts with women lawyers." Id. Epstein found that this wariness can limit informal interaction between male partners and younger women attorneys, a problem that may hamper the latter's

IV. UNSETTLING THE LEGAL UNDERSTANDING OF WOMEN ATTORNEYS

Commentators have noted the limits of using anti-discrimination law in professional settings. Deborah Rhode argues convincingly that the traditional equal opportunity framework of anti-discrimination law is limited in its ability to confront the "institutional and ideological forces that contribute to gender disadvantage" in the professions.[130] Intentional discriminatory treatment is very difficult to prove in these cases.[131]

This is in part due to the subjective standards used to evaluate professionals. Attributes such as "legal reasoning" or "ability to work under pressure" lack precise definition and are hard to apply in specific cases.[132] Disagreement also exists over those skills that are most important to professional success.[133] There is no consensus, for example, on whether the ability to attract clients is more important than the ability to handle complex litigation. This indeterminacy makes comparing a female professional to a favorably treated male professional a difficult task at best, a problem compounded by heightened judicial reluctance to second-guess employer decision-making in the professional context.[134]

Rhode also describes as problematic the effect of unconscious bias on subjective evaluations.[135] In many cases, there will be no outward manifestation of such prejudices, and thus no direct proof of intentional discrimination. Even in instances where bias is voiced overtly, where criticism is also conveyed in performance-based terms, courts may fail to characterize an action as discriminatory. Law does a poor job of sorting out

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networking opportunities. Id.

[130] See Rhode, supra note 34, at 1193.

[131] See id. at 1193; see also Abrams, supra note 34, at 1232–33.

[132] Rhode, supra note 34, at 1193.

[133] Id.

[134] Id. at 1193-94; see also Susan Bisom-Rapp, Contextualizing the Debate: How Feminist and Critical Race Scholarship Can Inform the Teaching of Employment Discrimination Law, 44 J. Legal Educ. 366, 383–84 (1994) (noting that courts have been unwilling to second-guess employment decisions in professional workplaces). Section 102(c)(1) of the Civil Rights Act of 1991 provides plaintiffs with the right to a jury trial in cases of intentional discrimination. 42 U.S.C.A. § 1981a(c)(1) (West 1994). To the extent that juries are more willing than judges to intervene in employer decision-making, this point is less salient.

[135] See Rhode, Gender and Professional Roles, supra note 43, at 65.

illegal influences where subjective evaluation criteria is used.[136] As Rhode notes, "the complexity of professional decision-making cannot be adequately captured by an adversarial framework that insists on either/or explanations—on finding that race or gender bias either did or did not "cause" a particular decision."[137]

Sustained scholarly attention has not been paid, however, to the role that defense attorneys may play in restricting the effectiveness of anti-discrimination law. Considering how those legal actors use and react to employment discrimination law is necessary to understand why legal regulation sometimes falters.[138] Focusing on defense practice does not imply that plaintiffs' attorneys are resourceless or that they never attempt strategic maneuvers. Nor does it mean that plaintiffs never win employment discrimination suits. Nor does it deny that some employees file baseless

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[136] See Rhode supra note 34, at 1195. See generally, Bisom-Rapp, supra note 5, at 1047–48 (arguing that unconscious discrimination makes it epistemologically impossible to untangle legitimate and discriminatory motives in so-called mixed motives cases).

[137] Rhode, supra note 34, at 1195.

[138] See McBarnet, supra note 36, at 74.

discrimination claims.[139] Rather it is meant to illustrate one way that the playing field is far from level.

Both Epstein and the defense attorney who advises law firms to take preventative steps acknowledge that there is something problematic about the position of women in those institutions.[140] Epstein, aware of the initial obstacles that faced an earlier generation of women lawyers, discerns the residual difficulties that explain continuing gender disparities in the career

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[139] As a former employment discrimination defense attorney, I am not unfamiliar with baseless suits. However, I am not convinced, as an empirical matter, that the problem is as great as some would imply. See, e.g., Edwards v. Interboro Inst., 840 F. Supp. 222, 231 (E.D.N.Y. 1994) ("[Title VII has] unquestionably served to embolden disgruntled employees, who have been legitimately discharged because they were incompetent, insubordinate, or dishonest, to file suits alleging they have been the victims of discrimination."). Moreover, I would argue that the number of such suits, if ascertainable, should be balanced against the number of those individuals who have grounds for suit, yet for a variety of reasons decide not to pursue claims. Indeed, David Engel and Frank Munger recently noted that civil rights may be "among the least invoked of all laws." David M. Engel & Frank W. Munger, Rights, Remembrance, and the Reconciliation of Difference, 30 Law & Soc'y Rev. 7, 10 (1996).

Although I know of no studies examining the filing of baseless discrimination claims, one study of wrongful discharge suits, actions vulnerable to the charge of employee abuse, found the threat of suit to be inflated. See Lauren B. Edelman, et al., Professional Construction of Law: The Inflated Threat of Wrongful Discharge, 26 Law & Soc'y Rev. 47, 74–80 (1992) (arguing that employer hysteria about potential employee suits is in part due to exaggerated descriptions of the legal environment provided by employer advisors). In addition to prompting employer hysteria, "horror stories" about baseless suits may profoundly influence legal reform movements. See Martha Fineman, Dominant Discourse, Professional Language, and Legal Change in Custody Decisionmaking, 101 Harv. L. Rev. 727, 753–56 (1988) (describing the use of "horror stories" by social workers in their largely successful effort to influence divorce law reform).

[140] The attorney's acknowledgment is more implicit than Epstein's. By pointing out that discrimination suits are a threat to firms, and proffering a strategy for rooting out bias, she implies that the status of women attorneys is less than perfect. As noted previously, her article also encompasses a concern about minority males who might bring suits against legal employers. See supra note 26.

paths of attorneys. The attorney, concerned about the vulnerability of "non-discriminatory" firm decisions, proffers a preventative strategy that seeks to separate the discriminatory wheat from the performance-based chaff.[141]

I voice my concern for women attorneys somewhat differently. I fear that litigation prevention strategies jeopardize efforts to integrate fully the legal profession. First, they place firms in a defensive posture. Instead of adopting a proactive stance committed to rectifying the problems women attorneys face—for example, by ensuring that attorneys on flexible or part-time schedules receive meaningful training and development—they promote a "siege mentality" in law firm partners.[142] Dire warnings of the need for law firms to "take adequate precautions to guard themselves" from "costly" law suits transform female and minority attorneys from human beings with contributions to make into an enemy "Other" to be wary of.[143]

Next, they validate and reinforce dichotomous thinking about women attorneys by assuming that the evaluation of their performance can be viewed apart from the gendered reality they confront. By erasing the difference that gender makes in the lives of lawyers, such thinking risks obscuring both the problems facing women attorneys and the potential solutions to them.

Performance is an amorphous and manipulable concept, contingent upon the values of the evaluator.[144] Thus, when an individual's performance is labeled deficient, we must ask what the supervisor's notions of a good performer look like.[145] Epstein's study demonstrates that in large law firms, a good performer looks like a man and often actually is a man. For example, women with children, no matter how hard they work, are often seen as less committed to their careers.[146] In such androcentric environments, to disaggregate performance from gender means to miss why women are less frequently labeled good performers.

Finally, because employers have a strategic advantage over plaintiffs in discrimination cases, litigation prevention advice makes anti-discrimination law an increasingly imperfect device for addressing inequality in the legal workplace. The defense attorney's article suggests introducing

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[141] See Martin, supra note 16, at 7.

[142] See Edelman, supra note 139, at 74–80.

[143] Martin, supra note 16, at 7.

[144] See Bisom-Rapp, supra note 5, at 1057.

[145] Id. at 1057–58.

[146] See Epstein, supra note 15, at 423–24 (discussing irony of fact that women report approaching career more seriously after becoming mothers, yet feel viewed as less serious and committed).

a new practice into law firm administration: on-going, supervised, written performance evaluation of all attorneys expressed in gender- and racial-neutral terms.[147] As described above, her strategy flows directly from employment discrimination law doctrine itself. That doctrine provides a lawful discourse for describing the decisions employers make: decisions about whom to hire, promote, demote, and fire. This language of gender and racial neutrality—the merit-based language of performance and qualifications—is transmitted to law firms and other employers via numerous channels: through attorneys and management consultants; through in-house personnel specialists; and through the media and popular culture.

These transmissions often make two points: that sex- and race-based comments pollute the work environment; and that such comments are damning evidence in litigation. The "prescriptive reminder" of one attorney is an example:

> Racial comments, sexually-based remarks or jokes and related actions or statements should be avoided in the workplace. They have a corrosive impact on what should be a professional, businesslike environment where excellence can be pursued without distraction.
>
> Second, former co-workers and managers, eavesdroppers, vendors, visitors, and even customers can testify about what they heard a particular manager say as long as it is relevant to the issues presented in court. If such statements are made and overheard outside work, they may also be admissible evidence. . . . [E]ven "innocent" jokes or remarks regarding race, age, sex, and other protected characteristics can compromise, if not defeat, a manager's legitimate explanations regarding particular employment decisions.[148]

The emphasis in the above excerpt is not on integrating a changing workforce; its focus is on using gender- and racial-neutral language as a litigation prevention measure. My concern is that adopting this new discourse may change the way a story is told and even understood, yet fail to alter the story's outcome one whit. Use of performance-based terminology to justify, for example, a firm's partnership decisions is no guarantee that more women will be made partners. Yet I focus on women

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[147] While many firms may prepare written reviews for associates nearing partnership consideration, I would imagine that few have the sort of program envisioned by the defense attorney.

