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Not by Numbers Alone

A New Decade for Women in the Law

Margaret H. Marshall

There has been a dramatic increase in both the percentage and the numbers of women who have entered the legal profession in the last fifteen years, but women have not penetrated its higher echelons — partnerships in law firms, general counsel of corporations, and chiefs of government bureaus — in the same percentage that those advances should be reflecting. While entry-level salaries may be equal for male and female attorneys, are women in the legal world discovering the same glass ceilings and barriers to entry at these top levels of economic empowerment that their corporate counterparts have experienced? The author states that the pressure of their numbers has not made it easier for women to attain these higher positions. But as legal firms compete for outstanding women attorneys, they will have to adapt to accommodate the specific needs of such women to assure their advancement.

A revolution has taken place in the legal profession in the past twenty years. A profession that was the almost exclusive domain of men has been entered by women in ever expanding numbers. The dramatic change began in the mid-1970s, when increasing numbers of women applied to and were accepted at law schools throughout the country. In 1970 few law schools numbered 10 percent women among their students. Today the entering classes at most law schools include more than 40 percent women.

Of the 541 students who entered Harvard Law School in the fall of 1989, 44 percent were women.¹ This at an institution that refused to admit any women as students until 1950² and, for the succeeding two decades, admitted them grudgingly and in small numbers. Today women comprise approximately 20 percent of the legal profession, a stunning increase from the 3 percent figure of 1970.³ Seventy-five percent of women lawyers graduated after that date.⁴

For women who have practiced law for longer than twenty years, the low numbers of earlier decades will come as no surprise; the resistance of the legal profession to the admission of women has been well documented.⁵ Barely a century ago courts affirmed the legitimacy of the formal exclusion of women from the profession. In Massachusetts the

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Supreme Judicial Court ruled that the appointment of a woman to the office of justice of the peace would violate the Constitution of the commonwealth:

The law of Massachusetts at the time of the adoption of the Constitution, the whole frame and purport of the instrument itself, and the universal understanding and unbroken practical construction for the greater part of a century afterwards, all support this conclusion, and are inconsistent with any other. It follows that, if a woman should be formally appointed and commissioned as a justice of the peace she would have no constitutional or legal authority to exercise any of the functions appertaining to that office.⁶

Shortly afterward the United States Supreme Court upheld a state prohibition against women's admission to the practice of law. In a concurring opinion, Justice Bradley argued that Mrs. Myra Bradwell's claim "assumes that it is one of the privileges and immunities of women as citizens to engage in any and every profession, occupation, or employment in civil life." That argument was firmly rejected.

It certainly cannot be affirmed, as an historical fact, that this has ever been established as one of the fundamental privileges and immunities of the sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator and the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.⁷

Not until well into this century were the absolute barriers preventing women from entering the legal profession removed. Little by little women were admitted to law schools. Yale Law School first explicitly admitted a woman law student in 1918. Columbia Law School waited until 1927 before it followed suit. By World War II many law schools, but not Harvard, admitted women, and during the war years their enrollment grew — at Yale they reached 18 percent of one class.⁸ But after the war the numbers of women law students fell again, and the decline was reflected in the profession at large. In 1952 only 3 percent of the legal profession were women.⁹

While the barriers preventing access to the profession were removed, employment after graduation continued to present further obstacles. Many law firms refused to hire women at all; others consented to hiring one or two, but not more, a practice that continued as recently as fifteen years ago. "Enlightened recruiters in the 1950's and 1960's 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.¹⁰ And if women were not being hired as lawyers, they certainly were not being admitted to the inner circles of power: as late as 1965, the Wall Street law firms collectively had only three women partners.¹¹

The blatant discrimination against their admission to law schools and the bar and against their hiring when they earned their degree is a thing of the past. In 1988 women comprised 41 percent of all law school students.¹² But it is well to remember that the removal of those barriers came very recently: in 1966 only 4 percent of law students were women.¹³ In law firms, government legal offices, and corporate law departments large numbers of men lawyers can recall a period not too long ago when there were few women

in their profession. While women today have opportunities available to them that were impossible twenty-five years ago, the numbers of those who have been in the profession for twenty or even thirty years are small indeed.

But what is happening to this new generation of women in finding employment when they graduate? The evidence suggests that within the profession women continue to be excluded from positions of power and prestige; and the exclusion continues even when one takes into account their relatively recent arrival in large numbers. "The assumption that the next generation will not repeat the biases of today is an illusion. We are dealing with very complex, ages-old attitudes and much more must be done."¹⁴

In 1988 the American Bar Association Commission on Women in the Profession conducted an extensive investigation into the status of women lawyers. In its report to the ABA House of Delegates the commission concluded that women are simply not rising to the positions of greatest power, prestige, and economic reward within the profession in appropriate numbers.

