Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination against Women Partners

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Articles

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by
MARK S. KENDE*

Introduction

In an 1873 decision, the U.S. Supreme Court denied Myra Bradwell admission to the Illinois Bar because she was a woman.1 Justice Joseph Bradley authored a famous concurrence in that case, stating that "[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it" for law practice.2 Since then, women lawyers have not enjoyed smooth sailing pursuing their vocation. In 1952 private law firms would only hire Justice Sandra Day O’Connor as a stenographer even though she graduated third in her class from Stanford Law School.3 The dean of the law school that Justice Ruth Bader Ginsburg entered once asked her why she was occupying a seat that could be held by a man.4

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2. Bradwell, 83 U.S. at 141.
The professional indignities that women have experienced extend to Title VII of the Civil Rights Act of 1964, the federal law that prohibits discrimination in employment on the basis of race, sex, religion, and national origin. Title VII only covers women because a congressman thought that he could get the legislation defeated by adding women as a protected class.

Despite these inauspicious beginnings, the number of women entering the professions has increased dramatically over the years, in part, because of laws such as Title VII.

However, what has not changed is the paucity of women and minorities who have reached the top of their professions. This is known as the “glass ceiling” problem. The 1991 Civil Rights Act created a


6. See Francis J. Vaas, Title VII: Legislative History, 7 B.C. INDUS. & COM. L. REV. 431, 441 (1965-1966) (Congressman Smith, a leading opponent of the original bill, proposed the amendment “in a spirit of satire and ironic cajolery”). See also Elizabeth A. Sherwin, Sex Discrimination and State Constitutions: State Pathways Through Federal Road Blocks, 13 N.Y.U. REV. L. & SOC. CHANGE 115, 115 (1984-1985) But see Carl M. Brauer, Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act, 49 J.S. HIST. 43-45 (1983) (suggesting that the amendment was added partly as a joke and partly because Congressman Smith thought that women should be protected by Title VII if blacks were to be protected).


8. See, e.g., Hon. Judith S. Kaye, Women Lawyers in Big Firms: A Study in Progress Towards Gender Equality, 57 FORDHAM L. REV. 111, 119 (1988) (Chief Judge of the New York State Court of Appeals reports that the 1988 American Bar Association Commission on Women study reveals that women lawyers are not rising to the highest positions in the legal profession and that bias against them continues); Diane Crothers, Owning the Power of the Law: Women Learn That to Advance Their Rights, They Must Understand the Law, 20 HUM. RTS., Fall 1993, at 12, 29 (women are now 43% of law school graduates, 31% of attorneys, and 23% of ABA members; yet, “as of 1992, only four of 58 chairs of ABA standing committees are women and 27 states have no women representatives in the ABA's House of Delegates”).

9. See, e.g., U.S. DEP'T OF LABOR, LEAFLET, BREAKING THE GLASS CEILING (1989) (“Glass ceiling” is the phrase used to describe the artificial barriers, based on attitudinal or
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national Glass Ceiling Commission to address the problem, and the national press has frequently discussed the professional obstacles facing women and minorities. Studies by the U.S. Department of La-


The first press report using the term appeared in a United Press International Lifestyle wire story. Patricia McCormack, Woman's World; The Nation's Judges and Women Today, May 21, 1985. Search of LEXIS, Nexis News Library, US file (Nov. 2, 1994). That article described a speech given by Muriel Fox, Chairwoman of the National Organization for Women's (NOW) Legal Defense and Educational Fund, at her acceptance of the New York NOW Chapter's first Eleanor Roosevelt Leadership Award. The article quotes Ms. Fox as saying "there is a 'glass ceiling' in the middle of the ladder leading to the top, and it cannot be seen. But when the women run into it they bump their heads and cannot move beyond it without the women's movement."


The Glass Ceiling Commission was created to study the causes of glass ceiling barriers and to propose solutions. Id. at § 203(a). See also 57 Fed. Reg. 10,777 (1992). See generally Alvarez, supra note 9 (laying out the federal government's actions regarding the glass ceiling problem); David A. Cathcart & Mark Snyderman, The Civil Rights Act of 1991, ALI-ABA Course of Study on Advanced Empl. Law and Litig., Dec. 2-4, 1993, at 66 (describing the creation of the Glass Ceiling Commission and prior Department of Labor approach to the issue).


The Illinois case of Beall v. Baker & McKenzie, No. 91 CH 9448, mem. op. (Cook Cty. Cir. Ct. Ch. Div. Aug. 18, 1992), received extensive press coverage as an example of the glass ceiling problem. The plaintiff, Ingrid Beall, was the first woman partner in the world's largest law firm. She alleged that the firm discriminated against her by freezing her
bor and by various private groups have concluded that discrimination created this glass ceiling. For example, a recent survey of 800 law partners and associates found that one in six women felt that they had been sexually harassed within the past three years, and that 51% of the women felt that they had been harassed at some point in their careers.

Significantly, these studies of the legal profession’s glass ceiling suggest that women partners are no less the victims of sexual harass-
ment and discrimination than women associates.14 Women law partners have become increasingly unhappy during the last several years.15 Title VII is partly responsible for this because it does not protect bona fide women partners from discrimination even though it protects the associates or employees who work for them.16 Thus, by making part-

14. See infra notes 70, 71, 80, and 89.
15. Rutledge, supra note 12, at 31; see infra note 71. This greater dissatisfaction suggests that the glass ceiling is not shattered once a woman makes partner. See, e.g., Glass Ceiling Commission Heals Plaintiff Lawyer, Lab. L. Rep. (CCH) No. 494, at 6 (May 17, 1994) (plaintiff's lawyer says to the Commission that legal changes are needed since women who make partner face the reality that civil rights laws may no longer protect them because court decisions include partners in the definition of employer). This Article concentrates on the barriers keeping women partners from reaching the top positions within their law partnerships and the profession. However, much of the evidence relied upon will involve studies of associates since more research has been done in that area. See, e.g., Grace M. Giesel, The Business Client is a Woman: The Effect of Women as In-House Counsel on Women in Law Firms and the Legal Profession, 72 Neb. L. Rev. 760, 774-86 (1993) (discussing numerous studies regarding why women associates do not make partner in numbers comparable to men).

Despite this dissatisfaction, there have been comparatively few discrimination lawsuits brought by lawyers against their firms. In Wheeler v. Hurdman, 825 F.2d 257, 266 (10th Cir. 1987), the Tenth Circuit explained that the paucity of such lawsuits is due to the low numbers of minorities and women that have been in the profession until recently. Another scholar suggests that lawyers hesitate to sue their firms partly because they fear being blacklisted within the "closed society" of the bar. Kenneth J. Wilbur, Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility, 92 Dick. L. Rev. 777, 778 n.9 (1988). See also Gender Bias Charges Have Been Rare So Far, S.F. Daily J., Nov. 25, 1991, at 1 (quoting the author of this Article as stating that women lawyers often do not sue their firms because it hurts their chances for success at the firm in the short run).

However, the number of these lawsuits appears to be increasing. See, e.g., Charles S. Caulkins & James J. McDonald, Jr., Lawyer Terminations Increasingly the Subject of Employment Discrimination Suits, 65 Fla. Bar J. 27 (1991); Julie Tamminen, Law Firms Face New Challenges in Their Roles as Employers, Law Prac. Mgmt., Mar. 1991, at 40-41 ("While lawyers may not have dared to sue their own firms in the past, they are now doing so with increasing frequency.").

16. See, e.g., Burke v. Friedman, 556 F.2d 867 (7th Cir. 1977) (holding that a partner is not an employee for the purpose of a discriminatory employment suit); infra note 92. The corporate law firm is especially important for an analysis of sex discrimination in the law because it embodies "the primary function of the legal system . . . 'greasing the wheels of capitalism' . . . [by] providing advice to clients about the myriad rules that order business affairs." Harrington, supra note 7, at 16. As sociologist Cynthia Fuchs Epstein states: [T]hese firms constitute a network of legal institutions not matched anywhere in the world. Their clients are the largest corporations, commercial banks, and investment houses, and a few rich men and women. They derive a good deal of their power from their ability to "make" law in this country by influencing legislation and the way it is implemented, as well as by working on many precedent-setting cases.

ner, these women have become even more vulnerable to sexual harassment and to other forms of sex discrimination.

Admittedly, women and minority partners are protected from certain other forms of misconduct because all partners have to act as fiduciaries toward one another. In addition, the rights and duties of most partners are generally established by a partnership agreement. Yet judicial statements about fiduciary relationships have emphasized partners' duties to avoid financial conflicts of interest and to fulfill information disclosure obligations rather than their duty to avoid discrimination.

This Article focuses on the glass ceiling problem as it affects women law partners. Its thesis is that an implied covenant of good faith and fair dealing [hereinafter an "implied covenant"] governs all partnership agreements and that this covenant prohibits partners from discriminating against each other on the basis of gender. Several courts have ruled that an implied covenant of good faith can prohibit work-

**Lawyer Statistical Report** 12, 13 (1985) (most attorneys are employed in private practice).


19. See, e.g., Latta v. Kilbourn, 150 U.S. 524, 541 (1893) (detailing such conduct as being prohibited by fiduciary duties); Bakalis v. Bressler, 115 N.E.2d 323, 327 (Ill. 1953) ("The fiduciary relation prohibits all forms of trickery, secret dealings and preference of self in matters relating to and connected with a partnership and joint venture.").


However, § 1981 does not cover sex discrimination. Bobo v. ITT, Continental Baking Co., 662 F.2d 340, 342 (5th Cir. 1981). Thus, this Article analyzes how the common-law implied covenant of good faith protects women partners from discrimination. Although this Article concentrates on women law partners, its legal analysis is also applicable to women partners in other professions.
place discrimination. These cases are supported by the U.S. Supreme Court decision in *Hishon v. King & Spalding*, as well as by Justice Souter's concurring opinion in *United States v. Burke*, in which he stated that an employment discrimination claim "is easily envisioned as a contractual term implied by law." Several commentators have made similar arguments. Moreover, this thesis is consistent with the strong public policies against sex discrimination evident in Title VII, state anti-discrimination laws, and various judicial decisions.


22. 467 U.S. 69 (1984). The Court in *Hishon* ruled that Title VII of the Civil Rights Act of 1964 enabled a female law firm associate to state a claim of sex discrimination on the basis of the partnership selection process. The Court stated that, if proven, this could constitute discrimination in the "term[s], condition[s], or privilege[s]" of her employment. Id. at 77. See also Masterson v. LaBrum & Doak, 846 F. Supp 1224, 1231 (E.D. Pa. 1993) (holding that a law firm that discriminated against a female attorney by denying her partnership and treating her poorly, such as by introducing her to judges as "the new broad," must promote her to partner and award her back pay). But see Ezold v. Wolf, 983 F.2d 509 (3d Cir. 1992), cert. denied, 114 S. Ct. 88 (1992) (reversing a trial court verdict and ruling that law firm did not discriminate in denying partnership to a woman associate).

23. 112 S. Ct. 1867, 1878 (1992) (examining the taxability of damages received in employment discrimination cases).


25. See, e.g., E.E.O.C. v. Ford Motor Co., 458 U.S. 219, 228 (1982) ("The 'primary objective' of Title VII is to bring employment discrimination to an end . . . .").

26. See infra note 267-268 and accompanying text.

27. See, e.g., Reed v. Reed, 404 U.S. 71 (1976) (holding that employer's policy was facially discriminatory); International Union, United Auto, Aerospace & Agric. Implement Workers of America v. Johnson Controls, 499 U.S. 187 (1991) (defendant could not exclude women from assembling batteries due to paternalistic concern about women's
This Article has six parts. Part I provides a history of women in the legal profession and describes the glass ceiling that women law partners face. Part II explains why courts have concluded that Title VII does not protect partners from employment discrimination. Part II also demonstrates how Title VII decisions by the U.S. Supreme Court and by lower federal courts support the application of a common-law remedy against discrimination in the absence of statutory protection. Part III shows how partnerships are governed by an implied covenant of good faith, which is strengthened by the partnership’s fiduciary nature. Part IV explains why partnership expulsion and personnel decisions must be made in good faith. Part V demonstrates that a partner has an implied duty not to discriminate, regardless of which judicial definition of good faith is used. Finally, Part VI shows that the common-law rule, which restricts when partners can sue one another, should not block this kind of discrimination claim.

I. Women in the Legal Profession

Throughout most of America’s history, women could not vote, maintain their own finances, serve on juries, or hold elected office; further, employer did not establish that sex was a bona fide occupational qualification).

28. This Article challenges the traditional view that categories of the common law are virtually set in stone. See, e.g., CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 43 (1993) ("the common law of tort, contract, and property could be seen as a kind of natural state"). Under this traditional approach, discrimination is a public-law problem that the common-law categories do not address. Yet this view fails to recognize that the common law is not "a natural or unchosen baseline. Instead its principles amounted to a controversial regulatory system that created and did not simply reflect the social order." Id. at 50. It reflects the legal rules and biases of a free market economic system. Professor Catherine MacKinnon argues that some supposedly objective categories are not sacrosanct because they reflect power relations, not necessarily the natural state of things. CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 164 (1987). The critical race scholars have issued a similar challenge to traditional First Amendment law. See generally MARI J. MATSUDA ET AL., WORDS THAT WOUND (1993). This Article shows why the public law/common law distinction has broken down regarding the matter of sex discrimination.

29. Donald J. Weidner & John W. Larson, The Revised Uniform Partnership Act: The Reporters’ Overview, 49 Bus. LAW. 1, 24-25 (1993) ("The ‘good faith’ requirement draws upon both the fiduciary law of cooperative relationships and the contract law of adversarial relationships.")

30. See, e.g., FRIEDMAN, supra note 1, at 168 (noting that women were not given the right to vote until the Nineteenth Amendment to the U. S. Constitution passed in 1920, approximately 55 years after African-American men were given this same right by the Thirteenth Amendment).

31. MORELLO, supra note 3, at 9. Courts even ruled that women could not own property by themselves. See, e.g., Ferguson v. Kinsland, 93 N.C. 337 (1885). See also Nickie McWhirter, It's Still a Man's World, DET. NEWS, Nov. 16, 1993, at 9A (stating that just
Many states prohibited women from becoming lawyers because they supposedly lacked the necessary intelligence and toughness. Formal state-sponsored discrimination has now been virtually eliminated, and the numbers of women entering law schools and the legal profession are approaching the numbers of men. Yet, studies show that, because of discrimination, women lawyers and other professionals hit a glass ceiling and rarely reach leadership positions in their law firms, law schools, or in public life. This Section describes the history of discrimination against women in the law, the origins of the glass ceiling problem, and the situation faced by women partners in law firms today.

before civil rights legislation passed in 1964, it was virtually impossible for women "to get a bank loan, buy a house, buy a car, even get a charge card without a male co-signer and guarantor"). Sex discrimination has also denied women the right to retain possession of their offspring. FRIEDMAN, supra note 1, at 196 (reporting that in the mid-1800s it was impossible for a divorced woman to receive custody of her children; "fathers had a right to custody of their legitimate minor children that was absolute").

32. MORELLO, supra note 3, at 9.
33. Id.
34. For example, Iowa and Wisconsin had statutes indicating that only men could practice law. MORELLO, supra note 3, at 12, 23. Justice Bradley's concurring opinion in the Bradwell case takes the typical view that women were too frail to participate in the hurly burly of the legal world. Bradwell v. Illinois, 83 U.S. 130, 141 (16 Wall.) (1873).
35. Women currently make up 43% of law school graduates. Crothers, supra note 8. The proportion of women in law schools nationwide went from 4% in 1964 to nearly 40% in 1984. MORELLO, supra note 3, at 248. The number of women entering the legal profession increased nearly tenfold from 12,000 to 116,000 between 1973 and 1986. Id. See also Arthur Goldgaber, Glass Ceiling Remains for Women Going for Partner, L.A. Bus. J., Dec. 10, 1990, at 33. A 1991 survey of the nation's largest firms revealed that women made up 37% of all associates. Giesel, supra note 15, at 773.
36. See, e.g., Giesel, supra note 15, at 773 (women represented at most 11% of all partners in the nation's largest law firms as of 1991); Rhode, supra note 9, at 1178-79:

between the early 1960's and the mid 1980's, the percentage of women in the legal profession increased from 3 to 14 percent, but they still constituted only 5 percent of the partners at the nation's 100 largest law firms and a handful of key judicial and governmental decision makers. Overall, female attorneys in the mid 1980s were less than half as likely as male attorneys to be partners in a firm, earned approximately 40 percent less, and were disproportionately represented in low-prestige specialties.

(footnotes omitted). See also Pamela Brogan, Glass Houses: Gender Pay Gap Found Among Congress' Staff, Hous. Post, Dec. 19, 1993, at A1, A29 (the glass ceiling is an invisible barricade that frustrates minorities and women from progressing up the corporate ladder and wage scale traditionally held by men); Goldgaber, supra note 35, at 33; Rutledge, supra note 12, at 31 (a report from the ABA Young Lawyer's Division entitled The State of the Legal Profession 1990 concluded that women lawyers were less likely to be promoted and made less money than men because "[w]omen in all levels of the profession deal with some degree of sexual discrimination").
In the 19th century women faced innumerable road blocks to becoming a lawyer including statutory restrictions, hostile state bar associations, exclusively male law schools, and biased judges. Nonetheless, a few male judges and lawyers opened doors for the first women lawyers. Industrialization and the Civil War created job

37. Iowa, for example, restricted bar admission to "any white male person, twenty-one years of age, who is an inhabitant of this State, and who satisfies the court that ‘he possesses the requisite learning’..." Morello, supra note 3, at 12 (citing Iowa Code § 1610 (1851)). Wisconsin had a law that said: "To entitle any such person to practice as such attorney... he shall be first licensed by order of one of the judges thereof made in open court." Id. at 23 (emphasis added). The male bias of these statutes was used in both states to resist admission of women to the bar. Id. at 12, 23.

38. For example, Myra Bradwell's application to the Illinois State Bar was turned down in the 1860s because she was a woman. Morello, supra note 3, at 17. Nonetheless, Ms. Bradwell became the publisher of the Chicago Legal News and fought for improvements in the legal system, women's rights, and the situation of the mentally ill. Friedman, supra note 1. The Chicago Legal News in 1869 contained what appears to be the first published reference to a woman practicing law in a rural area of Iowa. Morello, supra note 3, at 11. Morello assumes that Bradwell only devoted herself to local disputes because the Iowa bar did not admit women, and local practice did not require state bar acceptance at that time. Id.

39. In 1869 Lemma Barkaloo was apparently the first woman to be admitted into a law school when she enrolled at the Law Department of the Washington University in St. Louis. Morello, supra note 3, at 44. Nonetheless, in 1886, Yale Law School added language to its course catalog specifying that "[i]t is to be understood that the courses of instruction are open to persons of the male sex only, except where both sexes are specifically included." Id. at 92. "Not until 1972 did all accredited law schools admit women." Rhode, supra note 9, at 1173 (citing Donna Fossum, Women in the Legal Profession: A Progress Report, 67 Women Law. J. 1 (1981)).