[148] Stephen M. Paskoff, Members of the Jury: Aftershocks of New Employment Laws 3, training materials distributed at the Society for Human Resource Management Annual Conference, June 1994.

attorneys as merely an example of the potential effect of strategic advice. The danger is that a systematic embrace of such strategies, not only by law firms but by *all* employers, may alter substantive results in discrimination suits and simultaneously mask continuing conditions of inequality. Thus, the language of gender- and racial-neutrality itself, initially adopted through equal opportunity law to advance the interests of women and minorities, ends up operating as a shield, protecting from outside scrutiny employer decisions that might otherwise rightly be suspect.[149]

The following subsections focus on this last point: that embracing litigation prevention strategy may increasingly disable anti-discrimination law from combating systemic inequality. By highlighting both the proliferation of advice concerning litigation prevention strategies and the potential effectiveness of those devices, I will demonstrate how the employer's evidentiary advantage works and the disturbing results that may flow from it. Before proceeding, however, a brief discussion about some of the materials I will be analyzing is in order.

A. Employment Discrimination Law in Everyday Life

If you ask an employment lawyer where to look for information on employment discrimination law, you will likely be directed to statutes, case reporters and legal treatises—all valid sources for explication of legal doctrine, or law "on the books." Yet for all their explanatory power, these sources fail to reveal how anti-discrimination law functions in the workplaces that it purportedly governs. Nor do they provide a "thick description"[150] of how attorneys and other legal actors transform, challenge, and reinvent that law in their local practices.[151] One interested

[149] Martha Fineman's work on divorce reform rhetoric is a significant influence on my thesis. Fineman details how changes in the language used to discuss custody arrangements – from *physical custody* and *visitation* to *shared parenting* and *periods of physical placement* – shifted power to fathers in negotiating divorce and eclipsed the fact that "in practice, joint-custody dispositions continue to resemble sole maternal custody and paternal visitation." Martha Albertson Fineman, The Illusion of Equality: The Rhetoric and Reality of Divorce Reform 150 (1991).

[150] Clifford Geertz uses the term "thick description" for a description which illuminates the meanings, "the piled-up structures of inference and implication," that ethnographers discern in interpreting social action. See Clifford Geertz, Thick Description: Toward an Interpretive Theory of Culture, in The Interpretation of Cultures 3, 7 (1973).

[151] See Barbara Yngvesson, Inventing Law in Local Settings: Rethinking

in a more complete picture of how employment discrimination law functions in daily life, must look elsewhere.

By looking beyond the law library, the next subsection will construct a picture not only of how employment discrimination law acts upon society, but how society acts upon it. In approaching this task, I employ an interactive conception of "law" propounded by some socio-legal scholars. These scholars "examine the varied ways in which law and everyday life come together, and in which law both constitutes and is constituted in the everyday."[152] Austin Sarat and Thomas Kearns describe the endeavor this way:

> Because it is a scene of action and production, we can turn to the everyday to see the way law is reenacted and remade far from its well-recognized, well-marked official sites. . . . Law does not just happen *to* the everyday; it is produced and reproduced *in* everyday encounters.[153]

In short, legal actors may use and react to law, and produce effects from those actions in ways not at all anticipated by legislators and judges. Those everyday actions are as much a part of law as a statute or judicial decision. Indeed they are integral to statutes and judicial decisions.

Examining what employment lawyers say about employment discrimination law is a way to access its everydayness. To accomplish this, one could conduct interviews with attorneys or consider one's own experience in law practice and draw general conclusions about the strategies lawyers employ. I take a different tack by undertaking a content analysis of advice and training materials published by employment attorneys and management consultants.[154]

Popular Legal Culture, 98 Yale L.J. 1689, 1693 (1989).

[152] Austin Sarat & Thomas R. Kearns, Law in Everyday Life 9 (Austin Sarat & Thomas R. Kearns, eds., 1993).

[153] Id. at 7–8.

[154] These materials are cultural artifacts, "the products of individual activity, social organization, technology, and cultural patterns." Reinharz, supra note 33, at 147. Shulamit Reinharz describes the properties of cultural artifacts in this way: "First, they possess a naturalistic, "found" quality because they are not created for the purpose of study. Second, they are noninteractive, i.e., they do not require asking questions of respondents or observing people's behavior. Cultural artifacts are not affected by the process of studying them as people typically are. Instead, scholars can examine a written record or some other type of "text" without interacting

The materials are drawn from two central sites for the discussion and dissemination of strategic ideas: the legal training seminar and general advisory publications. The latter source yields articles written in widely-read trade journals and newspapers, as well as legal reference books published for human resource professionals and others.

From a sociological point of view the former source is quite interesting. As employment attorneys attest, programs dedicated to instructing attorneys on workplace law have proliferated in recent years. Many of these programs provide advice and strategy tips for both plaintiffs' and defense attorneys. For example, a 1995 American Law Institute-American Bar Association (ALI-ABA) course entitled "Current Developments in Employment Law" is specifically advertised as an "Advanced . . . Course of Study for Plaintiffs' and Defendants' Bars."[155] Other conferences are more partisan in character. The National Employment Lawyers Association (NELA), an organization of plaintiffs' attorneys, holds an annual convention devoted to the representation of employees. On the other side of the practice divide, the Greater New York Chapter of the American Corporate Counsel Association (ACCA) recently sponsored a seminar, Trends in Employment Litigation, geared toward "preventative labor and employment law."[156]

These seminars are accompanied by study guides and training materials, which are provided to participants and are also frequently available (for a fee) to individuals who cannot attend. Most often the study guide is a collection of individual papers prepared by faculty members that memorialize the advice and information given at the course.

The conference and course materials provide an especially valuable window on the everyday practice of employment law. There are two points to consider in this respect. First, the instructors, by and large, are legal professionals of note. While most are experienced attorneys, law professors

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with the people who produced it." Id.

[155] See ALI-ABA CLE Review, June 30, 1995, at 3 (brochure on file with author). Another bipartisan conference, this one scheduled for Spring 1996, attempts to entice participants by urging in an advertising brochure: "Learn how 'the other side' views things because we offer the plaintiff and defense perspective on almost every issue." Georgetown University Law Center Continuing Legal Education Division, Employment Law & Litigation Update, Apr. 18–19, 1996 (brochure on file with author).

[156] Jackson Lewis Schnitzler & Krupman, Promotional material, in Trends in Employment Litigation 1 (American Corporate Counsel Association, 1995) (training materials on file with author).

and judges sometimes appear on faculty rosters as well.[157] The strategies recommended and advice rendered represent views of the law and how to use it by those considered among the most highly skilled in the legal profession.

Second, those views are widely disseminated. Many of the courses provide credit hours to participating attorneys who practice in mandatory continuing legal education jurisdictions.[158] Thus, the courses are taken by significant numbers of practitioners, for both the credit they receive and for the practice tips the courses provide.[159]

I began collecting and analyzing advice and training materials three years ago. Examination of them reveals a striking number of recurring themes and topics. For example, many authors discuss discovery strategy;[160] deposition techniques;[161] effectively deploying and repulsing

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[157] The faculty for an ALI-ABA course on Advanced Employment Law and Litigation, held on Dec. 7–9, 1995, included the Honorable Charles Richey, a well-respected federal district court judge; Gilbert Casellas, Chairman of the Equal Employment Opportunity Commission; and Charles Shanor, a professor at Emory University School of Law. Faculty roster, in Advanced Employment Law and Litigation xv-xvi (ALI-ABA, 1995).

[158] For example, a course entitled Avoiding Liability in the Workplace, presented by Federal Publications in May 1995, was announced in an advertising brochure as being eligible for 11 continuing legal education credit hours in the following states: Alabama, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming. Federal Publications Inc., Avoiding Liability in the Workplace (May 1995) (brochure on file with author).

[159] ALI-ABA, for example, reports that its approximately 100 courses, which cover a broad range of substantive areas, are taken by thousands of lawyers each year. Preface to Advanced Employment Law and Litigation (ALI-ABA, 1995).

[160] See, e.g., Mark S. Dichter & Deidre Grossman, Discovery and the New Federal Rules of Civil Procedure, in Employment Discrimination Litigation 67–106 (Practicing Law Institute, 1994) (providing detailed strategy outline for defense counsel); Jay W. Waks & Linda M. Gadsby, Employment Litigation Under the New Federal Rules, in The Third Annual Employment Law & Litigation Conference 429, 436–40 (Law Journal Seminars-Press, 1994) (discussing practical considerations of amended

motions for summary judgment;[162] alternative dispute resolution

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discovery rules); Paul M. Heylman, Effective Discovery Techniques in Employment Litigation, in The Third Annual Employment Law & Litigation Conference 469–78 (Law Journal Seminars-Press, 1994) (arguing that careful discovery planning is necessary); Gerald S. Hartman et al., Current Employment Law and Related Litigation Issues 399–406 (Wake Forest University School of Law, 1994) (explaining impact of new discovery and offering practical suggestions); Elaine C. Bredehoft, Discovery Issues in Employment Discrimination Litigation, in Twelfth Annual Multi-State Labor and Employment Law Seminar B1-43 (Southern Methodist University School of Law, 1994) (discussing discovery principles and issues, and providing sample discovery requests); Thomas P. Murphy, Managing Discovery in Employment Litigation: The Employer's Perspective, in Twelfth Annual Multi-State Labor and Employment Law Seminar B1-12 (Southern Methodist University School of Law, 1994).

[161] See, e.g., Nancy L. Abell et al., Selected Tips for Defending Employment Cases, in Employment Discrimination Litigation 215, 260–70 (Practicing Law Institute, 1994) (providing strategy to defense counsel on taking plaintiff's deposition); Heylman, supra note 160, at 470–72 (providing to plaintiffs' and defense counsel outline of fact questions to ask); Peter M. Panken, Employment Litigation under the Americans with Disabilities Act, in Employment Discrimination and Civil Rights Actions in Federal and State Courts 225, 253–62 (ALI-ABA, 1993) (discussing deposition strategy and techniques for plaintiffs' and defense counsel); Elden M. Rosenthal, Plaintiffs Win Cases, in 1994 Fifth Annual Convention § 3, 2–6 (National Employment Lawyers Association, 1994) (discussing preparation of plaintiff for deposition); Labor Department of Gibson, Dunn & Crutcher, A Guide to Employment Discrimination Litigation, in Employment and Labor Law 1161, 1202–03 (ALI-ABA, 7th ed. 1995) (offering strategic tips on deposing plaintiff and experts).

