Glass Ceiling or Concrete Wall? Removing the Barriers to Gender Equality in the Legal Field Through Statutory Remedies

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Introduction

The legal field has, in many ways, moved past the overt sexism that was commonplace for most of the United States' history. Most people would be shocked to read past Supreme Court opinions that reinforce this sexism. Take, for example, *Bradwell v. The People of the State of Illinois* from 1872, where the Court permitted the refusal of a woman from entering the legal field because of her gender.[1] In doing so, the Court affirmed the lower court's opinion which stated that "God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws."[2] Although much of this overt sexism is no longer commonplace, the legal field is far from being an equal and welcoming place for women today.

This inequality becomes readily apparent when looking at the gender makeup of those in the highest positions in the legal field. Many prestigious positions within the legal field remain heavily male-dominated. In private practice, men make up only 54% of associates, yet constitute 78% of managing partners, 81% of equity partners, and 78% of partners.[3] Additionally, the percentage of female oral advocates before the Supreme Court has exceeded 20% only one time.[4] Throughout the history of the U.S. legal system, women have been

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1 83 U.S. 130.

2 *See id.* at 130 (upholding denial of Myra Bradwell's application to practice law in Illinois).

3 American Bar Association, *A Current Glance of Women in the Law,* 2 (Apr. 2019), https://www.americanbar.org/content/dam/aba/administrative/women/current_glance_2019.pdf [https://perma.cc/V9UM-D7KG].

4 Jake Holland, *Pipeline for Female Supreme Court Advocates Shows Some Cracks*, Bloomberg Law (July 15, 2019), https://news.bloomberglaw.com/us-law-week/pipeline-for-female-supreme-court-advocates-shows-some-cracks-1.

disadvantaged and denied equal opportunities.[5] Ultimately, a male-dominated profession has disfavored and disadvantaged women.[6]

Despite these glaring discrepancies, the legal field makes little attempt to correct gender disparities. Throughout the 1900s, activists, scholars, and attorneys took steps to address discrimination in employment broadly, which not only improved conditions for all women in the workplace, but also specifically for women in the legal field.[7] In 1964, Congress enacted Title VII of the Civil Rights Act to provide a legal cause of action for those who experience employment discrimination on account of various bases, including sex discrimination.[8] Some firms adjusted their promotion schemes to foster fair practices and improve conditions for women in the legal field.[9] However, these efforts proved ineffective in a wide variety of circumstances, most notably when considering that implicit bias is the biggest culprit of discrimination.[10] This Comment will argue that by broadening the authority of the Equal Employment Opportunity Commission (EEOC) to conduct mandatory checks on law firms and produce public ratings on fairness and equality in the workplace, the legal field will begin to catch up to, and perhaps surpass, other professional fields in achieving gender equality.

Part I of this Comment will discuss how women broke into the legal field and the highest levels they have reached to date. This part will also discuss common myths in the legal field about women in the workplace, and show why this problem cannot be solved with time. Finally, this part will conclude by exploring the background of the Civil Rights Act and its implicit bias shortfalls. Part II of this Comment will explain the statutory provisions that grant authority to the EEOC for such a request, and discuss the similarities to other professions using such ratings. Finally, this part will examine the positive effect that incorporation of these public ratings could have for women in the legal field.

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5 *See* discussion *infra* Background Section I.

6 *See* discussion *infra* Background Section I.

7 *See, e.g.*, Equal Pay Act of 1963, P.L. 88-38, 77 Stat. 56 (1963) (mandating equal pay for men and women performing same work).

8 Civil Rights Act of 1964, P.L. 88-352, Title VII, § 701, 78 Stat. 253 (1964).

9 There is now abundant data that these adoptions actually cause more harm and lead to higher discrepancies between male and female promotion rates. *See* discussion *infra* Background Section I.C.

10 *See* discussion *infra* Background Section I.C.

BACKGROUND

I. HISTORY OF WOMEN IN LAW

The legal profession has shifted gradually from women's complete exclusion[11] to women now entering the field at higher rates than men.[12] Women were first able to break into the legal field, at law firms specifically, after World War II (WWII).[13] These scholars generally agree that women achieved this milestone after WWII because of the firms' need for talent quickly and women's ability to stay with the firms after the war.[14] Despite this step, it took decades for women's entry numbers to substantially increase.[15] Between 1970 and 1980, the percentage of women attorneys rose from 4% to 12.4%.[16] In the same time frame, women law students rose from 8% to 33%.[17] Since 1980, women have come to make up around 50% of law students, and, in some instances, exceed such numbers.[18] Specifically since 2016, women now make up a majority of law students.[19]

A. *Women's Exclusion from and Admission into the Legal Field*

Women in the United States have been fighting for a seat at the table in the legal field for nearly 200 years. When the legal field was first established in the United States, the entering process was quite different than what occurs today. For most of the legal profession's existence, people entered through apprenticeships with practicing attorneys.[20] Even after the College of William and Mary created the first law school in the United States in 1793, it took decades for formalized legal education to become the standard method of entry into

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11 *See* Bradwell, 83 U.S. at 132.

12 American Bar Association, *supra* note 3, at 4.

13 CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 175-76 (1st ed. 1981).

14 *Id.* at 176.

15 CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 5 (2nd ed., Illini Books 1993).

16 *Id.*

17 *Id.*

18 American Bar Association, *supra* note 3, at 4.

19 *Id.*

20 Austin Carsh, *Riddled with Exclusivity: The Homogeneity of the Supreme Court Bar in the Roberts Court*, OREGON ST. U., https://open.oregonstate.education/open-judicial-politics/chapter/riddled-with-exclusivity-the-homogeneity-of-the-supreme-court-bar-in-the-roberts-court/.

the field.[21] It was not until 1957, with the appointment of Justice Charles Whittaker, that every member of the Supreme Court received a formal legal education.[22] With this lack of formality, women only became trained in the law if they found an apprenticeship with a practicing attorney.[23]

The problem with this apprenticeship process was that per state statutes, only men were eligible to become practicing attorneys.[24] Some of these statutes specifically stated that only white men were eligible, whereas others stated that only eligible voters could gain admission.[25] Belva Lockwood was one woman affected by these exclusionary state statutes.[26] A trailblazer in many regards, Belva was the first woman to argue before the Supreme Court and the first woman to run for President.[27] Although formalized legal training was not common at the time, Lockwood tried to enter the field by enrolling in a law school.[28] However, the faculty denied her admission because "such admission would not be expedient, as it would be likely to distract the attention of a young man."[29] While Lockwood was eventually admitted to a law school, she was forced into segregated courses after male students refused to graduate with female students.[30] After finishing her coursework, Lockwood encountered problems with state bars prohibiting her admittance because she was a woman.[31]

Lockwood was not the only woman trying to enter the legal field, nor was she the first.[32] Belle Babb Mansfield was the first woman admitted to a state bar when the Iowa state bar approved her admittance in 1869.[33] At that time, Iowa was the only state bar that admit-

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21 *Id.*

22 *Id.*

23 *See* KAREN B. MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT 8 (1986).