40. Justice Bradley's concurring opinion in the Bradwell case is typical. 83 U.S. 130, 139 (16 Wall.) (1873). Another example of this attitude comes from Wisconsin Supreme Court Justice Edward Ryan's decision rejecting a woman lawyer's application for admission to the Wisconsin State Bar in 1875. Morello, supra note 3, at 23. Justice Ryan said, We cannot but think the common law wise in excluding women from the profession of law... The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race, and for the custody of the homes of the world, and their maintenance in love and honor. And all lifelong calling of women, inconsistent with these radical and social duties of their sex, as is the profession of law, are departures from the order of nature, and when voluntary, treason against it.

Id. at 24.

41. In 1869 Belle Babb Mansfield was apparently the first woman admitted to a state bar, but it took the creative legal reasoning of a male judge to make this possible given Iowa's statute restricting admission to males:

The matter came before Justice Francis Springer, then one of the most liberal and progressive judges in Iowa. Springer agreed that Belle Mansfield had the necessary qualifications of intellect and character to practice law but felt limited by the wording of the admissions statute. In order to circumvent the gender provisions, Springer relied on another Iowa statute which held that "words importing the masculine gender only may be extended to females." Then Judge Springer went one step further. He declared that when a statute contained an affirmative decla-
openings and greater social mobility, giving women new opportunities. Women finally gained the right to vote in 1920 because of the efforts of the suffragette movement, which encouraged women to become involved in public affairs. The massive changes caused by World War II brought even more women into the work force. In 1950 Harvard Law School opened its doors to women.

These changes were met with hostility from the predominantly male legal culture, which believed that "[t]he simple truth of the matter is that women as a class are not endowed by their Creator with either the physical or mental attributes which fit them for a legal career." For example, in 1918 Lady Willie Forbus was the valedictorian of her class at the University of Michigan Law School, yet the law
school’s dean told her that a law firm would only hire her if she applied for a stenographer position. In 1934 a Texas state senator responded to the first nomination of a woman to be a state court judge by saying that “a married woman ought to be home washing dishes.” Moreover, many of the most talented women to enter American law schools in the 1950s and 1960s were subjected to ridicule or criticism by their male peers. This hostile attitude limited the growth in the number of women entering the legal profession from 1920 through the 1960s.

47. Id. at 198.
48. Id. at 236 (citing Rebekah S. Greathouse, Hitlerism in Texas, WOMEN LAW. J., Feb. 1935, at 33).
49. The ordeal suffered by United States Supreme Court Justice Ruth Bader Ginsburg typifies the experiences of women attorneys in the 1950s. In 1959 Ginsburg graduated number one in her class from Columbia University Law School. She had been a member of the Harvard Law Review before transferring to Columbia. After graduation, every law firm to which she applied denied her employment. Id. at 207.

Finally, she landed a position as a law clerk for a federal district judge but “as anyone familiar with the subject knows, . . . a man with those grades from that school could have gotten a clerkship in a [f]ederal appeals court, if not the United States Supreme Court.” Id. (quoting N.Y. TIMES, Jan. 26, 1972). Ginsburg later became the first female tenured professor at Columbia University Law School. Id. Justice O'Connor faced similar humiliation. Id. at xii.

Rita Hauser, a senior partner at New York's prestigious law firm Stroock, Stroock, & Lavan, realized that “not even a Fulbright fellowship, a doctorate and an honors law degree could get her employment on Wall Street.” Id. at 207. She was told by a New York law firm “to forget about an international practice, since women couldn't be expected to travel.” Id. Despite these admonitions she eventually became a U.S. Representative to the United Nations Commission on Human Rights. Id.

Geraldine Ferraro, an honors graduate of Fordham Law School, was told during her fifth interview with a prestigious Wall Street law firm, “We're sorry, but we're not hiring any women this year.” Id. at 194.

When Elizabeth Dole attended Harvard Law School, women comprised five percent of the first-year class. One male peer said to her, “What are you doing here—taking the place of a male who could really use a Harvard education!” David Behrens, Elizabeth Dole Takes Her Leave from the Corridors of Public Power, NEWSDAY, Nov. 26, 1990, at 60.

Rose Elizabeth Bird, former Chief Justice of the California Supreme Court, described her law school experience by saying, “I had been discouraged at Boalt Hall [University of California at Berkeley] from going into trial work because it was the belief of most of the professors that women were emotionally not suited for that type of work.” MORELLO, supra note 3, at 243 (citing Shawn D. Lewis, BARRISTER MAG., Spring 1983, at 26). While working as a public defender, a judge once ordered her out of his courtroom because he was not accustomed to seeing women attorneys. Id.

The first woman elected President of the American Bar Association, Roberta Cooper Ramo, could not get a job in the Raleigh-Durham-Chapel Hill area of North Carolina after graduating from the University of Chicago Law School in 1967. Ramo was elected in 1994. David Margolick, At the Bar: More Than A Century After Its Founding, A New Honorific at the ABA; Madam President, N.Y. TIMES, Feb. 4, 1994, at A19.

50. See Rhode, supra note 9, at 1174 (“Women remained under [one] percent of the legal profession until 1920, and it took another half century for their representation to
Other businesses and professions shared this "homebound" conception of women through the early 1960s. It was commonly felt that "strength, endurance, drive, and ambition" were attributes that females lacked and that, in turn, justified the inequality between men and women.\footnote{Claudia Goldin, Understanding the Gender Gap: An Economic History of American Women 203 (1990).} Moreover, business owners believed that women did not expect to have careers and, therefore, would not remain with the firms long enough to warrant further training or advancement.\footnote{Id. at 206.} Men, on the other hand, received extra training and were promoted, while women stagnated at low-level "uninteresting and monotonous occupations."\footnote{Id. at 203-04 (quoting Elizabeth Beardsley Butler, Women and the Trades: Pittsburgh, 1907-1908, at 373 (1984)).} Thus, the "[differential treatment of women] was one of the many pillars of social and familial stability and, for other reasons as well, was viewed less as discrimination than as paternalism."\footnote{Id. at 199.}

Title VII's passage in 1964 gave women a tool for attacking these discriminatory practices and attitudes.\footnote{The addition of sex discrimination to the bill as "an accident, at worst a joke, signifies how difficult it was to mobilize Americans to pass legislation guaranteeing equality by sex." Id. at 202. But see Brauer, supra note 6 (suggesting that the amendment adding a prohibition on sex discrimination to Title VII resulted from an odd coalition of women's rights advocates and conservatives). Nonetheless, scholars view the passage of Title VII as a historic turning point for the rights of women. See, e.g., Harrington, supra note 7, at 20, 107-08; Rhode, supra note 9, at 1178; Wilson, supra note 44, at 820.} The feminist movement of the 1960s also challenged the view that women should stay at home rather than pursue careers.\footnote{The most influential book advocating that women pursue careers was Betty Friedan, The Feminine Mystique (1963). See, e.g., Rhode, supra note 9, at 1177 ("Works such as Betty Friedan's The Feminine Mystique, which described the cultural origins and limitations of domestic roles, provided important catalysts for personal reassessment and social activism"). Moreover, activists like Gloria Steinem and NOW vigorously lobbied for women to pursue their individuality and not be restrained by domestic roles. See Harrington, supra note 7, at 20, 107-08. In the early 1970s a movement gained force to pass an Equal Rights Amendment to the U.S. Constitution for women. Id. at 20. See Barbara A. Brown et al., The Equal Rights Amendment: A Constitutional Basis for Equality, 80 Yale L.J. 871 (1971). The amendment was defeated because only 35 of the necessary 38 states ratified it. Geoffrey R. Stone et al., Constitutional Law 651 (1986).} These two catalysts, combined with the civil rights movement in the South and the anti-war movement, revolutionized our society's values and affected 1970s work places.\footnote{See, e.g., Epstein, supra note 16, at 53-55.}
Many women wanted to pursue careers\(^{58}\) and fought against existing forms of discrimination.\(^{59}\)

In the late 1970s to mid 1980s, booming economic conditions increased the number of women attorneys since the exponential expansion of law firms produced a need for more associates.\(^{60}\) Although the economy had slowed by the late 1980s, the number of women entering law schools and the legal profession more closely than ever approxi-
mated the number of men. Another problem then surfaced. These women hit a glass ceiling.

Susan Faludi described the problem in her best-selling 1991 book *Backlash*:

If women have "made it," then why are nearly eighty percent of working women still stuck in traditional "female" jobs—as secretaries, administrative "support" workers and salesclerks? And, conversely, why are they less than eight percent of all federal and state judges, less than six percent of all law partners, and less than one half of one percent of top corporate managers? Why are there only three female state governors, two female U.S. Senators, and two Fortune 500 chief executives? Why are only nineteen of the four thousand corporate officers and directors women—and why do more than half the boards of Fortune 500 companies still lack even one female member?

Numerous surveys during the 1980s confirmed that women lawyers felt like second-class citizens and held very few high-level jobs in the judiciary, academia, and in private law firms. These surveys also

61. See supra note 35.
62. See supra note 9 and accompanying text.
63. See also Morello, supra note 3, at 218 (reporting that when Sandra Day O'Connor became an Associate Justice on the United States Supreme Court in 1981, only 900 of 20,000 judicial positions were occupied by women).
64. See also Goldgaber, supra note 35.
65. See also Ronald E. Roel, Legislatures Will Face the Nation; New Pressure Builds on Congress for Host of Workplace Reforms, Newsday, Dec. 30, 1990, at 82 (reporting that a UCLA study "found that women and minorities at Fortune 500 companies held fewer than five percent of senior management positions"); Rochelle Sharpe, The Waiting Game: Women Make Strides, But Men Stay Firmly In Top Company Jobs, Wall St. J., Mar. 29, 1994, at A1 (citing detailed study that shows that men still dominate upper level positions at major corporations).
66. Susan Faludi, Backlash: The Undeclared War Against American Women xiii (1991). These figures have changed slightly since the election of President Clinton. For example, the number of women U.S. Senators has increased to six, due in part to Clinton's election and the national reaction to Anita Hill's testimony regarding sexual harassment during Clarence Thomas's Supreme Court confirmation hearings. See Harrington, supra note 7, at 117; Wilson, supra note 44, at 835 n.146 (referring to the outpouring of anger from women over how the U.S. Senate handled allegations of sexual harassment by Anita Hill against Thomas) (citing Marjorie Williams, From Women, An Outpouring of Anger, Wash. Post, Oct. 9, 1991, at A1).
67. See supra notes 8, 12; Faludi, supra note 66, at 257; Ginsburg, supra note 4, at 10, n.4 (statistics on limited numbers of high ranked women in academia) (citing Marina Angel, Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women, 61 Temple L. Rev. 799, 802 (1988)); Kaye, supra note 8, at 119-20 ("Decades after their entry into the big firms, women make up a third or more of the associates but less than 8 percent of the partners" and a study of 70 women from the Harvard Law School class of 1974 reveals that they lagged behind men in terms of the "prestige" levels of their jobs. Comparable statistics exist within the judiciary, tenured law faculty positions, and in the management of government and legal services organizations.)
showed that firms have made a smaller percentage of female associates partners. In addition, the few female attorneys who were ad-

(citing ABA Report: Women in Law Face Overt, Subtle Barriers, N.Y. L.J., Aug. 19, 1988, at 1; Morello, supra note 3, at 218; Rhode, supra note 9, at 1178-79; J. ABRAMSON & B. FRANKLIN, WHERE THEY ARE NOW: THE STORY OF THE WOMEN OF HARVARD LAW 1974, at 298 (1986)); Wald, supra note 7, at 41 ("Only six percent of the law school deans, and 10 percent of tenured law school teachers are women. In four years from 1976-1980, 41 women were appointed to the federal bench; in the next eight years, only 31 were appointed."); Wilson, supra note 44, at 827 n.76 (less than 12% of the faculty at several top law schools are women) (citing Tom Goldstein, Women in the Law Aren't Yet Equal Partners, N.Y. TIMES, Feb. 12, 1988, at B7). See also Amee McKim, Note, The Lawyer Track: The Case for Humanizing the Career Within a Large Law Firm, 55 OHIO ST. L.J. 167, 175-76 n.53 (1994) (describing the sacrifices made by women in the early years of private practice and the effects of a decision not to make such sacrifices on promotions and opportunities to work on prestigious assignments).

The problems that women encounter within their law partnerships take several forms. Women are often channelled into the less prestigious areas of firms, such as family law, where there is little chance of advancement. See Rhode, supra note 9, at 1179 (female attorneys in the mid 1980s were “disproportionately represented in low-prestige specialties”) (citing Survey: Women Lawyers Work Harder, Are Paid Less, But They're Happy, 69 A.B.A. J. 1384, 1385 (1983)). Thus, Nancy Ezold could have avoided her lawsuit by accepting an offer to become a partner in the family law department of her firm, but she turned it down. See Ezold v. Wolf, 983 F.2d 509 (3rd Cir. 1992), cert. denied, 114 S. Ct. 88 (1993). Women partners also tend to lack the mentoring that leads male partners to the top of the heap. Giesel, supra note 15, at 777. Thus, women partners often lack the business contacts of their male colleagues. Infra note 80. Women have similar problems advancing in other areas of business. Saltzman, supra note 11 (reporting that only three percent of the top executives at the largest American companies are women and the figure has changed little in the last decade).

68. See Kaye, supra note 8, at 119-20 (Harvard Law study of 70 graduates found that after ten years, fewer than a quarter of those women entering private practice were partners, compared to more than half of the men) (citing ABRAMSON & FRANKLIN, supra note 67); Rutledge, supra note 12, at 31 (45% of men and 18% of women make partner). See also Tom Goldstein, Women in the Law Aren't Yet Equal Partners, N.Y. TIMES, Feb. 12, 1988, at B7 (studies show that women attorneys are not advancing as quickly as males and that women tend to be in comparatively low-prestige legal positions); Horst, supra note 58, at 842 (“This new form of sex discrimination is vividly demonstrated by the inability of female attorneys to succeed to the pinnacle of power, wealth, and prestige—law firm partnership. Although increasing numbers of female attorneys are being hired, significant resistance to female partnership remains.”) (citing Burke & Johnson, More Women on the Way Up, NAT'L L.J., Apr. 20, 1981, at 1;); Doreen Weisenhaus, Still a Long Way to Go for Women, Minorities; White Males Dominate Firms, NAT'L L.J., Feb. 8, 1988, at 1 (From 1982 to 1988, the number of women partners increased only one percent per year; if this pattern continues “by the year 2000, only one in five partners will be women.”).

mitted to partnerships ran into roadblocks. They made less money than their male counterparts and were frequently sexually harassed.

(1984)); Giesel, supra note 15, at 777; *Women's Exclusion From Top Management Studied, Fair Empl. Prac. Summ.* (BNA) 30 (Mar. 14, 1994) (stating informal subjective criteria play the largest role in senior management promotions, creating a risk that discriminatory stereotypes will influence the decision). The absence of senior male lawyers who are willing to act as “mentors” for junior female lawyers compounds the problem.

69. *See supra* note 12 and accompanying text. Men have always been paid higher salaries than women regardless of the field. VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 49 (1988). In the mid 1980s “women earned only two-thirds as much as the average man for each hour of work.” *Id.* In the 1960s and 70s the difference in earnings between racial groups narrowed, but the difference in earnings between the sexes increased. *Id.* at 50. The literature on the wage differential between the sexes in the legal field is voluminous. *See Ann J. Gellis, Great Expectations: Women in the Legal Profession, A Commentary on State Studies, 66 Ind. L.J. 941, 947 (1991) (Indiana gender bias study reveals that “[w]omen lawyers make less than their male counterparts. Over half of the women (53.1%) make under $40,000, compared with 20.6% of the men.”) (citing INDIANA STATE BAR ASSOCIATION, REPORT OF THE COMMISSION ON WOMEN IN THE PROFESSION 10 (Oct. 18, 1990); Holmes, supra note 16, at 19 (“[W]omen attorneys with more than nine years of law firm practice earn just 32% of their male colleagues’ incomes.”); Rhode, supra note 9, at 1179 (“Within a decade after graduation, men and women from the same law school class were already finding significant differences in salary and advancement.”) (citing ABRAMSON & FRANKLIN, supra note 67, at 298-99); Wilson, supra note 44, at 827 (“Female lawyers are also discriminated against in terms of salary. The Department of Labor recently found that female lawyers and judges earn, on average, seventy percent of what males earn in the same positions.”) (citing Amy Saltzman, *Trouble at the Top*, U.S. News & WORLD REP., June 17, 1991, at 40).

The Honorable Richard Posner has argued that women receive lower wages than men and do less well professionally because women do not invest in themselves, not because of discrimination. Richard Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. Chi. L. Rev. 1311, 1315 (1989). Specifically, women do more of the childrearing than men. *Id.* See also Frances A. McMorris, *Panel Offers Advice to Those Hitting the 'Glass Ceiling,'* N.Y. L.J., Dec. 6, 1993, at A1 (quoting Ms. Davis, a former associate at Sullivan & Cromwell, who left the firm after her first child was born: “I couldn’t balance work and family. I wasn’t willing to make the sacrifice. I don’t want that as a glass ceiling.”). Posner asserts that “[t]he average woman will therefore invest less in her human capital, causing her wage to be lower than the average man’s, since a part of every wage is repayment of the worker’s investment in human capital.” Posner, *supra* at 1315. Others point out that women get paid less because they generally bring in less business.


There is no explanation other than discrimination for the common phenomenon discussed in this Article of a law firm paying men and women different amounts of money for virtually identical work.
by them. Women partners, therefore, became increasingly unhappy with their legal jobs. They experienced a more sudden increase in job dissatisfaction during the late 1980s than either male partners or female associates.

70. Greenwald, supra note 11. See also Gellis, supra note 69, at 943 (Indiana study of women partners and associates finds that “[s]ignificant numbers of women report overt discrimination, including physical and verbal sexual harassment”) (citing INDIANA STATE BAR ASSOCIATION REPORT supra note 69); David Margolick, Wall Street’s Sexist Wall, NAT’L L.J., Aug. 4, 1980, at 58; Rutledge, supra note 12, at 32 (“Some of the most disturbing findings in the YLD study concern sexual harassment. Sixty-three percent of the women and half of the men who responded to the survey feel that incidences of sexual harassment have stayed the same or increased in the last five years.”); infra notes 89-90. A recent survey of 30,000 male and female faculty members at 270 public and private institutions found that 24% of female full professors had been sexually harassed during their academic careers. Maryanne George, 1 in 7 Faculty Women Report Sex Harassment, DET. FREE PRESS, Apr. 7, 1994, at 1. One of the coauthors of the study said, “We were surprised to find that sexual harassment continues throughout a career, rather than just in the early years.” Id. This study further supports the evidence that women are still subjected to sexual harassment after making partner.