[162] See, e.g., Abell, supra note 161, at 276–303 (discussing defense tactics for structuring summary judgment motion); Mark S. Dichter, The Rush to Summary Judgment in Employment Cases, in The Third Annual Employment Law & Litigation Conference 775–824 (Law Journal Seminars-Press, 1994) (providing synopsis of cases on summary judgment standards); Ellen M. Martin, Dispositive Motions in Federal Employment Discrimination Cases, in Employment Discrimination and Civil Rights Actions in Federal and State Courts 859, 872–900 (ALI-ABA, 1993) (providing detailed discussion of defense strategy); Murphy, supra note 160,

procedures;[163] jury selection;[164] opening and closing statements at

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at B5 (advising defense attorneys to posture case for summary judgment); Michael L. Foreman, Prepare for the Obvious: The Summary Judgment Motion, in Twelfth Annual Multi-State Labor and Employment Law Seminar C1-21 (Southern Methodist University School of Law, 1994) (offering strategy tips to plaintiffs' attorneys on how to repulse summary judgment motions).

[163] See, e.g., R. Gaull Silberman et al., Alternative Dispute Resolution of Employment Discrimination Claims, in Advanced Employment Law and Litigation 33–60 (ALI-ABA, 1994) (providing overview of dispute resolution techniques); Peter M. Panken & Stacey B. Babson, Avoiding Employment Litigation: Alternative Dispute Resolution of Employment Disputes in the 90's, in Advanced Employment Law and Litigation 61–77 (ALI-ABA, 1994) (encouraging employers to use alternative dispute resolution to speedily resolve controversies); Robert B. Fitzpatrick, Non-Binding Mediation of Employment Disputes: An ADR Method That Is Consistent with the American Promise of Fairness, in The Twelfth Annual Equal Employment Opportunity Update 441–455 (Georgetown University Law Center, 1994) (arguing that voluntary, non-binding mediation is effective for resolving disputes); Gerald S. Hartman, supra note 158, at 413–426 (discussing alternative dispute resolution issues); Richard H. Block et al., Avoiding Liability in the Workplace 69–82 (Federal Publications, 1994) (discussing employer use of grievance procedures and arbitration to handle disputes).

[164] See, e.g., Abell, supra note 161, at 314–24 (tips on jury selection for defense counsel); Ann Cole, Jury Profiling in Employment Discrimination Cases, in Employment Discrimination Litigation 409–22 (Practicing Law Institute, 1994) (demonstrating how to create successful plaintiff or defense juror profile); Amy Singer, Six Rules for Picking a Successful Jury, in Advanced Employment Law and Litigation 477–82 (ALI-ABA, 1994) (discussing general behavioral rules for jury selection); Dan R. Gallipeau, Choosing the Jury: Do's and Don'ts for Voir Dire and Jury Selection, in The Twelfth Annual Multi-State Labor and Employment Law Seminar E1-6 (Southern Methodist University School of Law, 1994) (describing use of jury questionnaire and conducting voir dire); Allen J. Gross, Jury Selection and Opening Statements: Defense Perspective, in The Twelfth Annual Equal Employment Opportunity Update (Supplemental Course Materials) § V (Georgetown University Law Center, 1994) (discussing principles of jury selection).

trial;[165] and legislative developments and judicial decisions.[166] These themes or topics fall roughly into three broad categories: general reviews of the law; litigation strategy; and litigation prevention strategies. Both plaintiffs' and defense attorneys offer advice and analysis in the first two categories. However, only defense attorneys proffer information in the last category, and their advice is voluminous and detailed.

One would not expect plaintiffs' attorneys to offer written litigation prevention strategy. Unlike employers, employees typically do not retain counsel to advise them years in advance of litigation. Rather, they hire lawyers after adverse actions have been taken against them. Defense attorneys, on the other hand, help employers mobilize tremendous resources

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[165] See, e.g., Robert L. Bell, "Ready for the Plaintiff!" and Other First Impressions in an Employment Discrimination Trial: Voir Dire and Opening Statement, in The Twelfth Annual Equal Employment Opportunity Update (Supplemental Course Materials) § VIII (Georgetown University Law Center, 1994) (advice on opening statement for plaintiffs' counsel); Gross, supra note 164, at § V (advice to defense counsel on opening statement); Keith M. Pyburn, Jr., Sex Discrimination: Demonstration of Effective Opening and Closing Statements, in The Third Annual Employment Law & Litigation Conference 827 (Law Journal Seminars-Press, 1994) (discussing general principles for plaintiffs' and defense counsel); John R. McCall, Trying an Employment Case to a Jury, in Twelfth Annual Multi-State Labor and Employment Law Seminar § I (Southern Methodist University School of Law, 1994) (providing general rules of opening and closing statement).

[166] See, e.g., Charles A. Shanor, Recent Developments in Age Discrimination Litigation, in Advanced Employment Law and Litigation 309 (ALI-ABA, 1995) (discussing recent case law); Delores Y. Leal, Developments in Sexual Harassment Law, in The Twelfth Annual Equal Employment Opportunity Update 113 (Georgetown University Law Center, 1994) (discussing case law and new state legislation); Helen Norton, The Family and Medical Leave Act: Selected Issues, in Advanced Employment Law and Litigation 427 (ALI-ABA, 1994) (discussing issues evolving under the statute); William R. Sullivan, Jr., Litigation Issues Arising under the Americans with Disabilities Act, in Benefit and Employment Law Litigation § VII (American Conference Institute, 1994) (discussing issues arising under new Act); Christopher R. Brewster, Litigation on the Horizon: The Legislative Picture, in The Third Annual Employment Law & Litigation Conference 573 (Law Journal Seminars-Press, 1994) (discussing pending labor legislation).

to safeguard employment decisions from challenge as a general matter. The following quote represents a flamboyant pitch for the standard strategy:

> [T]here are virtually no workers you cannot discharge, provided you carefully document their performance and show that your grievances against them are justified. If you've been burdened by bad workers for a long period of time, you may not be able to fire them today. But rest assured. By following the procedures outlined in this special report, you will get rid of them soon enough.[167]

By presenting a composite picture of such litigation prevention strategies, the next subsection will illustrate further how defense attorneys attempt to operationalize the employer's evidentiary advantage.[168]

B. Bullet-proofing the Workplace: Litigation Prevention in Everyday Life

That defense attorneys engage in the discussion and dissemination of preventative strategies comes as no surprise. Their professional fates are tied to those of their employer clients,[169] who in turn are subject to significant legal regulation through the numerous laws governing the workplace.[170] Of paramount concern to that client population are those

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[167] National Institute of Business Management, Fire At Will: Terminating Your Employees Legally 4 (1995).

[168] As previously noted, I hope in a subsequent article to analyze the litigation strategies of plaintiffs' attorneys, perhaps by way of a survey. I would imagine that their responses to litigation are more varied than those of defense attorneys, which may be due in part to the absence of a general body of literature such as that created by the defense bar. If this is correct, the very difference between management and plaintiffs' attorneys supports my point. Greater uniformity of response is a manifestation of the defense bar's advantage, which is operationalized by putting into place an apparatus that generates helpful evidence.

[169] See Maureen Cain, The Symbol Traders, in Lawyers in a Postmodern World 15, 32 (Maureen Cain & Christine B. Harrington eds., 1994) (arguing large firms are extremely dependent on corporate clients).

[170] A recent survey by the Bureau of National Affairs (BNA) indicates that human resource managers have grown more dependent on lawyers over the past 5 years. Fifty-five percent of the human resource executives

regulations, like anti-discrimination legislation, that constrain the personnel decision-making ability of management. This is not because most employers desire an unfettered right to discriminate against employees or otherwise treat them unfairly.[171] Rather, it is because such regulations open up to scrutiny and reevaluation every employment decision that an employer makes, an outcome viewed as both inefficient and antithetical to the business interests of the firm.[172]

Those on the receiving end of employment regulation are not passive recipients, however. In regard to tax law, Doreen McBarnet notes that legal control generally prompts the owners and managers of capital to use creative legal services to achieve their goals.[173] Lawyers minimize the effect of formal law on their clients by creating legal strategies for avoiding regulatory entanglement with it, a tactic McBarnet refers to as "creative compliance."[174] In the employment arena this activity is known as

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responding to the survey described their companies as "somewhat more reliant" or "much more reliant" on legal counsel than they were in 1989. Ninety-three percent of the managers seek legal review of some of their human resource policies and procedures, 66% consult with attorneys about new laws, and 62% seek advice in response to employee and applicant complaints, such as discrimination claims. Employment Law: HR Managers Turn to Counsel More Often in Wake of New Laws, BNA Survey Finds, Daily Labor Report, Feb. 15, 1995, at D27.

[171] I do not imply that overt sexism and bigotry have disappeared from the American workplace. However, given the prevalence of legal and social proscriptions against it, it is far more likely that bias is caused by what social scientists term "ambivalence," or "conflicts between a person's self-image as fair and unprejudiced and feelings of aversion that threaten this self-conception." Dipboye, supra note 128, at 122.

[172] Many management attorneys stress that defending suits is a costly and time consuming process. See, e.g. David A. Cathcart, Employment Termination Litigation: Collateral Tort Theories and the Multimillion Dollar Verdict, in Employment and Labor Law 309, 328 (ALI-ABA, 7th ed., 1995) (describing "substantial risks and costs arising from litigation"); Panken & Babson, supra note 163, at 64 ("It is time to stop this proliferation of litigation, find a faster method of resolving disputes and get on with productive pursuits."); Paskoff, supra note 148, at 6 (warning that litigation saps "financial and human resources which should be devoted to business").

