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The Gender Trap: Flexible Work in Corporate Legal Practice

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The Gender Trap: Flexible Work in Corporate Legal Practice

Abstract

Despite the fact that women comprise well over 50 per cent of law graduates in many parts of the world, women lawyers continue to be clustered disproportionately in the lower echelons of the profession. This paper considers the role of flexible work as a gender equity strategy and is illuminated by interviews with lawyers in elite corporate firms in Australia. It is argued that far from being a panacea, flexible work is being invoked to confine women to subordinate roles and to restrict access to partnerships. Not only is there a residual suspicion of the feminine in positions of authority and resistance to the idea of bodily absence from the workplace, but also the contemporary market discourse has erased a commitment to social justice and equality.

Keywords

Women lawyers; Flexible work arrangements; Sex discrimination in the workplace; Women--Legal status, laws, etc.; Australia

THE GENDER TRAP: FLEXIBLE WORK IN CORPORATE LEGAL PRACTICE[©]

MARGARET THORNTON* & JOANNE BAGUST**

Despite the fact that women comprise well over 50 per cent of law graduates in many parts of the world, women lawyers continue to be clustered disproportionately in the lower echelons of the profession. This paper considers the role of flexible work as a gender equity strategy and is illuminated by interviews with lawyers in elite corporate firms in Australia. It is argued that far from being a panacea, flexible work is being invoked to confine women to subordinate roles and to restrict access to partnerships. Not only is there a residual suspicion of the feminine in positions of authority and resistance to the idea of bodily absence from the workplace, but also the contemporary market discourse has erased a commitment to social justice and equality.

En dépit du fait que les femmes composent plus de 50 % des diplômés en droit dans de nombreuses parties du globe, les avocates sont encore cantonnées, de manière disproportionnée, aux échelons inférieurs de la profession. Cet article se penche sur le rôle que joue le travail souple à titre de stratégie en matière de parité des sexes. L'article est éclairé par quelques entrevues avec des avocats travaillant parmi les cabinets d'avocats chefs de file en droit des affaires en Australie. On y arguë que loin d'être une panacée, le travail souple est actuellement invoqué pour confiner les femmes dans des rôles subalternes et restreindre l'accès aux partenariats. Il existe non seulement un reste de méfiance envers la présence de femmes dans des postes d'autorité et une résistance contre l'idée des absences physiques au travail, mais le discours du marché contemporain a gommé l'engagement envers la justice sociale et l'égalité.

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I. INTRODUCTION

The status of women in the legal profession is an ongoing cause of concern to women lawyers all over the world.¹ This is because they continue to be disproportionately clustered in the lower echelons in managed positions, assigned less prestigious work, and earn less money than men, despite the prevailing discourse of gender equality. Every time concerns are raised, they tend to be met with stock responses. The most familiar refrain within the liberal repertoire is that it will be only a matter of time before women are equitably represented.² As there is no evidence that sex confers an intellectual advantage or disadvantage,³ the assumption is that numbers alone will miraculously remedy the problem. This “trickle up” theory suits the inherent conservatism of the legal profession, which is resistant to both acknowledging the existence of a problem and accepting that a remedial action might be necessary.

In many countries, the proportion of women students began to reach a tipping point in law schools two or three decades ago.⁴ In Australia, for example, women now represent 56 per cent of all graduates and 38 per cent of practitioners, thereby typifying the trend.⁵ Women tend to feature disproportionately among the top graduates, as

¹ Ulrike Schultz & Gisela Shaw, eds., *Women in the World's Legal Professions* (Oxford: Hart, 2003). There are also a number of valuable full-length studies, including Mary Jane Mossman, *The First Women Lawyers: A Comparative Study of Gender, Law and the Legal Professions* (Oxford: Hart, 2006) [Mossman, *First Women Lawyers*]; Jean McKenzie Leiper, *Bar Codes: Women in the Legal Professions* (Vancouver: UBC Press, 2006); Joan Brockman, *Gender in the Legal Profession: Fitting or Breaking the Mould* (Vancouver: UBC Press, 2001); Clare McGlynn, *The Woman Lawyer: Making the Difference* (London: Butterworths, 1998); Hillary Sommerlad & Peter Sanderson, *Gender, Choice and Commitment: Women Solicitors in England and Wales and the Struggle for Equal Status* (Aldershot: Dartmouth, 1998); John Hagan & Fiona Kay, *Gender in Practice: A Study of Lawyers' Lives* (New York: Oxford University Press, 1995); and Cynthia Fuchs Epstein, *Women in Law* (New York: Anchor Books, 1983).

² As observed by others, including former Justice of the Australian High Court, Mary Gaudron. See Mary Gaudron, “Speech to Launch Australian Women Lawyers” (Address delivered at the Grand Hyatt Hotel, September 1997), online: High Court of Australia <http://www.hcourt.gov.au/speeches/gaudronj/gaudronj_wlasp.htm>.

³ Londa Shiebinger, *The Mind has no Sex? Women in the Origins of Modern Science* (Cambridge: Harvard University Press, 1989).

⁴ Ulrike Schultz, “Introduction: Women in the World's Legal Professions: Overview and Synthesis” in Schultz & Shaw, *supra* note 1 at xxxviii.

⁵ In the State of Victoria, women comprise 56 per cent of all lawyers under 40. See Alicia Patterson, *Bendable or Expendable: Practices and Attitudes towards Work Flexibility in Victoria's Biggest Legal Employers* (Melbourne: Law Institute of Victoria, 2006) at 2.

they have done for more than a quarter of a century,⁶ which has caused the “just a matter of time” refrain to begin to sound somewhat empty.

This article will use as a theoretical touchstone Margaret Thornton’s study of women in the legal profession in Australia, *Dissonance and Distrust*,⁷ in which she argued that women remain fringe-dwellers of the jurisprudential community because of the way the feminine has been constructed within the western intellectual tradition. Characteristics exemplifying the feminine and private sphere— affectivity, corporeality, and care—have been conventionally constituted as binary opposites to the public sphere values of rationality, legality, and universality. These public sphere values have conventionally come to be associated with the masculine. The distrust associated with the entry of women into the public sphere affords at least a partial explanation of the resistance to the feminine following the protracted struggle by women to be “let in” to the legal profession. Thus, despite the rapid increase in the proportion of women admitted in the recent past—an increase that has coincided with economic growth since the early 1970s—numbers are not synonymous with equity. Women continue to be overwhelmingly assigned to “manned” or managed positions within law firms, which are bureaucratized and hierarchized.⁸

Since the publication of *Dissonance*, the instability induced by the conjunction of neo-liberalism and globalization has deflected attention away from gender equity and social justice. The love affair with the market and competition policy, as well as the embrace of a neo-conservative morality, has created a new milieu that has caused equality for women to become more elusive than ever.

Against the prevailing discourse of market liberalism, this article will evaluate strategies that have emerged from alternative discourses designed to improve the gender profile within the legal profession, particularly at the partner level. It argues that strategies such as flexible work may be invoked to reify conventional understandings of the

⁶ See e.g. Michael Kirby, “Women Lawyers—Making a Difference” (1997) 29 Aust. J. For. Sci. 49 at 57; Jane H. Mathews, “The Changing Profile of Women in the Law” (1982) 56 Aust. L. J. 634 at 637.

⁷ Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Melbourne: Oxford University Press, 1996) [Thornton, *Dissonance*].

⁸ Barristers (advocates), judges, and academics all exemplify independence and autonomy, but are not dealt with in this paper.

feminine to the disadvantage of women. While it appears paradoxical that the flexible work for which women have fought for more than a century could be construed as exercising a negative effect, availing themselves of it may now be taken as evidence of a lack of commitment to the firm. Most contentious is the idea of part-time partnerships, which combine the idea of flexible work with that of the total dedication presently demanded of partners. The attempt to reconcile the two concepts currently represents what is recognized in philosophy as an *aporia*⁹—an insoluble impasse or blocked passage.

While this study focuses on Australia, the experiences of women in legal practice are remarkably similar elsewhere, as reported within the international literature. This can be seen from the first struggles to be admitted into the legal profession at the turn of the nineteenth century¹⁰ and the subsequent struggles to be accepted in the twentieth century.¹¹ The globalized world of the twenty-first century has further accentuated the similarities between jurisdictions. Accordingly, it is hoped that this analysis will illuminate the challenges confronting women lawyers elsewhere as well.

The article will draw on interviews conducted with (mostly) senior lawyers in ten large and medium-sized Australian corporate law firms. Corporate legal practice refers to firms that act exclusively for corporate clients, rather than individuals. It is regarded as an elite sphere of practice and is consequently able to exercise disproportionate sway within professional legal organizations, reflecting, perhaps, the national and multinational wealth and power of corporate clients.¹² Corporate law firms, often with national and international affiliations themselves, are large, bureaucratized organizations that offer substantial financial rewards to both partners and employed lawyers. Partnerships in elite firms, like the prestigious domains of advocacy and judging,

⁹ While the concept is an old one, it has been used extensively by Derrida. See *e.g.* Jacques Derrida, "Force of Law: The Mystical Foundation of Authority" in Drucilla Cornell, Michel Rosenfeld & David Gray Carlson, eds., *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992) 3 at 26-29.

¹⁰ See Mossman, *First Women Lawyers*, *supra* note 1.

¹¹ For a sample, see *supra* note 1.

¹² The International Finance Law Review regularly identifies firms involved in multi-billion dollar mergers, acquisitions, and takeovers.

remain resistant to the feminine. For these reasons, we have chosen to focus on corporate legal practice.

Altogether, fifty lawyers were interviewed in 2005 and 2006. This figure included thirty male and twenty female lawyers. The disparity partly reflects the targeting of senior lawyers and partly reflects the greater willingness of male lawyers to be interviewed when an e-mail was sent to potential recruits explaining the project. Within the gender and seniority constraints, some interviewees were randomly chosen from websites while others were selected by means of "snowballing," a useful technique whereby interviewees identify other people whom they believe should be interviewed. Indeed, the original intention was to interview only senior lawyers in order to better understand how decisions were made within corporate law firms. However, the suggestion to include some junior lawyers came from several senior lawyers, who suggested that we might wish to interview "X," a junior member of their staff, in order to obtain a different perspective. This was a positive suggestion and the cohort included six junior lawyers as a result, as well as forty-four senior lawyers at associate, partner, and senior counsel level.¹³ At the partner level, there were equity partners, which included both staff and senior partners, and non-equity or salaried partners. It is not possible to disaggregate the numbers at this level, as the nomenclature varied between firms. The very large, top-tier firms tended to be more highly bureaucratized and hierarchized than the medium-sized second-tier firms, which adopted a somewhat less formalistic approach.¹⁴

No written questionnaire was distributed but respondents were interviewed on a one-on-one basis.¹⁵ The interviews took from one to two hours and were taped and transcribed. The questions were of a semi-structured nature. That is, they were based on a template, but the

¹³ In order to maintain confidentiality as required by the relevant research ethics protocol, lawyers are referred to generically.

