

# SANCTIONING SEX

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#### INTRODUCTION

When Britain's first female Prime Minister, Margaret Thatcher, took office in 1979, the male-dominated opposition party popularized the sexist slogan "Ditch the B\*tch!," and an MP purportedly nicknamed her "Atilla the Hen."<sup>1</sup> Implying that Thatcher's assertive leadership style made her more masculine than stereotypical women, a male Palestinian political leader insultingly referred to Thatcher as "The Iron Man."<sup>2</sup>

The reception of women<sup>3</sup> leaders was no more enlightened nearly four decades later when Hillary Clinton ran for President in 2016. To the contrary, obnoxious hecklers chanted "Iron my shirt" while Clinton spoke at a rally and held large signs saying the same.<sup>4</sup> A TV commentator labeled Clinton "a 'stereotypical b\*tch' who would drive

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1. Dan Amira, *10 Very Sexist Things People Said To or About Margaret Thatcher*, N.Y. MAG. (Apr. 8, 2013, 12:27 PM), <http://nymag.com/daily/intelligencer/2013/04/sexist-margaret-thatcher-quotes-sexism.html> [<https://perma.cc/V2EF-RCLX>].

2. *Id.*

3. The Author acknowledges that the intersection of sex with other aspects of identity, such as sexual orientation, disability, gender identity, or race, impacts a woman's experience and may exacerbate the discrimination and sidelining she endures. However, a discussion of intersectionality and other aspects of identity generally exceeds the narrow scope of the Article.

4. Sarah Wheaton, *Iron my Shirt*, N.Y. TIMES: THE CAUCUS (Jan. 7, 2008, 7:49 PM), <http://thecaucus.blogs.nytimes.com/2008/01/07/iron-my-shirt/comment-page-4/> [<https://perma.cc/YCS7-KB6V>].

all men crazy . . . [with] her ‘nagging.’<sup>5</sup> That same year, Republican vice presidential nominee, Sarah Palin, was dubbed a “VPILF,”<sup>6</sup> and she was asked on camera by a major news outlet whether her breasts were real.<sup>7</sup> On his popular nightly show, comedian David Letterman suggested that Palin’s primary achievement during a trip to New York involved buying “makeup from Bloomingdale’s to update her slutty flight attendant look.”<sup>8</sup>

The situation is equally, if not more, dire for other female leaders around the world. For example, when President Ursula von der Leyen, the first woman to lead the European Union, took office, she was asked whether she would be able to manage her duties while also raising her seven children—a question she felt would never have been addressed to a man.<sup>9</sup> Across the ocean, the macho media decried Argentinian President Christina Fernandez de Krichner as a “b\*tch,” “bimbo,” and even “botox Evita,” “lampoon[ing] [her] . . . for buying Christian Louboutin shoes during a trade trip to Paris.”<sup>10</sup> Australia’s first female Prime Minister, Julia Gillard, was called a “nonproductive old cow,” and sexualized cartoons featuring her were circulated on social media.<sup>11</sup> Gillard’s critics used sexist slogans like “[D]itch the witch” and “[D]itch the b\*tch.”<sup>12</sup> They even featured

5. Morvareed Z. Salehpour, *Election 2008: Sexism Edition: The Problem of Sex Stereotyping*, 19 UCLA WOMEN’S L.J. 117, 130 (2012).

6. *Id.* at 137–38.

7. Aaron Parsley, *Sarah Palin Responds to ‘Boob-gate,’* PEOPLE (June 12, 2010, 10:45 AM), <https://people.com/celebrity/sarah-palin-responds-to-boob-gate/>.

8. Kim Conte, *Top 50 Most Sexist Quotes on the Campaign Trail*, NAME IT CHANGE IT, <http://www.nameitchangeit.org/blog/entry/top-50-most-sexist-quotes-on-the-campaign-trail/> [<https://perma.cc/LF9A-PN XR>] (last visited Sept. 18, 2023).

9. Naina Bajekal, *Inside the Mind of the Most Powerful Woman in Europe*, TIME (June 9, 2022, 5:00 AM), <https://time.com/6185490/ursula-von-der-leyen-interview/>.

10. David Osborne, *Cristina Fernandez de Kirchner: The Iron Lady of the Malvinas*, INDEP. (Feb. 11, 2012, 1:00 PM), <http://www.independent.co.uk/news/people/profiles/cristina-fernandez-de-kirchner-the-iron-lady-of-the-malvinas-6715348.html>.

11. Damien Murphy, *Julia Gillard Tells BBC Sexist Attitudes She Encountered as PM Weren’t ‘Something Australian,’* SYDNEY MORNING HERALD (Feb. 26, 2014, 3:25 PM), <http://www.smh.com.au/federal-politics/political-news/julia-gillard-tells-bbc-sexist-attitudes-she-encountered-as-pm-werent-something-australian-20140226-33hry.html>; Kathy Marks, *Julia Gillard: Australia’s First Female Prime Minister Reveals the ‘Sexism and Misogyny’ She Faced on Her Rise to the Top*, INDEP. (Oct. 16, 2014, 9:26 AM), <http://www.independent.co.uk/news/world/australasia/julia-gillard-australias-first-female-prime-minister-reveals-the-sexism-and-misogyny-she-faced-on-9796953.html>.

12. Laura Bates, *Julia Gillard’s Views on Sexism in Politics are About Every Woman in Every Job*, GUARDIAN (June 16, 2015, 12:54 AM),

“Julia Gillard Kentucky Fried Quail” on the menu at a fundraiser.<sup>13</sup> The dish was described as having “small breasts, huge thighs and a big red box.”<sup>14</sup>

Across time, place, and industry, leaders who are women have often been sanctioned in both subtle and not-so-subtle ways *because* of their sex. But why? Part I of this Article explores the historical background of discrimination against women, particularly those who defy sex stereotypes. Part II investigates the myriad ways these women are sanctioned, often with the hope of making their leadership and employment experiences so intolerable that they either resign, fail, or both. Part III elucidates the possible reasons why women are sanctioned because of their sex. Part IV discusses the ultimate results of these sex-based sanctions, while Part V draws upon lessons from successful female leaders to offer possible solutions to counter them.

### I. ALL MEN ARE CREATED EQUAL

Despite America’s purported commitment to freedom and egalitarianism, our Declaration of Independence proclaims, “All men are created equal,” explicitly excluding women from its embrace.<sup>15</sup> As their name implies, the “founding fathers” were all men.

Thus, for centuries women were expected to thrive in a world arguably made *by men for men*. Doing so was no easy task, particularly since the law often subjugated women to the needs and designs of their fathers and husbands. Absent exceptional circumstances, colonial marriage and property laws known as “coverture” denied a married woman the right to own property in her own name or keep her wages.<sup>16</sup> Nor could she sue in court to redress a wrong.<sup>17</sup> A married woman could not enter into a contract or serve

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<http://www.theguardian.com/lifeandstyle/womens-blog/2015/jun/16/julia-gillards-views-on-sexism-in-politics-are-about-every-woman-in-every-job> [<https://perma.cc/4TG9-PNNG>].

13. Emine Saner, *Top 10 Sexist Moments in Politics: Julia Gillard, Hillary Clinton and More*, GUARDIAN (June 14, 2013, 1:14 PM), <http://www.theguardian.com/politics/2013/jun/14/top-10-sexist-moments-politics>.

14. Bridie Jabour, *Julia Gillard's 'Small Breasts' Served up on Liberal Party Dinner Menu*, GUARDIAN (June 11, 2013, 9:18 PM), <https://www.theguardian.com/world/2013/jun/12/gillard-menu-sexist-liberal-dinner>.

15. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). *But see Creating the Declaration of Independence*, LIBRARY OF CONGRESS, <https://www.loc.gov/exhibits/creating-the-united-states/interactives/declaration-of-independence/equal/index.html> (last visited June 30, 2023).

16. *Women and the Law*, HARV. BUS. SCH., [http://www.library.hbs.edu/hc/wes/collections/women\\_law/](http://www.library.hbs.edu/hc/wes/collections/women_law/) (last visited May 12, 2023).

17. *Id.*

as a guardian to her children in the event of divorce, which trapped women in unhappy, abusive marriages.<sup>18</sup> And the situation was far more dire for enslaved women who were sold, traded, raped, and abused without legal rights or redress.

The egregious inequality women endured is clearly illustrated in the Declaration of Sentiments, a monumental document created and signed at the Seneca Falls Convention of 1848 and deliberately modeled after the Declaration of Independence.<sup>19</sup> It asserts, in pertinent part:

We hold these truths to be self-evident; that all men and women are created equal . . . . The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her . . . . He has made her, if married, in the eye of the law, civilly dead . . . . He has endeavored, in every way that he could to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.<sup>20</sup>

The Declaration of Sentiments sets forth a long list of fundamental rights historically denied to women because of their sex from the right to vote and keep their wages to the right to work in certain occupations, to publicly serve in the Church, and to attend college.<sup>21</sup> Perhaps not surprisingly, male-run newspapers across the country mocked the Declaration and its signatories with hateful political cartoons and described women's rights as a "monstrous injury to all mankind."<sup>22</sup> Public shaming of the mostly female signatories was so intense that some abandoned the movement or even joined the opposition.<sup>23</sup> Yet others mobilized.

In fact, it was their firsthand experience with sex discrimination that catalyzed Elizabeth Cady Stanton and Lucretia Mott to host the Seneca Falls Convention. Years earlier, the two women had been outraged when male abolitionists barred them from speaking or

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18. *Id.*

19. Carrie Cokely, *Declaration of Sentiments*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/event/Declaration-of-Sentiments> (last visited Sept. 18, 2023).

20. DECLARATION OF SENTIMENTS para 2–3 (1848); *see also Declaration of Sentiments*, NAT'L PARK SERV., (Feb. 7, 2023), <https://www.nps.gov/wori/learn/historyculture/declaration-of-sentiments.htm>.

21. DECLARATION OF SENTIMENTS para. 3 (1848).

22. Hilary Clinton, *Remarks by the First Lady Hillary Rodham Clinton*, 150th Anniversary of the First Women's Rights Convention, Seneca Falls, New York (July 16, 1998), [https://clintonwhitehouse4.archives.gov/WH/EOP/First\\_Lady/html/generalspeeches/1998/19980804-3206.html](https://clintonwhitehouse4.archives.gov/WH/EOP/First_Lady/html/generalspeeches/1998/19980804-3206.html); *see also Declaration of Sentiments*, *supra* note 21.

23. Cokely, *supra* note 19.

voting during the World Anti-Slavery Convention of 1840 and required them to sit separately from the men behind a railed enclosure.<sup>24</sup> This demoralizing treatment spurred them to later form an alliance to fight for women's rights, particularly women's suffrage. They knew that even the staunchest advocates of gender<sup>25</sup> equality would be largely powerless to effect real change without the ability to vote and otherwise participate in the political process.

But the path to political enfranchisement was not easy. Stanton, Mott, and many of their fellow suffragists were devastated when they were asked to support the Fourteenth Amendment's extension of the right to vote to Black men, but not women, especially given their longtime dedication to abolition and universal suffrage.<sup>26</sup> Causes once viewed as compatible were now pitted against one another; while the Republican party advocated for Black Suffrage and against Woman Suffrage, the Democrats took the opposite view.<sup>27</sup> Perpetuating harmful but pervasive sex stereotypes, antisuffragist propaganda cast suffragettes as either "loose" women willing to do almost anything to garner support for their cause, including the performance of sexual favors, or alternatively, as masculine, man-hating "spinsters" who wanted to seize control from men or even force men to marry them.<sup>28</sup> Not surprisingly, it would take another fifty years until women were granted the right to vote in federal elections via the Nineteenth Amendment.<sup>29</sup>

While that groundbreaking achievement opened a sea of possibilities, progress toward gender equality remained slow and steady for the next few decades. Colleges and professional schools increasingly opened their doors to women, at least in small numbers.<sup>30</sup> During World War II, factories and other male-dominated industries had no choice but to hire women for the first time, and thousands of women, under the banner of patriotic fervor, flocked to farms, factories, classrooms, and offices like never before. When the soldiers came home, many of these working women did not want to leave. For the first time, they had proven to themselves and their

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24. JUDITH WELLMAN, *THE ROAD TO SENECA FALLS: ELIZABETH CADY STANTON AND THE FIRST WOMAN'S RIGHTS CONVENTION* 59–61 (2004).

25. As used herein, the terms "sex" and "gender" are generally used interchangeably. Gender identity is a distinct concept that generally exceeds the scope of the Article.

26. ELLEN CAROL DUBOIS, *FEMINISM & SUFFRAGE* 23, 77, 103 (1978).

27. *Id.* at 76–77.

28. ABIGAIL PERDUE, *EXPLORING DISCRIMINATION: SEX, DISABILITY, AND GENETIC INFORMATION* 91 (2021).

29. U.S. CONST. amend. XIX.

30. Genevieve Carlton, *A History of Women in Higher Education*, BESTCOLLEGES (Mar. 20, 2023), <https://www.bestcolleges.com/news/analysis/2021/03/21/history-women-higher-education/>.

communities that they were just as capable and competent as their male counterparts.

Anti-discrimination legislation soon followed. In 1963, the Equal Pay Act was enacted to prohibit the unequal pay of men and women performing “equal” work.<sup>31</sup> A year later, Title VII of the Civil Rights of 1964 barred sex discrimination in the terms and conditions of employment.<sup>32</sup> But the fight for gender equality gained real momentum during the Women’s Movement of the 1960s and 1970s. “Women’s Libbers,” as they were often called, advocated for passage of the Equal Rights Amendment to ensure equal protection on the basis of sex.<sup>33</sup> They held sit-ins, peaceful protests, and large rallies across the country, calling attention to women’s issues from sexual assault and domestic abuse to reproductive rights and equal employment opportunities. For example, on March 18, 1970, activists held an eleven-hour sit-in inside the office of the male Editor-in-Chief (EIC) of the Ladies Home Journal to protest the magazine’s promulgation of the “happy homemaker” sex stereotype as well as its use of overtly sexist ads.<sup>34</sup> In response, the EIC granted them eight pages in an upcoming issue to cover their issues of interest.<sup>35</sup> Yet, according to Women’s Movement Leader Gloria Steinem, the “predominant reaction to the women’s movement [at least initially] was ridicule.”<sup>36</sup>

Interestingly, some of the staunchest opponents of the Women’s Movement and Equal Rights Amendment were other women. For instance, conservative activist Phyllis Schlafly accused the movement of crafting a harmful narrative of women as victims.<sup>37</sup> A Harvard-educated mother of three, Schlafly and her supporters stirred up opposition to the Equal Rights Amendment by arguing that it would lead to the mandatory inclusion of women in the military draft, the elimination of single-sex bathrooms and other sex-segregated spaces, and the end of chivalry.<sup>38</sup> Ultimately, the Equal Rights Amendment fell three states short of ratification and to date, has never been added to the U.S. Constitution.<sup>39</sup>

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31. 29 U.S.C. § 206(d)(1); 29 C.F.R. § 1620 (2023) (“equal” does not mean “identical”).

32. 42 U.S.C. § 2000e-2.

33. Ryan Bergeron, *The Seventies: Feminism Makes Waves*, CNN (Aug. 17, 2015, 12:30 PM), <https://www.cnn.com/2015/07/22/living/the-seventies-feminism-womens-lib/index.html>.

34. NOT DONE: WOMEN REMAKING AMERICA (PBS television broadcast Feb. 26, 2013).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. Bill Chappell, *Virginia Ratifies the Equal Rights Amendment, Decades after the Deadline*, NPR (Jan. 15, 2020, 3:36 PM), <https://www.npr.org/2020/01/15/796754345/virginia-ratifies-the-equal-rights->

Yet the Equal Rights Movement gained traction in other ways. Perhaps taking note of the changed sentiment toward gender equality, advocates for women's rights secured landmark victories at the U.S. Supreme Court that resulted in precedent holding that the Fourteenth Amendment's Equal Protection Clause prohibits discrimination on the basis of sex.<sup>40</sup> Passage of Title IX of the Education Amendment Acts of 1972 extended prohibitions against sex discrimination to federally funded educational programs<sup>41</sup> and prompted the explosive growth of women's sports.<sup>42</sup> The Pregnancy Discrimination Act of 1978 prohibited covered employers from discriminating against a woman because of pregnancy, childbirth, or related issues, such as the use of maternity leave.<sup>43</sup> Taken together, these advances in Congress and the courts opened doors to women that had been closed for centuries.

And women seized those opportunities. Despite decades of political disenfranchisement, approximately 393 women served in Congress between 1917 and 2022.<sup>44</sup> In fact, there are roughly 153 women in the 118th United States Congress—an astonishing increase from the past.<sup>45</sup> Kamala Harris currently serves as our nation's first female vice president.

These remarkable gains are just as evident in the courts and classrooms as they are in Congress. For example, about one-third of active federal judges are female,<sup>46</sup> and four currently reside on the

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amendment-decades-after-deadline; Tara Law, *Virginia Just Became the 38th State to Pass the Equal Rights Amendment: Here's What to Know about the History of the ERA*, TIME (Jan. 15, 2020, 4:41 PM), <https://time.com/5657997/equal-rights-amendment-history/>.

40. *E.g.*, *Weinberger v. Wisenfeld*, 420 U.S. 636 (1975); *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

41. 20 U.S.C. §1681–§1688.

42. *E.g.*, Sarah Pruitt, *How Title IX Transformed Women's Sports*, HISTORY (Aug. 16, 2023), <https://www.history.com/news/title-nine-womens-sports>.

43. 42 U.S.C. §§ 2000e et seq. (amending Title VII).

44. WOMEN IN CONGRESS 1917–2006, U.S. HOUSE OF REPRESENTATIVES (2006), <https://www.govinfo.gov/content/pkg/GPO-CDOC-108hdoc223/pdf/GPO-CDOC-108hdoc223.pdf>; *Women in the U.S. Congress 2022*, RUTGERS EAGLETON INSTITUTE OF POLITICS (last accessed September 13, 2023), <https://cawp.rutgers.edu/facts/levels-office/congress/women-us-congress-2022> (“3.2% of all members of Congress to date have been women.”).

