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Judith S. Kaye

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Cover Page Footnote

Associate Judge of the New York Court of Appeals. Judge Kaye graduated cum laude from New York University School of Law in 1962. She was Associate Editor of the Law Review, and a member of the Order of the Coif. Upon graduation, Judge Kaye spent one and a half years at Sullivan & Cromwell, then joined the legal staff of IBM. She returned to NYU in 1965 as an assistant to the Dean, and it was during this time that her three children were born. In 1969, Judge Kaye joined the litigation department of Olwine, Connelly, Chase, O'Donnell & Weyher, on a part-time basis, ultimately becoming a partner in 1975. Prior to her appointment to the bench, she was a director and vice president of the Legal Aid Society. Judge Kaye was appointed twice by President Jimmy Carter to the United States Nominating Commission for Judges to the Second Circuit and has served on various bar association committees. Governor Mario M. Cuomo appointed her to the bench for a fourteen-year term in September, 1983. Judge Kaye is grateful to Felicia Ann Rosenfeld for her assisance in preparing her speech for publication.

WOMEN LAWYERS IN BIG FIRMS: A STUDY IN PROGRESS TOWARD GENDER EQUALITY*

*JUDITH S. KAYE***

RECENTLY the front page of the *New York Law Journal* reported that Milbank, Tweed, Hadley & McCloy would relocate the head of its 100-lawyer banking department to the firm's Los Angeles office, where its Pacific Rim and West Coast practice is expanding.[1] Also front page news that day was the report of the American Bar Association Commission on Women in the Profession.[2] It occurred to me that the two, in a curious way, are connected, and that both are relevant as well to Noreen McNamara, the gifted individual for whom this memorial lecture was established.

The Milbank firm today approaches 400 lawyers, with offices in several cities, including Tokyo, Singapore and Hong Kong. Of its 105 partners, eight are women; of its more than 250 associates, nearly a third are women. Its thirty-nine starting associates—40 percent of them women—will earn in excess of $70,000.[3] While surely not the biggest, Milbank in size and distribution is representative of front-rank law firms in the nation today.

And in those respects it was representative of the nation's leading law firms thirty-six years ago, when Noreen O'Connor, having finished Fordham Law School at the top of her class, joined Milbank as an aspiring tax lawyer. Milbank in 1952 had only fifty-two lawyers situated at one address—no branches in exotic cities of the world, no 100-lawyer banking

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* This article was delivered as the Second Noreen E. McNamara Memorial Lecture on October 6, 1988, at Fordham University School of Law in New York. The text remains substantially as it was delivered.

** Associate Judge of the New York Court of Appeals. Judge Kaye graduated *cum laude* from New York University School of Law in 1962. She was Associate Editor of the *Law Review*, and a member of the Order of the Coif. Upon graduation, Judge Kaye spent one and a half years at Sullivan & Cromwell, then joined the legal staff of IBM. She returned to NYU in 1965 as an assistant to the Dean, and it was during this time that her three children were born. In 1969, Judge Kaye joined the litigation department of Olwine, Connelly, Chase, O'Donnell & Weyher, on a part-time basis, ultimately becoming a partner in 1975. Prior to her appointment to the bench, she was a director and vice president of the Legal Aid Society. Judge Kaye was appointed twice by President Jimmy Carter to the United States Nominating Commission for Judges to the Second Circuit and has also served on various bar association committees. Governor Mario M. Cuomo appointed her to the bench for a fourteen-year term in September, 1983. Judge Kaye is grateful to Felicia Ann Rosenfeld for her assistance in preparing her speech for publication.

1. *See* N.Y.L.J., Aug. 19, 1988, at 1, col. 1.

2. *See ABA Report: Women in Law Face Overt, Subtle Barriers*, N.Y.L.J., Aug. 19, 1988, at 1, col. 1.

3. Letter from Jane L. MacLennan to Judge Judith S. Kaye (Sept. 12, 1988) (available in the files of the *Fordham Law Review*).

department, no $70,000 starting salaries.[4] Noreen O'Connor—who shortly became Noreen McNamara—was in many ways distinctive. She was one of three women lawyers at Milbank—all of them associates—and among the handful of women lawyers in "Wall Street" firms, then as now, male-dominated and bastions of power within the legal profession. In 1952 there were hardly any women lawyers at all—roughly three percent of the entire profession. Few were hired by the Wall Street law firms, and even those had little prospect of partnership; as late as 1965, the firms collectively had only three female partners.[5] Though Milbank was among the more progressive firms, in that there were two or three women associates in the firm as long as anyone there can remember, even Milbank did not name its first woman partner until 1977—a full quarter-century after Noreen McNamara began there.

I don't intend to discuss Noreen McNamara, or Milbank particularly, or to linger long on history. Having entered the litigation department of Sullivan & Cromwell in 1962, and having remained in the big firm environment for the next twenty-one years, I certainly would enjoy relating anecdotes about those early years. Enlightened recruiters in the 1950s and 1960s didn't bat an eye either turning away qualified women because the firm's quota of women was filled (meaning they had one) or offering a privileged few female invitees lower salaries than the men.[6] The questions so carefully prepared and then "spontaneously" asked by my male classmates during interviews, about the firm's advancement policies and partnership opportunities, were for me absurd. Just getting in seemed a sufficient objective.

