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Women in the Law

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WOMEN IN THE LAW

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INTRODUCTION

IN 1869 Belle A. Mansfield, reputedly the first female lawyer admitted to practice in the United States, was admitted to the state bar of Iowa.[1] Others soon followed her and this dribble of women entering the legal profession has grown to a persistent and continuous trickle in the twentieth century, but it shows no signs of becoming a flood.[2] At last count approximately 7,000 out of America's 300,000 listed lawyers were women.[3]

Since the practice of law—even in the most masculine and aggressive Perry Mason style—does not require a strong back, large muscles, or any of the other peculiarly male characteristics, one might ask why women account for less than three per cent of all lawyers. That question is only part of a larger and equally puzzling inquiry about the status of women in medicine, engineering, business, and government, but this study cannot hope to answer the

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Gay Ford and Jay Herbst deserve special thanks. Gay endured countless changes in the manuscript and performed with equanimity the tedious tasks of sending, counting, and sorting questionnaires. Jay's skillful and patient service as master of the computer was invaluable. Without him and the computer, we could have made only a few of the comparisons and analyses which appear on the following pages.

1. THOMAS, WOMEN LAWYERS IN THE UNITED STATES at vii (1957).

2. HANKIN & KROHNKE, THE AMERICAN LAWYER: 1964 STATISTICAL REPORT 29 (1965), gives the following female listings:

Year	Total Lawyers Listed	Female Listings	Per Cent of Lawyers Listed in U.S.
1948	171,110	2,997	1.8
1951	204,111	5,059	2.5
1954	221,600	5,036	2.3
1957	235,783	6,350	2.7
1960	252,385	6,488	2.6
1963	268,782	7,143	2.7

3. In 1963, 7,143 woman lawyers (constituting 2.7% of all United States lawyers) were listed in Martindale-Hubbell. See *ibid.* Neither the male nor the female figures take into account the law graduates who are listed in Martindale-Hubbell.

larger question and does not endeavor to do so;[4] rather, its purpose is to investigate a ten-year segment of the small female contingent in the American bar.

In the legal world, both in law school and in practice, one hears a multitude of inconsistent rumors about the composition and status of this female segment of the bar. One source will say that almost all women lawyers are tough, masculine, and querulous; another, with quite the opposite implication, will state that women come to law school only to achieve the feminine goal of capturing a husband by placing themselves in a most advantageous marriage market. One woman will report that she has been turned away by one potential employer after another because she is a woman. Another will report that she is working for an outstanding large city law firm and that she has received treatment from both her employer and other firms which was in no way discriminatory. One counselor will tell a woman to seek a job with a large firm where they can "afford to hire a woman"; another will tell her to find a job with a small firm where her individual abilities and capabilities will be appreciated and where she will be treated fairly.

One purpose of this article is to report data from a large sample of the women who are recent graduates of the country's law schools in order to give some basis for drawing conclusions about what women do and what opportunities are open to them. A second purpose is to compare the status of these women with that of a matched group of male graduates and to examine the possible causes for some of the differences in their status. Finally, we shall make a tentative examination of the forces at hand which might permit a narrowing of the gap which exists between female and male status where such a narrowing seems desirable.

I. The Status of Women in the Legal Profession

A. *The Sample*

In October of 1965 we wrote to each of the 134 accredited law schools in the United States and asked each of them for the name

4. The following bear upon the larger question of the female's status in twentieth century American society: Bernard, Academic Women (1964); Mattfeld & Van Aken, Women & The Scientific Professions (1965); Report of the Committee on Federal Employment to the President's Commission on the Status of Women (1963); Report of the President's Commission on the Status of Women (1963); *The Woman in America*, 93 Daedalus 579 (1964).

and address of each of its female graduates in the classes of 1956 through 1965 inclusive, and the name and address of one male from the same class for each such female. 108 schools ultimately replied to this request and supplied 2,219 female names and 2,151 male names.[5] We mailed questionnaires[6] to each of these women and men. 1,298 female and 1,329 male respondents ultimately returned usable[7] questionnaires; 303 questionnaires were returned as undeliverable; and 26 members of the sample refused to participate in the study. The women who returned usable questionnaires constituted 64.8% of those women whom we believe to have received a questionnaire. The corresponding percentage with respect to men was 66.4%. A detailed table showing response rates and percentages is contained in Appendix B.

The careful reader will bear in mind several important qualifications in considering the following discussion and in extrapolating from its results. First, he should not assume that either the female or the male sample is an exact replica of the entire male or female lawyer population. The sample comes entirely from the last ten years' law graduates and omits the 30% to 40% of the males and females in the sample who did not respond. Conceivably these silent figures would have slipped into the calculations without the change of a demical point in the tabulations; on the other hand, it is possible that they would have changed the results extensively. In the male sample, this problem is aggravated by the fact that not all of the law schools selected their male names on a truly random basis.[8]

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5. 26 law schools sent us no female names. Two of those, Notre Dame and Washington and Lee, have never admitted female students and thus have no female graduates. The following schools responded that they had had no female graduates in the period 1956 through 1965: the University of Idaho, University of Maine, Montana State University, and Rutgers (at Camden). The following schools presumably had female graduates but sent us no names: Boston University, Brooklyn Law School, University of California—Hastings College of the Law, Salmon P. Chase, Chicago-Kent Law School, Cleveland-Marshall Law School, De Paul, University of Detroit, University of Florida, Georgetown, Gonzaga, Howard College, University of Illinois, New York Law School, University of Oregon, St. John's, South Carolina State College, University of Southern California, University of Tulsa, and Willamette. We have been unable to acquire data from which we can determine with certainty how many females graduated from the 134 accredited schools during the years 1956 through 1965. It is our best estimate, on the basis of the returns from the 108 schools who did report, that the number is no larger than 2,600 and that it probably is smaller than that.

6. Copies of the questionnaires and the letters which accompanied them are attached as Appendix A.

7. Many of the questionnaires which were returned had not been completed. We coded and used all of the data that was returned, no matter how fragmentary.

8. 379 males were chosen by the selection of the male name on an alphabetical class list which next followed the matching female. We believe that this is a random selec-

So *reader beware*: "Males" means those men in the sample who responded; "females" means the same with respect to the opposite sex.

Finally, this report assumes that the respondents' memories were accurate and their reporting truthful. Undoubtedly the statistics have been rendered somewhat inaccurate by the failure of some to recall and record correctly all of the data. In a few cases the figures themselves hint at forgetfulness, disingenuousness, or distortion in the sample. For example, approximately 50% of all the respondents stated that they were in the top quarter of their graduating classes and only 5% to 6% acknowledged residence in the bottom quarter.[9] Perhaps these figures can be explained by the fact that many graduates do not know their quartile rank and gave themselves the benefit of the doubt. Whatever the explanation, to the extent that this report focuses on the differential between males and females, discrepancies of this kind may not be significant if we can assume that the males and females each gave themselves a uniform benefit of the doubt when their recollections were faint or inaccurate.[10]

B. *Money*

The questionnaire asked the respondent to state his adjusted gross income (1) for his "first non-temporary job" after law school and (2) for the calendar year 1964.[11] The respondent did not state his actual income but only marked an annual range (for example, $5,001-$8,000). Exhibits 1 and 2 summarize the data given in response to these questions.

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tion method. 332 males were selected by a process unknown to us but characterized as "random" by the responding schools. 323 were selected for having the academic average which most nearly matched that of the female in the class which they were chosen to match. The remaining 295 were selected by methods unknown to us.