24 *See id.* at 22.

25 *See* Catharine V. Waite, *Admission of Women to the Bar*, THE CHICAGO L. TIMES 76, 76, 87 (1887).

26 JILL NORGREN, BELVA LOCKWOOD, THE WOMEN WHO WOULD BE PRESIDENT, 43-45, 49-51 (2007).

27 *Id.* at *x-xiii.*

28 *Id.* at 42-43.

29 *Id.* at 41.

30 *Id.* at 43.

31 *Id.* at 43-44.

32 NORGREN, *supra* note 26, at 42-43.

33 MORELLO, *supra* note 23, at 11.

ted women.[34] In 1872, the Supreme Court heard *Bradwell v. Illinois*, a case about Myra Bradwell's rejection from the Illinois state bar because of her gender.[35] In this case, the Supreme Court decided that the state bar was allowed to decide what qualifications a person must have to be admitted, even if that allowed the categorical exclusion of women.[36] This decision was a major setback for women because other state bars relied on it to also refuse women's admission.[37] It was not until 1971 that the Supreme Court invalidated a law that discriminated based on sex.[38] In this historic case, *Reed v. Reed*, the Supreme Court held that when a state law imposes differential treatment among different classes of individuals, the classification must bear a substantial relation to the purpose of the legislation.[39] The Supreme Court acknowledged both that discrimination based on sex was improper, and that without supporting evidence, a state or other entity could not assume that women were worse at something because of their gender.[40] The Supreme Court's 1971 decision in *Reed* showed how much progress women had made since the 1872 *Bradwell* decision.

B. *Women's Admission into Law Schools*

The legal field's increasing reliance on law schools to train future attorneys created another barrier for women trying to enter the field. Even if women could find someone to study under, they were not permitted to enter the profession without first attending an accredited law school.[41] However, it was common and largely expected for law schools to reject women because of their gender.[42]

Resultantly, law schools were dominated by white males.[43] Many law schools explicitly excluded women when they were first founded.[44] Eventually, in 1870, Ada Kepley became the first woman to graduate

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[34] *See id.*

[35] *See* Bradwell, 83 U.S. 130.

[36] *See id.* at 139.

[37] *See, e.g.,* MORELLO, *supra* note 23, at 28.

[38] *See* Reed v. Reed, 404 U.S. 71 (1971).

[39] *See id.* at 75-76.

[40] *See id.* at 76.

[41] *See* MORELLO, *supra* note 23, at 67-68.

[42] *See id.* at 67-68, 76.

[43] Carsh, *supra* note 20.

[44] *Id.*

from a law school.[45] Although her graduation was a significant victory for women, it was an anomaly.[46] Because of this widespread exclusion, in 1896, Ellen Spencer Mussy and Emma Gillet founded the Washington College of Law in the District of Columbia, now the American University Washington College of Law.[47] At first, Mussy and Gillet created Washington College of Law to provide women with the typical introductory law school courses.[48] Mussy and Gillet hoped that women would have more success entering the legal field after taking these introductory classes, but did not intend to create a full-fledged law school.[49] However, when Mussy and Gillet asked the law school of Columbian College, now the George Washington University,[50] to accept the first cohort of women for their final year, the school refused because "women did not have the mentality for law."[51] After the rejection, Mussy and Gillet decided to transform the program at Washington College of Law to a full-fledged law school program.[52]

Several law schools continued their female exclusion policy well into the twentieth century.[53] Harvard Law School for example did not admit women until 1950.[54] For decades, women remained a minority at law schools,[55] and those who enrolled often experienced harassment from their male colleagues and faculty.[56] A story familiar to many women in the law is that of the late Justice Ruth Bader Ginsburg's first week at Harvard Law School in 1956. Despite having already admitted nine female students, Harvard's dean required the nine female first-year students to explain to law school faculty why they

45 *History,* NORTHWESTERN PRITZKER LAW, SCHOOL OF LAW, http://www.law.northwestern.edu/about/history/ (last visited Aug. 2, 2021).

46 Carsh, *supra* note 20.

47 *History*, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, https://www.wcl.american.edu/impact/history/ (last visited Aug. 2, 2021).

48 *Id.*

49 *Id.*

50 *A Brief History of GW*, GW LIBR., https://library.gwu.edu/scrc/university-archives/gw-history/a-brief-history-of-gw (last visited Aug. 2, 2021).

51 American University Washington College of Law, *supra* note 47.

52 *Id.*

53 Carsh, *supra* note 20.

54 *See* Paul Massari, *HLS Fetes 50 Years of Women Graduates:*, HARV. GAZETTE, (May 8, 2003), http://news.harvard.edu/gazette/story/2003/05/hls-fetes-50-years-of-women-graduates/.

55 Carsh, *supra* note 20.

56 *See, e.g.*, MORELLO, *supra* note 23, at 96-97 (noting the harassment women received from male students and faculty after Columbia started to admit women in 1927).

were "taking" the seat of a man.[57] This well-known story provides just one illustration of many women's law school experiences. Women admitted into law school also faced microaggressions, like Harvard Law School's two law buildings having only one women's bathroom.[58]

Despite how commonplace the clear discrimination and negative treatment was for women in law schools, they continued to enroll. Female law student attendance rates slowly increased from the 1950s to the 1970s.[59] But between 1970 and 1980, women's law school attendance rates jumped substantially.[60] By the 1985-1986 school year, women comprised 40% of first-year law school enrollees.[61] Since then, the rates have continued to increase. Women now comprise the majority of law students since the 2016-2017 school year.[62]

C. *Incorporation of Women in Firms and Higher Positions in the Legal Field*

Women's role in the legal field shifted dramatically in the twentieth century, beginning with the Nineteenth Amendment. The Nineteenth Amendment not only granted women the right to vote in 1920, but also prompted all states to admit qualified women to the bar.[63] This acceptance was because state statutes required applicants to have the requisite education and be eligible voters.[64] Before the Nine-

57 Elizabeth Magill, *At the U.S. Supreme Court: A Conversation with Justice Ruth Bader Ginsburg*, 89 STAN. LAW. (2013). It should be noted the Ruth Bader Ginsburg did not believe the question was asked maliciously, but rather so the Dean would have some reasons to tell his doubtful colleagues why the women were there. *Id.*

58 *Id.*

59 Richard K. Neumann Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 314 (2000).

60 *Id.*

61 American Bar Association, *Enrollment and Degrees Awarded*, (2013), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/enrollment_degrees_awarded.authcheckdam.pdf.

62 Elizabeth Olson, *Women Make Up Majority of U.S. Law Students for First Time*, N.Y. TIMES, (Dec. 16, 2016), http://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html; Ian Pisarcik, *Women Outnumber Men in Law School Classrooms for Third Year in a Row, but Statistics Don't Tell the Full Story*, JURIST (March 5, 2019, 10:10:58 AM), https://www.jurist.org/commentary/2019/03/pisarcik-women-outnumber-men-in-law-school/.

