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Being a Woman, Being a Lawyer and Being a Human Being—Woman and Change

Cover Page Footnote

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BEING A WOMAN, BEING A LAWYER AND BEING A HUMAN BEING—WOMAN AND CHANGE

ELEANOR M. FOX*

I. INTRODUCTION

This is an essay on hierarchy, humanism and change. It is inspired by the insightful essay of Judge Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*.¹

Women, people of color and others historically denied a place on the upward track of the traditional hierarchies in the practice of law, have today, more than ever before, the chance to succeed on merit. Moreover, we have a unique opportunity to rehumanize an increasingly specialized, technocratic, compartmentalized and sometimes unresponsive profession. But we also face the dual pitfalls of being swept up the ladder as yet another homogeneous body in the cold machinery of the law, or of being swept out of the cadre of serious professionals, in despair of finding a home in the law harmonious with our selves.

Women before me have shed the constraint of speaking only "like a lawyer." In this tradition, I will tell a part of my own story; I will speak of women and law school, women and law firms, women and scholarship, and the future of our law students.

II. LAW SCHOOL AND LAW FIRMS

I began law school in 1958. There were three other women in my section, and about eight in my graduating class. Institutionally, women were not unwelcome, but, pervasively, women were the brunt of jokes. In some classes professors simply did not call on women. In one class, the professor allowed women to speak only on "Ladies' Day." I always laughed at the jokes about women. I came to speak about women as "they."²

In my second year of law school my friends and I began to look for summer jobs in law firms. At that time applicants simply went to law firms, gave their resume to the receptionist, who gave it to a hiring partner, and they were interviewed. I went to Wall Street one day after classes. A representative of the first firm I visited said the firm did not hire women for summer jobs; its summer program was for students likely

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1. 57 Fordham L. Rev. 111 (1988).

2. In my novel, *W.L., Esquire* (1977), I described—with some poetic license—the atmosphere of the classroom at that time. See also 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 Temp. L.Q. 799 (1988) (personal and statistical account of women in law school, women in legal education and women in the profession).

to join the firm after graduation and perhaps become partners. I heard the same message everywhere else I went. Then I learned that the United States Attorney's Office for the Southern District of New York hired women as summer assistants in the Civil Division.³ That was good news. I went to Foley Square, was offered a summer job for \$15 a week, and accepted it.

Meanwhile, law school was challenging and wonderful. My summer job was challenging and wonderful. I was a devoted student; I loved my studies; I was a member of the law review and fondly remember the collegiality, the late night sessions, and the shared academic community. I was not critical about the situation of women. I was grateful to have the chance to participate in the great learning of the law.

In my third year of law school, I thought more specifically about my career. My horizons were not broad. I heard that some firms hired women for tax, and some for trusts and estates. I was confident that if I did not get a job with a law firm I could get a job with a legal publisher. Because I was pregnant in my last year of law school, I postponed my law firm search. I arranged to do research for one of my professors on the international law of rivers, and for another on the bail project of the VERA Institute of Justice.

I graduated, took the bar, and did research. In November 1961 my first child was born. In January 1962 I hired a nursemaid for four hours and left the apartment with a list of the names and addresses of about twenty Wall Street law firms provided by my law school's placement office. I went to the law firm nearest to the subway exit, was offered and accepted a job to do a file search to answer a document request in a major antitrust case, and stayed on with the firm for the next fourteen years. I became a partner in 1970.

I have left out a few details. To the extent that my life just happened to me, I was fortunate beyond belief. My law firm was a most remarkable one. Its senior partner was Whitney North Seymour, a leader of the bar in every sense and a model of the humanistic, socially-concerned, humane, renaissance lawyer. A towering figure, he wore a bowler hat in winter and a boater in summer. Photographs of Supreme Court Justices lined his office wall, personally signed with regard. And when I walked down the green carpet and came to Whitney's office door, he would say to me, as he said to others, "'Good morning, counsellor. Come on in and put your feet up.'"⁴

In 1963, the year after I began to practice law, women comprised only 3.8% of all incoming law students.⁵ Only one other woman associate

3. In 1970, when Whitney North Seymour, Jr. became United States Attorney for the Southern District of New York, he abolished the rule that restricted Criminal Division attorneys to men.