But I'm going to resist the temptation to tell those stories, and instead focus on the important subjects reflected by the Milbank statistics—the obvious change in the climate of big firm practice; the obvious change in the composition of those firms; and the impact of these changes on each other. It is safe to say that gender issues that undoubtedly concerned Noreen McNamara during her professional life—particularly as the mother of six children—and that surely have concerned me these past twenty-five years, have not abated. Gender issues persist to this day, but they have taken on distinctly different forms.

Why focus on the big firms? Of all the women lawyers who have faced discrimination, this elite sliver of the profession—highly credentialed and highly compensated—would seem to be least in need of anyone's attention or concern. I have three principal reasons.

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4. *See id.*; *see also* Letter from Daniel G. Tenney, Jr. to Judge Judith S. Kaye (Sept. 22, 1988) (available in the files of the *Fordham Law Review*).

5. Rhode, *Perspectives on Professional Women*, 40 Stan. L. Rev. 1163, 1174 (1988).

6. One "war story": When a downtown firm offered me a starting salary of $6,500, as opposed to $7,200 for men, the partner who extended the offer (now a federal judge), much to his credit, said that he personally was offended and hoped I would decline. Having had scores of rejections, I was less offended than he—at least I had an offer (albeit unacceptable). It was a particular pleasure to turn down that offer in favor of Sullivan & Cromwell—at equal pay.

First, the big firms are most familiar to me from my own decades in private practice and from public reports, and these are for the most part the sources of my information. *Second*, I am convinced that what seems to be happening in the big firms is symptomatic of something more pervasive—that is exactly why there is so much publicity about them[7]—and that these firms are in fact a superb example of our halting progress toward gender equality in the workforce. The big firms cast a giant shadow, in terms of public perceptions of the profession, parallels in other fields, and standards within the legal community. Their every uptick reverberates widely. *Third*, the actual influence of the big firms and their alumni—many of them general counsels of major corporations—extends far beyond their numbers.[8] If any change should be made, they have the creativity to devise solutions and the resources to implement them.

A Changed Professional Climate

The Milbank statistics reflect the first dramatic changes in practice today—law firm size, geographical distribution and high specialization.[9] Size alone means institutionalization. It is hardly unusual to find law firms, like Milbank, numbering in the hundreds, spread throughout the world. One firm has more than a thousand lawyers, and a second is already close. Despite elaborate, expensive recruitment programs and intensive competition for the best law school graduates, with entering associate classes of thirty-nine or fifty-nine or ninety-nine, each new recruit must know that the odds are overwhelmingly against lifetime association; most will leave.[10] Then too, the supply of lawyers has soared; every year more than 30,000 new lawyers join the profession.[11]

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7. *See, e.g.*, *Women in Law*, 74 A.B.A. J. 49 (June 1, 1988) (entire issue devoted to women); Carter, *Women Face Hurdles as Professors*, Nat'l L.J., Oct. 24, 1988, at 1, col. 1; Caher, *Law Opens to Women*, Albany Times Union, Sept. 5, 1988, at A5, col. 6; Kingson, *Women in the Law Say Path is Limited by 'Mommy Track'*, N.Y. Times, Aug. 8, 1988, at A1, col. 5; Abramson, *For Women Lawyers, an Uphill Struggle*, N.Y. Times, March 6, 1988 (Magazine), at 36, 75.

8. Cynthia Fuchs Epstein wrote of large firms:

> [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.

C. Epstein, Women in Law 176 (1981). Further, the fact that only a small percentage of the graduates of our top law schools now choose to work in the public sector is some evidence of the gaps and disparities large firms have created within the legal community.

9. *See* ". . . .In the Spirit of Public Service:" A Blueprint for the Rekindling of Lawyer Professionalism, ABA Comm'n on Professionalism 1-5 (1986); Rehnquist, *The State of the Legal Profession*, 59 N.Y.S.B.J. 18, 18-19 (1987).

10. *See* Wise, *Making Partner is a Long Shot for Associates at Major Firms*, N.Y.L.J., Oct. 11, 1988, at 1, col. 3.

11. *See* C. Epstein, *supra* note 8, at 16.

Laterals are a second recent phenomenon.[12] New linkages and unlinkages of partners, associates, entire departments seem to be announced every day; whole law firms have crumbled and disappeared into other firms.[13] Where lawyer mobility, even client mobility, was once exceptional, today there is a dizzying movement of associates, partners and clients from firm to firm, with two growth industries in the law—tabloids and headhunters—fueling the pace. A former law clerk of mine, who spent two years with a prestigious New York City firm, told me that at the firm she received daily calls from lawyer placement firms soliciting her interest in some better opportunity—feeding discontents but hardly helping to forge bonds within the firm. While an effective law school graduate in the recent past might have looked forward to steady ascension into partnership ranks, today there are new byways even for those managing to make a career with a single firm—permanent associate, senior lawyer, nonequity partner, specialized counsel.

In short, both the sheer numbers of us and the ready accessibility of a better opportunity have put new emphasis on perpetual production and tangible results.