In spite of the large number of women entering the profession, women are not increasing their representation among partnerships, judgeships and tenured law faculty positions in nearly the percentages that their numbers and class rank would indicate. Disproportionate numbers of women lawyers enter government and legal services work but have not advanced to management positions commensurate with their numbers.¹⁵

William W. Falsgraf, a former president of the American Bar Association and a member of its commission, summarized his concern as follows: "Men keep saying, 'Why do we need [the ABA] commission? Women dominate the law reviews. We are hiring so many. They are so smart.' But you don't have to look at the statistics very long to say, 'Wait a minute. Something's wrong.'"¹⁶

Although great numbers of women have been hired as associates in large, private law firms, for more than a decade,¹⁷ it is clear that the percentages of women admitted to partnership are far lower than their numbers should dictate.¹⁸ In a study conducted in 1984 the Women Lawyers' Association of Los Angeles found that the number of women partners in local law firms was 5.6 percent, a number that should have been 8 percent to 10 percent based on the number of women graduating from the nation's law schools before 1977.¹⁹ More recent figures suggest that since 1982 women in Los Angeles have been increasing their share of law partnerships by only one percent a year.²⁰ National statistics are no better than those of Los Angeles.

In a 1988 survey the *National Law Journal* found that women accounted for about 8 percent of the partners in the nation's 247 largest firms. The American Bar Association reports that 94 percent of partners in all private law firms are men and 6 percent are women.²¹ Even more dramatic was the finding that only 20 percent of all new partners elected at the surveyed firms since 1986 were women, although the numbers should have been closer to 40 percent.²²

Other studies evidence a pattern of women leaving large law firms rather than being admitted to partnership. In 1981 a leading Chicago law firm, Lord, Bissell & Brook, admitted six women associates. By 1988 all six had left the firm and only one was practicing full time at a large law firm.²³ A study of seventy women of the Harvard Law School class of 1974 found that ten years later 23 percent of those who entered private practice were partners, while 59 percent of the men who entered private practice were partners. In addition, the women lagged behind the men in both earnings and prestige levels of their jobs.²⁴

If women are not faring well in the private sector, are they succeeding in government? Women lawyers are disproportionately employed in government practice.²⁵ The American Bar Association reports that 8 percent of all lawyers work in government. However, only 7 percent of all male lawyers but 14 percent of all female lawyers work in government, a figure suggesting a disproportionate percentage of women in that area of the legal profession.²⁶ While there is a perception that women fare better in government, recent studies suggest that positions of power and prestige are equally elusive to them there. In 1985, although 25 percent of the attorney work force at the Justice Department consisted of women, a survey conducted by the Women's Bar Association showed that only 14.3 percent (11 out of 77) of the section chiefs and branch directors were women. There are no more recent statistics, but in 1989 "a head count from an internal telephone directory listing high-ranking officials [showed] that women hold thirteen of sixty-six positions — a little less than twenty percent."²⁷

The change in law school demographics over the past fifteen years *has* had an impact on government lawyers. For example, the Justice Department's professional female work force jumped dramatically from 11.5 percent in 1976 to 23.5 percent at the end of President Jimmy Carter's administration in 1980. The percentage of women in the Justice Department during Ronald Reagan's administration rose again slightly, to 28.3 percent. But most of those women were concentrated in mid-level positions. In the highly competitive honors program in the Justice Department, forty-eight women were hired from the class of 1975 — 27 percent of the honors program that year. In 1988 seventy-two women represented 44.7 percent of the 161 lawyers hired. For the past decade women have made up 45 percent of honors program applicants and 46 percent of those chosen.²⁸ But the probability of women rising to the highest levels is less assured.

Outside the Justice Department the situation is also bleak. For example, in 1989 only four of the ninety-three federal districts had women United States attorneys — San Antonio, Texas; Indianapolis, Indiana; Raleigh, North Carolina; and the Virgin Islands.²⁹ Moreover, the usual explanation for the failure of women to become partners in the private sector, namely that they have been hired by law firms only comparatively recently, is not applicable in the public sector. "Women have been in the government for a long time."³⁰ As one writer concluded: "Women's numbers may be growing, but they haven't penetrated the inner circles of a department that officially remains oblivious to the obstacles they face."³¹

If women are lagging behind in their penetration of the higher echelons of the public or private sector, how well are they performing in the universities, where the time conflicts with family life are fewer and there are no demands to bring in business? Professor Richard Chused of Georgetown University Law Center compiled data on twenty-two prestigious law schools for the 1986–1987 academic year and found that "the so-called prestige law schools tend to lag behind others in the number of women in the faculties."³² Chused found that at Harvard, for example, five of fifty-six tenured positions were held by women. (Since that time two more women have been given tenure.) Chused reported that at Columbia five of forty-two tenured positions were held by women (Columbia University Law School now has a woman dean, Barbara Black), while at Yale two of thirty-four tenured positions were held by women.³³

A review of the number of candidates who will be considered for promotion to tenured positions in the future is disheartening for women. At Harvard in 1986–1987 only two of nine tenure-track positions were held by women. In 1989 they held none. At Columbia three of seven and at Yale three of eight tenure-track positions were held by women. "Al-

though 20 percent of full-time faculty positions are held by women, the majority of women law school professors are clustered in lower paying nontenure track positions such as legal writing instructors and clinical advisors.”³⁴ At this rate it will be decades before the number of women in the law faculties reflect the gender mix of law students.