45. Rebecca Leppert & Drew Desilver, *118th Congress has a record number of women*, PEW RSCH. CTR. (Jan. 3, 2023), <https://www.pewresearch.org/short-reads/2023/01/03/118th-congress-has-a-record-number-of-women/>; *History of Women in the U.S. Congress*, Center for American Women and Politics, Rutgers Eagleton Institute of Politics (last accessed September 13, 2023), <https://cawp.rutgers.edu/facts/levels-office/congress/history-women-us-congress>.

46. *Women's History Month*, UNITED STATES COURTS, <https://www.uscourts.gov/about-federal-courts/educational-resources/annual-observances/womens-history-month> (last visited Sept. 18, 2023).

U.S. Supreme Court.<sup>47</sup> As to higher education, 52.8 percent of all college deans are women,<sup>48</sup> and in 2016, women entering law school outnumbered men for the very first time.<sup>49</sup> “[A]s of July 1, 2022, 43 percent of all law school deans were women.”<sup>50</sup> As to Corporate America, fifty-two women ran Fortune 500 businesses as of 2023, which is an all-time high.<sup>51</sup> Stanton, Mott, Sojourner Truth, and other advocates of women’s rights would likely be astonished and elated at the tremendous progress toward equality women have made in the last two centuries.

But the fight for equality is not over. Despite these gains, the number of women in Congress, the courts, classrooms, and corporations still does not reflect the number of women who comprise the U.S. population. According to The Representation Project, “[a]t this rate, women may not achieve parity for 500 years.”<sup>52</sup> Similarly, at the state level, the share of female legislators has more than quadrupled from 4.5 percent in 1971 to 24.2 percent in 2015 but still does not accurately reflect the proportion of women in the population.<sup>53</sup> As of August 2023, the global average of women in national assemblies was only 26.7 percent.<sup>54</sup>

Indeed, the underrepresentation of women dramatically increases the further up the ranks you go; some have dubbed this phenomenon the “leaky pipeline” of female leadership.<sup>55</sup> By way of

47. *About the Court*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/about/justices.aspx#:~:text=Nine%20Justices%20make%20up%20the,Justice%20and%20eight%20Associate%20Justices> (last visited Sept. 18, 2023).

48. College Dean Demographics and Statistics in the US, ZIPPPIA, <https://www.zippia.com/college-dean-jobs/demographics/> (last visited Sept. 18, 2023).

49. Staci Zaretsky, *Women Are Dominating When It Comes To Law School Enrollment*, ABOVE THE LAW (July 14, 2022, 1:13 PM), <https://abovethelaw.com/2022/07/women-are-dominating-when-it-comes-to-law-school-enrollment/>.

50. *Women in the Legal Profession*, AM. BAR ASS’N, <https://www.abalegalprofile.com/women.php> (last visited Sept. 18, 2023).

51. Sky Ariella, *Women in Leadership Statistics [2023]: Facts On The Gender Gap In Corporate And Political Leadership*, ZIPPPIA (June 8, 2023), <https://www.zippia.com/advice/women-in-leadership-statistics/>.

52. *Miss Representation Trailer*, THE REPRESENTATION PROJECT, <http://thereproject.org/films/miss-representation/> (last visited Sept. 25, 2023).

53. Wendy Wang, *Chapter 1: Women in Leadership*, 11, 11–13 PEW RSCH. CTR. (Jan. 14, 2015), <https://perma.cc/Y9P9-L8WL>; *Women in U.S. Congress 2015*, RUTGERS EAGLETON INST. OF POL., <https://perma.cc/MG99-JEF8> (last visited Sept. 19, 2023); *American Fact Finder*, U.S. CENSUS BUREAU, <https://perma.cc/2WNP-RAHS> (last visited Sept. 19, 2023) [hereinafter *Women in U.S. Congress*].

54. *Global and Regional Averages of Women in National Parliaments*, IPU PARLINE, <https://data.ipu.org/women-averages> (last visited Sept. 19, 2023).

55. RENEE KNAKE JEFFERSON & HANNAH BRENNER JOHNSON, SHORTLISTED: WOMEN IN THE SHADOWS OF THE SUPREME COURT 11 (2020) (“[L]eaking pipeline

illustration, America has never had a female President. Women held only 8.8 percent of leadership positions at Fortune 500 companies in 2022 and 10.4 percent in 2023.<sup>56</sup> Only 22 percent of all equity partners in law firms were female in 2020, according to the National Association of Women Lawyers—but at least that was an increase from 2012 when it was a paltry 15 percent.<sup>57</sup> But that number does not reflect the number of women entering the legal profession. For example, in 2021, women constituted a majority of law students (55.3 percent), and there have been nearly equal numbers of male and female law students for the past two decades.<sup>58</sup> That contrasts dramatically to the same statistics in 1963 when “only 4 percent of first-year law students were female.”<sup>59</sup> Despite the nearly equal numbers of men and women entering law school and the profession, data from 2020 demonstrates that, by the middle of their careers, only 12 percent of women are managing partners, 28 percent of governance committee members, and 27 percent of practice group leaders.<sup>60</sup> Women are also less likely to become an equity partner (22 percent) versus non-equity partner (32 percent).<sup>61</sup> In fact, only 6 percent of managing partners at the nation’s largest law firms are female.<sup>62</sup> Furthermore, during the 2008-2009 school year, women held only 29 percent of highly coveted tenure-track and tenured faculty positions.<sup>63</sup>

Women also continue to face barriers to leadership in Corporate America. For example, as of 2014, only 5 percent of the CEOs of Fortune 500 companies were female.<sup>64</sup> As of 2013, about 17 percent of board members of Fortune 500 companies were women, and women held 52.2 percent of managerial and professional occupations in America.<sup>65</sup> According to a 2014 survey of U.S. businesses, “only 22

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. . . the idea that women enter the profession in numbers equal to men but do not advance into leadership positions at the same rate, if at all.”)

56. Ariella, *supra* note 51; Sky Ariella, *25 Women in Leadership Statistics [2023]: Facts on the Gender Gap in Corporate and Political Leadership*, ZIPPPIA (June 8, 2023), <https://www.zippia.com/advice/women-in-leadership-statistics/>.

57. *Women in the Legal Profession*, *supra* note 50.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Justin D. Levinson & Danielle Young, *Implicit Gender Bias in the Legal Profession: An Empirical Study*, 18 DUKE J. GENDER L. & POL’Y 1, 4 (2010).

63. *Id.* at 5.

64. Wang, *supra* note 53, at 13; Justin Wolfers, *Fewer Women Run Big Companies than Men Named John*, N.Y. TIMES (Mar. 2, 2015), <https://www.nytimes.com/2015/03/03/upshot/fewer-women-run-big-companies-than-men-named-john.html> (“Fewer large companies are run by women than by men named John . . .”).

65. Wang, *supra* note 53, at 14.

percent of senior managers were women.”<sup>66</sup> Furthermore, by some estimates, “women hold only 3 percent of clout positions in telecommunications, entertainment, publishing, and advertising.”<sup>67</sup> Clearly, women have made significant gains but still lag behind men in acquiring senior leadership positions.

The statistics paint a troubling picture of a leaky leadership pipeline for women. In other words, while more men advance to leadership roles, more women either remain stagnant at lower, less powerful levels of the hierarchy or leave their companies (and perhaps the profession) altogether. Although women increasingly enter previously male-dominated professions like law and politics, something happens along the way that prevents many of them from ultimately reaching the pinnacles of their fields and attaining leadership roles. But what?

## II. SANCTIONING SEX

This Article posits that sex-based sanctions, specifically sexual harassment, gender sidelining, decision-making tainted by sex stereotypes, and pay inequity drive women out of the workplace and discourage them from pursuing or excelling in leadership roles.

### A. Overt Discrimination

As explained above, during the first two centuries of our nation’s existence, overt sex discrimination was used to bar women’s entry into the legal profession and many other spheres. In fact, the legal system was used to prohibit women from voting, owning property, attending college, entering many professions, and more.<sup>68</sup> Even after the Equal Protection Clause was ratified in 1868, its plain language barring any state from denying “equal protection of the laws” to “any person” was consistently interpreted for more than 100 years to *not* apply to women.<sup>69</sup> During that time, laws were upheld that barred married women from practicing law,<sup>70</sup> excluded women from serving on juries,<sup>71</sup> limited women’s work hours,<sup>72</sup> and restricted their employment opportunities.<sup>73</sup>

66. *Id.*

67. MISS REPRESENTATION (Girls’ Club Entertainment Jan. 20, 2011).

68. DECLARATION OF SENTIMENTS, *supra* note 21, at para 3.

69. U.S. CONST. amend. XIV, § 1; *see also* *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872); *Goesaert v. Cleary*, 335 U.S. 464, 465–66 (1948).

70. *Bradwell*, 83 U.S. at 133.

71. *Glasser v. U.S.*, 315 U.S. 60 (1942) (deciding that all-male juries were permissible); *see also* *Hoyt v. Florida*, 368 U.S. 57 (1961) (upholding Florida’s opt-in policy for female jurors).

72. *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding an Oregon law that limited women to working ten hours per day in factories).

73. *E.g.*, *Goesaert*, 335 U.S. at 467 (upholding a Michigan law, which prohibited women from being licensed as a bartender in all cities having a

By way of illustration, Myra Bradwell was married to an attorney and often assisted her husband with his legal research and writing.<sup>74</sup> She ran a newspaper and became increasingly active in the fight for women's rights, even helping to draft a statute that would expand rights for women.<sup>75</sup> Her aptitude caught the attention of a judge who recommended that she become an attorney.<sup>76</sup> Due to his encouragement, she applied for a license to practice law in Illinois.<sup>77</sup> Although she was extremely qualified, Illinois rejected her application solely because she was a married woman and as such, could not be contractually bound under Illinois law.<sup>78</sup> Bradwell challenged the decision all the way to the U.S. Supreme Court, hoping to find relief under the Privileges and Immunities Clause of the newly ratified Fourteenth Amendment.<sup>79</sup> In a short affirmance, the Supreme Court upheld the denial of her application, reasoning that licensure to practice law was not a "privilege" of U.S. citizenship.<sup>80</sup> Justice Bradley concurred, adding:

The claim that under the Fourteenth Amendment of the Constitution . . . the law of Illinois, or the common law prevailing in that state, can no longer be set up as a barrier against the right of females to pursue any lawful employment for a livelihood (the practice of law included), assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life. It certainly cannot be affirmed . . . that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman . . . . The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life . . . the domestic sphere . . . properly belongs to the domain and functions of womanhood. The harmony . . . [of] the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband . . . .

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population of 50,000 or more unless their father or husband owned the establishment).

74. *Myra Bradwell*, WOMEN HIST. BLOG, <https://www.womenhistoryblog.com/2013/07/myra-bradwell.html> (last visited Sept. 19, 2023).

75. *In Re Lady Lawyers: The Rise of Women Attorneys and the Supreme Court*, SUP. CT., <https://www.supremecourt.gov/visiting/exhibitions/LadyLawyers/Section1.aspx> (last visited July 12, 2023).

76. *Myra Bradwell*, *supra* note 74.

77. *Id.*

78. *Bradwell v. Illinois*, 83 U.S. 130, 131 (1872).

79. *Id.* at 138.

80. *Id.* at 139.

The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother . . . .<sup>81</sup>

After women finally attained the right to vote in 1920, however, things slowly began to change. Legislation like the Equal Pay Act, Title VII, and Title IX, as well as evolving interpretations of the Fourteenth Amendment's Equal Protection Clause, outlawed blatant discrimination based on sex, forcing sex discrimination to assume new, more clandestine forms that were equally, if not, more pervasive than their overt predecessors.<sup>82</sup>

### B. *Sexual Harassment*

Sexual harassment is one such tool, which is frequently used to sanction sex. In fact, an estimated one in three women have experienced sexual harassment as compared to 15 percent of men.<sup>83</sup> A recent American Bar Association (ABA) study revealed that 75 percent of female attorney respondents reported experiencing “demeaning comments, stories, or jokes” at work because of their sex.<sup>84</sup> In 2018, at the height of the #MeToo Movement, the Equal Employment Opportunity Commission (EEOC) received over seven thousand charges of discrimination alleging sexual harassment.<sup>85</sup> Between 2018 and 2021, a whopping 78.2 percent of the charges alleging sexual harassment were filed by women.<sup>86</sup> In 2021, that number had fallen to 5,581,<sup>87</sup> perhaps due to the fact that so many employees had moved to remote work during the pandemic, which, reduced the opportunity for sexual harassment. These numbers, however, are likely an underestimate of the actual pervasiveness of sexual harassment since victims are often too afraid to report it,<sup>88</sup> and rates will likely increase as workers return to the workplace post-pandemic.

There are two primary forms of sexual harassment: quid pro quo and hostile environment. Quid pro quo sexual harassment involves inappropriate and unwelcome sexual conduct, such as having sexual intercourse with a supervisor, that is made, either implicitly or explicitly, a term or condition of employment. Hostile environment

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81. *Id.* at 140–41 (1872) (Bradley, J., concurring). Justice Swayne and Justice Field concurred in that opinion. The Chief Justice dissented, but authored no dissenting opinion.

82. *Women in the Legal Profession*, *supra* note 50.

83. ThinkProgress, *How Society Silences Victims of Sexual Harassment*, YOUTUBE (Dec. 4, 2017), [www.youtube.com/watch?v=p4BHDnggAVI](http://www.youtube.com/watch?v=p4BHDnggAVI).

84. *Women in the Legal Profession*, *supra* note 50.

85. EQUAL EMP. OPPORTUNITY COMM'N, EEOC DATA HIGHLIGHT 1 (Apr. 2022), <https://www.eeoc.gov/data/sexual-harassment-our-nations-workplaces>.

86. *Id.* at 2.

87. *Id.* at 1.

88. Perdue, *supra* note 28, at 191.

harassment, which is probably more common and certainly more difficult to litigate, refers to unwelcome conduct based on sex that has the purpose or effect of creating an intimidating, hostile work environment.<sup>89</sup> Various kinds of behavior could create a hostile work environment from making inappropriate comments about a person's appearance or sex life to circulating bawdy cartoons or dirty jokes in the workplace.<sup>90</sup> Claims need not involve unwelcome physical touching or an adverse employment action to support a hostile environment claim.<sup>91</sup> Nor must they be based on sexual attraction.<sup>92</sup> Furthermore, same-sex sexual harassment is actionable under Title VII.<sup>93</sup>

Because sex was added to Title VII as a protected trait in the eleventh hour, scant legislative history existed to determine whether Title VII's drafters intended it to bar sexual harassment.<sup>94</sup> Thus, for the first two decades of Title VII's existence, the statute primarily barred explicit sex discrimination, such as refusing to hire a woman solely because of her sex. But Title VII did little or nothing to protect women from sexual harassment once there, and sexual harassment was and still is used, consciously or not, as a tool to drive women out of the workplace and discourage them from attaining positions of authority, especially over men.

That changed in 1986 when the U.S. Supreme Court held that hostile environment sexual harassment violated Title VII.<sup>95</sup> Plaintiff Mechelle Vinson, a bank teller, accused her former male supervisor, the bank's vice president, of making explicit and unwelcome sexual overtures toward her and even forcing her to have intercourse with him throughout her employment, which he denied.<sup>96</sup> The Supreme Court clarified that sexual harassment can violate Title VII even if it does not involve the grant or denial of economic quid pro quo so long as it "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."<sup>97</sup> It need not result in economic injury to be actionable.<sup>98</sup>

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89. *Id.*

90. *Id.* at 192.

91. *Id.*

92. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998).

93. *Id.* at 82.

94. Rebecca Onion, *The Real Story Behind "Because of Sex"*, SLATE (June 16, 2020, 5:54 PM), <https://slate.com/news-and-politics/2020/06/title-vii-because-of-sex-howard-smith-history.html>; Paul M. Downing, *The Civil Rights Act of 1964: Legislative History; Pro and Con Arguments; Text*, SENATE.GOV (Aug. 1965), [https://www.senate.gov/artandhistory/history/resources/pdf/CivilRights\\_CRSPort1965.pdf](https://www.senate.gov/artandhistory/history/resources/pdf/CivilRights_CRSPort1965.pdf).

95. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 73 (1986).

96. *Id.* at 60.

97. *Id.* at 65.

98. *Id.* at 64.

But plaintiffs alleging hostile environment sexual harassment must meet an onerous evidentiary bar. They must establish by a preponderance of the evidence that the conduct occurred because of sex, that it was unwelcome, that it would be objectively offensive to a reasonable person and was subjectively offensive to the plaintiff, and that it was severe or pervasive.<sup>99</sup> Courts examine the totality of the circumstances, including the social context of the misconduct, to determine whether it rises to the level of actionable sexual harassment.<sup>100</sup> Consequently, many claims that involve egregious instances of inappropriate conduct still fail. For example, in *Leslie v. Cumulus Media, Inc.*, the female plaintiff was purportedly texted an unwelcome picture of a male coworker's erect penis and subjected to other sexually lewd remarks, but the district court concluded that the misconduct was not severe or pervasive enough to create a hostile work environment.<sup>101</sup> Perhaps this explains why in 2021, the EEOC found reasonable cause that sexual harassment had occurred in only 5 percent of the filed charges alleging it.<sup>102</sup>

Victims of sexual harassment also fear retaliation, which decreases reporting. And rightly so, given that one study revealed that 75 percent of employees who spoke out against sexual harassment reported experiencing retaliation.<sup>103</sup> Even when sexual harassment is reported, some companies do little or nothing to redress it, and civil litigation can be protracted, expensive, and stressful. For example, in the late 1980s, Barbara Burns began working as a Safety Director for Smoot Coal.<sup>104</sup> According to Burns, her male boss began stalking and sexually harassing her until she resigned and sued.<sup>105</sup> It took more than thirteen long years for the West Virginia Supreme Court to finally rule in her favor.<sup>106</sup> Because sexual harassment claims can drag on for years and provoke retaliation, many victims of sexual harassment choose to either endure it or address it by removing themselves from the workplace environment rather than reporting their harasser. Their careers come to a standstill, while the harasser advances in the ranks.

As a result, sexual harassment remains a powerful tool used to sanction women, particularly those like Burns who defy sex

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99. *E.g.*, *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993); *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 75 (1998).