That brings me to a third related change in practice—the pressures dictated by the fierce, open competition and by law office economics, including rising expenses, fees and starting salaries; seven figure partner draws; "golden handcuffs"; bonuses for "rainmakers" bringing in business. Billable hours—just which lawyers are earning their keep and which are not—are assiduously recorded and instantaneously matchable; even "profitability indices"—or the ratio of profits per partner to revenues per lawyer—are published and subject to ready comparison. Increased costs require more hours,[14] higher rates, billing premiums, scrupulous attention to weeding out poor performers. A few months ago a survey of 100 New York City law firms disclosed that, on the average, billable hours had risen by nearly one-third, leading the reporter to conclude that law firm associates soon may be packing pajamas in their briefcases; the showers and cots are already there.[15]

The intensified pressures are not limited to associates. A friend I've watched since she was in law school—now a partner in a major firm—observed that the stakes or "antes" for success within the firms have been upped significantly for partners as well as associates, with partner "dues" payable in the form of more billable hours, more business and enlarged client bases.[16] She told me: "This isn't the same profession you bought

12. *See* Lacayo, *Tremors in the Realm of Giants*, Time Magazine, Dec. 7, 1987, at 58.

13. *See id.*

14. Over just the past five years, there has been a significant increase in average billable hours. *See* Zeldis, *Survey Shows Associates Work 29% More Hours Over 5 Years*, N.Y.L.J., Oct. 11, 1988, at 1, col. 3; F. Sussman, Speech at the New York Women's Bar Association Annual Dinner 2-3 (May 18, 1988) (available in the files of the *Fordham Law Review*).

15. *See* Zeldis, *supra* note 14.

16. *See* ABA Comm'n on Professionalism, *supra* note 9, at 8-9.

into twenty-five years ago, and it's not what I bought into even ten years ago."[17]

None of this is secret. It's a rare legal publication today that does not expose some facet of these phenomena, and the popular press has seized on it as well.[18] Chief Justice Rehnquist,[19] like Chief Justice Burger[20] before him, has spoken of the increasing pressures of megafirms and megabucks. With spiraling salaries, increased specialization and escalating billable hours, Justice Rehnquist lamented that young lawyers are just not having any fun practicing law these days.[21] Other bar leaders have charged that law firms today lure young lawyers, bribe them, narrow them and never tell them that they're giving up a decent way of life, that it's become just another business—a very well-paying one at that.[22]

No one, no lawyer, could read such stories passively. I am, quite frankly, hostile to them; I believe they are distorted and exaggerated. They wholly omit the manifold contributions of big firm lawyers to the profession and to society, and they neglect any mention of the tremendous fun and excitement—let alone discipline and training—these firms offer. While I recognize the new constraint imposed by law school tuition loans, it is also true that those who disagree about the pleasures of big firm practice can readily find satisfying alternatives within our multifaceted profession. I know, too, that law is inherently not a popular profession—criticism of the legal profession is a long-time popular sport; that lawyers in all walks traditionally work long hours; that in every age the profession has been criticized as too much a business;[23] that much of the current talk is simple nostalgia and a yearning for the imagined days of one's youth. In a world exploding with social and technological progress, to say nothing of population, how could the practice of law remain unchanged?

Yet even after taking very deep discounts for all of the above, I am ultimately persuaded that a disturbing picture remains. The alarms are exaggerated, but I accept that they are not false. Bar associations are

17. *See also* Greenhouse, *Linowitz's Call for Lawyers to be People Again*, N.Y. Times, April 22, 1988, at B5, col. 3 (emphasizing human side of legal practice as experienced over 50 years); S. Linowitz, *Regaining Respect for the Legal Profession: Some Suggestions*, 60 N.Y.S.B.J. 8, 9 (Nov. 1988) (observing decline in values over 50 years since graduating law school).

18. *See, e.g.*, Wise, *supra* note 10; Bird, *Unequal Partners*, Washington Post, June 28, 1987 (Magazine), at 45; Greenhouse, *supra* note 17.

19. *See* Rehnquist, *supra* note 9, at 18-19.

20. *See* Burger, *The State of Justice*, 70 A.B.A. J. 62 (April 1984); Burger, *Remarks of Warren E. Burger, Chief Justice of the United States at the Dedication of Notre Dame London Law Centre: The Role of the Lawyer Today*, 59 Notre Dame L. Rev. 1 (1983).

21. *See* Rehnquist, *supra* note 9, at 20-21.

22. *See* Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Ass'n Comm'n on Professionalism*, 18 Loyola U. Chi. L.J. 1149, 1154 (1987); Linowitz, *supra* note 17, at 9 (quoting Chief Justice Rehnquist).

23. *See, e.g.*, Brandeis, *The Opportunity in the Law, reprinted in* G. Hazard & D. Rhode, The Legal Profession: Responsibility and Regulation 16 (1985); Linowitz, *supra* note 17, at 2-3; Rehnquist, *supra* note 9, at 18-19.

rightly studying the consequences of today's intensified pressures on professional ethics, on our responsibility to render public service, and on legal education.[24] From every quarter there is a call for a return to "professionalism."[25]

I worry also about the human costs of the changed culture, and particularly on its impact on women, who are at last coming into the profession in large and growing numbers. While the bar studies whether the escalating demands of law office economics are causing us to lose sensitivity to the needs of society, I think we must also ask whether they are causing us to lose sensitivity, as individuals, to the needs of each other. And though I certainly recognize that my perceptions have much broader applicability, today I want to talk only about the women, for whom immutable biological and still decidedly dominant cultural differences engender genuinely different concerns.[26]

A Changed Workforce and its Impact on the Law

It is ironic that the pressures that are triggering alarms within the legal profession have escalated during years marked by women's acceptance into the workforce. Recent decades have seen increased recognition of the idea that the human race will not perish if women work outside the home,[27] and that their relative lack of advancement has been a consequence not of personal incompetence but of societal attitudes and inequities.[28] Women, many in their prime childbearing years, will shortly make up half the labor force. Most families today consist of two-earner couples working outside the home.[29] Millions of women, many of them poor and otherwise disadvantaged, are raising children alone.[30] It has been true for some time now that, with increased longevity, the average American woman with children will spend most of her adult years in a

24. *See* ABA Comm'n on Professionalism, *supra* note 9 (blueprint for rekindling public service by lawyers); Cramton, *The Trouble with Lawyers (and Law Schools)*, 35 J. Legal Educ. 359 (1985). In New York State, both state and local bar associations are studying the subject.

