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Cover Page Footnote

Judge, United States Court of Appeals, D.C. Circuit; Chief Judge 1986-1991; Member D.C. Circuit Task Force on Gender, Racial and Ethnic Bias 1993-1995

GLASS CEILINGS AND OPEN DOORS: A REACTION

Patricia M. Wald*

THERE was cause to cheer this past term when the Supreme Court decided 7-1 in *United States v. Virginia*,¹ that women must be admitted to the Virginia Military Institute ("VMI"), a state-supported school offering a unique "adversative" education, which includes stripping down young men's egos and instilling in them a capability to totally subordinate their own wills to the orders of their superior officers for the good of the team.² Justice Ginsburg's opinion for the Court unsurprisingly but persuasively forbade the state to deny opportunity to those women "who have the will and capacity, the training and attendant opportunities that VMI uniquely affords."³ Professor Kathleen Sullivan characterizes the case as "a sitting duck waiting to be shot out of the water," a decision easily reached under the already prevailing intermediate level of review applied to gender discrimination cases since the 1970s.⁴

How sobering then to turn to *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*,⁵ Cynthia Epstein, et al.'s 150-page report (the "Report") on the past, present, and future of women lawyers in eight top legal firms in New York City documenting the significant inequalities between the positions of women and men that continue to exist. As an experiment to test my own "over-60" reactions to the results of a four-decade (and for some even earlier) fight for gender parity in our profession, I solicited reactions from two of my "just-over-20" young women law clerks, and got back the following:

This report was really depressing. Not just because of its conclusion that women face a glass ceiling in the law firms, but even more so because of the utterly distasteful picture the report paints of firm culture in general. My gut reaction . . . was a feeling that women should be smart enough to stay away from these big firms in the first place⁶

* Judge, United States Court of Appeals, D.C. Circuit; Chief Judge 1986-91; Member, D.C. Circuit Task Force on Gender, Racial and Ethnic Bias 1993-95.

1. 116 S. Ct. 2264 (1996).

2. *Id.* at 2269.

3. *Id.* at 2280.

4. Kathleen M. Sullivan, *Decisions Expand Equal Protection Rights*, Nat'l L.J., July 29, 1996, at C7, C9.

5. Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *Fordham L. Rev.* 291, 384 (1995) [hereinafter *Glass Ceilings*].

6. Interviews with Law Clerks for Judge Patricia Wald, Washington, D.C. (August, 1996) [hereinafter Interviews].

And from another "best and brightest" entry into the field, more of the same: "At the risk of sounding either naive or melodramatic, as someone who is about to try her hand in the private law firm sector, I found . . . reading and mulling over this report a depressing [experience]."⁷

I, too, was depressed. After all, vastly more young women law graduates join law firms or aspire to be successful practitioners than "brother (or sister) rats" at VMI. And no verbal formula, even from the lips of eminent Supreme Court Justices—no intermediate or strict level of review—can convert what now looks like a depressing prospect for one's lifetime career into a horizon of hope and glory. This is a task that must be won inch by inch, block by block, in the trenches by the women (and their bosses, male and female) out there in the concrete canyons of mid-town Manhattan. But right now no one, including the authors of the Report—though they proffer some useful suggestions—knows how, or even *if* it can be won. Frankly, I am pessimistic that gradual incremental gains will alter so fundamental and persistent an imbalance in the profits, power, and prestige of big-time law practice. In Ayn Randian terms, I fear the whole structure may have to be blown away, and strangely that may be precisely what is beginning to happen already—for reasons quite apart from the dilemma of women associates and partners.

I. WHAT THE REPORT TELLS US

The Report performs yeoperson service in searching for answers to why so many women entrants into law firm practice get waylaid before they reach the apex in the big law firm sweepstakes. Throughout the '80s we were told it was simply a matter of time, women had not entered the law schools in significant numbers until the early '70s. But now in the mid-90s we know better. There are indeed more women in big firms, there are more women partners (about eleven percent), but nowhere near the number one would expect from the number of entry level associates (about fifty percent). In the decade from the mid-70s to the mid-80s, nineteen percent of the male hires were promoted to partner, compared to only eight percent of the women hires in the same cohort.