4. See *A Visit with Whitney North Seymour* 90-94 (E. Fox, J. Monckton & C. Harper eds. 1984).

5. See C. Epstein, *Women in Law* 53 (1981).

was then employed by my firm, and she left shortly after my arrival. By 1970, women comprised 8.5% of incoming law students,⁶ and 5.1% of law firm associates were women.⁷ When I became a partner on January 1, 1970, apparently only two other women were or had ever been partners in major Wall Street law firms.⁸

During this decade, things were both more than and less than equal within the firms. Women who worked hard and performed well were treated with special admiration and affection. But clients were skeptical of women as their lawyers, especially as negotiators and litigators. Clients' skepticism influenced work assignments. Annual firm outings were for men only. They were a time for male camaraderie. The women were invited to take a night out on New York City. This was an occasion for Lutece or Le Pavillon.

In the 1970s women began visibly to assert their rights, in the law firms as well as in the law schools. Almost suddenly, women were hired in not insignificant numbers; and women were invited to firm outings. Discrimination suits were brought against Wall Street law firms. One such suit was settled by a consent decree requiring affirmative efforts in hiring and promoting women.⁹

In 1976, I joined the faculty of the law school from which I had graduated. While I had once heard a background chorus, "Women can't be litigators," I now heard, "Women can't be scholars"—a subject to which I shall return.

At about the time of my own transition from practice to teaching, enormous changes occurred in the legal profession. To some, this signaled the beginning of the commercialization of the law and the decline of professionalism; we had arrived at the age of greed; we were on the threshold of the age of the Dennis Levines.¹⁰ But to others, the profession had long been a cartel that had distanced itself, denied access, consolidated power and charged high fees.¹¹ Through a series of changes,

6. *See id.*

7. *See id.* at 97 (interpolated from chart). For related statistics regarding women in law school, women in the profession, and women in legal education, see Angel, *supra* note 2, at 801-05.

8. *See* Warren, *Three Women Lawyers in Major League of the Legal Profession*, N.Y. Times, June 22, 1970, at 46, cols. 1-2; Kihss, *Law Firms Here Changing Styles*, N.Y. Times, Jan. 11, 1970, at 62, col. 1. For a sense of women's situation in the profession in 1970, see *Women Lawyers Cite Obstacles: Sex Discrimination is Called Major Problem in Work*, N.Y. Times, Dec. 9, 1970, at 65, col. 1.

9. *See* Lubasch, *Top Law Firm Bans Sex Discrimination*, N.Y. Times, May 8, 1977, at 13, col. 1.

10. Dennis Levine was a central figure in a major insider trading scandal of the 1980s in which several lawyers were implicated. *See Partner Resigns from Law Firm; Reported Tied to Insider Probe*, N.Y.L.J., July 16, 1986, at 1, col. 3; *5 Admit Guilt in 2 Cases of Insider-Trading Schemes*, N.Y.L.J., June 6, 1986, at 1, col. 3.

11. *See* J. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* (1976); *see also* First, *Competition in the Legal Education Industry* (pt. 1), 53 N.Y.U. L. Rev. 311 (1978) (cartelizing and exclusion in legal education); First, *Competition in the Legal Education Industry* (pt. 2), 54 N.Y.U. L. Rev. 1049 (1979) (same).

including lawyer advertising and the birth of newspapers devoted to lawyers and the law, mystique was stripped away, barriers were torn down, the middle class gained greater access to legal services, and female, minority and public interest lawyers gained greater ease of entry and more opportunity to serve.