25. *See supra* notes 19-23 and accompanying text.

26. *See* Overholser, *So Where's the Daddy Track?*, N.Y. Times, August 25, 1988, at A26, cols. 1-2 ("[f]or all the revolution in women's lives, attitudes about who really ought to raise the children and who is really 'a serious worker' have really not changed"). As the author observes, it remains true that men who stay home with a baby fear they will be perceived as "wimps," not serious about their careers. As a society we have not been successful in getting men to assume roles traditionally held by women. *See id.*; *see also* S. Hewlett, A Lesser Life 11-17 (1986) (comparing situation of American women with their European counterparts).

27. *See* A. Kessler-Harris, Out to Work: A History of Wage-Earning Women in the United States 185-95 (1982); Nussbaum, *Needed: Human Capital*, Business Week, Sept. 19, 1988, at 102-03.

28. *See* Rhode, *supra* note 5, at 1177.

29. *See For American Business, A New World of Workers*, Business Week, Sept. 19, 1988, at 112-13.

30. *See id.*

household not dominated by child care requirements.[31]

Concomitantly, society is openly struggling to understand and manage what is plainly a transitional period in a social revolution in interpersonal relations. Once private topics like contraception, family planning, abortion, cohabitation, homosexuality are today the subject of lively public discourse. We recognize that such subjects, though still intensely individual, may also affect us all very directly and fundamentally, and therefore are of common concern.

Whatever the precise catalyst—whether the workforce statistics, or the women's movement and a changed ideological climate, or changing patterns of marriage and childbearing, or the cost of living, or the civil rights movement, or our increased openness, or all these and more—recent years also have been marked by change in the law, with what might loosely be described as "women's issues" at the very frontiers, responding to, inspiring, accelerating the pace of social change. Beginning in 1971, the Supreme Court has overturned state and federal statutes on account of sex discrimination and sustained programs designed to compensate women for past discrimination.[32] Legislative and court dockets abound with fascinating questions relating to the new reality of two working parents and new forms of family.[33] At the same time, advances in reproductive technologies promise ethical and legal questions we cannot yet even fully anticipate.[34] Who is a "parent"; what is a "family"; issues of custody, child care, parental leaves, domestic violence, pornog-

31. *See* R. Bader Ginsburg, Remarks on Women Becoming Part of the Constitution for Presentation at the Eighth Circuit Judicial Conference 6-7 (July 17, 1987) (available in the files of the *Fordham Law Review*).

32. *See, e.g.*, Hishon v. King & Spalding, 467 U.S. 69 (1984); Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973); Reed v. Reed, 404 U.S. 71 (1971); *see also* Hopkins v. Price-Waterhouse, 825 F.2d 458 (D.C. Cir. 1987) (sex discrimination case), *cert. granted*, 108 S. Ct. 1106 (1988).

33. *See, e.g.*, McNamara v. City of San Diego, 108 S. Ct. 1466 (1988) (father seeking to block mother from putting child up for adoption); Turner v. Safley, 107 S. Ct. 2254, 2258 (1987) (regulation of marriage of prison inmates); Burchard v. Garay, 42 Cal. 3d 531, 533-34, 724 P.2d 486, 487, 229 Cal. Rptr. 800, 801 (1986) (father seeking custody of child); Michael H. v. Gerald D., 191 Cal. App. 3d 995, 1001, 236 Cal. Rptr. 810, 812 (1987), *cert. granted*, 108 S. Ct. 1992 (1988) (father seeking custody of biological daughter whose mother was married to another man at time of child's birth); People v. Liberta, 64 N.Y.2d 152, 163, 474 N.E.2d 567, 573, 485 N.Y.S.2d 207, 213 (1984) (abolition of marital rape exception), *cert. denied*, 471 U.S. 1020 (1985); *In re* Marriage of Larocque, 139 Wis. 2d 23, 26-27, 406 N.W.2d 736, 737 (1987) (division of property and post-marital maintenance); Kingson, *Courts Expand the Rights of Unmarried Fathers*, N.Y. Times, Oct. 28, 1988, at B9, col. 6. *See generally* L. Tribe, American Constitutional Law §§ 16-29, at 1580-85 (2d ed. 1988).