9. See Exhibit 11 *infra*.

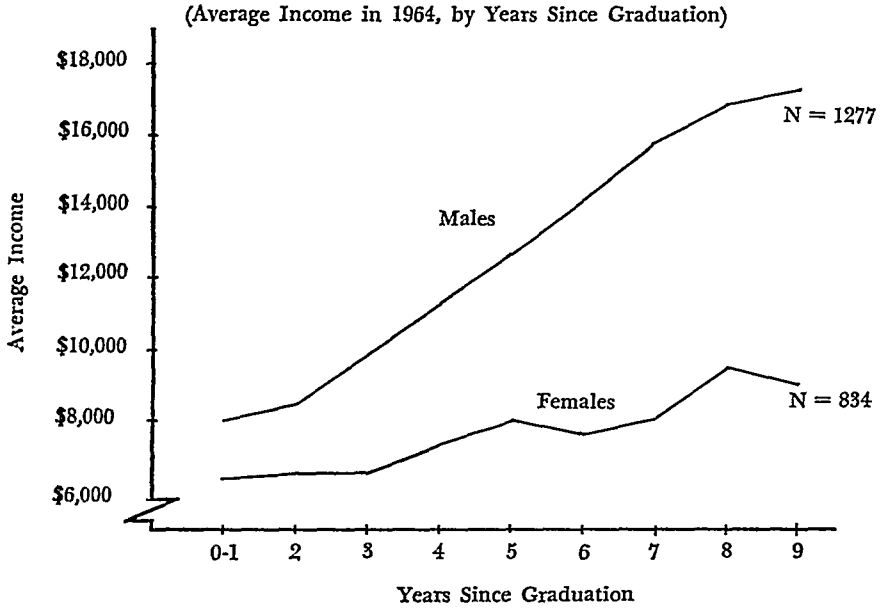
10. The percentages of males and females in each quartile of class standing were surprisingly similar. The widest deviation was only 1.9%. For a complete comparison, see Exhibit 11 *infra*.

11. The members of the classes of 1964 and 1965 were asked to state their adjusted gross income or *estimated* adjusted gross income for their first full calendar year of work after graduation from law school. Thus most of the members of the class of 1964 should have reported their income for the calendar year 1965 and most of the graduates from the class of 1965 should have reported their estimated income for the calendar year 1966. Throughout the survey the respondents from the classes of 1965 and 1964 have been combined.

EXHIBIT 1[12]

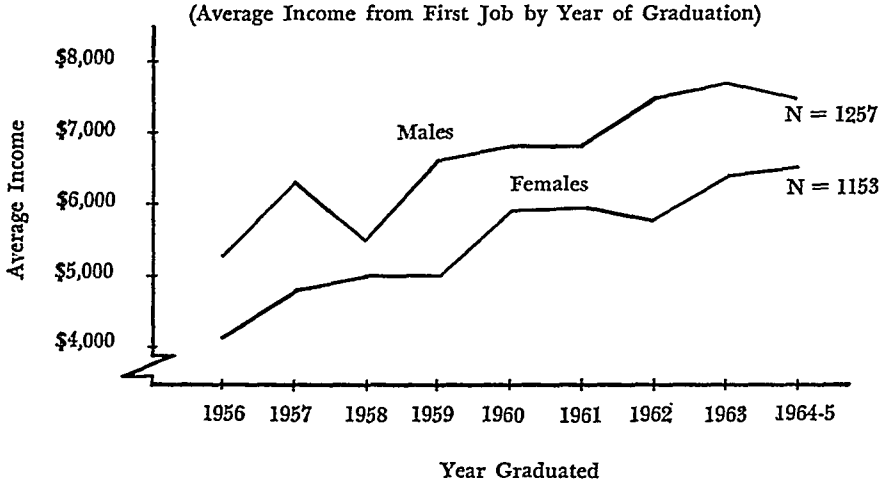
PRESENT INCOME

(Average Income in 1964, by Years Since Graduation)



STARTING INCOME

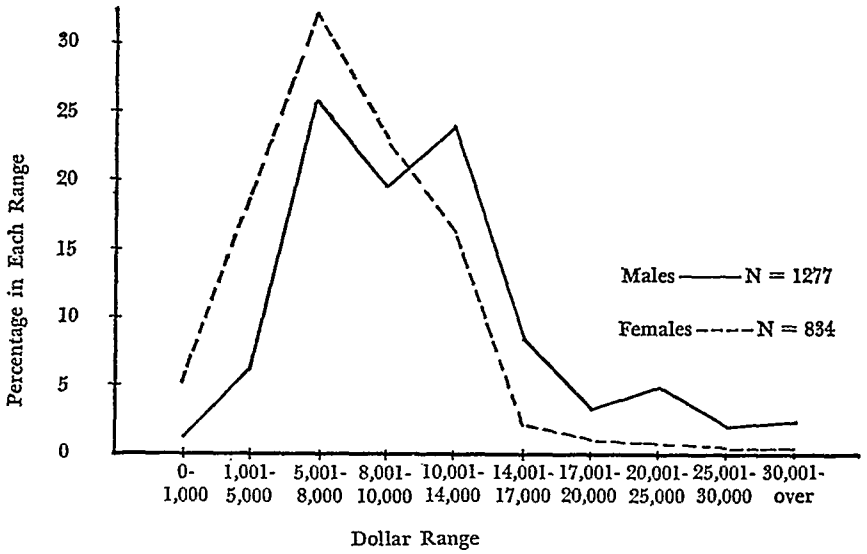
(Average Income from First Job by Year of Graduation)



12. Exhibit 1 and each of the other exhibits showing respondents' incomes are based upon the assumption that the average income of all persons marking a given range was the mid-point in that range. This assumption is an approximation made for want of any other convenient way to present the data in a readily understandable form; the actual data by numbers and salary ranges are presented in Appendix C.

EXHIBIT 2[12]

PRESENT INCOME DISTRIBUTION



The starting income brackets were: Less than $1,000, $1,001-$5,000, $5,001-$8,000, $8,001-$10,000, and over $10,000. The person who earned $5,000 in year 1 would be treated as though he had earned $3,000. On the other hand, a person who earned $5,001 would be treated as though he earned $6,500. Thus, with the change of only one dollar in starting income, a person's income would appear to jump $3,500 because of our averaging assumption. The apparently large starting income jumps of the males between 1958 and 1959 and between 1961 and 1962 and those of the females between 1959 and 1960 and between 1962 and 1963 are partly caused by the fact that a large bulk of males or females respectively crossed over a segment boundary in those years. Thus the true starting salary curve is probably a less jagged one than that shown on the exhibit above. The data concerning present income in Exhibit 1 are presented in tabular form in Appendix C.

In most cases, the number of responses which provide the basis for a given exhibit will be reflected at the bottom of the exhibit. The difference in the number of responses is attributable partly to the fact that some exhibits deal with only a portion of the sample and partly to the fact that many respondents completed only part of the questionnaire.

Hereafter the use of the words "present income" on exhibits means income of respondents in the calendar year, 1964, with the exception of the classes of 1964 and 1965, whose income is that indicated in note 11 *supra*.

13. The following is a gross tabulation of the *intial* incomes:

INITIAL ADJUSTED GROSS INCOME

	Females (N = 1174)	Males (N = 1277)
Less than $1,000	6.1%	.7%
$1,001-$5,000	35.5%	24.7%
$5,001-$8,000	47.8%	54.5%
$8,001-$10,000	6.9%	11.0%
over $10,000	3.7%	9.1%

The message of each of the foregoing exhibits is the same and it is clear: the males make a lot more money than do the females. The differential in present income is approximately $1,500 for those in their first year after graduation, and, with the passage of each year, the males increase their lead over the females until they pass off the graph at the class of 1956 with a $17,300 to $9,000 lead and with no substantial appearance of abatement in their rate of gain. In 1964, 9% of the males earned more than $20,000, but only 1% of the females had reached that level; 21% of the males exceeded $14,000, as compared with only 4.1% of the females. The converse is true at the levels below $8,000, where one finds 56.3% of the females but only 33.6% of the males. These figures are not distorted by the inclusion of housewives or others who are not employed full time at a paying job because only those employed full time at a paying job were included.

Doubtless the reader can imagine a variety of rival hypotheses in addition to discrimination which might explain the enormous income difference between males and females. Some of these, such as class standing, school, type of employer, and type of work, will be considered in Part II of this article.