71. See Rutledge, supra note 12, at 31 (ABA YLD study reveals that from 1984 to 1990, “the most sudden increase in dissatisfaction came from women partners. In 1984, only 15 percent of women partners reported being dissatisfied with their work, but 42 percent reported dissatisfaction in 1990. (The corresponding numbers for men are 9 and 22 percent.) That means almost half of the women who successfully climb the private practice ladder to success find disappointment at the top.”). Ingrid Beall’s lawsuit against Baker & McKenzie was based in part on the belief that male Tax Department partners could not accept that she had become as financially successful as they were. She alleged, in part, that they started to take away her opportunities to work and to sit on law firm committees the year after her income reached almost a half-million dollars. See supra note 11. Cf. Weisenhaus, supra note 68, at 48 (“[M]ore and more female attorneys, particularly on the associate level, are showing dissatisfaction with life at the megafirms, and are leaving for smaller firms, part-time work, teaching or other alternatives.”).

The term “partner” has a double meaning that suggests that women may face difficulties once they make partner. In addition to its business meaning, the term is also used to describe domestic relationships between men and women, e.g., life partners or sexual partners. See, e.g., DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 331 (9th Cir. 1979) (discussing claim that if a male employee prefers males as sexual partners, he will be treated differently from a female who prefers male partners); Chervin supra note 68, at 208; Claire Moore Dickerson, Is It Appropriate to Appropriate Corporate Concepts: Fiduciary Duties and the Revised Uniform Partnership Act, 64 U. COLO. L. REV. 111, 155 (1993)(“The word ‘partner’ carries a connotation of social intimacy not found in ‘shareholder.’”). Women face the difficulty of being taken seriously in the business community due to stereotypical perceptions of their domestic roles. See Derr v. Gulf Oil Corp., 796 F.2d 340, 341-42 (10th Cir. 1986)(female lease analyst was told by a supervisor that women with too much education create problems and was criticized for working despite having children); DONNA JACKSON, HOW TO MAKE THE WORLD A BETTER PLACE FOR WOMEN 29 (1992) (“Over half of working women say they’ve suffered unpleasant incidents at work due to off color sexual jokes and demeaning comments about women.”); id. at 45 (“In one study, adult men consistently liked and trusted women who spoke self-effacingly more than women who spoke with self-assurance.”).
Many states appointed gender bias task forces to study their courts, and these bodies found that discrimination was endemic. In sum, "[t]he forces that once kept women out of the law altogether simply have shifted now to keep them out of powerful positions within the law." This pervasive discrimination leads women to feel that they must outperform men to be their professional equals.

72. The Chair of the ABA’s Section on Litigation recently described the major problems with the civil justice system and included gender bias among them. He said, The Ninth Circuit, the D.C. Circuit, 36 states, and the ABA are conducting comprehensive studies on the degree to which racial and gender biases persist in the court system. These studies cover everything from juror attitudes, to the treatment of court staff, to the manner in which women and minorities are treated by courts and opposing litigants. They are all reaching the same conclusion: Bias problems are not just perceived but real, and much work remains to be done.

Robert N. Sayler, Tigers at the Gates—The Justice System Approaches Melt Down, Litig., Fall 1993, at 1, 2 (emphasis added). As Mona Harrington states:

Other evidence suggests that the courthouse is a site of particular tension over female sexuality. Many state court systems, in the late eighties, published extensive self-studies of gender bias operating in the courts, including the subjection of women lawyers to sexually charged attention from male judges, lawyers, and court officials. The 1989 Massachusetts Gender Bias Study, for example, reported that 64% of the women lawyers surveyed had observed male lawyers, in court, making remarks or jokes that demean women, 43% had heard inappropriate comments of a sexual or suggestive nature, and virtually everyone had heard remarks about the clothing or physical appearance of women lawyers, and the use of endearments such as “sweetheart” or “honey” directed at them.

HARRINGTON, supra note 7, at 103. Chief Judge Kaye of the New York Court of Appeals writes, “In New York a vigilant, effective Implementation Committee is in place particularly to address the fact that pervasive gender bias has been found in our court system.” Kaye, supra note 8, at 125 (citing Second Report of the Comm’n to Implement Recommendations of the N.Y. Task Force on Women in the Courts (1987)); Wald, supra note 7, at 54 (discussing the 1988 ABA report on the position of women in the profession, Chief Judge Wald asks, “What can we do to discourage the sexual advances and harassment from court personnel that women report?”).


73. Morello, supra note 3, at 250. She adds, “[s]tatistics [show that] while women seem to be making important gains in entry-level positions, they still are not making a significant impact on the prestigious and powerful areas of the law.” Id. at 195. It seems that with the passage of Title VII, “on paper, American citizens, male and female, now enjoy equal rights and opportunities in almost all arenas of human endeavor. However, it’s a different story in human hearts and minds. Today the battle of the sexes seems more vicious and brutal than ever before.” McWhirter, supra note 31, at 9A.

74. “Women cannot merely match men’s performance; in areas where women are traditionally perceived as weak, they must outperform their male colleagues. Women who succeed are more tough, more committed to their careers, and more willing to take risks
Moreover, in the late 1980s and early 1990s, the recession created serious economic problems for many of the law firms that had just expanded and for the women lawyers who worked there. As business declined, these firms had no way to pay their debts and succumbed to the high overhead costs they had accumulated. Several major law firms failed, leaving partners unemployed. Other law firms cut costs by firing groups of partners.

than their successful male colleagues.” Holmes, supra note 16, at 22. Professor Holmes also cites other scholars who have reached the same conclusion. Id.
75. HARRINGTON, supra note 7, at 37-38. See also Judith Scherero, Running From the Law: Discontented Lawyers Flee Profession, USA TODAY, Oct. 7, 1993, at B1 (“Brodersen and Winkle say publicly what many practicing lawyers admit only privately: The law can be a miserable profession, characterized by grueling hours, meaningless work, cutthroat colleagues and golden handcuffs.”).

76. See Kim Isaac Eisler, SHARK TANK 217 (1990) (chronicling the downfall of one of the nation’s largest law firms, Finley Kumble, this book explains that its partners started deserting the firm when its debt, attributable to expansion and salaries, reached $83 million); HARRINGTON, supra note 7, at 29 (describing the high overhead items such as sophisticated computer equipment, associate salaries, and high quality support staff). One commentator has suggested that “the rise of in-house corporate counsel, and the consequent challenge to private firms” has prompted increased specialization. See Holmes, supra note 16, at 16. See also John H. Kennedy, “Reality” Check Coming in Legal Costs, BOSTON GLOBE, Mar. 8, 1992, (Econ.), at 81 (“Some companies are keeping more of their legal work in-house”); Larry Smith, The Party’s Over: Firms Invoke a Variety of Cost-Cutting Measures, PRENTICE HALL L. & Bus., Jan. 7, 1991 (summarizing many of the cost-cutting measures that were taken by law firms).


78. See, e.g., Edward A. Adams, Shea & Gould’s Ax, NAT’L L.J., Apr. 12, 1990, at 2 (detailing partners who have been fired by a New York firm); Jensen, supra note 77 (44%
The press has highlighted these partner termination stories because they undermine the traditional view that partnership guarantees lifetime security. The glass ceiling problem took on a new twist since women partners were often the first to be fired because they did not hold the top positions at their firms and usually were not business "rainmakers." In addition, more lawyers sued their firms in re-


Law firms are under siege. The traditional view of the law firm as a stable institution with an assured future is now challenged by an awareness that even the largest and most prestigious firms are fragile economic units facing a myriad of risks in their quests to survive and prosper. No longer can the law graduate join a major firm with the sanguine assumption that the firm will not experience major upheavals, turnover in partners, or, in extreme cases, receivership.


80. Chief Judge Kaye states that "[r]ainmaking, or bringing in business—a key to the inner sanctum of private firms—is hard for everyone, but particularly so for women; the world of corporate general counsels who dispense that business is still all but closed to them." Kaye, supra note 8, at 121. Chief Judge Wald agrees, "Women also suffer substantial disadvantages in 'rainmaking'.... Women tend to have fewer business contacts...." Wald, supra note 7, at 42. See also Ezra T. Clark III, Note, *Title VII & The Civil Rights Act of 1991: What Professional Firms Should Know*, 7 B.Y.U. J. Pub. L. 99, 116 (1992); Jensen, supra note 77 ("Mr. Corwin, a specialist in representing exiting partners and currently attorney for ex-partners at Boston-based Gaston, Snow added that so-called service partners, rather than rainmakers, are the most likely to be asked to leave."). J. Craig Peyton, *Firms Consider Litigation Risk*, Nat'l L.J., May 13, 1991, at 29 (advising firms that must terminate lawyers to discharge those with the least seniority first because there is a seniority exception in the discrimination laws—advice that would injure newcomers to firms such as women and minorities). These authorities demonstrate that women partners will generally
sponse to these cutbacks.\textsuperscript{81}

The federal government first addressed the glass ceiling problem in 1988 when the Labor Department's Office of Federal Contract Compliance (OFCCP) began tracking the progress of women, minorities, and handicapped workers beyond entry-level jobs.\textsuperscript{82} The OFCCP required federal contractors to include middle and upper-level man-

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\textsuperscript{81} See, e.g., Caulkins & McDonald, supra note 15, at 27; Tamminen, supra note 15, at 40-41.

\textsuperscript{82} Alvarez, supra note 9, at 193. This is mandated by Executive Order Number 11246 that requires certain businesses receiving federal funds not to have disproportion-
agement positions in corporate affirmative action plans.\textsuperscript{83} The OFCCP restructured its compliance review program under a Glass Ceiling Initiative, which encompasses a variety of businesses including law firms.\textsuperscript{84} Ten businesses have been subjected to the third stage of the OFCCP’s glass ceiling reviews.\textsuperscript{85}

President Bush then signed the Civil Rights Act of 1991, which contained the Glass Ceiling Act. This Act established a Glass Ceiling Commission to recommend ways to remove barriers that hinder the professional advancement of women and minorities.\textsuperscript{86} The legislative history of the Act viewed discrimination as the cause of the glass ceiling, and it referred to sex discrimination by law firms as an example.\textsuperscript{87}

\textsuperscript{83} Alvarez, supra note 9, at 193. One of the other major reasons that women advanced so rapidly in the legal profession during the 1970s and 1980s was affirmative action plans adopted by law schools and employers. See Epstein, supra note 16, at 55-56.

\textsuperscript{84} Alvarez, supra note 9, at 193. The details of the OFCCP actions are enumerated in the Alvarez article. One goal of the initiative is to recognize and reward publicly those companies that remove their own glass ceiling. \textit{Id.} at 196.

\textsuperscript{85} \textit{Id.} at 193 & n.1. The one law firm within the third stage of review is the prestigious, “white shoe” Wall Street firm of White & Case. See also \textit{Law Firm Target of OFCCP Review}, 60 Fed. Cont. Rep. (BNA) 186 (Aug. 30, 1993) (“The review, which was initiated in early 1993, involves an in-depth examination of possible barriers hindering the promotions of women and minorities to upper-management positions. The scope of the review extends to both lawyers and support staff.”)

\textsuperscript{86} The glass ceiling problem involves virtually all of the work force. See, e.g., Brogan, supra note 36 (reporting that the personnel employed by Congress can be categorized into two groups: “highly paid men who hold most of the power and lower-paid women whose careers can be stunted by an institutional glass ceiling”); F. Anthony Comper, \textit{Why Equality for Women Is a Necessity}, \textit{Am. Banker}, Dec. 20, 1990, at 6 (reporting that women are “at the core of our human resources strategy for the 1990’s” in the banking field and that the goal of the banking industry will be to shatter the glass ceiling that women hit on their way up the corporate ladder); Goldgaber, supra note 35 (“The [glass ceiling] problem is not just tied to the law, there is still a general bias against women in business that it’s more appropriate for them to be at home than active in the highest level positions.”); Paul Wilkes, \textit{The Hands That Would Shape Our Souls: The Changing and Often Deeply Troubled World of America’s Protestant, Catholic, and Jewish Seminaries}, 266 \textit{The Atlantic} 59, 81 (Dec. 1990) (reporting on the glass ceiling that women hit in the world of religion: “The real problem for women isn’t finding a first job. . . . There are jobs as college chaplains or assistants at bigger churches, or specialty jobs like music or education. . . . The problem is when the choice comes down to a man or a woman for the average-sized parish, or when an opening occurs in the bigger, most prestigious churches or temples.”).

\textsuperscript{87} See Gyeti, supra note 68, at 113 (“[T]hese Congressional findings [regarding the existence of a glass ceiling] provide evidence from which a court in a disparate impact case could conclude there has been a subtle but widespread societal discrimination against women and minorities in the upper-level positions.”).

Senator Robert Dole introduced the glass ceiling legislation and made the following statement in its support: “While there are probably as many definitions of the glass ceiling
Despite these laudable efforts, the OFCCP's impact on the glass ceiling problem has been limited because it has only conducted a few compliance reviews and because the Glass Ceiling Commission's role is merely advisory. Moreover, a 1993 survey showed that law firm partners and associates believed that sexual harassment against women remained a serious problem and that women continued to experience a glass ceiling of discrimination in partnership/management decisions, assignments, and general career opportunities.

88 See supra note 10 and accompanying text. Law firms have tried to develop their own solutions to the glass ceiling problem, but these solutions may do more harm than good. For example, some law firms have allowed women attorneys to be on a less demanding "mommy track" to assist with their desire to have more time with their children. Yet, commentators have said that this may perpetuate the perception that women are unable to handle the full responsibilities of partnership. See, e.g., Wilson, supra note 44, at 843-45.

89 Thom Weidlich & Charise K. Lawrence, Sex and the Firms: A Progress Report, Nat'l L.J., Dec. 20, 1993, at 1. Twenty-seven percent of the women surveyed were partners. The survey of male and female law firm partners and associates revealed that nearly six in ten women lawyers think the glass ceiling has either remained intact or become even more impenetrable during the past three years. The survey found that "women still feel that firms are giving them fewer opportunities than men to meet potential clients; that the glass ceiling is still in place, especially for management positions; and that men still have more leeway in making personal and career decisions." Id. at 22. Nearly one-third of the women attorneys said that they have been passed over for an assignment because of their sex. Fifty-one percent of the women said that they had experienced sexual harassment on...
The only optimistic note in these recent surveys is the increasing number of law firms adopting written policies against sexual harassment and disciplining harassers. These firms appear concerned about the potential financial exposure that a successful Title VII sex discrimination claim may bring. However, women partners are in a particularly difficult situation because they are not protected by Title VII.

II. The Title VII Gap

The U.S. Courts of Appeals for the Fourth, Seventh, Tenth, and Eleventh Circuits have ruled that Title VII does not protect bona fide partners from discrimination. These decisions rely on the text of Title VII. However, U.S. Supreme Court and D.C. Circuit Court of App-
peals decisions support the idea that partners have an implied common-law duty not to discriminate against other partners.\textsuperscript{93}

Title VII makes it unlawful for an employer to discharge or to otherwise discriminate against any individual with respect to the terms, conditions, or privileges of employment because of that individual's sex.\textsuperscript{94} Title VII defines an "employer" as a "person engaged in an industry affecting commerce who has fifteen or more employees for each working day."\textsuperscript{95} It defines a "person" as "one or more . . . partnerships, associations or corporations."\textsuperscript{96} Thus, partners are employers under Title VII and undeserving of its protection.\textsuperscript{97}

The U.S. Supreme Court's only discussion of whether Title VII protects partners supports the federal appellate court decisions. In \textit{Hishon v. King & Spalding}, Justice Powell stated in his concurring opinion:

I write to make clear my understanding that the Court's opinion should not be read as extending Title VII to the management of a law firm by its partners. The reasoning of the Court's opinion does not require that the relationship among partners be characterized as an "employment" relationship to which Title VII would apply. The relationship among law partners differs markedly from that between . . . the partnership and its associates.\textsuperscript{98}

The only exception to this rule is when the partner functions as an associate or employee. In \textit{Fountain v. Metcalf, Zima & Co.}, the Eleventh Circuit defined what it meant by partner: "[W]e focus not on any label, but on the actual role played by the claimant in the operations of the involved entity and the extent to which that role dealt with traditional concepts of management, control, and ownership."\textsuperscript{99} Justice Powell stated in \textit{Hishon} that, "[o]f course, an employer may not evade the strictures of Title VII simply by labeling its employees as

\begin{itemize}
  \item \textsuperscript{93} \textit{See infra} notes 106, 109.
  \item \textsuperscript{97} \textit{See Wheeler v. Hurdman}, 825 F.2d 257, 276 (10th Cir.), \textit{cert. denied}, 484 U.S. 986 (1987) ("Use of 'employee' instead of a broader designation provides its own exclusion of bona fide general partners."); \textit{Burke v. Friedman}, 556 F.2d 867, 869 (7th Cir. 1977) (adopting this reasoning).
  \item \textsuperscript{98} 467 U.S. 69, 79 (1984) (Powell, J. concurring).
  \item \textsuperscript{99} 925 F.2d 1398, 1400-01 (11th Cir. 1991).
\end{itemize}
'partners.' However, few federal courts have rejected a partner's label. Thus, Title VII does not protect bona fide partners.

On the other hand, *Hishon* and two other cases support implying a common-law duty for partners not to discriminate. In *Hishon*, the Court ruled that Title VII prevents a law firm from discriminating against a woman associate on the basis of her gender in the partnership selection process. The Court ruled that this constituted discrimination in the "terms, conditions, and privileges" of her employment. The Court also stated that certain contracts may "afford a basis for an implied condition that the ultimate decision would be fairly made on the merits"—i.e., on a non-discriminatory basis.

In *United States v. Burke*, the U.S. Supreme Court ruled that damages awarded in a Title VII employment discrimination lawsuit were taxable because they were not meant to compensate for a personal injury, but instead represented lost job benefits similar to back wages. In concurrence, Justice Souter also rejected the personal injury analogy because of the "similarity between Title VII and contract law, at least in the context of an existing employment relationship... [given the] great resemblance of rights guaranteed by Title VII to

100. 467 U.S. at 79 n.2 (Powell, J., concurring).

101. For example, the partner label was not overridden in any of the cases listed supra note 92. See also Howard McCoach, Note, *Applying Title VII to Partners: One Step Beyond*, 20 Rutgers L.J. 741, 768 (1989) (no discrimination case has allowed a bona fide partner the statute's protection). *But see* Cain v. Hyatt, 734 F. Supp. 671, 672-73 (E.D. Pa. 1990) (regional "partners" possessing no equity in the firm are at-will employees within the meaning of Pennsylvania Human Relations Act); Caruso v. Peat, Marwick, Mitchell & Co., 717 F. Supp. 218, 220 (S.D.N.Y. 1989) (if a partner's or principal's duties closely resemble those of a salaried employee, title alone will not defeat an ADEA claim).

102. Justice Powell stated that bona fide partners are typically involved in a wide range of decisions:

These decisions concern such matters as participation in profits and other types of compensation; work assignments; approval of commitments in bar association, civic or political activities; questions of billing; acceptance of new clients; questions of conflicts of interest; retirement programs; and expansion policies. Such decisions may affect each partner of the firm.