34. *See, e.g.*, Attansio, *The Constitutionality of Regulating Human Genetic Engineering: Where Procreative Liberty and Equal Opportunity Collide*, 53 U. Chi. L. Rev. 1274 (1986); Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 Yale L.J. 599 (1986); Robertson, *Embryos, Families, and Procreative Liberty: The Legal Structure of the New Reproduction*, 59 S. Cal. L. Rev. 939 (1986); Tribe, *supra* note 33, at §§ 12-17, at 920; Preliminary Report of the NYSBA Special Comm. on Biotechnology & the Law (April 1988) (available in the files of the *Fordham Law Review*).

raphy are riveting attention.[35] Yale scholar Owen Fiss observed that the women's movement has a momentum that once belonged to the civil rights movement, that it "seems to be on the verge of mobilizing an entire generation of law students."[36]

As the law moves, and is pushed, to new frontiers, it is interesting as well to follow the commentary, which is by no means monolithic. Despite long demands for equality in the workplace, equal pay for equal work, and equal justice, we have reached a point where we are now thinking, talking and writing more about what they really mean.[37] How will we know that "equal justice" has been attained? And when we talk about the law and the courts as the mechanism by which equal justice will be achieved, what does it mean for women to participate in a system that has been developed essentially without them?

I am particularly drawn by the debate focused on the significance to be given to women's differences—their biological and cultural differences from men, as well as differences that have been identified in their sense of self, their sense of morality, their relationships with others. Some abjure all talk of differences, remembering that women's differences once served as the basis for laws that circumscribed their lives.[38] But today there is a growing voice for the view that recognizing differences is essential to true gender equality.[39] The observation has been made, for example, that dwelling "only on sameness limits criticism and change; it means accepting the world as constructed by men, challenging only women's exclusion from it, and acceding to our forced integration into the dominant culture."[40] "An equality doctrine that ignores the unique quality of [pregnancy, abortion, reproduction] implicitly says that women can

35. *See, e.g.*, Thurman v. City of Tarrington, 595 F. Supp. 1521, 1527 (D. Conn. 1984) (police department policy afforded lesser protection to victims of spousal abuse thus resulting in denial of equal protection); Burchard v. Garay, 42 Cal. 3d 531, 535-39, 724 P.2d 486, 488-91, 229 Cal. Rptr. 800, 802-05 (1986) (denying father custody of child); People v. Liberta, 64 N.Y.2d 152, 158-60, 474 N.E.2d 567, 569-71, 485 N.Y.S.2d 207, 209-11 (1984) (marital rape), *cert. denied*, 471 U.S. 1020 (1985); People v. Torres, 128 Misc. 2d 129, 134-35, 488 N.Y.S.2d 358, 362-63 (N.Y. Sup. Ct. 1985) (battered wife syndrome); *see also* Benson, *Pornography and the First Amendment:* American Booksellers v. Hudnut, 9 Harv. Women's L.J. 153 (1986) (pornography generates and reinforces sexist behavior and attitudes); Hacker, *Farewell to the Family?*, 29 N.Y. Rev. of Books 37 (March 18, 1982) (changing concepts of family), *reprinted in* J. Areen, Family Law 79-88 (1985).

36. Fiss, *The Death of the Law?*, 72 Cornell L. Rev. 1, 15 (1987).

37. *See, e.g.*, Law, *Rethinking Sex and the Constitution*, 132 U. Pa. L. Rev. 955 (1984); Minow, *Forward: Justice Engendered*, 101 Harv. L. Rev. 10 (1987); Rhode, *supra* note 5.

38. *See, e.g.*, C. MacKinnon, Feminism Unmodified 34-40 (1987) (discussing an "assimilationist" or "sameness" view of gender equality); Law, *supra* note 37, at 963 (same).

39. *See* Minow, *supra* note 37, at 17-31. *See generally* C. Gilligan, In a Different Voice (1982) (feminist theory). For a fascinating account of different views on gender issues among women, see C. Harrison, On Account of Sex: The Politics of Women's Issues 1945-1968 (1988).

40. Weiss & Melling, *The Legal Education of Twenty Women*, 40 Stan. L. Rev. 1299, 1301 (1988).

claim equality only insofar as they are like men."[41]

It is especially interesting to reflect on this dialogue, and on society's growing recognition of the consequences of the emergence of women, and at the same time to consider the status of women lawyers within today's legal profession—where one might have expected to find the greatest advances toward genuine integration.

The Progress of Women Lawyers

As in other segments of the workforce, women in recent decades have been entering the legal profession in large numbers. Between the 1960s and the 1980s the number of women lawyers has more than quadrupled.[42] Women today make up close to 20 percent of the profession and more than 40 percent of law school enrollments.[43]

The relaxation of entry barriers for women lawyers is no longer news; the books and articles chronicling their arrival are interesting reading, but they are history books. The news now, after decades of a solid, visible presence, is that women lawyers have not truly "arrived" in the profession at all. In a culture dominated by male "gatekeepers"—to borrow Cynthia Fuchs Epstein's term[44]—the verdict is that women have surmounted one barrier only to encounter another. The American Bar Association Commission on Women recently concluded its investigation with several sobering conclusions—*first*, that there continues to be overt and subtle bias against women within the profession; *second*, that "women are simply not rising to the positions of greatest power, prestige and economic reward within the profession in appropriate numbers;"[45] and *third*, that we can have no "sense of complacency that the sheer numbers of women entering the profession will eliminate barriers to their advancement."[46] The Commission found that there is inequity and imbalance, and that time alone will not correct them.

These conclusions are abundantly documented. 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.[47] A study of seventy women of

41. Law, *supra* note 37, at 1007; *see also* Littleton, *Reconstructing Sexual Equality*, 75 Calif. L. Rev. 1279, 1285 (1987) ("Equal acceptance cannot be achieved by forcing women (or the rare man) individually to bear the costs of culturally female behavior, such as childrearing, while leaving those (mostly men and some women) who engage in culturally male behavior, such as private law firm practice, to reap its rewards.").