63 RONALD CHESTER, UNEQUAL ACCESS: WOMEN LAWYERS IN A CHANGING AMERICA 8 (1985).

64 *See, e.g.*, Vivian Sue Shields & Suzanne Melanie Buchko, *Antoinette Dakin Leach: A Woman before the Bar*, 28 VAL U. L. REV. 1189, 1220 (1994) (Indiana statute required lawyers to be eligible voters and have requisite education).

teenth Amendment, women were generally not eligible voters, thus precluding them from bar admission.[65] Certain states, like Illinois, changed their state statutes and allowed women to be admitted to the bar.[66]

Even after the bar admission progress from the Nineteenth Amendment, the legal field remained reluctant to embrace women.[67] Throughout the nation, firms repeatedly told qualified women, "We want a man."[68] Despite being qualified to practice law, most law firms continued to hire women only as stenographers or librarians.[69] In the 1930s, the New Deal increased the role of law in society, leading to more positions for lawyers in the federal government.[70] This shift allowed many women law graduates to find employment with the federal government, though still typically in clerical positions.[71] In the 1930s and 1940s, a number of Wall Street firms hired their first women associates.[72] There was little change in the practice of hiring relatively few women and keeping them in lower positions throughout the 1950s and 1960s.[73] The evidence shows that even though certain firms reported the best candidates for associate positions were female, the firms refused to change their male-only hiring policies.[74] In the 1970s, women law students grew tired of repeated rejections and clear sex discrimination.[75] Consequently, a group of female students at New York University School of Law and Columbia Law School filed a complaint against ten major New York law firms.[76] After a conten-

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65 *See* Olivia B. Waxman, *5 Myths about the Nineteenth Amendment and Women's Suffrage, Debunked*, TIME.COM (Aug. 18, 2020, 11:10 AM), https://time.com/5879346/19th-amendment-facts-myths/. (Women could vote in all elections in only 18 states).

66 Waite, *supra* note 25, at 79.

67 *See* EPSTEIN, *supra* note 13, (The increase of women lawyers through the 1960s was very slow. In the 1960s only about four percent of lawyers were women).

68 Cynthia Grant Bowman, *Women in the Legal Profession from the 1920s to the 1970s: What can we Learn from their Experience about Law and Social Change*, 61 ME. L. REV. 1, 4 (2009).

69 KENNETH LIPARTITO & JOSEPH PRATT, BAKER & BOTTS IN THE DEVELOPMENT OF MODERN HOUSTON 129-30 (1991); Bowman, *supra* note 68, at 4.

70 CHESTER, *supra* note 63, at 14.

71 *Id.* at V.

72 Bowman, *supra* note 68, at 5.

73 *Id.* at 9-12.

74 *Id.* at 13.

75 *Id.*

76 The ten firms sued were Royall, Koegel & Wells; Cravath, Swaine & Moore; Roth, Carlson, Kwit, Spengler, Mallin & Goodell; Aranow, Brodsky, Bohinger, Einhom & Dann; Carter, Ledyard & Milburn; Gilbert, Segall & Young; Shea, Gallop, Climenko & Gould; Shearman &

tious fight, the case settled when the firms agreed to adopt new guidelines to ensure the hiring of women associates.[77] After this settlement, the number of women lawyers increased from 4% in 1970 to 12.4% in 1980.[78] By 2002, the percentage of women in large law firms rose to 40.3%.[79] In 2019, women made up nearly half of associates.[80]

Notwithstanding these increases, women partnership rates at law firms remain disproportionately low. In 2019, women comprised 22% of managing partners, 19% of equity partners, and 22% of partners.[81] Women make up just 30% of in-house counsel for Fortune 500 companies.[82] Only 35% of law school deans are women.[83] And, women lawyers' weekly salaries are estimated to be 80% of the male equivalent.[84]

Recent studies indicate that while the door to large law firms may have opened, women abruptly ran into a glass ceiling.[85] Women lawyers in the 1970s and 1980s managed to open the doors to large law firms by getting hired as associates.[86] However, women lawyers have been unable to achieve equal representation at partnership levels.[87] In efforts to improve these statistics, many law firms adopted merit-

Sterling; Sullivan & Cromwell; and Winthrop, Stimson, Putnam & Roberts. MORELLO, *supra* note 23, at 211.

77 MORELLO, *supra* note 23, at 213; *See also* NANCY LISAGOR & FRANK LIPSIUS, A LAW UNTO ITSELF: THE UNTOLD STORY OF THE LAW FIRM SULLIVAN & CROMWELL 218 (1988).

78 EPSTEIN, *supra* note 15.

79 *Diversity in Law Firms*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N (2003), https://www.eeoc.gov/special-report/diversity-law-firms.

80 American Bar Association, *supra* note 3.

81 *Id.*

82 *Id.* at 3.

83 *Id.* at 4.

84 *Id.* at 6. It should be noted that this percentage is different depending on the woman's race, with white women earning the highest percentage. *See Out of the Black Box: Highlighting Central Myths of Gender Pay Disparity in the Legal Profession in 2020*, ATT'Y AT L. (Nov. 11, 2020), https://attorneyatlawmagazine.com/highlighting-central-myths-gender-pay-disparity-in-the-legal-profession-2020.

85 Eli Wald, *The Changing Professional Landscape of Large Law Firms, Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 FORDHAM L. REV. 2245, 2252 (2010).

86 CYNTHIA FUCHS EPSTEIN, WOMEN IN THE LAW 200 (2d ed., Anchor Books, 1983); S. Elizabeth Foster, *The Glass Ceiling in the Legal Profession: Why Do Law Firms Still Have So Few Female Partners?*, 42 UCLA L. REV. 1631, 1638 (1995); Judith S. Kaye & Anne C. Reddy, *The Progress of Women Lawyers at Big Firms: Steadied or Simply Studied?*, 76 FORDHAM L. REV. 1941, 1945 (2008).

87 EPSTEIN, *supra* note 86, at 200-01; Foster, *supra* note 86; Steve French, Note, *Of Problems, Pitfalls and Possibilities: A Comprehensive Look at Female Attorneys and Law Firm Partnership*, 21 WOMEN'S RTS. L. REP. 189, 189-90 (2000); Kaye & Reddy, *supra* note 86, at 1945-47.

based promotions, meaning "everyone has an equal chance to advance and obtain rewards based on their individual merits and efforts."[88] Unfortunately, studies found that the firms using these methods still favor men over equally performing women in performance evaluations and compensation.[89] There are two reasons for these results. First, the employers adopted these procedures merely for symbolic reasons.[90] Essentially, employers adopted merit-based promotional schemes to signal their *attempt* to improve equality rather than to actually improve equality.[91] Second, employers are more likely to embody prejudicial attitudes when they feel they satisfied their "moral credentials."[92] By adopting a merit-based promotional scheme, employers believed that equality was then achieved and thus no longer needed to exert effort towards this end.[93] Resultingly, employers were less likely to take certain events, like accusations of discrimination or unfair promotions, as seriously because they already implemented the "solution."[94] These results suggest that merit-based approaches encourage bias instead of improving conditions.