[173] McBarnet, supra note 36, at 73.

[174] Id. at 75.

preventive employment relations, a technique popularized by law firms like Jackson, Lewis, Schnitzler and Krupman.[175]

The goal of preventive strategies is to create an environment free of the factors that trigger outside regulation.[176] As Christopher Tomlins observes, liberating employers from the state's interference leaves them free to pursue profit, not only by refining and reorganizing technology and the production process, but by exercising control over their employees.[177] One primary way defense attorneys who represent management attempt to aid employers in obtaining legal avoidance is through litigation prevention strategies that involve the creation of evidence.[178]

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[175] As the firm notes in its promotional materials:

> Jackson Lewis has been, in many respects, a pioneer. We are probably the first firm actively to practice preventive labor and employment law. From our beginning 37 years ago, Jackson Lewis has advocated that the education of management is the key to avoiding legal problems. This preventive approach continues to be the foundation of our practice.

Jackson, Lewis, Schnitzler & Krupman, supra note 154, at 1.

[176] See id. (noting in the context of union avoidance "perhaps our proudest accomplishment is the number of clients who have relied on our expertise in developing issue-free environments, thereby making intervention of a union unnecessary.").

[177] Christopher L. Tomlins, Law, Labor and Ideology in the Early American Republic 295 (1993). Tomlins argues that to enhance their control over employees, employers in the first half of the nineteenth century made an "extensive bid for legal aid." Id. at 295. Using as an example the area of liability for industrial accidents, he demonstrates that this "bid" took the form of a plea for non-interference. By rebuffing tort-based suits for work injuries and naturalizing industrial accidents as routine risks borne by employees, courts simultaneously secured for employers power over their employees and rendered that power invisible. Id. at 296–97.

[178] Two other strategies bear mention: the promulgation of work rules and control of venue for dispute resolution. The former attempts to remove ambiguity about the terms that structure the employment relationship. One technique recommended to achieve this is drafting a comprehensive personnel manual. See, e.g., Peter M. Panken & Stacey B. Babson, Creating the Personnel Paper Trail: Personnel Manuals, in Employment and Labor Law 1 (ALI-ABA, 7th ed. 1995) (describing the provisions a manual should contain); Christopher H. Mills, Drafting Personnel Manuals and Employee

That evidence plays a determinative role in litigation is so basic it hardly needs stating. What is rather less widely acknowledged is Gary LaFree's insight that evidence in any given case is not simply found, but created.[179] Any empirical event may give rise to varying amounts of evidence.[180] In criminal cases, for example, officials responsible for an investigation will generate more or less evidence depending on their views of the case.[181] The degree of interest that officials have in winning a case affects the amount of work done and the amount of evidence generated.[182]

Moreover, as Mark Cooney has recently demonstrated, all parties are not equal in their ability to attract the evidence necessary to sustain their legal claims.[183] In fact, people and organizations with "elevated social status" and "extensive social ties" have significant evidentiary advantages.[184]

Understanding evidence as the creation of human labor and affected by the social characteristics of the litigants highlights the advantages held by employment discrimination defense attorneys and their clients. Employment discrimination cases are unique in that employers typically control most, if not all, documents bearing on liability.[185] Significantly, these documents may be created years in advance of any litigation. Recognizing this leads many management attorneys to advise that documents supporting employer

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Handbooks: Practical and Legal Considerations, in Employment and Labor Law 39 (ALI-ABA, 7th ed. 1995) (outlining reasons for having a manual).

The latter, control of venue, attempts to keep disputes from becoming law suits by providing other avenues for addressing employee complaints. Recommendations for attaining this goal include promulgation of corporate grievance procedures and alternative dispute resolution techniques such as mediation. See, e.g., Peter M. Panken & Stacey B. Babson, Grievance Procedures for Non-Union Companies, in Employment and Labor Law 997 (ALI-ABA, 7th ed. 1995) (recommending promulgation of grievance procedures); supra note 163 (citing numerous articles on alternative dispute resolution).

[179] Gary D. LaFree, Rape and Criminal Justice: The Social Construction of Sexual Assault 105–06 (1989).

[180] Mark Cooney, Evidence as Partisanship, 28 Law & Soc'y Rev. 833, 834 (1994).

[181] La Free, supra note 179, at 105–06.

[182] Id.

[183] Cooney, supra note 180, at 834.

[184] Id.

[185] Martin, supra note 162, at 873.

decision-making be generated, reviewed, and placed in personnel files on a continual, on-going basis. To ensure their evidentiary value, these files must be periodically "sanitized"[186] and kept "clean";[187] that is to say management must remove "potentially misleading and harmful documents,"[188] and "eliminate unnecessary references to sex, age, etc."[189] In short, defense attorneys show employers how to script the story of any employment decision made and "shape legal reality itself."[190]

1. Performance review (not biology) as destiny

By far the most common counsel given to employers is to promulgate and carefully administer an employee performance review system.[191] The primary focus of this advice is not on improving employee morale or workplace efficiency; it is on producing a record that can be used by the employer to defend itself should the need ever arise.[192] Appraisals represent crucial documentary evidence[193] because the issue of job performance is absolutely central in employment litigation.[194]

From an employer's perspective written reviews are a double-edged sword; they are extremely useful if prepared correctly and terribly damaging if done poorly.[195] Two management attorneys put it this way:

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[186] Hartman, supra note 160, at 358.

[187] Douglas L. Williams, Handling the EEOC Investigation, in Employment and Labor Law 1123, 1145 (ALI-ABA, 7th ed. 1995).

[188] Hartman, supra note 160, at 358.

[189] Williams, supra note 187, at 1145.

[190] Cooney, supra note 180, at 854.

[191] See, e.g., Robert B. Fitzpatrick, Reducing Management's Litigation Exposure Through Appropriate Personnel Practices and Procedures, in Advanced Employment Law and Litigation 691, 698–701 (ALI-ABA, 1995).

[192] Bisom-Rapp, supra note 5, at 1054.

[193] August Bequai, Every Manager's Legal Guide to Firing 58 (1991).

[194] See Bredehoft, supra note 160, at B3; Vicki Lafer Abrahamson, Trying a Large Damages Employment Discrimination Case, in The Third Annual Employment Law & Litigation Conference 727, 738 (Law Journal Seminars Press, 1994).

[195] See Nathan Aaron Rosen, Performance Appraisals and Staff Evaluations: A Reemerging Management Tool or a Legal Mine Field, in Managing the Private Law Library 1993: Managing in a Changing Economy

> The way an employer does these appraisals and what they show about an employee who later is terminated can have a significant effect on the outcome of a subsequent wrongful termination law suit....
>
> An employer will have great difficulty convincing a jury that an employee was terminated for poor performance if the employee's personnel file contains years of consistently superior or even merely satisfactory performance appraisals. . . .
>
> By contrast, candid and careful performance appraisals can provide important evidence in support of an employer's termination decision.[196]

Thus, employers must ensure that documentation provides evidence that supports rather than casts doubt on management actions.

A company's evaluating supervisors are an obstacle to the preparation of helpful appraisals. Defense attorneys perceive many supervisors as "overly generous" in their appraisals, "gloss[ing] over defects in the work of their subordinates."[197] One practitioner describes some supervisors as "constitutionally incapable of writing bad performance reviews, even when clearly warranted."[198] Another management team laments that "[d]efending discrimination charges often involves cringing over the writings of supervisors and company officials who are neither trained nor astute in the dangers of discrimination litigation."[199]

Supervisors are not seen as irrational in their hesitancy to detail the shortcomings of their subordinates. Employer advocates note supervisors

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(Practicing Law Institute, 1993), available in WESTLAW, 8 ("The performance appraisal can be a two-edged sword."); see also Robert B. Fitzpatrick, Negligence Claims Against an Employer, in The Twelfth Annual Equal Employment Opportunity Update 419, 429–30 (Georgetown University Law Center, 1994) (warning reviews must be prepared carefully); Peter A. Veglahn, Key Issues in Performance Appraisal Challenges: Evidence from Court and Arbitration Decisions, 44 Labor L.J. 595, 598 (1993)("[an] employer can protect itself by conducting a series of performance appraisals before taking any action"); Hartman, supra note 160, at 358 (describing the "need for frank performance evaluations").

[196] Ralph H. Baxter, Jr. & Thomas P. Klein, Protecting Against Exposure, Nat'l L. J., Feb. 28, 1994, at S1.

[197] Hartman, supra note 160, at 358.

[198] Martin, supra note 162, at 874.

[199] Panken & Babson, supra note 163, at 76.

reasonably worry that negative evaluations may demoralize employees[200] or make them difficult to supervise.[201] Moreover, supervisors may dislike the paperwork associated with the review process, lack detailed knowledge about a subordinate's performance, fail to understand the review standards against which performance is to be judged, or feel there are more pressing matters to handle.[202] Nevertheless, employers are exhorted to conquer supervisor hesitancy; these officials are a force to be marshaled.

To this end, supervisory training is recommended as a component part of any effective performance review system.[203] This training not only encompasses a review of the performance factors considered important to the employer,[204] it also emphasizes the evidentiary value of the documents produced.[205] Evaluators must be encouraged to "list employees' principal weaknesses,"[206] give specific examples to back up their evaluations,[207]

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[200] See Rosen, supra note 195, at 2 (noting the common view that appraisal leaves employees "bitter, dejected and depressed"); see also Cathacart, supra note 172, at 393 (positing that supervisors "fail to identify job performance problems" because they wish "not to 'upset' an employee" or "interfere with a friendship or with an employee's advancement").

[201] Baxter & Klein, supra note 196, at S1; see also Block, supra note 163, at 58 (noting that supervisors fail to document performance problems because they "want to avoid the confrontation").