At a time when more than 40 percent of the new graduates of law schools are women,¹² many of whom are contemplating professional lives harmonious with personal lives,¹³ law firms are on a track of expansion, specialization, and "the bottom line." The largest firms now have more than 1,000 lawyers each;¹⁴ in the most profitable, partners earn an average of more than a million dollars a year.¹⁵ Having bid up the "price" for entering lawyers to more than \$80,000 a year,¹⁶ the firms are demanding yet more billable hours from each associate.¹⁷ There is no more luxury to learn the law at the feet of the great people of the profession. The age of the renaissance lawyer has passed. And even as classes of entry-level lawyers in large law firms have been one-third to one-half women for several years, ninety-four percent of the partners in these firms are men.¹⁸ Moreover, few women partners in large firms rise to leadership level in their firms. Even as partners, women report that they hit the "glass ceiling."¹⁹

Against this background, I return to women and scholarship.

12. See Kaye, *supra* note 1, at 119; see also Peshel & Linden, *The Gender Gap: Employment and Pay Differences*, Nat'l L.J., Mar. 27, 1989, at 22, col. 1 (41% of law students are women).

13. I am not referring here to women choosing a "mommy track." See Schwartz, *Management Women and The New Facts of Life*, Harv. Bus. Rev. 65 (Jan.-Feb. 1989). I suspect that the proportion of women who enter a firm intending to be other than committed professionals, and who fail to give the firm more—even much more—than the firm gives them, is overstated. I refer in the text to individuals who want a professional life that does not pull them away from developing themselves as human beings.

14. See Lehman, *An End to Collegiality: When the Law Becomes Big Business*, N.Y. Times, Feb. 5, 1989, § 3, at 3, col. 1.

15. See *What Lawyers Earn*, Nat'l L.J., Mar. 27, 1989, at S2.

16. See Kaplan, *Sharp Rise in Pay for Associates at Largest Firms*, N.Y.L.J., Mar. 22, 1989, at 1, col. 4.

17. See Lehman, *supra* note 14. One New York law firm has announced bonuses for attorneys whose billable hours reach 2500 per year. See N.Y.L.J., Mar. 22, 1989, at 1, col. 1.

The push toward the bottom line may translate into a push toward ethical corner-cutting. See Lacayo, *Tremors in the Realm of Giants: As Firms Change the Legal Field Becomes a Battlefield*, Time, Dec. 7, 1987, at 59.

18. See ABA Report: *Women in Law Face Overt, Subtle Barriers*, N.Y.L.J., Aug. 19, 1988, at 2, col. 3; see also Kaye, *supra* note 1, at 119-20.

19. I report the "sense" of many women. Even if the perception is correct, the problem is a complicated one. Room at the top is often reserved for rainmakers; men have been more effective rainmakers than women, having had more opportunity and access necessary to successful rainmaking than women. See Zeldis, *Rainmaking at Law Firms: The Last Hurdle for Women*, N.Y.L.J., May 1, 1989, at 1, col. 3; see also E. Fox, W.L., Esquire (1977) (the heroine, Lieberman, could become a "free man"—albeit constrained near the top—but not a "free woman"; she could not actualize herself).

III. WOMEN AND SCHOLARSHIP

Women can be scholars. Women are important scholars in virtually every field of law. To a large extent, content and point of view in scholarship have no identifiable relationship with the gender of the author. At the same time, a noteworthy body of gender-identified scholarship has emerged.²⁰ Feminist legal scholars provide a new window for understanding law formation, and may fill a void in the understanding of law and the possibilities for its development.

For many years the dominant and most respected form of scholarship was doctrinal: scholarship that focused on a particular legal doctrine, its application, and its evolution. Typically, scholarship of this genre canvassed the relevant judicial decisions and the secondary literature, discovered the legal principles, and perhaps elaborated on the next generation problem and how the law would and should be applied to it.