103. *Hishon*, 467 U.S. at 78.

104. *Id.* at 77. The Court also referred to the employment contract between the firm and the associate as being the source of these terms, conditions, or privileges of employment. *Id.* at 74.

105. *Id.* at 74-75 n.6.

those commonly arising under the terms and conditions of an employment contract." He further stated that "Title VII's ban on discrimination is easily envisioned as a contractual term *implied* by law."  

Finally, in *Hopkins v. Price Waterhouse*, the D.C. Circuit Court of Appeals affirmed a district court's promotion remedy on behalf of another professional woman who sued her accounting firm under Title VII for sex discrimination because of its refusal to make her a partner. *Hopkins* appears to be the first Title VII case in which a court ordered a plaintiff made a partner as relief. The court also indicated that further relief would be available if the plaintiff was subjected to unequal terms after becoming a partner or if she was retaliated against for bringing a Title VII claim. Thus, the *Hopkins* court implied that Title VII does not give partners carte blanche to discriminate against women associates as soon as they make partner.  


108. *Id.* at 1878 (emphasis added). "A strong argument can be made that the rights guaranteed by Title VII are implied terms of every employment contract . . . ." Charles A. Shanor & Samuel A. Marcossion, *Battleground for a Divided Court: Employment Discrimination in the Supreme Court*, 1988-89, 6 LAB. LAW 145, 174 n.118 (1990). See also Robert Charles Johnson, Comment, *Partnership and Title VII Remedies: Price-Waterhouse Cracks the Glass Ceiling*, 1991 Wisc. L. REV. 787, 803 (Title VII's prohibition on discrimination adds implied terms to the traditional at-will employment agreement).

109. 920 F.2d 967 (D.C. Cir. 1990). *Hopkins* is the continuation of a Supreme Court case that outlined the burdens of proof in mixed motive Title VII discrimination cases. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).


111. *Hopkins*, 920 F.2d at 978 n.10. For a lengthy analysis of Hopkins's remedy, see Chervin, *supra* note 68, at 212.

112. The legislative history of Title VII suggests that its failure to protect partners from discrimination was not a deliberate exclusion. Instead, it reflects a failure to address the issue and a simple adoption of language used in most other federal statutes. See, e.g., Note, *supra* note 20, at 285 (explaining that Title VII adopted the same general definition of "employee" used in other federal statutes); Horst, *supra* note 58, at 850 (pointing out that Congress did not exempt businesses that employ professionals from having to comply with Title VII); *id.* at 852-61 (arguing that court's interpretation of the term employee in Title VII is inconsistent with the intent of Congress). *Cf. Hishon*, 467 U.S. at 77 n.10 (excerpts from Title VII legislative history do not show that partnerships are free to discriminate against their employees in partnership decisions). Title VII's failure to protect partners...
In sum, Title VII does not protect partners. But the Supreme Court and the D.C. Circuit have left a door open for courts to find that partners have an implied contractual duty not to discriminate against each other.

III. The Duty to Act in Good Faith Among Partners

In his 1841 *Commentaries on the Law of Partnership*, Justice Story said that “good faith, reasonable skill and diligence, and the exercise of sound judgment and discretion, are naturally, if not necessarily, implied from the very nature and character of the relation of partnership.” Justice Story’s view of partnerships as essentially contractual can be traced to Roman partnership law. This Section describes the characteristics of modern professional partnerships and explains the basis for a partner’s duty to act in good faith.

A. The Partnership Organization

In *Commissioner of Internal Revenue v. Tower*, the U.S. Supreme Court stated that a partnership exists “when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is community of interest in the profits and losses.” Section 6(1) of the Uniform Partnership Act from discrimination is therefore unlike the deliberate exclusion of companies with less than 15 employees from the statute’s coverage. 42 U.S.C. § 2000e-1(b) (1988 & Supp. 1993). This omission is understandable since there were almost no minority or women partners when Title VII was passed. See *Harrington*, supra note 7, at 18 (“The profession was so overwhelmingly male that there was little pressure and certainly little inclination on the part of professional leaders to think about how women would fit.”).


114. 1 *Reed Rowley, Rowley on Partnership* § 18(g), at 499 (2d ed. 1960) (“Partnership being a relation of trust, confidence and mutual agency, it follows that it must be founded on contract . . . .”). See infra note 128.

115. Donald J. Weidner, *The Revised Uniform Partnership Act Midstream: Major Policy Decisions*, 21 U. Tol. L. Rev. 825, 852 (1990). Justice Story summarized his understanding of the good faith principle in Roman partnership law: “[I]n cases of partnership the same diligence is ordinarily required of each partner, as reasonable and prudent men generally employ about the like business; unless the circumstances of the particular case repel such a conclusion.” *Id.* (quoting *Story, supra* note 113, at 263). Under Roman law, the good faith requirement bound the contracting parties to the contract’s explicit terms and also to “all the terms that were naturally implied in their agreement.” E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. Chi. L. Rev. 666, 669 (1963) (quoting *Frederick Lawson, A Common Lawyer Looks at the Civil Law* 124-25 (1955)).


117. The U.S. Court of Appeals for the Tenth Circuit has described partnerships by saying:
nership Act [hereinafter "the U.P.A."] defines a partnership as "an association of two or more persons to carry on as co-owners [of] a business for profit."\textsuperscript{118} Partnerships have tax advantages for professionals over the corporate form.\textsuperscript{119} Partners also generally have security since "[a] partnership relationship is typically intended to operate over a long term."\textsuperscript{120}

Unlike shareholders and directors in corporations who are typically shielded from liability by the corporate form, partners are personally liable for the acts of their colleagues.\textsuperscript{121} Partners also generally make capital contributions to the firm, which increases their personal exposure.\textsuperscript{122} The major protection that partners have against these financial risks is the fiduciary duty that all partners owe one another.\textsuperscript{123} However, scholars disagree over whether fiduciary duties are fundamentally contractual.\textsuperscript{124}

Despite some differences in partnership law between states, the general indicia of partners and partnership are very similar across state lines. The Uniform Partnership Act (hereinafter U.P.A.) sets forth, among others, the following characteristics of a partner: (1) unlimited liability (§ 15); (2) the right to share in profits and participate in management subject to agreement between partners (§ 18(a), (e)); (3) the right and duty to act as an agent of the other partners (§ 9); and (4) shared ownership (§ 6).


\textsuperscript{119} 1 Allan R. Bromberg & Larry E. Ribstein, Bromberg and Ribstein on Partnership, § 1.03(9), at 1:34-35 (3d ed. 1994); Franklin A. Gevurtz, Preventing Partnership Freeze-Outs, 40 Mercer L. Rev. 535, 536 n.4 (1989).

\textsuperscript{120} 1 Bromberg & Ribstein, supra note 119, § 1.01, at 1:11. See also Wheeler v. Hurdman, 825 F.2d 257, 274 (10th Cir.), cert. denied, 484 U.S. 986 (1987).

\textsuperscript{121} 1 Bromberg & Ribstein, supra note 119, § 1.01, at 1:2; Claire Moore Dickerson, Is It Appropriate to Appropriate Corporate Concepts: Fiduciary Duties and the Revised Uniform Partnership Act, 64 U. Colo. L. Rev. 111, 149 (1993).

\textsuperscript{122} 1 Bromberg & Ribstein, supra note 119, § 2.07, at 2:71.

\textsuperscript{123} Dickerson, supra note 121, at 154.

\textsuperscript{124} For the contractual view, see Frank H. Easterbrook & Daniel R. Fischel, Contract and Fiduciary Duty, 36 J.L. & Econ. 425 (1993). But cf. Vestal, supra note 118. For a more balanced analysis tending toward a noncontractual view, see Dickerson, supra note 121, at 115. Professor Dickerson does an excellent job of describing the various schools of thought.
Partnerships are more egalitarian than other business organizations in that partners have equal rights in the management and conduct of their affairs. Professor Bromberg, in his treatise on partnerships [hereinafter "Bromberg and Ribstein"], states that a partner cannot be excluded from participating in management unless the agreement is "explicit and unambiguous ... because a partner's right to participate in management is such an important protection from the co-partner's abuse of power."

Partnerships are governed by many areas of law, such as trusts and agency, but "[f]undamentally, general partnership is a contractual relationship among the partners." This means that "[i]f an explicit..."
[partnership] agreement does exist, it governs most aspects of the parties' relationship, since many of the provisions of the Uniform Partnership Act are subject to the parties' agreements. Thus, the agreement is the law of the partnership ...."129

The U.P.A. is a set of default rules, adopted by 49 states, that governs areas in which the partnership agreement may be silent.130 The U.P.A. expulsion provisions are based on an aggregate theory of partnership which assumes that a partnership is no more than the collection of partners who compose it.131 Under the aggregate theory, a partnership "dissolves" when one partner leaves or is expelled since the previous aggregate of partners no longer exists.132 By contrast, corporations exist as entities separate and apart from their shareholders and directors. A Revised Uniform Partnership Act [hereinafter "the R.U.P.A."] has recently been adopted that moves toward an entity approach.133 Finally, a state's common law of partnerships may also supplement a partner's obligation if the agreement and the U.P.A. do not speak to the issue.134

evidenced by the fact that most routine, day-to-day partnership affairs are conducted pursuant to the partnership agreement and in accord with other rules adopted by the partnership that are contractual in nature. REV. UNIF. PARTNERSHIP ACT § 103, 6 U.L.A. 231 (Supp. 1993).

However, Vestal is correct in emphasizing the contractual nonwaivability of the fiduciary duties that partners owe to one another. See infra note 148. Indeed, the Revised Uniform Partnership Act takes a contractual approach to partnerships while also making the fiduciary and good faith duties that partners owe to one another mandatory. REV. UNIF. PARTNERSHIP ACT § 103(b)(5), 6 U.L.A. 231 (Supp. 1993). After all, a partnership without fiduciary obligations would be a business association, not a partnership. See Peterson v. Eppler, 67 N.Y.S.2d 498, 500 (Sup. Ct. 1946) ("The parties cannot by using the word 'partnership' create such a relationship when . . . there was to be no community of interest in the business as such and no right to participate in the management of the business."); Dickerson, supra note 121, at 155 ("The word 'partner' carries a connotation of social intimacy not found in 'shareholder.' The emphasis is on trust in its non-technical sense.").

129. 1 BROMBERG & RIBSTEIN, supra note 119, § 2.05, at 2:42.

130. See Weidner, supra note 115, at 828; Beveridge, supra note 128, at 765. Professor Weidner was the Reporter for the R.U.P.A.

131. See Wensinger, supra note 118, at 908-09 n.30.

132. 1 BROMBERG & RIBSTEIN, supra note 119, § 1.03(c)(6), at 1:29. Most firms insert language in their partnership agreements that permit the firm to continue operating despite such a membership change. See Hillman, supra note 79, at 33-35. These clauses are probably ineffective. Id. at 34-35. However, their frequency probably reflects the fact that partnerships see themselves as business entities despite the fact that the law sees them as an aggregate. Id. at 35-38.


134. 1 BROMBERG & RIBSTEIN, supra note 119, § 1.01, at 1:10-12 (partnership law is supplemented by the law of agency, property, trusts, and especially contract interpretation). Section 5 of the U.P.A. states that the rules of law and equity govern gaps in the
B. The Contractual Roots of the Good Faith Duty

Section 205 of the Second Restatement of Contracts states that every contract contains an implied covenant of good faith and fair dealing, and thirty eight states have adopted this position. This applies to the contractual relation known as a partnership. This Section describes the history of the implied good faith doctrine and its application to partnerships.

One of the first American contract cases relying on the covenant was *Wood v. Lucy, Lady Duff-Gordon,* in which Justice Cardozo stated that a contract to pay profits pursuant to an exclusive agency agreement implicitly included "a promise to use reasonable efforts to bring profits and revenues into existence." The doctrine saw little use again until the Uniform Commercial Code (U.C.C.) was promulgated in the middle of this century.

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136. 118 N.E. 214 (N.Y. 1917).

137. *Id.* at 215.


> When we turn to the precedents we are met at once with the confusion of statement whether a covenant can be implied only if it was clearly "intended" by the parties, or whether such a covenant can rest on principles of equity . . . . One may perhaps conclude that in large measure this confusion arises out of the reluctance of courts to admit that they were to a considerable extent "remaking" a contract in situations where it seemed necessary and appropriate so to do.
The U.C.C. defines "good faith" as "honesty in fact in the conduct or transaction concerned." The U.C.C. also refers to a "good faith purchaser" in numerous sections. The commentary to section 1-203 of the U.C.C. notes that good faith requires "observance by the merchant of reasonable commercial standards of fair dealing in the trade." Professor E. Allan Farnsworth suggests that this "inquiry goes to decency, fairness or reasonableness in performance or enforcement." Many courts began to use the implied good faith doctrine in commercial cases following promulgation of the U.C.C.

The First Restatement of Contracts did not impose an implied good faith obligation on contracting parties. However, the subsequent adoption of the good faith doctrine within the U.C.C. provided the momentum for its eventual inclusion in the Second Restatement. Section 205 of the Second Restatement of Contracts, adopted in 1981, recognizes this good faith obligation.

The commentary to section 205 of the Second Restatement provides examples of prohibited conduct:

Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further; bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party's performance.

140. The U.C.C. refers to a "good faith purchaser" in §§ 2-403, 2-507, 2-702, 2-706, 2A-305, 5-108, 6-101, 7-209, 7-301, 7-403, 7-503, 7-504, 8-311, 8-315, and 9-504.
142. Farnsworth, supra note 115, at 668.
143. Lillard, supra note 138, at 1233.
145. The covenant has been used frequently in cases involving franchise termination disputes and cases involving an insurance company's failure to pay. See RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d, illus. 3 (based on a bad faith failure to settle by an insurance company in Brassil v. Maryland Casualty Co., 104 N.E. 622 (N.Y. 1914)); Ernest Gellhorn, Limitations on Contract Termination Rights—Franchise Cancellations, 1967 DUKE L.J. 465, 495. It has been applied in those cases to prohibit one party with discretion over another from exercising that discretion arbitrarily. See infra note 230. It also applies when one party interferes with a condition precedent to contract performance. Bane v. Ferguson, 707 F. Supp. 988, 994 (N.D. Ill.), aff'd, 890 F.2d 11 (7th Cir. 1989); Golden Bear Family Restaurants v. Murray, 494 N.E.2d 581, 588 (Ill. App. Ct. 1986).
Many courts have also held that the implied covenant of good faith prohibits abusive acts of discretion by the partners who control the firm. This implied contract doctrine dovetails with the relational view of business contracts that courts have increasingly embraced—a non-formalistic view applicable to partnerships. Moreover, this duty cannot be waived even by agreement of the parties.


147. See Ian R. Macneil, Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law, 72 Nw. U. L. Rev. 854, 895 (1978). The relational view emphasizes how the continuing business contacts between parties essentially establish and modify any formal contract terms by creating new and effective implied expectations. Id. at 889 (“Processes for flexibility and change in contractual relation”). Bromberg and Ribstein find this relational analysis important to an understanding of partnership law:

A partnership relationship is typically intended to operate over a long term. Since the partners cannot foresee all events that may arise during the course of the relationship, they have opted to be governed by a set of fiduciary rules that serve to fill in the gaps in their agreement. In this sense, the agreement among the partners lends itself to a “relational” analysis that attempts to sustain the parties’ relationship and that does not view the initial agreement as the sole source of rules governing the relationship throughout its duration.

148. See, e.g., Wartski v. Bedford, 926 F.2d 11 (1st Cir. 1991) (under Massachusetts law, a contract providing that “[g]eneral [p]artners shall not be prevented from engaging in other activities for profit, whether in research and development or otherwise, and whether or not competitive with the business of the partnership” did not allow partner to buy another investor’s interest in a connected corporation); Tri-Growth Centre City, Ltd. v. SiIddorf, Burdman, Duignan & Eisenberg, 265 Cal. Rptr. 330 (Ct. App. 1989) (a contract allowing partners to compete with the partnership did not legitimize a partner’s exploitation of secret information against the partnership, including his awareness that the partnership could not close the deal right away, or his deceiving the seller into believing that the partnership thought that the property was too expensive); Labovitz v. Dolan, 545 N.E.2d 304 (Ill. App. Ct. 1989) (“Defendants cite no authority, and we find none, for the proposition that there can be an a priori waiver of fiduciary duties in a partnership—be it general or limited.”); Appletree Square I v. Investmark, Inc., 494 N.W.2d 889, 893 (Minn. Ct. App. 1993) (partners are permitted to vary certain aspects of their relationship but not its fiduciary character); Harold Gill Reuschlein & William A. Gregory, Handbook on the Law of Agency and Partnership § 184, at 268 (1979) (“[P]artners are free to vary many aspects of their relationship inter se, but they are not free to destroy its fiduciary character.”); id. § 181, at 262 (“This is very obvious because these rights are so fundamental to fair play and the basic concept of a partnership . . . .”); Dickerson, supra note 121, at
C. The Fiduciary Roots of the Good Faith Duty

The fiduciary nature of the partnership relationship further strengthens the good faith obligations between partners. Justice Cardozo provided a famous description of these fiduciary duties in *Meinhard v. Salmon*:

[C]o partners, owe to one another... the duty of the finest loyalty. Many forms of conduct, permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone but the punctilio of an honor the most sensitive is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the “disintegrating erosion” of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

Professor Bromberg interprets a partner’s fiduciary duties as requiring the partner to act with the “utmost good faith, fairness, and loyalty” toward other partners. Further, Professor Norwood Bever-
idge says that the fiduciary obligation encompasses the duties of care, loyalty, and good faith. These fiduciary duties are similar to the ones that directors and officers in a close corporation owe to the shareholders.

The R.U.P.A. expressly requires partners to act in good faith toward one another, although it does not characterize this as a fiduciary duty. Section 404(d) of the R.U.P.A. says:

matters relating to and connected with a partnership and joint venture." Bakalis v. Bressler, 115 N.E.2d 323, 327 (Ill. 1953).

152. See Beveridge, supra note 128, at 755-56 (quoting J. Story’s Commentaries, supra note 113, regarding the good faith obligations of partners). Professor Beveridge describes the duty of care as part of the duty of loyalty dictating the particular level of care with which a partner must act to avert liability, e.g., negligence, gross negligence, etc. Id. at 753-55.

The relationship between the duty of loyalty and the duty of care is discussed by Professor Geoffrey Hazard in his Foreword to A.L.I. Principles of Corporate Governance: Analysis and Recommendations ix (Tentative Draft No. 5, 1986):

[B]oth analytically and normatively the principle of loyalty precedes that of due care. Analytically, the principle of loyalty has primacy in that the duty of care entails the principle of loyalty. As stated in § 4.01(a) of Tentative Draft No. 4, the conduct of an officer or director conforms to the duty of care when it is "in good faith, in a manner he reasonably believes to be in the best interest of the corporation . . . ." Normatively, the principle of loyalty to the corporation specifies the direction in which the efforts are to be made that are regulated by the due care requirement.