100. *Harris*, 510 U.S. at 23.

101. 814 F. Supp. 2d 1326, 1343 (S.D. Ala. 2011).

102. Equal Emp. Opportunity Comm'n, *Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 - FY 2022*, <https://www.eeoc.gov/data/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2021> (last visited Sept. 19, 2023).

103. ThinkProgress, *supra* note 83.

104. NOT DONE: WOMEN REMAKING AMERICA, *supra* note 34.

105. *Id.*

106. *Id.*

stereotypes by pursuing male-dominated professions or leadership roles. For example, a study of cadets at the formerly all-male Virginia Military Institute (VMI) revealed that 73.47 percent of female respondents indicated that they had “experienced discrimination at VMI because of sex” as compared to 22.85 percent of male respondents.<sup>107</sup> 91.22 percent of male respondents said they had “never” experienced sexual harassment at VMI, while 48.98 percent of women said they had.<sup>108</sup> 38.38 percent of male respondents felt that sexual harassment was not a problem on campus compared to 14 percent of female respondents.<sup>109</sup> 59.12 percent of male respondents felt that sexual assault was “no problem” on campus compared to 32 percent of female respondents.<sup>110</sup>

Similarly, a study published in October 2019 by the ABA and ALM Intelligence revealed that out of the 1200 senior lawyers at law firms surveyed, “half of all female lawyers (50 percent) said they [had] experienced unwanted sexual conduct at work, and 1 in 4 women said they avoided reporting sexual harassment due to fear of retaliation. One in six female lawyers (16 percent) said they lost work opportunities as a result of rebuffing sexual advances.”<sup>111</sup>

It is not uncommon for women placed in authority over men to find themselves subjected to resentment, second guessing, and even worse, sexual harassment. For example, in *Cronin v. United Service Stations, Inc.*, the court found that the female plaintiff had been sexually harassed and constructively discharged in violation of Title VII.<sup>112</sup> The plaintiff’s boss had first offered a managerial promotion to John Webster who rejected it.<sup>113</sup> The boss then offered the position of manager to Plaintiff Cathleen Cronin, who accepted it.<sup>114</sup> Shortly thereafter, Webster purportedly began to continuously interfere with Cronin’s management.<sup>115</sup> According to Cronin, Webster “verbally abused her, made sexual advances,” and “told her a woman could not handle being the manager of the store.”<sup>116</sup> At one point when she called a meeting of store employees, Webster allegedly went behind her back and cancelled the meeting.<sup>117</sup> The harassment was likely

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107. Abigail Perdue, *Transforming “Shedets” into “Keydets”: an Empirical Study Examining Coeducation Through the Lens of Gender Polarization*, COLUM. J. GENDER & L. 371, 429 (2014).

108. Abigail Perdue, David Novack, and Lesley Novack, VMI Survey, (2010-2011) (on file with author).

109. *Id.*

110. *Id.*

111. *Women in the Legal Profession*, *supra* note 50.

112. 809 F. Supp 922, 925 (M.D. Ala. 1992).

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

an attempt to undermine Cronin's actions as manager and force her to fail.<sup>118</sup>

Likewise, in *Humphreys v. Medical Towers, Ltd.*,<sup>119</sup> the plaintiff was a female administrative assistant who was eventually promoted to bookkeeper and later building manager. After her promotion, a male subordinate allegedly subjected her to verbal abuse, called her a "b\*tch" and "wh\*ore," threw a paperweight at her, and refused to follow her directions.<sup>120</sup>

Similarly, in *Lyles v. District of Columbia*, female supervisor, Evelyn Lyles, claimed that for over a year, her male subordinate made "lewd gestures toward [her], including pretending to spank[] [her]," deliberately brushed up against her in the hallway, and even "grabbed [her] breast" at work.<sup>121</sup> Moreover, in *McCowan v. City of Philadelphia*, the plaintiff, a police officer and the only female supervisor in her entire unit, reportedly experienced lewd remarks like "[d]amn, you sexy," and "[a]re you sure you don't want to have sex with me" from male subordinates after her promotion.<sup>122</sup>

Another commonly reported phenomenon involves men lashing out at women who have beaten them out for a promotion, raise, or accolade and falsely attributing that woman's success to something other than her merit. For example, one study of VMI cadets revealed that 77.82 percent of male cadets and 40.82 percent of female cadets assumed that a female chosen for VMI Leadership (known as Cadre) was primarily chosen because of her sex, not her merit.<sup>123</sup> That, of course, threatens the legitimacy of the women's leadership from day one. Similarly, in *Parker v. Reema Consulting Services, Inc.*, the plaintiff alleged, *inter alia*, that she had suffered hostile work environment sexual harassment in part because her male coworker spread a false rumor that she had engaged in a sexual relationship with a high-level manager to obtain a promotion.<sup>124</sup> The district court dismissed her complaint, but the Fourth Circuit reversed, explaining that the rumor was deeply rooted in the persistent sex stereotype that women, but not men, must rely on sexual favors to advance in the workplace.<sup>125</sup> Likewise, in *Madsen v. City of Phoenix*,<sup>126</sup> the plaintiff accused her male subordinate of, *inter alia*, referring to her and other

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118. *Id.* at 925–26.

119. 893 F. Supp. 672, 677 (S.D. Tex. 1995).

120. *Id.* at 678.

121. 17 F. Supp. 3d 59, 63 (D.D.C. 2014).

122. No. 19-3326, 2022 WL 742687, at \*7 (E.D. P. Mar. 11, 2022).

123. Abigail Perdue, *Man Up or Go Home: Exploring Perceptions of Women in Leadership*, 100 MARQ. L. REV. 1233, 1307 (2017).

124. 915 F.3d 297, 299–300 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 115 (2019).

125. *Id.* at 300.

126. No. CV-19-03182, 2022 WL 10551067 (D. Ariz. Oct. 18, 2022).

women as “b\*tches” and claiming that another female employee had gotten her job by “laying on her back.”<sup>127</sup>

Experiencing sexual harassment, particularly when one feels powerless to stop it, can lead to lower morale, decreased productivity, higher absenteeism, and decreased job satisfaction.<sup>128</sup> These repercussions from sexual harassment, whether reported or not, may in turn generate lower performance evaluations later used to justify terminating a female employee, demoting her, denying her a raise, or failing to promote her to a position of leadership. This adds insult to injury, prompting the woman to simply stay silent or leave.

Perhaps the reason that women in authority are often targeted for sexual harassment is because “[a]t its core, sexual harassment is about the unequal power relations between men and women.”<sup>129</sup> Men who feel threatened by women in power or who view women leaders as gender deviants may harass them as a way to “knock them down a peg,”<sup>130</sup> hopefully driving them to either fail or resign.<sup>131</sup> Sexual harassment sends a clear message to women “that they don’t belong.”<sup>132</sup> Indeed, it often has nothing to do with sexual attraction and everything to do with power and privilege.

### C. *Sex Sidelining*

Although sexual harassment often goes unreported,<sup>133</sup> it is at least actionable under Title VII, which may prevent it to some degree or at least provide an avenue of recourse. As a result, people who are uneasy with female leadership may avoid full-blown harassment and instead resort, consciously or not, to a different form of sanctioning sex known as sex sidelining. Sex sidelining refers to unactionable forms of sex discrimination, such as “manterruption,”<sup>134</sup> “mansplaining,”<sup>135</sup> and denying women access to certain networking

127. *Id.* at \*2.

128. Meredith Ann Newman, *Sexual Harassment and Productivity: It's Not Just a U.S. Problem*, 19 PUB. PRODUCTIVITY & MGMT. REV. 172, 178–79 (1995).

129. Marianne Cooper, *The Power of Us: How We Stop Sexual Harassment*, TED, [https://www.ted.com/talks/marianne\\_cooper\\_the\\_power\\_of\\_us\\_how\\_we\\_stop\\_sexual\\_harassment](https://www.ted.com/talks/marianne_cooper_the_power_of_us_how_we_stop_sexual_harassment) (last visited Sept. 19, 2023).

130. *Id.*

131. *Id.*

132. *Id.*

133. Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, EQUAL EMP. OPPORTUNITY COMM’N (June 2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace>.

134. “Manterruption” refers to a man unnecessarily interrupting a woman. Jessica Bennett, *How Not to Be ‘Manterrupted’ in Meetings*, TIME (Jan. 20, 2015, 4:02 PM), <https://time.com/3666135/sheryl-sandberg-talking-while-female-manterruptions/>.

135. Mansplaining refers to a man with less relevant expertise or knowledge explaining a concept to a woman who does possess relevant knowledge about the

or mentorship opportunities. Sidelining is used, knowingly or not, to constructively evict women from the workplace as well as the leadership pipeline.

Limiting women's access to client development, networking, and mentorship opportunities is one common form of sidelining. By way of illustration, if the male managing partner of the practice group decides to host clients at a strip club, that may provide less access for client building and mentorship for female associates who may feel uncomfortable in those spaces. These kinds of actions solidify the "old boys" network and make it harder for women to climb the corporate ladder. The ABA/ALM study of more than twelve hundred senior attorneys found that 67 percent of women reported a "lack of access to business development opportunities" as compared to 10 percent of male respondents.<sup>136</sup> According to a 2016 McKinsey report, "women get less access to the people and opportunities that advance careers and . . . reported fewer substantive interactions with senior leaders than their male colleagues—a gap that seemed to widen as men and women advance up through the corporate hierarchy."<sup>137</sup>

Misappropriation of female-generated works or ideas by men, colloquially known as "bropropriation,"<sup>138</sup> is another common form of sidelining. For example, one woman explained that when her company invited employees to share innovative ideas, she provided a proposal for a novel training initiative.<sup>139</sup> Although her male leader adopted the idea, he hired a new male employee with no relevant experience in the area to lead it.<sup>140</sup> "Bropropriation" is also common in the art world where men "routinely signed their names to [and took credit for] [art]work [created] by their wives, sisters or daughters."<sup>141</sup> Similarly, the significant contributions of scientists like Rosalind Franklin and Jocelyn Burnell were overshadowed by their male peers and supervisors and all but lost to history.<sup>142</sup> Microbiologist Esther Lederberg collaborated with her husband to develop a novel bacterial transfer method, but only he was awarded a Nobel Prize for their

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topic due to an erroneous assumption about her ignorance. Brian O'Connell, *Signs that You're a Mansplainer at Work*, SHRM (June 23, 2020), <https://www.shrm.org/resourcesandtools/hr-topics/people-managers/pages/mansplainers-at-work-.aspx>.

136. *Women in the Legal Profession*, *supra* note 50.

137. Jessica Fink, *Gender Sidelining and the Problem of Unactionable Discrimination*, 29 STAN. L. & POLY REV. 57, 79–80 (2018).

138. Bropropriation refers to a man taking credit for a woman's idea. Bennett, *supra* note 134.

139. Interview with Women, Law, and Leadership course, (2020–2021) (on file with author) [hereinafter Confidential Interviews].

140. *Id.*

141. Fink, *supra* note 137, at 70–71 (noting how Walter Keane took credit for his wife, Margaret's, wildly popular portrait series in the 1960s).

142. *Id.* at 74.

discovery.<sup>143</sup> Women whose ideas are constantly stolen by others will simply stop sharing them, which leads to a tremendous loss of intellectual capital for the employer and may cause the female employee to be perceived as disengaged and unimaginative. Yet any woman who challenges the misappropriation of her ideas risks being labeled “uncollaborative.”

Every working woman has probably had the frustrating experience of making a statement at a meeting that is seemingly ignored until a man repeats it as though it were being said for the very first time. Men tend to speak more at meetings and in class,<sup>144</sup> while women speak less and are interrupted more.<sup>145</sup> This is true even at the highest levels. In fact, a recent study of the U.S. Supreme Court concluded that female justices are interrupted by their colleagues 123 percent more often than male justices, including by other justices.<sup>146</sup> The repeated interruption and silencing of female voices became such a problem among female staffers in the Obama White House that they created a strategy called “amplification” where they would deliberately repeat each other’s ideas during meetings to minimize “bropropriation.”<sup>147</sup>

Yet this form of sidelining remains pervasive across industries. A 2016 McKinsey report revealed that only 67 percent of women (compared to 74 percent of men) felt they were able to participate

143. *Id.*

144. Jennifer J. Lee & Janice M. McCabe, *Who Speaks and Who Listens: Revisiting the Chilly Climate in College Classrooms*, 35 GENDER & SOC’Y 32, 35 (2021), <https://journals.sagepub.com/doi/full/10.1177/0891243220977141>.

145. Alice Robb, *Women Get Interrupted More—Even by Other Women*, THE NEW REPUBLIC (May 14, 2014), <https://newrepublic.com/article/117757/gender-language-differences-women-get-interrupted-more>; Adrienne B. Hancock & Benjamin A. Rubin, *Influence of Communication Partner’s Gender on Language*, 34 J. LANGUAGE & SOC. PSYCH. 46, 46 (2015), <https://journals.sagepub.com/doi/full/10.1177/0261927X14533197>; Jason Maderer, *Women Interrupted: A New Strategy for Male-Dominated Discussions*, CARNEGIE MELLON UNIV. (Oct. 21, 2020), <https://www.cmu.edu/news/stories/archives/2020/october/women-interrupted-debate.html>; Tonja Jacobi & Dylan Schweers, *Female Supreme Court Justices Are Interrupted More by Male Justices and Advocates*, HARV. BUS. REV. (Apr. 11, 2017), <https://hbr.org/2017/04/female-supreme-court-justices-are-interrupted-more-by-male-justices-and-advocates>.

146. Tonja Jacobi, *Female Justices Still Interrupted at Argument, But Barrett Less*, BLOOMBERG LAW (Mar. 30, 2023, 12:01 PM), <https://news.bloomberglaw.com/us-law-week/female-justices-still-interrupted-at-argument-but-barrett-less>; see also Jacobi & Schweers, *supra* note 145.

147. Fink, *supra* note 137, at 78 (citing Jessica Bennett, *Hillary Clinton Will Not Be Manterrupted*, N.Y. TIMES (Sept. 27, 2016), [https://www.nytimes.com/2016/09/28/opinion/campaign-stops/hillary-clinton-will-not-be-manterrupted.html?\\_r=0](https://www.nytimes.com/2016/09/28/opinion/campaign-stops/hillary-clinton-will-not-be-manterrupted.html?_r=0)). See generally Shelley Cavalieri, *On Amplification: Extralegal Acts of Feminist Resistance in the #MeToo Era*, 2019 WIS. L. REV. 1489 (2019).

meaningfully in workplace meetings.”<sup>148</sup> Moreover, “[m]en are retweeted more than twice as often as women even though there are more women on Twitter.”<sup>149</sup> University of Texas researcher Ethan Burris conducted a study in which he formed random teams and gave one member of the team secret helpful information.<sup>150</sup> Burris’s experiment revealed that when the team member with the secret data were female, the client was “less likely to act on” her suggestions and more likely to see her as disloyal for making them.<sup>151</sup> This is perhaps because both men and women “trust males voices more”; indeed, “deeper voices” are generally perceived “to be smarter and more authoritative.”<sup>152</sup> But when women feel that no one listens to them when they speak, they may simply stay silent. There may also be another reason why some women consciously mute themselves at work. One study showed that “male executives who spoke more than their peers received 10 percent higher competency ratings from colleagues, while female executives who spoke more . . . were rated 14 percent less competent.”<sup>153</sup>

Another example of sidelining involves holding women to a higher standard than similarly situated men. Professor Joan C. Williams refers to this well documented phenomenon as “Prove It Again” bias, which forces women to repeatedly prove themselves to attain a leadership position.<sup>154</sup> As she explains, “the public has an easier time visualizing men . . . in positions of power, [so] they see female leaders as more of a risk, forcing [women] ‘to prove themselves over and over again.’”<sup>155</sup> But if women are constantly held to higher standards, they are likelier to receive lower reviews than men based

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148. LAREINA YEE ET AL., MCKINSEY, *WOMEN IN THE WORKPLACE 2016*, 11 (2016), <https://womenintheworkplace.com/2016>.

149. Upworthy, *The Science of MANSPLAINING!*, YOUTUBE (Mar. 10, 2015), [www.youtube.com/watch?v=t7GUjKv9qSI](http://www.youtube.com/watch?v=t7GUjKv9qSI). The platform formerly known as Twitter is now known as X.

150. Ethan R. Burris, *The Risks and Rewards of Speaking Up: Managerial Responses to Employee Voice*, 55 *ACAD. MGMT. J.* 851, 863–64 (2012).

151. Fink, *supra* note 137, at 90 (citing Sheryl Sandberg & Adam Grant, *Speaking While Female*, N.Y. TIMES (Jan. 12, 2015), [https://www.nytimes.com/2015/01/11/opinion/sunday/speaking-while-female.html?\\_r=0](https://www.nytimes.com/2015/01/11/opinion/sunday/speaking-while-female.html?_r=0)).

152. *Id.* at 73 (citing Andy Isaacson, *Why Men Always Tell You to See Movies*, N.Y. TIMES (Jan. 27, 2012), <http://www.nytimes.com/2012/01/29/movies/trailer-voice-over-work-scarce-for-women.html>).

153. *Id.* at 83 (citing Sandberg & Grant, *supra* note 151); see also Victoria L. Brescoll, *Who Takes the Floor and Why: Gender, Power, and Volubility in Organizations*, 56 *ADMIN. SCI. Q.* 622 (2011), <https://journals.sagepub.com/doi/full/10.1177/0001839212439994>.

154. Fink, *supra* note 137, at 81 (citing Joan C. Williams & Veta Richardson, *New Millennium, Same Glass Ceiling? The Impact of Law Firm Compensation Systems on Women*, 62 *HASTINGS L.J.* 597, 667 (2011)).