Along with women being less likely to be promoted to partnership positions, they are also relegated to work considered less prestigious. In 1991, the American Bar Association (ABA) Commission on Women in the Profession found that women "sometimes steered away from major litigation, commercial matters, heavy client contact, extensive travel, or late night responsibility . . . [and were] more likely to be relegated to supporting roles such as document preparation," even when they are the lead in case preparation.[95] Over thirty years have passed since the ABA Commission on Women in the Profession wrote this report, but its findings remain true today.[96] For example, a sharp contrast exists in the gender makeup of the oral advocates before the

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88 Emilio J. Castilla & Stephen Benard, *The Paradox of Meritocracy in Organizations*, 55 ADMIN. SCI. Q. 543, 543 (2010).

89 *Id.* at 560.

90 *Id.* at 544.

91 *See id.* at 546-47.

92 *Id.* at 567.

93 *See* Castilla & Bernard, *supra* note 88, at 567-68.

94 *See id.* (People more likely to act on negative stereotypes about women when they feel they are objective).

95 *Report to the House of Delegates,* A.B.A. COMMISSION ON WOMEN IN THE PROFESSION 11 (1988).

96 Nicole Tharp Johnson, *Is This Thing On? Muting the Microphone on Women Before the Supreme Court*, 10-11 (Nov. 18, 2020) (unpublished comment) (on file with author).

Supreme Court and the advocates that write the briefs for those Supreme Court cases.[97] In the 2010, 2011, 2013, and 2014 terms, nearly 100% of cases before the Supreme Court had women listed on at least one brief cover page.[98] Even though this shows nearly 100% of these cases could have been argued by a woman, fewer than 20% of the oral advocates during these terms were women.[99]

1. Enactment of Title VII and the EEOC

Congress was slow-moving in enacting federal legislation ensuring fair employment practices.[100] Representative Vito Marcantonio proposed the first fair employment practices bill to Congress in 1941.[101] However, this bill never made it past the referral to the House Committee on the Judiciary.[102] The next year, another similar bill was proposed but also died in the Committee.[103] Throughout subsequent years, Congress reviewed hundreds of fair employment practices bills but none survived, and most never made it out of the Committee.[104] After nearly two decades of unsuccessful bills, Congress passed two civil rights bills: the Civil Rights Act of 1957[105] and the Civil Rights Act of 1960.[106] Although the passage of these Acts positively impacted women's rights, much remained unprotected.[107] The National Association for the Advancement of Colored People, along with other prominent organizations, aggressively pushed for further protections.[108] Marches around the country, including the first March on Washington where Martin Luther King, Jr. gave his "I have a dream speech,"[109] added additional pressure.[110] While both Republi-

97 *Id.* at 10.
98 *Id.*
99 *Id.* at 9.
100 *See* Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. L. REV. 431, 431 (1966).
101 *Id.*
102 *Id.*
103 *Id.*
104 *Id.*
105 Civil Rights Act of 1957, Ch. 315, 71 Stat. 634 (1957) (codified in scattered sections of 5, 42 U.S.C.).
106 Civil Rights Act of 1960, Ch. 449, 74 Stat. 86 (1960) (codified in scattered sections of 18, 20, 42 U.S.C.).
107 Vaas, *supra* note 100, at 431-32.
108 *Id.* at 432.
109 *See March on Washington for Jobs and Freedom*, NAT'L PARK SERV. (Aug. 4, 2020), https://www.nps.gov/articles/march-on-washington.htm#:~:text=AN%20estimated%20250%2C000%20people%20attended,from%20all%20over%20the%20country.

cans and Democrats had pledged their support for civil rights legislation in 1960, this pressure heightened the sense of urgency.[111] And by 1964, the time came for Congress to act on its promises.[112]

When the 88th Congress convened, various Senators and Representatives submitted civil rights bills.[113] Some bills contained comprehensive provisions on discrimination in private employment, some dealt with equal employment.[114] The bills proposed different methods of enforcement, varying from creating an administrative agency that could hold hearings and issue enforceable cease-and-desist orders to requests for further study and recommendations.[115] Finally, Congress proposed two pieces of legislation, H.R. 405 and H.R. 7152, which combined turned into Title VII of the Civil Rights Act of 1964.[116] Significant tension existed regarding the amount of authority the administrative agency should have and how the agency could utilize that authority.[117] H.R. 405 provided for an administrative agency comparable to the National Labor Relation Board that could hold hearings and issue cease-and-desist orders.[118] Ultimately, Congress decided to remove the EEOC's ability to decide whether there has been discrimination and instead have the EEOC occupy a secondary role.[119]

Representative Howard W. Smith of Virginia proposed a notable amendment, which added sex to the list of characteristics that employers could not discriminate against.[120] Although this provision had positive ramifications for women, that was not the amendment's intention.[121] Rather, Representative Smith proposed the amendment "in a spirit of satire and ironic cajolery."[122] When presenting the amendment, he read from a letter he had received from a female constituent, which stated:

110 Vaas, *supra* note 100, at 432.

111 *Id.*

112 *Id.*

113 *Id.* at 433.

114 *Id.*

115 *Id.*

116 Vaas, *supra* note 100, at 433, 435.

117 *Id.* at 434-35.

118 *Id.* at 435.

119 *Id.* at 436, 452.

120 *Id.* at 439.

121 *Id.* at 441.

122 Vaas, *supra* note 100, at 441.

> The census of 1960 shows that we had 88,331,000 males living in this country, and 90,992,000 females, which leaves the country with an "imbalance" of 2,661,000 females. Just why the Creator would set up such an imbalance of spinsters, shutting off the "right" of every female to have a husband of her own, is, of course, known only to nature. But I am sure you will agree that this is a grave injustice to womankind and something the Congress and President Johnson should take immediate steps to correct, especially in this election year. Would you have any suggestions as to what course our Government might pursue to protect our spinster friends in their "right" to a nice husband and family?[123]

Even though Mr. Smith proposed the amendment as a joke, it passed the House on February 8, 1964 by a 168 to 133 vote.[124] Despite opposition, the bill, as amended, passed the House two days later and moved to the Senate.[125] The tension between how much authority the administrative agency, now known as the EEOC, should be granted, was just as prevalent in the Senate as in the House.[126]

The Senate adopted the Mansfield-Dirksen substitute and five additional amendments to H.R. 7152, which made three changes substantially impacting the EEOC's authority.[127] One change further restricted the powers of the EEOC in three ways.[128] The restrictions on the EEOC's discretionary powers were:

> (1) to establish regional or state offices by confining the exercise thereof to those the EEOC "deems necessary to accomplish the purpose of this title" (section 703 (f)); (2) to cooperate with existing state and local agencies, both public and private, by providing that this should be done only "with their consent" (section 703(g)(1)); and (3) upon request to assist employers and labor organizations in effectuating the provisions of Title VII by limiting the "other remedial action" which the EEOC might take to "such . . . as is provided by this title" (section 703 (g)(4)).[129]

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123 *Id.* at 441-42 (citing 110 Cong. Rec. 2577 (1964)).