Id. (emphasis added). Professor Dickerson offers a slightly different view:

In their simplest forms, the duty of loyalty requires that the fiduciary place the interests of the beneficiary ahead of the fiduciary’s own, and the duty of care imposes a prudent person standard on the fiduciary. Good faith, in this context, is an element of the fiduciary’s duties of loyalty and care, but not a wholly separate fiduciary duty. The degree of the standard of good faith is part of the continuing debate, but classically it has meant more than arm’s length good faith when applied to a fiduciary.

Dickerson, supra note 121, at 111 n.2.

153. 1 Bromberg & Ribstein, supra note 119, § 1.01, at 1:4-5 (“Many of the features of partnership under the U.P.A. are best suited to closely held businesses . . . . [B]ecause general partnership provides a well-developed model for closely held businesses, partnership precedents may be particularly influential in cases involving closely held corporations.”). Partnerships are more like close corporations because neither is publicly owned and because fiduciary duties control the leaders in both businesses. 1 F. Hodge O’Neal & Robert B. Thompson, O’Neal’s Oppression of Minority Shareholders § 3.06, at 37-52 (2d ed. 1985) (chapter entitled “Eliminating Minority Shareholders From Directorate and Excluding Them From Company Employment”); David A. Kendrick, Comment, The Strict Good Faith Standard—Fiduciary Duties to Minority Shareholders in Close Corporations, 33 Mercer L. Rev. 595 (1982).

154. The U.P.A. contains no explicit references to a partner’s duty of good faith and is thus less explicit than the R.U.P.A. The U.P.A. does refer to fiduciary obligations and these obligations impliedly include a duty to act in good faith. Section 21(1) of the U.P.A., entitled “Partner Accountable as a Fiduciary,” says:
A partner shall discharge the duties to the partnership and the other partners under this [Revised Act] or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing. The obligation of good faith and fair dealing may not be eliminated by agreement, but the partners by agreement may determine the standards by which the performance of the obligation is to be measured, if the standards are not manifestly unreasonable.\textsuperscript{155}

Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

\textsuperscript{155} REV. UNIF. PARTNERSHIP ACT § 404(d), 6 U.L.A. 254 (Supp. 1993). Professor Vestal argues that the R.U.P.A. destroys the fiduciary duties that have traditionally bound partners under the common law and the U.P.A. Vestal, supra note 118, at 550-51. He asserts that the R.U.P.A. takes a contractual approach to partnership and does not clearly recognize its fiduciary character. Id. at 550. He also argues that the fiduciary duties set forth in the R.U.P.A. are weakened because partners may limit their scope. Id. at 534. Furthermore, Vestal argues that R.U.P.A. provisions permitting partners to act in their own self-interest negate significant fiduciary obligations. Id. at 553-55.

Vestal’s concerns are exaggerated. Professor Weidner, the Reporter for the R.U.P.A., has stated that its duty of good faith goes beyond a contractual duty. Weidner & Larson, supra note 29, at 25 n.149 (“Because R.U.P.A. assumes cooperative rather than adversarial relationships, the obligation of good faith and fair dealing presumably will be given a more powerful reading in the partnership context.”) & n.149 (quoting Donahue v. Rodd Electrotpe Co., 328 N.E.2d 505 (Mass. 1975), requiring partners to act in accord with a “strict good faith standard” as an example of the scope of the R.U.P.A.’s good faith duties). Professor Ribstein has even criticized the R.U.P.A. for taking too broad a view of fiduciary duties. Larry E. Ribstein, The Revised Uniform Partnership Act: Not Ready For Prime Time, 49 BUS. LAW. 45, 55-57 (1993). This suggests that Professor Weidner’s perspective on the R.U.P.A.’s duty of good faith, located somewhere between Vestal and Ribstein, is probably correct.

Professor Dickerson has shown that the duty of good faith between partners has not historically been considered a separate fiduciary duty. She writes: “Historically, although the duties of loyalty and care are reflected in the U.P.A. and its case law gloss, the so-called duty of good faith and fair dealing appears not to have been separately articulated. Good faith, instead, has been an integral aspect of the duties of loyalty and care.” Dickerson, supra note 121, at 111, 115 n.18. Thus, the R.U.P.A.’s failure to list the duty of good faith as a separate fiduciary duty accurately reflects the common-law tradition that Vestal acknowledges is at the root of the U.P.A.. Vestal, supra note 118, at 526-27.

Professor Vestal’s argument that partners can agree to negate the duty of good faith ignores the fact that the R.U.P.A. makes the duty mandatory, unlike the U.P.A. that said nothing explicit about the subject. See Vestal supra note 118, at 552. R.U.P.A. § 404 specifically prohibits partners from authorizing actions that are “manifestly unreasonable.” REV. UNIF. PARTNERSHIP ACT § 404, 6 U.L.A. 254 (Supp. 1993). Professor Ribstein even
The R.U.P.A. duty of good faith is mandatory.\textsuperscript{156} Moreover, section 405 of the R.U.P.A. greatly expands the legal remedies available to partners against other partners.\textsuperscript{157} Thus, courts impose good faith obligations on partners based on the contractual roots of the partnership, as well as its fiduciary nature.

IV. Good Faith and Partnership Expulsions

Although courts and scholars agree that partners must act in good faith toward one another, they disagree over whether this re-

recognizes that the R.U.P.A.'s "[m]andatory fiduciary duties change decades of prior law under the U.P.A." Ribstein, \textit{Revised Uniform Partnership Act}, supra at 57. See also Dickerson, \textit{supra} note 121, at 143-45 (stating that partners must at a minimum not act "manifestly unreasonable"). The omission of this kind of language from the U.P.A. led a few courts to conclude that fiduciary duties could be abrogated by agreement. See, e.g., Gelder Medical Group v. Webber, 363 N.E.2d 573, 576-77 (N.Y. 1977) (enforcing a partnership agreement permitting expulsion without cause or good faith). No court could render such a ruling under the R.U.P.A. See also Donald J. Weidner, \textit{Three Policy Decisions Animate Revision of the Uniform Partnership Act}, 46 Bus. Law. 427, 453-54 (1991) (the Reporter for the R.U.P.A. explains that one important goal was to remove the ambiguities in the U.P.A. given the fact that certain default rules were mandatory).

Vestal also ignores several other parts of the R.U.P.A. where good faith duties have been strengthened. For example, the commentary to § 404 of the R.U.P.A. is entitled, "R.U.P.A. contains an \textit{expanded} and exclusive statement of the fiduciary duties of a partner." 1 \textsc{Bromberg} \& \textsc{Ribstein}, \textit{supra} note 119, app. at 127 (emphasis added). Moreover, Vestal ignores R.U.P.A. § 405(b)'s huge expansion of remedies that permit partners to sue the partnership at law. 6 U.L.A. 257 (Supp. 1993).

In addition, Professor Vestal's view of the U.P.A.'s duty of good faith may be too rosey as courts often took a laissez-faire approach toward partnerships under the U.P.A. See, e.g., Day v. Avery, 548 F.2d 1018, 1028 n.54 (D.C. Cir. 1976), \textit{cert. denied}, 431 U.S. 908 (1977) (suggesting that a partnership agreement can override U.P.A. provisions and common law); Ribstein, \textit{supra}, at 56 ("Current law enforces the power to expel even without proof that it was exercised for good cause or in accordance with particular procedures."); \textit{id.} at n.85 (listing cases).

Finally, the R.U.P.A.'s new provision regarding self-interested actions by partners is not a great change from the U.P.A. Dickerson, \textit{supra} note 121, at 118. All the new language does is change "the burden of proof. A partner is, therefore, not automatically in a defensive posture merely because of the benefit derived from an act." \textit{Id.} at 144. Indeed, Professor Ribstein says that this part of the R.U.P.A. restricts the self-interest of partners too much "by requiring partners to be 'nice' rather than merely to refrain from twisting the contract in ways the parties never intended." Ribstein, \textit{supra}.

Thus, Vestal's view that the R.U.P.A. substantially weakens the fiduciary duties of partners is incorrect, especially since the R.U.P.A. makes the good faith duties of partners mandatory and permits partners to bring actions at law.

\textsuperscript{156} See Dickerson, \textit{supra} note 121, at 143 ("[T]his language renders unenforceable any absolute blanket waiver of the obligation of good faith and fair dealing.").

\textsuperscript{157} The new § 405(b) permits partners to sue other partners in courts of law, rather than to be limited to filing an accounting action in a court of equity. \textsc{Rev. Unif. Partnership Act} § 405(b), 6 U.L.A. 257 (Supp. 1993).
quirement extends to partnership expulsion decisions. This issue is important because the most damaging discriminatory action that a firm can take against a partner is to expel her or force her out. The case law, the U.P.A. and R.U.P.A., several scholars, and public policy all support imposing a good faith requirement on partnership expulsions.

There are three basic expulsion clauses in partnership agreements: "no cause" provisions, "for cause" provisions, and "silent" provisions. The silent provisions do not require the partnership to have cause for expelling the partner, but they usually specify that a vote of the partners must be taken. The analysis in this Section assumes that this most common type of agreement is in effect.

The leading case holding that partner expulsion decisions must be in good faith is Page v. Page. In Page, Justice Traynor of the California Supreme Court said that a partner could not legally dissolve the

158. The reference to expulsion includes actual and constructive discharges, as well as freeze-outs. Gevurtz, supra note 119, at 536.

159. See, e.g., John Narducci, Note, The Application of Antidiscrimination Statutes to Shareholders of Professional Corporations: Forcing Fellow Shareholders Out of the Club, 55 Fordham L. Rev. 839, 857-58 (1987) (arguing that shareholders who are "squeezed out" of a professional corporation for discriminatory reasons should be able to sue for breach of fiduciary duty). The present Article concentrates on expulsions because there is some controversy over whether the good faith obligations of partners apply there. If the good faith obligations apply there, they certainly cover discrimination in areas such as promotions and case assignments because there is no dispute among scholars that good faith obligations exist regarding the actual conduct of the partnership's business.


161. Id. at 742-49. Without such provisions, the partner could be removed at the whim of a few controlling partners notwithstanding the capital contributions that the partner has probably made to the firm. Paul Carrington & William Sutherland, The Articles of Partnership for Law Firms 47-48 (1961) (model partnership agreement requirements for expelling a partner), cited in Hillman, supra note 79, at 35-39).

162. The standard form partnership agreement has this percentage vote format and is known as a "partnership at will." See, e.g., Carrington & Sutherland, supra note 161, at 47-48; Gevurtz, supra note 119, at 539. Partnerships governed instead by a "for cause" expulsion provision may not arbitrarily expel a partner. Hynes, supra note 148, at 742. An expulsion may only be carried out under that type of provision if the partner has committed one of the acts that constitutes cause as defined in the agreement. A discriminatory expulsion clearly would not constitute just cause. See, e.g., Robert Fitzpatrick, The Future of Employment Discrimination Law as the United States of American Enters the 21st Century, ALI-ABA Course of Study on Advanced Empl. Law and Litig., Dec. 2-4, 1993, at 13 ("Obviously, race [discrimination] is not just cause. Nor is sex [discrimination].")

Moreover, the mandatory nature of the good faith duties means that a partnership agreement that attempts to nullify those duties is ineffectual. See supra note 148. The rest of this Article focuses on partnership agreements which say that an expulsion can occur by a particular vote of the partnership.

partnership “in bad faith” and violate “his fiduciary duties” because this would negate the “implied agreement not to exclude [the other partner] wrongfully from the partnership business opportunity.” Professor Donald Weidner, the official reporter for the R.U.P.A., has used the Page case to demonstrate the scope of the R.U.P.A.’s mandatory duty of good faith. The Georgia Supreme Court followed the reasoning of Page in Wilensky v. Blalock by holding that a bad faith termination of a partnership violated Georgia law.

Several expulsion cases have involved law firms. In Rosenfeld, Meyer & Susman v. Cohen, a California appellate court ruled that a law firm partner could not maliciously dissolve a partnership because partners “must exercise their rights in good faith, deal fairly with each other and refrain from injuring the right of another party to receive the benefits of an agreement or relationship.” In Wieder v. Skala, the New York Court of Appeals determined that a lawyer, who was discharged from a firm for refusing to act unethically, could maintain a complaint alleging that the firm acted in bad faith and breached an implied condition of his employment. An Illinois court, in denying a defense motion to dismiss, held that an implied covenant of good faith restricted the power of the world’s largest law firm, Baker & McKenzie, to freeze out one of its female partners.

164. Id. at 45. A later California Supreme Court decision involving a joint venture to bid on a construction project affirmed this rule stating: “It is no less a violation of the trust imposed between partners to permit the personal exploitation of that partnership information and opportunity to the prejudice of one’s former associates by the simple expedient of withdrawal from the partnership.” Leff v. Gunter, 658 P.2d 740, 744 (Cal. 1983).

165. Weidner & Larson, supra note 29, at 25 n.149.

166. 414 S.E.2d 1 (Ga. 1992).

167. Id. at 4. See also Prentiss v. Sheffel, 513 P.2d 949 (Ariz. Ct. App. 1973) (two majority partners in a three-man partnership at-will were allowed to purchase the partnership assets when the exclusion of the minority partner was not done for wrongful purposes and when the minority partner was not injured); Monteleone v. Monteleone, 497 N.E.2d 1221 (Ill. App. Ct. 1986) (analyzing who among the partners was at fault for wrongfully dissolving the partnership and allowing the other partners to continue the business); Ball v. Britton, 58 Tex. 57 (Tex. 1882) (defendant-partner had no right to expel plaintiff-partner from the firm in an effort to take over its assets and plaintiff was entitled to damages measured by the value of his services to the firm as well as punitive damages); Howell v. Bowden, 368 S.W.2d 842 (Tex. Civ. App. 1963) (awarding $57,500 in damages for partner against co-partner for accounting and settlement of partnership and for co-partner’s breach of fiduciary duties); Sewell v. Connor, 23 S.W. 555 (Tex. Civ. App. 1893) (rejecting defendant’s demurrer to suit by a partner after the partner was expelled).

168. 94 Cal. Rptr. 180, 188 (Ct. App. 1983).

169. Id.


The U.P.A. and R.U.P.A. support this position. Section 31(1)(d) of the U.P.A. states: "Dissolution is caused: . . . (d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners." A "bona fide" expulsion must be legitimate—i.e., in good faith. This language highlights the fact that partner expulsion decisions are subject to the good faith requirement. Moreover, as discussed, the R.U.P.A. makes the good faith requirement mandatory. In addition, the managing partner of a firm usually initiates terminations and his actions are subject to the most stringent good faith standards.

Professor Gevurtz argues that when a partnership agreement does not specify grounds for partner expulsion, it is "rational to assume the parties intended an implicit requirement of reasonable grounds for removal—rather than subject their interests completely to the whims of other partners." He explains that "[o]n balance, given the danger of partners' abusing expulsion clauses to effect a freeze-
out, courts should require agreements be more specific before reading them to dispense with a requirement that there be good cause to expel a partner."\textsuperscript{178} The danger posed by a freeze-out is that the partnership will abscond with the expelled partner's capital contributions and other assets.\textsuperscript{179}

Professor Gevurtz also suggests that courts may superimpose such a substantive restriction on expulsions, despite the partnership agreement's silence, because the agreement "sets out the minimum, [but] not necessarily the entire requirement."\textsuperscript{180} The R.U.P.A. takes this position,\textsuperscript{181} as do many other scholars.\textsuperscript{182}

There are important policy reasons supporting this view. "Application of the good faith rule [to partner expulsion] removes the financial incentives which might impel some lawyers to enter into a war with their [old] firm, in the hope of winning the battle of the files."\textsuperscript{183} Under the aggregate theory of partnership, a partner’s removal “dissolves” the partnership. Thus, a good faith requirement promotes sta-

\textsuperscript{178} Id.
\textsuperscript{179} Dickerson, supra note 121, at 154 ("Given the unlimited personal liability of a partner for the obligations of the partnership, and given the power of each co-partner to bind the partnership in a wide scope of activities, a partner is uniquely vulnerable to the acts of each co-partner. At a minimum, that reality suggests a presumption that the classic fiduciary duties apply unless otherwise expressly agreed."). Gevurtz proposes a method for courts to determine whether an expulsion is based on reasonable grounds. First, the expelling partners must have reasonable grounds for removing the other partner. Second, these grounds must have actually motivated their decision. Gevurtz, supra note 119, at 581. See also Narducci, supra note 159, at 857-58.
\textsuperscript{180} Gevurtz, supra note 119, at 579.
\textsuperscript{181} Weidner & Larson, supra note 29, at 25 n.149 (citing cases in which the duty of good faith was applied to expulsion decisions).
\textsuperscript{183} Feldman & Berkheiser, supra note 182, at 29. Cf. Daniel S. Reynolds, Wrongful Discharge of Employed Counsel, 1 GEO. J. LEGAL ETHICS 553, 583 (explaining how good faith covenant precludes the discharge of a lawyer for complying with ethical rules); Wilbur, supra note 15, at 92-93 (arguing that permitting wrongful discharge claims by attorneys, who are fired for refusing to commit ethical violations, would advance ethical standards in the profession).
bility by ensuring that such organizational shake-ups occur for legitimate reasons.184

The position of a law firm partner is also similar to that of a tenured professor.185 Tenure is considered a professor’s guarantee that she cannot be discharged except for serious misconduct.186 Therefore, it would be absurd to argue that a professor’s tenure ensures that the university will deal with her in good faith, except in the event of discharge. Similarly, it would be wrong to assert that partners have a duty of good faith to one another in all parts of the business except expulsion decisions.187

These arguments draw additional support from two kinds of employment law cases. First, employees who are hired for a term of years may not be fired without cause by their employers during the term.188 Law partners deserve at least as much protection against ar-

184. In Howard v. Babcock, 863 P.2d 150 (Cal. 1993), the California Supreme Court upheld a law firm partnership agreement that contained a clause requiring withdrawing partners to compensate the firm if they later competed with it. Id. at 160. The court disagreed with the departing partners who had argued that such a contract impermissibly restricted their right to practice. Id. The court explained that the increasingly turbulent legal market justifies such precautions. Id. at 159-60. Imposing a good faith limitation on the discretion of partners regarding expulsion decisions has the same benefit.

185. Many courts and scholars have treated partnership status as similar to that of a tenured professor. See Hishon v. King & Spalding, 467 U.S. 69, 80-81 n.4 (1984) (Powell, J., concurring); FRIEDMAN & STRICKLER, supra note 110, at 683; Chervin, supra note 68, at 210 (analogizing partnership and tenure decisions); Mary Johnson, Hishon v. King & Spalding: Equal Justice Under Law, 30 Loy. L. Rev. 1008, 1013, 1017 (1984) (“Promotion to partnership has been analogized to an appointment of tenure by a university in that both represent ‘badges of success’ in their respective worlds. . . . Courts also consider the fact that a promotion to partner or an award of tenure to an individual practically guarantees that person lifetime job security.”); Note, Tenure and Partnership as Title VII Remedies, 94 Harv. L. Rev. 457 (1980).