[202] Rosen, supra note 195, at 3; Block, supra note 163, at 58.

[203] See, e.g., Steven C. Kahn et al., Legal Guide to Human Resources 6–28 (1994) (recommending supervisor training); Bequai, supra note 193, at 100 ("[m]ake sure that supervisors understand the company's goals"); David A. Cathcart, Employment Options for the Employer in Transition: Age Discrimination, OWBPA, WARN Act, and NLRA Issues, in Employment and Labor Law 1033, 1055 (ALI-ABA, 7th ed., 1995) (recommending that supervisors be given guidelines and briefed); Baxter & Klein, supra note 196, at S2 (arguing supervisor training essential); Hartman, supra note 160, at 359 (recommending that supervisors be provided with written guidelines).

[204] See Baxter & Klein, supra note 196, at S2 (arguing supervisors must be trained to know what constitutes good performance and what weight they should accord various factors).

[205] See Block, supra note 163, at 58 ("Supervisors should be apprised of the potential evidentiary value of these documents.").

[206] See Baxter & Klein, supra note 196, at S1.

[207] Martin, supra note 16, at 11.

and describe areas for improvement.[208] They must be warned that if they fail to be candid, "their words may come back to haunt them."[209] Yet in expressing their candor, evaluators must not be overzealous. Overly negative or petty evaluations can hurt the employer's position and play into the hands of a plaintiff.[210] One pair of advocates actually suggests apprising supervisors that their own performance ratings hinge, in part, on how well they handle their reviews of others.[211]

Some defense attorneys believe that trained supervisors should not to be left to their own devices, seeing oversight of the appraisal process as essential to producing documentation that will support employer decision-making in the event of litigation.[212] They recommend that either the evaluator's supervisor or some central screening authority review all completed appraisals. These documents should be reviewed for inappropriate comments connoting stereotyping or other bias.[213] If bias is detected, the company should exclude the evaluator's review.[214] However, if investigation reveals that the comments were unfortunately chosen rather than actually biased, the evaluator can "expand upon or clarify

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[208] Block, supra note 163, at 58.

[209] Martin, supra note 16, at 11; see also Hartman, supra note 160, at 358 ("generosity [in evaluation] can come back to haunt the company").

[210] See Block, supra note 163, at 58; Bequai, supra note 193, at 58; Jeffrey Needle, The Overzealous Defendant or Trashing the Plaintiff, in 1994 Fifth Annual Convention § 14 (National Employment Lawyers Association, 1994); Kahn, supra note 203, at 6–15 Cf.; Martin, supra note 162, at 874 (advocating a strategy of admitting plaintiff's strengths while stressing deficiencies).

[211] See Baxter & Klein, supra note 196, at S2 ("supervisors should be told that the company regards the proper completion of performance appraisals to be a significant part of their jobs and that their overall performance will be rated, in part, based on how well they handle this responsibility").

[212] See Fitzpatrick, supra note 191, at 699; Baxter & Klein, supra note 196, at S2; Martin, supra note 16, at 11; Cathcart, supra note 203, at 1056.

[213] Martin, supra note 16, at 11; see Fitzpatrick, supra note 191, at 700 ("Evaluation forms should be reviewed for unlawful or otherwise inappropriate inquiries.").

[214] Martin, supra note 16, at 11.

the review."[215] Necessary editing may also be done by "someone else in management."[216]

Management attorneys see the final steps of the appraisal process as having implications for potential litigation as well. Once a review has been completed, and where necessary approved by higher level management, it must be presented to the employee in a face-to-face encounter.[217] As these management advocates note:

> Not only will this make it more likely that the employee will regard the appraisal as a significant event, it will make it easier to convince a jury that the employer was engaged in a good-faith effort to communicate its views of the employee's performance to the employee.[218]

To minimize the risk of a defamation suit and promote fairness, another attorney advises that discussion be limited to the employee's evaluating supervisor, that supervisor's boss, and the appropriate human resources manager.[219]

Defense lawyers suggest the employee be given a chance to ask questions and offer oral and written comments.[220] If disagreement is not expressed, "later complaints that the review was without basis will be less credible."[221] Where objections are raised, the employer can investigate and take any remedial actions necessary "before it is faced with a discrimination suit."[222] At the conclusion of the interview, the employee should sign the form, acknowledging that the evaluator presented the review.[223]

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[215] Id.

[216] Baxter & Klein, supra note 196, at S2.

[217] See id.; Martin, supra note 16, at 11; Block, supra note 163, at 58.

[218] Baxter & Klein, supra note 196, at S2.

[219] Fitzpatrick, supra note 191, at 700.

[220] Baxter & Klein, supra note 196, at S2; Martin, supra note 16, at 11; Block, supra note 163, at 58-59; Hartman, supra note 160, at 359; Kahn, supra note 203, at 6-29; Fitzpatrick, supra note 191, at 700.

[221] Martin, supra note 16, at 11; see Baxter & Klein, supra note 196, at S2 ("[I]f the employee does not object to the review, it will be more difficult for the employee to convince a jury that a negative appraisal was inaccurate."); Veglahn, supra note 195, at 598 (court decisions indicate that "any problem the employee has with a performance appraisal should be raised at the time of appraisal, not at a later date").

[222] Martin, supra note 16, at 11.

[223] Baxter & Klein, supra note 196, at S2; Block, supra note 163, at 59;

What is striking about the sum and substance of performance review advice is both the uniformity of the recommendations and the degree to which they consciously advocate the project of evidence creation and envision its potential use. Also notable and important for gauging employers' evidentiary advantages is that the documents produced are not, by and large, created for use in *pending* litigation. Rather, they function as an insurance policy safeguarding *future* employment decisions from *potential* challenge.

2. Handling the problem case

While performance appraisal aims to ensure support for future decisions that may be unknown at the time an actual review is completed, employers are nevertheless advised to create additional documentation when the desire to take action against an employee becomes clear. The evidentiary advantages the employer enjoys in this context are well understood by defense lawyers. One attorney notes that the defendant's biggest advantage is control of the facts.[224] She continues:

> [I]t is becoming increasingly common for clients to consult defense counsel before making adverse employment decisions affecting members of protected groups. When counsel is consulted before the decision is made, counsel has the rare chance to shape the facts and create the record before litigation is commenced. This is an excellent opportunity to plan for summary judgment, for example by ensuring that adverse action is not taken until there is convincing evidence that the plaintiff has performed unsatisfactorily, including objective evidence and documentation of the same.[225]

"Shaping the facts," as that attorney suggests, requires the generation of documents memorializing the employee's performance difficulties. Indeed, the mantra of management attorneys is "document, document, document."[226] Many advocates view progressive discipline[227] as an

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Hartman, supra note 160, at 359; Fitzpatrick, supra note 191, at 699.

[224] Martin, supra note 162, at 873.

[225] Id. at 873-4.

[226] See, e.g., Bequai, supra note 193, at 56 (counseling employers to "write down *everything* connected with the matter, no matter how trivial"); Williams, supra note 187, at 1145 (suggesting employers "[m]aintain documentation of [the] bases for decisions"); Jackson, Lewis, Schnitzler & Krupman, supra note 156, at 14 (advising in the "Ten Commandments of

important catalyst for the creation of evidence that supports the employer's decision[228] and "establishes a record of fairness."[229] As with performance reviews, the evidentiary value of the documents created is constantly stressed. This advice is illustrative:

> [I]f a manger has to testify in court, he/she can rely on such records to reconstruct what happened about an event which may have occurred years earlier. Such records can be admitted into

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Effective Discharge" that employers "[d]ocument thoroughly").

[227] Progressive discipline provides "notice to an employee of his or her shortcomings and one or more opportunities to correct them." Baxter & Klein, supra note 196, at S2.

[228] See id. ("a progressive discipline system will provide significant evidence that the stated reason for the termination is the real reason"); Hartman, supra note 160, at 359 ("It is advisable to use progressive discipline. . . . Such a procedure will supply documentation which will justify a just cause discharge if necessary."); Bequai, supra note 193, at 56 ("you'll be on solid ground if your records show that . . .[y]ou warned the employee to improve performance or alter behavior within a certain time frame."); see also Jackson Lewis, Schnitzler & Krupman, supra note 156, at 17-18 (describing in great detail model progressive discipline policy and documentation accompanying each step); Fitzpatrick, supra note 191, at 700 (noting, among other things, that "progressive discipline . . . increases the likelihood of the employer prevailing."); Cathcart, supra note 172, at 391 (arguing that due process, and "where appropriate, progressive discipline," are advisable).

[229] Baxter & Klein, supra note 196, at S2; see also Gallipeau, supra note 164, at E12-13 (advising use of progressive discipline and cautioning that jurors expect the employer to be "fair"); Hartman, supra note 160, at 359–60 (noting that "fair" treatment through progressive discipline may make the employee less likely to sue).

Some attorneys also note that progressive discipline may provide the opportunity for the employee to correct the performance deficiencies. See Hartman, supra note 160, at 359 (noting progressive discipline "preserve[s] the possibility that an employee will change his ways"); Baxter & Klein, supra note 196, at S2 (stating that progressive discipline "may enable an unsatisfactory employee to improve"); Fitzpatrick, supra note 191, at 700 (noting progressive discipline "prevents unnecessary termination when performance is corrected"); Martin, supra note 16, at 11 (opining that providing specific examples of deficiencies helps the employee to improve).

> evidence and examined by a judge or jury bolstering management's position and credibility. A supervisor who has taken the time and effort to document a problem can demonstrate that he/she did not act arbitrarily. Without such information, it is possible that a legitimate decision will look unfair, inconsistent or improperly motivated. *Since judges and juries expect to see such records from employers, managers should take the time to prepare them as significant employment events occur.*[230]

Extensive oversight of the disciplinary and termination process is also recommended. One attorney suggests designation of a "termination czar" to review all proposed discharges.[231] The individual conducting the review should be well-versed in both the employer's practices and the law's governing employment relationships.[232] He or she must review the employee's personnel file and records,[233] ascertain how other "similarly situated" employees have been treated,[234] ensure company policies have been complied with,[235] and talk to witnesses[236]—all necessary to ascertain whether the employee might have legal grounds for suit.