124 *Id.* at 442 (citing 110 Cong. Rec. 2577-84 (1964)).

125 *Id.* at 443 (citing 110 Cong. Rec. 2804-05 (1964)).

126 *See id.* at 450-52 (noting the Senate amendments to the House Bill that affected EEOC powers).

127 *Id.* at 447.

128 Vaas, *supra* note 100, at 451.

129 *Id.*

Although this change made these restrictions, it also broadened the EEOC's power to provide assistance to "any labor organization, whose members of some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title."[130] Additionally, the change gave the EEOC the authority to make its studies available to the public, not just "interested governmental and nongovernmental agencies."[131] The second significant change was the addition of subsection (6) in section 705, which authorized the EEOC to:

> Refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706, or for the institution of a civil action by the Attorney General under section 707, and to advise, consult, and assist the Attorney General on such matters.[132]

The third and most far-reaching change occurred in section 706.[133] This change removed the EEOC's enforcement power in court suits.[134] In other words, under the Senate's version of the bill, the EEOC could not bring suit against employers.[135] The EEOC's function was then "limited to an attempt at voluntary conciliation of alleged unlawful practices and the conciliation efforts must be conducted in confidence and not even the charge against the employer may be made public."[136] By including this change, only the aggrieved person could file the suit, unless a pattern or practice of resistance existed which then allowed the Attorney General to bring suit against the employer.[137] The other significant change in this section was the Senate's effort to preserve State sovereignty.[138] The Senate provided that a State could maintain exclusive jurisdiction over employment practices for a limited time if State or local laws prohibiting such practices

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130 *Id.*

131 *Id.*

132 *Id.*

133 *Id.* at 452.

134 Vaas, *supra* note 100, at 452 (citing Memorandum prepared by a staff member of Senate Judiciary Committee, 110 CONG. REC. 14331-32 (1964)).

135 *Id.*

136 *Id.* (citing Memorandum prepared by a staff member of Senate Judiciary Committee, 110 CONG. REC. 14331-32 (1964)).

137 *Id.*

138 *Id.*

existed.[139] This change further safeguarded employers, stating that an employer must have intended to discriminate before a federal court can grant relief.[140] On June 19, 1964, the bill passed the Senate.[141]

After the passage of H.R. 7152 in the Senate with these amendments, the House approved the amended bill on July 2, 1964.[142] Later that day, President Johnson signed the bill, and the Civil Rights Act of 1964 became the law.[143] Civil rights advocates had much hope and belief that the Act would be an end to discriminatory employment practices in the United States.[144] In President Johnson's bill-signing proclamation, he stated, "This act is a challenge to all of us to go to work in our states and communities, in our homes and in our hearts, to eliminate the last vestiges of injustice in America."[145] Civil rights advocates were uncertain about the law's strength, and organizational leaders announced their intentions to test the law.[146] Although many issues remain, the Act made huge changes to employment practices throughout the country.

These changes were, in part, due to increases to the EEOC's powers over the years. These increases began shortly after the Civil Rights Act of 1964 became law.[147] In 1967, Congress passed the Age Discrimination in Employment Act (ADEA).[148] Originally, Congress granted the Department of Labor enforcement powers regarding ADEA claims.[149] In 1968, the EEOC submitted amicus briefs in cases brought by individual employees because the EEOC could not file lawsuits directly against employers.[150] In 1972, Congress gave the EEOC the authority to file lawsuits directly against private companies

139 *Id.* at 452-53 (citing Memorandum prepared by a staff member of Senate Judiciary Committee, 110 CONG. REC. 14331-32 (1964)).

140 Vaas, *supra* note 100, at 453 (citing Memorandum prepared by a staff member of Senate Judiciary Committee, 110 CONG. REC. 14331-32 (1964)).

141 110 CONG. REC. 14511 (1964).

142 110 CONG. REC. 15897 (1964).

143 Kenneth Wing, *Title VI and Health Facilities: Forms without Substance,* 30 HASTINGS L.J. 137, 150 (1978).

144 *See* Merriman Smith, *Civil Rights Law Now In Force,* LEOMINSTER ENTERPRISE, July 3, 1964, at 4, https://www.rarenewspapers.com/view/561965?imagelist=1.

145 *Id.* at 1.

146 *Id.* at 4.

147 *Timeline of Important EEOC Events,* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/youth/timeline-important-eeoc-events (last visited Aug. 2, 2021).

148 *Id.*

149 *Id.*

150 *Id.*

and broadened Title VII's reach to the entire federal government and to all state and local government agencies with at least fifteen employees.[151] In 1978, Congress amended Title VII through the Pregnancy Discrimination Act, and President Carter transferred enforcement power to the EEOC regarding the ADEA and the Equal Pay Act.[152] Thus, the primary increase in the EEOC's power came when Congress reversed course and gave the EEOC authority to file lawsuits against private companies.[153]

2. The Short-Falls of Title VII and the EEOC

Although the enactment of the Civil Rights Act of 1964 and the establishment of the EEOC reduced overt discrimination in the workplace, these events did not entirely remove discrimination in the workplace or achieve equality in high level positions.[154] Despite the Civil Rights Act's intention to "alter social conditions," much discrimination persists through implicit bias.[155] Discrimination persists primarily because Congress designed the law to address only overt and explicit discrimination, and has not yet updated the law to address discrimination based on implicit bias that remains in the workplace.[156]

Implicit bias exists because of the culmination of a few factors.[157] One factor is that because of the amount of information people are expected and required to process every minute, the mind designs mental strategies for simplifying the surrounding environment.[158] In simplifying the environment, the mind typically perceives members of the same group as similar and members of different groups as dissimilar.[159] Cognitive psychologists refer to this sorting as "schemas."[160]

151 *Id.*

152 *Id.*

153 Timeline of Important EEOC Events, *supra* note 147.

154 *See* Kya Rose Coletta, *Women and (In)Justice: The Effects of Employer Implicit Bias and Judicial Discretion on Title VII Plaintiffs*, 16 HASTINGS BUS. L.J. 175, 185 (2020).

155 *See id.; See generally* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007); AT&T v. Hulteen, 556 U.S. 701 (2009); Ricci v. DeStefano, 557 U.S. 557 (2009); Wal-Mart Store, Inc. v. Dukes, 564 U.S. 338 (2011).

156 Coletta, *supra* note 154, at 185.

157 *Id.* at 178-81.

158 *See* Linda H. Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1188 (1995).

159 *See id.* at 1189.

160 *See* Coletta, *supra* note 154, at 178-79 (citing David E. Rumelhart, *Schemata and the Cognitive System*, in 1 HANDBOOK OF SOCIAL COGNITION 161, 166 (1984)).