186. Stensrud v. Mayville State College, 368 N.W.2d 519, 521 n.1 (N.D. 1985); Drans v. Providence College, 383 A.2d 1033, 1039 (R.I. 1978) (“Tenure in the academic community commonly refers to a status granted, usually after a probationary period, which protects a teacher from dismissal except for serious misconduct or incompetence.”).

187. Johnson, supra note 185, at 1017 (making partner at a law firm, like tenure, is generally a guarantee of “lifetime job security”); 1 BROMBERG & RIBSTEIN, supra note 119, § 7.02(f), at 7:27-28; Gordon, supra note 79, at 61.

188. American workers are presumed to be at-will employees who can be fired for any reason or no reason at all. H.G. WOOD, LAW OF MASTER AND SERVANT § 134 (1877) (this treatise is credited with creating this doctrine, even though its premises were inaccurate); Lillard, supra note 138, at 1240 n.38. Historically, the only exception to this rule was employees who were hired to work for a definite term. Theodore J. St. Antoine, Employment-at-Will—Is The Model Act the Answer?, 23 Stetson L. Rev. 179 (1993); Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816, 1817 n.8 (1980) (citing Brekken v. Reader's Digest Special Prods., Inc., 353 F.2d 505 (7th Cir. 1965)). They cannot be fired arbitrarily during the term because that would enable employers to readily circumvent the employ-
bitary removal as "term" employees since partners have more permanent positions.189

In addition, several courts have ruled that an implied covenant of good faith bars an employer from firing an at-will employee in certain situations.190 However, most state courts disagree191 and refuse to adopt such a requirement because it would erode the doctrine of at-will employment.192 By contrast, implying such a covenant to partner expulsion decisions would further the contractual security that underlies the status of being a partner. This contractual security separates partners from at-will employees.193

Professor Bromberg takes the contrary view:

189. Wheeler v. Hurdman, 825 F.2d 257, 274 (10th Cir.), cert. denied, 484 U.S. 986 (1987); 1 Bromberg & Ribstein, supra note 119, § 1.01, at 1:11.


191. The covenant of good faith is implied by courts as a matter of law. However, state courts today favor the “more traditional theories such as implied-in-fact contract and public policy tort. . . .” See Perritt, supra note 190, at 697-98 n.83 (listing cases from various states rejecting applicability of the implied covenant to the employment situation). One example of an implied-in-fact employment contract would be a just cause provision in an employee personnel handbook. See, e.g., Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880 (Mich. 1980). Many states recognize a public-policy based claim for a retaliatory discharge action. See, e.g., Palmateer v. International Harvester Co., 421 N.E.2d 876 (Ill. 1981).

192. The absence of clear limitations in the scope of the implied covenant of good faith wrongful discharge theory made it unattractive to courts. See, e.g., Moriss v. Coleman Co., 738 F.2d 841 (Kan. 1987); Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984). Nonetheless, courts that have rejected the implied covenant of good faith as a general exception to at-will employment still have found certain bad faith terminations to be actionable. Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 438 (7th Cir. 1987) (“avowedly opportunistic” actions against an employee are barred even if the employee is an at-will employee).

193. The meaning of “good faith” in the implied covenant is debated. Lillard, supra note 138, at 1249-58. Monique Lillard surveyed how courts have used the doctrine in the employment context and identified eight categories: “too vague to discuss”; “I know it when I see it”; a benefit of the bargain approach; a good cause requirement; a prohibition on bad faith conduct; a provision for honesty in fact; an evaluation based on community “standards/business” practice; and a fair dealing requirement. Id.
It has been held that the expelling partners need not prove that the expulsion was in good faith or for good cause shown, and that the duty of good faith does not require that expulsion be conditioned on any particular procedures, such as notice, a specification of charges, or an opportunity to be heard.194

Two decisions involving law firms that support his position are Holman v. Coie195 and Lawlis v. Kightlinger & Gray.196

Those courts refused to examine the motives behind two partnership expulsions because, they reasoned, the purpose behind a silent partnership agreement was "to provide a simple, practical, and above all, a speedy method of separating a partner from the firm."197 Professor Hillman argues that a good faith requirement would create "unnecessary complications and uncertainties" to partnership decisions.198 Other scholars argue that implying a good faith limitation contradicts the express terms of the contract.199 Finally, partnerships can assert that restricting their power to expel infringes their rights to expression and association.200

These arguments are flawed. First, a partnership agreement's silence on the expulsion issue does not justify rejecting an implied good faith limitation. By definition, this limitation is not explicit. As Professor Gevurtz points out, this implied term is not inconsistent with a percentage vote requirement—it supplements that requirement by adding an implied substantive limitation.201 Second, the U.P.A. and R.U.P.A., which control when a partnership agreement is silent, both require bona fide partner expulsions.202

196. 562 N.E.2d 435 (Ind. Ct. App. 1990). Another case involving a law partnership in which the duty of good faith between partners was given a narrow construction is Day v. Avery, 548 F.2d 1018 (D.C. Cir. 1976), cert. denied, 431 U.S. 908 (1977). See also Smart v. Hernandez, 66 A.2d 643 (N.H. 1949) (court strictly adheres to language of partnership agreement in refusing to find broad good duty of good faith); McPherson v. J.E. Sirrine & Co., 33 S.E.2d 501, 510 (S.C. 1945) ("It is not the province of the court to alter a contract by construction or to make a new contract for the parties . . . ."); Ribstein, supra note 155, at 56 n.85.
198. Hillman, supra note 79, at 43. See also Hynes, supra note 148, at 740.
199. See, e.g., Smart, 66 A.2d at 645 (courts should not alter private contracts governing partnership arrangements); Easterbrook & Fischel, supra note 124, at 427 ("Actual contracts always prevail over implied ones."); Gevurtz, supra note 119, at 554-55.
200. This objection was raised by the law firm defendant in Hishon v. King & Spalding, 467 U.S. 69, 78 (1984).
202. See supra notes 172-176.
In addition, as Professors Gevurtz and Dickerson note, partnership agreements are designed to provide protection and security to partners, not to ensure that they can be expelled rapidly.\textsuperscript{203} If the latter interpretation prevailed, partnership would not be such a cherished professional goal for lawyers.\textsuperscript{204} Requiring that partner expulsion decisions be made in good faith is necessary to fulfill this goal.

Finally, the associational and expressive arguments should be rejected because "[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it never has been accorded affirmative constitutional protections."\textsuperscript{205} Partnership expulsion decisions should, therefore, be made in good faith.

\textbf{V. The Duty of Good Faith as a Bar to Discrimination}

Courts should interpret the duty of good faith that governs partners to prohibit sex discrimination for three reasons. First, many courts have adopted such an interpretation of the duty of good faith in wrongful discharge cases, and the justifications for these decisions apply to partnerships. Second, discriminatory conduct is inconsistent with good faith obligations, regardless of which judicial definition of good faith is used. Finally, public policy supports this interpretation.

\textbf{A. The Case Law and Commentary}

Both federal and state courts permit plaintiffs to attack discrimination by alleging that their employers or superiors breached an implied covenant of good faith. One of these cases involved a suit by a woman partner against her law firm.

In \textit{Harrison v. Edison Bros. Apparel Stores},\textsuperscript{206} the United States Court of Appeals for the Fourth Circuit ruled that an employer violated the implied covenant of good faith by firing a female employee who had refused to reciprocate sexual advances. The United States Court of Appeals for the Eighth Circuit in \textit{Lucas v. Brown & Root, Inc.}\textsuperscript{207} and the New Hampshire Supreme Court in \textit{Monge v. Beebe

\begin{footnotesize}
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\item \textsuperscript{203} See supra notes 119, 121.
\item \textsuperscript{204} See Gordon, \textit{supra} note 79. See also Wheeler v. Hurdman, 825 F.2d 257, 274 (10th Cir. 1987).
\item \textsuperscript{206} 924 F.2d 530 (4th Cir. 1991).
\item \textsuperscript{207} 736 F.2d 1202 (8th Cir. 1984).
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Rubber Co. reached the same result. In these cases, plaintiffs used the covenant to combat sexually discriminatory conduct. Moreover, in *Berube v. Fashion Centre, Ltd.*, the Utah Supreme Court ruled that the fact finder must consider whether an employee was a victim of sex discrimination in order to decide whether an employer breached an implied covenant of good faith.

In *Beall v. Baker & McKenzie*, an Illinois state court found that a woman law partner's allegation that she was denied work and squeezed out of the partnership due to gender bias stated a claim because

[c]ases of breach of an implied covenant of good faith typically occur where the contractual obligation of one party is contingent upon a condition particularly within the power of that party . . . . In this case, defendants had the power to avoid compensating Beall by denying her work assignments. If they denied these assignments with a discriminatory purpose, as Beall alleges they did, they exercised their discretion in bad faith and violated the implied covenant.

The egalitarian nature of the partnership structure also supports the *Beall* court's ruling that the partnership cannot discriminate.

In *McKinney v. National Dairy Council*, the United States District Court for Massachusetts held that the covenant prohibits age discrimination. The court reasoned that "[s]ince Massachusetts law, as well as federal law, plainly manifests a public policy against age discrimination in employment, it would be a striking limitation of the scope of the implied covenant if it were held inapplicable to a decision to terminate because of age." Courts have used the covenant to attack other forms of discrimination as well.
Ian Ayres’s review of Richard Epstein’s book, *Forbidden Grounds: The Case Against Employment Discrimination Laws*, supports the thesis that discrimination should be prohibited in private contracts. Professor Epstein’s book advocates the abolition of employment discrimination laws, and the return to freedom of contract. However, Professor Ayres states that “Epstein desires not only freedom of contract, but a particular kind of freedom. It would be equally consistent with contractual freedom to imply a warranty of non-discrimination . . . .”  

Professor Ayres’s reasoning suggests that an implied duty not to discriminate governs partnerships.

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215. Professor Ayres’s full excerpt reads:

Epstein desires not only freedom of contract, but a particular kind of freedom. It would be equally consistent with contractual freedom to imply a warranty of non-discrimination that an employer could waive only by explicitly telling employees and consumers that the employer retains the right to discriminate on the basis of race. After all, warranties that apartments will be maintained in a livable condition, or that products will be usable, are routinely presumed in contract law. Forcing employers to affirmatively contract for the right to discriminate might at least give employees and consumers information to protect themselves against the harms of discrimination.


Given the uproar that would be created, it is unlikely that any modern business would announce a contractual right to discriminate. For example, the national press ran stories about flagrant discrimination by the law firm of Baker & McKenzie in its recruiting of an African-American woman for a summer position. *See* Charles-Edward Anderson, *Affirmative Reaction*, 75 A.B.A. J. 20 (June 1989) (interviewer asked the woman how she would react if someone called her a “black bitch”). *See also* UPI, *Racial Slur Charged to Law Firm: University Bans Attorneys After Student Reports Offensive Interview*, DET. FREE PRESS, Feb. 3, 1989, at 1A (firm was subjected to a recruiting boycott by law students after news of the discriminatory incident came out); Daniel J. Lugo, Comment, *Don’t Believe the Hype: Affirmative Action in Large Law Firms*, 11 LAW & INEQ. J. 615, 626 n.48 (1993). Thus, the implied obligation not to discriminate recognized by Professor Ayres is, as a practical matter, nonwaivable.

216. Professor Ayres’s reasoning is further supported by the extent to which socially valuable duties are implied in other areas. For example, in the early 20th Century, courts increasingly used the common law to hold that businesses issue an implied warranty to consumers that their products are not imminently dangerous. *See*, e.g., MacPherson v. Buick, 111 N.E. 1050 (N.Y. 1916). It is not coincidental that these common-law developments
Professor Zemelman also recognizes the tendency of courts to "treat[ ] the Title VII right to be free from discrimination as an implied contractual term . . . ".217 Addressing the United States Supreme Court's treatment of contract law, Professor Shell notes that there are "[i]mmutable rules that bar transactions in such things as . . . bias . . . and intolerance [that] serve a moral function . . . ."218 Moreover, Professors Neil Williams and Steven Burton have demonstrated that common-law contract doctrines should be interpreted to prohibit racial discrimination.219

However, several courts have ruled that Title VII and state antidiscrimination statutes preempt common law remedies against employment discrimination by establishing a comprehensive administrative scheme for addressing such claims.220 Yet these statutes do not protect partners and, therefore, should not preclude them from common law redress.221 The Illinois state court in Beall rejected Baker &

paralleled increasing pro-consumer governmental regulation of businesses. Edward H. Levi, An Introduction to Legal Reasoning 24 (1948) ("[MacPherson] is usually thought to have brought the law into line with 'social considerations.'") Thus, new governmental policies often have an impact on the common law's supposed private ordering.

217. Zemelman, supra note 24, at 201. The trend whereby law firms are increasingly adopting formal policies against sexual harassment, referenced earlier, supports the finding that partners have an implied contractual right to be free of gender discrimination. See, e.g., N.Y. State Bar Ass'n Comm. on Women in the Law, Sexual Harassment: A Report and Model Policy for Law Firms (1992). Such formal employment policies are frequently the source of contractual rights. See supra note 191.

218. Shell, supra note 148, at 526.


220. See, e.g., Wolk v. Saks Fifth Ave., 728 F.2d 221, 223-24 (3d Cir. 1984) (statutory remedy in Pennsylvania Human Relations Act precludes common law claim); see generally Greenbaum, supra note 21, at 68 (listing cases); 2 Henry H. Perritt, Employee Dismissal Law and Practice § 5.25 (3d ed. 1992) (listing cases).

221. One objection to such a broad interpretation is that it unfairly favors partners by enabling them to bring discrimination lawsuits in a court without first going to the EEOC or to a state civil rights agency like other discrimination plaintiffs. See, e.g., Mallor, supra note 21, at 669 (discussing permissibility of common-law discrimination claims given that the EEOC administrative process is circumvented). But see Mich. Comp. Laws Ann. § 37.2101-.2804 (West 1985 & Supp. 1994) (Elliott-Larsen Civil Rights Act permits discrim-
McKenzie's preemption argument for this reason, and its decision is in accord with other preemption cases. Moreover, none of the cases in which common law discrimination claims were found to be preempted dealt with claims brought by partners. Professor Marc Greenbaum has thoroughly analyzed federal and state anti-discrimination statutes and has concluded that they were not intended to be preemptive.

B. The Various Definitions of Good Faith

Judges have used four definitions of the duty of good faith in employment cases. Discriminatory conduct breaches the duty under all four tests.

1) Just Cause

Several courts and scholars have concluded that the duty of good faith requires an employer to have just cause before taking an adverse personnel action. Examples of just cause include a company's need to cut jobs because of financial problems, employee misconduct, or
unsatisfactory job performance. Obviously, a law partnership’s discriminatory animus toward a particular sex would not be just cause.

2) Bad Faith Conduct

Many courts have defined the implied covenant of good faith negatively by providing examples of prohibited conduct. According to Professor Summers, this “excluder” approach shows that the covenant precludes “a wide range of heterogeneous forms of bad faith.” The commentary to section 404 of the R.U.P.A. cites Summers’s views as supporting the duty of good faith. Using this approach, courts

1 Henry H. Perritt, Jr., Employee Dismissal Law and Practice § 4.54, at 389 (3d ed. 1992) (emphasis added). Gevurtz has said that the partners’ fiduciary duties require that a partnership termination be based on good cause unless the partnership agreement is very clear about requiring some lesser proof of good faith. Gevurtz, supra note 119, at 580-81. This reasoning is consistent with Justice Cardozo’s discussion of fiduciary duties in Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928).

Professor Perritt acknowledges that many relationships that preclude discharge without just cause “enumerate reasons for which dismissal will not occur, e.g. sex, race, age, disability, or sexual orientation discrimination.” 1 Perritt, supra note 225, § 4.46, at 369-70. See also Fortune v. National Cash Register Co., 364 N.E.2d 1251 (1977). One of the first law review articles to advocate modification of the at-will employment doctrine to permit a tort claim for abusive discharge relied on the anti-discrimination laws. Lawrence Blades, Employment At Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 Colum. L. Rev. 1404, 1414 (1967).

Professor Summers made the following defense of this position:

In my view, good faith in the general requirement of good faith in ordinary moral dealings, and in the general case law of contract up to the late 1960s, was most felicitously conceptualized as an “excluder.” That is, it was not appropriately formulable in terms of some general positive meaning . . . .

Id. But see Lillard, supra note 138, at 1255-57. Professor Lillard suggests that the excluder approach lacks definition. Moreover, she says that certain firings that we deem illegal (e.g. firing an employee as her pension is about to vest) are actually quite rational (since the employer seeks to save pension monies). Thus, the excluder approach that attacks bad faith conduct does not cover all forms of objectionable discharges. In addition, this test may be too difficult for plaintiffs since it forces them to prove the defendant’s state of mind. Id.

Professor Summers’s seminal law review article on the implied covenant of good faith was referenced in the commentary to the Second Restatement of Contracts in which the covenant was endorsed. See Restatement (Second) of Contracts § 205 rptr. notes (1981).

See 1 Bromberg & Ribstein, supra note 119, app. at 208 (1992). The R.U.P.A. commentary to § 404 provides:
have prohibited arbitrary and capricious actions, avowedly opportu-
nistic acts, acts motivated by “disinterested malevolence,” and
acts motivated by “spite or ill will.” The commentary to section 205

Some commentators believe that good faith is more properly [defined] by what it
excludes than by what it includes. See Robert S. Summers, “Good Faith” in Gen-
eral Contract Law and the Sales Provisions of the Uniform Commercial Code, 54
VA. L. REV. 195, 262 (1968):

“Good faith, as judges generally use the term in matters contractual, is best un-
derstood as an ‘excluder’—a phrase with no general meaning or meanings of its
own. Instead, it functions to rule out many different forms of bad faith. It is hard
to get this point across to persons used to thinking that every word must have one
or more general meanings of its own—must be either univocal or ambiguous.”

230. Bane v. Ferguson, 707 F. Supp. 988, 994 (N.D. Ill.) (co covenant of good faith used to
“check the exercise of a party’s discretion under a contract” over another party), aff’d, 890
F.2d 11 (7th Cir. 1989); Magnan v. Anaconda Indus., 479 A.2d 781, 786-87 n.19 (Conn.
1984) (“It would appear that the rubric bad faith would be applied to any discharge which
is merely arbitrary, i.e., without a valid reason . . . .”); Foster Enterprises v. Germania Fed.
Sav. & Loan Assn., 421 N.E.2d 1375, 1381 (“Good faith between contracting parties re-
quires that a party vested with contractual discretion must exercise his discretion reason-
ably and may not do so arbitrarily or capriciously.”); Beall v. Baker & McKenzie, No. 91
CH 9448, mem. op. (Cook Cty. Cir. Ct. Ch. Div. Aug. 18, 1992); Easterbrook & Fischel, supra
note 124, at 436. This use of the covenant is common when one party to the contract
has greater power than the other and when there is a danger of the stronger party exploit-
ing that power without justification. Hillman, supra note 79, at 46 n.237.