42. *See* ABA Comm'n on Professionalism, *supra* note 9, at 1-2.

43. *See id.*; *Women in Law: Introduction*, 74 A.B.A. J. 49 (June 1988). Twenty years ago, women accounted for 4.25 percent of law school attendance at Albany Law School, while this semester 45.5 percent of the 290 first-year students are women. *See* Caher, *supra* note 7.

44. *See* C. Epstein, *supra* note 8, at 14.

45. *See ABA Report*, *supra* note 2; *see also* Weisenhaus, *Women, Minority Lawyers Inching Along at Big Firms*, N.Y.L.J., Feb. 29, 1988, at 1, col. 2 (despite progress, women still face stumbling blocks to advancement).

46. *See ABA Report*, *supra* note 2.

47. *See id.* (94% of all partners are male, 6% are female). In 1984, women accounted

the Harvard Law School class of 1974 after ten years found that less than a quarter of those women who entered private practice were partners, while more than half the men were partners.[48] The women lagged both in earnings and prestige levels of their jobs.[49] Comparable statistics exist among judgeships, tenured law faculty positions, and in the management of government and legal services organizations.[50] Throughout the profession the median income for women lawyers is lower than that for men.[51]

Two popular phrases capture these conclusions. "Glass ceiling" describes the daunting fact that women are not proportionally rising to the highest levels of the legal profession—they can see but not reach the top. And "mommy track" associates work flexible or part-time schedules, with no prospect of advancement into partnership ranks. While *The New York Times* recently wrote of "mommy track" *associates*,[52] it is also true that with delayed marriage and childbearing, and with the computer's unquenchable thirst for partner revenues and billable hours, even women who have secured the brass ring of partnership may find themselves there—admitted, yet not truly *admitted*, to the partnership. Both phenomena apparently are duplicated throughout business and the professions: women generally seem to be delaying or foregoing—voluntarily or involuntarily—the ascent to the pinnacle.[53]

The authors of the Harvard study identified several causes. After years of trying to fit a stereotype, many women in private firms concluded that it was simply not possible to run a household, raise children and bill 2,000 hours, and they either dropped out or sought legal work traditionally deemed appropriate for women.[54] Even those women will-

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for 30 percent of the associates and 5 percent of the partners. *See* Sylvester, *Women Gaining, Blacks Fall Back*, Nat'l L.J., May 21, 1984, at 1, col. 2.

48. *See* J. Abramson & B. Franklin, Where They Are Now: The Story of the Women of Harvard Law 1974 201 (1986).

49. *See id.* at 298.

50. *See ABA Report*, *supra* note 2.

51. *See* Winter, *Survey: Women Lawyers Work Harder, Are Paid Less, But They're Happy*, 69 A.B.A. J. 1384-85 (1983); *ABA Report*, *supra* note 2.

52. *See* Kingson, *supra* note 7.

53. *See* Sussman, *supra* note 14, at 2. *Newsweek* reported recently, based on Department of Labor statistics, that almost one-third more women, having delayed childbearing while climbing the corporate ladder, had opted to work part-time and enjoy more time with their children. *See* Kantrowitz, *Moms Move to Part-Time Careers*, Newsweek, Aug. 15, 1988, at 64.

A 1986 *Fortune Magazine* survey of women who had graduated from the country's top business schools in 1976 revealed that one in four had left the managerial workforce in favor of self-employment, part-time jobs or staying home; most cited the demands of raising a family as the reason for their decision. *See* Taylor, *Why Women Managers Are Bailing Out*, Fortune, Aug. 18, 1986, at 16. The article concludes that "companies have found a place in the managerial work force for the superwoman who came to the job unencumbered by outside obligations. Now, if they want the benefit of her brains, they will have to find a place for the woman with a family. The woman, in short, who is merely human." *Id.* at 23.

54. *See* J. Abramson & B. Franklin, *supra* note 48, at 296.

ing to accommodate to existing norms—to live the life of a workaholic—encountered new barriers. They reported that it was easy to find a job but "quite another thing to become a real insider, part of the decision-making structure."[55] Rainmaking, 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. Finally, the experience of qualified women in firms—the "invisible bar" to true advancement—was plainly discouraging to other women, who found few role models, and even among the women who had made it to the top, few sympathetic to their concerns.[56]

Based on their findings, the authors of the Harvard study concluded that it was hard "to draw any hopeful conclusions about the status of women in the law generally."[57] While the legal profession would never again be the gentlemen's club of the Louis Auchincloss novels, there were still unanswered questions: "Will the profession do more to assist working mothers? Will larger numbers of women make partner? Will women lawyers develop into successful rainmakers?"[58] Will the next ten years see more women who can honestly be characterized as leaders of the profession? In short, will women have any real impact in and on the profession, or will the topmost ranks remain closed to all but the few willing to assimilate totally?

Tough questions. In the big firms we hear of the pioneering years when law firm doors were barely open to women, when even the few who entered had no real prospect of partnership—indeed, no right even to cross the main threshold of the downtown clubs for lunch with clients or join the athletic associations for a game of squash with fellow lawyers. Once entry barriers fell, we progressed to a superwoman stage, a time when women lawyers coming into firms were intent on conforming to—even outstripping—the standards that had been set by the men, on remaining childless or willingly revising loan agreements in the labor room while giving birth, on standing out as lawyers but never as *women* lawyers.