Schema theories show that these schemas function as implicit information structures that organize "input into, storage in, and recall from memory."[161] These structures, although essential, bias what people see, how people interpret information, and how that information is stored.[162] In group settings, these biases can lead to discrimination "whether we intend it or not, [and] whether we know it or not."[163] In a law firm setting, these biases can lead to discrimination against women in many situations, such as requiring women to work harder than men in order to "prove" they are as competent, or mistaking women as administrative staff,[164] especially when a sharp gender imbalance exists, as previously referenced.[165] Without amending Title VII to accommodate for these instances, two hurdles for Title VII plaintiffs remain. First, Title VII plaintiffs face a high, often insurmountable, burden of proof.[166] Second, the judiciary is reluctant to interfere with decisions made by upper-level employers.[167]

The Supreme Court made an earnest effort to differentiate forms of discrimination. In *Griggs v. Duke Power Company*, the Supreme Court described two forms of discrimination: disparate treatment and disparate impact.[168] Disparate treatment refers to the different treatment of equally qualified individuals based on a prohibited category.[169] Disparate impact refers to circumstances when a facially

161 *See* Krieger, *supra* note 158, at 1209.

162 *Id.* at 1190.

163 *Id.*

164 More examples include: believing women must act feminine but also that women who are too feminine are not strong or tough enough to be lawyers and expecting that women will have children or be the primary child-rearing parent.

165 Coletta, *supra* note 154, at 182-85.

166 Jenny R. Yang & Jane Liu, *Strengthening Accountability for Discrimination: Confronting Fundamental Power Imbalances in the Employment Relationship*, ECONOMIC POLICY INSTITUTE (Jan. 19, 2021), https://www.epi.org/unequalpower/publications/strengthening-accountability-for-discrimination-confronting-fundamental-power-imbalances-in-the-employment-relationship/.

167 Coletta, *supra* note 154, at 185.

168 *See* Griggs v. Duke Power Company, 401 U.S. 424 (1971) (holding that Title VII was intended to prohibit not only open discrimination but also neutral employment practices that, regardless of intent, result in discrimination on the basis of a protected trait); *see also* Coletta, *supra* note 154, at 185-86.

169 *See* Griggs, 401 U.S. at 436; Linda H. Krieger, *The Intuitive Psychologist Behind the Bench: Models of Gender Bias in Social Psychology and Employment Discrimination Law*, 60 J. OF SOC. ISSUES 835, 835 (2004).

neutral practice affects certain individuals differently, such as men and women.[170]

Title VII plaintiffs establish a prima facie case for employment disparate treatment by showing that: (1) they are members of a class protected by Title VII; (2) they are qualified for the job; (3) they were denied the promotion; and (4) the employer continued to seek applicants with the plaintiff's qualifications.[171] If the plaintiff can establish a prima facie case, the burden shifts to the employer to state a "legitimate, nondiscriminatory reason" for its practice.[172] If the employer makes such a statement, the burden shifts back to the plaintiff to show that the employer's reason was a "pretext or discriminatory in its application."[173] Disparate treatment jurisprudence thus favors employers as they need only point to a legitimate justification for their decision and defend that justification as not being a mere cover for discrimination.[174]

Further, even if a Title VII plaintiff establishes a prima facie case, the plaintiff must overcome the judiciary's reluctance to interfere with employers' professional judgments.[175] This is especially true when faced with employers' decisions on upper-level positions.[176] To justify this reluctance, members of the judiciary assert that entry-level decisions are more objective because skills such as product output are measured rather than professional skills, such as collegiality or leadership abilities.[177] The judiciary's reluctance causes plaintiffs to achieve a positive outcome primarily only if they settle their case.[178] This is not wholly out of step with the enacting Congress's plan.[179] Some representatives expressly wanted cases to settle to avoid excessively bur-

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[170] *See Griggs*, 401 U.S. at 429-30; Krieger, *supra* note 158, at 835.

[171] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[172] *Id.*

[173] *See id.* at 807 (holding that a plaintiff could provide evidence of an employer's treatment of the employee during employment, the employer's policies for minority employment, and statistics of the employer's policies and practices to show pretext).

[174] Coletta, *supra* note 154, at 186.

[175] *See* Tracy A. Baron, Comment, *Keeping Women Out of the Executive Suite: The Courts' Failure to Apply Title VII Scrutiny to Upper-Level Jobs*, 143 U. PA. L. REV. 267, 268 (1994); *see also* Anjum Gupta, *Dead Silent: Heuristics, Silent Motives, and Asylum*, 48 U. COLO. L. REV. 1, 28 (2018); Terry Carter, *Implicit Bias is a Challenge Even for Judges*, ABA J. (Aug. 5, 2016, 9:58 PM), http://www.abajournal.com/news/article/implicit_bias_is_a_challenge_even_for_judges.

[176] Coletta, *supra* note 154, at 188.

[177] Baron, *supra* note 175, at 268.

[178] Coletta, *supra* note 154, at 188.

[179] H.R. REP. NO. 88-914 (1963), as reported in 2 U.S.C.C.A.N. 2391, 2515-16 (1964).

dening employers.[180] However, this employer-favored mindset does not align with the Civil Rights Act of 1964's guiding principle to "alter social conditions."[181] If employers are aware of the nearly impossible burden for plaintiffs, their actions will not likely change, and therefore, social conditions will not be altered.[182] Ultimately, this reluctance by the judiciary creates a nearly impossible burden for plaintiffs to overcome and thus defeats the guiding principle of the Civil Rights Act.[183]

ANALYSIS

I. THE EEOC SHOULD HAVE THE POWER TO REQUIRE FIRMS TO COMPLETE SEMI-ANNUAL INVESTIGATIONS, PUBLISH EQUITY AND FAIRNESS SCORES, AND PROVIDE SUCH INFORMATION TO APPLICANTS

The legal field has a tragic history of discrimination against women. Despite this, women continued entering the field at high rates.[184] The legal field, however, still impedes women's ability to achieve equivalent rates to their male counterparts.[185] To address this problem, Congress should authorize the EEOC to investigate law firms and require them to produce fairness and equity reports that provide applicants and potential clients a clear picture of the firms' discriminatory practices. This Part will explain why Congress should give the EEOC this authority, why this is legally permissible, and how the EEOC would operate within this new authority.

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180 *Id.*

181 *See generally* Ledbetter, 550 U.S. at 618; AT&T v. Hulteen, 556 U.S. 701 (2009); Ricci v. DeStefano, 557 U.S. 557 (2009); Wal-Mart Store, Inc. v. Dukes, 564 U.S. 338 (2011).

182 *See generally* Ledbetter, 550 U.S. at 618; Hulteen, 556 U.S. at 701; Ricci, 557 U.S. at 557; Dukes, 564 U.S. at 338.

183 Coletta, *supra* note 154, at 188.

184 Baron, *supra* note 175, at 267-68.

185 *See generally id.* at 269-83.