¹⁴ Categories of partnership and seniority within law firms are evolving in line with the perceived needs of law firms to structure their businesses in a profit-driven industry. The traditional and hierarchically structured lockstep system of partnership, where equity partners are financially rewarded on the basis of seniority regardless of performance, is quickly being modified towards "eat what you kill" models. In that system, partners are remunerated on the basis of their performance outcomes and move down the hierarchy if their performance is not sustained.

¹⁵ These interviews were conducted by the Joanne Bagust as part of her doctoral research.

interviewer was free to probe further on a particular issue, just as interviewees were free to elaborate on issues of interest to them.

II. WORK/LIFE BALANCE

Women are no longer expected to emulate the male career pattern—at least according to the contemporary rhetoric. Rather, the goal is to lead satisfying lives based on a balance of work and “life.”¹⁶ The discourse of work/life balance has wide currency in labour relations and popular culture. It has been described as “*the* topic of the 21st Century for families, employers and government.”¹⁷ Effecting a work/life balance has been accepted as a way forward for women in the legal profession—not just in Australia but in the United States and elsewhere.¹⁸ How to effect such a balance, however, has perplexed women in the legal profession for more than a century.¹⁹

The phrase “work/life balance” assumes that a balance is attainable, but the evidence is not as encouraging. Corporate law firms are resistant to the idea in practice, despite their espousal of the theory. The only acceptable balance for them seems to be work/work. Furthermore, the work/life balance has assumed a gendered hue because “life” tends to be associated with the feminized role of caring for others, particularly children. Few male lawyers wish to be “balanced”—at least so far as family responsibilities are concerned.

¹⁶ Joanne Conaghan, “Women, Work and Family: A British Revolution?” in Joanne Conaghan, Richard Michael Fischl & Karl Klare, eds., *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: Oxford University Press, 2000); Jill Murray, ed., *Work, Family and the Law* (Leichhardt, NSW: Federation Press, 2005); and Belinda Smith, “Not the Baby and the Bathwater: Regulatory Reform for Equality Laws to address Work-Family Conflict” (2006) 28 Sydney L. Rev. 689.

¹⁷ Sarah Squire & Jo Tilley, *It's About Time: Women, Men, Work and Family* (Sydney: Human Rights and Equal Opportunity Commission, 2007) xi; quoted in Oklahoma County Bar Association Work Life Balance Task Force, *Initial Report on the Survey: Work/Life Balance in the Legal Profession* (Oklahoma: Oklahoma City University, 2003) at 17. [Emphasis in original] A USA Today poll conducted in 2002 revealed that employees across all job markets ranked the work/life balance as their number one priority in seeking a job.

¹⁸ Dianne Molvig, “Balancing Work and Personal Life: Flexible Work Options” (2004) 77 Wis. Lawyer 10.

¹⁹ Mossman draws attention to the fact that Lelia Robinson, a Boston lawyer, first posed the question in 1889. See Mary Jane Mossman, “Lawyers and Family Life: New Directions for the 1990’s (Part One)” (1994) 2:1 Fem. Legal Stud. 61; see also Virginia G. Drachman, “My ‘Partner’ in Law and Life”: Marriage in the Lives of Women Lawyers in late 19th and early 20th century America” (1989) 14 Law & Soc. Inquiry 221 at 221-22.

Ironically, other facets of “life,” such as playing sports and drinking with clients, may be actively encouraged because they are believed to promote the marketing aspects²⁰ of legal practice:

Marketing takes over your life and, in some areas like private equity, for instance, which is a very red wine-fuelled sector, it's important to be out there and be at the football, or whatever.²¹

There is such an animus towards the idea of balancing family responsibilities that it may signal the end of partnership aspirations. Although the emphasis is now on “families rather than gender, the consequence of families is still much more heavily felt by women.”²² As Victorian Women Lawyers note, “having a family is not good for your career.”²³ As a result, the trend for women in corporate firms is to secure promotion to partnership and then have children, although this is not likely to be appreciated by the firm: “You find that the new partners, all of a sudden, are off for eighteen months in the next five years having a family.”²⁴ As the biological clock keeps on ticking for professional women, it is clear that there is no best time in which to have children and a disproportionate number remain childless.²⁵

It has long been a feminist aspiration that men assume greater responsibility for caring. Women cannot be the equals of men in the world of work if the private sphere remains a site of inequality. The symbiotic relationship between the public and private spheres has entrenched this unequal relationship. In essence, the private sphere, the sphere of necessity—where women cook and clean, as well as care—frees men to participate in public sphere activities and the world of paid work.²⁶ The inequality emanating from the private sphere is unlikely to

²⁰ Activities such as sport play a key role in strengthening the homosocial bonds between male lawyers and their clients. Thornton, *Dissonance*, *supra* note 7 at 168-72.

²¹ Interview with male partner, 28 November 2005.

²² Interview with male partner, 22 November 2005.

²³ Patterson, *supra* note 5 at 4.

²⁴ Interview with male partner, 22 November 2005.

²⁵ According to the Australian Bureau of Statistics data, while it is estimated that 24 per cent of all women will remain childless, the figure for professional women is close to 50 per cent. See Australian Bureau of Statistics, *Australian Social Trends* (Canberra: Australian Government Publishing Service, 2005).

²⁶ Margaret Thornton, “The Cartography of Public and Private” in Margaret Thornton, ed., *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995) 2.

be cured by work-based strategies alone, as a woman lawyer is not autonomous in the way that the paradigmatic male subject of liberalism is still assumed to be. Some argue that women should assume responsibility for not having shifted at least some of the burden of this skewed world to their male partners:

My personal thesis is that women of my generation assumed the burden of success ... and we ran around like mad things and we effectively did it all and, in the process, we let our male partners do their thing. ... The dads will do pretty much anything you ask them to do, but ... you've got to *ask* them to do it, you've got to arrange it, you've got to organize it, you've got to provide the facilities for it and then they'll turn up and they'll actually do it. ... We also have to get a hell of a lot more commitment from our male partners—not just to turn up when required or asked and then need to be thanked for it, but actually to take a role in all of that. And I actually think that what women are thinking [is] that it's all too hard.²⁷

Even if male lawyers want to participate in the raising of children, the cultural constraints militating against doing so are immense. Those who do must hide their longings from their colleagues' gaze:

My main problem with working in a big firm is balancing my family life. I've got two kids under two. I want to be involved with their upbringing; I want to be there when they're up in the morning and when they go to bed at night, so I'm constantly trying to balance a work environment, which wants to take every hour that God gives you, and home life, which wants to take every minute that God gives you. In the end, I feel that I'm not doing either job to 100 per cent of my ability.²⁸

There is no serious talk about flexible work practices for men to enable them to share in childcare, which is still seen as a paradigmatically feminized endeavour. We do not see men giving up work or being moved sideways into support work in order to balance their "life" responsibilities.

The women who "choose" to have children (and choice is a problematic concept in relation to a cultural construct) do want a genuine balance in their lives. They do not want to work "24/7," which signifies the extraordinary expectation of the corporate law firms. Of course, there is always the exceptional woman who is able to manage everything, usually by delegating to a nanny and a range of other paid household helpers.²⁹

²⁷ Interview with female partner, 30 November 2005.

²⁸ Interview with male senior associate, 20 October 2005.

²⁹ This is the mother-attorney as superwoman, about which Porter writes so tellingly. See Nicole Buonocore Porter, "Re-Defining Superwoman: An Essay on Overcoming the 'Maternal Wall' in the Legal Workplace" (2006) 13 *Duke J. Gender L. & Pol'y* 55.

Despite the odds, some women in leading firms do manage to accommodate a partnership as well as caring responsibilities at home:

I'm a single parent. I have two kids; I've got a house; I've got a cat and I've got a life. ... I just get rid of the clutter. You don't get to cook. Of course, I have a cleaner at home and I don't do a lot of home maintenance. I outsource all that.³⁰

Most women who have children do not want to be absentee mothers like the stereotypical lawyer fathers: "There have been times ... when I didn't see my children awake for a month and a half."³¹ As the number of women in the legal profession has increased, pressure has been put on law firms to do something about inequitable representation at the senior levels. Few well-qualified and experienced women lawyers want to give up their careers completely because child care generally takes no more than a few intense years.

The refrain that underpins the liberal model of equal treatment suggests that a little tweaking here and there is all that is necessary to make flexible policies effective in attaining equality. However, most interviewees were skeptical about achieving a balance:

I don't think you can really get a work/life balance and I don't think it matters how many policies you have; it is intrinsically difficult. If we think it is possible to work fewer hours than the other gender, that's rubbish. How can we? If a man sitting in the office next door is doing twice as much work, he is getting twice as much exposure to his colleagues, and twice as much exposure to his clients. How can we get a work/life balance?³²

Structural reforms ignore the subliminal psychoanalytic factors at the heart of the equality conundrum. The question that no one dares to ask is this: "How much 'balance' is permissible in order to retain the masculinity of the legal profession?" The fear is that feminization could cause male flight. That is, once the tipping point is reached, and there are more than 50 per cent women, male lawyers may well evacuate the field.³³ However, if the senior and authoritative positions remain

³⁰ Interview with female partner, 30 November 2005.

³¹ Interview with male partner, 7 December 2005.

³² Interview with female partner, 28 July 2005.

³³ Secretarial work and bank-telling are examples of occupations that were formerly male-dominated positions, but became feminized as more women entered the field. See Anne Game, *Gender at Work* (Sydney: George Allen & Unwin, 1983).

masculinized, male flight may be avoided.³⁴ There is therefore an element of anti-feminism undergirding flexible recruitment practices, which might even include reverse discrimination:

Male Partner: The young blokes don't tend to interview too well, whereas the girls are just sensational. ... Our whole gender balance in the firm was seriously being skewed because if you keep on getting your 70-80 per cent of new lawyers coming through as females, after a few years ... they are all females...

Q. So would that affect the clients? Do you think clients would be less inclined to give you work?

A. Some are, particularly bankers; it's a boys' club. Fine, you can bring X along to a meeting but when you want to talk seriously, or go out for a night, or take them out for a sports, like the footy—"Don't bother bringing her; we want a boys' day out thank you very much" ...

Q. So has the firm remedied that?

A. ... We had to offer places to a few more guys just to try to have more equal representation.³⁵

This is a very revealing comment. If reverse discrimination is already occurring covertly in favour of less-talented male applicants, transparent equalizing measures in the interests of women lawyers are inevitably going to be problematic.