155. *Id.*

on similar performance. Indeed, men are “judged according to their *potential*, [while] women find themselves judged according to their *performance*.”<sup>156</sup> As a result, women’s mistakes are generally noticed more often, remembered longer, and judged more harshly.<sup>157</sup> Women also tend “to receive more polarized evaluations.”<sup>158</sup>

By way of illustration, a study conducted at North Carolina State University found that college students rate an instructor higher when they assume he is male, even if the instructor is actually female.<sup>159</sup> Researchers set up a fully asynchronous online course and divided it into four small groups.<sup>160</sup> Two groups were taught by a female, and two groups were taught by a male.<sup>161</sup> The female instructor told one of her groups that she was male, and the male told one of his groups he was female.<sup>162</sup> The students “never saw or heard” their instructor in the fully asynchronous class, so they had no way of knowing their instructor’s actual sex.<sup>163</sup> When students completed course evaluations at the end of the course, the instructor whom students thought was male “received higher ratings on all 12 traits [in the evaluation], regardless of whether the instructor was actually male or female” and despite the fact that the groups had been taught in an identical manner.<sup>164</sup> Likewise, a 2016 study analyzed data from “23,001 evaluations of teaching of 379 instructors by 4,423 students in six mandatory first-year courses . . . at a French university.”<sup>165</sup> They concluded that although male instructors generally received higher evaluations from both male and female students, “the students of male instructors generally do worse on . . . final” exams and may actually learn less from male faculty than from female professors.<sup>166</sup> These findings are troubling given the important role evaluations play in determining a female faculty member’s promotion to tenure, receipt of a merit-based raise, and selection for leadership. This may explain, at least in part, why “women remain disproportionately less likely to receive faculty appointments, obtain leadership positions,

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156. *Id.*

157. *Id.* at 81–82.

158. *Id.* at 82 (citing *Prove Yourself... Again: Why Women Get Overlooked for Management Positions*, WOMEN ON BUS. (May 6, 2015), <https://www.womenonbusiness.com/prove-yourself-again-why-women-get-overlooked-for-management-positions>).

159. N.C. State Univ., *Online students give instructors higher marks if they think instructors are men*, SCIENCE DAILY (Dec. 9, 2014), <https://www.sciencedaily.com/releases/2014/12/141209120137.htm>.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. Anne Boring et al., *Student Evaluations of Teaching (Mostly) Do Not Measure Teaching Effectiveness*, SCIENCE OPEN RSCH. 1 (Jan. 7, 2016).

166. *Id.* at 7.

earn comparable wages, receive grant funding, and are more likely to leave the academy prematurely.”<sup>167</sup> Perhaps the real reason why female academics are held to a double standard is because “academia is entrenched in a masculinised model of success . . . [which] privilege[s] the stereotypical traits, career styles, work practices, and preferences of men[.] . . . [W]hen women excel in this masculinised environment, they are often criticised because such behaviours clash with conventional social expectations of feminine comportment.”<sup>168</sup>

This biased double standard even taints evaluations of teaching assistants (TA). A different study “found that students in an [asynchronous] online course who had the same TA gave that TA five times as many negative evaluations when they believed that she was a woman, as compared to when they thought she was a man.”<sup>169</sup> This was true even though 62 percent of the students were female.<sup>170</sup> Half of the 136 college students were told they had been assigned a female TA; the other half were told they had a male TA.<sup>171</sup> In reality, the same woman served as TA for all 136 students.<sup>172</sup> The average rating differed by seven points, and five out of the six negative ratings were all for the female TA.<sup>173</sup> Receiving poor TA evaluations may adversely impact that TA’s letters of recommendation, prevent her from being rehired as a TA, and discourage her from pursuing a career in academia.

Similarly, a Swedish study found that “peer reviewers gave female applicants lower scores than male applicants who had shown the same level of scientific productivity” and deemed the “most productive group of female applicants” as equivalent with the “least productive” group of men.<sup>174</sup> Another study revealed that “male attorneys received more favorable numerical ratings” than their female counterparts, even when the women were favorably reviewed in the narrative portion of the evaluation form.<sup>175</sup> The impact of

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167. Cheryl Pritlove et al., *The good, the bad, and the ugly of implicit bias*, 393 *THE LANCET* 502, 502 (2019).

168. *Id.* at 503.

169. Colleen Flaherty, *Gender Bias in TA Evals*, *INSIDE HIGHER ED* (Nov. 1, 2020), <https://www.insidehighered.com/news/2020/11/02/study-finds-gender-bias-ta-evals-too>.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. Fink, *supra* note 137, at 76 (citing Christine Wennerås & Agnes Wold, *Nepotism and Sexism in Peer Review*, 387 *NATURE* 341 (1997)).

175. See Curt Rice, *Peer Evaluation is Not Objective: Academia and Law Firms*, *CURT RICE SCI. IN BALANCE* (Nov. 2, 2011), <http://curt-rice.com/2011/11/02/peer-evaluation-is-not-objective-academia-and-law-firms/>; see also Monica Biernat et al., *The Language of Performance Evaluations: Gender-Based Shifts in Content and Consistency of Judgment*, 3 *SOC. PSYCH. AND PERSONALITY SCI.* 186, 190–91 (2012).

“Prove It Again” bias is incredibly important because performance evaluations play a vital role in a woman’s promotion to partnership, leadership, tenure, as well as her ability to attain a raise or bonus. With regard to STEM, the higher scrutiny to which women scientists are subjected could impede their ability to receive grant funding, which can have serious and lasting professional implications. This double standard can harm a woman’s career advancement in myriad ways.

Sidelining can also involve failing to promote men’s and women’s accomplishments in the same way or attributing a woman’s success to a male coach, mentor, or spouse. For example, when Olympian Corey Cogdell-Unrein won a bronze medal in trap shooting, the Chicago Tribune sidelined her accomplishment by announcing “Wife of [Chicago] Bears’ Lineman Wins Bronze Today in Rio Olympics,” implying that her role as his wife overshadowed her accomplishments as an athlete in her own right.<sup>176</sup> The headline comports with a University of Cambridge study illustrating that female athletes are predominantly described by their appearance, age, or marital status, whereas men in sports are generally mentioned by name.<sup>177</sup> The study further found that within sports reporting, men are more often associated with words like “fast,” “strong,” and “great,” while women were more often associated with “aged,” “older,” “pregnant,” and “married.”<sup>178</sup> Perhaps not surprisingly, a 2016 McKinsey report revealed that only 49 percent of women felt that their workplace contributions were properly valued.<sup>179</sup> Many reported feeling overlooked, ignored, and usurped.<sup>180</sup> Women also have more difficulty than men negotiating for a raise and promoting their own accomplishments.<sup>181</sup>

Sidelining can even take the form of positional dominance when men position themselves in spheres of influence, physically pushing women to the periphery. For example, at an important Turkish summit in 2021, only two chairs were provided for EU President

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176. Chicago Tribune (@chicagotribune), TWITTER (Aug. 7, 2016, 5:33 PM), <https://twitter.com/chicagotribune/status/762401317050605568?lang=en>.

177. *Aesthetics Over Athletics When It Comes to Women in Sport*, UNIV. OF CAMBRIDGE (Aug. 12, 2016), <http://www.cam.ac.uk/research/news/aesthetics-over-athletics-when-it-comes-to-women-in-sport>.

178. *Id.*

179. LAREINA YEE ET AL., *supra* note 148, at 11.

180. *See generally id.*

181. *Id.* at 12 (noting that women “are 30 percent more likely than men who negotiate to receive feedback that they are ‘intimidating,’ ‘too aggressive,’ or ‘bossy’”); *see also* Christine Exley & Judd Kessler, *Why Don’t Women Self-Promote as Much as Men?*, HARV. BUS. REV. (Dec. 19, 2019), <https://hbr.org/2019/12/why-dont-women-self-promote-as-much-as-men> (“Women systematically provide less favorable assessments of their own past performance and potential future ability than equally performing men.”).

Ursula von der Leyen and two other male leaders.<sup>182</sup> The two men—Charles Michel, President of the European Council, and Turkish President Recep Erdogan—immediately took both seats, visibly pushing an embarrassed President von der Leyen to the sidelines.<sup>183</sup>

Another example of sidelining is disproportionately assigning less desirable work to women, particularly uncompensated or non-billable service work. For example, when women’s rights activist Gloria Steinem first commenced her career as a journalist, she was primarily assigned unimportant “fluff pieces” on topics like textured stockings, which stalled her ability to advance and eventually prompted her to leave the magazine altogether.<sup>184</sup> Likewise, 48 percent of female attorneys in an ABA/ALM survey said they have “missed out on a desirable assignment” because of their sex.<sup>185</sup> At law firms and in academia, women usually perform more of the Diversity, Equity, and Inclusion (DEI) and wellbeing work that is critical to building a sense of community and ensuring productivity and morale.<sup>186</sup> Yet that work is often undervalued, unacknowledged, and uncompensated.

Likewise, in corporate and academic committees, female members are often disproportionately tasked with administrative and secretarial duties like taking notes, creating the PowerPoint slides, getting coffee or food, cleaning up the conference room, or showing clients to the room. For example, Valerie Alexander recounts her experience as a new female attorney at her law firm billing over 2000 hours a year.<sup>187</sup> When she asked her female administrative assistant to enter her time sheet for her, the assistant instead offered to teach Alexander how to do it herself, even though that work was non-billable.<sup>188</sup> Through subsequent investigation, Alexander learned that every single female attorney at the firm had been asked to enter her own time, but no man had.<sup>189</sup> Similarly, in law schools, legal writing professors, who are predominantly female, are more often tasked with training teaching assistants, coaching Moot Court

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182. Maïa De La Baume, *Von der Leyen on Sofagate: It happened because I am a woman*, POLITICO (Apr. 26, 2012, 7:45 PM), <https://www.politico.eu/article/sofagate-turkey-sofa-ursula-von-der-leyen-recep-tayyip-erdogan-charles-michel-it-happened-because-i-am-a-woman/>.

183. *Id.*

184. NOT DONE: WOMEN REMAKING AMERICA, *supra* note 34.

185. *Women in the Legal Profession*, *supra* note 50.

186. RACHEL THOMAS ET AL., MCKINSEY, WOMEN IN THE WORKPLACE 2021 1, 5 (2021), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/diversity%20and%20inclusion/women%20in%20the%20workplace%202021/women-in-the-workplace-2021.pdf>.

187. Valerie Alexander, *How to Outsmart Your Own Unconscious Bias*, YOUTUBE (Oct. 22, 2018), <https://www.youtube.com/watch?v=GP-cqFLS8Q4>.

188. *Id.*

189. *Id.*

competition teams, reviewing job application materials and writing samples for students, all of which is often uncompensated. Yet the more time a woman spends on these kinds of uncompensated and undervalued “housekeeping” duties, the less time she can devote to the work that is valued most for purposes of promotion, tenure, raises, and performance evaluations. Placing the burden of housekeeping work disproportionately on women’s shoulders also leads to more exhaustion and premature burnout. But if women say no and set boundaries to protect their time (and sanity), they risk being labeled as uncooperative, lazy employees who lack a “team mentality.”

Despite the adverse impact sidelining can wreak upon a woman’s workplace experience, incidents of sidelining do not generally meet the onerous “severe and pervasive” standard necessary to constitute sexual harassment under Title VII. Nor have courts generally determined that sidelining rises to the level of an adverse employment action.<sup>190</sup> For example, one court observed that a supervisor snubbing the female plaintiff at meetings and dismissing her questions did not support a retaliation claim.<sup>191</sup> Despite this, however, these slights compound over time to create significant barriers to advancement for women, while also decreasing their job satisfaction.

Taken together, sidelining causes capable, talented women to feel “less creative” and “less engaged.”<sup>192</sup> Beaten down and burned out, they often simply “shut down” and disconnect.<sup>193</sup> Sidelining robs them of their “internal sense of success”<sup>194</sup> and leaves them wondering whether they have what it takes to lead. As one sidelined woman observed:

My workplace environment became so intolerable, discouraging, and stressful that I began experiencing physical side effects like insomnia and headaches. I started skipping all non-mandatory work events, keeping my camera turned off during remote meetings, speaking only when spoken to, and limiting my interaction with coworkers. I completely stopped sharing feedback or ideas for fear they would be stolen. As my work became less and less rewarding, I channeled my energy and creativity into activities outside work where I could derive a real sense of worth and fulfillment.<sup>195</sup>

Even women who stay in the pipeline will likely find their professional dreams stalled due to the barriers to development they have endured along the way. Indeed, one study found that female

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190. Fink, *supra* note 137, at 63.

191. *Id.*

192. *Id.* at 89.

193. *Id.*

194. *Id.*

195. Confidential Interviews, *supra* note 139.

CEOs worked an average of twenty-three years at a company before becoming CEO compared to fifteen years for men.<sup>196</sup> In other words, “the climb to the top was over 50 percent longer” for women.<sup>197</sup>

In conclusion, although sidelining does not rise to the level of actionable sex discrimination, it constitutes a slow death by a thousand cuts<sup>198</sup> for many women’s professional dreams and aspirations.

#### D. Pay Inequity

Pay inequity due to sex is another factor that can chill women’s desire to pursue leadership roles or drive them out of the workforce altogether. Even when controlling for variables like hours worked, abundant research demonstrates that on average, women’s pay lags behind their male counterparts, and that gap appears to widen as men and women advance.<sup>199</sup> In fact, according to the U.S. Department of Labor, “on average, women working full time, year round are paid 83.7 percent of what men are paid.”<sup>200</sup> In 2023, the Economic Policy Institute reported that on average, women earn “roughly 22 percent less than men.”<sup>201</sup> Moreover, this wage gap exists at every level of education<sup>202</sup> and is even more dramatic for Black and Hispanic women.<sup>203</sup> And although women are likelier to work in lower paying jobs, they still earn less than similarly situated men

196. Fink, *supra* note 137, at 93.

197. *Id.*

198. In reality, the death by a thousand cuts was an excruciating form of Chinese torture later outlawed. Today the expression is generally used to describe a series of events that despite being minor in isolation, are collectively devastating. *Death by a Thousand Cuts*, TIMES HIGHER EDUC. (MAY 8, 2008), <https://www.timeshighereducation.com/books/death-by-a-thousand-cuts/401789.article#:~:text=Few%20of%20those%20who%20now,criminal's%20of%20death%20ensued>.

199. Elise Gould & Katherine DeCourcy, *Gender wage gap widens even as low-wage workers see strong gains*, ECON. POLY INST. (Mar. 29, 2023, 12:40 PM), <https://www.epi.org/blog/gender-wage-gap-widens-even-as-low-wage-workers-see-strong-gains-women-are-paid-roughly-22-less-than-men-on-average/> (“Women are paid roughly 22% less than men on average” and “[t]he wage gap grows with wage level.”).

200. Wendy Chun-Hoon, *5 Fast Facts: The Gender Wage Gap*, U.S. DEPT OF LAB. (Mar. 14, 2023), <https://blog.dol.gov/2023/03/14/5-fast-facts-the-gender-wage-gap>.

201. Gould & DeCourcy, *supra* note 199.

202. Chun-Hoon, *supra* note 200; Gould & DeCourcy, *supra* note 199.

203. Rakesh Kochhar, *The Enduring Grip of the Gender Pay Gap*, PEW RSCH. CTR. (Mar. 1, 2023), <https://www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/> (“In 2022, Black women earned 70% as much as White men and Hispanic women earned only 65% as much. The ratio for White women stood at 83%, about the same as the earnings gap overall, while Asian women were closer to parity with White men, making 93% as much.”).

even within the same occupation.<sup>204</sup> In fact, “women must complete one additional degree in order to be paid the same wages as a man with less education,” which may drive women further into student loan debt or discourage them from pursuing career advancement and promotions.<sup>205</sup>

Women in some male-dominated spheres are particularly vulnerable to pay inequity. Athletic coaching, for instance, is notorious for dramatic disparities both in coach salaries as well as financial resources expended toward women’s sports. By way of illustration, a 1997 National Collegiate Athletic Association’s (NCAA) Gender Equity Study found that women earn only “40 percent of the money spent on coaching in high schools and universities.”<sup>206</sup> Moreover, in the 1996–1997 school year, the highest salary paid to a women’s head basketball coach among Division I schools “was \$344,000 compared to \$900,000 for a men’s basketball coach.”<sup>207</sup> The same study found that “[t]he median salary for a women’s head basketball coach was \$98,400, compared to \$290,000 for a men’s head basketball coach.”<sup>208</sup> A different study conducted in 2000 revealed that on average, coaches of Division I women’s teams earned roughly 62 percent of what the coaches of men’s teams earned.<sup>209</sup>

Pay inequity also plagues the legal field. For example, “in 2020, female associates and female non-equity partners [at law firms] received, on average, 95 percent of the compensation of their male counterparts. But among equity partners, women received just 78 percent of the compensation of men, on average.”<sup>210</sup> “Only 2 percent of law firms said their highest-paid attorney is female—and that number actually dropped from 8 percent in 2005.”<sup>211</sup>

Nor is legal education immune. To the contrary, in recent years, several prominent law schools have been accused of paying female professors less than their similarly situated male counterparts.<sup>212</sup>

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204. Chun-Hoon, *supra* note 200; Gould & DeCourcy, *supra* note 199 (“The wage gap is smallest among lower-wage workers, in part due to the minimum wage creating a wage floor. . . . [but] [a]t the 10th percentile, women are paid \$1.55 less an hour, or 11.4% less than men . . .”).

205. Chun-Hoon, *supra* note 200.

206. Michelle R. Weiss, *Pay Equity for Intercollegiate Coaches: Exploring the EEOC Enforcement Guidelines*, 13 MARQ. SPORTS L. REV. 149, 149 (2002).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Women in the Legal Profession*, *supra* note 50.