The final task of the independent reviewer—talking with witnesses—bears independent consideration. Mark Cooney has noted that the willingness of witnesses to come forward, and the partisanship of their testimony tend to increase with the status of the party requesting the evidentiary assistance.[237] If this is so, one would expect employers, whose status is higher than the lone discrimination plaintiff, to have greater success in soliciting favorable testimony from witnesses. In general, this seems to be the case. As an advocate notes:

> The defense . . . generally controls almost all, if not all, the witnesses other than the plaintiff. One reason for this is that the

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[230] Paskoff, supra note 148, at 2. This attorney further warns against creating false documentation and back-dating documents, noting "[t]his practice is fraudulent." Id.

[231] Fitzpatrick, supra note 191, at 701.

[232] Baxter & Klein, supra note 196, at S3.

[233] Cathcart, supra note 172, at 393-94.

[234] Id., at 394; Baxter & Klein, supra note 196, at S3; Jackson Lewis, Schnitzler, & Krupman, supra note 156, at 14.

[235] Baxter & Klein, supra note 196, at S3.

[236] Joe Backer Laird, Conducting a Discrimination or Harassment Investigation, in Employment and Labor Law 1085, 1090 (ALI-ABA, 7th ed. 1995).

[237] See Cooney, supra note 180, at 843–51.

> witnesses with knowledge of facts that occurred in the workplace tend to have allegiance to the employer. It is not unusual in an employment discrimination case for the plaintiff not to be able to call a single witness other than himself on liability and, indeed, for the plaintiff to have to call defense witnesses on his case-in-chief in order to avoid a directed verdict.[238]

Whether employers have access to witnesses because of loyalty, fear, a desire to be helpful, or simply cynical opportunism, this access provides the defense with a significant evidentiary advantage. For starters, it enables the employer to enlarge the universe of favorable evidence. One attorney suggests defense counsel encourage witnesses to come up with as many examples of the employee's performance deficiencies as possible to "make the defense story much more believable."[239] Additionally, a thorough understanding of potential witness testimony enables the defense to review and correct inconsistencies between documentary and testimonial evidence.[240] Finally, by working with witnesses and memorializing their opinions, defense attorneys may help increase the witnesses' testimonial abilities. This may prevent the plaintiff's attorney from shredding the paper trail by interrogating on the stand an inarticulate employer witness.[241]

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[238] Martin, supra note 162, at 873; see also Abrahamson, supra note 194, at 736 (noting that highly regimented employers such as large corporations "often employ plenty of individuals eager to display loyalty to the employer by serving as defense witnesses").

[239] See Martin, supra note 162, at 874; see also Abell, supra note 161, at 230 (instructing defense attorneys interviewing witnesses, "Do not leave the time block until all details necessary to recreate the scene have been established.").

[240] Martin, supra note 162, at 875; Abell, supra note 161, at 228–29 (urging defense attorneys to meet with witnesses to review key documents, and "[c]onfront the witnesses with and iron out inconsistencies); see also Peter M. Panken et al., Age Discrimination: Selected Current Topics in Employment and Labor Law 157, 173 (ALI-ABA, 7th ed., 1995) (advising employers to make sure personnel documents do not contradict the employer's articulated reason when planning for reduction in force).

[241] See Stephen L. Brischetto, Shredding the Paper Trail: Or Strategies for Attacking in Paper Cases, in 1994 Fifth Annual Convention § 14, 7 (National Employment Lawyers Association, 1994) (discussing case where he demonstrated that defense witnesses "didn't take their own reasons seriously").

If the independent investigation finds that the record is sufficient to support a termination or adverse action, authorization will presumably be given. Another defense lawyer warns that at this point even potential litigation is a threat.[242] Thus, the actual termination meeting must be handled carefully, not only for the sake of the employee, "but to avoid creating tort claims."[243] He suggests, if possible, a videotaped rehearsal of the termination interview, with someone playing the role of the employee. The employer "should state reasons consistent with the documentation in its files; should be direct, honest, and firm; should avoid argument; should not sugarcoat the real reasons for the termination; should be humane; but should not be apologetic."[244]

The point of this discussion is not to prove that all employees are good performers whose work records are mercilessly smeared by dastardly defense attorneys and unscrupulous employers. It is to illustrate the power that defense attorneys and employers have to script the story of the plaintiff's performance.[245] The next subsection considers the impact that this practice might have on discrimination claims generally, by focusing specifically on suits brought by women attorneys.

C. Performance and the Woman Attorney

How might litigation prevention strategy potentially affect discrimination claims filed by women attorneys? Might it increase the chances that the complex reality of women attorneys discerned by Epstein will be overlooked by formal law? Certainly, a firm implementing a rigorous performance review process, complete with evaluation screening, will likely preempt the inadvertent creation of a "smoking gun." These same actions will also likely produce a record suitable for proving that the firm's decision was performance-based. Indeed, the effectiveness of such strategies is illustrated by three attorney discrimination suits discussed at length in the defense attorney's article on safeguarding law firm decisions from attack. In each case, written evaluations played a pivotal role and impacted the court's willingness to consider the social reality that the plaintiff confronted.

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[242] Fitzpatrick, supra note 191, at 702.

[243] Id.

[244] Id. at 703.

[245] The idea of "scripting the story" rests on a view of evidence as something that is not simply "found" but often "created." See supra notes 179–90 and accompanying text.

In *Ezold v. Wolf Block Schorr & Solis-Cohen*,[246] the Third Circuit reversed a lower court's finding that a female associate was discriminatorily denied partnership status. Relying on written evaluations, the firm contended that Ezold's analytical skills were insufficient;[247] she was perceived as unable to handle complex litigation without supervision.[248] However, Wolf Block acknowledged that she had other strengths, such as courtroom skills and effective client relations.[249] Ezold claimed and the district court agreed that overall, her written evaluations were substantially similar or superior to those of eight successful male candidates for partnership.[250]

The Third Circuit chastised the lower court for substituting its own general criterion for the specific reason proffered and documented by Wolf Block: insufficient analytical ability. Instead, the district court should have compared the firm's written evaluations of the male candidates' analytical ability with Ezold's, rather than compare their skills overall.[251]

Consider for a moment how limited such a doctrinal approach is in combating the problems confronting women attorneys. Applying *Ezold's* lessons to working mothers who, as Epstein notes, often deviate from the norms of the legal workplace is illustrative. For example, a woman who regularly leaves the office at six o'clock to have dinner with her family could be denied partnership status because she is evaluated as insufficiently committed to practice.[252] That this attorney might have superior skills in other vital areas would be considered immaterial under the Third Circuit's analysis. Nor would that court likely question the firm's judgment in evaluating her against the proffered criterion. In short, the employer has the right to pick the reason, no matter how subjective or prone to potential stereotyping, and the court may not question it.[253]

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[246] 983 F.2d 509 (3rd Cir.), cert. denied, 114 S. Ct. 88 (1993).

[247] Id. at 512.

[248] Id. at 520, 524, 526.

[249] Id. at 517, 526, 528.

[250] Id. at 513, 524.

[251] See Bisom-Rapp, supra note 134, at 383–84.

[252] The irony is that Epstein found that the belief that women are less committed to legal practice is a stereotype significantly present in large law firms, and as described above, one that limits their careers in a number of subtle but nonetheless powerful ways. See supra notes 68–87 and accompanying text.

[253] See Ezold, 983 F.2d at 526.

The reluctance of the Third Circuit to see beyond written evaluations is striking, though not surprising. Some seven pages of the opinion itself are devoted to describing the review form—both the criteria used and the rating grades—and excerpting the partners' numerous written comments, most of which express concerns over Ezold's analytical ability.[254] Yet attributes of the evaluation process itself, despite the veneer of standardization, appear quite susceptible to gender stereotyping. For example, the court describes Wolf Block's assessment of Ezold's analytical ability as "based on a subtle and subjective consensus among the partners."[255] To put that consensus in perspective, one must consider the gender makeup of the evaluating group. Evaluations were submitted by 91 partners,[256] yet only five of the firm's 107 partners were women; there was only one woman partner of the twenty-eight partners in the litigation department, where Ezold was an associate.[257]

While the court found Ezold's raw numbers lacking in probative value,[258] social psychologists have documented the effect that such gender imbalance can have on evaluation. Studies suggest that male presence in evaluating groups tends to precipitate anti-female bias.[259] One study found that males displayed more anti-female evaluation bias when in all male groups, rather than alone.[260] Another study found that mixed groups with equal gender composition rated female-authored articles less highly than male-authored articles, an effect that was not present in all-female rating groups.[261]

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[254] Id. at 514–20.

[255] Id. at 526.

[256] Id. at 520.

[257] Id. at 542.

[258] Id. at 542–43.

[259] See Rhoda Unger & Saundra, Sexism: An Integrated Perspective, in Psychology of Women: A Handbook of Issues and Theories 141, 147 (Florence L. Denmark & Michele A. Paludi eds., 1993).

[260] Id.

[261] Id. A recent study that examined, in part, the effect of gender group composition in performance evaluation found that:

> [W]omen are rated about half a standard deviation lower than men when women make up less than 20% of the group. When women make up more than 50% of the work group, they are in fact rated more highly than men.