III. STRUCTURES AND STRATEGIES

Following hot on the heels of the "just a matter of time" refrain is the "broken career" refrain.³⁶ Because so many women have taken time out to bear and care for children, this is adduced as a justifiable explanation for their "non-success" at partnership level. It was thought that the broken career syndrome would be ameliorated by maternity leave, introduction of child care, and flexible work strategies.

A notable feature of the last decade has been the numerous studies undertaken by different associations representing women lawyers, documenting and addressing the structural barriers that women

³⁴ If men enter feminized occupations, such as nursing and teaching, they quickly assume managerial positions. Megan-Jane Johnstone, *Nursing and the Injustices of the Law* (Sydney, London, Orlando, Fla: W B Saunders/Baillière Tindall, Harcourt Brace, 1994); Jill Blackmore & Judyth Sachs, *Performing and Reforming Leaders: Gender, Educational and Organizational Change* (New York: SUNY, 2007).

³⁵ Interview with male partner, 6 February 2006.

³⁶ Michael Kirby, "Women in the Law—What Next?" (2002) 16 *The Australian Feminist L. J.* 148 at 151.

still encounter.³⁷ The plethora of task force reports and surveys has been supplemented by other reports, such as those of human rights agencies³⁸ and government.³⁹ These reports tend to play down the significance of systemic discrimination, enmeshed within the social fabric, and emphasize remedial courses of action. They express the hope that once the right strategy has been identified, gender equity can be attained.

A. *Maternity/Paternity Leave*

While Australian women are entitled to twenty-four months unpaid maternity leave,⁴⁰ paid leave is not guaranteed.⁴¹ In practice, many employers, including law firms, provide varying short periods of paid leave in order to retain their female staff. However, the increasingly competitive environment is causing resistance even to unpaid maternity leave on the part of professional women themselves. While no data for lawyers is available, a study conducted by the Association of Professional Engineers, Scientists, and Managers of Australia found that thirty-four per cent of eligible working mothers had

³⁷ A list of those appearing in the 1990s is included in Victorian Women Lawyers, *Taking Up the Challenge: Women in the Legal Profession* (Melbourne: Victorian Women Lawyers, 1999) at 17-18 [Victorian Woman Lawyers, *Taking Up the Challenge*]. For a comprehensive bibliography on women in the legal profession in Australia, see Terry Hutchinson, "Women in the Legal Profession in Australia: A Research Start" (2005) 12:2 *Austl. L. Librarian* 23. Rhode notes some sixty surveys on bias in the United States legal profession over the last two decades, which consistently found race and gender discrimination. See Deborah Rhode, "The Profession and its Discontents" (2000) 61 *Ohio St. L.J.* 1335 at 1349 [Rhode, "The Profession"]; Cynthia Fuchs Epstein, "Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession" (1995) 64 *Fordham L. Rev.* 291. See also Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993). For a report on Scotland, see Moira MacMillan, Dr. Nick McKerrill & Angus McFadyan, *Women in the Legal Profession in Scotland: A Study by the Law Society of Scotland and the Equal Opportunities Commission Scotland* (Glasgow: Glasgow Caledonian University, 2005).

³⁸ See e.g. Squire & Tilley, *supra* note 17.

³⁹ See e.g. Austl., Commonwealth, House of Representatives Standing Committee on Family and Human Services, *Inquiry into Balancing Work and Family* (Canberra: Parliament of Australia, 2006) online: <<http://www.aph.gov.au/house/committee/fhs/workandfamily/>>.

⁴⁰ Austl., Commonwealth, Australian Industrial Relations Commission, *Family Provisions Decision* (PRO82005) (Canberra: Australian Government Publishing Services, 2005).

⁴¹ Australia, along with the United States and New Zealand, declined to ratify the revised *Maternity Protection Convention* (2000), which recommended fourteen weeks of paid maternity leave. See also G. Whitehouse et. al., *The Parental Leave in Australia Survey: November 2006 Report*, online: The Parental Leave in Australia website <<http://www.uq.edu.au/polsis/parental-leave/level1-report.pdf>>.

not taken maternity leave because they feared that it would negatively impact on their careers.⁴² To the extent that it is possible to extrapolate from this finding, it does not bode well for the success of flexible work strategies for lawyers, as will be shown.

Paternity leave of one or two weeks may be available in law firms, but it is by no means unequivocally accepted. It is also suggested that a young man could jeopardize his career by taking leave of this kind:

A guy that I know, he had paternity leave when he had a third child, or second child, but I imagine that that works better for men than it does for women because he was already a partner of some standing. ... But if you're a Senior Associate—a young guy coming up and you have kids and take paternity leave, that will put the skids under you. They will remember it and you will not really be one of the ones going to make it.⁴³

For the most part, however, fatherhood does not exert the same devastating effect on a career as motherhood. Most lawyer fathers in this study had partners who were full-time, stay-at-home mothers, which attests to the conservative lifestyle of those in corporate practice. In any case, fatherhood has conventionally been viewed as an indicator of marriage and stability—factors deemed to justify higher pay.⁴⁴

In contrast, pregnancy can determine a woman lawyer's future career trajectory. As soon as the pregnancy is announced, the nature of work assignments may change.⁴⁵ The transformation from highly-competent professional to low-competence support worker is a shock for many professional women. The most telling riposte upon returning to work came from an American lawyer who retorted that "[she had] a baby, not a lobotomy!"⁴⁶ Giving birth is a reminder of the vestigial association of the feminine with nature and abjection,⁴⁷ the antithesis of

⁴² Ewin Hannan, "Mothers skipping newborn leave" *The Australian* (29 March 2007) 3.

⁴³ Interview with female solicitor, 23 January 2006.

⁴⁴ The principle of the normative worker as a married man, with a dependent wife and children, has been judicially entrenched for more than a century. See *Harvester Judgment* (1907), 2 CAR 1.

⁴⁵ Buonocore Porter, *supra* note 29 at 56; Lisa Vash Herman, Lynn M. Adam, & Emily Hammond Meazell, "It's About Time: Part-Time Policies and Practices in Atlanta Law Firms" (2004) online: SSRN website <<http://ssrn.com/abstract=916111>>.

⁴⁶ Joan Williams & Nancy Segal, "Beyond the Maternal Wall: Relief for Family Caregivers who are Discriminated Against on the Job" (2003) 26 *Harv. Women's L.J.* 77 at 90-96.

⁴⁷ Kristeva invokes the idea of abjection to capture the peculiar repugnance associated with bodily functions and uncontrolled flows. Julia Kristeva, *Powers of Horror: An Essay on Abjection*

the claimed rationality associated with law and the public sphere. Whether due to these factors, or due to assumptions about child care that are not clear, pregnancy may also signal the end of partnership prospects for women:

A. I have one of my lawyers at the moment away on maternity leave ...

Q. So does that put her off the partnership path?

A. Yes. Yes, to be perfectly frank because there is no reason why she may not later on go away and have another child.⁴⁸

B. *Provision of Child Care*

While women alone presently bear children, the conventional corollary is that they are also the primary caregivers. In addition, they are expected to care for the elderly, the infirm, and grown-up men—that is, those who are perfectly able to look after themselves.⁴⁹ Dislodging the stereotype of the ideal lawyer as free, autonomous, and male has proven intractable: “I think, unfortunately, ... the unencumbered worker is the worker who you know will go far.”⁵⁰ The model is one in which *he* is assumed to be able to slough off relational ties in order to devote himself unconditionally to work.

The plea for adequate and affordable child care as a solution to the inequitable representation of women in the world of paid work has been a persistent refrain of the women’s movement. In addition to government-provided and government-subsidized child care, work-based child care has also been advocated by feminist activists from time to time. Still, most employers, including law firms, have been unreceptive to the suggestion that they provide child care facilities:

We are moving to another building where I am assured ... I am going to be moving into an open-plan, no office—despite the requirements of confidentiality and document management—but there is a gym at the new building ... I said, “Look, Gentlemen, this may come as a slight surprise to all of you that I am not into the gym.” ... It’s

trans. by Leon S. Rondiez (New York: Columbia University Press, 1982). See also Thornton, *supra* note 7 at 230.

⁴⁸ Interview with male partner, 6 February 2006.

⁴⁹ Nancy Fraser, *Unruly Practices: Power, Discourse and Gender in Contemporary Social Theory* (Cambridge: Polity, 1989) at 148.

⁵⁰ Interview with female partner, 6 October 2005.

unbelievable that two decades on we are still having gyms fitted into our new buildings instead of childcare.⁵¹

I know the law firms will be the last to do it [set up child care facilities], partly because they'll be concerned about the liability implications.⁵²

The culture embedded with long hours has proven just too difficult for women with young children, which in turn provides grist to the mill of their detractors. As a result, many women have left corporate practice for the public sector or smaller firms where they are not required to work twenty-four hours a day, seven days a week,⁵³ or they drop out of law altogether. To prevent the hemorrhage of qualified staff, other strategies have been advocated. Making child care tax-deductible is one such strategy which has met with a singular lack of success.⁵⁴

These child care strategies now appear to have largely disappeared from the political agenda. Instead of attaching children to the workplace, the aim is to develop flexible work strategies for lawyer parents in an endeavour to effect a balance between work and "life."

C. *Flexible Work*

In recognition of the fact that few women can effectively be full-time workers as well as full-time mothers, flexible work became the principal strategy of women lawyers' associations in many jurisdictions by the 2000s. Flexible work generally refers to part-time work, although it also includes flexible working hours, job-sharing, tele-working, and variable leave arrangements. The functional argument in favour of flexible work practices is that it may save a firm thousands of dollars in recruiting and retraining talented staff.⁵⁵ The justification is couched in

⁵¹ Interview with female solicitor, 23 January 2006.

⁵² Interview with male partner, 28 November 2005.

⁵³ This is not to suggest that the work of corporate counsel is lightweight. For an in-depth study of corporate counsel in the United States, see Joan C. Williams, Cynthia Thomas Calvert & Holly Cohen Cooper, "Better on Balance? The Corporate Counsel Work/Life Report" (2003-04) 50 Wm. & L. 367.

⁵⁴ *Lodge v. Federal Commissioner of Taxation* (1972), 128 C.L.R. 171; *Jayatilake v. Federal Commissioner of Taxation* (1991), 101 A.L.R. 11. See also Rebecca Johnson, *Taking Choices: The Intersection of Class, Gender, Parenthood, and the Law* (Vancouver: UBC Press, 2002).

⁵⁵ Victorian Women Lawyers, *Flexible Partnership—Making it Work in Law Firms* (Melbourne: Victoria Women Lawyers, 2002) at 29 [Victorian Women Lawyers, *Flexible Partnership*].

the language of economic rationalism, not individual rights or social justice for women, as it is only the former that is currently heard within neo-liberalism.