The reasons explaining such figures are many and Professor Epstein and her colleagues have explored them conscientiously. There is the big "F"—family; the years of grooming for partnership are also the premier biological years for conceiving and raising children. This reality, and the lasting perception that motherhood spells an automatic diminution of commitment to one's career, relegates many young women aspirants to a "nonserious player" status. There is also the business cycle; an increasingly competitive legal marketplace works to the

7. *Id.*

detriment of women in these firms. As clients demand more for less, firms are inclined to increase attorney workloads and expect a greater commitment from associates. These economic pressures, combined with stereotypes that question women's commitment, put women in a difficult position in the evaluation process. After 1990, the earlier nineteen percent male promotion rate declined to seventeen percent and the eight percent female promotion rate to five percent. In this kind of cold climate, rainmakers dominate, and most women are not yet perceived as rainmakers.⁸

Persistently, women remain the "minders and the grinders," not the "finders." Client development is often key to becoming and staying a partner. Even post-promotion the pressures remain; if anything, they increase for younger partners to pay their way, not just in billings, but in new business. But the rainmakers among senior partners often do not throw client involvement opportunities women's way, and unfortunately some of the clients themselves are reluctant to trust women with big, complex, high-stake cases. Eventually it all gets back to inbred notions about women not being as ambitious, as committed, as good at business as men—stereotypes that do not seem to disappear and too often become self-fulfilling prophecies. There is well-documented evidence in the forty or more Gender Task Forces around the country of persisting stereotypical notions that women lawyers, whether single, married, mothers, or grandmothers, are just not as well-suited, tough and mean or singleminded, as men for legal combat duty.

The most frustrating aspect of this thorough and provocative Report is that it leaves one stymied as to what to do next. It seems clear that some fundamental conflict of basic social values is at work, that palliatives do not seem able to cure. We are told that in the eight firms, "family friendly" policies like generous time off for childbirth or part-time tracks for young mothers virtually guarantee second-tier status and no partnership at the end of the line. The result is an unwritten policy of: "Stay Home Now, Pay Later." We are told, too, that successful sensitization of male partners about gender disparagement or sexual harassment has left many such partners gun-shy and unwilling to get involved in any way in helping women associates advance. Fully half of all women partners in these firms did not break through in-firm barriers; instead, they were hired laterally, after they had established their track records elsewhere. The paucity of women in the top echelons, particularly any with clout in the management committees, in turn makes it less likely that they will focus on the intrafirm pathways for the next generation of women—the chicken and egg syndrome.

8. *But see* Claudia H. Deutsch, *Women Striving to Make it Rain at Law Firms; Bringing in Business Is the Best Path to Partnership*, N.Y. Times, May 21, 1996, at D1, D7 (recounting stories of women who are successful rainmakers).

It used to be thought that systematic mentoring by older women of younger ones would smooth the way, but the Report shows that the best mentoring happens naturally. Formal programs attempting to institutionalize such mentoring do not work as well. Women, however, often cannot find a mentor, or better still, several mentors. Male partners often shy away from the role because they worry that special attention devoted to a young woman attorney will be translated into suspicions of personal relationships and gossip; yet men often make more desirable mentors because they are more powerful and the number of potential women mentors is smaller perhaps because they tend to have less time. Furthermore, it must be conceded that some women are just not interested in the mentor role.

Not every woman (or man) of course courts partnership. From personal experience, I know many of my law clerks enter firms with the notion they will get good pay for a few years (and wipe out government loans), valuable experience, an impressive line on a resume, and then head for the groves of academia or an intriguing government policymaking position. Many women in this survey expressed the additional fear that partnership would be so demanding as to make a normal family life impossible. The awful truth is that the vast majority of young associates in these New York City firms know they never will make partner so why should they forfeit body and soul trying?

II. WHAT THE REPORT DOES NOT TELL US

A. *Why Are Law Firms So Greedy?*

The "greedy" nature of law firm practice, i.e., the stress on billable hours and client development, is an impediment to aspiring women lawyers. Physical presence at the firm appears to be a principle proxy for commitment to the firm. (This is, incidentally, not true only of law firms, but of corporations, advertising agencies, etc.) Women surveyed in the Report on average spent fewer hours at work than men. The benchmark for unflagging dedication in the case of an associate was a sixty to seventy hour week (1800 billable hours a year was a barely tolerable low; 3000 hours was high; and the median was 2000-2400). High fees (\$450 an hour for a partner) demand high visibility, immediate accessibility whenever the client calls, and instant response capability. In the Report's words, "The law firm is the epitome of a 'greedy institution,' which minimally acknowledges or tolerates seriously competing loyalties to family or friends in favor of the client."⁹ Moreover, the hours, whatever their total, cannot be planned ahead—"emergencies" must be accommodated by long hours and weekends. Whatever the reality, partners define what is an emergency and the associates must comply. Personal commitments must take a back seat.