C. *Job Profiles*

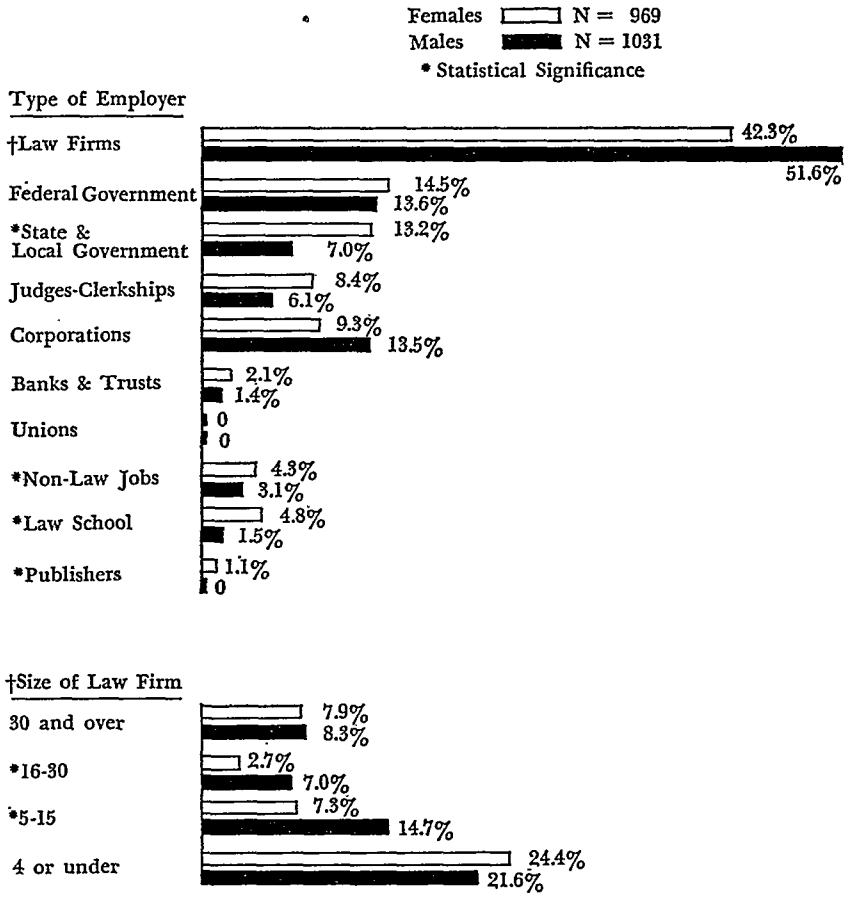
Approximately 25% of the respondents, both male and female, found their first jobs with firms of 4 or under (including solo practice).[14] There were only statistically insignificant differences[15] in the percentage of males and females taking their first jobs with firms of over 29 and with the federal government. However, men far exceeded women in obtaining jobs with firms in the 5- to 30-man category, and women had a substantial edge over men in state and local government.

14. The category "firm of four or less" includes an undetermined but probably significant number of respondents who were in solo practice or were partners and not employees. This fact contaminates that category and renders it unreliable as a basis for generalization about the small firm as an employer.

15. The statement that a difference is a statistically significant one means that the distributions for the two data sets being compared differ by more than the critical value of .05 when subjected to the Chi-square test. In layman's terms, if two groups do *not* differ in a statistically significant way from one another, one would expect a random division of the entire group to be as likely to produce the same differences between the groups as those observed between the groups formed by the current method of division. For example, the statement that men's I.Q.'s do not differ in a statistically significant fashion from women's means that if one made a random division of the entire mass of males and females into two groups, he would be likely to find as great a difference between the two such groups as he found between the females and males.

EXHIBIT 3[16]

INITIAL EMPLOYER



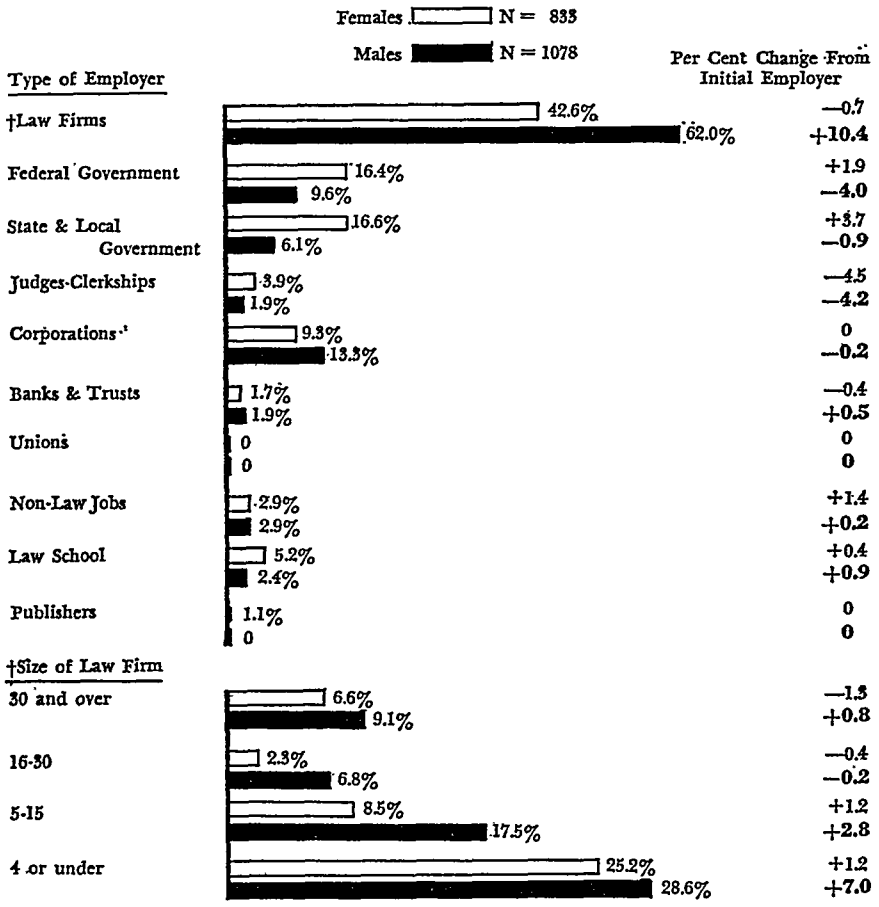
A comparison of male and female migrations from starting to present jobs shows several significant differences. The percentage of women in government work increases by more than 5%, while the corresponding male percentage decreases by approximately the same amount. Women increase their representation in firms of 15 and under by only 2.4%, but nearly 10% more men find their present jobs with firms of 15 and under than started there. Other migrations are less significant.

16. On any table in which numbers with respect to males and females appear, the data with respect to females which is marked * differs in a statistically significant manner from the corresponding data with respect to the males. In absence of such marking and except where otherwise indicated, the reader may assume that no difference of a statistically significant margin exists between the male and female data.

† The portion of the graph titled "Size of Law Firm" is a breakdown of the data presented next to the title "Law Firms" above.

EXHIBIT 4[17]

PRESENT EMPLOYER



These statistics are consistent with two commonly held notions: (1) men often use the government as a stepping stone to private practice; and (2) a large part of all women lawyers (about one third) find long-term employment in government.

The comparative distribution of men and women in small, medium, and large firms is puzzling. Women have roughly comparable representation with men in small and large firms, but have substantially less representation in medium-sized firms. The question-

17. This exhibit shows only *net* movement of lawyers from one job to another. For example, if one person moved from a corporate employer to a firm of 30 or over and another person moved in the opposite direction, the two changes would cancel each other and the table would show zero change. Female data were not tested for statistically significant difference from male data in this exhibit.

† The portion of the graph titled "Size of Law Firm" is a breakdown of the data presented next to the title "Law Firms" above.