Nevertheless, attesting to the increased numbers of women in law, the discourse of work/life balance has permeated the legal culture, and flexible work policies have been accepted and even embraced by law firms. If the preponderance of law graduates are now women, firms want to attract the best of them: "If you don't do it, women won't come and work for you."⁵⁶ A number of leading firms make reference to their commitment to flexible work in their business plans and on their websites.⁵⁷

However, the reality has not caught up with the rhetoric, as the websites do not highlight the fact that embarking on a pattern of flexible work could impede one's career. Victorian Women Lawyers conducted a survey in 2005 illustrating the point.⁵⁸ A significant proportion (seventy-four per cent) of those using flexible work practices believed that the type and quality of their work declined after they started working flexibly. This could be attributed to the implementation of the policy, which is perceived as "better managed" in the government and corporate sectors than it is in private law firms.⁵⁹

Rather than cutting-edge work involving corporate clients, women working part-time are likely to be assigned to what is known as "knowledge management," which is resonant in these times:

Managing the intellectual resources that we have ... notices and documents and all those sorts of things. It's creating precedents to use in all sorts of situations so that basically every time someone needs to do something they're not reinventing the wheel. So with litigation, there's someone who will keep court precedents constantly updated. There's a large number of advice and settlement deeds and everything that you would basically need as a litigator we've got precedents for. ... They're all lawyers, and I'm trying to think if there

⁵⁶ Interview with male partner, 19 August 2005.

⁵⁷ Nicola Anderson & Jennifer Batrouney, "20 Years of Women in the Law" (Paper presented to the Challenge, Change and Cha Cha Cha: A Conference on Women, Feminism and the Law, October 2004), online: <<http://www.womenlawyers.org.au/publications.htm>>.

⁵⁸ Victorian Women Lawyers, *A 360 Review: Flexible Work Practices— Confronting Myths and Realities in the Legal Profession Firms* (Melbourne: Victoria Women Lawyers, 2002) at 6, online: <<http://www.vwl.asn.au/>> [Victorian Women Lawyers, *360 Review*]. Compare Buonocore Porter, *supra* note 29 at 64.

⁵⁹ Victorian Women Lawyers, *360 Review, ibid.*

are any people in knowledge management who are not women. ... We've actually got a large number of women who are practising as lawyers but are all working part-time.⁶⁰

Knowledge management has emerged as a new feminized underclass of lawyering. It is regarded as mundane work that can be done tomorrow or the next day,⁶¹ usually in a support capacity:

I have one woman who works for me who has children and I'm very flexible with her. She works two days a week and she has every school holiday off ... she leaves at four on the days that she works, but if I need her to do something she'll take work home and she'll work an extra day and so on ... she's just a good resource for me to have because she's an older woman and she's more experienced than some of the others.⁶²

Knowledge management tends to be derided and regarded as a "career graveyard."⁶³ A particularly misogynistic descriptor is that of "occupational therapy," defined in solely feminized terms, as it is used "for some of our ladies who've wanted to come back after maternity leave."⁶⁴ That is, once a woman has a child, it is assumed that she loses interest in a career. This invokes the old adage that while men have careers, women have jobs. Those seeking to work part-time because of family commitments are even depicted as selfish:

I sometimes think that it's very much a me-generation out there and it's always like it's from a me-perspective, and like, "I want all the opportunities, but ... I don't want to give as much as others." ... I do think that maybe, you know, if you do want to have that lifestyle balance, maybe you're going to have to accept that some things are not going to be as easy.⁶⁵

A study by Victorian Women Lawyers revealed that most lawyers were (understandably) dissatisfied with the negative effects on their careers,⁶⁶ while support staff were dissatisfied with the expectation that they hide from clients the reason why lawyers were not available. In

⁶⁰ Interview with female partner, 1 December 2005.

⁶¹ Jennifer Batrouney, "Gender Issues in Law Firms" (2004) Austl. L. Management J. online: <<http://www.womenlawyers.org.au/publications>>.

⁶² Interview with female partner, 23 January 2006.

⁶³ Variations on this theme emerged from a national survey in the United States: "the kiss of death," "a fast track to obscurity," "a professional dead end," and "an invitation to end up permanently out to pasture." See Deborah L. Rhode, *Balanced Lives: Changing the Culture of Legal Practice* (Chicago: American Bar Association, 2001) at 16 [Rhode, *Balanced Lives*].

⁶⁴ Interview with female partner, 6 October 2005.

⁶⁵ Interview with female partner, 23 September 2005.

⁶⁶ Victorian Women Lawyers, *360 Review*, *supra* note 58 at 7.

contrast, clients suggested that this was a pretext and that the real reasons resided within law firm cultures. The clients indicated that they were more interested in outcomes than in the working arrangements effected by particular lawyers.⁶⁷ It is clear that a female partner who works flexible hours for the purposes of family responsibilities suffers repercussions, even if the variation in time worked is minimal:

You're not going to be considered one of the top performers if you are taking that time for your family. ... "We don't really need to give you a bonus and we don't need to take your contribution as seriously as somebody who's here 18 hours a day." ... My daughter has violin on Tuesday mornings, so I don't get in until 9:30 and ... if somebody wants to talk to me, well they'll just have to wait. And now there's the perception that I go home to relieve my nanny at 5:30 three days a week, or two days a week ... and that is just something that is completely unheard of with the male partners, so I don't feature in bonuses. I don't feature in any sort of extras as a partner.⁶⁸

In view of the adverse ramifications of flexible work, the take-up rate remains low.⁶⁹ There also appears to have been a drop in the promotion of lawyers engaged in non-traditional work arrangements, other than part-time positions.⁷⁰ Thus, despite the high hopes for flexible work as a solution to the gender conundrum, the reality is that those who want a life—as well as a career—go elsewhere. Alternatives include moving to a smaller firm, the public sector, or an in-house position and accepting less money, or moving overseas and competing in a bigger pool for even greater rewards. It is also apparent that disenchanted women are continuing to leave the profession in increasing numbers.⁷¹

You see women leaving the profession all the time ... often they are fantastic lawyers and probably in three days a week could do the same work a lot of male lawyers might do in five, but simply because there is that ingrained "you've got to be there five days a week".

⁶⁷ *Ibid.*

⁶⁸ Interview with female partner, 6 October 2005.

⁶⁹ New York City Bar Committee on Women in the Profession, *Best Practices for the Hiring, Training, Retention and Advancement of Women Attorneys* (New York: New York City Bar Association, 2006) at 24.

⁷⁰ This finding is based on a survey of the top 60 firms in Victoria, Australia. Patterson, *supra* note 5 at 4.

⁷¹ See Victoria Women Lawyers, *Taking up the Challenge*, *supra* note 37. See also Victorian Women Lawyers, *Flexible Partnership*, *supra* note 55. The situation is similar in New York: "[M]any women opt to leave work altogether rather than risk being branded with the pejorative 'mommy track' label associated with part- and flex-time schedules." New York City Bar Committee, *supra* note 69 at 24.

sort of belief; it is very difficult. ... As soon as you indicate you want to work part-time for whatever reason, and this applies to the men as much as the women, you are immediately taken off that [partner] track because the perception is that you can't dedicate.⁷²

In an endeavour to circumvent the full implications of flexible work policies, we see an almost perverse meaning accorded to the term "part-time" by the profession, as it is defined as "a practitioner working less than full-time hours to achieve a full-time budget."⁷³ Lawyers are expected to be connected to the firm even if they are officially working only three days per week:⁷⁴

The feedback I get from my friends and colleagues who are working moms is that they feel like the two days are forever encroached upon by mobile phones ringing in.⁷⁵

And she says, "What happens is that I'm really doing a five-day job and getting paid four days a week for it."⁷⁶

I've worked part-time for a long time ... It's almost like you're having to prove ... that you're committed ... I think it's like, "Yes, of course I can do that, and sure, I'll do that on my day off. No problem!" So you're almost being part-time without being part-time ... because you're constantly aware that people will perhaps be looking at you saying, "Are you committed?" and you're really having to prove yourself 110 per cent.⁷⁷

The feeling that one cannot really avail oneself of flexible work policies and say "no" to intrusive requests reveals how a part-time arrangement is insidiously transmuted into a full-time commitment, a phenomenon the American literature refers to as "schedule creep."⁷⁸ The fact that the phenomenon occurs at all highlights the ambivalence of law firms towards their own policies.⁷⁹

A major dilemma associated with flexibility is that of invisibility. It seems to be that "the only time you're adding value is if you're at your

⁷² Interview with male senior associate, 4 August 2005.

⁷³ Victorian Women Lawyers, *Flexible Partnership*, *supra* note 55 at 29.

⁷⁴ Rhode, *Balanced Lives*, *supra* note 63 at 11.

⁷⁵ Interview with male partner, 28 November 2005.

⁷⁶ Interview with male partner, 22 November 2005.

⁷⁷ Interview with female partner, 22 November 2005.

⁷⁸ Williams, Thomas Calvert & Cooper, "Better on Balance?" *supra* note 53 at 416.

⁷⁹ The same ambivalence is apparent in the United States. The American Bar Association Commission on Women in the Profession study dramatically supports this proposition in that while 95 per cent of law firms have policies that allow part-time work, only 3 per cent of lawyers actually work part-time. See Rhode, *Balanced Lives*, *supra* note 63 at 12.

desk in the office."⁸⁰ The significance of lack of bodily presence militates against flexible work; it means that you can expect to be sidelined.⁸¹

The objection to bodily absence can be met by job-sharing, although this carries with it its own set of problems and prejudices and is rarely used. It is disliked by firms because of the lack of continuity, although it can work if two lawyers get together and plan their relationship and responsibilities beforehand.

The pressure to be seen has been internalized by lawyers in accordance with Foucault's idea of governmentality.⁸² This means that it is not necessary to have the managing partner delivering a lecture, or colleagues making snide remarks about leaving the office early, because lawyers govern themselves. They have internalized the idea that the norm of bodily presence is an integral dimension of the culture of legal practice:

It is something that is overridingly put into people's psyche ... you've got to be seen. Whatever we say, I suffer from it ... fear and guilt, the great Catholic motivators. You've got to be seen to be there. If you're not there, there's still that inherent suspicion about people working. If you're working from home, how can you be monitored, and are you really working?⁸³

Bodily absence suggests that the telecommuting lawyer does not add value to the firm in the same way as the lawyer who drinks with clients does:

You spend less time at the office, certainly as a partner ... instead you are at your clients' offices or with them after work; taking them out for a bite to eat or a drink. ... All of that is part of nurturing and growing a business. It is building relations with your clients. ... So, that's not billable, but for partners that's not important. ... It's the work you as a partner bring in to sustain your business.⁸⁴

There is a legal professional standard against which non-traditional workers, including flexible workers, are measured and found wanting. The fine-sounding lawyerly rhetoric advocating flexibility is quickly shed when it comes to the crunch, although being able to avail

⁸⁰ Interview with female partner, 27 January 2006.