9. *Glass Ceilings*, *supra* note 5, at 384.

I myself have always been suspicious of the origins of big-time lawyering's "greedy nature." My court handles many of the most complex and heavy record appeals in the federal system that spawn so much of the big firms' heavy litigation duty. Over seventeen years I have personally read thousands of those briefs produced by midnight oil and filed at the last possible minute, despite the full year or more parties usually have between filing an appeal and the date briefs are due, and I have perused literally millions of pages of appendix record. I find it hard to believe that what the court needs cannot be produced by an efficient law firm within a reasonable timeframe, and my sense is that much of the "emergency" nature of big-time litigation is self-imposed. Briefs in general are overwritten; many, particularly intervenors' briefs in agency appeals, seldom add anything; appendices are indiscriminate and include much irrelevant material; and there are often scores of silly pre-argument motions to strike, to supplement, to censure opponents—none of which we judges pay much attention to at all. The big firms are the most susceptible to overkill. The "greediness" of the law firm may well be a reflection of the personalities of old lawyers pursuing old ways thoughtlessly rather than the real demands of practice, especially given the trend in the federal courts—and soon probably agencies—to simplify proceedings, reduce paperwork, and use summary procedures to avoid unnecessary briefing and argument.¹⁰ That goal runs counter to the justification typically given for the ungodly hours demanded of law firm associates and partners. Clients, too, over the past decade have demonstrated a healthy skepticism of overloaded litigation budgets and over-personnelled litigation teams. Poor economies may yet require law firms to follow the suit of the courts and check on their own internal operating procedures, cutting back on no-holds-barred responses to every litigation event, which could make for a more tolerable working environment for women as well as men lawyers at all levels.

B. *Why Does "Part-Time" Not Work?*

One of the most frustrating dilemmas posed by the Report's findings is that so far a part-time status for women lawyers, even one lasting only a few years, just does not seem to work. The primary reason women choose part-time is to care for young children. Indeed, part-time as an appellation for many of these programs seems inappropriate; it is generally defined as less than forty hours a week, but in some

10. See Long Range Plan for the Federal Courts; Judicial Conference of the United States 10, 58 (1995). The Long Range Plan recognized that civil case filings have increased approximately 1400% since 1904, mostly since 1960. *Id.* at 10. In response, Recommendation 28 suggested: "Rules of practice, procedure, and evidence for the federal courts should be adopted and, as needed, revised to promote simplicity in procedure . . . and a just, speedy, and inexpensive determination of litigation." *Id.* at 35.

firms, sixty percent of a normal workload is the minimum part-time requirement, and two years the maximum part-time tenure. Some firms have no formal part-time policy at all, only ad hoc and arbitrary arrangements for "worthy" supplicants. The Report recounts an expected institutionalized suspicion of part-time tracks—the concern on the one hand that clients will not accept anything less than universal availability of counsel and on the other that full-time colleagues will be forced to fill in the gaps. The other stigma part-time work carries is its negative impact on choice assignments and partnership prospects. Worse yet, the Report "conclude[s] that for many of these women the decision to work part-time is indeed an impediment to career advancement."¹¹ With one exception every associate working part-time in the survey was taken off the partnership track. This demotion in itself is not so threatening if there is opportunity to get back into the mainstream later when the children get older and the woman is willing to work longer hours. But that usually seems not to be the scenario. Many older partners felt that even when a part-timer returns to a full schedule, she loses "momentum." They "think those women are self-selecting them[selves] out of [the partnership] decision."¹²

Ironically, the Report evidences that the traditional full-time model is more rigidly advanced by the older generation, both men and women, who made it the hard way. That of course is not my experience or even the experience of the ten women in my Yale Law School class of 1951, but I gather from the Report we may be exceptions, or maybe, in my case, Washington is just different from New York. Several of my women classmates took off extended periods of time to raise our children—over ten years in my case. A decade later—in our mid-thirties—we inched our way back into the market through part-time jobs, or in small firms run by male friends, or in government jobs, traditionally a safer harbor for women attorneys. Eventually most of us rose to leadership positions, in government, the judiciary, and in private corporations. So if the experience of my class is at all instructive it cannot be a lesser quality of women who self-select themselves out of the partnership track or display a lack of "momentum" when they return. It suggests rather that the culture of the firm and its demands for conformity, or perhaps internal competition between those who will commit all and those who hold back something from the firm (for at least a time), discourage or devalue the part-timers.