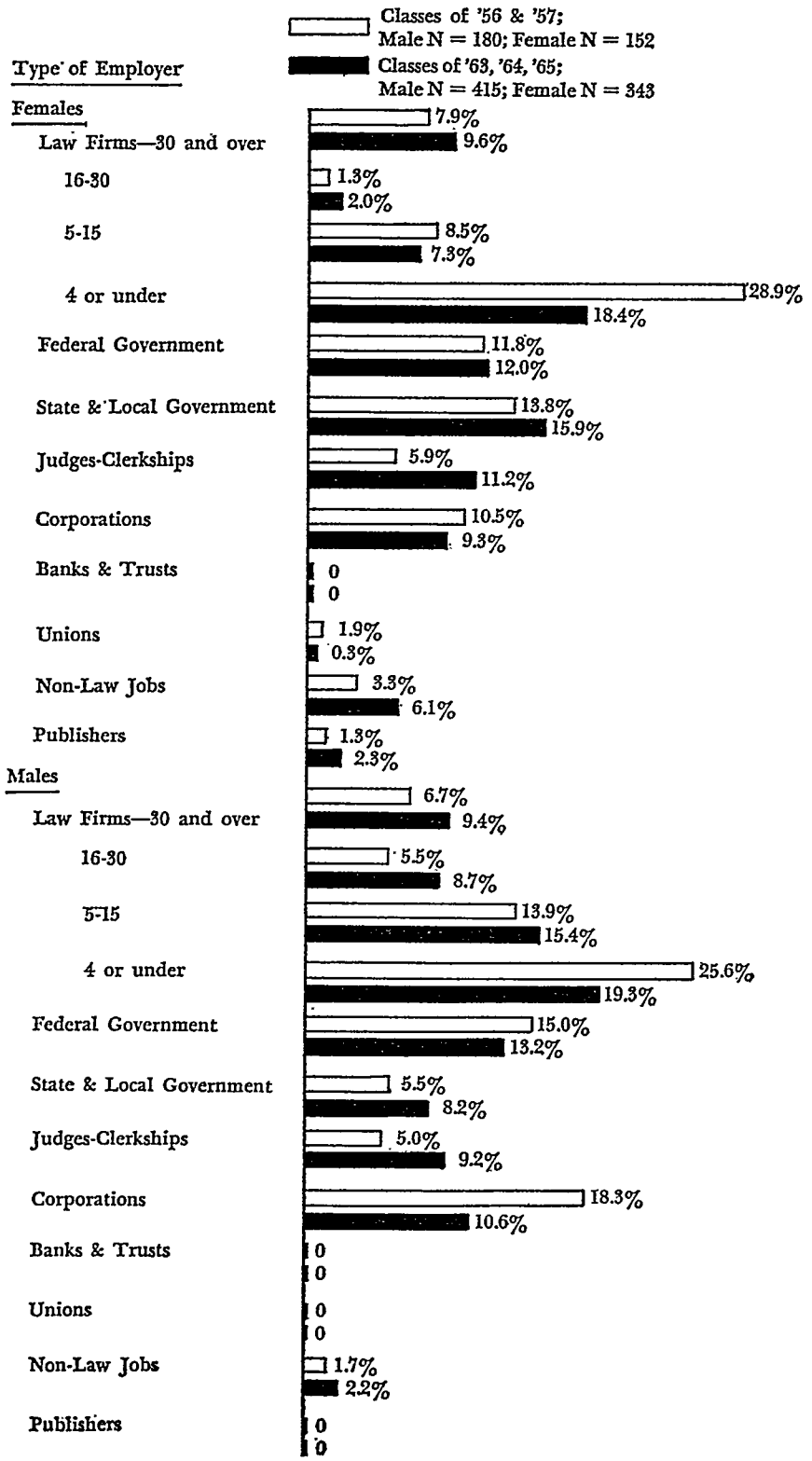
naire offered only tantalizing fragments of information to explain these phenomena. The comparative lack of female representation in the medium-sized firm may be explained by the function which the female law graduate performs. If her function in the large firms is to do research, mind the library, and perform other specialized tasks which fall somewhat short of practice on the same scale as her male colleagues, her comparatively small representation in the medium-sized firm can be explained by the fact that such firms are not large enough to justify hiring her. However, since the small firm is no better able to hire women exclusively for research or library work than is the medium-sized firm, this analysis cannot explain the extensive representation of women in the 4 or under category. The answer here may lie in the peculiar status of lawyers in these firms, which include solo practice and practice in which the starting lawyer is something more than an ordinary employee. For example, it includes cases in which a woman forms a partnership with her husband, her father, or with another person of approximately her own age. The questionnaire did not yield data on the number in solo practice, nor did it give the number in practice with husbands, fathers, or other relatives. Nonetheless, my discussions with lawyers and my own observations of female practice suggest that this form of practice is common for many women. Thus the comparatively large representation of women in the 4 or under category may be attributable to the fact that she does not face the usual employer's discrimination either because she is not an employee at all or because she has a familial relationship with a member of the firm which overcomes any such discrimination.

D. *First Jobs: Ten-Year Change*

It is quite possible that the jobs available to the class of 1950 one year, five years, and ten years after graduation differ considerably from the jobs available at the corresponding periods after graduation to the members of the class of 1930. Since the data cover only a ten-year time span, however, there is very little information about changes in job profiles from one class to another. This is particularly true as to the respondents' present jobs, and it would be misleading to compare the present jobs of a class only two or three years out of law school with those of a class which had been out eight years. In such a comparison, the change in profiles between two classes would be obscured by the fact that one class had been in practice longer than the other. For that reason, we have presented a comparison of only the starting jobs of the two oldest and three youngest classes.

EXHIBIT 5

STARTING JOBS—TEN-YEAR CHANGE



Certain changes were common to both males and females: (1) more now find their first jobs with firms of 30 or more, in clerkships, and in state and local government than they did eight to ten years ago; and (2) fewer find their first jobs in firms of 4 or under. Since our data did not effectively distinguish between firms of 4 or under and solo practice, it is not possible to tell what percentage of this decrease is attributable to the fact that fewer lawyers are starting out in solo practice. Once again, the 5- to 30-man firm plays the villain. A substantially larger percentage of the men started with such firms in the 1963 to 1965 period than ten years ago, but the corresponding percentage of women starting with such firms has diminished. Except to the extent that the data show discrimination generally, they give no explanation for the opposite movement of men and women in this case.

E. *Work Performed*

The survey disclosed interesting differences between the areas of work of men and women. Most of the respondents indicated that they performed more than one kind of work; many acknowledged the performance of all of the types indicated in Exhibit 6. The proportion of females engaged in trusts and estates (60%), domestic relations (50%), and tax (31%) were higher than the proportion of men engaged in those activities. These data accord with the commonly held beliefs about women's practice. The fact that 45.6% engage in litigation and 27.7% in criminal work is more surprising. Since the question did not limit "litigation" to actively contested adversary court proceedings, some may have acknowledged participation in litigation even though their court appearances amounted to nothing more than procuring a signature on a probate order or obtaining an occasional uncontested divorce. However, even if the number is reduced somewhat to account for those who marked litigation but do not engage in adversary proceedings, the size of the female response to this question and to the question about the number of court appearances per year[18] indicate that a substantial part of the practicing women carry on an active trial practice and are not hidden away in the "women's specialties."

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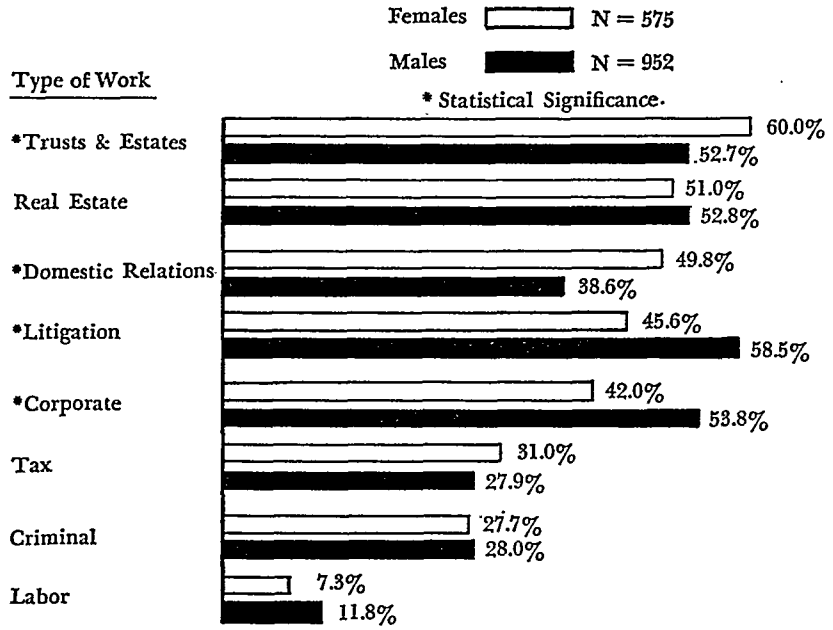
18. See note 57 *infra*.