231. See Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 438 (7th Cir. 1987) (“avowedly
opportunistic” action toward employee is impermissible); Rao v. Rao, 718 F.2d 219 (7th
Cir. 1983) (employer may not dismiss an employee without good cause and in bad faith,
and then enforce a restrictive covenant severely limiting scope of employee’s professional
practice). Jordan was decided by Judge Easterbrook using a contractarian approach to the
duty of good faith over a dissent by Judge Posner. Some scholars have harshly criticized
Jordan. See, e.g., Deborah A. DeMott, Beyond Metaphor: An Analysis of Fiduciary Obli-
gation, 1988 DUKE L.J. 879, 884. The issue in Jordan was whether a closely held corpora-
tion breached its fiduciary duty to an employee-shareholder when it repurchased his
shares, yet neglected to inform him that negotiations had started that might lead to a
merger between the corporation and another entity. Id. at 882. Professor DeMott posits
that Judge Easterbrook misunderstood the concept of fiduciary duty. She says that Judge
Easterbrook found that the corporation had a duty to disclose based on “a standby or off-
the-rack guess about what the parties would agree to if they dickered about the subject
explicitly.” Id. at 884. She calls this the “hypothetical bargain” approach to fiduciary du-
ties and says that it is contractual in nature and “confuses the analysis” because fiduciary
duties exist independent of the contractual relationship. Id. at 885-87. Judge Easterbrook
responds by stating that Professor DeMott’s analysis contains an amorphous “conclusion”
about the source of these fiduciary duties and “it takes a theory to beat a theory.” Easter-
brook & Fischel, supra note 124, at 434.


233. Steven J. Burton, Breach of Contract and the Common Law Duty to Perform in
Good Faith, 94 HARV. L. REV. 369, 387 n.80 (1980) (“Some noneconomic motives, such as
spite or ill will, are likely to run afoul of the good faith performance doctrine or otherwise
to result in liability for breach of contract.”); Davies, supra note 182, at 33.
of the Second Restatement of Contracts lists other prohibited conduct.

Discriminatory conduct has many of the same qualities as these other bad faith actions. For example, in Reed v. Reed,234 the Supreme Court declared a statute that discriminated on the basis of sex to be unconstitutional because it was arbitrary and irrational—just like the bad faith conduct identified above.235 Other cases have characterized discriminatory attitudes as being motivated by spite or ill will.236 Thus, discriminatory acts are quintessential examples of bad faith conduct.

3) The Honesty Requirement

Many courts have followed the U.C.C., the Restatement (Second) of Contracts, and various scholars by interpreting the duty of good faith to require honesty above all.237 The Model Employment Termination Act238 also defines good faith as "honesty in fact."239 However, the R.U.P.A. has rejected this definition of good faith.240

235. Such discrimination is generally viewed as illegal because it reflects preferences for one group over another that bear no relation to the real abilities and competence of the person being affected. Katharine Bartlett, Gender and Law 72 (1993) ("Formal equality insists not only that those who are similarly situated be treated alike, but that stereotypes and overgeneralizations not dictate who is determined to be similarly situated to whom."). Such acts are therefore arbitrary and capricious. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment . . . .") (emphasis added).
236. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (preference in favor of veterans that harms women is not illegal unless the preference was intended to discriminate because of, and not in spite of, gender).
237. The relevant U.C.C. and Restatement sections were discussed supra notes 138-147 and accompanying text. See also Heney v. Sutro & Co., 153 P. 972, 974 (Cal. Ct. App. 1915) ("As understood in law the phrase 'in good faith' has a settled and well-defined meaning, which generally imports that . . . the transaction . . . was honestly conceived and consummated . . . ."); Stark v. Circle K Corp., 751 P.2d 162, 167 (Mont. 1988) (an employer must show a "fair and honest reason" for a dismissal). See generally Lillard, supra note 138, at 1234-35, 1257-58; Mack A. Player, Employment Discrimination 7 (1988).
239. Model Empl. Term. Act § 1(5). The problem with this definition alone is that it would not prohibit a controlling partner from honestly and openly taking advantage of another partner. Nonetheless, the standard would encourage forthright communication to a partner who is about to be expelled.
240. 1 Bromberg & Ribstein, supra note 119, app. at 182 (1992). The R.U.P.A. may allow a partnership to agree to such a limited duty of good faith. But cf. Dickerson, supra note 121, at 145 (suggesting the R.U.P.A. duty of good faith is mandatory and is more stringent than the U.C.C. approach); supra note 148.
Nonetheless, courts using this approach should also prohibit discriminatory conduct given its inherent dishonesty.

Discriminatory conduct is dishonest in two ways. First, such conduct is based on the victim’s sex or skin color rather than her personal qualities and skills. This falsification of the victim is dishonest. Second, the wrongdoer in most cases pretends that he did not discriminate and fabricates a legitimate reason for its action. Thus, the crucial issue in most discrimination cases is whether the proffered legitimate justification is a pretext (i.e., whether it is true or false).

4) The Parties’ Expectations

According to some courts, the duty of good faith is limited to the contracting parties’ reasonable unstated expectations, although the U.P.A. and R.U.P.A. reject such a weak approach as stated earlier.

241. For example, sexism has been defined as “the tendency to behave towards and think about people purely on the grounds of gender, to generalize about individuals and groups on the basis of their biology rather than to recognize their actual interests and capacities.” Rose Pearson & Albie Sachs, Barristers and Gentlemen: A Critical Look at Sexism in the Legal Profession, 43 Mod. L. Rev. 400, 407-08 (1980). In Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987), the U.S. Supreme Court explained that the prohibition on racial discrimination in 42 U.S.C. § 1981 was aimed at preventing an individual from being reduced to a “genetic[ ] part of an ethnically and physiognomically distinctive sub-grouping of homo sapiens.” Id. at 607 (quoting Chevron Oil Co. v. Huson, 404 U.S. 97 (1971). See also MacKinnon, supra note 28, at 107, 165 (“Women are substantively absent.”); Sunstein, supra note 69, at 62 (“The motivating idea here is that differences that are irrelevant from the moral point of view ought not to be turned into social disadvantages . . . .”)

242. See, e.g., St. Mary’s Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993) (discussing pretext stage in employment discrimination cases); McDonnell Douglas v. Green, 411 U.S. 792 (1973) (adopting a tripartite allocation of the burden of proof in individual disparate treatment employment discrimination cases: (1) requiring plaintiff to demonstrate a prima facie case; then (2) requiring defendant to produce some evidence of a legitimate nondiscriminatory justification; and (3) requiring the plaintiff to demonstrate that defendant’s justification is false or pretextual). In Hicks, the Supreme Court held that plaintiff does not automatically prevail if pretext is proven. Id. at 2756. The jury can decide that plaintiff wins but the jury is still free to conclude that defendant did not discriminate. Id. The Hicks approach demonstrates that defendant’s honesty or lack thereof is still the crucial issue in discrimination cases.

Courts that adopt the view that a partner breaches an implied covenant of good faith by discriminating against another partner may wish to draw on Hicks and McDonnell Douglas in determining how to allocate the burden of proof. Those courts could also draw on the case law dealing with the plaintiff’s burden of proof in a case alleging the breach of an implied covenant of good faith. See, e.g., 1 Perritt, supra note 225, § 4.64, at 423-25 (implied covenant of good faith jury instructions). This is one of many practical issues that will have to be resolved if courts adopt the thesis of this Article.

243. See, e.g., Golden Bear Family Restaurants, Inc. v. Murray, 494 N.E.2d 581, 588 (Ill. App. 1986); Hobbs v. Pacific Hide & Fur Depot, 771 P.2d 125 (Mont. 1989) (declaring that covenant arose from objective manifestations of employer giving rise to reasonable employee expectations); Clayton P. Gillette, Limitations on the Obligation of Good Faith,
This definition centers on the career opportunities the employee gives up to accommodate her employer, and on the employee's reasonable belief that she will receive benefits from the employer in return.\textsuperscript{244}

For example, an employer cannot legally fire a long-serving at-will employee, without cause, right before the employee's pension vests.\textsuperscript{245} An employer also cannot discharge a recently-hired employee, absent cause, when the employer lured the employee away from another job and the employee relocated at substantial expense.\textsuperscript{246} Employees cannot be fired arbitrarily in these situations because of their personal sacrifices—long service in one case and substantial inconvenience in the other.\textsuperscript{247} This reasonable expectation approach also precludes discrimination against partners.

Lawyers traditionally sacrifice a great deal to make partner. They work long hours for many years as associates before they become eligible.\textsuperscript{248} The high-stakes nature of the work, particularly in a lawyer's
trial practice, makes it extremely stressful. This stressful work is com-
pounded by its tedious nature, as exemplified by lengthy document 
reviews. The pressure is heightened by the steadily decreasing 
number of associates who make partner. It is hardly surprising that 
lawyers have comparatively high instances of depression and 
problems with alcohol. Moreover, those associates who make part-
ner contribute their own capital to the firm and are at risk for the 
malfeasance of their colleagues and other firm debts.

has also risen to between seven and ten. HARRINGTON, supra note 7, at 38 (the weeding 
out process for associates has become lengthier); Holmes, supra note 16, at 14. Also, there 
are different levels of partners at many firms which further delays a lawyer's arrival at the 
position of equity partner. HARRINGTON, supra note 7, at 85-86; Holmes, supra note 16, at 
22 n.18.

249. HARRINGTON, supra note 7, at 38, 73, 78. See also Robert L. Nelson, Practice and 
Privilege: Social Change and the Structure of Large Law Firms, 95 A.B.A. Found. Res. J. 
97, 133 (1981):

These days you get a very narrow conception of the role of the lawyer . . . . I think 
today that the lawyer is more concerned with technical compliance, about the 
complexities of the law, rather than how things should be done. The fact that law 
has become so much more complex, there are so many technical details to do in 
this legal climate, means the lawyers don't have the time to take a broader view of 

things.

250. Holmes, supra note 16, at 15-16 ("For an associate who sets her sights on partner- 
ship at a large firm, the way up is long and draining. She is expected to work grueling 
hours. Her work may not be riveting. Law firms 'relegate thousands of the best young 
 minds in America to sifting aimlessly through documents or writing endless streams of 
legal memoranda.'"). For a detailed discussion of the increasing pressures on big firm at-
torneys in the 1980s, see HARRINGTON, supra note 7, at 24-40. For example, the dramatic 
escalation of associate salaries in the 1980s meant that firms had to leverage the associates 
for ever increasing amounts of work in order to bill more and cover the salaries. The 
Harrington book consists of interviews with 100 female graduates of Harvard Law School, 
and it amply demonstrates that these stresses were worse for women because they gener-
ally took on the domestic roles in their romantic relationships, such as taking care of chil-
dren. Id. at 135-147, 236.

251. Id. at 38; Gordon, supra note 79, at 60.

252. Holmes, supra note 16, at 24:

[A]n eminent psychiatrist noted that the high incidence of stress-related disorders 
among attorneys suggests that lawyers are "one of the most highly stressed pro-
essional groups" (Lefer 1986, p. 23). Other evidence supports this assumption. 
Eighteen to 30 percent of attorneys drink too much, as compared with 10 percent 
of the general population. And some 34 out of 100,000 lawyers commit suicide, a 
figure which is twice as high as the rate for the general population. (Zemp 

See also G. Andrew Benjamin, et al., Comprehensive Lawyer Assistance Programs: Justifi-
cation and Model, 16 Law & Psy. Rev. 115 (1992) (analysis of data from Washington state 
lawyers demonstrated that "one-third of the lawyers suffered from psychological, behav-
ioral and physical symptoms that indicated the presence of depression, alcohol abuse or 
cocaine abuse"); Rutledge, supra note 12, at 32.

253. Dickerson, supra note 121, at 154.
Law firm associates do not make these sacrifices in vain. They labor to make partner based on their reasonable belief that partnership guarantees them job security, financial rewards, and greater power within the firm. Law firms that discharge partners find themselves receiving substantial press coverage because such discharges are still the exception, not the rule. Moreover, law firms, which seek high quality work from their associates, foster the impression that making partner is worth the sacrifice. It would be inconsistent with the reasonable expectations of a partner who made these sacrifices if a law firm could fire her for discriminatory reasons.

C. The Public Policy Rationale

Courts should interpret the implied covenant of good faith as protecting partners from sex discrimination because this interpretation furthers the public policy against such discrimination embodied in the United States Constitution, Title VII, state constitutions, and state anti-discrimination laws. Professor Player is correct when he states that “[t]he two concepts of ‘public policy’ and implied obligations of good faith and fair dealing are not mutually exclusive and can operate simultaneously.”

As discussed earlier, the United States Supreme Court's decisions in Burke and Hishon support this policy. It is also supported by two cases in which the Supreme Court refused to enforce contractual clauses that would have permitted racial discrimination: Shelley v. Kramer and Hansberry v. Lee. The Court in Shelley invalidated a
restrictive covenant that barred the sale of a house to African-Americans as violative of the 14th Amendment. Shelley demonstrated the Court’s hostility toward private contracts that permit discrimination given the Court’s “stretch” to find state action. Moreover, in Hansberry, the Court refused to bar the plaintiffs from challenging a racially restrictive covenant on constitutional grounds, even though the covenant had been upheld by the Illinois Supreme Court. These precedents demonstrate that the Court has virtually prohibited discrimination in private contracts.

A later United States Supreme Court decision, Bob Jones University v. United States, also supports this policy argument. In Bob Jones, the Supreme Court analyzed whether a non-profit educational institution that discriminated on the basis of race was a charitable entity for tax exemption purposes. Historically, the Internal Revenue Service had said yes. However, the Court said that a racially discriminatory institution could not be considered a charity for tax purposes in the 1980s, given the general public policy against racial discrimination evidenced by federal civil rights statutes, state statutes, and Supreme Court decisions.

260. 311 U.S. 32 (1940).
261. See Louis Henkin, Shelley v. Kramer: Notes for a Revised Opinion, 110 U. Pa. L. Rev. 473 (1962). The Court had to find that state action was present to invoke the Constitution’s prohibitions on racial discrimination. The private nature of the restrictive covenant made it difficult to find state action.
262. 461 U.S. 574 (1983). See also Red Bull Assocs. v. Best Western Int’l, 862 F.2d 963, 970 (2d Cir. 1988) (affirming denial of venue change where change would injure plaintiff’s ability to press civil rights claim alleging that defendant terminated motel franchise for racially-motivated reasons). The court stated: “While individuals are free to regulate their purely private disputes by means of contractual choice of forum, we cannot adopt a per se rule that gives these private arrangements dispositive effect where the civil rights laws are concerned.”
263. Bob Jones, 461 U.S. at 577.
264. Id.
265. Id. at 593-96 (citing Brown v. Board of Education, for example). The Court used this approach in an earlier case when it stated, “It has always been the duty of the common-law court to perceive the impact of major legislative innovations and to interweave the new legislative policies with the inherited body of common-law principles—many of them derived from earlier legislative exertions.” Moragne v. States Marine Lines, 398 U.S. 375, 392 (1970). Marc Greenbaum summarized the views of numerous scholars who hold this evolving view of the common law in his article, Toward a Common Law of Discrimination. Greenbaum, supra note 21, at 105-08. The Honorable Guido Calabresi addressed this issue in his classic work, A Common Law For The Age Of Statutes (1982) in which, as Greenbaum points out, Calabresi “denounce[d] the judicial policy of treating statutes separately from the common law and proposes a more expansive role for common-law development.” Id. at 108-109 n.275. See also Burton, supra note 219, at 434 (“As Dean Guido Calabresi pointed out, much of our thinking about law draws too sharp a distinction between statutory law and common law. There is a need for innovations to
Consistent with the reasoning of *Bob Jones*, although the common law did not prohibit sex discrimination in 1964, it does today because of the thirty-year history of Title VII's prohibitions, state antidiscrimination laws, state constitutional provisions, and Supreme Court rulings outlawing sex discrimination. This history shows that sex discrimination is against public policy. The recent national at-

relate these two kinds of law in a way that enhances the law's coherence and relevance to contemporary circumstances.

266. *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) (“Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid.”).


268. The following state constitutions bar discrimination on the basis of sex. *ALASKA CONST.* art. I, § 3 (1972); *COLO. CONST.* art. 2, § 29 (1972); *CONN. CONST.* art. 1, § 20 (1974); *HAW. CONST.* art. 1, § 5 (1972); *ILL. CONST.* art. I, § 18 (1971); *MD. CONST.* Declaration of Rights, art. 46 (1972); *MASS. CONST.* pt. 1, art. I (1976); *MONT. CONST.* art. 2, § 4 (1973); *N.H. CONST.* pt. 1., art. 2 (1974); *N.M. CONST.* art. 2, § 18 (1973); *PA. CONST.* art. I, § 28 (1971); *TEX. CONST.* art. 31, § 1 (1972); *UTAH CONST.* art. 4, § 1 (1896); *VA. CONST.* art. 1, § 11 (1971); *WASH. CONST.* art. 31, § 1 (1972); *WYO. CONST.* art. 1, §§ 2, 3 and art. 6, § 1 (1890).

One criticism that could be made of this public policy analysis is that it assumes that glass ceiling discrimination is a pervasive problem in this country, and yet argues at the same time that the nation's public policy is overwhelmingly intolerant of employment discrimination. This criticism confuses our legal norms (and accepted public policies) with our inability to meet them. Our real world failures in no way diminish the shared nature of those norms. See, e.g., *Slade*, supra note 11, at B12 (explaining that increasing numbers of law firms have detailed written policies against sexual harassment despite the continuing discrimination problems that women lawyers face).

269. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973) (holding that classifications based upon sex are inherently suspect and must be subjected to heightened judicial scrutiny); *Craig v. Boren*, 429 U.S. 190 (1976)(gender-based classifications must serve important governmental objectives and must be substantially related to the achievement of those objectives).

270. See, e.g., *St. Antoine*, supra note 188, at 180 n.3 (1993) (“three decades of increasingly expansive civil rights legislation testify to the concern about extirpating nearly all forms of categorical or status-based discrimination from the workplace”). Marc Greenbaum asserts that Title VII and the anti-discrimination statutes embody a public policy favoring the “elimination of class-based discrimination from the workplace.” *Greenbaum*, supra note 21, at 106.