One must also entertain the question of whether the "out before up" syndrome is a two-way street—the nature of firm life turns off top candidates who have visions of the law and life that cannot be accommodated within its narrow corners, as much as it rejects those who would like to stay but cannot withstand the grueling pace. In that

11. *Glass Ceilings*, *supra* note 5, at 408.

12. *Id.* at 407.

sense, I am unsure that I am altogether comfortable with the Report's observation that "[f]irms only reproduce the values of the society at large."¹³ I think many if not most successful women have found career paths outside of the law firm mode, just as the ever-rising number of smaller women-owned and women-managed firms has created an alternative track in industry and commerce. It may thus be that the current male-normed and dominated law firm or corporation is itself just too resistant to changes taking place in society at large, and women can do better building career ladders of their own.

But for those women who, despite all, still hanker for the senior partner slots, the question remains as to how, if at all, change can be brought about. Will change occur when there are enough women partners? Or perhaps when men join the crusade for more flexible work schedules? As women we are commonly told, "Many of the women who have been successful are just as resistant to such changes as men." This statement reminds me of a story told to me about a woman who teaches at a prestigious law school. She is in her mid-30s and late last fall, she had her first child. When she inquired about the school's maternity leave policy, she was told that she could take a semester off and receive half-pay for the entire year *or* personally negotiate some type of leave with the dean—an awkward task for someone facing a tenure decision in twelve months. The lack of a defined leave policy which did not require giving up half of one's annual salary struck her as unreasonable and out of line with common practice. Harder for her to understand was that this could be the case at an institution with several women deans and home to a number of leading (somewhat older) feminist legal scholars.

Still, I am unsure that this "generational split" is as prevalent as the survey might indicate. I, along with many of my "pioneer peers," tend to sympathize with the plight of our daughters facing the career/child-raising conflict and at least in my case, advocate that they do what feels best for them, including taking time off. But we—having taken that road ourselves—may be the exception. I, for one, recognize that it is more difficult for a young woman to get back on track now than it was for me to come back in the mid-60s. At that juncture, for the first time, there was a demand for mature women in the professions and public life and I was lucky enough to be one of them.

The younger women often feel cheated by the indifference of the older successful achievers who they feel should be their natural allies, and whose role model status they reject as unattainable "superwomen" or not-to-be-emulated "martyrs." I discern a bit of impatience in the Report for those young women who do not see the older women partners as the ideal role models. This passage is illustrative:

13. *Id.* at 411.

In stereotyping women partners, women associates do not see the diversity among them, diversity that the interviewers can clearly see. Further, because the dialogue today is such that there is general discontent with the harshness of demands, older women tend to define their own lives as marked by sacrifice, too, so they do not tend to communicate the satisfactions they have obtained by both having children and excellent careers.

It is probably the case that the good aspects of women partners' lives are invisible to younger women. It is further the case that believing that the women partners' lives are difficult provides a cushion—a way of cooling themselves out should junior women fail to climb the professional ladder.¹⁴

What that seems to be saying is those that make it to the top with children are eminently to be admired. Those that do not choose to hand over their children to surrogate caretakers so that they can perform their full-time career role are softies intent on "cooling themselves out." I do not happen to think this is the case. It is not, in my view, a matter of true grit to play by the firms' rules and stay the course however the chips fall at home. Sometimes the Report seems to be implying there need be no real conflict between family and career but "thinking makes it so"—what the authors refer to as the "ideology of motherhood" which assumes mothers should be the primary caretakers of young children while they are young and that the use of surrogate care for very young children is to be avoided if possible. But almost anyone who has been a parent knows the conflict is real not imaginary: how to manage when a child is seriously ill and for months afterward cries if a parent leaves the room; when a child is stumbling at school and needs many more hours of personal tutoring and attention than the teacher or the au pair can possibly provide; or when he is having problems making friends and needs special treats to attract other children which the maid is not adept at thinking up. Stereotypes and perceptions are often inaccurate and pose unnecessary obstacles to true balance; but sometimes reality is not accommodating either and, yes, choices must often be made in priorities of family and career. Why then not the father? This question of course highlights the other big social factor in young women's dilemma—women, not men, even in professional couples, still carry the primary responsibility for child rearing. Of course we would all cheer for an EEOC in the home, and the Report suggests more awareness of that need. But it is not here yet by a long shot, and one's child *is* here in the now. Most women who opt for less than the total career commitment come to realize this.