211. *Id.*

212. E.g., Kathryn Rubino, *Law School Settles Lawsuit Over Unequal Pay . . . Again.*, ABOVE THE LAW (Jan. 10, 2020, 4:02 PM), <https://abovethelaw.com/2020/01/law-school-settles-lawsuit-over-unequal-pay-again/> (University of Denver); Kathryn Rubino, *Elite Law School Faces Gender Pay Gap Lawsuit*, ABOVE THE LAW (Dec. 13, 2019, 5:30 PM), <https://abovethelaw.com/2019/12/elite-law-school-faces-gender-pay-gap-lawsuit/>

Pay disparities often result from and exacerbate unequal power dynamics and status inequity in legal education. For example, the field of legal writing, which is disproportionately female, has been dubbed the “pink ghetto” because legal writing professors are often treated as a “second-class citizens” by academics who view legal writing as unintellectual “women’s work” that anyone can do.<sup>213</sup> For this reason, men are sometimes actively discouraged from entering the field. For instance, a prominent legal writing scholar explained that when he interviewed for a legal writing position within a top-ranked writing program, he was asked by two male doctrinal professors, “So why do you want to join the pink ghetto?”<sup>214</sup>

The treatment of legal writing faculty has been attributed, at least in part, to “gender disparagement” because, as of 2014, 64 percent of tenured law faculty were male, while women comprised 72 percent of legal writing faculty.<sup>215</sup> Some law schools still categorically exclude members of this predominantly female discipline from tenure eligibility, voting rights, access to research grants, opportunities for research leave, and other basic aspects of full and equal citizenship in the law school environment.<sup>216</sup> Even at law schools where legal

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(alleging that one of University of Texas’s “most distinguished” female professors earned \$134,449 less than a male professor with the same teacher evaluation rating, less teaching experience, fewer than a third of her publications, and “fewer professional honors.”); Kathryn Rubino, *Law School Professor Alleges Discrimination, Says She Was Reprimanded for Not Smiling*, ABOVE THE LAW (Dec. 2, 2019, 4:14 PM), <https://abovethelaw.com/2019/12/wake-forest-discrimination-complaint/> (alleging that female professor “was paid less for her teaching hours, something the university allegedly justified as the difference between legal writing class hours and doctrinal ones”).

213. Kristen Konrad Tiscione, “*Gender Degradation*”: *New Words to Tell an Old Story*, 28 THE SECOND DRAFT 29, 30 (2015) (footnotes omitted).

214. Confidential Interviews, *supra* note 139.

215. ALWD & LEGAL WRITING INST., REPORT OF THE ANNUAL LEGAL WRITING SURVEY 68 (2014). See generally Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias*, 16 COLUM. J. GENDER & L. 679 (2007); Martha S. West, *Gender Bias in Academic Robes: The Law’s Failure to Protect Women Faculty*, 67 TEMP. L. REV. 67 (1994) (discussing the role that gender bias may play in evaluations and hiring of women faculty); Joan M. Krauskopf, *Touching the Elephant: Perceptions of Gender Issues in Nine Law Schools*, 44 J. LEGAL EDUC. 311, 329 (1994); Pamela Edwards, *Teaching Legal Writing as Women’s Work: Life on the Fringes of the Academy*, 4 CARDOZO WOMEN’S L.J. 75 (1997); Richard K. Neumann, Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313 (2000); Kathryn M. Stanchi & Jan M. Levine, *Gender and Legal Writing: Law Schools’ Dirty Little Secrets*, 16 BERKELEY WOMEN’S L.J. 3, 4 n.3 (2001); Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333 (1996).

216. See Tiscione, *supra* note 213, at 30–31; see also Edwards, *supra* note 215, at 77–78. See generally Ruth Anne Robbins et al., *Persistent Structural Barriers to Gender Equity in the Legal Academy and the Efforts of Two Legal Writing*

writing faculty are eligible for tenure, whether programmatic or unitary, traditional legal writing scholarship often does not fulfill their scholarship requirement, doubling their workload by requiring them to write and present both in their field and outside it. In addition, legal writing professors are still generally paid less than their doctrinal counterparts, regardless of their qualifications, experience, or scholarship.<sup>217</sup> And if they do receive a pay raise for merit or promotion, it is often calculated on a percentage basis, which exacerbates historical pay inequity. Alternatively, they are told that they may attain unitary tenure but, unlike their doctrinal peers, they will not receive any pay raise as a result.

Like sidelining, institutions engaging in inequitable pay practices, based on sex in whole or in part, often escape liability or detection because salary structures are usually opaque, complicated, and confidential, making it difficult for one faculty member to know whether she is being paid less than a similarly situated man. Furthermore, institutions often evade the Equal Pay Act's standard of "equal pay for equal work" by simply arguing that teaching legal writing is distinct from teaching an exam-based course like contracts. This is why legal challenges are less likely to be successful unless they are between male and female doctrinal faculty and at state universities, where salary data is public.<sup>218</sup>

Yet women workers who languish under inequitable pay practices pay a heavy physical and emotional toll. According to the ABA/ALM study, 54 percent of women attorneys surveyed reported the denial of a salary increase or bonus due to their sex compared to only 4 percent of their male counterparts.<sup>219</sup> Pay inequity may force these women, particularly single women without a partner's second income to rely upon, to work overtime, take on additional responsibilities for extra pay, or even pursue second jobs and outside employment to make ends meet. Burning the candle at both ends, however, can impair their performance at their primary job as well as make them less available for networking and mentorship opportunities outside regular business hours, which could impede their professional advancement. Working overtime may also lead to exhaustion, burnout, irritability, and stress-related health consequences. As a result, some women may leave or opt not to climb

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*Organizations to Break Them Down*, 65 VILL. L. REV. 1155 (2020); J. Lyn Entrikin et al., *Treating Professionals Professionally: Requiring Security of Position for All Skills-Focused Faculty Under ABA Accreditation Standard 405I and Eliminating 405(d)*, 98 OR. L. REV. 1 (2020).

217. See Tiscione, *supra* note 213, at 31.

218. Elizabeth Hernandez, *DU Law School's "Fix" for Its Gender-Pay Gap Revealed a Female Professor Makes \$30,000 Less than Her Peers*, DENVER POST (June 6, 2019, 8:57 AM), <https://www.denverpost.com/2019/06/05/du-sturm-college-of-law-pay-gap/>.

219. *Women in the Legal Profession*, *supra* note 50.

the ladder, especially if doing so means more demanding work for unequal pay. However, employers often react negatively when women self-promote or advocate for themselves to rectify pay inequity by actively seeking a promotion or a raise.<sup>220</sup>

It is no wonder then that addressing pay inequity improves employee morale, engagement, recruitment, retention, and job satisfaction.<sup>221</sup> “In fact, 82 percent of workers feel more engaged with and fulfilled by their work when they are paid fairly, and 81 percent of respondents say they are more productive and loyal to their employers.”<sup>222</sup> Fair pay also enhances talent acquisition and retention. Indeed, people are 75 percent likelier to apply for a position with a company known for fair pay practices.<sup>223</sup>

### *E. Putting the Pieces Together*

In conclusion, women often experience a death by a thousand cuts at the workplace, whether from sexual harassment or sex sidelining to pay inequity or being held to a higher standard than a male peer. This, in turn, likely leads to lower rates of job satisfaction and higher rates of attrition among female employees.<sup>224</sup> It also causes men’s and women’s workplace experiences to be vastly different. In fact, a joint 2019 ABA/ALM study of more than twelve hundred senior lawyers at law firms nationwide revealed that 88 percent of men said, “gender diversity is widely acknowledged as a firm priority,” but only 54 percent of women agreed.<sup>225</sup> As demonstrated in the chart below, men’s experience in the law firm environment clearly differs dramatically from that of most female attorneys.

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220. SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* 45 (2013); Emily T. Amanatullah & Catherine H. Tinsley, *Punishing Female Negotiators for Asserting Too Much. . . or Not Enough: Exploring Why Advocacy Moderates Backlash Against Assertive Female Negotiators*, 120 *ORG. BEHAV. & HUM. DECISION PROCESSES* 110, 110–11 (2012); Hannah Riley Bowles et al., *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, *ORG. BEHAV. & HUM. DECISION PROCESSES* 84, 84–85 (2006).

221. See generally Kristy Threlkeld, *A Piece of the Pie: Understanding the Importance of Fair Pay*, *INDEED* (Jan. 22, 2021), <https://www.indeed.com/lead/the-importance-of-fair-pay-and-salary-transparency>.

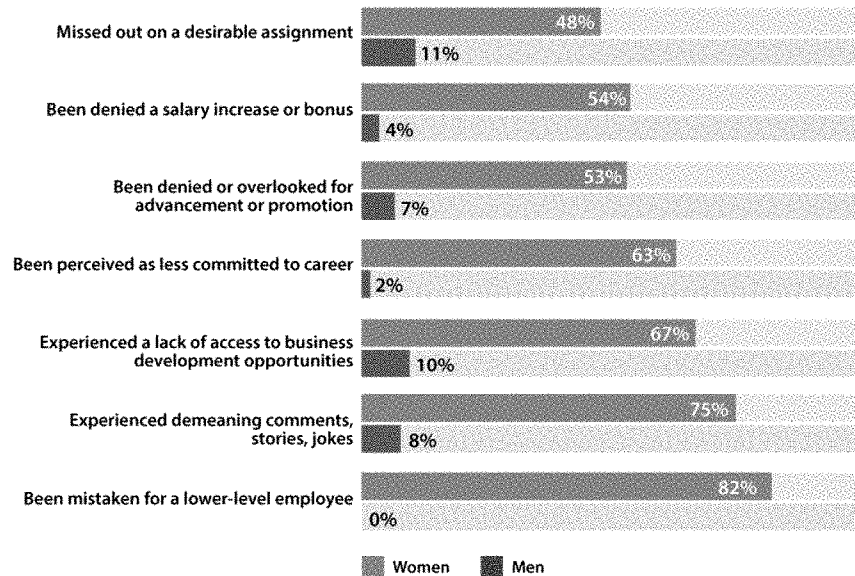
222. *Id.*

223. *Id.*

224. *Women in the Legal Profession*, *supra* note 50.

225. *Id.*

### Everyday Experiences Because of Gender<sup>226</sup>



Unfortunately, these sex-based sanctions, taken together, may prompt women to simply leave the workforce because the emotional costs eventually outweigh the employment benefits. They may lose hope that things will ever change or improve.

### III. WHY SEX IS SANCTIONED

But why is sex sanctioned? Why do women generally experience higher rates of sexual harassment, sidelining, and pay inequity? Theories abound, of which only some will be briefly discussed herein.

#### A. Gender Deviance

Perhaps the most compelling theory is that set forth by Dr. Serena Nanda who posits that Western societies create a male/female dichotomy between sex, which is biological, and gender, which is a social construct, but then problematically fuse together the two distinct concepts.<sup>227</sup> As a result, “men are usually acculturated to exhibit ‘masculine’ characteristics traditionally associated with the social construct[] of maleness” like assertiveness and leadership.<sup>228</sup> On the other hand, “women are generally socialized to display

226. *Id.* ©2022 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

227. SERENA NANDA, GENDER DIVERSITY: CROSSCULTURAL VARIATIONS 1 (2d ed. 2000).

228. Perdue, *supra* note 28, at 1263.

[stereotypical] ‘feminine’ qualities” associated with home and family like being nurturing, soft-spoken, and enjoying domestic activities like cooking, shopping, and childcare.<sup>229</sup> Individuals who defy such characterizations are known as *gender variants*.<sup>230</sup> “Their attempts, conscious or not, to breach the fused cultural template of sex and gender are often stigmatized and viewed as undesirable or threatening.”<sup>231</sup> As such, they often spur backlash, in the form of harassment, discrimination, prejudice, and even physical violence. As Dr. Marianne Cooper explains, the threatened person uses harassment, sidelining, or other sex-based sanctions to put the gender deviant in her place.<sup>232</sup>

Historical accounts support Dr. Nanda’s theory. For example, in 415 A.D., Hypatia, arguably the most brilliant mathematician, astronomer, teacher, and philosopher in all of Egypt at that time, was abducted from a carriage, dragged by an angry mob into a nearby building, stripped naked, and brutally murdered.<sup>233</sup> The enraged mob then decapitated her body and publicly set it ablaze.<sup>234</sup> While most Egyptian women cooked, sewed, bore children, and managed the home, trailblazing Hypatia refused to marry and instead studied mathematics, astronomy, and philosophy.<sup>235</sup> And she did not just study them; she publicly taught them, asserting her authority over countless male students, including Orestes, the Roman prefect of Alexandria.<sup>236</sup> She was a powerful, unconventional woman whose very existence called into question long-held notions of how women should behave. And while she was beloved by many, others found her behavior and growing influence, especially over Orestes, troubling, which likely contributed to her ultimate demise.<sup>237</sup>

But Hypatia is not alone. Around the world and across the centuries, remarkable women like her have been sanctioned as gender deviants because they defied deeply entrenched gender roles and sex stereotypes. This defiance of social norms has provoked impassioned opposition, even violence, from men and women alike.

229. *Id.*

230. NANDA, *supra* note 227, at 3.

231. Perdue, *supra* note 28, at 1263.

232. Marianne Cooper, *For Women Leaders, Likability and Success Hardly Go Hand-in-Hand*, HARV. BUS. REV. (Apr. 30, 2013), <https://hbr.org/2013/04/for-women-leaders-likability-a/>.

233. SOCRATES OF CONSTANTINOPLE, ECCLESIASTICAL HISTORY 348–49 (George Bell and Sons 1904).

234. *Id.* at 349.

235. Sarah Zielinski, *Hypatia, Ancient Alexandria’s Great Female Scholar*, SMITHSONIAN MAG. (Mar. 14, 2010), <https://www.smithsonianmag.com/history/hypatia-ancient-alexandrias-great-female-scholar-10942888/>.

236. *Id.*

237. *Id.*

Fast forward several centuries to backward villages dotting Europe and the Colonies, and one discovers hundreds of innocent women accused and even killed for alleged witchcraft.<sup>238</sup> While the accusations were lodged by near equal numbers of men and women, the accused were nearly all female.<sup>239</sup> In Europe, for example, “80 percent of the accused and 85 percent of those executed were female; men who were associated with witchcraft were primarily those related to women who were already suspect or because they had committed other crimes.”<sup>240</sup> The same held true across the ocean in the New England colonies where “78 percent of accused witches were women [and] men accused of witchcraft tended to have family or sexual relations with accused witches.”<sup>241</sup>

Notably, the women most vulnerable to witchcraft accusations were those perceived as social deviants. Reed (2007) notes that “accused witches tended to be women out of place—the poor and homeless, the childless, or, alternately, women who had inherited property for lack of brothers.”<sup>242</sup> Similarly, when the European witch craze began, most accused witches were “widows or spinsters,” although the accusations eventually spilled over to married women and young girls.<sup>243</sup> Wealthy widows who refused to remarry were especially susceptible to accusations.<sup>244</sup> Wealth brought power and influence, which some may have felt rightly belonged under the control of men—a belief fostered by the widespread coverture laws that forbade married women from owning property.<sup>245</sup> What better way to prevent unmarried women from concentrating financial power than by accusing them of witchcraft and providing a clear and unambiguous warning to all those who were similarly situated to insulate themselves by marriage.

Female “healers” and midwives were also “chief suspects of witchcraft” because they provided herbal remedies, including birth control and abortifacients, to other women, which gave women more

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238. Anne Llewellyn Barstow, *On Studying Witchcraft as Women's History: A Historiography of the European Witch Persecutions*, 4 J. FEMINIST STUD. IN RELIGION, 7, 7 (1988).

239. *Id.* at 9.

240. *Id.* (criticizing other historical interpretations of the witch trials as not a matter of sex, but of economic, social and religious factors).

241. Isaac Reed, *Why Salem Made Sense: Culture, Gender, and the Puritan Persecution of Witchcraft*, 1 CULTURAL SOCIO. 209, 216 (2007).

242. *Id.*

243. Nachman Ben-Yehuda, *The European Witch Craze of the 14th to 17th Centuries: A Sociologist's Perspective*, 86 AM. J. SOCIO. 1, 21 (1980).

244. H.C. ERIK MIDELFORT, *WITCH HUNTING IN SOUTHWESTERN GERMANY 1562–1684*, at 195 (1972).

245. DuBois, *supra* note 26, at 45.

reproductive control over their bodies and childbearing decisions.<sup>246</sup> As such, midwives and healers posed a special threat to the agentic power and privilege of husbands, clergymen, and male doctors. Not surprisingly, the threats of witchcraft accusations were likely used as a tool to control women's bodies and sexuality. As a result, witchcraft accusations were "heavily negative about female sexuality: women were blamed for preventing conception, causing miscarriage, abortion, and stillbirth, making men impotent, seducing men, having sex with the devil, [and] giving birth to demons."<sup>247</sup>

Centuries later, another witch hunt began for advocates of Woman Suffrage. Accordingly, suffragettes were ostracized, socially shunned, arrested, fired, and denied employment because of their political beliefs and activities.<sup>248</sup> Women who participated in protests were sometimes imprisoned and violently force-fed when they engaged in peaceful hunger strikes:<sup>249</sup> "Suffragettes could suffer broken teeth, bleeding, vomiting and choking as food was poured into the lungs."<sup>250</sup> "Emmeline Pankhurst, founder of the Women's Social and Political Union, described one London prison during a period of force-feeding [as] . . . 'a place of horror and torment. Sickening scenes of violence took place almost every hour of the day, as the doctors went from cell to cell performing their hideous office.'"<sup>251</sup>

More recently, after the U.S. Supreme Court held that the publicly funded Virginia Military Institute must either admit women or go private,<sup>252</sup> VMI's Board of Trustees narrowly voted to become coeducational.<sup>253</sup> In 1997, the first female students in history entered VMI, and in the spring of 1999, the first two women became members of Cadre, VMI's student leadership regime.<sup>254</sup> In response, a cadet newspaper published an article questioning their qualifications.<sup>255</sup> Third class women also met resistance when trying to discipline male

246. Ben-Yehuda, *supra* note 243, at 22 ("[M]idwives were among the chief suspects of witchcraft . . . midwives were expert in birth control and no doubt helped and cooperated in infanticide.").

247. Barstow, *supra* note 238, at 8.

248. DuBois, *supra* note 26, at 126.

249. Beverly Cook, *Six Things You Should Know About the Suffragette Hunger Strikes*, MUSEUM OF LONDON (Oct. 5, 2018), <https://www.museumoflondon.org.uk/discover/six-things-you-didnt-know-about-suffragette-hunger-strikes>.

250. *Id.*

251. *Id.* See also *What We Can Learn from Vintage Anti-Suffrage Postcards and Cartoons*, ANDREAS AVESTER (June 27, 2019), <https://andreasavester.com/what-we-can-learn-from-vintage-anti-suffrage-postcards-and-cartoons/>.

252. *United States v. Virginia*, 518 U.S. 515, 525–26 (1996).

253. LAURA FAIRCHILD BRODIE, *BREAKING OUT: VMI AND THE COMING OF WOMEN* 66 (2000).

254. *Id.* at 348.