EXHIBIT 6[19]

TYPES OF WORK PERFORMED
(EXCLUDING THOSE EMPLOYED BY GOVERNMENT)



Another question asked the respondent to state his "type of work performed" (singular) in one or two words and suggested "general practice" as a sample answer. Although the question did not define "specialty," any answer other than general practice probably indicates that the respondent devoted a substantial amount of time to the type of work listed.

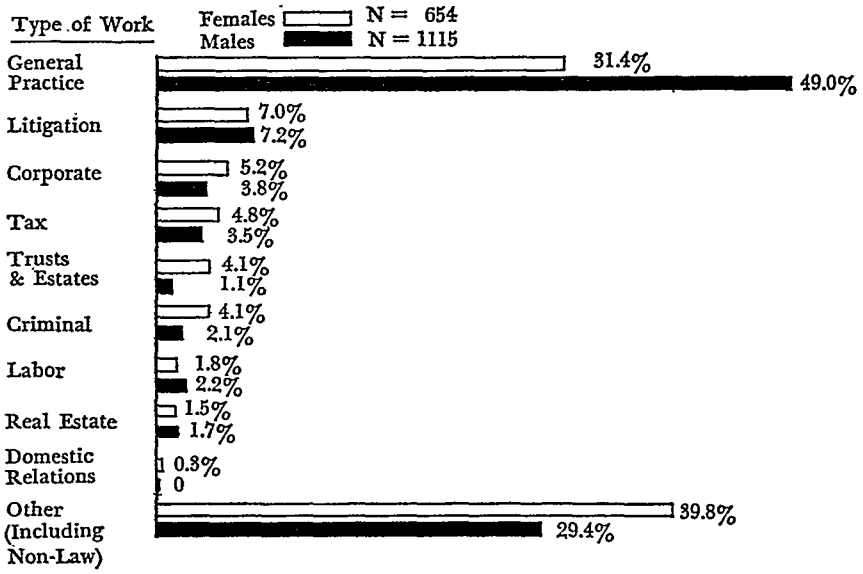
19. One should note that the exhibit tells nothing about the percentage of his working hours that any respondent devoted to any one of the types of work mentioned, nor does it tell anything about the level of responsibility or the specific kind of work performed within the general type mentioned. For instance, both a highly paid tax specialist who did nothing but complex corporate tax planning and a lawyer who made out five returns a year would properly list "tax" among the types of work which he performed. The respondents employed by the federal government showed the following distribution of work performed:

FEDERAL GOVERNMENT JOBS

Type of Work	Females (N = 78)	Males (N = 50)
Litigation	34.6%	42.0%
Labor	23.0%	16.0%
Tax	21.8%	24.0%
Corporation	6.4%	4.0%
Real property	6.4%	4.0%
Criminal	5.1%	2.0%
Other	2.7%	8.0%

EXHIBIT 7[20]

WORK DESCRIPTION—PRESENT JOB



Only 30% of the women stated that they were engaged in "general practice," but nearly 50% of the males so characterized their practice. The study produced no data which explain this apparent female propensity to specialize. One can speculate that the woman makes a conscious choice to avoid general practice because she believes that a special skill will reduce or overcome sex discrimination. Or, the relative absence of women in general practice may mean only that some employers hire women for specialized positions in probate, tax, and other fields. Whatever the explanation, the data presented in Exhibit 13 *infra* show that women who listed a type of work other than general practice usually made more money than their sisters in general practice.[21] Although the woman is likely to increase her earnings by moving out of general practice, the table also shows that her chances of reducing the margin between herself and males in the same kind of practice are only slightly better than even, for in several cases the incomes of the male specialists exceeded those of their general practitioner brethren by as much as the female specialists' income exceeded that of female general practitioners.

20. Female data were not tested for statistically significant difference from male data.

21. Many of the respondents believed that specialization would improve the woman's opportunities. In response to a question about the advice they would give a neophyte female lawyer, 6% of the female respondents and 9% of the male respondents recommended that she specialize.

F. *Family*

Twenty-eight per cent of the women and 25.6% of the men had at least one lawyer among their parents, grandparents, uncles, and aunts. This difference between men and women in the aggregate is not statistically significant. On the other hand, the percentage of women who had a *female* relative in the law was greater than the corresponding percentage for men by a statistically significant margin.[22] However, this was not a factor of great importance in explaining professional choice, for only 47 out of 1,300 women had a female-lawyer relative.

A more fertile ground for inquiry is the respondent's own marital and maternal status. 890 (69.0%) of the women and 1,098 (83.2%) of the men were or had been married at the time of the study.[23] The following exhibit summarizes family-work relations:

EXHIBIT 8

FAMILY-WORK RELATIONS

	Males	Females	Single Females	Married Females without Children	Married Females with Children
Full-time	85.5%	65.3%	83.5%	74.5%	44.5%
Part-time	3.8%	12.1%	5.5%	4.0%	22.2%
Not working	—	12.9%	—	11.2%	25.7%
Not responding to this question	10.6%	9.7%	11.0%	10.3%	7.6%
	N = 1329	N = 1298	N = 475	N = 276	N = 534

Previous studies have indicated that marriage alone does not usually cause a woman who is working to cease working, and our

22. The mothers of only 4 of the males and 20 of the females were lawyers. 15 males and 25 females had an aunt who was a lawyer. The following table summarizes the data on relatives of the respondents:

Relation of Lawyer-Ancestor	Females	Males
Father	185	176
Mother	20	4
Uncle	155	199
Aunt	25	15
Grandfather	77	72
Grandmother	2	4
	464	470

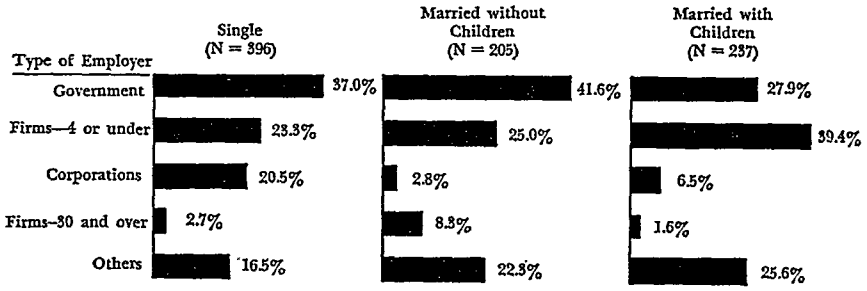
23. The questionnaire did not ask the respondent to state whether or not he had been divorced. Some volunteered that information in response to a question about their marital status, but the absence of a specific question renders the data on divorce unreliable. All references to "married" females and males mean those who were or had been married at the time they answered the questionnaire.

data are consistent with those findings.[24] More than half of the full-time employed women were married, and only 19 (6.1%) of the women who were not practicing at the time they answered the questionnaire acknowledged that they had left practice "to get married." Of all of those who had ceased practice, only 5.4% left in the same year as their marriage without having a child. 85 (27.3%) of the females who were not practicing acknowledged that they ceased practice to have a child and another 73 (23.5%) acknowledged having ceased practice to "devote time" to their families. The data indicate that 54.0% of those who left practice did so in the same year or in the year following the birth of their first child. Although the birth of a child will necessarily cause some interruption in a woman's practice, the data suggest that it is also an event which may cause a more lengthy, if not necessarily permanent, departure from practice. However, it is by no means true that the birth of a child always means departure from practice. 27.8% of all full-time employed women were married *and* had children. Moreover, most of these children were less than seven years old.[25]

The following exhibit reflects the relation between type of employer and marital and maternal status for the full-time employed women who responded to the relevant questions.