Within the past twenty years, at least three additional important modes of scholarship have taken shape. First is law and economics scholarship, which attempts to explore the effect on behavior of one legal rule as opposed to another, or the costs and benefits of a given legal rule or system. Contemporary law and economics scholarship, however, is not always driven by these modest ambitions. Perhaps most law and economics scholars make the heroic assumption that efficiency is the goal of law, and many offer as a formula for meeting that goal a road map to aggregate wealth maximization.²¹ Second is jurisprudential, rights-based scholarship, which investigates the nature of law and of rights. It may assert a concept of egalitarianism as the ideal to be achieved by law, and may suggest that there is a right way to move toward the just rule or system. Scholarship of this genre is philosophical, theoretical and abstract.²² Third is critical legal studies scholarship, which asserts that law is politics; that law formation is merely a mechanism to enhance power; that legal doctrine is infinitely manipulable—and is manipulated—to enhance or preserve power or position.²³ Most critical legal scholarship, like the realist scholarship of the 1930s,²⁴ is destructive; it tears down the law but does not offer a theory or methodology for constructing it.

Feminist scholarship takes its place in the array, concentrating on context and experience. Feminist scholars devote central attention to the

20. See Minow, *The Supreme Court 1986 Term, Foreword: Justice Engendered*, 101 Harv. L. Rev. 10 (1987); Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. Cal. L. Rev. 1877 (1988); *Women in Legal Education—Pedagogy, Law, Theory, and Practice*, 38 J. Legal Educ. 1-193 (1988) (essays by various authors).

21. See, e.g., Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. Legal Stud. 103 (1979).

22. See R. Dworkin, *Taking Rights Seriously* (1977).

23. See Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976).

24. See Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 Va. L. Rev. 689 (1968).

values of caring and nurturing, and listening and learning from listening. They view society as a network of interacting human beings whose humanity drives and inspires them to help, support, and enhance other people.²⁵

While feminist scholarship contrasts with other forms of legal scholarship, it contrasts most sharply with law and economics scholarship. Even law and economics scholarship of modest ambition normally takes the existing distribution of wealth as a given. Moreover, it posits that people act only in response to price; indeed, that everything can be reduced to price. It assumes that people affected, that is, those called upon to make a choice, *have* freedom of choice and have sufficient information to make an informed choice unless the contrary is proved; it assumes that markets are robust and work well and that no law will be honored if the costs of compliance exceed the costs of breach.²⁶ Further, in a grander world-view, law and economics scholars assert that the only proper goal of law is to increase wealth, no matter who wins and who loses, on the theory that efficiency so defined is the route to freedom and justice. That is, if people have clear property rights and the freedom to bargain, private action increases wealth and is in that sense allocatively efficient. Pursuit of allocative efficiency will therefore minimize the need for government, and minimization of government (assertedly) increases choice and makes us all "freer."²⁷ The theory works fine for those who already have or can expect to have real freedom of choice, and for those who are not the usual victims of market failures (which are assumed away).²⁸ Thus, the theory works for those who are in or can expect to be admitted

25. See Kissam, *The Decline of Law School Professionalism*, 134 U. Pa. L. Rev. 251, 280-82 (1986); sources cited *supra* note 20.

26. See A. Polinsky, *An Introduction to Law and Economics* (1983); R. Posner, *Economic Analysis of Law* (2d ed. 1977).

Contrast with the law and economics scholars, who assume that people obey law only because of the price of violation, the philosophy of Whitney North Seymour, who was fond of quoting Lord Moulton: "The measure of a civilization is the degree of its obedience to the unenforceable." A Visit with Whitney North Seymour 17 (E. Fox, C. Harper & J. Monckton eds. 1984).

27. See R. Bork, *The Antitrust Paradox: A Policy at War with Itself* 418-25 (1978); R. Posner, *The Economics of Justice* (1981); Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 Hofstra L. Rev. 487 (1980); cf. Fox, *Chairman Miller, The Federal Trade Commission, Economics, and Rashomon*, 50 Law & Contemp. Probs. 33 (Autumn 1987) (economics is indeterminate within a wide range; conceptions of law and economics are driven by political philosophy).