Have women fared any better in the judiciary? The first woman appointed to a federal trial court was Burnita Shelton Matthews, named to the bench by President Harry Truman in 1949.³⁵ For the next thirty years very few women were appointed to the judiciary at any level, and the experience of women lawyers in private or government practice holds true of the judiciary: too few are being appointed to the bench. After an initial increase in the number of women appointed to the federal bench by President Carter, the numbers decreased dramatically during the Reagan administration. By February 1988, only 31 of the 367 judges appointed by President Reagan to federal courts were women.³⁶ “Despite the increase in the number of women of an appropriate experience level in the last few years, the percentage of women on the federal bench has actually declined.”³⁷ The ABA Commission on Women in the Profession also reported that women comprised only 7.4 percent of district, circuit, and U.S. Supreme Court judges.

Women in Private Practice

Increasingly law firms compete aggressively for the top candidates from law schools, both men and women. The concern now is that a disproportionate number of women are leaving large law firms, either of their own choosing or because they are not admitted to partnership, the ultimate goal for lawyers practicing in the private sector. While the entry level barriers have all but disappeared, serious concerns remain for women who seek to compete in the environment of the most prestigious law firms.

If the old barriers no longer exist, what are the reasons for women’s continued failure to advance to the highest levels? Members of the American Bar Association’s Commission on Women in the Profession concluded:

Female lawyers lack mentors. They are given subsidiary assignments. Sometimes senior attorneys acquiesce to client requests not to use a woman. Women are excluded from environments where business contacts are made and then told they will not be partners because they aren’t “rainmakers,” lawyers who bring in big business . . . They are forced to sacrifice career advancement in a competitive field to have children, while men “suffer little or no adverse consequences” if they have families.³⁸

As women in private practice contemplate the last decade of this century, certain of their concerns are repeated again and again. Their first concern is that when they need to fulfill family obligations they will be taken “off track” and relegated to second-class status. Their second concern is that women are not as capable as men in performing rainmaking functions precisely when such performance is becoming an important factor in areas such as admission to partnership and compensation. A third concern is that the requirement of escalating “billable hours” — hours which can be billed to a client — conflicts with the demands of family commitments, which still must be met primarily by women.

Finally, women remain concerned that despite their numbers, sexism permeates decisions regarding their future at all stages of their professional development.³⁹ “As more women enter the profession, as the social climate changes and as the stakes of big firm success are notched 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.”⁴⁰ Unless law firms are able to address these concerns and provide an environment in which women can function energetically and creatively, the number of women leaving the prestigious law firms will continue, at great cost, financial and otherwise, to those firms. Demographics alone will make the failure of any law firms to adjust to the new decade an extremely expensive one.

Conflict Between Work and Family

A key factor in measuring the value of individual lawyers in law firms is the number of billable hours that lawyers work in a given year.⁴¹ Increased costs of the large law firms, including substantial rises in the salaries paid to the most junior lawyers, have required the firms to charge their clients high rates, while lawyers work longer hours themselves in order for their firms to remain profitable. The average number of hours billed by lawyers — itself not a total reflection of the time they actually spend working — has risen substantially, from approximately 1,600 hours each year several years ago to between 2,300 and 2,500 hours each year.⁴² Moreover, the demand to bill large numbers of hours is no longer confined to associates: partners in law firms are under the same pressure, and it is not unusual for firms to require them to bill 1,900 or more hours each year.

Those numbers do not include time spent, for example, on administrative matters, recruiting, bar association activities, or marketing. The escalation of the numbers of hours that successful lawyers must devote to their profession has increased at precisely the time that large numbers of women have entered the profession. The excessive hours are difficult, if not impossible, to reconcile with family obligations — foremost the demands of raising children — and it is women who remain most vulnerable as they attempt to reconcile the competing demands on their time.

The structures of private law firms, in particular, “were originally developed by men in an era when the workforce was predominantly male and the dual career family was an anomaly. The work expectations and definitions of career commitment were created at a time when the prototypical lawyer was one whose wife, in most instances, devoted full-time to raising their children and providing him with a well-organized homelife.”⁴³

As the structures and attitudes have failed to adjust to the rising number of women entering the legal profession, it is the women who have experienced the greatest conflicts and burdens of trying to balance family with professional obligations. There is overwhelming evidence that women lawyers feel that their professional advancement is threatened when they decide to have children, particularly if they choose to work reduced numbers of hours. “Women who make partner are disproportionately unmarried, divorced and childless . . . Men don’t have to make that choice. [Women] cannot have a family and partnership.”⁴⁴ “The basic rules seem to be that either you are married when you start, or you marry the man you were already engaged to or living with, or you stay single,” said Peggy Kerr, a partner at the giant New York law firm Skadden, Arps, Slate, Meagher & Flom, who took an informal survey of the women partners. “Of the fourteen women partners, there is none who met a man, married and had children while climbing up the Skadden ladder. Eight of the women partners are married, but most of them entered Skadden laterally, late in their careers, and were already married. Only four have children.”⁴⁵