255. *Id.* at 349.

first-year cadets; some male upperclassmen allegedly told their male first-year cadets to ignore female upperclassmen, and this disrespect was not confined to peers.<sup>256</sup> Indeed, when a female faculty member attempted to discipline male cadets, male students allegedly came out onto their stoops and loudly called her a “b[\*]tch” and “wh[\*]re.”<sup>257</sup>

Still today, in modern America, women over age twenty-one are primarily celebrated only when they achieve a major *domestic* milestone: marriage or childbearing. Yet it is not as customary to publicly celebrate a woman’s *professional* achievements, such as buying her first home, landing her first job, or securing a promotion or tenure. Media and cultural traditions, even popular children’s games like “Old Maid,” send a clear message to women and girls that marriage should be their highest aim. Although well-intended, cultural traditions that reward women *only* for achieving the domestic role of wife or mother may entrench deep-seated sex stereotypes and exacerbate notions that non-wives and non-mothers are undesirable gender deviants unworthy of celebration. Downplaying women’s professional milestones is a subtle way of discouraging women from pursuing them. Such longstanding social norms remind women that “the paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.”<sup>258</sup>

Like the female “deviants” outlined above, women who enter male-dominated fields and especially those who assume positions of leadership within them will likely be viewed as gender deviants to the extent they defy a male-gendered construct of leadership. Yet women who adopt traditionally “masculine” leadership qualities like assertiveness and decisiveness will likely be judged as bossy, abrasive, or worse. Women leaders who exhibit a collaborative leadership approach more consistent with stereotypical notions of femininity risk being perceived as more likeable but less competent.<sup>259</sup> Indeed, “high-achieving women experience social backlash because their very success—and specifically the behaviors that created that success—violate[] our expectations about how women are supposed to behave.”<sup>260</sup> As a result, women leaders are often caught in a double bind. Like former Prime Minister Margaret Thatcher, they are derided unless they comport with male-gendered

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256. *Id.* at 348.

257. *Id.* at 175.

258. *Bradwell v. Illinois*, 83 U.S. 130, 140–41 (1872) (Bradley, J., concurring). Justice Swayne and Justice Field joined in that opinion.

259. Robin Hauser, *The Likeability Dilemma for Women Leaders*, YOUTUBE (May 19, 2022), <https://www.youtube.com/watch?v=T2I4tus05hI>; Marianne Cooper, *supra*, note 232.

260. Marianne Cooper, *For Women Leaders, Likability and Success Hardly Go Hand-in-Hand*, HARV. BUS. REV. (Apr. 30, 2013), <https://hbr.org/2013/04/for-women-leaders-likability-a/>.

notions of leadership, yet criticized as being “b\*tchy,” manly, and “not a real woman,” if they do. This may explain, at least in part, why women leaders are so often subjected to sex-based sanctions.

### B. Conflict Theory

Conflict theory provides another possible explanation for sex-based sanctions. Conflict theory “contends that beneficiaries of systems of inequality protect their privilege by using the resources they control to exclude members of subordinate groups . . . [and take] strategic, self-interested actions . . . [to] intentionally exclude and exploit subordinate group members to protect or advance their own interests.”<sup>261</sup> This territoriality results from a perceived shortage of resources, such as a highly coveted promotion.<sup>262</sup> Faced with real or imagined scarcity, individuals do whatever it takes to secure resources for themselves, often at the expense of others.<sup>263</sup> Consciously or not, they may even rely on biases and stereotypes to justify their self-serving actions or give themselves an advantage. This may explain, for instance, why the male employee in *Parker* spread a false rumor that his female co-worker had gotten the promotion he had wanted simply by sleeping with the boss.<sup>264</sup> Or why anti-suffrage propaganda promulgated by men who were afraid to lose their monopoly over the political process often cast suffragettes as man-hating spinsters and jilted lovers who were willing to win the right to vote by engaging in sexually promiscuous behavior.<sup>265</sup> By undermining the authority of women leaders, men motivated by conflict theory may believe they are driving women to either fail in those positions, bolstering the belief that women are ill-suited for that type of position, or prompting women to leave the workplace altogether, which will open up opportunities for men to replace them.

### C. Unconscious Biases and Sex Stereotypes

A third explanation relates to unconscious sex biases and stereotypes. Humans often use stereotypes and biases, consciously or not, as mental shortcuts to quickly process information about the world.<sup>266</sup> According to Levinson and Young, “[i]n the context of gender stereotypes, children are likely to learn at an early age that men are ‘competent, rational, assertive, independent, objective, and self-confident,’ and women are ‘emotional, submissive, dependent, tactful,

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261. Perdue, *supra* note 28, at 9–10.

262. *Id.*

263. *Id.*

264. *E.g.*, *Parker v. Reema Consulting Servs.* 915 F.3d 297, 300 (4th Cir. 2019).

265. Perdue, *supra* note 28, at 91.

266. *See, e.g.*, Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity*, 52 J. PERSONALITY & SOC. PSYCH., 871, 871 (1987).

and gentle.”<sup>267</sup> But “[i]f we immediately picture a man when we think about a trial lawyer, for example, what might that mean for women seeking to reach the pinnacle of the [legal] profession?”<sup>268</sup> Indeed, according to LeanIn.Org President and Co-Founder Rachel Thomas:

Men are expected to be assertive, confident, and opinionated, so we welcome their leadership. In contrast, women are expected to be kind, nurturing, and compassionate, so when they lead, they are going against our expectations. A man who makes a tough decision at work is often seen as decisive, while a woman who does the same may be seen as impulsive and brash.<sup>269</sup>

Another study revealed that women who are more “likeable” because they are viewed as helpful or friendly are less likely to also be perceived as competent; yet women are more likely to be sanctioned for self-promoting or being direct.<sup>270</sup>

The Implicit Association Test (IAT) is a tool that aims to measure a person’s unconscious bias.<sup>271</sup> Studies using the IAT have shown that most people more easily associate men with work and leadership and women with domestic and support roles.<sup>272</sup> For example, in 2010, Justin Levinson and Danielle Young conducted an empirical study, which:

found that a diverse group of both male and female law students implicitly associated judges with men, not women, and also associated women with the home and family . . . implicit gender biases were pervasive . . . . [T]he more strongly male participants associated judges with men in the Judge/Gender

267. Levinson & Young, *supra* note 62, at 6.

268. *Id.*

269. *Leadership Tips for Managers*, BAN BOSSY, <http://banbossy.com/manager-tips/> [<https://perma.cc/29GF-8NLH>] (last visited Sept. 19, 2023).

270. Laurie Rudman, *Self-Promotion as a Risk Factor for Women: The Costs and Benefits of Counterstereotypical Impression Management*, 74 J. PERSONALITY & SOC. PSYCH. 629, 629–30, 643 (1998); *The Double-Bind Dilemma for Women in Leadership: Damned if You Do, Doomed if You Don't*, CATALYST (Aug. 2, 2018), <http://www.catalyst.org/knowledge/double-bind-dilemma-women-leadership-damned-if-you-do-doomed-if-you-dont-0>; Madeline E. Heilman & Julie J. Chen, *Same Behavior, Different Consequences: Reactions to Men’s and Women’s Altruistic Citizenship Behavior*, 90 J. APPLIED PSYCH. 431, 431–32 (2005); Madeline E. Heilman & Tyler G. Okimoto, *Why are Women Penalized for Success at Male Tasks?: The Implied Communal Deficit*, 92 J. APPLIED PSYCH. 81, 81–82 (2007).

271. *About the IAT*, PROJECT IMPLICIT, <https://implicit.harvard.edu/implicit/iatdetails.html> (last visited Sept. 19, 2023); see also Anthony G. Greenwald et al., *Understanding and Using the Implicit Association Test: I. An Improved Scoring Algorithm*, 85 J. PERSONALITY & SOC. PSYCH. 197, 197 (2003).

272. See generally Levinson & Young, *supra* note 62.

IAT, the more they preferred that appellate judges possess masculine (compared to feminine) characteristics[,] . . . demonstrat[ing] that implicit gender biases can affect decision-making.<sup>273</sup>

Notably, however, the same individuals who possessed an implicit gender bias were still capable of making gender-neutral decisions.<sup>274</sup> Specifically, “for the resume study, male law student participants even preferred female candidates to male candidates and held other pro-female job attitudes . . . [and] law student participants were no more likely to cut funds from a women’s organization than from other organizations.”<sup>275</sup> According to Levinson and Young, their results suggest that while “the power of implicit gender biases persists . . . the emergence of a new generation of egalitarian law students may offer some hope for the future.”<sup>276</sup>

Other studies have reached a different conclusion, determining that unconscious biases may influence a person’s actual decision-making. For example, one study revealed that science professors hiring for a lab manager position who examined *identical* résumés belonging to a man and a woman perceived the woman as “less competent,” offered her a significantly lower start salary than the man, were less likely to offer to mentor her, and were more likely to say they would hire the man.<sup>277</sup> Notably, female professors “did not rate the female student as more competent . . . or hireable.”<sup>278</sup> Nor did they offer her a higher salary than male professors.<sup>279</sup> Another study involving academic psychologists found that “[b]oth men and women were more likely to vote to hire a male job applicant than a female job applicant with an identical record.”<sup>280</sup>

In recognition of the adverse consequences of sex stereotyping, the U.S. Supreme Court has made clear that sex stereotyping in employment is a form a sex discrimination that violates Title VII.<sup>281</sup> The case involved Ann Hopkins, an “outstanding professional” described as hardworking, creative, “extremely competent,” and “very

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273. *Id.* at 3.

274. *Id.*

275. *Id.* at 3–4.

276. *Id.* at 4.

277. Corinne A. Moss-Racusin et al., *Science Faculty’s Subtle Gender Biases Favor Male Students*, 109 PNAS 16474, 16478 (Oct. 9, 2012).

278. *Id.*; *Why Does John Get the STEM Job Rather than Jennifer*, STAN. (June 2, 2014), <https://gender.stanford.edu/news/why-does-john-get-stem-job-rather-jennifer>.

279. Moss-Racusin et al., *supra* note 278.

280. Rhea E. Steinpreis et al., *The Impact of Gender on the Review of Curricula Vitae of Job Applicants and Tenure Candidates: A National Empirical Study*, 41 SEX ROLES 509, 509–10 (1999) (“The results of this study indicate a gender bias for both men and women in preference for male job applicants.”).

281. *See generally* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

productive.”<sup>282</sup> However, even after landing a \$25 million contract, she was rejected for partnership at Price Waterhouse (PWC).<sup>283</sup> PWC justified its decision by arguing that Hopkins was “overcompensating for being a woman,” “overly aggressive,” “macho,” abrasive, used foul language, etc.<sup>284</sup> To enhance her chance of making partner, she was purportedly advised to “take a course at charm school,” wear makeup and jewelry, and “dress more femininely.”<sup>285</sup> At the time, only seven of PWC’s 662 partners were female, and Hopkins was the only woman in the current applicant pool.<sup>286</sup> Social psychologist Dr. Susan Fiske testified that sex stereotyping had tainted PWC’s partnership selection process. The Supreme Court agreed, concluding that “an employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.”<sup>287</sup>

In conclusion, sex stereotyping and biases are both the cause and effect of sex-based sanctions. They legitimate male power while potentially disadvantaging women. They also undermine a woman leader’s ability to lead effectively.

#### IV. CONSEQUENCES OF SEX-BASED SANCTIONS

Regardless of the underlying reasons for sex-based sanctions, which remain hotly debated and not well understood, the “leaky pipeline” to leadership that they produce is beyond dispute.<sup>288</sup> From STEM and higher education to law and politics, leaky pipelines exist across industries.<sup>289</sup> Many talented, promising women enter the field, but too few emerge as powerful, high-ranked leaders. Why?

##### A. *Selecting Out*

Sex-based sanctions can sometimes make a woman’s workplace environment so intolerable that she feels compelled to either not pursue a leadership role or alternatively, to leave the job or workforce, altogether. Selecting out is especially true when sanctions like sexual harassment, pay inequity, and sidelining take an emotional and physical toll on the woman, which outweighs the benefits of remaining at the workplace. Not surprisingly, an ABA/ALM study of twelve hundred senior lawyers at law firms nationwide published in

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282. *Id.* at 234.

283. *Id.* at 234–35.

284. *Id.* at 234–35.

285. *Id.* at 235.

286. *Id.* at 233.

287. *Id.* at 251.

288. JEFFERSON & JOHNSON, *supra* note 56, at 19.

289. *See, e.g.*, WORLD ECONOMIC FORUM, GLOBAL GENDER GAP REPORT 2022, at 7 (July 2022).

October 2019 revealed that 74 percent of the male respondents said “their law firms successfully retained experienced women,” but only 47 percent of women agreed.<sup>290</sup> A different survey of two hundred women lawyers across 36 states found that most left because of “gender biases, microaggressions, billable hour target pressure, preservation of mental health, lack of mentorship, unequal pay, as well as isolation, long hours and unpredictable schedules, lackluster career trajectory prospects and insufficient work-life balance, among others.”<sup>291</sup> More than 60 percent of the respondents were aged thirty-five to fifty-five and in their career prime, the point at which they are often advancing to higher levels of leadership within their law firms.<sup>292</sup> Yet most reported feeling unsupported. In fact,

90 percent of survey respondents said that workplace culture was the main reason why they quit, with 82 percent blaming lack of flexibility and work/life balance. 74 percent said that the trajectory of their careers drove them to leave their current firms, a signal that many women feel shut out of advancement opportunities.<sup>293</sup>

Despite the common refrain that women leave law firms by choice before making partner solely or primarily because they want to have children or get married, “the most eye-opening insight from the survey – [was that] while three-quarters of survey respondents said they are mothers, *women lawyers are not leaving the legal field due to childcare barriers resulting from the COVID-19 pandemic.*”<sup>294</sup> Nearly 70 percent of respondents reported that staying home with their children had little or nothing to do with their decision to leave their legal jobs.<sup>295</sup> Nor was the pandemic the main reason why they left Big Law; only 20 percent of respondents flagged it as a key factor in their departure.<sup>296</sup> Yet many employers perpetuate this narrative perhaps in part because it absolves them of any culpability for the high attrition of female employees.

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290. SCALE LLP, *Women in Law are Driving an Entirely New Practice Model*, ABOVE THE LAW (March 23, 2023, 11:14 AM), <https://abovethelaw.com/2023/03/women-in-law-are-driving-an-entirely-new-practice-model/>.

291. Laura Leopard, *Why are Women Leaving Big Law and What Can Law Firms Do About It?*, LEOPARD SOLUTIONS (July 25, 2022), <https://www.jdsupra.com/legalnews/why-are-women-leaving-big-law-and-what-6682026/>. As noted *infra*, other research has concluded that caretaking roles outside work do play a significant role in women’s decisions to leave the profession.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

In addition, sidelining fosters self-doubt in women, which causes them to generally undervalue their skills and competency. Perhaps as a result, they are less likely to ask to handle high-stakes matters or new opportunities—the kinds of initiative and risk-taking that often lead to promotions and advancement.<sup>297</sup> Women are also more susceptible to feeling that they are frauds who do not belong in the position, a phenomenon oft-described as “imposter syndrome.”<sup>298</sup> In fact, one study found that women typically will not apply for a job unless they meet 100 percent of the application criteria, while men will apply if they meet only 60 percent of the criteria.<sup>299</sup> Sex-based sanctions can also deter women from pursuing leadership roles and advancement opportunities, which may only make their work life more demanding but less rewarding. In fact, a 2016 McKinsey Report found that while 40 percent of women and 56 percent of men in the U.S. “seek top executive positions,” only 25 percent of women as compared to 42 percent of men “think they are likely to achieve their goal.”<sup>300</sup> This gnawing self-doubt can prompt a woman to select out of leadership roles because she feels ill-equipped to excel in them.

In conclusion, although some women do leave the workplace or profession for caretaking reasons, many others exit because sex-based sanctions pervasive in their workplace cultures leave them feeling unsupported, undeveloped, undervalued, and underpaid.

But employers cannot solve a problem that they do not understand. Unfortunately, the majority of people at the highest levels of leadership are men who have extremely different perceptions of how their law firms perform with regard to gender diversity, promotion, and retention, as illustrated below.

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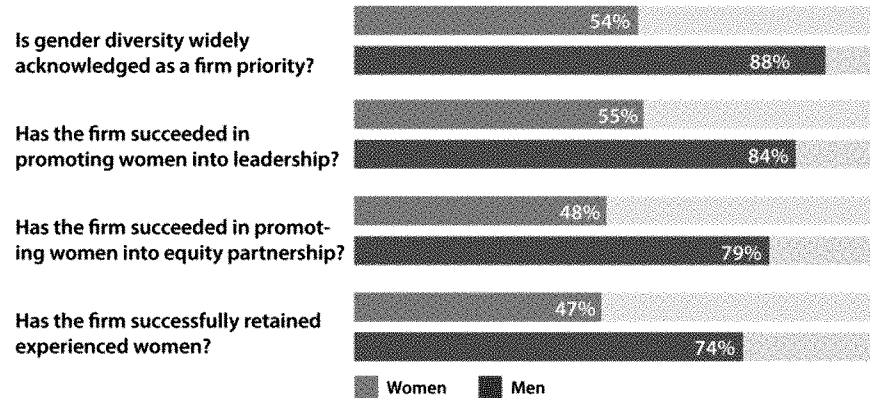
297. Irene E. De Pater et al., *Challenging Experiences: Gender Differences in Task Choice*, 24 J. MANAGERIAL PSYCH. 1, 4–6 (2009); D. Scott Lind et al., *Competency-Based Student Self-Assessment on a Surgery Rotation*, 105 J. SURGICAL RES. 31, 31 (2002); Kimberly A. Daubman et al., *Gender and the Self-Presentation of Academic Achievement*, 27 SEX ROLES 187, 187–90 (1992). See generally Leslie P. Culver, *The Rise of Self-Sidelining*, 39 WOMEN’S RTS. L. REP. 173 (2018).

298. Oliver Lewis, *Women more likely to suffer from imposter syndrome than men, according to research*, INDEP. (Apr. 7, 2023, 9:34 PM), <https://www.independent.co.uk/life-style/women-imposter-syndrome-workplace-confidence-b2313770.html>.