Thus I am less sanguine than the authors who conclude:

As we learned from the interviews and observations, the obligations of motherhood alone do not create problems for women. Instead,

14. *Id.* at 433.

problems arise from the multiple messages that these women are not meeting the norms of good mothering, as well as from the demanding time pressures exerted in both spheres. But women do succeed when the evaluations of what they are doing are positive rather than negative—when they have support from their husbands and in the firm from their colleagues; when they have enough child care of good quality and dependability; and to some extent, when they are insulated from cultural norms regarding one “correct” way to be a mother.¹⁵

I do not think that we need more cheering sections for women to continue their mainline jobs free from any social disapproval, but rather the institutionalization of a temporary respite from the full responsibilities of the partnership track with a genuine expectation they can go back. It is the stereotype that working mothers who take time out are not top-tier that needs to be debunked more than the “ideology of motherhood” that all young children need their mothers around most of the time. This apparently is what many of today’s young women also want. Again from a law clerk:

It strikes me as highly unlikely that women will ever break through the law-firm glass ceiling en masse unless and until the all-consuming, dollar-driven intensity of firm culture lets up. As long as associates are expected to work 60+-hour work weeks, be on-call 24 hours a day, and schmooze with CEOs in order to bring in business, women will remain at a distinct disadvantage when it comes time for partnership promotions. As long as the criteria for partnership include round-the-clock devotion to the firm, women will be forced to choose between having successful law firm careers and having rewarding family lives (we learned in the '80s that the Supermom ideal is unrealistic for most people). As the study points out, men who are expected to work the same grueling hours usually face this choice in less stark terms, since many of them (particularly the older generation) have wives who bear a majority of the family responsibilities.

I would bet everything I own that most of the young lawyers in firms (men and women alike) would prefer 45- or 50-hour work weeks over the 65- and 70-hour weeks they are currently expected to log. Many of the men interviewed claimed that they would like to have the part-time option available to them, but explained that they thought any attempt to take advantage of the program would be met with strong disapproval. I believe that if they could work fewer hours for less pay without suffering the stigma they currently fear, huge numbers of associates would take advantage of the chance to combine a career and a private life.

The question then is what would it take to make it acceptable for men to work fewer hours for less pay? I think it would take some critical mass of young male lawyers sacrificing their chances for

15. *Id.* at 438.

partnership (as women have been doing for years) and insisting on being able to have a life away from the firm.¹⁶

In the view of many, besides my prescient law clerk, "the best strategy for integrating women into the partnership ranks of large firms [is] not gender specific."¹⁷ Things will not happen until men demand as well the choice of a reduced schedule for early child-raising years (or maybe even longer) so that it is no longer a gender-specific option. But, let us be frank—that likelihood is not imminent. Everyone knows one—but hardly anyone knows more than one—male who has asked for such a "daddy track" and invariably that male has been similarly penalized with the "mommies"—no longer regarded as a serious challenger for partnership. It is often suggested that law firms that do not provide a respite for young parents who need less billable hours in order to live a sane family life are shortsighted because eventually their reputation will cause them to lose the "best and the brightest," both men and women. Even in the "rainmaking" front—where women have traditionally suffered from lack of old boy networks—things may be changing. An old girls network is developing within some client corporations where women now more commonly hold general counsel positions, and where women now constitute one-third of all in-house corporate attorneys.¹⁸

But the fact remains we simply see no significant move yet in the direction of widened adoption of a real part-time option for young attorneys. Why is it that part-time work is not more readily accepted as an interim solution to parenting problems? Why must any alternative to full-time commitment for an entire lifespan "carry with [it] negative consequences for women's careers . . . [leading to a] professional dead end—a track that never leads to partnership?"¹⁹ Part of the problem may be the differing perceptions among women themselves about the extent and cause of their plight. Not only are there obvious divisions among women themselves as to the value and need for a formal part-time track without permanent consequences, but women

16. See *Interviews*, *supra* note 6.

17. *Id.*

18. See Andrea Adelson, *Casual, Worker-Friendly and a Moneymaker, Too*, N.Y. Times, June 30, 1996, at 8F. Patagonia, maker of sports apparel, "has made a commitment to avoid the barriers that women can face in business." *Id.* Women hold half of high level positions; they make up 53% of its workforce and hold five of eight positions as directors. New fathers as well as mothers get paid leave; there is a subsidized child care center; decisions are by "consensus." Its chairwoman, however, laments:

I don't think corporate America is reformable If you want to create an environment like Patagonia, you have to create it yourself. It's not in the big sweeping decisions. It's in the minutia, in the thousands of tiny decisions made every day. You can't teach it. You can't sell it. It's only from people whose natural inclination is to live that way.