EXHIBIT 9

TYPE OF EMPLOYER BY MARITAL-MATERNAL STATUS OF FEMALE



The women who continue full-time practice after the birth of a child are heavily concentrated in the 4 or under category and their ranks

24. See Rossi, A Plan for the Analysis of Women College Graduates 5 (National Opinion Research Center, 1965).

25. The following table summarizes the maternal status of the women who were employed full-time in 1964:

AGE OF CHILDREN FOR FULL-TIME EMPLOYED FEMALES

Age of Youngest Child	Number of Females (N = 237)	Per Cent
Child under 5	162	68.5
Child 5 to 7	30	12.6
Child 7 to 10	15	6.3
No response to age of child	30	12.6

in larger firms and government are reduced, but the data do not reveal the reasons for these results. Higher earnings alone are not a satisfactory explanation, for the women with children both in large firms and in government earned more money than did their sisters in the firms of 4 or under. It is possible that solo practice and small firms have a flexibility which suits the mother of a small child. Many large firms and government agencies may not offer the necessary flexibility because of their size and attendant bureaucratic rigidity, or they may offer it only when it is accompanied by a second-class status which the woman will not accept.

Although married women without children are more heavily represented in government and in firms of 30 and over than are either single women or women with children, these data do not necessarily mean that childless married women are more likely to find places with government agencies and large firms than are unmarried women, for many of the childless married women were unmarried at the time they took the jobs reflected in the exhibit.[26]

One might expect married women to earn less money than their unmarried female colleagues for two reasons: married women presumably need less money because they are maried to men who are expected to support them; and a married woman's devotion to the job and resulting productivity may be less than that of a man or an unmarried woman, since both of the latter presumably seek their primary satisfaction from job success. However, the data contradict these expectations. The full-time employed married women in the classes of 1956 through 1960 earned significantly more money in 1964 than did the unmarried women in the corresponding classes.[27] One can make a variety of interesting speculations about this finding.[28] It might be explained by the fact that some married women

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26. The data may mean only that women who go with large firms marry colleagues there.

27. The following chart compares the income in 1964 of full-time employed married and unmarried females:

	1964-65	1963	1962	1961	1960	1959	1958	1957	1956
Married	$6750	$6200	$6600	$7300	$9200	$8100	$9200	$11900	$10800
Unmarried	$6200	$7400	$6650	$8600	$8700	$7800	$8350	$10800	$9250

28. The higher earnings of married women are not attributable to the fact that married women demand a job with relatively high pay or accept none at all, for an analysis of the figures shows that married women were spread over a wider spectrum on the income scale than were unmarried women. They had a higher average income not because of an absence of their numbers in the lower ranges but because of an abundance of their numbers in the higher ranges.

practice with their husbands and are able to make more advantageous monetary agreements than if they were dealing with other males. On the other hand, it may simply reflect a relationship between the emotional qualities which lead a woman to take a mate and those which make her acceptable to clients and colleagues. Unfortunately, the data do not give any satisfactory explanation for the higher earnings of married women.

G. *Attitudes and Opinions*

Nearly half of the women stated that they believed that they had "certainly or almost certainly" been the object of discrimination because of sex by their present, a former, or a potential employer. Another 17% of the women thought that they had "probably" been the object of such discrimination.[29] Upon observing this wide-spread conviction among the women, and upon seeing that many women either have ceased practice or are earning much less than their male counterparts, one might expect that many women would regret their decision to become lawyers. The study contradicts such a conclusion. In response to a question whether they would again become a lawyer if they "had to do it over," 1,150 (94.1%) of the women answered affirmatively; only 72 (5.9%) said they would not. These responses do not differ significantly from those of the males.

Another indication of female optimism is given by the women's answers to a question which asked what advice they would give a present-day female law student seeking employment. 10% of the women would instruct her to work hard and prove herself; another 6% would counsel patience and perseverance; and nearly 13% would tell her to do well in school. On the other hand, only 3% of the men think it is important that she work hard to prove herself; only 2.2% counsel patience and perseverance; and only 6.3% think it important that she do well in school.[30] No women would have told the prospective female graduate to "forget it," but nearly 8% of the men would have so advised her. It appears, therefore, that the women have a continuing, and perhaps irrational, belief that hard work, good grades, and perseverance will overcome the ob-

29. For a summary of the responses to the question concerning beliefs about discrimination, see Exhibit 15 *infra*.

30. Our data show that the advice with respect to grades is sound in that a female's income tends to increase in relation to her grades. See note 33 *infra*. The questionnaire solicited no information which accurately tells whether hard work and perseverance are effective, but the aggregate income figures suggest that the male pessimism may be nearer to the truth than is the female optimism.

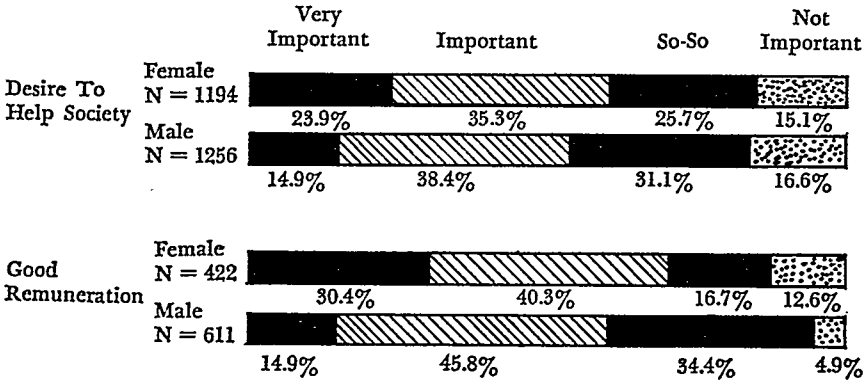
stacles which they face, whereas the men are less sanguine about the effect of these factors upon the success of the potential woman lawyer.

H. *Motives for Studying Law*

It is sometimes suggested that differences between male and female status in the bar are attributable to the different motives which men and women have for entering the profession. The argument is as follows: Women are really social workers who wish to become lawyers for the unselfish reason of helping the poor and oppressed; although these motives are laudable, they render the woman a less able representative of the profit-motivated business client than is a standard male lawyer who, like the businessman, is strongly influenced by monetary motives. In an attempt to test this theory, one question sought the respondent's motivation for going to law school. He was asked to state whether each of six different motives was "very important, important, so-so, or not important" to him in his decision to enter law school. The answers to that question are inconsistent with the "social worker" characterization of women lawyers. The percentage of women who marked "desire to help society" as "important" or "very important" exceeded that of the males by a margin which was *not* statistically significant (59% to 53%), while the percentage of females who marked "good remuneration" as "important" or "very important" exceeded the males by a margin which *was* statistically significant (70% to 60%). Indeed, twice the percentage of women as men stated that good remuneration was a *"very important"* reason.

EXHIBIT 10

REASONS FOR ATTENDING LAW SCHOOL



For two reasons, these data probably do not justify the conclusion that the prospect of monetary gain more strongly influenced women than it did men to take up the practice of law: (1) women more than men tended to mark "very important" or "important" as to all of the motives and the women's responses may simply reflect this female inclination to depict each of the motives "important" or "very important"; and (2) a large number of the women placed no mark at all in the "good remuneration" boxes. We cannot state whether these women would have rated the monetary motive as relatively important or unimportant, but if one infers from the absence of any mark that the motive was only "so-so" or "unimportant" to them, then he may conclude that the women as a whole were less strongly influenced by monetary considerations than were the males.

Nevertheless, it is clear that a substantial part of the women were strongly motivated by a desire to make "good money" and that the "social worker" characterization does not fit them to any greater degree than it fits the men. One wonders whether other assumptions about the woman lawyer's motives and beliefs are equally as inaccurate as the one that they are uniformly motivated to become lawyers by a desire to help society.