299. Tara Sophia Mohr, *Why Women Don’t Apply for Jobs Unless They’re 100% Qualified*, HARV. BUS. REV. (Aug. 25, 2014), <https://hbr.org/2014/08/why-women-dont-apply-for-jobs-unless-theyre-100-qualified>.

300. SANDRINE DEVILLARD ET AL., MCKINSEY, WOMEN MATTER 2016: REINVENTING THE WORKPLACE TO UNLOCK THE POTENTIAL OF GENDER DIVERSITY 21 (2016), <https://www.mckinsey.com/~media/mckinsey/featured%20insights/women%20matter/reinventing%20the%20workplace%20for%20greater%20gender%20diversity/women-matter-2016-reinventing-the-workplace-to-unlock-the-potential-of-gender-diversity.ashx>; LAREINA YEE ET AL., *supra* note 148, at 1–2.

**How Men and Women View Law Firm Policies  
(percent who said yes)<sup>301</sup>**



If law firm leadership mistakenly believes that all or most women leave by choice to raise families, they can effectively exonerate themselves from any responsibility for improving retention. They can perpetuate a narrative that justifies them doing little or nothing to address other foundational reasons that prompt high rates of attrition.

*B. Burnout and Fatigue*

In addition, sex-based sanctions may take such a heavy emotional and physical toll on women that they are reluctant to pursue even more demanding leadership roles. In fact, one study found that 42 percent of women said they “have been always or often burned out during 2021.”<sup>302</sup> In a recent ABA/ALM study, 54 percent of the women attorneys surveyed said that “stress at work” drove female attrition.<sup>303</sup> Likewise, Houle et al. (2011) concluded that sexual harassment is associated with depression and diminished mental health, especially in women.<sup>304</sup> “Harassed workers feel annoyed, angry, and conflicted, often leading to self-doubt and self-blame,” which can destroy the self-esteem necessary to pursue

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302. RACHEL THOMAS ET AL., *supra* note 186, at 13.

303. Women in the Legal Profession, *supra* note 50.

304. Houle et al., *The Impact of Sexual Harassment on Depressive Symptoms during the Early Occupational Career*, 1 SOC. MENTAL HEALTH 89, 100–01 (July 1, 2011).

leadership and advancement opportunities.<sup>305</sup> In addition, “the effects of harassment are indeed lasting, as harassment experiences early in the career were associated with heightened depressive symptoms nearly ten years later.”<sup>306</sup> Furthermore, a person who experiences sexual harassment at the beginning of her career is likelier to experience it later as well, perhaps on a recurring or ongoing basis.<sup>307</sup>

Even absent sexual harassment, women leaders experience high rates of burnout due in part to other issues like the double standard to which they are held and the sidelining they endure: “[An estimated] 43 percent of women leaders are burned out, compared to only 31 percent of men [who are] at their [same] level.”<sup>308</sup> Among senior women leaders, that number rose to 50 percent in 2020.<sup>309</sup> Senior women leaders also “report higher rates of burnout, chronic stress, and exhaustion” than their male counterparts.<sup>310</sup> Not surprisingly, “[i]n 2020, a quarter of women in senior leadership roles said they wanted to leave the workforce or downshift their careers. Now, the proportion seeking to quit or offload major responsibilities has risen to one in three senior-level women.”<sup>311</sup>

Stereotyping and bias also cause burnout. “Women who regularly experience microaggressions are twice as likely as those who don’t to be burned out, more than twice as likely to report feeling negative about their job, and almost three times as likely to say that they have struggled to concentrate at work during the past few months due to stress.”<sup>312</sup> In an ABA/ALM joint study of twelve hundred senior lawyers, 82 percent of the female respondents said they had been mistaken for a lower level employee.<sup>313</sup> Not a single male respondent had experienced this same “microinsult.”<sup>314</sup> Similarly, a female law professor recounted the way in which a male law student had asked her in front of the class on the first day of law

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305. *Id.* at 101.

306. *Id.*

307. *Id.* at 91.

308. RACHEL THOMAS ET AL., MCKINSEY, WOMEN IN THE WORKPLACE 2022 14 (2022), <https://womenintheworkplace.com/>.

309. Judy D’Agostino et al., McKinsey, *Stepping up, but risking burnout: Women leaders in the public and social sectors in 2021* (Nov. 12, 2021), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/stepping-up-but-risking-burnout-women-leaders-in-the-public-and-social-sectors-in-2021>.

310. *Id.*; see also McKinsey, *Women leaders continue to feel the burn of burnout* (Feb. 16, 2022), <https://www.mckinsey.com/featured-insights/sustainable-inclusive-growth/chart-of-the-day/women-leaders-continue-to-feel-the-burn-of-burnout>.

311. *Id.*

312. RACHEL THOMAS ET AL., *supra* note 309, at 28.

313. *Women in the Legal Profession*, *supra* note 50.

314. *Id.*

school, “[d]o I have to call you professor?”<sup>315</sup> A female attorney explained the way in which she had repeatedly been mistaken for her male coworker’s administrative assistant whenever male opposing counsel came to the office merely because she sat in the equivalently-sized office next to him.<sup>316</sup> A female doctor recounted experiences with male patients who asked, “Where’s the doctor?” when she entered the room, assuming she was the nurse.<sup>317</sup> Countless women shared experiences of being talked over or talked at by colleagues, patients, clients, and students.<sup>318</sup> After a while, it becomes difficult for even the most resilient women to keep going. This problem is even more pronounced for women of color.<sup>319</sup>

Another sex-based sanction—unpaid “housekeeping” work—exacerbates the problem of burnout. For example, women are likelier than men to perform formal and informal work to support DEI initiatives. This gap is especially prevalent among senior-level women, who are “twice as likely” as their male counterparts to spend time on DEI work—such as recruiting employees from underrepresented groups and supporting employee resource groups—that falls outside their formal job responsibilities and is often unpaid.<sup>320</sup> Likewise, wellness and community-building initiatives, which are increasingly popular to rebuild the sense of community diminished or lost during the pandemic, are also disproportionately assigned to female employees.<sup>321</sup> In fact, women do an astonishing “60 percent more work than their male counterparts to support the emotional health of their colleagues.”<sup>322</sup> Organizations enjoy significant benefits from the this type of uncompensated work. For example, when managers support employee wellbeing, those employees report being 27 percent happier, 28 percent less burnt out, and 32 percent less likely to consider leaving their organization than employees who do not receive such support.<sup>323</sup>

Unfortunately, employers receive the benefits of this important work, but the women performing it often do not. While 70 percent of organizations say DEI efforts are critical, only 24 percent of organizations substantially recognize contributions to this initiative.<sup>324</sup> Similarly, 87 percent of organizations say wellbeing is important, but only 25 percent give it (or the people conducting it)

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315. Confidential Interviews, *supra* note 139.

316. *Id.*

317. *Id.*

318. *Id.*

319. RACHEL THOMAS ET AL., *supra* note 186, at 27–29.

320. *Id.* at 17.

321. McKinsey, *supra* note 311.

322. *Id.*

323. RACHEL THOMAS ET AL., *supra* note 186, at 20.

324. *Id.* at 21.

substantial recognition.<sup>325</sup> However, women who say no to unpaid service work lose social capital at the workplace—the kind necessary to advance—while men gain capital if they say yes and “face minimal fallout for saying no.”<sup>326</sup> Yet women should not be forced to sacrifice their own wellbeing to inure benefits to their coworkers and employer. Furthermore, two-thirds of women at Fortune 200 companies serve in the kinds of support roles that are less likely to culminate in senior leadership positions.<sup>327</sup>

Finally, women not only bear the brunt of “housekeeping” at work, but they are also usually the primary caregivers at home. These caretaking commitments, compounded by unpaid “housekeeping” responsibilities at work, undoubtedly contribute to high rates of female attrition. Although caretaking responsibilities are likely not the sole or primary reason women exit the legal profession, 58 percent of women surveyed by the ABA/ALM stated that their “caretaking commitments” did contribute to their decision to leave the firm.<sup>328</sup>

### C. *Lower Rates of Job Satisfaction*

Last but certainly not least, the cumulative effects of sex-based sanctions may lead women to experience lower levels of job satisfaction than their male counterparts, prompting them to want to move on more than move up. As the chart below demonstrates, women are significantly less satisfied with their law firm leadership, advancement opportunities, salaries, as well as the recognition they receive.

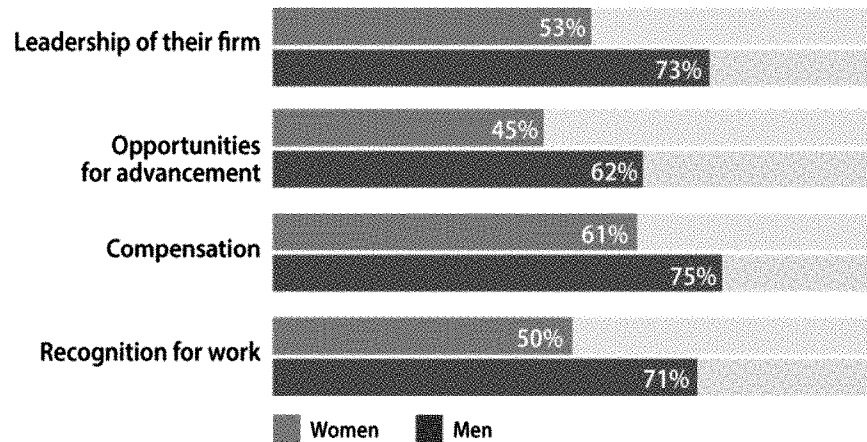
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325. *Id.*

326. BAN BOSSY, *supra* note 270, at 10.

327. JOANNA BARSH & LAREINA YEE, UNLOCKING THE FULL POTENTIAL OF WOMEN AT WORK 6 (2012).

328. *Women in the Legal Profession*, *supra* note 50.

**Job Satisfaction (extremely or somewhat satisfied)<sup>329</sup>**

In conclusion, sex-based sanctions are an important factor that may prompt women to select out of leadership opportunities, to experience higher rates of burnout, and to feel dissatisfied with their jobs. Consequently, these same women, who entered the profession full of promise and optimism, may leave their jobs, leaking out of the pipeline for leadership. So how can employers plug those leaks?

#### V. PLUGGING THE LEAKS

There is no one-size-fits-all solution for the leaky pipeline of female leadership. To the contrary, organizations and individuals must fully understand the issues present in their specific workplaces and craft customized, workable solutions. Moreover, there is disagreement regarding which measures are most effective, with some even arguing that the leaks need not be plugged if greater numbers of women are recruited for entry into the profession. With those caveats, what follows is a non-exhaustive list of possible suggestions, ranked in no certain order, for organizations to consider as they strive to minimize the harmful effects of sex-based sanctions.

##### A. *Organizational Initiatives*

###### 1. *Encourage employees to examine their own behavior*

Too often, sexual harassment trainings focus solely on knowledge acquisition, lecturing at non-lawyer employees about the legal dos and don'ts that will protect the company from liability. They do not

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329. *Women in the Legal Profession*, *supra* note 50. ©2022 by the American Bar Association. Reprinted with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

shed light on how sex-based sanctions make women *feel* or the deeper reasons why sex-based sanctions like sexual harassment harm everyone, not just women. Nor do they sufficiently invite sharing and reflection among employees. Yet “the biggest stumbling block” to equality of the sexes in the workplace is “unexamined behavior.”<sup>330</sup> Consequently, trainings should be broad enough to cover harassment, stereotyping, and sidelining. They should include practice hypotheticals that diverse groups of employees can discuss and troubleshoot. Moreover, during reflection sessions, they should invite employees to consider whether they would act the same way or say the same thing if the person were a different sex or if their spouse, boss, or HR manager were in the room. Trainings need to focus more on cultivating compassion, empathy, and understanding than on shaming, vilification, and finger-pointing. They should be less legalistic and more human-centered.

### 2. *Expanding notions of effective leadership*

The current leadership model in many organizations remains rooted in archaic masculinized notions that the best leaders “take charge.” But leadership literature today shows that there are many effective approaches to leadership, such as servant leadership, which is more collaborative and focuses on aligning team members with whatever they need to perform their best.<sup>331</sup> There is no one way to be an effective leader, and requiring women to fit into antiquated, sexist notions of leadership is like forcing a square peg into a round hole.

### 3. *Greater support for caretaking responsibilities*

Although competing data exists on this point, it is beyond dispute that caretaking commitments play a role in driving experienced female lawyers from the profession.<sup>332</sup> To retain and support talented women, law firms and other organizations must invest in caretaking support services. This may include providing free or subsidized full-time onsite childcare like the law firm of Akin Gump.<sup>333</sup> Alternatively, companies and firms could partner with a reputable and conveniently located daycare or preschool near the office where

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330. Alexander, *supra* note 187.

331. Jim Haudan, *6 Reasons Why Servant Leadership is Best*, ROOT INC. (Oct. 26, 2020), <https://www.rootinc.com/why-servant-leadership-really-works/>.

332. *Women in the Legal Profession*, *supra* note 50.

333. Sarah Richmond, *Akin Gump Named a Top Firm for Working Mothers by Yale Law Women*, AKIN GUMP (May 20, 2020) [https://www.akingump.com/en/insights/press-releases/working-mother-names-akin-gump-among-best-law-firms-for-women#:~:text=This%20is%20the%20most%20recent,Women%20in%20Law%20Empowerment%20Forum.](https://www.akingump.com/en/insights/press-releases/working-mother-names-akin-gump-among-best-law-firms-for-women#:~:text=This%20is%20the%20most%20recent,Women%20in%20Law%20Empowerment%20Forum.;); *Top Firms History*, YALE L. WOMEN, <https://ylw.yale.edu/top-firms-history/> (last visited July 20, 2023).

employees can enjoy subsidized childcare rates. Companies could similarly partner with elder care facilities or assisted living homes to offer similar benefits to employees or ask human resources personnel to actively assist employees in finding safe and affordable childcare and eldercare. These measures will minimize the caretaking burden on all employees, regardless of sex, and in particular, may increase the recruitment and retention of women. Employees could even partner with cleaning companies, pet daycares, and housekeeping services so employees could use those services at a discounted rate.

#### 4. *Flexible work arrangements*

Flexible work arrangements will also better promote the recruitment and retention of women. A 2021 PWC survey of 133 executives and twelve hundred office workers found that an overwhelming 83 percent of employers described pandemic-related remote work as “successful.”<sup>334</sup> In fact, “[o]ver half of employees (55 percent) would prefer to be remote at least three days a week once pandemic concerns recede.”<sup>335</sup> Indeed, flexible work-from-home arrangements have been shown to increase productivity and job satisfaction,<sup>336</sup> reduce absenteeism,<sup>337</sup> increase employee engagement,<sup>338</sup> reduce attrition,<sup>339</sup> improve morale and work

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334. PWC, PWC’S US REMOTE WORK SURVEY (Jan. 12, 2021), <https://www.pwc.com/us/en/library/covid-19/us-remote-work-survey.html> [https://perma.cc/3N83-HHT6].

335. *Id.*

336. See Susanti Saragih et al., *Benefits and Challenges of Telework During the Covid-19 Pandemic*, 14 INT’L RSCH. J. BUS. STUD. 129, 130 (2021); Prithwiraj Choudhury, *Our Work-From-Anywhere Future*, HARV. BUS. REV. (2020) (“A 2015 study by Nicholas Bloom and coauthors found that when employees opted in to WFH policies, their productivity increased by 13%.”); Laurel Farrer, *5 Proven Benefits of Remote Work For Companies*, FORBES (Feb. 12, 2020), <https://www.forbes.com/sites/laurelfarrer/2020/02/12/top-5-benefits-of-remote-work-for-companies/?sh=2ef6f02f16c8> (“Teleworkers are an average of 35-40% more productive than their office counterparts, and have measured an output increase of at least 4.4%.”); PWC, *supra* note 335 (52% of executives surveyed stated that employee productivity improved during remote work).

337. See Farrer, *supra* note 337 (“Higher productivity and performance combine to create stronger engagement, or in other words, 41% lower absenteeism.”).

338. See Choudhury, *supra* note 337; Farrer, *supra* note 337.

339. See Choudhury, *supra* note 337; Farrer, *supra* note 337 (“54% of employees say they would change jobs for one that offered them more flexibility, which results in an average of 12% turnover reduction after a remote work agreement is offered.”); Saragih et al., *supra* note 337, at 130 (noting that flexible work from home arrangements increase retention, “attracting employees (61%)” and reducing “turnover (52%)”). See *generally* FAMILIES AND WORK INST., WHEN WORK WORKS: 2008 GUIDE TO BOLD NEW IDEAS FOR MAKING WORK WORK, 1–2 [hereinafter *Bold New Ideas*] (providing examples in which employers have noticed flexible work arrangements improve employee productivity, engagement,

quality,<sup>340</sup> and attract diverse, global talent without creating complex immigration issues. Significantly, these benefits remain “constant regardless of the economic climate.”<sup>341</sup> It “may lead to more efficient time use, lower stress caused by traffic and other commuting woes, and free up that time to tend to personal needs, engage in healthy physical activities, or deal with family responsibilities.”<sup>342</sup> Because women more often serve as primary caregivers, they appear to benefit the most from flex-time arrangements.<sup>343</sup>

*5. Increased access to sex-neutral opportunities for mentoring, networking, business development, and leadership training*

As noted earlier, 67 percent of female attorneys surveyed felt they had been denied equal access to mentorship and development opportunities, and only 45 percent were satisfied with the opportunities for advancement at their law firms.<sup>344</sup> 51 percent said that an “emphasis on marketing or originating business” drove women to leave the law.<sup>345</sup> Law firms and other organizations must reevaluate their mentorship, networking, leadership, and business development opportunities to ensure they are sex-neutral and that equal numbers of affinity events are offered. For example, if a law firm golf tournament is offered as a mentorship opportunity but will segregate the sexes into the men’s tees and ladies’ tees, then another

and retention, reduce costs, turnover, and absenteeism, increase customer satisfaction and staffing coverage, and boost innovation).