⁸¹ Thornton, *Dissonance*, *supra* note 7 at 246.

⁸² Michel Foucault, "Governmentality" in Graham Burchell, Colin Gordon & Peter Miller, eds., *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991).

⁸³ Interview with male partner, 7 December 2005.

⁸⁴ Interview with male partner, 10 November 2005.

oneself of flexible practices may depend on where one is positioned in the hierarchy. It is clearly easier for a partner than for a junior associate to work more flexibly. Even then, however, an ongoing commitment to part-time work is going to be viewed with far greater suspicion than an ad hoc one:

So, if I want to go and get my hair cut, I just go and get my hair cut, so in that sort of thing there's flexibility. ... If I was having to pick up a child at 9:30 every day, or drop off a child, then that would be harder. ... Yes, as soon as you have to actually reduce the hours, it becomes, I think, very difficult.⁸⁵

There is a degree of flexibility in professional practice, in that if I don't have a commitment, a meeting or something that has to be done at the moment, I can go home, I can see my kids' Christmas concert without any problems at all. It just goes into the diary and it's scheduled in.⁸⁶

Q: So, if you have a sick child, you can work from home that day?

A: Yes.

Q: Could you do that if you were a third year, fourth year lawyer?

A: Only if you've got an understanding partner. I'd hope most could, but I couldn't guarantee that.⁸⁷

Thus, despite the rhetoric, being available for anything less than full-time work is construed as evidence of lack of commitment—even of slothfulness.⁸⁸ This includes working “only” an 8-hour day—a major achievement of the labour movement. That is, the full-time norm for the majority of workers is re-defined as part-time for lawyers in private firms:⁸⁹

I think we kid ourselves if people think they can work 9-5 without actually getting that much done. Maybe the law is not for them at all. That's a choice you make.⁹⁰

I can feel the daggers in my back as I walk out at 5:30 but I've talked to my partner about working the three days I work. I work 7:30 in the morning until 5:30 at night. That's my standard hours, so I can catch a particular train home and see my children before they go to bed. ... And if you can say to [other lawyers in your work area], “Don't look at me as

⁸⁵ Interview with female partner, 16 September 2005.

⁸⁶ Interview with female partner, 22 November 2005.

⁸⁷ Interview with female partner, 22 November 2005.

⁸⁸ Victorian Women Lawyers, *Flexible Partnership*, *supra* note 55 at 33; Buonocore Porter, *supra* note 29 at 64.

⁸⁹ Nancy E. Dowd, “Resisting Essentialism and Hierarchy: A Critique of Work/Family Strategies for Women Lawyers” (2000) 16 Harv. Blackletter L.J. 185 at 200.

⁹⁰ Interview with female partner, 19 August 2005.

the bludger who only comes in three days a week. Look at me as the extra person who comes in for three days that can help you out."⁹¹

The long-hours culture has undoubtedly become more deeply entrenched as a result of increased competition. Women who favour flexible work practices provide a justifiable reason for being tacitly removed from the partnership track on the grounds of their dubious commitment to the firm.

In view of the negative repercussions of flexible work practices, there is very little evidence of men making regular use of them.⁹² None of the men interviewed, nor any of their colleagues in the big corporate firms, undertook alternative work arrangements to care for children—although one or two were simultaneously studying for a masters degree or pursuing alternative interests in academia, business, or sport. It was assumed that these activities, unlike caring, were adding value to the firm:

They will let footballers ... work part-time to make their training commitments, or if you are an Olympic skier or very talented. This guy I knew worked four days but he was incredibly talented and came from a great musical family—so if you have some shining star which might reflect the firm.⁹³

Full-time commitment is associated with those who claim to be the indigenous inhabitants of corporate law firms—"benchmark men." In addition to being male, they tend to be white, Anglo-Canadian, heterosexual, able-bodied, and middle class.⁹⁴ Where part-time work is not specifically prohibited for male lawyers in the big firms, powerful normative pressures prevail to discourage them from having recourse to flexible work, as it is perceived to be feminized. One part-time male lawyer who did not do billable work was "seen as a bit of a wimp."⁹⁵ Even a father's going home "early" at 5:30 to see his children was construed negatively by his colleagues.

Because of the ongoing debate about the role of gender at work and how to resolve the problem of family responsibilities, it is

⁹¹ Interview with female senior associate, 8 November 2005.

⁹² In one top-tier firm, a number of rights to work part-time were specifically limited to women.

⁹³ Interview with female solicitor, 23 January 2006.

⁹⁴ They represent the standard against which "others" are measured and invariably found wanting. Thornton, *Dissonance*, *supra* note 7 at 2.

⁹⁵ Interview with female senior associate, 8 November 2005.

convenient to fall back on the construct of individual choice. This has become the favoured refrain of neo-liberalism. If a woman with family responsibilities cannot manage everything as a full-time lawyer and her career founders, the explanation inheres within her individual choice. Similarly, choice is supposed to explain why there are so few women at the top of the hierarchy.⁹⁶ In fact, it may mean that women have very few options from which to choose.⁹⁷

The preference theory of conservative labour market theorist Catherine Hakim has been invoked to legitimize the inferior position of women in the workforce generally.⁹⁸ Hakim argues that the differences between the labour market experiences of men and women arise from the lifestyle choices they make, including choosing part-time work. She distinguishes between work-centred women, home-centred women, and adaptive women. The first two groups are self-explanatory, while the third refers to women who place their families first and fit paid work in around their needs. Hakim's theory affords a convenient justification for the paucity of women partners, which can be ascribed to individual choice. In this way the systemic issues that deleteriously impact on women are glossed over. If effecting a balance is too difficult and a talented woman drops out because of the lack of institutional support, it is assumed that she has made a personal choice: "Life is full of options and personal choices and I think sometimes it's unfair to blame work."⁹⁹ She has "chosen" to put her family first, which justifies her relegation to knowledge management. The choice factor also legitimizes the resentment towards colleagues who work part-time:

I've chosen not to have [a] family. But [of] these women who work part-time, I'm the one ... who's called in by the partners to do the extra work and I virtually have to collect the tab.¹⁰⁰

"Blaming" women for their "non-success" through the discourse of choice also serves to sustain the disorderly subtext associated with women lawyers. So great is the antipathy by firms towards anything

⁹⁶ Dowd, *supra* note 89 at 192.

⁹⁷ Smith, *supra* note 16 at 697.

⁹⁸ Catherine Hakim, *Key Issues in Women's Work: Female Diversity and the Polarisation of Women's Employment*, 2d ed. (London: Glasshouse Press, 2004).

⁹⁹ Interview with male partner, 22 November 2005.

¹⁰⁰ Interview with female partner, 1 December 2005.

perceived to be less than total dedication that change is clearly going to require more than “just a matter of time.”

D. *Flexible Partnerships*

People need to see a partnership for what it is, which is access to more income It doesn't make you a better person; it doesn't make you a better lawyer.¹⁰¹

Promotion to partnership occurs at a significantly slower rate for women than for men.¹⁰² The disparity between the number of male and female partners is marked.¹⁰³

We still have the same problem that most firms have ... I think we've got one woman equity partner and the balance are non-equity partners. So, the power still is definitely with the boys.¹⁰⁴

There are 170 or 180 partners, mainly male ... so maybe, gosh, a sixth, a seventh, would be female, maybe? But predominantly male.¹⁰⁵

Yes, 240 [partners]. Goodness, that's a difficult one. I would guess and it is only a guess that it would be around 20 per cent female, so I'm conscious it's not a fantastic ratio.¹⁰⁶

Yes, we have 45 [partners] currently and female partners would be three, so there is a slight gender imbalance.¹⁰⁷

The conjunction of masculinity and authority is insidiously constructed through the allocation of high status work. Leaving aside the issues of maternity and child care, women are more often assigned work that does not entail high billable hours.¹⁰⁸ It is then averred that

¹⁰¹ Interview with male partner, 7 December 2005.

¹⁰² New South Wales, Ministry for the Status and Advancement of Women, *Gender Bias and the Law-Women Working in the Legal Profession in New South Wales* (Sydney: NSW Ministry for the Status and Advancement of Women, 1995).

¹⁰³ Women comprised an estimated 17.8 per cent of partners in Australian law firms in 2001-02, a figure that does not distinguish between equity and non-equity partners. See Australian Bureau of Statistics, *Legal Practices: Australia 2001-02. 8667.0* (Canberra: Australian Bureau of Statistics, 2003) at 11. The comparable figure in the United States is remarkably similar—17 per cent (also not disaggregated). New York City Bar Committee, *supra* note 69 at 2.

¹⁰⁴ Interview with female partner, 27 January 2006.

¹⁰⁵ Interview with male partner, 7 December 2005.

¹⁰⁶ Interview with male partner, 28 November 2005.

¹⁰⁷ Interview with male partner, 6 February 2006.

¹⁰⁸ Kate Eastman, “Sex Discrimination in the Legal Profession” (2004) 27 U.N.S.W.L.J. 866 at 874.

they have performed less well when they apply for partnership. The resistance towards the feminine in positions of authority and high income is compounded by flexible work and bodily absence.

The Victorian Women Lawyers study, *Flexible Partnership*,¹⁰⁹ addresses the dilemma. Despite the much touted work/life balance, the view has been adopted by many law firms that part-time partnerships are not a viable career option.¹¹⁰ Nevertheless, some large firms have reluctantly accepted the idea of a part-time equity partnership sought by a person who is *already* a partner, although even that is regarded with suspicion.¹¹¹

We amended our partnership record two years ago to allow part-time partners, which we didn't allow previously. That was largely, not exclusively, but largely to cater for mothers who were partners and had other commitments. So there's no legal barrier. I'm not even sure there is a ... cultural barrier ... but I think that there is enough of the economic rationalist sort of clique within the partnership to make part-time partners, most of whom are going to be mothers, unattractive.¹¹²

Promotion to part-time partnership from associate status is most difficult, for it directly challenges the full-time worker norm. It presently constitutes the major site of contestation for women lawyers.

But first, what are the criteria for partnership? The construction of merit is perennially elusive in the context of status positions.¹¹³ The more prestigious the position, the less likely there are to be formal criteria at all, a practice that prevails until a woman is appointed.¹¹⁴ Only then are criteria likely to be adduced, in respect of which the woman in question may be found to be deficient. Those who are black, gay, or lesbian will also attract additional scrutiny as they will be seen to be disrupting the norm of benchmark masculinity.

¹⁰⁹ Victorian Women Lawyers, *Flexible Partnership*, *supra* note 55 at 5.

¹¹⁰ Research undertaken by the New South Wales Law Society for the Gender and Industrial Issues Task Force a decade ago found that part-time employment was not generally regarded to be a viable option. More than 700 solicitors were involved in the survey. See *ibid* at 16 and Herman, Adam & Hammond Meazell, *supra* note 45 at 14.