Paul R. Sackett et al., Tokenism in Performance Evaluation: The Effects of Work Group Representation on Male-Female and White-Black Differences

Moreover, tokenism seems to accentuate stereotypical beliefs, and have a different effect on women than on men. Several studies have demonstrated that token males integrate well into female groups, often assuming leadership positions.[262] In contrast, one study found that solo females had great difficulty integrating into male groups.[263] They were "unlikely to be selected as group leaders; overall group satisfaction was lowest when a solo female was present; and gender-related issues were most likely to be raised in groups that included a solo female."[264]

Additionally, the proffered criterion itself—analytical ability—is one ripe for stereotyping. Women are traditionally viewed as having little ability to reason and to analyze.[265] Epstein reports that almost no one interviewed for her study *expressed* the opinion that men and women display differences in intellectual ability, but many attorneys expressed the stereotypical view that personal style varied by sex.[266] Style—including a lawyer's manner of speaking and presenting her views—might in turn affect a subjective impression of a lawyer's intellectual ability.

The Third Circuit did acknowledge that Wolf Block's decision could be overturned in one of two ways: if evidence showed that the firm itself judged Ezold's analytical skills to be comparable to those of the male candidates[267] (an unlikely prospect given that the firm assiduously documented its opinion of her skills); or if the court found that the adverse action was more likely than not motivated by discrimination, rather than the proffered legitimate reason.[268] Proof of the latter could include the firm's past treatment of the plaintiff.[269]

Ezold argued that discriminatory treatment prevented her from getting desirable assignments that would have allowed her to prove her intellectual mettle.[270] Yet faith in the written evaluations once again persuaded the court that gender-based considerations had nothing to do with Ezold's

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in Performance Ratings, 76 J. Applied Psychol. 263, 266 (1991). A limitation in generalizing the results of this analysis to women lawyers is that managerial and professional jobs were not well represented in the study. Id. at 269.

[262] See Unger & Saundra, supra note 259, at 165.

[263] Id.

[264] Id.

[265] See Bisom-Rapp, supra note 134, at 383.

[266] See Epstein, supra note 15, at 365-70.

[267] Ezold, 983 F.2d at 523–24, 533.

[268] Id. at 523, 539.

[269] Id.

[270] Id. at 540–42.

problems. Some of those evaluations pinned the assignment problem on the fact that Ezold had not attended an Ivy League law school, an explanation that the court seized upon in declaring that her treatment represented simple unfairness, not sex discrimination.[271] As the court notes, "It is a sad fact of life in the working world that employees of ability are sometimes overlooked for promotion. Large law firms are not immune from unfairness in this imperfect world."[272]

There is, however, another way to interpret what happened to Nancy Ezold. Indeed, Epstein's study unsettles the court's facile conclusions. She notes that many junior women partners and a good proportion of women associates "have complaints or concerns that they do not get the good work that will position them well on career tracks."[273] Moreover, the ability to garner choice assignments is connected to one's ability to attract individuals willing to act as mentors, an area where Epstein discerned gender-specific problems disadvantage many, if not all, women.[274]

The difficulty is that courts may either fail to recognize the overall systemic disadvantage and/or discount it for at least two reasons. First, because it is only natural that some women do receive challenging assignments, fact finders may conclude that sex does not play a role in assignment at a given firm. Next, it may also be possible to find men who have not been assigned good work, prompting a conclusion that there was no differential treatment—despite the fact that women may not receive such assignments for highly gender-specific reasons.[275]

The inability to find a similarly situated male attorney for a point of comparison may also eclipse gender-related effects. [276] An example of this

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[271] Id. at 540–41.

[272] Id. at 542.

[273] Epstein, supra note 15, at 343. A recent survey by Inside Litigation found that male litigators spend more time at trial than their female colleagues. Women litigators spend more time on non-trial activities like settlement negotiation and document preparation. J. Stratton Shartel, More Female Litigators Relegated to Non-Trial Work, Survey Finds, Inside Litigation, February 1995, at 12.

[274] See supra notes 88–96 and accompanying text.

[275] In *Ezold* the court noted that "[c]oncerns about associates being exposed only to 'small' matters were not unique to Ezold." Ezold, 983 F.2d at 542. Such concerns were expressed about two male partnership candidates as well. Id.

[276] Feminist scholars criticize the formal equality paradigm central to the intentionalist model of discrimination. In the formal view, equality is

problem may be found in *Neuren v. Adduci*,[277] a case implicitly praised in the defense attorney's article for the deference given to a law firm's termination decision.[278] There the D.C. Circuit held, *inter alia*, that "in order to show that she was similarly situated to the male employee, Neuren was required to demonstrate that all of the relevant aspects of her employment situation were 'nearly identical' to those of the male associate."[279] She failed to do so, however, in great part due to performance reviews prepared by the firm's partners.

Several written evaluations of Neuren's performance were dispositive. Those reviews expressed concern about her ability to meet deadlines and to get along with co-workers.[280] In contrast, the performance evaluations of the male associate she sought to compare herself to (who was not fired or disciplined) expressed concern about his legal writing abilities, and "his tendency to stretch out work when he was not otherwise busy."[281] The court explained that the two associates were not similarly situated because the firm viewed Neuren's deficiencies as "serious" and the male associate's difficulties as different from Neuren's and "less serious."[282]

These easy distinctions between the associates can be disrupted by Epstein's observations regarding attorney stereotypes about ideal lawyering style:

> Stereotypes about ideal lawyering style are a part of law firm culture, although any observer may see that lawyers exhibit quite a wide range of styles. But the stereotypes are the standards against which associates are measured. Ambivalence about women is sometimes expressed in the evaluations of personal style. . . . [W]omen are often faulted for being too tough (e.g.

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defined as treating similarly those similarly situated, a framework that implicitly biases the legal discourse in favor of men, who are treated as the standard against which women are measured. E.g., Deborah L. Rhode, Justice and Gender: Sex Discrimination and the Law 81–85 (1989). The problem, of course, is that women are often not similarly situated to men. See Herma H. Kay, Models of Equality, 1985 U. Ill. L. Rev. 39, 40–41 (arguing assimilationist model of equality is inadequate for confronting immutable reproductive differences).

[277] 43 F.3d 1507 (D.C. Cir. 1995).

[278] See Martin, supra note 16, at 11.

[279] Neuren, 43 F.3d at 1514.

[280] Id. at 1512.

[281] Id. at 1514.

[282] Id.

> like a man) or not tough enough (e.g. too feminine). This often leaves women feeling insecure about how to behave or wondering whether their professional skills count less than their personalities.[283]

There are indications that the partners' perceptions of Neuren's personality may have overshadowed her actual performance. If this is so, one could argue that the firm viewed Neuren's deficiencies as more serious than the male associate's difficulties because its evaluation of her was influenced by stereotyping. Neuren testified that in two oral evaluation sessions, she was told by partners that the firm was "pleased with her work," that it was "outstanding," and that she was "the best among associates."[284] The firm did not deny these facts. Instead, it offered as legitimate reasons for Neuren's termination the deadline problem and her interpersonal skills.

One of the partners expressed in a written evaluation his impression of the latter factor this way: "Extremely difficult on secretarial and support staff. A bitch!"[285] This sex-specific pejorative term might well indicate that the evaluation was influenced by the sort of stereotyping Epstein describes.[286] Yet the D.C. Circuit held the review "though possibly inappropriately phrased, was obviously grounded in gender-neutral concerns about Neuren's interpersonal relations with coworkers . . . ."[287] Thus the dichotomous analytic framework of Title VII, which separates performance from gender, obscured the possible effect of gender on the evaluation of performance.

A more psychologically sophisticated understanding of how professional women's interpersonal skills are often rated is described in Justice Brennan's plurality opinion in *Price Waterhouse v. Hopkins*,[288] a case involving the denial of partnership status to a female senior manager:

> [E]ven if we knew that Hopkins had "personality problems," this would not tell us that the partners who cast their evaluations of Hopkins in sex-based terms would have criticized her as sharply

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[283] Epstein, supra note 15, at 445.

[284] Neuren, 43 F.3d at 1509.

[285] Id.

[286] See, e.g. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) (superseded in part by 42 U.S.C. §§ 2000e-2(m), -5(g)(2)(B) (Supp. 1995)) (noting Title VII prohibits evaluation of woman senior manager's interpersonal skills in stereotyped terms).

[287] Neuren, 43 F.3d at 1513.

[288] 490 U.S. at 258.

> (or criticized her at all) if she had been a man. It is not our job to review the evidence and decide that the negative reactions to Hopkins were based on reality; our perception of Hopkins character is irrelevant. We sit not to determine whether Ms. Hopkins is nice, but to decide whether the partners reacted negatively to her personality because she is a woman.[289]

There is, however, a significant evidentiary difference between *Price Waterhouse* and *Neuren*. In the former case, many of the performance evaluations described Anne Hopkins's personality in overtly stereotyped terms.[290] In *Neuren* the "bitch" remark was the only such comment, making it appear to the court as a poorly-phrased description of a truly neutral, legitimate deficiency. With recommendations such as those proffered by the defense attorney in circulation, I predict that attorney evaluations will come to more closely resemble those in *Neuren* rather than those in *Price Waterhouse*.

Performance reviews and evaluation criteria were a significant factor in the final case discussed in the defense attorney's article, *Masterson v. LaBrum and Doak*.[291] In *Masterson*, a district court held as discriminatory a firm's decision to deny partnership status to a female associate, while simultaneously admitting to partnership five males.[292] The firm based its decision on the belief that Masterson had brought no business to the firm.[293] However, several factors, many linked to performance evaluation, convinced the court that this explanation was a pretext for sex discrimination.[294]

First, unlike the male candidates, Masterson was not informed in her performance review that developing business was a criterion for partnership. Indeed, her written reviews were exemplary, indicating that she exceeded a rating of "excellent with respect to established partnership criteria" on virtually all counts.[295]

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[289] Id.

[290] See id. at 235 (noting Hopkins was described as "macho," "overcompensating for being a woman," and "somewhat masculine").

[291] 846 F. Supp. 1224 (E.D. Pa. 1993).

[292] Id. at 1227, 1239.

[293] Id. at 1229. As described above, Epstein found rampant stereotyping about women's rainmaking abilities. See supra notes 57–67 and accompanying text.