A. *Congress Should Expand the EEOC's Enforcement Powers Because It Has Significant Authority to Investigate and Serve Employers and, if Expanded, It Could Improve Equality*

Congress went through many iterations of what would become the Civil Rights Act of 1964 throughout the legislative process.[186] Before Congress heard these iterations, the House Committee on Education and Labor heard and debated the bill.[187] This provision, then H.R. 405, provided an administrative agency with the authority to hold hearings and issue legally enforceable cease-and-desist orders.[188] The agency would have included an "Equal Employment Opportunity Board" and an "Office of the Administrator of the Equal Employment Opportunity Commission."[189] The EEOC, however, was granted significantly less authority.[190] The Committee explained this lack of authority in the "Additional Views on H.R. 7152," without mentioning the Committee's reasons for removing the language allowing the EEOC to investigate discrimination.[191] Rather, the report emphasized the Committee's concerns regarding the judicial power that the Act would give the EEOC.[192] The concern was that the EEOC would be able to essentially decide whether a company was discriminating.[193] The Committee stated that "[a] substantial number of committee members, however, preferred that the ultimate determination of discrimination rest with the Federal judiciary."[194]

At present, the EEOC has the power to investigate discrimination when an employee files a complaint with the agency that falls within its authority to address.[195] In investigating an employer, the agency may request the employer to submit a statement of position, respond to a Request for Information (RFI), permit an on-site visit,

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186 Vaas, *supra* note 100, at 433-37.

187 *See generally id.* at 435.

188 *Id.*

189 *Id.* at 436.

190 *Id.*

191 H.R. REP. NO. 88-914 (1963), as reported in 2 U.S.C.C.A.N. 2391, 2515-16 (1964).

192 *Id.*

193 *Id.*

194 *Id.*

195 *What You Can Expect After a Charge is Filed*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, https://www.eeoc.gov/employers/what-you-can-expect-after-charge-filed (last visited Aug. 3, 2021).

and provide contact information for or have employees available for witness interviews.[196] The RFI may ask the employer to submit personnel policies, the Charging Party's personnel files, the personnel files of other individuals, and other relevant information.[197]

The EEOC's ability to conduct annual investigations is not significantly outside the realm of the current system. First, the EEOC already has investigatory authority.[198] However, at present, the EEOC does not investigate an employer until a complaint is filed.[199] Under the proposed system, the EEOC would investigate annually without requiring a prior complaint. Second, the EEOC conducts its investigations while maintaining the employee's confidentiality.[200] The investigations occur without the employer having knowledge of which employee made a complaint. In the proposed system,[201] the EEOC would conduct an investigation without obviously targeting any one employee in the same way.

Although the proposed system is like the EEOC's current operation, Congress must amend the Civil Rights Act to give the EEOC this authority. Congress should implement this system to decrease discrimination in the legal field and for the numerous reasons outlined below.

B. *Explanation of the Proposed System*

The proposed system has three parts. First, the EEOC will have the power to publish equity and fairness reports on firms. Second, to create such reports, the EEOC will have the power to complete semi-annual investigations of firms. Third, the EEOC will have the power to require firms to give applicants the reports.

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196 *Id.*

197 *Id.*

198 *Quality Practices for Effective Investigations and Conciliations*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, (Sept. 30, 2015), https://www.eeoc.gov/quality-practices-effective-investigations-and-conciliations.

199 Eric E. Petry, *Master of its Own Case: EEOC Investigations after Issuing a Right-To-Sue Notice*, 85 U. CHI. L. REV. 1227, 1235 (2018).

200 42 U.S.C. § 2000e-5(b).

201 *See* discussion *infra* Section I.B.

1. Fairness and Equity Reports

The purpose of the fairness and equity report is to determine the level of discrimination within a firm. The system within which the EEOC already operates to provide right-to-sue letters creates a logical path for determining how firms perform.[202] This is not the only way that the EEOC could produce these reports, but they should at least be incorporated into the process.

Much like how restaurant inspection grades operate,[203] the fairness and equity reports will assign a letter grade of A, B, C, or F to law firms. The EEOC will assign the grades after it conducts the annual inspection and determines how well the firm manages discrimination. Congress could adopt the following grading system. A firm will receive: an "A" letter grade if the EEOC determines that no employees could be granted a right-to-sue letter from the agency and no firm employees within the previous twelve months received a right-to-sue letter from the agency; a "B" letter grade if less than 1% of the firm's employees could receive a right-to-sue letter or less than 1% of the firm's employee have received a right-to-sue letter in the previous twelve months; a "C" letter grade if the EEOC determines that less than 3% of the firm's employees could receive a right-to-sue letter or less than 3% of the firm's employees have received right-to-sue letters in the previous twelve months; a "F" letter grade if more than 3% of the firm's employees could have received right-to-sue letters, or more than 3% of the firm's employees have received right-to-sue letters in the previous twelve months.

If a firm receives a grade it believes is inaccurate, it can request the EEOC perform a follow-up investigation before the next investigation takes place after showing evidence of how the discriminatory actions were addressed. These grades would be publicly available and included in the fairness and equity report that employers would be required to give to potential employees. The remainder of the fairness and equity report would not be publicly available through the EEOC. Employers could publish their reports on their own, which could improve their assigned letter grade. The report would include non-confidential details explaining why the firm was assigned a certain

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202 *Filing a Lawsuit*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, https://www.eeoc.gov/filing-lawsuit (last visited Aug. 3, 2021).

203 *See, e.g.*, *Letter Grading for Restaurants*, NYC HEALTH, https://www1.nyc.gov/site/doh/business/food-operators/letter-grading-for-restaurants.page (last visited Aug. 3, 2021).

letter grade. The non-confidential details could include an explanation of whether the letter grade was assigned because of the firm having a certain percentage of employees who could be given right-to-sue letters, or if it was assigned because a certain number of right-to-sue letters were granted. These details could also include an explanation of which of the protected classes like race, sex, national origin, and age, the possible violations could have been about, or the timeframe the right-to-sue letters were given. Additionally, the report would include the firm's demographic details regarding protected classes' ranks in the firm for partner, equity partner, associate, paralegal, and other positions.

2. Annual Investigations

The annual investigations would operate much in the same way the EEOC currently conducts investigations. Currently, the EEOC may request the employer to submit a statement of position, respond to an RFI, permit an on-site visit, and provide contact information for or have employees available for witness interviews.[204] The RFI may ask the employer to submit personnel policies, the Charging Party's personnel files, the personnel files of other individuals, and other relevant information.[205] To make the fairness and equity reports, the EEOC would not need any more information than could be requested through these three methods. An on-site visit would be required each year and, like restaurant inspections, the employer would not have notice of the visit. The EEOC may also interview employees and access files if necessary.

3. Mandatory Disclosure of Equity and Fairness Reports to Applicants

Lastly, the proposed system would require that employers provide potential employees with their most recent fairness and equity report. The employer could either give the candidate the report physically or digitally, or the firm could publish its report on its website and instruct the candidate to review it before making a final decision. In its investigation, the EEOC will ask new hires whether they are

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204 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, *supra* note 195.
205 *Id.*

familiar with the employer's report. If a majority of new hires are not familiar, the firm's grade could be impacted.