II. Analysis of Discrimination

Part II of this study is an examination of some of the possible explanations for the male-female income differential reported in Part I. The principal reason for selecting income as the focal point of the discrimination analysis is my belief that it is the most universally recognized single measure of success in American society. It is an even more universal measure when one limits his inquiry to a single profession, for this limitation renders irrelevant any special recognition which may inhere in membership in a particular group, such as the medical or legal professions. Another reason for using income as the focus is that adjusted gross income, unlike nonmonetary rewards, is a specific thing which is capable of certain measurement. Except for exceedingly modest deviations, its meaning is the same for all American taxpayers; thus one comparing the adjusted gross income of two persons faces none of the definitional problems which he would have in comparing recognition or status within the profession. Finally, it is my impression that the income associated with a particular mode of practice (that is, large firm, house counsel, small firm) is closely related to the status of that mode within the profession. Thus, when one finds that women earn less than men, he is likely also to find that they are concentrated in jobs of less status than those of men.

In his study of income differential, the hurried traveler on the devious way of statistical analysis is tempted to end his journey by a short cut from the observation of a wide income difference between the males and the females to the conclusion that it was caused by unjustified discrimination against the females. However, the more careful traveler will take the slower route of examining the other plausible causes for such a differential and may find that his data cannot carry him all the way to his conclusion. The following discussion will deal with ten of the factors other than discrimination which might have caused or contributed to the observed income differential.

Obviously many things other than one's sex have an effect upon how much one earns. If any factor inherent in the psychology or intellect of "woman" is excluded for the moment, there are still many factors which, solely or in combination, could have caused the observed difference between the incomes of the males and females or which could have caused the incomes of the males and females in our sample to fail to be representative of the incomes of male and female lawyers of their age groups in the bar generally. In attempting to examine the other plausible hypotheses, we have arbitrarily classified them in the following way: (1) failure of the women to work full time; (2) greater experience on the part of the men; (3) class rank and law review participation; (4) school attended; (5) type of employer; (6) type of work performed; (7) type of work sought by men and women; (8) composition of the 35% of the sample who did not respond; (9) failure of the male sample to be representative of males in the bar generally; (10) forgetfulness and disingenuousness of the respondents.[31]

We can dispose of the first two of these objections at once. While it is true that many women in the sample did not work or worked only part time, the comparative income figures were not distorted by that fact because only women who were working full time were included in computing those figures. Second, although experience in law practice is not exclusively a function of the passage of time since graduation from law school, time since graduation in a sample greater than 1,000 probably is a satisfactory measure of experience for the purposes of a gross comparison of aggregate income. Since the income comparisons were made by year of graduation from law

31. A final factor which may play some part in this income differential is that a disproportionately large part of the females may be Jewish or members of other minority groups. If so, part of the observed income differential may be attributed to discrimination against these groups. The questionnaire solicited no data on the respondent's racial, ethnic, or religious backgrounds; therefore we can neither prove nor disprove this possibility.

school and since an income differential existed between the male and female members of each class, the differences cannot be adequately explained by arguing that the men had had more experience than had the women in the sample.

A. *Class Rank and Law Review*

Several studies support the proposition that one's starting and ultimate income as a lawyer are related to his class standing and law review participation.[32] Our findings are consistent with that proposition and show that, as a general rule, the law review participant will earn more than the non-law review participant and, with some exceptions, the higher one is in his class, the more money he is likely to earn.[33] An analysis of the following exhibit, however, shows that this factor does not account for the difference between the incomes of the female and male samples, for neither the entire female sample nor the full-time employed females differed significantly from the male sample in class rank or law review participation.

32. HARVARD LAW SCHOOL, CLASS OF 1955—10TH YEAR CLASS REPORT (1965); Wellman, Memorandum to the Law Faculty and Law Class of 1951 (University of Michigan Law School, April 1966).

33.

AVERAGE PRESENT INCOME BY CLASS RANK AND LAW REVIEW

	Females		
Class Rank	Classes of 1956-58	Classes of 1959-61	Classes of 1962-65
Upper 10%	$10,700	$9,700	$7,500
Upper quarter but below 10%	12,000	7,600	7,100
Second quarter	10,300	8,400	7,000
Third quarter	9,500	9,000	6,500
Fourth quarter	†	†	6,000
† Insufficient response to get a meaningful figure.			
Law review	12,000	9,200	7,800
No law review	10,100	8,400	6,600
	N = 260	N = 316	N = 534

	Males		
Class Rank	Classes of 1956-58	Classes of 1959-61	Classes of 1962-65
Upper 10%	$18,700	$14,000	$10,000
Upper quarter but below upper 10%	17,400	12,000	8,700
Second quarter	14,700	12,600	8,800
Third quarter	14,600	11,500	8,000
Fourth quarter	14,200	10,500	7,700
Law review	18,200	13,500	9,400
No law review	16,000	12,000	8,600
	N = 319	N = 329	N = 609

EXHIBIT 11
CLASS RANK AND LAW REVIEW PARTICIPATION

Class Rank	Females	Males
Upper 10%	30.3%	29.5%
Upper quarter but below upper 10%	25.0%	23.1%
Second quarter	25.4%	27.0%
Third quarter	13.9%	14.8%
Fourth quarter	5.4%	5.7%
	N = 1230	N = 1317
Law review	25.1%	28.8%
Not on law review	74.9%	71.2%
	N = 1241	N = 1254

B. *School Attended*

For a variety of reasons, one might hypothesize that the graduates of the most widely known and highly respected law schools would have higher aggregate incomes than the graduates of other schools. If so, and if a larger part of the men than the women in the sample came from such schools, this could be a contributing factor to the income differential. To test for this kind of bias in the sample, we divided both the men and the women into those who were graduates of nine schools which we considered to be relatively high in prestige and those who were graduates of all the remaining law schools.[34] There was no statistically significant difference between the percentage of men and women in each of the two groups. Thus, whatever the effect of the type of school attended upon a lawyer's income, that factor cannot explain the male-female income differential revealed by this study.

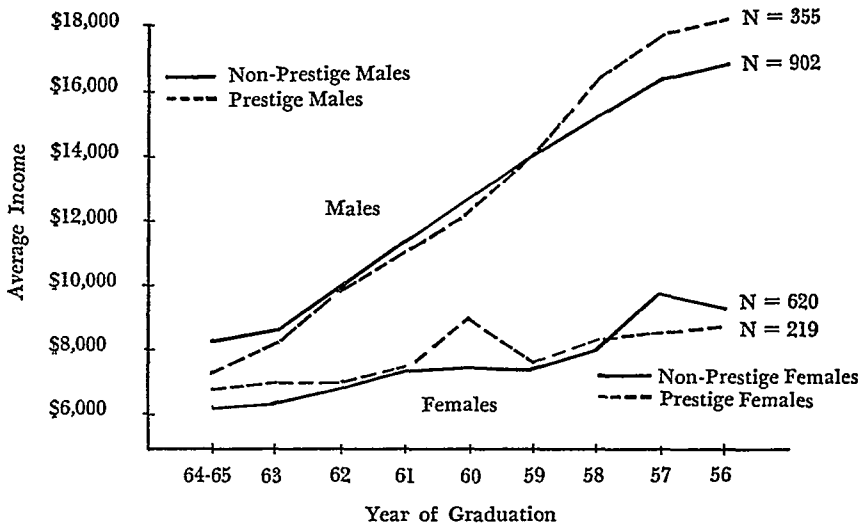
Our statistics did cast some doubt upon the accuracy of the hypothesis that attendance at a prestige school results in higher income. The starting salaries of the men from "non-prestige" schools in six out of the nine classes which we tested, and the present salaries in five out of the nine classes, exceeded the respective average salaries of the male graduates of the prestige schools. These figures are not conclusive, however, for the present income of prestige male graduates in the classes of 1956, 1957, and 1958 exceeded the salaries of their "non-prestige" counterparts, and the margin appeared to be growing. Perhaps the graduates of prestige schools concentrate in jobs which have greater ultimate income potential but which pay less for the first five or six years. The prestige-school hypothesis appeared to be more uniformly accurate for the women; the prestige

34. I have selected the nine schools on the basis of the mean LSAT scores of their student bodies and on the basis of my own subjective observation of the esteem in which they are held by others on law faculties and in law practice.

females' average starting income exceeded that of the other women for seven out of the nine graduating classes examined, and the present salary of the prestige women exceeded that of the other women in six out of the nine classes.[35]

35.