The price that women in the private sector pay with respect to marriage and children was confirmed by a survey of 2,000 lawyers (men and women) conducted in 1987 by the

Boston Bar Association. It demonstrated that women lawyers are significantly less likely to be married or to have children than their male counterparts.⁴⁶

When women first entered the legal profession in large numbers, few law firms or other legal employers had maternity leave policies: the question of lawyers requiring such leave simply had not been confronted. The few practicing women who had children had worked out ad hoc relationships: some had left the practice of law, others worked part time, but were denied partner status, others left for a period of time but gave up all seniority rights. Maternity leave, as such, is no longer an issue. By the late 1980s high percentages of women lawyers had taken maternity leaves of absence and returned to work, and almost all legal employers had some form of paid maternity leave.⁴⁷ At the same time, while women lawyers feel free to request maternity leave, paternity leave has found much slower acceptance.⁴⁸ “In our society and in the legal world, to take parental leave is wimplike. The kind of toughness that is needed to be perceived as a go-getter lawyer is more harmed if a man takes parental leave than if a woman does.”⁴⁹

For women the question is no longer whether they can afford, professionally or financially, to take maternity leave, but how they will balance the demands of their family with those of the practice of law over an extended period of time. In this respect there has been little or no willingness on the part of legal employers to provide for flexible work arrangements or to modify the demands of high billable hours and other professional requirements. Short-term absences from work, presumably while children are infants, are tolerated in many, but not all cases without loss of seniority or status. But few firms have been willing to provide for part-time or similar arrangements for women lawyers for a great length of time, and those that do have taken few steps to ensure that women do not suffer in terms of status, partnership, or compensation.⁵⁰

The problem is tenacious: even those women who return to full-time practice after an absence of some time for family reasons perceive that they are regarded as second-class citizens. “Every single woman that I have spoken to without exception, partner or associate, has experienced rampant hostility and prejudice upon her return. There is a sentiment that pregnancy and motherhood has softened her, that she is not going to work as hard.”⁵¹ But there is now an urgent need for law firms to address the long-term issues of combining family and law without relegating women to second-class status. The ABA’s Commission on Women found that “when the pressures are growing for law firms to be successful businesses, and for lawyers to produce even greater numbers of billable hours, lawyers are becoming dehumanized, unable to relate to clients and family members.”⁵² At the commission hearings witnesses repeatedly testified about the need to develop formal policies for parental leave, part-time employment, and child care.

While testimony concerning the need to formalize parental leave, part-time work and daycare policies dominated the hearings, a number of witnesses spoke about the difficulty of combining family life with professional demands. The result, for many women, is a decision to postpone marriage and/or childbearing until the career is well established. The conflict between family life and career is, generally, not a dilemma that young male lawyers face. Many women who delay marriage and/or childbearing, find that it is too late to have a family and remain single or childless while not being entirely happy about the way their lives have turned out.⁵³

The main concern for women is whether they will be able to engage in the flexible work arrangements that are *essential* if they are to combine family and law without sacrificing

their own status or ability to work effectively.⁵⁴ The issue is not one of compensation: lawyers who work reduced hours do not expect to get paid at the same levels as their full-time counterparts. But women lawyers do not expect and will not tolerate second-class status because of their need for flexible work arrangements. Unless law firms are prepared to admit and retain part-time lawyers as partners, unless they are prepared to take steps to ensure that women continue to retain their status, and unless women continue to be given choice assignments, the numbers of those who are leaving the profession in general and large law firms in particular will continue. Flexible working hours, child care, and lenient maternity leaves will not be sufficient if women who take advantage of those policies find themselves left behind. There are those who view a woman's concern for family responsibilities as a signal of her lack of competence or seriousness as a lawyer. Those who subscribe to that view do so at their peril, for they will be unable to compete for, and retain the best of, a new generation of lawyers.

There is considerable evidence that embracing or accepting flexible working arrangements has been slow. A report of the Massachusetts Women's Bar Association confirmed that large numbers of employers are offering maternity leave and part-time arrangements, but it cautioned that its survey responses did not contain any information about the "spirit" in which benefits are provided. "They do not tell us how many individuals left their employment because satisfactory accommodations could not be made; they do not tell us what effect, in fact, the use of a parental leave or part-time option has had on career advancement; and they do not indicate how many people simply refrain from using a parental leave or part-time option for fear of its potential negative effect on job security or promotion."⁵⁵ At its hearings on the status of women lawyers, the ABA Commission found that "men who have families suffer little or no adverse consequences to their careers while women who have families often must sacrifice career advancement, remuneration and respect of colleagues."⁵⁶