C. *By Providing the EEOC Such Powers, Discrimination Against Women in Firms Will Begin to Evaporate*

By granting the EEOC the power to investigate law firms and produce fairness and equity reports annually, equality for women in the legal field would increase for two main reasons. First, it would bring applicants closer to having "perfect information" about firms. Second, because large clients[206] require outside counsel to have certain levels of diversity, the firm's bottom line would be affected if it had a low score.

1. Bringing Applicants Closer to Having "Perfect Information" About Firms

By making fairness and equity report grades publicly available and requiring employers to give their full reports to candidates, those seeking employment in the legal profession will come closer to operating with "perfect knowledge," as it is called by economists.[207] Some candidates could see the reports and not care about a firm's low scores. For example, many employees know of Jones Day's history of sex discrimination[208] but still work there.[209] However, low scores would likely deter some candidates and encourage those candidates to work at places with higher scores. Some candidates may also fall somewhere in the middle, who would not turn down a job because the firm has low scores but would opt to accept a position at a firm with a

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[206] *See, e.g.*, Tamara Frazier & Theresa Rakocy, *Intel's New Diversity Standards for Outside Counsel*, THE NAT'L L. REV., (Feb. 1, 2020), https://www.natlawreview.com/article/intel-s-new-diversity-standards-outside-counsel.

[207] *See* Manoj J. Kumar, *Perfect Competition: Meaning, Assumptions and Other Details*, ECON. DISCUSSION, https://www.economicsdiscussion.net/perfect-competition/perfect-competition-meaning-assumptions-and-other-details/7150 (last visited Aug. 2, 2021).

[208] *See, e.g.*, Debra Cassens Weiss, *Suit against Jones Day alleges archaic Gender Roles and Photo Altering*, ABA J., (Aug. 15, 2019, 1:51 PM), https://www.abajournal.com/news/article/new-suit-says-jones-day-follows-archaic-gender-roles-in-parental-leave-doctors-bio-photos-of-females.

[209] Jacqueline Bell, *These Firms have the most Women in Equity Partnerships*, LAW360, (Oct. 19, 2020, 8:02 PM), https://www.law360.com/insurance/articles/1310926/these-firms-have-the-most-women-in-equity-partnerships (Jones Day at 27.2 percent of women in equity partnerships).

higher score if its offers were similar. In addition, the firm's scores would likely impact the firm's public relations. If regularly given poor scores, the firm could not deny a discriminatory culture. All these components would impact the firm's ability to hire the most qualified candidates. Thus, by continually permitting discrimination in their workplace, employers would hinder their own ability to hire the most qualified candidates.

2. The Firm's Bottom-Line Will Be Affected if Reports Show Discriminatory Practices

A firm's lack of diversity may also affect its bottom line. This has been at issue since Charles Morgan, then general counsel of BellSouth Corporation, got a few of his colleagues to sign "a statement promising to consider law firm diversity when hiring their outside counsel" in 1999.[210] In more recent years, more large clients began holding law firms accountable for their lack of diversity.[211] Legal departments for these big clients have since heightened their requirements, and many of these clients ask for supporting data showing that not only are firms incorporating more diversity in their teams, but also that those diverse individuals are put in leadership positions.[212] In 2017, Facebook announced that it would require outside counsel's teams to be comprised of at least 33% women and ethnic minorities.[213] In addition, Facebook announced outside counsel must show they "actively identify and create clear and measurable leadership opportunities for women and minorities."[214] Facebook further clarified that such opportunities included "serving as relationship managers and representing Facebook in the courtroom."[215]

210 Stephanie Russell-Kraft, *Companies Use Diversity Data to Hold Law Firms Accountable*, BLOOMBERG L. (Apr. 3, 2017), https://news.bloomberglaw.com/business-and-practice/companies-use-diversity-data-to-hold-law-firms-accountable.

211 *Id.*

212 *Id.*

213 Ellen Rosen, *Facebook Pushes Outside Law Firms to Become More Diverse*, N.Y. TIMES (Apr. 2, 2017), https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html?ref=dealbook&_r=0&login=email&auth=login-email&login=email&auth=login-email.

214 *Id.*

215 *Id.*

Numerous other big clients[216] articulated similar, or even more stringent, policies.[217] Some policies include "diversity holdback[s]."[218] Hewlett-Packard's policy incorporates a 10% "diversity holdback" on fees.[219] These "diversity holdbacks" allow a big client to retain a set percent—10% in Hewlett-Packard's case—if the firm does not meet the client's diversity requirements.[220] As Kim Rivera, general counsel for HP, stated, "One of the challenges in the legal profession is that, despite all the focus, the lack of diversity is a stubborn and persistent problem.[221] We think we can help if we can be clear and unambiguous and hold firms financially accountable."[222] As more big clients incorporate these programs, firms will have to decide whether to lose a percentage of their profits, potentially lose the client, or instead hire and assign leadership roles to more women and ethnic minorities.

In addition, this public information could be used in future litigation involving Title VII cases. Title VII plaintiffs face many challenges,[223] so the ability to show a jury that a firm has a history of discrimination could help the plaintiff's case. A jury would more likely believe a plaintiff claiming sex discrimination from a firm that has a very poor report. Moreover, the reports could increase settlement values for both the employee and the employer. If an employer knew that its low score would hurt them in court, it would be more likely to settle the case but also would likely offer the plaintiff more, thus benefitting the plaintiff. This also aligns with enacting Congress's desire for Title VII cases to settle quickly.[224]

By permitting discrimination in its workplace and subsequently receiving a poor score, the employer's bottom line would be impacted in two main ways. First, the employer's bottom line would be impacted by big clients opting for other firms or withholding funds. Second, higher settlement rates and jury verdicts would also affect the employer's bottom line.

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216 *Id.* (citing Hewlett-Packard, MetLife, and Verizon as examples of this trend).
217 *Id.*
218 *Id.*
219 Rosen, *supra* note 213.
220 Russell-Kraft, *supra* note 210.
221 Rosen, *supra* note 213.
222 *Id.*
223 *See* discussion *supra* Background Section C.2.
224 H.R. REP. NO. 88-914 (1963), as reported in 2 U.S.C.C.A.N. 2391, 2515-16 (1964).

CONCLUSION

The legal field has, in many ways, moved past the overt sexism that was commonplace for the majority of the United States' history. When Congress enacted Title VII of the Civil Rights Act of 1964, the amendment to include sex as a protected class was nearly not included, yet it became the law and has provided women a significant source of combatting discrimination in the workplace. Despite the achievements that opened the door for women to enter the legal field, the legal field still suffers from implicit biases. These implicit biases are readily apparent from the glaring discrepancies between men and women in the highest positions in the legal field. Although many attempts have been made and potential solutions proposed, none have proven effective in solving these problems. However, by broadening the power of the EEOC to provide equity and fairness reports, conduct semi-annual inspections, and require firms to provide such reports to their applicants, the legal field will begin to catch up, and even surpass, other professional fields in achieving gender equality.