340. Farrer, *supra* note 337 (discussing a study that revealed that flex-time “workers produce results with 40% fewer quality defects”); *see also* Saragih et al., *supra* note 337, at 130 (citing a 2015 study, which revealed that granting flexible work arrangements led to “employee excellence, higher commitment (74%), . . . and quality of employees’ work (59%).”).

341. *See generally* WFD CONSULTING, BUSINESS IMPACTS OF FLEXIBILITY: AN IMPERATIVE FOR EXPANSION, CORP. VOICES FOR WORKING FAMILIES (2005) [hereinafter Business Impacts], [https://www.canada.ca/content/dam/canada/employment-social-development/migration/documents/PDFS/BusinessImpactsofFlexibility\\_March2011.pdf](https://www.canada.ca/content/dam/canada/employment-social-development/migration/documents/PDFS/BusinessImpactsofFlexibility_March2011.pdf) (observing that flexible work arrangements positively impact talent acquisition, increase employee satisfaction, dedication, retention, engagement, and productivity).

342. Mireia Las Heras, *The Benefits of Flex Work for People, Families and the Environment*, FORBES (Jan. 9, 2021, 9:10 AM), <https://www.forbes.com/sites/iese/2021/06/09/the-benefits-of-flex-work-for-people-families-and-the-environment/?sh=42c8d4725be6> (“[W]orking from home reduced commute-related stress by 63% while boosting overall happiness by 10% and causing a 21% reduction in multitasking that causes stress and weakens work quality.”).

343. *Id.*

344. ROBERTA D. LIEBENBERG & STEPHANIE A. SCHARF, WALKING OUT THE DOOR: THE FACTS, FIGURES, AND FUTURE OF EXPERIENCED WOMEN LAWYERS IN PRIVATE PRACTICE 6–7 (2019).

345. *Id.* at 10.

mentorship event should be offered that will allow the male associates to mingle only with female partners and female associates to have exclusive access to male partners.

#### 6. *Flexible structures for advancement*

It is no surprise that in the world of work that was created by men for men, the typical pathway to promotion or tenure generally coincides with the period of time in which many women are undergoing the exhaustion of pregnancy and the challenge of raising young children. For example, at many law firms, an unwritten “up and out” model exists that affords employees roughly five to ten years to prove their suitability for partnership, after which time they are asked to leave.<sup>346</sup> The same holds true in academia, where professors generally have around seven to ten years from their initial hiring to attain full tenure. For many women, that timespan is the most challenging time for them to prove their worth, especially when they are simultaneously experiencing sex-based sanctions, are subjected to a double standard, and are disproportionately saddled with caretaking responsibilities at home. In reality, however, these advancement timelines are arbitrary and may not allow tolling for pregnancy and childrearing. As such, law firms, universities, and other institutions should reconsider the necessity of these rigid timelines and whether they should be tolled during periods of pregnancy, parental leave, and family leave, so women are not disadvantaged for pursuing both their personal and professional dreams. In addition, law firms should move away from the antiquated “up and out” model and establish more creative promotion structures and part-time options for talented employees where they can remain employed, albeit in roles that are less time consuming and more flexible. Employers should also consider permitting employees to move flexibly off a partnership or tenure track for a period of time and then back onto it without losing the benefit of their prior experience on that track.

#### 7. *Greater insurance coverage and support for fertility and miscarriage care*

Women are generally the most fertile in their late teens and early twenties, which is the same time many of them are completing college or graduate degrees or even beginning their first jobs. Career-oriented women increasingly delay marriage and childbearing until their mid to late thirties and beyond,<sup>347</sup> around the same time they are also being considered for partnership, tenure, and other critical

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346. *E.g.*, *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

347. Sabrina Tavernise et al., *Why American Women Everywhere Are Delaying Motherhood*, N.Y. TIMES (June 16, 2021), <https://www.nytimes.com/2021/06/16/us/declining-birthrate-motherhood.html>.

forms of promotion. However, unlike a man, a woman's fertility decreases dramatically with age and the incidence of birth defects, chromosomal disorders, and other complications increases.<sup>348</sup> As a result, working women increasingly turn to assisted reproduction and adoption to have children.<sup>349</sup> Unfortunately, a single IVF cycle averages around \$15,000 to \$30,000,<sup>350</sup> and most companies provide limited or no insurance coverage for much-needed fertility care.<sup>351</sup> Nor do they robustly cover IVF-related necessities like legal fees, donor costs, or genetic testing.<sup>352</sup> Thus, companies effectively force women to: (1) leave the workforce and opt out of the partnership track to bear children, putting a temporary halt on their advancement, (2) risk bankruptcy to build a family, or (3) forego the opportunity to have biological children. Men, however, generally need not make these same sacrifices because they are able to bear children well into old age. As a result, companies should expand their fertility care coverage to ensure that working women have the best chance possible to build a family through assisted reproduction or adoption at any stage of their careers. In addition, employers should also offer greater coverage and support for miscarriage care, including counseling. This will likely encourage recruitment and retention of female employees.

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348. The American College of Obstetricians and Gynecologists Committee on Gynecologic Practice & The Practice Committee of the American Society for Reproductive Medicine, *Female Age-Related Fertility Decline*, 101 FERTILITY AND STERILITY 633, 633 (2014).

349. See generally Claire Cain Miller, *The U.S. Fertility Rate Is Down, Yet More Women Are Mothers*, N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/upshot/the-us-fertility-rate-is-down-yet-more-women-are-mothers.html>; Kristen Hamilton, *Demographics of Adoptive Parents* (Jan. 3, 2023), <https://adoptioncouncil.org/article/demographics-of-adoptive-parents/> (“People that adopted through infant domestic adoption had the highest level of education and household income, averaged 35 years old, and 94% were married at the time they adopted.”).

350. Marissa Conrad, *How Much Does IVF Cost?*, FORBES HEALTH (Mar. 7, 2023, 11:47 AM), <https://www.forbes.com/health/family/how-much-does-ivf-cost/> (“A single IVF cycle—defined as ovarian stimulation, egg retrieval and embryo transfer—can range from \$15,000 to \$30,000, depending on the center and the patient’s individual medication needs. Medications can account for up to 35% of those charges.”).

351. Elissa Strauss, *40 Years Later, Why is IVF Still Not Covered by Insurance? Economics, Ignorance and Sexism*, CNN (July 25, 2018), <https://www.cnn.com/2018/07/25/health/ivf-insurance-parenting-strauss/index.html> (“IVF costs, on average, roughly \$20,000 a cycle and is not, in most cases, covered by insurance. For the vast majority of the infertile population, this means they either have to take on considerable debt or avoid receiving treatment and likely the chance to have children altogether.”).

352. *Id.*

8. *More equitable and transparent compensation structures and work allocation*

Companies should hire outside law firms or accounting firms to regularly conduct salary and wage compensation audits to identify and address pay inequity. These auditors will interview employees to learn the type of work they perform on a daily basis, the hours they invest, and the compensation they have received. They will also assess the uncompensated work individuals are doing. They can then impartially analyze whether individuals are indeed performing equal work for unequal pay. Companies should minimize uncompensated work to the extent possible and make efforts to ensure that it is evenly distributed, rather than falling disproportionately on women. Women should also be more proactive in negotiating their pay,<sup>353</sup> and decisionmakers should receive training on the impact of gender bias in salary negotiations.

9. *Female representation in governance and leadership*

Companies should make concerted efforts to ensure that diverse women are well represented in task forces, leadership, and other governance committees. Indeed, Grada et al. (2015) demonstrated that involving female faculty in the design and development of institutional policies and programs promoted more inclusive metrics of success.<sup>354</sup>

10. *Rethink evaluation and assessment structures*

Given the mounting research regarding the way in which sexism taints anonymous evaluations from students, universities and other organizations should reconsider the weight afforded to such evaluations in the promotion and tenure process as well as in awarding merit-based bonuses and wage increases. Because women are often penalized for self-promotion,<sup>355</sup> companies should also give employees the option of either drafting their own self-evaluations for

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353. Mary Sharp Emerson, *Women Negotiation Skills: How Women Can Get What They Want in a Negotiation*, HARV. DIV. OF CONTINUING EDUC. (July 28, 2022), <https://professional.dce.harvard.edu/blog/women-negotiation-skills-how-women-can-get-what-they-want-in-a-negotiation/#:~:text=According%20to%20Shahbari%2C%20women%20negotiators,assertively%20and%20achieve%20better%20outcomes> (“In one study, for example, only seven percent of women coming out of business school negotiated their starting salary, compared to 57 percent of men. Failure to negotiate that first salary can lead to a \$7,000 pay gap that first year. That wage gap then grows to as much as \$1 million over the course of a 45-year career.”).

354. Grada et al., *Naming the Parts: A Case-Study of a Gender Equality Initiative with Academic Women*, 30 GENDER IN MGMT.: AN INT’L J. 358–78 (2015), <https://www.emerald.com/insight/content/doi/10.1108/GM-09-2013-0118/full/html>.

355. Emerson, *supra* note 354.

purposes of a raise or promotion or alternatively, appointing a colleague to craft it for them. Research reveals that while women are less successful at negotiating their own raises, they are more successful when negotiating on behalf of others.<sup>356</sup> Thus, employees should all be given this option when seeking a promotion or raise. Organizations should also ensure that diverse women are well represented on evaluation committees and ask all members to take the Implicit Association Test for Gender and Work<sup>357</sup> prior to completing their assessment so they are more conscious of their own biases and less likely to act on them.

*11. More equitable allocation of and value placed on uncompensated work*

Companies and organizations should develop a fair and transparent “wheel” whenever possible for the more even distribution of uncompensated work. At a law school, for example, legal writing faculty should not be expected to serve as Moot Court and Transactional Bowl coaches year after year without compensation. To the contrary, each faculty member’s name could instead be entered into a “Coaching Wheel,” so that the coaching responsibilities are evenly distributed, and legal writing as well as doctrinal professors can cycle in and out of coaching responsibilities at fair, reasonable intervals. Alternatively, law schools could compensate coaches with reasonable stipends. Leaders should also ensure that any uncompensated work is equally valued in year-end assessments, evaluations, as well as publicly acknowledged during workplace gatherings or faculty meetings.

*12. Enhanced exposure to stereotype-defying women*

Research has shown that exposure to stereotype-defying women can decrease implicit bias, at least temporarily.<sup>358</sup> As a result, organizations should consider hosting a speaker series, social media campaign, or other initiatives that highlight the accomplishments of female trailblazers, both within and outside the organization. These celebrations should not be limited to Women’s History Month but instead should be meaningfully integrated throughout the year.

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356. *Id.* (“According to Shahbari, women negotiators often excel at negotiating on behalf of others, such as their team or their organization. They tend to negotiate more assertively and achieve better outcomes.”).

357. *Implicit Association Test (IAT)*, HARV. OFF. FOR EQUITY, DIVERSITY, INCLUSION & BELONGING, <https://edib.harvard.edu/implicit-association-test-iat> (last visited Sept. 19, 2023).

358. See Nilanjana Dasgupta & Shaki Asgari, *Seeing is Believing: Exposure to Counterstereotypic Women Leaders and Its Effect on the Malleability of Automatic Gender Stereotyping*, 40 *J. EXPERIMENTAL SOC. PSYCH.* 642, 645 (2004) (exposure to women role models may temporarily decrease implicit bias).

### 13. *Awareness of unconscious bias and sex stereotyping*

Training on implicit bias is important, but it should perhaps be recalibrated to call people into the conversation. Virtue signaling and shaming alienate the very employees who most benefit from the sessions, but they will learn nothing if they arrive with resentment and preconceived notions that the session aims to do nothing more than to shame and blame them. Facilitators should help participants understand that bias is a fear of the unknown.<sup>359</sup> It is an evolutionary response that our ancestors cultivated to survive.<sup>360</sup> Still today, when we experience the unfamiliar, our bodies unconsciously experience a fight or flight response, including the release of stress hormones and other physiological changes like our heart rate speeding up.<sup>361</sup> This feeling of discomfort fuels bias and segregation.<sup>362</sup> Yet as Valerie Alexander explains, by making the unexpected expected and increasing people's exposure to women leaders, we may reduce this response.<sup>363</sup> Sessions should encourage participants to take the implicit association tests (without sharing their results), reflect on the origins of their biases and how they may impact their behavior and decision-making, and then explore possible ways to control those biases rather than allowing their biases to control them. According to Alexander, this important work of self-examination and reducing bias can and should be done without "attacking our allies."<sup>364</sup>

### 14. *Zero tolerance for sexual harassment*

According to Dr. Marianne Cooper, "the single biggest predictor of sexual harassment is how permissive the organization is of this behavior." If people don't think the perpetrator will face consequences, then bad behavior will lead to more bad behavior, a "green light . . . to further misconduct."<sup>365</sup> Consequently, it is critical for organizations to promptly punish harassment and other sex-based sanctions. Even if sidelining does not warrant termination, leaders and Human Resources Managers should still call managers and employees' attention to this harmful behavior and redirect them, with a clear warning that continued sidelining could adversely impact their own careers.

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359. Alexander, *supra* note 187.

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. Marianne Cooper, *The Power of Us: How We Stop Sexual Harassment*, TED, [https://www.ted.com/talks/marianne\\_cooper\\_the\\_power\\_of\\_us\\_how\\_we\\_stop\\_sexual\\_harassment](https://www.ted.com/talks/marianne_cooper_the_power_of_us_how_we_stop_sexual_harassment) (last visited Sept. 19, 2023).

*15. Offer coaching programs*

Companies could provide free leadership coaching opportunities for employees throughout their careers and make these widely available.

*16. Multiple effective avenues of anonymous feedback for management and leaders*

Corporate culture begins at the top. Deans, CEOs, and other high-ranking leaders set the tone for the organization. Unfortunately, however, absolute power corrupts absolutely and can make leaders feel invincible against complaints of sex-based sanctions. That is why it is critical that well established processes are in place whereby subordinates can provide anonymous feedback to leadership and leaders are annually subjected to rigorous 360 evaluations. These feedback processes must protect anonymity as many subordinates will otherwise not participate due to fear of retaliation.

*17. Greater emphasis on emotional intelligence in leadership selection*

According to Goleman, emotional intelligence (EI) is the “sine qua non” of effective leadership.<sup>366</sup> EI skills include self-awareness, self-regulation, motivation, empathy, and social skills. Organizations who wish to grow strong leaders should require employees to take EI assessments annually throughout their careers, report the scores to unit managers, and encourage managers to recommend the highest scorers for leadership development training as well as offer remedial coaching to low scorers.

*18. Gather data and make data-driven decisions, not stereotype-driven assumptions*

As the ABA/ALM study revealed, men and women often have very different perceptions of how well their law firms retain women, promote gender diversity, and ensure equal access to advancement opportunities.<sup>367</sup> That is why it is important for leadership to annually conduct anonymous climate surveys to gather data on how employees and other stakeholders feel the organization is doing with regard to sex equality, rather than relying on less reliable qualitative assessments like employee interviews or meetings. Employees are far less likely to reveal their true concerns at such interviews out of fear of retaliation and harassment. For this reason, anonymous surveys are far more effective at gathering reliable data. Feedback should also be solicited from employees transitioning back to work

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366. Daniel Goleman, *What Makes a Leader?*, 76 HARV. BUS. REV. 93, 93 (1998).

367. LIEBENBERG & SCHARF, *supra* note 345, at ii.

after parental or family leave to determine whether those individuals felt supported during and after their leave.

*19. Institute a no-interruption policy for meetings*

As noted earlier, women are interrupted more than men, which effectively stilts and silences female voices. “When Glen Mazarra, a showrunner at *The Shield*, an FX TV drama from the early 2000s, noticed that his female writers weren’t speaking up in the writer’s room—or that when they did, they were interrupted and their ideas overtaken—he instituted a no-interruption policy while writers (male or female) were pitching.”<sup>368</sup> Mazarra noted that the new policy “worked, and . . . made the entire team more effective.”<sup>369</sup> As such, consider implementing a no-interruption policy for meetings and classes.

*20. Leverage technology to police and prevent sex-based sanctions*

Some organizations have installed hidden cameras throughout public spaces in the office and notified employees that they have no reasonable expectation of privacy, except in private spaces such as restrooms, private offices, or locker rooms. When done lawfully, this form of cybersurveillance could possibly reduce the incidence of sexual harassment since employees would know that there was an increased risk that their bad behavior would be caught on tape. In addition, companies increasingly rely on software programs that permit employers to police workplace technology to, *inter alia*, monitor productivity and determine whether employees are using their work-issued devices to visit inappropriate sites during the workday or send inappropriate emails, instant messages, etc.<sup>370</sup> Organizations utilizing such surveillance technology must notify employees clearly and are encouraged to have an explicit technology-use policy reminder appear on the screen each time the person logs into the work-issued device. This surveillance may help reduce harassing behaviors in the workplace, such as the circulation of improper images or inappropriate jokes. Notably, however, the use of such technologies raises privacy and other concerns that exceed the scope of this Article.

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368. Bennett, *supra* note 134.

369. *Id.*

370. Chad Davis, *What Are the Methods Used by Companies to Monitor Employee’s Computers?*, CHRON., <https://smallbusiness.chron.com/methods-used-companies-monitor-employees-computers-64671.html> (last visited Sept. 19, 2023); Daniel M. West, *How Employers Use Technology to Surveil Employees*, BROOKINGS (Jan. 5, 2021), <https://www.brookings.edu/blog/techtank/2021/01/05/how-employers-use-technology-to-surveil-employees/>.

## CONCLUSION

In conclusion, over the last few centuries, women have made astounding progress with regard to equal rights. Through constitutional amendments, legislative action, and powerful social movements, they have courageously toppled many of the outright barriers to entry in voting, education, employment, and more. Yet in modern America, sex discrimination persists through more clandestine sex-based sanctions from sexual harassment and sidelining to double standards and pay inequity. Taken together, these sex-based sanctions have created a leaky pipeline of leadership where many promising women enter the field, but few attain high-ranking leadership roles.<sup>371</sup> To prevent the dire consequences that result from this massive talent melt, employers must take measures to plug the leaks and ensure that *all* employees feel supported, seen, and heard.

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371. Fink, *supra* note 137, at 94 (“The more women are undermined, ignored, or upstaged at work, the fewer women who will emerge as leaders within the organization.”).