Many law firm managers remain concerned that it is impossible to have flexible work arrangements while performing a professional level job, that lawyers who do not work full time are not committed to their careers or to their law firms, and that the cost of part-time lawyers will be too great.⁵⁷ While there has been no published study of the long-term effect of part-time or other flexible work arrangements over an extended period of time in the legal profession, a recent study by the New York research organization Catalyst "refuted two popular myths about flexible work arrangements: that they only work in routine jobs with few significant responsibilities, and that they solve an employee's child care problems." The research conducted by Catalyst found that "flexible work arrangements are successful in a variety of functions, including line positions and jobs with supervisory, client and travel responsibilities." While Catalyst's research was drawn primarily from corporations, rather than law firms, its findings that "education, policy communication and senior management support for flexible work arrangements are important methods of reinforcing business motivations for flexibility" have equal applicability in the legal profession.⁵⁸

In response to the growing numbers of women entering law firms, some managers have begun to recognize that flexible work arrangements are not necessarily financially burdensome. Part-time and other policies can make good sense by enhancing productivity. Moreover, such policies help firms retain experienced lawyers and are useful in recruiting the best law graduates. "According to the testimony of several large-firm senior partners, in today's competitive market place, parttime policies can, in the long run, inure to the

economic benefit of the firm.”⁵⁹ But the reality remains that many managers of prestigious law firms remain dubious about flexible work arrangements for lawyers, especially for those working in certain practice areas. “Several men in the top ranks of prestigious firms said they saw no problems with part-time lawyers working in family law or trusts and estates. But the most lucrative fields, like litigation and mergers and acquisitions, are closed to all but the round-the-clock workers.”⁶⁰ The view of these men is not lost on those women who do take maternity leave or who work part time while raising their families. “These women claim that the stigma remains that if you’re not working full-time, you’re not a dedicated attorney. Some who are working part-time also observe open hostility towards them — from other women as well as men.”⁶¹

Two strains emerge from the studies and informal surveys about the attempts of women to balance family and profession. First is the concern that women will be forced into second-class status because of the unwillingness of prestigious firms and other important employers to adapt their legal institutions to the long-term needs of women. Fern Sussman, executive director of the Association of the Bar in New York, succinctly summarized that view: “We are beginning to have two-tier law firms. The top tier is the full-time partnership track lawyer, who has all the perks and prestige, and the bottom tier is the part-time track, made up largely of women.”⁶²

While that concern is an important one, another view suggests that the demands of large law firm practice are taking their personal toll on men as well as women and that there is little encouragement for the personal growth of any lawyers, regardless of their sex, in these institutions. “I believe the challenge facing large law firms is not specific to women or to men. Rather, lawyers of both sexes want more balance in their lives, want to work less crushing hours, want more time to spend in family and community activities, want more time to spend thinking about the law and responding to clients’ demands rather than processing the big deals for the hours and fees alone.”⁶³

While both men and women may find that the current needs of law firms conflict with their personal goals, it is women who face the crisis more consistently and who pay the highest personal price. In its survey of 2,979 women lawyers in fifty-six large law firms, the *National Law Journal* reported that 67 percent of its respondents believed that women who work part time experience a loss of opportunity for quality assignments. Ninety percent believe that if a woman associate works part time it slows down or negates her partnership. And a massive 47 percent believe that women partners who work part time are given less serious consideration as a career lawyer. Significantly, only 17 percent of the respondents believe that part-time work results in a loss of client respect.⁶⁴

Women comprise a significant percentage of top-ranking students recruited by prestigious law firms. The costs of attracting women as new associates to law firms and investing in their training and development, only to see them leave for other work settings more compatible with parental and other family obligations or personal goals, will be enormous. Law firms must take the lead in finding ways to retain women lawyers without forcing them to choose between a successful career and marriage or children.

Can Women Compete Successfully?

The business of law is becoming more competitive. Barely ten years ago few lawyers changed their law firms once they attained partner, and few clients changed their lawyers. That consistency no longer exists: law firms compete not only for one another’s partners,

but also for clients, and the competition is national. In this new environment power and prestige within law firms is tied not only to tenure and experience but to the ability to attract major clients to the firm, which to some extent is a function of experience.

Because of women's short history as members of the legal profession, it is not surprising that they have encountered difficulty in attracting clients. But the question remains: Will that difficulty continue, and if so, will it adversely affect women in private law firms by either denying them partnership status or preventing them from attaining the highest levels within their partnerships?

A consensus is emerging that women do face greater obstacles in attracting major clients. In the *National Law Journal* survey 85 percent of the respondents reported that it is more difficult for a woman to generate new business than for a man.⁶⁵ This perceived inability to attract clients is viewed as a new barrier for women in the legal profession. "It is still not a level playing field for women in firms because it is harder to get clients."⁶⁶

Many reasons are advanced as to why women have not been more successful in attracting new clients. First, those who retain lawyers are largely male. According to a 1985 survey by *Institutional Investor*, there were only seven women among the 600 managing directors at the major investment banking houses. The situation on corporate boards was much the same — 92 percent of directors are white men. Most important, males decide which outside legal counsel to retain. The American Corporate Counsel Association reported that only 18 percent of the organization's 7,100 members are female.⁶⁷ "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 [women]."⁶⁸ "It's difficult for women to become rainmakers now that there are so few who are on the client side giving out business. When there are more women managers in corporate America, we'll see more women rainmakers."⁶⁹