Id.

19. Note, *Why Law Firms Cannot Afford to Maintain the Mommy Track*, 109 Harv. L. Rev. 1375, 1376-77 (1996).

disagree in the degree to which they define their own decisions to avail themselves of the devalued mommy track or leave elite firms altogether, as a "choice," rather than as the product of unreasonable constraints imposed by others.

I am also pessimistic about older men, who currently hold the trump cards, seeing the light on their own. One oft-cited reason for dissatisfaction by women lawyers about their professional prospects and working conditions arises from their everyday experiences in the courthouse and the office, where in many cases they continue to be treated as second-team players. I worked for over two years on the D.C. Circuit's Task Force on Gender, Race and Ethnic Bias. The Task Force, like more than forty others of its kind around the United States, dared to ask whether the justice system treats people disparately depending on their gender, race, or ethnicity. The purpose of the exercise, of course, was not to hunt down actual incidents of provable bias or discrimination, but rather to examine the effects of bias, much of it unconscious, on significant relationships in the courthouse.

Our Task Force sent questionnaires to 2700 D.C. federal court practitioners, asking for personal experiences and observations about how women were treated by judges, courthouse personnel, and other lawyers. The completed questionnaires we received back—sixty four percent of those we sent out—revealed unsurprising, but significant slights experienced by many women involved in the justice system. Thirty-seven percent of the women who responded to the survey reported being addressed by judges and other counsel as "honey," "dear," "young lady," or by their first names; twenty-nine percent reported having their physical appearance commented upon in a way they perceived to be inappropriate; seventeen percent claimed to have been exposed to unwanted sexual advances from clients, eleven percent from co-workers, nine percent from supervisors, nine percent from opposing counsel, and one percent from judges.²⁰

Women also consistently reported feeling they had been disproportionately interrupted by men in courtroom arguments, during in-chambers discussions with the judge, and in depositions or negotiations with other lawyers. Fifty-eight percent of the women, as opposed to only four percent of the men, felt they had been unfairly treated in this regard. Interruptions of course signal to the listener—and to the original speaker—that what is being said is not worth listening to. Women in our study also reported disproportionate experiences of not being recognized in the courthouse as lawyers. Of the lawyers who participated in the survey, a significantly higher percentage of black women lawyers (thirty-three percent) than lawyers in any other category (one to ten percent) reported nonrecognition by fed-

20. For a full version of the report, see *Report of the Special Committee on Gender to the Gender, Race, and Ethnic Bias Task Force Project in the D.C. Circuit*, 84 Geo. L.J. 1657 (1996).

eral judges; but over fifty percent of all responding women lawyers had not been recognized as such by nonjudicial courthouse personnel.²¹ No one claims that these statistics unveil some sinister desire among men to discriminate against their female colleagues, but they *do* tell us that, on a gut level, women, and particularly women of color, still do not *look* like lawyers and judges even to courthouse employees and some judges.

The bottom line is that our Task Force Report, like many others, revealed no spectacularly surprising results, and certainly made no particularly radical recommendations. The then President of the D.C. Bar, the first African-American woman to hold that position, summed it up like this:

The picture these reports paint of what it is like to be a woman or a minority involved in the justice system of this circuit, either as an attorney, an employee, a juror, or a defendant, is mixed at best, and depressing at worst. Sadly, to be minority and female is to be in the worst possible status.²²

The Task Force study showed that being a woman did make a difference in what daily life in the courthouse was like: you had to endure more slights, stay more alert, and probably perform at a higher level to stay on a par or excel—all of which comes with a heavy personal price tag in terms of individual lives and careers.