¹¹¹ Victorian Women Lawyers, *Flexible Partnership*, *supra* note 55 at 5.

¹¹² Interview with male partner, 10 November 2005.

¹¹³ Margaret Thornton, "Affirmative Action, Merit and the Liberal State" (1985) 2 *Austl. J. L. & Soc.* 28.

¹¹⁴ Caroline Kirton, "Has the System Failed Women?" (Speech presented to the Australian Bar Association, October 2006), online: <<http://www.womenlawy.org.au/publications.htm>>.

While most large and some medium-sized firms have formal written criteria, others have none at all, which has allowed nebulous add-ins to be included. For example, some participants alluded to the “X” factor, or “fitting in” with the rest of the firm, and not having “rubbed anybody up the wrong way.”¹¹⁵ These are classic expressions of homosociality that allow the balance to tip in favour of a “safe” candidate who most resembles the decision-maker. That is, *he*, as this ideal candidate will invariably be, is unlikely to be pregnant, “potentially pregnant,”¹¹⁶ or engaged in primary care. The disproportionately small percentage of women partners also means that there are few women in partnership management who can act as decision-makers. In any case, the authority of female partners is often “more ostensible than real,”¹¹⁷ reflecting the misogynistic sub-text of the construction of merit. To justify the low proportion of women in partnership management, the progressivist “just a matter of time” refrain becomes audible once again, suggesting that the gender profile is likely to change once additional female partners are appointed.¹¹⁸

Gender, personality, and luck are all factors that are thought to influence the transition to partner. Others see having an influential mentor, such as a member of the management committee, as the key to success. Class affiliations may also play a part, particularly so far as “old school tie” connections are concerned, although this factor appears to be less overt than it once was:

Things like background don't impede career advancement at all. It is interesting that whilst everybody now looks upper middle class, quite a large percentage of people didn't come from that background. It is simply that they have adopted the mores and approaches of somebody who earns what they earn.¹¹⁹

Other more conventional criteria emphasize competition and business-generating skills:

¹¹⁵ Victorian Women Lawyers, *Flexible Partnership*, *supra* note 55 at 31.

¹¹⁶ *Sex Discrimination Act 1984* (Cth.) was amended in 1995 to include this rather odd phrase to cover the case of discrimination against a woman capable of or perceived to be capable of bearing a child.

¹¹⁷ Justice Catherine Branson, “Running on the Edge” (Address to the Women Lawyers’ Association of New South Wales, October 1997), online: <<http://www.womenlawy.org.au/publications.htm>> (accessed 22 March 2007).

¹¹⁸ Victorian Women Lawyers, *Flexible Partnership*, *supra* note 55 at 31.

¹¹⁹ Interview with male partner, 19 August 2005.

- legal expertise/knowledge;
- his/her own practice/client base;
- a certain level of billing including supervised billings;
- administrative skills;
- supervision of staff including mentoring skills; and
- marketing skills.¹²⁰

All these criteria, nevertheless, have to be evaluated, a process that is no less subjective than the application of the “X” factor. While the criteria have a descriptive dimension, they cannot be weighed up scientifically.

Underpinning all criteria is the unremitting commitment to hard work, which also tends to be understood in masculinist terms:

We’re still very much a profession that values hard work and so that often cuts out women with family commitments.¹²¹

If you had two very good candidates and one is willing to work longer hours than the other, well why wouldn’t you go to the one who’s willing to work longer hours?¹²²

“Hard work” is synonymous with the idea of law as business, for the candidate has to be a “good marketer” who attracts clients. The ideal is someone “who can wander out to lunch with someone they’ve never met before and come back with a handful of files, but that is the exception rather than the rule.”¹²³ If a person is super competent and possesses marketing skills, imperfections of all kinds can be forgiven: “Occasionally, that means you can be a bully or a sexual harasser or something like that, and that will be put up with as well.”¹²⁴

It is the proven ability to sustain and build client relationships that epitomizes hard work. This entails a certain depth of relationships with key clients so that lawyers do not have to re-market their services on each occasion. The increasingly insecure environment in which law is practised makes ongoing relationships with corporate clients crucial. The future of a firm can hinge on being retained by one multinational corporate client. Hence, there is a correlative desire “to have a greater

¹²⁰ Victorian Women Lawyers, *Flexible Partnership*, *supra* note 55 at 31.

¹²¹ Interview with female partner, 22 November 2005.

¹²² Interview with male partner, 23 September 2005.

¹²³ Interview with male senior associate, 17 January 2006.

¹²⁴ Interview with male partner, 19 August 2005.

certainty or faith in the person that you're promoting to partner."¹²⁵ Thus, any factor that raises a doubt about future performance—particularly in economically rationalist terms—may suffice to tip the balance against a candidate in the partnership stakes. The nexus between conservatism and benchmark masculinity is reinforced in the current climate, causing those who work part-time to be viewed as risky:

I think that there is enough of the economic rationalist clique within the partnership to make part-time partners, most of whom are going to be others, unattractive. They just say that part-time partners of necessity cannot pull their weight like a full-time partner can. Partnership is a full-time occupation—all for one, one for all—and if you're not prepared to make that level of commitment to your co-partners, in managing and growing and nurturing the business, then that is fair enough. That's your view, but therefore you do not become a partner. I'm not saying that's my view, but you can imagine that from a business perspective, it's not an argument that's entirely without merit.¹²⁶

Finally, successful corporate lawyers must be political players. They must aggressively promote themselves and “play the political game ... even if it doesn't suit [their] personality.”¹²⁷ While not wishing to be essentialist about this, self-promotion is more likely to be culturally associated with male, rather than female, behaviour. It can therefore be seen that the construction of merit clearly works against women being the “best” candidates.

To overcome the skewed gender profile at partnership level, special measures have been advocated by lobby groups. However, anything construed as affirmative action (AA) occupies an ambivalent status within liberalism, which privileges equal treatment, even though, as Aristotle recognized, treating in the same way those who are differently situated can produce a form of injustice.¹²⁸ Hence, while differential treatment may be philosophically justifiable within a substantive interpretation of equality that focuses on end results, the gender-conscious strategies of AA are strongly opposed not just by male lawyers, but by women too, who equate it with unjustifiable preferential treatment. The anti-AA rhetoric has become vociferous with the rise of

¹²⁵ Interview with male partner, 22 November 2005.

¹²⁶ Interview with male partner, 10 November 2005.

¹²⁷ Interview with female partner, 6 October 2005.

¹²⁸ Aristotle, *Politics*, trans. by John Warrington (London: Everyman Library, 1968), 1282b-1283a.

neo-liberalism.¹²⁹ Characterising flexible work strategies as a form of AA that contravenes the equal treatment principle is therefore an effective way of denigrating them. Those without family responsibilities resent having to assume carriage of weekend and evening functions, or taking over tasks when a colleague has to leave early. Most resented is a financial benefit going to a partner who has spent time on family responsibilities, regardless of how efficient they might be at work.

The ideal female appointee is the exceptional woman who has done everything without what she regards as special consideration. These superwomen are powerful role models for the status quo:

There is a partner in our Sydney office who is a mother and she brings in ... more money to this firm than any other partner in the place. ...If someone goes to her and says, "Well, look we think women should be treated a little differently because of their other mothering commitments," she will shoot you down in flames. So one of the impediments which mothers and women have to get around ... within this organisation is other women and other mothers because they've done it. ...They make a lot of sacrifices to do that and God only knows what their home life is like or the kids are like, but they say, "It can be done, and the reason why I know that is because I've done it."¹³⁰

The women who have babies make it their point to be back at work the next week. And Mary X, who is the equity female partner that everyone is fearful of—she has five kids and she boasts about how well she does. ...The myth is "Look at Mary X." These are role models of women who have kids and go back to work. She has a full time nanny; she is a multi-multi-millionaire.¹³¹

The image of the exceptional woman effectively puts to rest the idea of part-time equity partnerships. Unless a woman who is seeking to work part-time is already a fully-fledged equity partner and generating a comparable amount of business as male partners, a non-equity partnership may be the only option. The partnership, as a community of equals, struggles to tolerate the resentment and dissension arising from one person not doing the same work in the same way as everyone else (other than in an emergency). The masculine majority is able to invoke its power to interpret justice as formal and not substantive equality, in a way that occludes difference.

¹²⁹ In 1990, the words "affirmative action" were removed from the *Affirmative Action (Equal Opportunity for Women in the Workforce) Act 1986* (Cth.) as a result of pressure from the Business Council of Australia. See Margaret Thornton, "EEO in a Neo-Liberal Climate" (2001) 6 *J. Interdisciplinary Gender Stud.* 77.

¹³⁰ Interview with male partner, 10 November 2005.

¹³¹ Interview with female solicitor, 23 January 2006.

The “culture of workaholism” has become so ingrained that there is a predilection towards imbalance in the lives of partners, but is the pathological partner a desirable model?

The problem is that it takes a certain personality these days to become a partner—unless you are in a very specific or unique situation, or you are a superstar who just always was going to be a partner. I am not always convinced, having seen a lot of partners in action, that they are necessarily balanced people to start with—and I am not saying balanced in an unhealthy way but unbalanced in that they are very focused on financial gains—you don’t necessarily see them leading very healthy personal lives.¹³²

The evidence reveals that family dysfunction and divorce are the social costs of workaholism, underpinned by relentless competition and pressure:

Our area has a litany of failed marriages, which is too much to be a complete coincidence. And I know from my own marriage that a big deal does put some pressure on and I have tried to manage that. ... I can go home at sort of 6:00, 6:30, read a story to the kids and then retreat back to the shed. So they know their dad; they’re not calling out “stranger danger” when I walk in. But I have to say that doesn’t mean you spend any more time with your wife.¹³³

E. *Markets and Partnerships*

The spirit of workaholism characterizes both corporate legal practice and the competitiveness that has transformed the legal workplace.¹³⁴ Australia has a disproportionate number of large law firms but a limited corporate client base.¹³⁵ The result is that law firms are aggressively competing with one another for increasingly fickle clients as they desperately seek to maximize profits:

You’ve got huge firms slashing each others’ throats. And you’ve got still an expectation within partnerships of a level of income that in real world terms is disproportionate—if I can put it nicely. So all those pressures combine to make the road to partnership very difficult and the need to be able to have a business case for one’s ascension is a bit counterintuitive to the model ... [but] the associates underneath are doing the work.

¹³² Interview with male senior associate, 4 August 2005.

¹³³ Interview with male partner, 28 November 2005.

¹³⁴ The evidence suggests that Australia, like the United States, generally has a disproportionate percentage of the male workforce working very long hours—with 20 per cent working more than fifty hours per week. See Smith, *supra* note 16 at 697.