[294] Id. at 1232–33.

[295] Under the firm's evaluation system, a rating of four represented "excellent with respect to established partnership criteria." Masterson was

Next, Masterson was not afforded a performance review prepared by members of the Executive Committee, as were the male candidates. Such a review was seen at the firm as "aiding an associate in partner election."[296] Moreover, she was not asked to prepare for review a list of clients she had developed, as was one of the males.[297] Thus, the partnership failed to find out that she had, in fact, developed some business.

These facts set the stage for the court to consider broader issues regarding the place of women in the firm—issues that track Epstein's conclusions about the complexity of conditions confronting women lawyers. For example, unlike the court in *Ezold*, the *Masterson* court saw as significant the fact that the plaintiff was not given the opportunity for challenging, independent work assignments, although the male candidates were. Also important was the scarcity of women partners at the firm: from 1986 to 1990 the firm had no women partners.[298]

The court also gave weight to evidence that women partners and associates were treated in a manner differently than male partners: one partner was asked to leave the firm because she "didn't fit in";[299] an associate was terminated because she was viewed as "arrogant and overly aggressive."[300] Yet male associates and partners who had personality conflicts with those they worked with received no such negative sanction.[301] Without saying so expressly, the court identified the familiar double bind that affects professional women: when their behavior meets gendered expectations, they are viewed as breaching masculine workplace norms; however, when they conform to workplace norms that require aggressiveness, they are seen as harsh and abrasive.[302]

Finally, the court noted that the work environment was to some extent discriminatory.[303] One member of the Executive Committee made

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evaluated by two partners, one of whom rated her an overall four plus on a five point scale. The other partner rated her a four in all areas, save for "organizational ability," for which she received a rating of between three and four. Id. at 1228.

[296] Id. at 1229–30.

[297] Id. at 1233.

[298] Id. at 1230, 1233.

[299] Id. at 1230.

[300] Id.

[301] Id.

[302] See Chamallas, supra note 10, at 92 n.14; Rhode, supra note 34, at 1189; Bisom-Rapp, supra note 5, at 1068 n.204.

[303] Masterson, 864 F. Supp. at 1233.

demeaning remarks about women; another member introduced a woman attorney to two judges as "the new broad we just hired."[304] The court astutely noted that even though such comments may be intended as humorous, they indicate that women were not regarded as the professional equals of men.[305]

One might wonder how this case demonstrates the potential power of the defense attorney's strategy. After all, the court considered many issues outside of performance review—issues that recognized the complex position that women attorneys often find themselves in. Moreover, despite the absence of a "smoking gun," it made a finding of discrimination. The point to keep in mind is that the *Masterson* court accepted the written reviews as evidence of the "truth" about the plaintiff's performance. If Masterson had been rated less highly, the court most likely would have accepted that she was less skilled than her male counterparts. Similarly, if "business development" had been a criterion on the formal evaluation sheet and Masterson had been given the opportunity to meet it, the case outcome would likely be different as well.

Moreover, cases like *Masterson* serve an instructional role for defense attorneys. In discussing the specifics of what the firm should have done, such decisions provide guidance to employers on how to position themselves to avoid litigation or at least avoid liability when litigation ensues. Indeed, that is exactly what the defense attorney's suggestions are designed to do.

V. CONCLUSION

Good lawyers understand that "Truth" is often hard to come by in the cases that they handle. Using the evidence at their disposal, they seek to script or construct reality in a manner most favorable to their clients.[306] This Article does not question whether defense attorneys and employers will continue to employ litigation prevention strategies that take advantage of the dichotomous analytic of employment discrimination law. They most assuredly will. Rather, the essential query is whether fact finders will, where warranted, see beyond that strategy.

The Supreme Court recently took a small step toward acknowledging defensive practices in *McKennon v. Nashville Banner Publishing.* [307] In

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[304] Id. at 1231.

[305] Id. at 1233.

[306] See Kim Scheppele, Telling Stories, 87 Mich. L. Rev. 2073, 2090 n.53 (1989) ("An advocate knows that her job . . . [is to] present her client's *version* in the best possible light without actually lying.").

[307] 115 S.Ct. 879 (1995). The case was a suit brought under the Age

that case the Court held that so-called "after acquired evidence"—information discovered after an employee's discharge that would have led to firing if it had been known earlier—does not completely bar relief to a discriminatorily discharged plaintiff.[308] Rather, it only "bears on the specific remedy to be ordered."[309] At the very end of the unanimous opinion, Justice Kennedy paused to consider the effect of the ruling:

> The concern that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job to resist claims under the Act is not an insubstantial one, but we think the authority of the courts to award attorney's fees, . . . and in appropriate cases to invoke the provisions of Rule 11 of the Rules of Civil Procedure will deter most abuses.[310]

Even if one disagrees with the assessment of the deterrent effect of attorney's fees and Rule 11 sanctions, it is encouraging to see the Court consciously aware that its doctrine is deployed strategically by legal actors.

Similar consciousness was not displayed by the Court, however, in another recent case, *St. Mary's Honor Center v. Hicks*.[311] In *Hicks*, a divided Court ruled that the factfinder's disbelief of an employer's proffered reason for an adverse employment decision "permit[s]" but does not "compel[]" judgment for the discrimination plaintiff.[312] To demonstrate the justness of the decision, Justice Scalia offered a hypothetical in which an employer whose minority workforce composition greatly exceeds the percentage of minorities in the available labor market is sued for racial discrimination by a rejected minority applicant.[313] The hiring officer who rejected the plaintiff—a member of the same minority—has been fired, leaving the employer no source of information about the reasons for rejection other than the "now antagonistic former employee."[314] Were the majority to rule as the dissent desires, Scalia muses, the jury would have to be instructed to find for the plaintiff if it disbelieves the employer's reason,

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Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. (1988 and Supp. V).

[308] Id. at 884.

[309] Id. at 885.

[310] Id. at 886.

[311] 113 S.Ct. 2742 (1993).

[312] Id. at 2749.

[313] Id. at 2750.

[314] Id. at 2751.

"*whether or not they believe the company was guilty of racial discrimination.*"[315]

Responding to the hypothetical in dissent, Justice Souter characterized this concern as unrealistic:

> Most companies, of course, keep personnel records, and such records are admissible under Rule 803(6) of the Federal Rules of Evidence. Even those employers who do not keep records of their decisions will have other means of discovering the likely reasons for a personnel action by, for example, interviewing co-workers, examining employment records, and identifying standard personnel policies.[316]

Scalia retorted that the idea that employers keep records on people whom they never hire "seems to us highly fanciful—or for the sake of American business we hope it is."[317]

Both sides of the debate display an attitude toward business records that this Article has tried to disrupt. For both Scalia and Souter, the primary question is whether these records exist for use by an employer. Scalia fears that they do not, so the company is deprived of knowing the "true" reason for its decision. Souter assumes that they do, so the employer need not rely on the fired hiring officer to discern the "true" reason for its decision. What both sides miss is that the "true" reason does not necessarily reside within existing records.

Although the hiring officer and the candidate come from the same minority group, discrimination may still have taken place. Intra-group prejudice is not unknown. It may be based on, for example, differences in skin tone.[318] Assume for a moment that the hiring officer harbored such a bias. If he or she absorbed the discourse and lessons of litigation prevention strategies, it is likely that a business record will exist. It is also likely that the record would document neutral, performance- or qualification-based reasons for the decision. And, if the factfinder is uncritical of such evidence, it is likely that the plaintiff will not prevail.

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[315] Id.

[316] Id. at 2764 n.12.

[317] Id. at 2751 n.5.

[318] See, e.g., Walker v. Secretary of the Treasury, 713 F. Supp. 403 (N.D. Ga. 1989) (light-skinned black may maintain discrimination claim for discharge by dark skinned black); Hansborough v. City of Elkart, 802 F. Supp. 199 (N.D. Ind. 1992) (intraracial color discrimination actionable under Title VII).

Judges in many circumstances take judicial notice of basic, commonsense facts in everyday life.[319] Fact finders should take notice of how employment discrimination law is practiced in everyday life, and scrutinize carefully documentation prepared by employers. By becoming engaged with the daily and mundane existence of employment discrimination practice, courts could better advance the interests of the women and people of color that this law was designed to protect.

Beyond this, however, is a more important plea—one directed specifically at large law firms. Cynthia Fuchs Epstein's study reaches many troubling conclusions about the position of women lawyers. Gender Bias Task Forces in many states have reached similar conclusions.[320] Law firms should take these studies seriously and to heart. Instead of directing energy into litigation prevention strategies, firms should evaluate and revise the current conception of lawyering that disadvantages many women. Among the many components of that task, one stands out as paramount: to end the assumption that the lawyer is a male without significant family responsibilities.[321] Women will never be equals in the legal profession so long as a "pregnant attorney" is a contradiction in terms.

Firms have at least two compelling reasons for committing themselves to greater diversification. First, as noted in a recent American Bar Association Committee on Women in the Profession report, lawyers are the gatekeepers of the justice system. Thus, they should be "trailblazers in promoting equality."[322] Second, if they hope to remain competitive in attracting and retaining corporate clients, many of which have had far more success in diversifying their law departments, firms must "reflect the diversity of the clients they serve."[323] In short, firms should pursue full integration because it makes good moral and economic sense.

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[319] See Fed. R. Evid. 201 (providing for judicial notice in cases before federal courts).

[320] See Carrie Menkel-Meadow, Culture Clash in the Quality of Life in the Law: Changes in the Economics, Diversification and Organization of Lawyering, 44 Case W. Res. L. Rev. 621, 649–51 (1994) (describing the work and findings of those task forces).

[321] See Mossman, supra note 44, at 293; Bender, supra note 40, at 941–42.

[322] ABA Commission on Women in the Profession, supra note 39, at 3.

[323] Id. at 13.