As I said, the results of my circuit's Task Force Report were neither horrifying nor even particularly surprising. But what was both surprising and a bit horrifying was the reception our study received from some of our colleagues and from some members of Congress. Similar reports in various states and in the Ninth Circuit, whose recommendations had been more aggressive and ambitious than ours, had been almost unanimously acclaimed and endorsed by judges and practitioners. But the mere fact that our study was conducted garnered vociferous opposition from, among others, several of my colleagues on the bench.²³ These judges complained that our extrajudicial inquiry into bias was inappropriate, because knowledge of disparities based on gender or race might taint our impartial review of the merits of each case. We were accused of stirring up divisiveness among the ranks of the judiciary and of advancing a "radical" political agenda that would lead to quotas and affirmative action. Our Judicial Council passed some of our recommendations but disturbingly *rejected* our recommendations for anti-bias educational seminars for judges and court personnel and for collections of more baseline data about the treatment of women and minorities in the courthouse. Responding to our

21. *See id.*

22. Pauline A. Schneider, *Gender, Race, and Ethnicity in the D.C. Circuit*, Wash. Law., Mar./Apr. 1995, at 8.

23. *See* Laurence H. Silberman, *The D.C. Circuit Task Force on Gender, Race, and Ethnic Bias: Political Correctness Rebuffed*, 19 Harv. J.L. & Pub. Pol'y 759 (1996).

judicial critics, Congress dropped the money targeted for these studies in other circuits from the proposed Judiciary budget, and the ability of ongoing projects to continue is still in doubt. The Judicial Conference has decreed no new ones will be begun.

Much of the criticism of the Task Force study swirled around the accusation that the study reported only perceptions, not cases of proven or intentional discrimination. I could not help but remember my first year constitutional law class, reading *Plessy v. Ferguson*,²⁴ an 1895 case which marks one of the lowest points of our legal system's complicity with the country's shameful history of racial oppression. In *Plessy*, the Supreme Court upheld as constitutional a state law mandating segregation by race on railroads.²⁵ Rebutting the argument that separate-but-equal facilities necessarily stamped "the colored race" with a badge of inferiority, the Court announced "If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."²⁶ Like the complaining African-Americans in 1895 who perceived themselves to be slighted by a system of mandated societal segregation, so—our critics say—women *choose* to put a construction of inferiority on incidents that cannot be proven to be the products of intentional discrimination.

I personally find so discouraging this inability to recognize truth in more than one perspective, to realize that the same objectively real behavior affects different people in different ways—that the notion that women's negative experiences in the judicial or by analogy in the law firm process must be *either* real or perceived (i.e., unreal).²⁷ Perception *is* the reality for women and minorities on the receiving end of these "little murders" everyday in their workplaces, forced to play by the rules of a game fashioned by an overwhelmingly white male society of yesteryear. Yet when they solicit changes in these rules they are almost invariably labelled special pleaders asking for special treatment.²⁸

24. 163 U.S. 537 (1896).

25. *Id.* at 551.

26. *Id.*

27. See, e.g., Gina Kolata, *Man's World, Woman's World? Brain Studies Point to Differences*, N.Y. Times, Feb. 28, 1995, at C1 (discussing findings that differences in perception of objective events by men and women can be traced to different brain operating patterns); Gina Kolata, *Men and Women Use Brain Differently, Study Discovers*, N.Y. Times, Feb. 16, 1995, at A1, A22 (discussing findings that men and women use their brains differently to reach the same result).

28. See *supra* note 23 and accompanying text. Apathy and "unconscious racism" are rolling back minority progress in San Francisco law firms according to an investigation by the San Francisco bar association which looked at why minority associates leave for in-house jobs or go solo before making partner. "[M]inorities leave disproportionately after a year or two. Minority partners are dying on the vine. They were not able to penetrate white lawyers' business." Ann Davis, *Minority Attrition Rate: S.F. Bar Frets Over Race Stats*, Nat'l L.J., June 10, 1996, at A4. Minorities make up only three percent of partners in a national survey. *Id.*

C. *Is It Worth the Candle?*

Surely a probing reader of the Report must eventually ask: Even if a woman can break the glass ceiling, get back on the train after a few years at home, is the game worth it? The lifestyle at big firms may not be all that attractive; the Dean of Yale Law School once counselled idealistic young lawyers to steer clear of the big firm's "harshly economic spirit" and "increasingly commercial culture" as "inimical to the commitment to public service that is the hallmark of professional identity."²⁹ The history of how big law firms got to be what they are is a fascinating one and has been chronicled elsewhere.³⁰ But the animal is only a century old after all, and like dinosaurs, its continued existence could be threatened by its inability to accommodate to changing times and needs.