Other reasons may explain women lawyers' lack of success in this area. "The best rainmakers are people whose work is their life."⁷⁰ If women experience difficulty balancing commitment to family obligation and billing the large numbers of hours required by their firms, adding rainmaking as a further time demand becomes impossible. "Due to the after hours time demands of rainmaking that can conflict with raising a family, emphasis placed in developing such skills by law firm management is likely to have as critical an effect on attrition rates for women as will decisions on whether to weave extended maternity leave and part-time time policies into the norm of firm life."⁷¹

But while there may be institutional or historical reasons why women have not been more successful business generators, there is considerable evidence that over time, at least, women will become as successful at attracting new clients as their male counterparts. "Women are problem solvers, men are fighters. We are listeners, thinkers, negotiators. We fight, but in a much more subliminal way. Women are better able to put aside their own perception and go after the bottom line, to discover what the client wants."⁷² The "old boys" network, often described as an impediment to women, is not viewed by everyone as a barrier. "I challenge the assumption that you have to have a good old boys' network outside the office . . . I don't see any limitation on any women, artificial or real."⁷³

Law firms that wish to remain competitive must find new ways to assist their women lawyers to overcome existing obstacles. As increasing numbers of women join law firms, as more of them become partners, their numbers will threaten the firms' overall business potential unless the firms are prepared to take steps to assist women at all levels. While no

successful rainmaker suggests that successful business generation will come without sacrifices, women lawyers may be more inhibited than their male counterparts in seeking out new clients. “You have to be outgoing, committed and unashamed to go after business. A great number of women find that difficult.”⁷⁴ This is not to suggest that all male lawyers necessarily are successful business generators — there are successful men partners who do not have the ability to bring in clients either. But if conventional rainmaking skills do not work for women, law firms, in order to remain competitive, will have to take special steps to help women develop these skills as well.

The Tenacity of Sexual Discrimination

As women face the challenge of becoming partners and leaders in their law firms, and as they are joined by larger and larger numbers of women, one might expect that the overt discrimination recounted earlier would disappear entirely. But recent surveys suggest that both overt and subtle discrimination is not something of the past. In addition to the other challenges they face, women continue to operate in an environment that can be and often is overtly hostile to them.⁷⁵ The 1989 *National Law Journal* survey found that at least 60 percent of its respondents had experienced unwanted sexual attention of some kind, ranging from unwanted sexual teasing, jokes, remarks, or questions by their superiors, by colleagues, and by clients to unwanted sexual looks or gestures.⁷⁶ These findings are consistent with other surveys. Overwhelming percentages of men and women who responded to the Boston Bar Association survey reported that women attorneys are still discriminated against because of their sex.⁷⁷

In 1989 the Supreme Judicial Court of the Commonwealth of Massachusetts released its report on gender bias in the courts, a study which was funded by the Massachusetts Legislature. After an extensive investigation throughout the Commonwealth, the study concluded that “gender bias exists in many forms throughout the Massachusetts court system. Sexist language and behavior are still common, despite an increased understanding that these practices are wrong. Beyond these overt signs of bias, many practices and procedures exist that may not appear motivated by bias, but nonetheless, produce biased results.” The report also concluded that male attorneys emerged as the “worst offenders.” “Female attorneys are subjected to gender-biased conduct on the part of male attorneys, court employees of both sexes, and some male judges. Such conduct ranges from discriminatory treatment to sexual harassment and is especially pronounced toward minority attorneys.” In addition the report noted that attorneys rarely observe judicial intervention to prevent or correct gender-biased conduct.⁷⁸

How does this affect the performance of women in law firms? First, although the Massachusetts study focused on the courts and did not examine other areas of practice, there is little evidence to suggest that, while gender bias is pervasive in the courts, the situation is any better in law firms. “Anyone who thinks that sexual harassment does not go on in law firms is crazy. Law firms are no worse than other work places, but they are no better, either.”⁷⁹ In addition, women are concerned that the way they are treated not only creates a hostile environment, but also makes it difficult for them to succeed in precisely those areas which are considered prerequisites for attaining positions of great power and influence, attracting and retaining clients. Women litigators who are discriminated against in court are concerned that their clients who witness such activity may feel that a female advocate is not as effective as a male advocate and hesitate to refer additional business to her.⁸⁰

The ABA Commission on Women in the Profession concluded that “women still face overt instances of bias such as differential, belittling and harassing treatment in courtrooms, in private practice settings and law schools.”

Attitudinal barriers subject women to pressures which lead to discomfort and often rejection in the workplace. An example of the attitudinal barriers is the recurring testimony that women enter the legal arena and are faced with negative presumptions: women must prove their competence, while men must prove their incompetence.