It is true that some remnants of differential treatment of women remain, especially in the military where women are still barred from combat roles. Moreover, Title VII has a provision that permits barring women from certain jobs if the employer demonstrates that sex is a bona fide occupational qualification (“BFOQ”). 42 U.S.C § 2000e-2(e) (1981). However, there has been significant movement during the Clinton Administration toward opening up more military positions to women. See, e.g., *Eric Schmitt*, *Navy Women Bringing New Era on Carriers*, N.Y. TIMES, Feb. 21, 1994, at 1. In addition, the U.S. Supreme Court recently ruled that a company that had excluded women from assembling batteries
tention focused on prominent figures accused of sexual harassment further highlights public sentiments against such acts.271

was guilty of sex discrimination. See International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc., 499 U.S. 187 (1991). The company prevented the women from working in the battery area because the company feared that exposure to lead could injure a pregnant woman's fetus. Id. at 190-91. The Court determined that it was up to the female workers to decide whether they wished to take that risk. Id. at 197-98. The National Law Journal's December 20, 1993 survey also suggests that the position of women lawyers has improved slightly in the last several years and that more firms now have written sexual harassment policies and better parental leave policies. Supra note 90.

271. Chris S. Quillin, Note, The Expansion of the Public Policy Exception to the At-Will Termination Rule After Tate v. Browning-Ferris, Inc., 29 TULSA L.J. 207, 214-15 (1993) ("Recently, the severity and prevalence of sexual discrimination have been increasingly recognized nationally."). In 1993, for example, a record number of 88,000 charges of employment discrimination were filed with the EEOC—an increase of nearly 22 % from a year earlier. See Fair Empl. Prac. Summ. (BNA) 9 (Jan. 31, 1994). According to the EEOC, increases in charges of disability discrimination and sex harassment were largely responsible. Id. It is unlikely that incidents of discrimination increased dramatically from 1992 to 1993. Instead, the increase presumably reflects greater public unwillingness to tolerate employment discrimination.

This greater awareness of the problem is apparent in the popular press and culture. Sexual harassment stories are now front page news, evidenced by the media's coverage of the Navy's Tailhook scandal and of Senator Packwood's alleged indiscretions with women. See, e.g., Andrea Stone, Tailhook: Boom Starts Lowering, USA TODAY, Apr. 26, 1993, at 3A (reporting that the Pentagon's examination of the 1991 Navy Tailhook convention revealed that 83 women were sexually assaulted through molestation, the exposing by the male officers of their genitalia, and public sex); Ron Clairborne, World News Saturday (ABC television broadcast, June 27, 1992) (commenting that the Tailhook Scandal has significantly altered the Navy's view of sexual harassment and "that the old excuse that boys will be boys" is no longer acceptable). But see McWhirter, supra note 31 (stating that even though over 28 women have accused the Oregon Senator of sexual misconduct, major corporations are said to be contributing to his legal defense fund).

The hit movie Philadelphia (Columbia TriStar 1993) involved an employment discrimination lawsuit by an attorney allegedly fired by his law firm because he had AIDS. The movie starred the popular actors Tom Hanks and Denzel Washington, and Hanks won the Academy Award as Best Actor. Claudia Eller, "Schindler's List" Brings Triumph for Spielberg; Movies: Director Wins for Best Picture; Tom Hanks is Honored as Best Actor and Holly Hunter is Best Actress, L.A. TIMES, Mar. 22, 1994, at A1. In addition, the popular author of such novels as Jurassic Park (1990) and The Andromeda Strain (1969), Michael Crichton, wrote a best selling novel entitled Disclosure (1994) about a woman boss who sexually harasses a male employee. The book deals with the legal and corporate shenanigans that result from the harassment. It is currently being produced as a motion picture starring Demi Moore and Michael Douglas. Michael Giltz and David Denby, Movies; Guide to Fall 1994, NEW YORK, Sep. 12, 1994, at 64.

The source of this increased awareness of sexual harassment and employment discrimination can be traced back to Anita Hill's riveting testimony at the Clarence Thomas confirmation hearings in late 1991. Harrington, supra note 7, at 105, 110-19; Slade, supra note 11. In 1991 there were 72 sexual harassment claims filed with the Michigan Department of Civil Rights and 6,892 filed with the EEOC. In 1992, after the Thomas hearings, those numbers increased to 188 and 10,578 respectively. See High Court Makes Harassment Easier to Prove, DET. FREE PRESS, Nov. 10, 1993, at 1A. See also Crothers, supra
The Glass Ceiling Act of 1991 demonstrates that America's elected representatives, Congress and the President, will not tolerate sex discrimination in upper-level positions. The references to sex discrimination at law firms in the legislative history of the Act confirm that it applies to professionals.272

Several courts have also ruled that a company that discharges a female at-will employee because of her gender violates public policy.273 Yet this public policy argument is stronger for women partners because they are protected by a partnership contract, and courts are supposed to construe contracts in a manner consistent with public policy. A contract is contrary to public policy if it offends clearly established constitutional and statutory policies or abridges a fiduciary duty.274 The laws against sex discrimination embody such a public note 8, at 13 (“In the last quarter of 1991, sexual harassment claims filed with the Equal Employment Opportunity Commission were 71 percent higher than in the same quarter of 1990.”). The U.S. Supreme Court recently strengthened Title VII sexual harassment claims by ruling unanimously that a woman need not show severe psychological injury in order to maintain such claims. See Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993). In sum, the public policy against sex discrimination is clear.

272. This is further demonstrated by the OFCCP’s actions in auditing the Wall Street law partnership, White & Case. See Alvarez, supra note 9 (detailing the procedures involving the audit of White & Case regarding glass ceiling discrimination). The government’s auditing of a major law firm strongly demonstrates that the glass ceiling in law firms is no longer acceptable. Cf. Hopkins v. Price Waterhouse, 920 F.2d 967, 977 (D.C. Cir. 1990) (Title VII's legislative history shows that it was meant to eliminate discrimination that kept women and minorities back from “ascend[ing] the higher rungs in professional . . . life.”).


274. Shell, supra note 148, at 441. Section 512 of the original Restatement of Contracts specifies that a bargain is illegal if its “formation or its performance is criminal, tortious, or otherwise opposed to public policy.” The Pittsburgh, C. C. & St. L. Ry. Co. v. Kinney, 115 N.E. 505, 506-07 (Ohio 1916), court stated:

Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people—in their clear consciousness and conviction of what is naturally and inherently just and right between man and man . . . . Public policy is the cornerstone—the foundation—of all Constitutions, statutes, and judicial decisions; and its latitude and longitude, its height and its depth, greater than any or all of them.
policy. Thus, the implied covenant cannot be interpreted to contradict that policy.

Finally, courts should require law partners to comply with the public policy against discrimination because law partners symbolize the justice system to many Americans. One scholar writes that the legal community must "not tolerate laws, behavior, or attitudes that indicate that any member of society [such as lawyers] is being treated [with special favor] because he or she belongs to a particular segment of society."275 Moreover, judicial activism is appropriate here because each state’s highest court or bar association has traditionally regulated its own lawyers to ensure that they do not act illegally.276 Thus, courts should interpret the implied covenant of good faith to prohibit law firm partners from discriminating against other partners on the basis of sex.

VI. The Common Law Limitations on Partner Lawsuits

There is one roadblock that may stand in the way of courts permitting employment discrimination lawsuits by partners.277 Under the common law and aggregate theories of partnership, one partner cannot sue another because this would create the "procedural anomaly of a partner in effect suing himself."278 Partner A would be liable for lawsuits brought against co-partners B and C, even if the lawsuits were brought by A.279 Consequently, the only permissible remedy that one partner had against another was for an accounting at eq-


276. See, e.g., Ohralik v. Ohio State Bar Assoc., 436 U.S. 447 (1978) (discussing Ohio Bar's restrictions on lawyer advertising); AMERICAN BAR ASS'N, THE CODE OF JUDICIAL CONDUCT, Preface (1972) ("Almost fifty years ago, the American Bar Association formulated the original Canons of Judicial Ethics. Those canons occasionally amended, have been adopted in most states."); Ill. Sup. Ct. R. 751.

277. Another criticism is that this Article's thesis could erode the freedom that partners should have to contract as they see fit. It can be argued, for example, that discrimination against any group should be prohibited by the implied covenant of good faith if the covenant protects women. However, this Article need not be concerned with other possible groups that could be protected because its sole purpose is to focus on women partners and to determine whether the implied covenant of good faith and public policy prohibit discrimination against them.

278. See generally 2 BROMBERG & RIBSTEIN, supra note 119, § 6.08(c), at 6:98; REUSCHLEIN & GREGORY, supra note 148, at 286-87; Swinson, supra note 134.

279. See Swinson, supra note 134, at 909. See, e.g., Mitchell v. Wells, 19 N.W. 777 (Mich. 1884) ("no man can sue himself at law").
uity. However, there are four reasons why this doctrine should not bar a discrimination case by a partner alleging that her firm breached an implied covenant of good faith.

First, this genteel rule originated in a world where partnerships were small, there were virtually no women partners, there were no anti-discrimination statutes, and there was no public policy against sex discrimination. Many older statutes mandated sex discrimination. Now there are partners of both sexes and different races, and Title VII and state laws exist to protect against discrimination. Moreover, these original "small partnerships" have lost their collegiality and turned into some of the largest businesses in the world. This genteel rule, therefore, lacks viability given these changes and the important public policies served by permitting discrimination lawsuits by partners.

280. See Swinson, supra note 134, at 907. One of the best statements of the rule is that "[a]n action at law will not lie against a partner upon a demand arising out of the partnership relationship until a settlement of account and balance is struck." Moffatt v. Harden, 648 P.2d 1311, 1312 (Or. Ct. App.), cert. denied, 653 P.2d 998 (Or. 1982). The major purpose served by this rule was judicial economy as courts did not want to resolve every trivial dispute that came up during the course of an ongoing partnership. B. Troy Villa, The Status of Enforcing Fiduciary Duties in a Limited Partnership After DuPuis v. Becnel Co., 49 LA. L. REV. 1217, 1223 (1989). However, the rule did not apply once the partnership dissolved. See infra note 293.

281. This rule is "genteel" in that it comes from a period where prestigious corporate law firms were made up of white male partners who went to the same prep schools, colleges, and law schools. See Jan Hoffman, An End to a Law Firm That Defined a Type, N.Y. TIMES, Feb. 7, 1994, at 1 (article discussing the closing down of the New York City law firm of Shea & Gould, which had a reputation as a Jewish and Irish based firm that "spit-in-your-eye" as distinguished from the more traditional "white-shoe Wall Street firms"—firms that often forbid their own Jewish lawyers from having contact with clients). It was virtually inconceivable that one member of this "genteel" legal establishment would sue another.

282. Supra note 37.

283. Gibbons, supra note 248, at 71 ("As firms get larger . . . we will see an increased effort to centralize management rather than having all partners involved in the decision-making process . . . . Most likely, firms will create a spot for an executive director who essentially will act as a chief operating officer . . . . In some instances, this business professional won't even be a lawyer . . . . Skadden Arps—one of the highest revenue-generating firms in the nation—already has moved in that direction . . . ."); Giesel, supra note 15, at 783-84 ("the environment within the firm has changed in the last several decades such that the collegial atmosphere that once made firms pleasant work settings has all but vanished for all of the firm's participants. . . . The emphasis on the profitability of the firm has turned the firm into a business entity, with little regard for the quality of life of its participants."); Gordon, supra note 79, at 61 ("bemoaning loss of "collegiality in the organization of [law firm] work"); Holmes, supra note 16, at 14-15 (bureaucracies have been created as firms become "mega-firms").

284. Indeed, courts have refused to apply this rule to causes of action that did not exist when the rule originated. See, e.g., 2 Bromberg & Ribstein, supra note 119, § 6.08, at
Second, section 405 of the R.U.P.A. now permits partners to sue each other at law.\textsuperscript{285} The commentary explains that section 405 "is a new and broad remedies provision [reflecting] the policy that R.U.P.A. should provide ready access to the courts and leave great discretion in the courts to fashion remedies."\textsuperscript{286} One commentator says that "R.U.P.A. is likely to encourage courts to narrow the [common-law] restriction to those situations where it might still be appropriate, but courts have been doing this anyway."\textsuperscript{287} The adoption of the R.U.P.A. by many states will virtually nullify the old rule.\textsuperscript{288}

Third, the reasons for the old rule have been discredited.\textsuperscript{289} Since all partners had to be joined as defendants under the aggregate theory of partnership, the partner suing would, in effect, be both a plaintiff and a defendant. This rationale is outdated since "common name" statutes in most jurisdictions permit a partnership to be sued as a separate entity.\textsuperscript{290} Moreover, the view that a lawsuit by a partner would dissolve the firm assumed that partnerships were small businesses that could not tolerate the strain of such acts. Today, "[t]he idea of corporations or strangers continuing a business relationship during or fol-

\footnotesize{6:108-09 (citing St. James Plaza v. Notey, 463 N.Y.S.2d 523 (1983)). A discrimination claim is such a cause of action.}

\textsuperscript{285} Section 405(b) reads, "A partner may maintain an action against the partnership or another partner for legal or equitable relief, including an accounting as to partnership business to enforce a right under this [Act] including the partner's rights under §§ 401, 403, and 404." Section 404 is the good faith duty provision. 6 U.L.A. 257 (Supp. 1993).

\textsuperscript{286} 1 BROMBERG & RIBSTEIN, supra note 119, app. § 405, at 185. The commentary explains that the new section is based on an ABA Report that made the following recommendation:

[U.P.A. § 22] should be entitled "Remedies" and should authorize a direct suit by a partner against the partnership and one partner against another partner for any cause of action arising out of the conduct of the partnership business.

In addition to a formal account, the judge should specifically be authorized to grant any equitable or legal relief he thinks is appropriate, including damages and attorneys' fees. These changes will eliminate many of the case law procedural barriers to suits between partners that are filed independent of an accounting action. In addition, the proposed changes will increase the likelihood that a judge will be willing to grant relief other than dissolution and/or an accounting.

\textsuperscript{287} See Swinson, supra note 134, at 925.

\textsuperscript{288} The U.P.A. was silent on this rule and did not contain any express restriction of this type. Swinson, supra note 134, at 920. It was a common-law rule. The R.U.P.A. has already been adopted, with some modifications, by Texas, Wyoming, and Montana. See Vestal, supra note 118, at 579; 6 U.L.A. 235 (Supp. 1993).

\textsuperscript{289} However, the commentary to § 405 of the R.U.P.A. says that the old rule is not dead. 6 U.L.A. 257 (Supp. 1993).

\textsuperscript{290} See Swinson, supra note 134, at 909. Cf. Wayne-Oakland Bank v. Adam's Rib, 210 N.W.2d 121 (Mich. Ct. App. 1973) ("[U.P.A. § 13] was not intended to immunize the partnership entity because of an immunity held by one of the individual partners.").
ollowing a serious dispute seems less unusual than when close
individuals choose to do the same thing.” 291

Fourth, courts have created numerous exceptions to the restric-
tion on legal actions by partners—one of which applies to many part-
ner discrimination lawsuits. 292 This exception involves a situation in
which the partnership is wrongfully dissolved due to the improper ex-
pulsion of a partner. 293 Therefore, a discriminatory expulsion will dis-
solve the partnership, violate the partnership agreement, and permit a
legal remedy. 294

Thus, courts should reject the common-law rule in its entirety and
permit discrimination lawsuits by partners based on expulsion or acts
of sexual harassment. If a court insists on following the rule, it may
still permit a discrimination lawsuit by a partner who has been
squeezed out of the partnership if the partner fits into one of the ex-
ceptions. Lastly, if a partner has experienced discrimination but has
not actually been expelled from the partnership and resides in a juris-
diction that follows the rule, she can still obtain damages in the ac-
counting proceeding against her firm. 295

291. See Swinson, supra note 134, at 910-11. This rule’s other purpose was to foster
judicial economy by having all actions settled in one equity proceeding and by permitting
offsetting liabilities to be determined between the partner and the partnership. Id. at 905.

292. One Michigan court has abolished the rule altogether on the ground that partner-
ships are not aggregates of partners, but legally distinct entities that can be sued. Yenglin

293. See, e.g., Zimmerman v. Harding, 227 U.S. 489, 494 (1913) (“Neither is the remedy
[for judicial dissolution and an accounting] in equity for a breach of a partnership agree-
ment exclusive. There may be at law a recovery of all the damages which result, including
damages for profits prevented by a wrongful dissolution.”) See also Gherman v. Colburn,
140 Cal. Rptr. 330, 338 (1977) (“[W]here one partner excludes the other, repudiates the
very existence of the partnership and converts all of the partnership assets, the victim may
sue for damages without seeking judicial dissolution and an accounting.”); 2 BROMBERG &
RIBSTEIN, supra note 119, § 6.08, at 6:106-07. The wrongful dissolution of the partnership
permits a legal claim because the ousted partner is now an entity distinct from the
partnership.

294. Gevurtz, supra note 119, at 538-40 (on squeeze-outs); Beall v. Baker & McKenzie,

295. Many courts have said that partners can seek damages in accounting proceedings
against the partnership. See Hooper v. Ragar, 711 S.W.2d 148 (Ark. 1986) (a partner could
have raised fraud and defamation claims in an accounting proceeding against the partner-
ship and sought damages for those claims). In addition, Title VII has usually been de-
scribed as an equitable claim. See Chauffeurs, Teamsters & Helpers, Local No. 391 v.
other equitable relief” it deems appropriate for a discrimination victim). But see King,
supra note 106, at 128 (discussing whether the Civil Rights Act of 1991 has negated this
equitable characterization). This suggests that there is nothing problematic about attack-
ing sex discrimination through an equitable procedure like an accounting.
Conclusion

Women lawyers at all levels are discriminated against and sexually harassed by their colleagues and superiors. This discrimination acts as a glass ceiling in the legal world that hinders the professional advancement of women. Title VII provides women associates with tools to attack this discrimination and, with increasing frequency, they have gone to court seeking to vindicate their rights.296 This potential for legal action has caused law firms to adopt written policies against sexual harassment. On the other hand, women partners cannot use Title VII and, until recently, have lacked any legal remedy against discrimination by their fellow partners. Thus, they are generally unable to reach the most prestigious and high paying partnership positions at their firms and in the profession. For women partners, the glass ceiling reveals a depth that women associates cannot appreciate.

This Article has demonstrated that women partners can shatter this glass ceiling by relying on the implied covenant of good faith that binds all partners, as well as the fiduciary nature of the partnership relationship. Court decisions and scholars have correctly interpreted the implied covenant of good faith as barring sex discrimination. The R.U.P.A.’s mandatory good faith provision and its removal of the restriction on partner lawsuits further bolster this interpretation. Moreover, public policy requires such an interpretation as demonstrated by recent Supreme Court decisions and by the Glass Ceiling Act of 1991.

Admittedly, this extension of the implied covenant of good faith infringes on the ability of law partners to contract freely and to control all aspects of their firms. Yet this infringement is no more burdensome than Title VII’s prohibition on discrimination against associates. As we approach the 21st century, it is no longer reasonable for a law firm to insist that it has a contractual right to discriminate against its women partners. The common law has evolved and no longer reflects the values of a society in which the segregation of racial minorities is acceptable and women are meant to be seen and not heard. The glass ceiling that has injured so many professional women can only be shattered if courts take this step.

296. As discussed in this Article, during the last few years, several women associates have filed notable Title VII lawsuits against the law firms for which they worked. See supra notes 22.