28. By assuming that markets work to achieve allocative efficiency, Chicago School law and economics virtually "proves" that discrimination does not exist, except to the extent that it is a by-product of convenient categorizations—a "shorthand to deal with informational gaps." See Culp, *Judex Economicus*, 50 Law & Contemp. Probs. 95, 129-30 (Autumn 1987). The Chicago School model and assumptions would "prove" that slavery did not exist, were there not clear evidence to the contrary. This is because markets are assumed to work well; discrimination is inefficient; therefore markets would destroy discrimination. Cf. R. Posner, *Law and Literature: A Misunderstood Relation* 313 (1988) (suggesting that "most of the abhorred practices [such as slavery] are inefficient—and maybe that is ultimately why they are abhorred").

to the circle of wealth, power and advantage.²⁹

Two stories reveal the collision between feminist legal thought (and also humanism) and the common assumptions of law and economics. A law professor is interested in discrimination against women in the construction trades. She spent several days accompanying women who were trained and skilled laborers, and who, as was the practice, went to construction sites at an appointed time when a foreman for a construction job would select workers for a job. Although there was a scarcity of workers, the foreman at each site employed the men and rejected the women, even while falling short of his hiring needs.

The professor gave a paper on the subject at an academic workshop. Her paper presented anecdotal evidence, explored relevant legal doctrine, and proposed remedies designed to dissipate and counteract the gender discrimination. The males in the room were skeptical. They doubted that women wanted to be construction workers (although construction jobs paid \$14 per hour and the next best profit opportunity—domestic and food services—paid half that sum).³⁰ They noted the limited value of anecdotes. They urged the professor to embark upon an ambitious empirical study on gender discrimination in the construction trades, and then to reshape the paper. The proposed empirical study was not within her short-term scholarly resources; it would not have drawn upon her best talents; and some might ponder whether an empirical study would capture the discrimination that exists.

In discussion it became clear that the male discussants believed that the female construction workers must have been less qualified for the job than the male construction workers at each job site. Otherwise it would have been against the economic interests of the contractor to have rejected the women applicants since no one wants to pay a higher price than necessary to get a job done, and scarcity inflates price. All of the women in the room accepted the facts as presented (that the women were at least as well qualified as the male job candidates), and believed the discrimination story. When asked why anyone would forego a profit opportunity in getting their building built, the women speculated that the foremen never thought about foregoing a profit; they probably *believed* that females were less efficient/skilled/capable construction workers than males and had every disincentive to find out or to believe

29. By definition, measures that increase allocative efficiency expand the size of the pie. Economic theorists assume that freer markets will expand the size of the pie, and that an expanded pie will make everyone better off. Reality is typically harsher than theory. See Swanstrom, *Homeless: A Product of Policy*, N.Y. Times, Mar. 23, 1989, at A29, col. 1 (primary cause of homelessness is an inadequate housing supply; from 1974 to 1983, even "when low income families were spending more and more on rent, the supply of low rent housing units fell 8 percent"); Tolchin, *Richest Got Richer and Poorest Got Poorer in 1979-87*, N.Y. Times, Mar. 23, 1989, at A1, col. 2 (average income of the poorest fifth of the population declined by 6.1 percent from 1970 to 1987).

30. Assumption: Men are profit-maximizers. We cannot assume that women are profit-maximizers.

otherwise.³¹

The second story I will tell was told at a colloquium by a law and economics professor, to prove the power of law and economics and the naivete of those who disregard it. He and his friend went out one summer afternoon for ice cream. They arrived at Steve's, only to find a long line. They went up to the third and fourth persons in the line and said: "What's it worth to you to give up your place in line?" A deal was struck. The economist and his friend began to turn over the agreed price and to take their newly-bought places in line, and the sellers of their spots began to leave. But the people behind them became irate. They made such a commotion that the economist and his friend looked at one another in amazement and called off the deal, lest they be lynched. How peculiar and incredible, said the economist to the colloquium participants. We had made a deal that made everyone better off. There were no externalities. No one was made worse off.