Excessive scrutiny of women was a theme heard over and over again. The Commission also found that barriers exist in the very structure of the profession which has not been altered to reflect the emergence of women as members of the profession or the basic changes in society that have occurred in the past 20 years.⁸¹

The difficulty that women encounter in establishing mentoring relationships — a difficulty that is particularly harmful for long-term development — the failure to consider women for various positions of responsibility that can lead to business development or referrals, assignment to cases that result in less exposure to important client contacts or to subsidiary roles — all constitute forms of discrimination that persist despite the large numbers of women lawyers.⁸² The easy battles have largely been overcome: the overt discrimination and laws that prevented women from entering the profession have been removed. But unless law firms recognize and confront both the obvious and subtle forms of discrimination, their ability to retain women and watch them grow to their full potential will be curtailed.

The vast majority of women lawyers no longer have a choice as to whether they wish to work or not: like their counterparts in other sectors, women lawyers work because they must. If law firms are to remain competitive, if they are to continue to deliver legal services of the highest quality, they will need to address and resolve the problems that are specific to women, problems that will not be solved because the admission of women to the legal profession has been secured. 🙏

Notes

1. *Harvard Law Record* 89, 2 (September 15, 1989).
2. American Bar Association Commission on Women in the Profession, “History of Women in the Legal Profession — Timeline of Important Dates,” 4; hereinafter cited as ABA History.
3. *New York Times*, August 21, 1989, A14; American Bar Association Commission on Women in the Profession, “Fact Sheet: Women in Law”; hereinafter cited as ABA Fact Sheet.
4. *ABA Journal* 74 (June 1, 1988): 49.
5. See, e.g., Cynthia Epstein, *Women in Law* (1981) and Karen Berger Morells, *The Invisible Bar* (1986).
6. *Opinion of the Justices*, 107 Mass. 604–605 (1871).
7. *Bradwell v. The State*, 16 Wall 130, 83 U.S. 130 (1873).
8. *Yale Law Report* 34, 2 (Spring 1988): 26; ABA History, 3.
9. “Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality,” the Noreen E. McNamara Memorial Lecture delivered by the Honorable Judith S. Kaye at Fordham University Law School, October 6, 1988, 2; hereinafter cited as Kaye.

10. Kaye, 3.
11. *Ibid.*, 22. Sullivan & Cromwell, a prestigious New York law firm, hired its first woman associate in 1930. The firm named its first woman partner in 1982. ABA History, 30.
12. ABA Fact Sheet.
13. *Ibid.*
14. Lynn Hecht Schafran, a member of the American Bar Association's Commission on Women in the Profession, quoted in the *Washington Post*, August 9, 1988, A1.
15. American Bar Association Commission on Women in the Profession, "1988 Report to the House of Delegates," 3; hereinafter cited as ABA 1988 Report.
16. *Washington Post*, August 9, 1988, A4.
17. Sixty-three percent of all women lawyers work in private law firms. See ABA Fact Sheet.
18. Law firms hire new employees as "associates." Associates typically are paid a salary, do not share in the profits of the law partnership, and have a limited role in managing the firm. After a number of years of employment, usually seven to ten, the most valued associates are admitted as "partners" of the law firm, sharing in the profits and becoming full participants in the management of their firm. Admission to partnership is a necessary prerequisite to obtaining a position of power and prestige within the firm and, frequently, outside the firm as well.
19. *Law Office Management and Administration Report*, Issue 88, April 4, 1988, 14.
20. *Ibid.*
21. ABA Fact Sheet.
22. *New York Times Magazine*, March 6, 1988, 33.
23. Nancy Blodgett, "Whatever Happened to the Class of '81?" *ABA Journal*, June 1, 1988, 56.
24. J. Abramson and B. Franklin, "Harvard Law '74: Are Women Catching Up?" *American Lawyer*, May 1983.
25. ABA 1988 Report, 7.
26. ABA Fact Sheet.
27. Kenneth Jost, "The Women at Justice," *ABA Journal*, August 1989, 5.
28. *Ibid.*, 54.
29. *Ibid.*, 58.
30. Bettina Lawton, a partner with Decherdt, Price & Rhoads in Washington, quoted in Jost, "Women at Justice," 60.
31. *Ibid.*
32. *ABA Journal*, June 1, 1988, 53.
33. Yale later reported that four women held the rank of full professor. See *Yale Law Report* 34, 2 (Spring 1988): 26.
34. ABA 1988 Report, 6.
35. *New York Times*, April 27, 1988, sec. 2, 8.
36. *Los Angeles Times*, February 3, 1988.
37. ABA 1988 Report, 6.
38. *Washington Post*, August 9, 1988, A4.
39. See, generally, ABA 1988 Report, 2-4; "Women in the Law: Awaiting Their Turn," *National Law Journal*, December 11, 1989, S1-S12.