Now we seem to have reached a third plateau, where the hard-won prize is being examined and weighed against the rest of life. As more women enter the profession, as the social climate changes, and as the stakes for big firm success are edged up, lawyers—particularly women lawyers—have begun to question the price being exacted for what may be received in return, and many have dropped out.[59]

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55. *Id.*

56. *See generally* K. Morello, The Invisible Bar (1986) (a history of the woman lawyer in America from 1638 to the present).

57. J. Abramson & B. Franklin, *supra* note 48, at 298.

58. *Id.* at 300.

59. *See, e.g.*, Project, *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 Stan. L. Rev. 1209, 1257-58 (1988); Abramson, *supra* note 7, at 75.

So I think we rightly add this to the list of subjects being studied by law firms and bar associations.[60] However sympathetic or unsympathetic one may be to the plight of partners or associates leaving firms, I think the problem is real, not only because of the loss of qualified individuals and their loss of options, but also because of the prospect that the profession will remain essentially stratified—with the topmost ranks virtually all male. And the problem is not unique to the big firms, or even to the legal profession.[61]

What Next?

I set out not only to describe the changed climate and profile of the big firms, but also to comment on the impact of these changes on each other. I have, quite frankly, struggled without success to identify any impact the advent of women lawyers has made on the changed climate of big firm practice to date. It's not the women who have turned up the heat; they're too new and too few for this sort of policymaking. True, there are more lawyers coming into the profession, increasing fungibility—if one person won't work 2,000 billable hours a year, many others will—but that is not a consequence of gender. As for the impact of the changed professional climate on women lawyers to date, the statistics speak powerfully to the conclusion that there are new barriers to the advancement of women.[62] An atmosphere where individual value is measured solely by billable hours and tenths of hours would necessarily inhibit the rise of women with family responsibilities. During certain periods of their lives, hours are exactly what they have less of.

More interesting than what has brought us to this moment in the history of the legal profession, I believe, is what lies ahead. The real question is whether the arrival of women lawyers in increasingly large numbers will, for the future, effect any change in the big firm climate to accommodate their differences, or whether women will have to continue conforming to prevailing, escalating expectations or do something else.

The *Harvard Business School Bulletin* recently described the experience of a Colorado businessman who traveled to the campus for Entrepreneur Day, expecting to be asked how to start a business or make money, but finding instead that the students were much more interested in how to balance work and family obligations.[63] His response, in the best entrepreneurial tradition, was to start a new business—arranging seminars for students and alumni to address personal family issues.[64] I sense a parallel to the legal profession.

60. *See, e.g.*, LaMother, *For Women Lawyers, It's Still An Uphill Climb*, 7 Calif. Lawyer 8 (Sept. 1987) (discussing a meeting held by the California State Bar Committee on Women in the Law).

61. *See supra* note 53.

62. *See supra* notes 42-59 and accompanying text.

63. *See* Blagg, *Surviving Success*, 64 Harv. Bus. Sch. Bull. 38, 38 (June 1988).

64. *See id.* at 39.

More and more, women seem to be openly raising these subjects, gaining confidence and strength from their growing numbers and common predicaments. A woman's concern for family responsibilities is no longer seen as the signal of her lack of competence or seriousness as a lawyer. From my own informal survey, I learned of meetings of women in firms, of firm panels on family issues, and of policy discussions on these issues at partnership levels. Perhaps most significantly in terms of the future, law students, knowing the strings attached to the megabucks, are beginning to ask the tough questions before making career choices.[65] While interviewers decades ago were unabashed in inquiring about family plans and turning women away for "wrong" answers, in the superwoman stage such questions became tasteless and lawless. Now, however, candidates are asking firms about hours and family policies before accepting employment. With law school and entering associate classes nearly half female, competition to recruit and keep the best associates provides pressure for change.[66]

There is even tangible evidence of it. When I started in the litigation department of Olwine Connelly on a three-day-a-week basis twenty years ago, it was a bold experiment. I think, quite frankly, that both sides were astounded that it worked so well. But it did. Now, part-time work, though still hardly common, has become more regular.[67] Information about a firm's part-time arrangements appears on forms provided by the National Association for Law Placement. In many big firms, the "mommy track"—often a three- or four-day work week—has become a standard alternative rather than an ad hoc privilege.[68] One firm, recognizing the potential for luring superstars who might remain on full-time after child-rearing years, actually recruits for a part-time work week.[69]

Depending on the specialty, all sorts of private arrangements are in progress—for example, a per-deal "M & A" agreement with compensatory time off; a 9:00 to 6:30 five-day "part-time" workweek for a big firm litigator—no nights or weekends, no travel; a three-day week in the office

65. Now students publicly rate not only firm summer programs but also their interviewers. *See* Manhattan Lawyer, Sept. 13, 1988, at 24. With great efforts and funds committed to recruitment, no firm would want to risk bad notices. *See* Labaton, *Recruiting Season: When Firms Meet the Future*, N.Y. Times, Oct. 7, 1988, at B8, col. 3.

66. *See* Labaton, *supra* note 65.

67. Almost one-third more women are working part-time than a decade ago. *See Part-Time Lawyers Seek Full Consideration*, 13 Bar Leader 26, 26-27 (July 1987). The Committee on Women in the Courts of the Association of the Bar of the City of New York and the New York Women's Bar Association have circulated a survey to determine to what extent lawyers are interested in part-time employment. *See* 3 44th Street Notes (Dec. 1988) (insert).