For years, incomes and job security rose at large law firms. Then in the 1980s the economy turned sharply for the worse. Tenure and collegiality in the firm slipped with its economic base. Clients' expectations changed dramatically—they demanded greater accountability of outside counsel for their bills and strategies. The big firm lawyer typically is no longer a long-term counsellor, and an increasing proportion of work done by large firms is commodity work. Clients are no longer "stable navigation points" for the firm's future.³¹ These kinds of developments ought to spell changes in relationships inside the firms, but it is not clear that has happened. The preservation of high incomes for senior partners, for one thing, is a major impediment to restructuring law firms to permit more flexible career tracks. Yet I predict that legal careers are changing, and that the rigid hierarchical structure of big law firms will also change in the lifetime of the new entrants. Results and outcomes will more often dictate rewards than billable hours; creativity and ability to obtain results fast and with minimal bureaucratic apparatus will be at a premium. In this arena smart women should be able to compete better on the merits—when partnership decisions are made, quality of work and client satisfaction should be the criteria, not conformity and powerful mentors.

Lawyers in all kinds of practice are finding they can have "virtual offices" (computer and fax) and can research and write just as well thousands of miles away from their mid-town offices, plug into the office network, receive any new documents or information, and communicate by e-mail.³² Courts are in the process of converting to elec-

29. Marc Galanter & Thomas Palay, *Public Service Implications of Evolving Law Firm Size and Structure*, in *The Law Firm and the Public Good* 19, 40 (Robert A. Katzmann ed., 1995) (quoting the Dean of Yale Law School).

30. *Id.*

31. William C. Kelly, Jr., *Reflections on Lawyer Morale and Public Service in an Age of Diminishing Expectations*, in *The Law Firm and Public Good* 90, 92-93 (Robert Katzman ed., 1995).

32. Joshua J. Kaufman, *The Virtual Office*, Wash. Law., May/June 1996, at 51.

tronic filings. All of this may sound eerily futuristic, but in fact it should facilitate the ability of women (and men) lawyers to do their work where and when they want to. The myriad of dutiful gatekeeper secretaries and messengers tiptoeing over carpeted floors and the armies of paralegals squirreling through documents may just go by the wayside. Legal service may indeed become a commodity, not a perpetual service market. Our colleagues in the medical profession are facing a revolution in care delivery; how can the leaders of our profession expect to survive change tucked away in their walnut-panelled towers? Corporate CEOs rise and fall in increasingly truncated cycles according to whether they produce on the balance sheet; how can lawyers expect to inhabit top tiers decade after decade, earning exorbitant sums while an estimated half of the nation's population cannot afford a lawyer at all?

The Report touches on, but does not give much credence to, the effects that technological facilitators like fax machines and computers could have on home work. I am somewhat more impressed with their potential, however, at least for written legal work. Indeed judges on my court spend days—some, the majority of their time—in their homes using this technology to get their work done. It is hard to see why a brief-writer could not manage similarly given the databases now available for research. That in fact is the way I wrote my first two books in the '60s and managed the transition back to the professional world. One of my daughters is doing something similar in her field now. In an economy which insists that outcomes are more important than process, there is little doubt that specific assignments can be done at home; the internet and closed communication networks allow a maximum of rapid feedback. The problem raised in the Report that some women want their time at home to be quality family time uninterrupted by work demands does not seem to me a serious obstacle. Children's schedules—especially when they are young—can be worked around, and—I know this is heresy—for children a parent's presence in the home even when she is doing something other than playing with the child is often a big plus. And, from the mother's side, the child-sourced interruptions at home are often more manageable than telephone/colleague interruptions at work.

I may be uncharacteristically optimistic about the potential of technology to free women from a rigid demand that they do their work in a specific timeframe and at a specific workstation. And perhaps I am unduly pessimistic about how long big law firms can keep their over-compensated partners in control of an army of unhappy and over-pressured associates with an increasingly sophisticated clientele on the sidelines watching the cost-efficiency of their efforts.³³ But I do sense

33. See Paul M. Barrett, *Dreary Paper Chase Vexes Legal Rookies*, Wall. St. J., Oct. 21, 1996 at B1, B9 (noting that no more than 10% of the big New York law firm associates can expect to become partners; minimum billable hours have increased

“the times they are ‘a changin’” and so, in the end, the question—how can women achieve partnerships in the major law firms—may be the wrong one. The right ones may be how can women build their own career ladders in a society that may not be able to afford much longer those old law firm mastodons, and what should those career pathways look like so that they can accommodate a healthy family life? I hope this next generation of young lawyers and their bar associations will think long and hard about those questions.

from 1800 in the mid-80s to more than 2000 today; up to one-half of partners move laterally from one firm to another; and corporate clients are determined to “squeeze yet more savings from their outside lawyers” and, like Ford Motor Company, are moving all document work in-house and away from outside counsel).