40. Kaye, 18.
41. Most law firms charge their clients "by the hour," i.e., clients pay for the numbers of hours worked on their behalf multiplied by a specified hourly rate.
42. See *New York Times*, August 8, 1988, A15.
43. ABA 1988 Report, 14.
44. Elaine Weiss, staff director, American Bar Association Commission on Women in the Profession, quoted in Blodgett, "Whatever Happened to '81?," 58.
45. *New York Times Magazine*, March 6, 1988, 74.
46. Specifically the study found that, in their first five years of practice as lawyers, women are less likely to be married than their male counterparts (58.5% versus 77.0%) and that these numbers became even more dramatic for the most senior attorneys: 38.9% of women were married versus 80.4% of men. Women in general were less likely to have children than their male peers, and this disparity becomes most pronounced the longer women remain in the profession. For women practicing sixteen and more years, 55.6% reported having no children while only 5.4% of men reported having no children. See David Davis, et al., "Preliminary Report of the Boston Bar Association Study of the Role of Gender in the Practice of Law," Litigation Sciences, Inc., February, 1988, 27; hereinafter cited as Boston Bar survey.
47. Of the lawyers surveyed 69.3% reported that their firm or organization had paid maternity leave for women. Boston Bar survey, 26.
48. Only 17.5% of firms or organizations provided for paid paternity leave for lawyers. Boston Bar survey, 26.
49. Alice E. Richmond, a partner at Hemenway & Barnes, who served as the first and only woman president of the Massachusetts Bar Association, quoted in the *New York Times*, August 8, 1988, A1.
50. See ABA 1988 Report, 14–16. "The assumption is that lawyers who ask for an extended leave or parttime work arrangement display a reduced professional commitment and want to receive 'single treatment.'" Ibid., 15.
51. Barbara P. Billaur, president, Women's Trial Board, testifying before the American Bar Association Commission on Women in the Profession at a hearing in February 1988, quoted in the *New York Times*, August 8, 1988 8–15.
52. American Bar Association Commission on Women in the Profession, "Summary of Hearings," 9.
53. Ibid., 6.
54. "Women lawyers who have children are in the minority, but even those without family demands openly question whether the personal compromises in working thousands of hours a year are worth it." *New York Times Magazine*, March 6, 1988, 73.
55. Karen Kepler, president, Massachusetts Women's Bar Association, quoted in *Massachusetts Lawyer's Weekly*, December 18, 1989, 26.
56. ABA 1988 Report, 15.
57. The legal profession has its own definition of "part-time" work. "At some of the largest and most competitive firms, mainly in New York, Washington, Boston, Chicago and Los Angeles, single 'part-time' hours are 9 to 5, five days a week. Full-time work may mean being on call around the clock." *New York Times*, August 8, 1988, A15.
58. "Flexible Work Arrangements: Establishing Options for Managers and Professionals," Executive Summary, Catalyst (1989), 2–3. It is noteworthy that the research for the Catalyst report was funded in part by a major New York law firm, Skadden, Arps, Slate, Meagher & Flom.
59. ABA 1988 Report, 15.
60. *New York Times*, August 8, 1988, A15.

61. Law Office Management Administration Report, Issue 88, April 4, 1988, 14.
62. *New York Times*, August 8, 1988, A15.
63. *National Law Journal*, December 11, 1989, S12.
64. *Ibid.*
65. *Ibid.*, S3.
66. Joan Bernstein, general counsel, Waste Management Inc., quoted in David Machlowitz, "Corporate Moves: Achieving a Delicate Balance," *ABA Journal*, August 1989, 66.
67. *New York Times Magazine*, March 6, 1988, 75.
68. Kaye, 17.
69. Roberta S. Karmel, a partner at Kelley, Dry & Warren, quoted in the *New York Law Journal*, May 1, 1989, 2.
70. Erica H. Steinberg, a rainmaker at Latham & Watkins, quoted in *ibid.*
71. *Ibid.*, 1–2.
72. Martha Barnett, managing partner at Holland & Knight's Tallahassee office, quoted in Barbara Kate Repa, "Is There Life After Partnership?" *ABA Journal*, June 1, 1988, 17.
73. Gayle Gibson, managing partner of Houston's Fulbright & Jaworski, quoted in the *National Law Journal*, December 11, 1989, S10.
74. Rita Houser, a partner at New York's Strock, Strock and Lavan, quoted in Repa, "Is There Life?" 70.
75. See generally, ABA 1988 Report, 11–12.
76. *National Law Journal*, December 11, 1989, S2. The ABA Commission also reported that sexual harassment remains as an overt barrier to the advancement of women in the legal profession. See 1988 Report, 8.
77. Boston Bar survey, ii, 21.
78. *A Report of the Gender Bias Study of the Supreme Judicial Court* (1989), Executive Summary, 9, 141.
79. Joel Henning, a principal of Hildebrandt, Inc., a national law firm consulting organization, quoted in Nina Burleigh, "Breaking the Silence: Sexual Harassment in Law Firms." *ABA Journal*, August 1989, 46.
80. *Gender Bias Study*, 151.
81. ABA 1988 Report, 3, 4.
82. See generally, *ibid.*, 11–12.

Nothing, I am sure, calls forth the faculties so much as the being obliged to struggle with the world.

— Mary Wollstonecraft
Thoughts on the Education of Daughters