¹³⁵ For a profile of the Australian legal profession, see Margaret Thornton, “The Australian Legal Profession: Towards a National Identity” in William L. F. Festiner, ed., *Reorganisation and Resistance: Legal Professions Confront a Changing World* (Oxford: Hart Publishing, 2005).

From the partners' perspective, they've got to be secure enough in their own practice and professional wellbeing to be able to let go of a few clients and say, "You take these and develop them as your own."¹³⁶

Fickle and demanding clients have to be wooed and pandered to: "Your clients are God."¹³⁷ Corporations, invariably operating within internationally competitive markets themselves, are choosing to deal with a greater proportion of routine legal work in-house. For specialist advice, they want cut-price legal service.¹³⁸ Everything has to be done instantaneously, so there is an expectation that lawyers should be constantly available, which directly challenges the idea of part-time work. If the service afforded by the law firm does not measure up, the client will go elsewhere. The client can therefore hold the firm and its lawyers ransom.

The competitive mores of globalization exacerbate the pressure on multinational corporations, as well as law firms:

It's the clients and their corporate advisers [driving it], bearing in mind that the corporate advisers are on success fees, and for them every day that the deal's running and they haven't been paid is a cost to their business. The constant driver is the investment banks who are the main intermediary ... and the pressure on the law firms is the indirect phenomenon.¹³⁹

Eighty-five per cent of my client base [is] in a number of different time zones. I've got a substantial number of American clients; I've got a substantial number of European clients. It means, quite apart from the fact that I don't get a lot of sleep because I have to be on the phone at odd hours during the night, I've got East Coast, I've got West Coast and I've also got English and French clients. It also means that because we do some litigation that is multi-jurisdictional, for example, we are currently acting on behalf of a party in the X litigation. The X litigation has been ongoing in up to 28 jurisdictions around the world.¹⁴⁰

The pressures of global practice on lawyers trying to effect a work/life balance is immense. In addition to having to be available during the night, this work is also likely to involve extensive travel, thereby heightening its gendered predilection.

There has probably always been a competitive element in the structuring of law firms, although partnership was once a virtually

¹³⁶ Interview with male partner, 28 November 2005.

¹³⁷ Interview with female senior associate, 6 October 2005.

¹³⁸ Rhode, "The Profession," *supra* note 37 at 1339.

¹³⁹ Interview with male partner, 28 November 2005.

¹⁴⁰ Interview with female partner, 28 July 2005.

foregone conclusion in small firms. After several years of apprenticeship, it was assumed that a lawyer was entitled to an equitable interest in the firm. The “corporatization” of law firms, in which mergers and amalgamations led to the creation of large bureaucratic organizations resembling the corporate clients they represent, has threatened this once normal expectation. The phenomena of nationalization and internationalization have also raised the stakes and its subsequent rewards. Within these mega-firms, competition for partnership has become fierce, as the number of equity partners reaches what is deemed to be an optimal level. Exclusivity in management is maintained through selection practices that let in a small complement of candidates who are paid considerably large amounts of money.” As in the United States, lawyers’ incomes have increased substantially, while satisfaction levels have dwindled.¹⁴¹ There is concern that any increase in the pool of partners could reduce incomes and cause the top lawyers to depart for greener pastures. This jealous safeguarding of benefits has led to even greater scrutiny of candidates for partnership:

Well, we’ve got 50 partners now. If we add one, then we’re cutting down on how much we each get.¹⁴²

The rate at which we make partners has slowed ... the partners want to be more convinced that this person is going to have all the qualities we talked about before, and will be able to produce for the office, bring work in, do this, do that, and I think that means a tendency ... to have a greater certainty or faith in the person you’re promoting to partner.¹⁴³

Although membership of the inner sanctum is no longer the exclusive prerogative of “benchmark men,” the women who are admitted are expected to adhere to the masculinist norm of workplace dedication and inflated billing targets.

The corporatization of law firms also means that many lawyers will forever remain in managed positions, as firms aim for a pyramidal balance between partners, senior associates, and junior lawyers. To maintain exclusivity at the apex, additional sifting mechanisms in the process of selection have appeared in some firms, such as the identification of an area of need, which is specified in economic terms:

¹⁴¹ Rhode, “The Profession,” *supra* note 37 at 1340.

¹⁴² Interview with male senior associate, 17 January 2006.

¹⁴³ Interview with male partner, 22 November 2005.

In the old days ... it was sufficient if you were good enough and had all the personal qualities. ... Whereas now there needs to be a perceived business need to make a partner in a particular area, and *then* you look for the right person.¹⁴⁴

Also notable is the way the privileging of the *business* of legal practice has caused the significance of legal professionalism to wane. The partnership as a manifestation of professional excellence has also declined in importance. The idea of law as business has even led to lawyers in law firms describing themselves as businessmen:

It's like someone who owns the corner deli. I mean the corner deli might be open at 7 and close at 7, but they spend a lot longer at their business—getting it ready each day and making the sandwiches, stacking the shelves, dealing with the books, dealing with the accounts. That's what equity partners have to do, for their business, and I see that as being a real block-out for work/life balance for everyone once they get to partnership level. We're businessmen. ... It's the difference between being a lawyer as a ... professional only and being a lawyer as a business person where you are running and owning a business in conjunction with the partners.¹⁴⁵

The necessity of meeting specified billing targets has entrenched profits at the expense of the service mentality:

Law is competitive. ... You never like to say no. ... We have this little mantra here apparently that we're supposed to follow: "If you want to do the work at this time for this client at this price and if the answer to any of those is no, then you should say, 'Sorry, I can't do it.'" But that's an easier thing to say than to actually do. What will happen is that [the client] will go somewhere else, and once you've lost that [one], then the chances are you'll lose the next one and the next.¹⁴⁶

The way that business has supplanted service is an international trend, one that has been explored in detail in the American context by Anthony Kronman¹⁴⁷ and Mary Ann Glendon,¹⁴⁸ both of whom rue the passing of the good-citizen lawyer.

In picking up on the idea of law firms as good corporate citizens, there appears to be a total disjuncture between flexible work practices and competition policy, which is obscured by workaholism. In light of this reality, one must question how women can ever be accepted as

¹⁴⁴ Interview with female partner, 1 December 2005.

¹⁴⁵ Interview with male partner, 10 November 2005.

¹⁴⁶ Interview with male senior associate, 17 January 2006.

¹⁴⁷ Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Massachusetts: The Belknap Press of Harvard University Press, 1993).

¹⁴⁸ Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession is Transforming American Society* (New York: Farrer, Strauss & Giroux, 1994).

equals within the jurisprudential community in light of the limited success in encouraging men to focus less on their careers in order to take greater responsibility for caring for children and elderly relatives. The centrality of the normative worker as both full-time and male seems to be almost impossible to dislodge.¹⁴⁹ The pressures on male lawyers in large corporate firms *not* to work flexible hours or play an active role in caring are immense. Even having children, once an unequivocal good for a male lawyer, may now be perceived as a drawback—especially if his partner (not unreasonably) expects support from him:

We've got a young fellow who's not even 30 and he's just had baby No. 2 and he's needed to be really supported here because his wife's quite demanding at home, and so you know people have had to pick up the slack around here but ... he'll come to a stage where he won't be supported and that wife and those two children will not see him for three years while he is on the partnership track and so you know in a way he might have disadvantaged himself by having a family.¹⁵⁰

Changing partnership norms so that there is less money but less pressure would seem desirable, but it would require partners to surrender a portion of their income and status.¹⁵¹ This is a lot to ask in a society where wealth has become a key indicator of worth. A proposal to work a nine-month year in the present climate, for example, would appear to be fanciful.¹⁵² More realistic would be the appointment of additional staff to share the burden of work, but there is still likely to be resistance to the cost:

The problem with that is that you've got a very, very high salary bill and you've got a lot of fixed overhead and if, for some reason, you had a quiet period between major deals, you've got a lot of hungry mouths you've got to pay for without the revenue coming through ... You can't afford, for a firm this size, to have lots of people hanging around waiting for the big deal to come along.¹⁵³

¹⁴⁹ Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (New York: Oxford University Press, 2000).

¹⁵⁰ Interview with female associate, 6 October 2005.

¹⁵¹ A study by the Radcliffe Public Policy Center in Cambridge, Massachusetts of men in their 20s and 30s found that 70 per cent were willing to take lower salaries in exchange for more family time. See Molvig, *supra* note 18.

¹⁵² R.M. Paris, "Work, Time and the Lawyer" (2005) 63 *Advocate* 307.

¹⁵³ Interview with male partner, 6 February 2006.

IV. CONCLUSION

Competition and corporatization have made the path to partnership in corporate law firms more difficult for everyone, but this impact falls disproportionately on women. The corporeality associated with the feminine and the private sphere detract from women's authority as serious contenders for the most highly remunerated partnerships. The "male nurturer" retains its tautological overtones, which suggests that much more than just structural adjustment is required to actually modify prevailing norms:

I think very slowly our society is changing whereby blokes, if I may use that expression, are able to [act as primary caregivers] without feeling that they're lesser mortals and without sort of feeling any social opprobrium, but there's still got a long way to go.¹⁵⁴

Hope may lie with generational change. A distinctive characteristic of Generation X (born in the 1970s) and Generation Y (born in the 1980s) is that they are less obsessed with work than baby boomers. Reflecting the fickleness displayed by corporate clients in an age of insecurity and declining loyalties, they do not expect to remain with the same employer indefinitely.¹⁵⁵ They find overly specialized legal work to be monotonous and repetitive, and they are all too aware of the high level of dissatisfaction within the legal profession that has given rise to stress and depression.¹⁵⁶ The "pot of gold at the end of the rainbow"—a million dollar-plus partnership within an elite corporate firm—does not compensate for giving up on a life. These young lawyers would rather do interesting work than earn huge salaries.¹⁵⁷ They recognize that a culture that values long hours and a subsequent lack of work/life balance has contributed to unhappiness.

¹⁵⁴ Interview with male partner, 22 November 2006.

¹⁵⁵ Patterson, *supra* note 5 at 2. The data suggest that members of Generation X expect to stay between two and five years with the same employer, and members of Generation Y expect to stay about two years. The data from the United States suggest that over 40 per cent of associates leave within three years. Rhode, "The Profession," *supra* note 37 at 1348. On the changing nature of work generally, see Richard Sennett, *The Corrosion of Character: The Personal Consequences of Work in the New Capitalism* (New York: Norton, 1998).

¹⁵⁶ Patterson, *supra* note 5 at 3. A similar phenomenon has been identified in US law firms. See Jill Schachner Chanen, "The Great Divide" (2006) 92 ABA J. 45.

¹⁵⁷ Law Council of Australia, *2010: A Discussion Paper: Challenges for the Legal Profession* (Canberra: Law Council of Australia, 2001).