So it is assumed in neoclassical economics.

IV. THE FUTURE OF OUR LAW STUDENTS

My students want a life in a responsible, caring and humane profession. They do not want to become automatons. They do not want to be steered to a discipline so technical or an environment so isolated that they lose the sense of the texture of life or their ability, as lawyers and as human beings, to respond to people's and society's needs. Many, probably most, want to have families; and they want the chance to develop and nurture relationships with their children, spouses and other friends without losing the chance to become accomplished lawyers. They expect to work hard and to be devoted to the profession. They do not expect to be captured by it.³² Many worry about how to combine life and the practice of law. Most female students, however, seem unaware of the additional hurdles they will face just because they are women.

I am an optimist, and I believe that optimism succeeds. I believe that change is slow but possible, and it will come about if we work for it, at the edges and at the core.³³ Affirmative change must be rooted in who

31. The paper was published soon thereafter. Law, "Girls Can't Be Plumbers"—*Affirmative Action for Women in Construction: Beyond Goals and Quotas*, 24 Harv. C.R.-C.L. L. Rev. 45 (1989).

32. Norman Redlich, dean of New York University School of Law from 1975 to 1988, often spoke eloquently to students about humanity, values and professionalism as the individual's most precious assets in leading life and practicing law. See Fox, *In Honor of Norman Redlich*, 63 N.Y.U. L. Rev. 1, 8-11 (1988) (quoting Dean Redlich).

33. Some inroads are made by individuals not naturally accorded a place in the hierarchy but who feel at home in the environment, believe that there is a meritocracy, and excel at what they do. By being such good performers and so accepting of their environment, they weaken stereotypes and catalyze change at the margins in a positive unthreatening way. Other inroads are made by activists, who see inequities as pervasive and the decision-makers as self-consciously strategizing to preserve their own positions of privilege.

While activists may see marginalists as tokens, activists are often seen as trouble mak-

we are, what we feel, and how we do and should respond as human beings. Compassion, empathy, insight, knowledge, logic and skill must all combine. The hyper-technician, honed down and homogenized by the bureaucracy and driven by the constant reminder of private short-term profit-maximizing interests, will not have the human capacity to solve the legal problems of the twenty-first century.³⁴

In their first semester of law school I tell my students that they should think about who they are, what values they hold, and what they want for themselves as lawyers and as human beings. Especially for my students who are women or people of color, I have one more word of advice: Share experiences. Sharing of negative experience is hard to do, but the reason it is hard to do is the reason it should be done—each individual's painful experience, if isolated, tends to reflect negatively on her own merits. But by sharing experience, patterns, if they exist, can be observed. If patterns are observed, the meritocracy story may be impeached; and if the meritocracy story is impeached, or even ruffled at the fringes, the person who once felt herself devalued may gain a clearer view of reality and of the possibilities for both adjustment and change.

ers and not team-players. The very fact of their activism may tend to moderate their rise up the ladder of "meritocracy," on which congeniality and diplomacy are "merits." Thus, activists pave or push the way for others to rise in the establishment. For lasting change toward equality of opportunity, we need both—persistent activists and persevering traditionalists.

34. See Bok, *Law and Its Discontents: A Critical Look at Our Legal System*, 38 *Rec. A. B. City N.Y.* 12 (1983); *In Honor of Norman Redlich*, *supra* note 32, at 8-11.

If women are more likely than men to insist upon preserving and deepening our human capacities; if women are more likely to listen and thereby understand, to give regard to roots and context and thereby nurture wholeness, and to make the relational connections necessary to support others, to dispel dissonance, to harmonize, and to dampen the litigious instinct; and if these are the scarce or missing qualities in our modern institutions that are necessary for enlightened progress, then a firm's marginal benefits from employing women may be greater than its marginal benefits from employing men, and Felice Schwartz' deduction to the contrary from static, short-run costs is doubtful.