68. *See* Kingson, *supra* note 7; Sussman, *supra* note 14, at 6.

69. Recently, one of the legal tabloids featured a prominently pregnant person who had just been made partner in a major firm. The article reported that she went on disability leave before the partnership vote and planned to take a four-month maternity leave, then return on a reduced schedule for several months. She expressed surprise that her partners were so "gracious": "It was an enlightenment." *See* Belsky, *And Baby Makes Five . . . . Chadbourne Names Partners*, Manhattan Lawyer, Oct. 4, 1988, at 4, col. 1.

with a day's work at home for a real estate associate. I heard of a placement agency specializing in part-time jobs, job-sharing arrangements (though not in the private sector), firm-sponsored child-care facilities (particularly on an emergency basis), home computer terminals and home dictation facilities, as well as other efforts to permit lawyer-parents who need and want it to have more time with children both at home and at the office. In law firms that still bear the names of people who have been dead for a century, steps like these have the look of real movement and accommodation.

How to get into the laboratory for experimentation, or onto the "mommy track," is of course no longer the real question, even though these new measures stand as a triumph of sorts. The real questions are at the other end—how to get off them, how to make them part of the mainstream, and what their cost is for the individual.[70] We don't know that yet. Until those questions are answered, we cannot know whether even these steps in fact represent real movement toward adjustment in the professional climate, or simply a new substratum that will be largely populated by women. Indeed, the real challenge for me is drawing *any* conclusions out of my subject.

I'd like to start toward that objective, however, by observing that since 1952, when Noreen McNamara began at Milbank, Tweed, there has without question been increased opportunity for women in the big firms, as throughout the legal profession. Remembering that little more than twenty years ago there were only three female partners in the Wall Street firms, it would be hard to dispute that things seem better today. Nearly half of the entering associate classes in many major firms are women,[71] and those women will genuinely have some partnership prospect. The success of even a few women should serve as encouragement to others and lead to more.

My second observation is that this process of gentle evolution over time is like erosion of the planet Earth. It's a long process—very, very long. When I was asked recently by a high school student whether, in my view, gender bias would be eliminated in our lifetimes, I said unequivocally yes; the only problem is figuring out how to live that long. But the process is being significantly hastened by the public attention now centered on the status of women. It is the work largely, but by no means exclusively, of women. Hardly a day passes without news of interest—a child care bill or court decision; seminars and law reviews devoted to gender issues; prominent newspaper articles dealing with women's sta-

70. *See* Sussman, *supra* note 14, at 6-8. The large numbers of lawyers coming into firms every year necessarily makes any movement off the "hard track" or "fast track" risky. There are so many new lawyers stepping into a vacancy, that getting back into the mainstream after several years may be difficult. The new phenomenon of second and third year law students working part-time at the big firms also increases the competition and affects the availability of part-time opportunities.

71. *See supra* notes 42-43 and accompanying text.

tus in the legal profession and currents in feminist thinking.[72] 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.[73] The person-by-person enlightenment of judges, legislators, firms, clients, general counsels, other prospective clients, the public, is a step toward the elimination of discrimination, and we are plainly engaged in a full-scale nationwide seminar that brings us closer to that goal.

In a society that in a far shorter time has made a giant leap for mankind by putting people on the moon, can we honestly say that sufficiently great steps have been made for womankind? I think not. The statistics on women in the workforce and women in the legal profession, portraying a condition of lower status and lower pay, are nothing but distressing. But what we are witnessing that is new in our lifetimes is profound societal and legal change that holds promise for the future of women. As a society and in the law, we have seen enormous development in the concept of equality—a foundation word of this great nation—and of the constitutional guarantee of equal protection. Over years of living and litigating, we have come to better understand that equal treatment does not first require that everyone be exactly the same. We have also witnessed the emergence of women visibly *as women*, with open recognition of differences not as disabilities in need of special protection but as positive values women have to contribute. It is not simply a *different* voice we are hearing, but a *strong* voice.

What does that mean for the legal profession? I have no doubt that there will be change, and that the visible presence of women lawyers, conscious of their number, will help to motivate it. Already the bar is in the process of re-evaluating its directions—including the measurement of individual value by the clock. Bar groups right now are asking whether there should be structural and functional modifications within the profession to meet present and future societal needs, whether the profession should take control of its own destiny and determine what change is appropriate before others do. That even among the big firms there is discussion and recognition of a need to re-evaluate the way we practice law today, that there is a process afoot to address that need, and that women are active participants in that process—while hardly solutions—are to my mind bright prospects and therefore the ideal note on which to close.

Recent history has shown that the big firms are great *followers*, as they have emulated each other in notching up the numbers—law firm size, fees, salaries and billable hours. The challenge now lies with them to

72. *See, e.g.*, Lewin, *Feminist Scholars Spurring a Rethinking of Law*, N.Y. Times, Sept. 30, 1988, at B9, col. 3, *supra* note 7.

73. *See* Second Report of the Comm'n to Implement Recommendations of the N.Y. Task Force on Women in the Courts (1988); Report of the Comm'n to Implement Recommendations of the N.Y. Task Force on Women in the Courts (1987); Report of the N.Y. Task Force on Women in the Courts (1986).

assert themselves equally as great leaders, by applying their enormous resources to concerns that threaten a genuinely integrated profession. While women have long been a part of the legal profession, *this* is the time they will make a real impact that might serve as a model for all society as it struggles toward gender equality.