Generation X and Y lawyers (both male and female) believe that a work/life balance is attainable. Indeed, their resistance to the long-hours culture has already led to an overall decrease in working hours within some firms. Therefore, we are not merely alluding to a biased perception of the younger generation by its elders, but to an empirically demonstrated change. Generations X and Y want to have more time for their families and other things, despite attempts by firms to cull rebels at the outset. The perceived lack of dedication and hard work is greeted with alarm by senior lawyers:¹⁵⁸

They don't want to work as hard as I worked when I was a young lawyer. All I wanted to be was a partner, whereas now they don't ... they're more interested in other things.¹⁵⁹

These kids don't want to work for 12 hours a day and commit to the firm. ... A couple of years ago they started to notice that they were getting recruits that expected work/life balance, that wanted to put their pens down and go home at 6:30, who wanted to go to sport after work or that sort of thing. They stopped that at recruitment level.¹⁶⁰

Generation X and Y lawyers are unlikely to be able to change the competitive corporatized norms of the legal profession overnight, especially in light of the force of globalization and the desire to maximize profits within highly bureaucratized organizations. However, a discernible current of resistance to the domination of the market is apparent, which is destabilizing, particularly in light of the fact that dissatisfaction crystallizes in expensive employment separations and new hiring rounds. It may also cause more established lawyers to take stock and rethink their lives:

I'm a non-equity partner now, and I know that I could probably be an equity partner with not a huge amount of effort, but it would be an effort. And I'm at the stage of my life where I feel like I've worked hard enough for long enough and I just want to cruise for a while, so I'm also not prepared to work in the same way that the Baby Boomer partners worked.¹⁶¹

Despite the tacit support of Generations X and Y for greater diversity in patterns of work, the creation of non-equity categories of

¹⁵⁸ Confirmed by Canadian data. See Jean E. Wallace, "Work Commitment in the Legal Profession: A Study of Baby Boomers and Generation Xers" (2006) 13:2 *Int'l. J. Legal Prof.* 137 at 137-38.

¹⁵⁹ Interview with female partner, 27 January 2006.

¹⁶⁰ Interview with female senior associate, 6 October 2005.

¹⁶¹ Interview with female partner, 27 January 2006.

partnership as a solution has generated a “huge amount of resistance” on the part of at least some women lawyers: “Well, that’s second-best; we don’t want any second-best.”¹⁶² The resistance towards non-equity partnerships arose, according to this participant, because of the perception that the lesser-status positions would be used to prevent women from ever becoming equity partners. The fear is that such initiatives could represent yet another attempt to relegate women lawyers to a subordinate class and retain the apex of the hierarchy as a masculinized preserve.

The key to change would seem to reside in the private sphere as much as in the world of paid work. It is this realm beyond law and policy that remains most intransigent. The reality, however, is that male lawyers in the elite corporate firms do not regard undertaking primary responsibility for child care to be a viable “choice.”¹⁶³ It is doubtful that any male lawyer, including Generation X or Y lawyers, would remain in corporate firms if they chose to do this. Small firms, in-house lawyering, or the public sector are likely to be more accommodating and appealing. The reality is that the men who remain in the corporate firms, like many of the women, are less interested in a work/life balance than in a relentless desire to succeed:

Men come to work and don’t really care about home. That’s fine—happy to leave it there, off for the hunt having to catch the biggest animal. They are having a great time. They work long hours and when they work long hours, it is generally because they want to; they don’t really want to go home. This is their domain. We women believe we are taking time out from our real lives to be here.¹⁶⁴

The research is suggesting that when women and men start out, they have the same career aspirations, but ... when they get to Senior Associate something has changed. The men—a lot of them—still aspire to be a partner but a lot of the women, their priorities in work are quite different. It’s not, “I want to be a partner.” It is more, “I want to have rewarding work. I want to have a good work/life balance.”¹⁶⁵

The interviews suggest that there is still a vestigial belief in biological determinism: women are the natural nurturers, and men,

¹⁶² Interview with male partner, 10 November 2005.

¹⁶³ Joan Brockman, in her study of lawyers in British Columbia, suggests that little has changed for women lawyers on this front in the century since they were first admitted to practice. See Brockman, *supra* note 1 at 195.

¹⁶⁴ Interview with female partner, 28 July 2005.

¹⁶⁵ Interview with female partner, 10 November 2005.

fuelled by testosterone, aspire to bigger practices, bigger transactions, bigger clients, and bigger global deals. Even if there is a consciousness of imbalance in their lives, which may be a source of dissatisfaction, the choice is in favour of inflexible work, with no prospect of amelioration:

You just have a constant feeling that you are disappointing everyone, or you're not satisfying everyone. You leave the office an hour too early and you get home an hour too late. You know every day without fail, you can't do enough at work and you can't do enough at home.¹⁶⁶

Corporatism, competition, and globalization have provided openings for many more lawyers, but unless women lawyers emulate "benchmark men," they are not given what one interviewee described as "the keys to the kingdom." Since the primary aim of the corporatized law firm is to maximize profits and, inferentially, the incomes of partners,¹⁶⁷ attempts to restrict the eligible pool are to be expected. It is convenient to slot those seeking to balance work and family into subordinate, handmaiden roles, such as knowledge management, thereby designating them the new proletariat of corporate practice.¹⁶⁸

This article has focused on the topical discourse of work/life balance, but there is an entire sexualized and corporatized sub-text that serves to entrench the "otherness" of women in law—whether they have children or not. The public rhetoric maintains that a state of formal equality exists between male and female lawyers and that sex discrimination is a thing of the past. The interviews tell a different story. Overt discrimination is undoubtedly less common, but indirect discrimination manifests itself in practices such as the allocation of knowledge management to women returning from maternity leave, a phenomenon that is not easily caught by anti-discrimination legislation.¹⁶⁹ This is because the caring that women do, and the

¹⁶⁶ Interview with male partner, father of a baby and a toddler, 8 November 2005.

¹⁶⁷ If the CEO of a merchant bank receives a salary of AUD33.5 million, the bank's lawyers begin to believe that they are underpaid. ABC News "Macquarie stands by \$33.5m pay packet" ABC News Online (15 May 2007): <<http://www.abc.net.au/news/newsitems/200705/s1923580.htm>>.

¹⁶⁸ Derber describes the proletarianized worker as one who is "powerless to shape either the nature of his [sic] product or the process of his work." See Charles Derber, "Managing Professionals: Ideological Proletarianization and Mental Labor" in Charles Derber, ed., *Professionals as Workers: Mental Labor in Advanced Capitalism* (Boston: G. K. Hall, 1982) 3 at 7; Thornton, *Dissonance*, *supra* note 7 at 273.

¹⁶⁹ K. Lee Adams, "Indirect Discrimination and the Worker-Carer: It's Just Not Working" in Jill Murray ed., *Work, Family and the Law* (Annandale, Aust: Federation Press, 2005); Sara

accommodation they are compelled to make for it in their working lives, is woven into the weave of the social fabric and treated as normal life. It constitutes a form of systemic discrimination that relates to the “hidden” assumptions about appropriate gender roles that modernity has been unable to slough off.¹⁷⁰ The privileging of the market under neo-liberalism has also made the lodgement and pursuit of sex discrimination complaints generally much more difficult.¹⁷¹

Belinda Smith, drawing on contemporary regulatory scholarship, argues for a broader reconceptualization of discrimination law as it relates to worker-caregivers.¹⁷² She envisages a closer integration of a revamped legislative scheme, a compliance programme for employers, and an investment in social change. Self-regulation, however, is a limited mechanism through which to effect change as it allows law firms to substitute their own anaemic interpretation of the work/life balance so as to blanch it of meaning. On the other hand, we are skeptical about the possibility of the state developing a strong regulatory framework within the current political economy. The reality is that governments everywhere are obsessed with how they can better facilitate the market and maximize profits—in order to make nation states more competitive on the world stage. Accordingly, the neo-liberal state is far less willing to delimit employer prerogative today, in the interests of advancing workers’ rights, than was the social liberal state.¹⁷³ The crucial role of corporate lawyers as market facilitators on the global stage makes the prospect of increased state regulation even less likely in the case of law firms.

The empowerment of all women may well be the answer to resolving the inequitable status of women lawyers,¹⁷⁴ but how to get to that point poses a dilemma, although the active role of women lawyers’

Charlesworth, “Managing Work and Family in the ‘Shadow’ of Anti-Discrimination Law” in Jill Murray ed., *Work, Family and the Law* (Annandale, Aust: Federation Press, 2005).

¹⁷⁰ Mossman, *First Women Lawyers*, *supra* note 1 at 73.

¹⁷¹ Margaret Thornton, “Feminism and the Changing State: The Case of Sex Discrimination” (2006) 21:50 *Austl. Fem. Stud.* 151 online: <<http://www.tandf.co.uk/journals/carfax/08164649.html>>.

¹⁷² Smith, *supra* note 16.

¹⁷³ Katherine V.W. Stone, *From Widgets to Digits: Employment Regulation for the Changing Workplace* (Cambridge: Cambridge University Press, 2004). Labour relations in Australia were transformed by the Howard Government through Work Choices, which involved a shift away from Australia’s formerly unique centralized wage-fixing system to enterprise bargaining and individual workplace agreements.

¹⁷⁴ Dowd, *supra* note 89 at 207.

associations and gender bias task forces all over the world has been crucial in galvanizing support. Sensitizing prospective lawyers through the law curriculum has been another strategy,¹⁷⁵ but the conjunction of neo-liberalism and the corporatization of universities has induced a turning away from feminism and diversity. Reflecting the globalized economic turn, attention is now more likely to be devoted to subjects that facilitate the market, such as international trade law, rather than a social justice agenda.¹⁷⁶ The masculinist character of partnerships in corporate law firms is therefore likely to remain an ongoing site of contestation. Undoubtedly numbers help, but reliance on the “just a matter of time” refrain suggests that the wait could take centuries, particularly when new norms are constantly being inscribed on the social script that occlude the resistance to the feminine.

The global economy has contributed to the creation of a new normative environment in which competition and corporatization are quick to exploit any perceived vulnerability in the interests of profits. It would seem that flexible work represents just such an achilles heel in the strategies of women lawyers’ associations and their supporters, for it can be selectively invoked to confine women with family responsibilities to the pyramidal base of the legal hierarchy. This new incarnation of anti-feminism must be exposed and resisted.

¹⁷⁵ In 1993, the Australian Government sponsored an initiative relating to the preparation of gender-sensitive teaching materials on the themes of citizenship, work and violence for use in the core curriculum in law schools. See Regina Graycar & Jenny Morgan, “Legal Categories, Women’s Lives and the Law Curriculum OR: Making Gender Examinable” (1996) 18 *Sydney L. Rev.* 431.

¹⁷⁶ Margaret Thornton, “The Demise of Diversity in Legal Education: Globalisation and the New Knowledge Economy” (2001) 8 *Int’l J. Legal Prof.* 37.