PRESENT AVERAGE INCOME BY TYPE OF SCHOOL
(Prestige and Non-Prestige Schools)



STARTING AVERAGE INCOME BY TYPE OF SCHOOL
(Prestige and Non-Prestige Schools)

	Males — Year of Graduation								
	1964-1965	1963	1962	1961	1960	1959	1958	1957	1956
Prestige Males (N = 359)	$7,100	7,500	7,300	6,900	6,700	7,000	6,400	5,500	4,800
Non-Prestige Males (N = 898)	$7,700	7,700	7,500	6,800	6,900	6,400	5,100	6,500	5,600

	Females — Year of Graduation								
	1964-1965	1963	1962	1961	1960	1959	1958	1957	1956
Prestige Females (N = 321)	$6,900	7,100	6,800	6,300	5,900	5,600	4,700	5,000	3,700
Non-Prestige Females (N = 852)	$6,300	6,100	5,500	5,900	5,800	4,800	5,200	4,700	4,400

C. *Type of Employer*

In 1964, approximately one-third of the full-time employed women worked for federal, state, or local governments, while only 15.7% of the men found their jobs in government. Exhibit 4 *supra* shows other but less significant differences between the types of employers of the men and women. One might argue that women, for whatever reason, hold those jobs which are uniformly low-paying irrespective of the sex of the holder, and that the income differential between the males and females is caused by these differences in the type of employment. The graphs on the following page, which divide the males and females into three three-year blocs and by eleven kinds of employers, show that the income differential between the men and women indeed varied from job to job. Yet they also show that the average present income of the men exceeded that of the women by substantial margins in almost all of the possible combinations of year of graduation and job type.

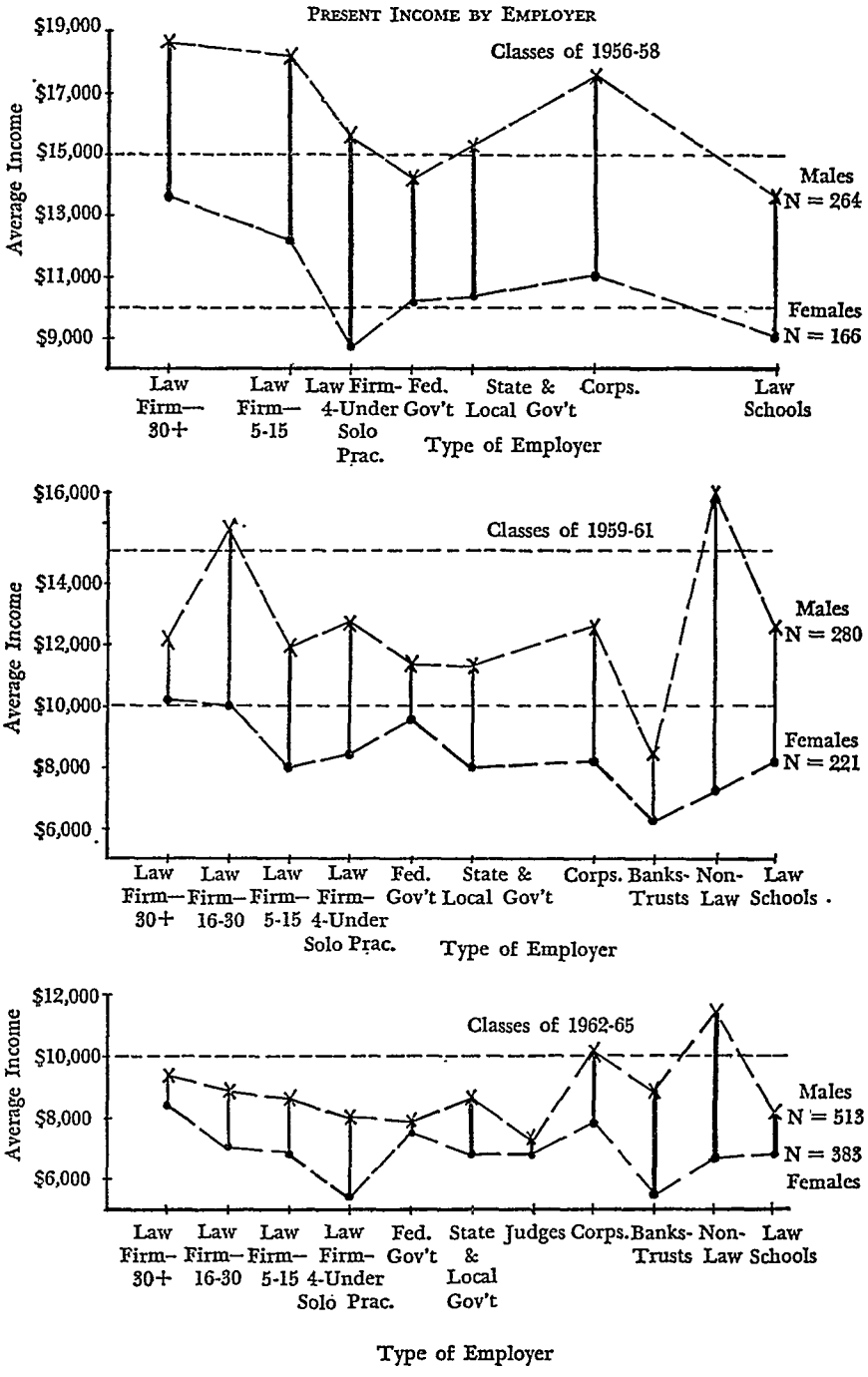
Contrary to what one might expect, the heavy concentration of women in government does not increase the income differential. If the women in the government jobs are removed from the sample, the aggregate female income *decreases* and the differential between them and the males grows larger.[36] On the other hand, if the same percentage of women as men were employed by each kind of employer, at the present average salary of women currently working for each such employer, the aggregate income differential between males and females would decrease; but the reduction would be only a few per cent. Thus, the concentration of females in the service of certain employers can explain no more than a small part of the income differential.

36. The following exhibit shows the effect of the elimination of women employed by the federal government and those employed by federal, state, and local governments upon the aggregate income of the females.

PRESENT INCOME FOR FULL-TIME FEMALES

Year Graduated	All Females	All Females Except Those in Fed. Gov't	All Females Except Those in Fed., State & Local Gov't
1964	$6,500	$6,500	$6,400
1963	6,600	6,600	6,600
1962	6,700	6,500	6,600
1961	7,400	7,200	7,200
1960	8,000	7,600	7,500
1959	7,500	7,200	6,900
1958	8,100	8,000	8,100
1957	9,500	9,300	8,700
1956	9,000	8,700	8,300

EXHIBIT 12[37]



37. Those categories not represented on the graph had five or fewer responses for the females.

D. *Type of Work Performed*

The questionnaire did not define or explicitly solicit information about the various specialties. As indicated above,[38] however, it is probably safe to assume that anyone stating his "type of work" (singular) to be something other than "general practice" devoted a substantial amount, perhaps the bulk, of his time to the type of work which he listed. The graphs on the following page show that the type of work performed is relevant in determining income, but they also show that the income of the males exceeded that of their female counterparts in almost every category.

Because of the wide income differences which exist between men and women within nearly every category of work performed, the data suggest that the differences in the type of work performed do not explain the male-female income differential. This conclusion must be more tentative than some of those reached above for two reasons. First, the question was not explicit and it is possible, for example, that some who should be considered tax specialists listed general practice as their type of work, while others whom one would consider general practitioners may have listed tax because 10% or 15% of their work lay in that area. A second and more important deficiency in the data is that they do not tell us anything about the level of responsibility which the respondent has or about the sophistication and degree of difficulty of the work which he performs. It is possible, for example, that the women who listed litigation as a specialty engaged mostly in "nickel and dime" cases and that the men dealt principally in litigation involving more money and greater responsibility. Of course, the converse may as well be true; we simply cannot say.[39]

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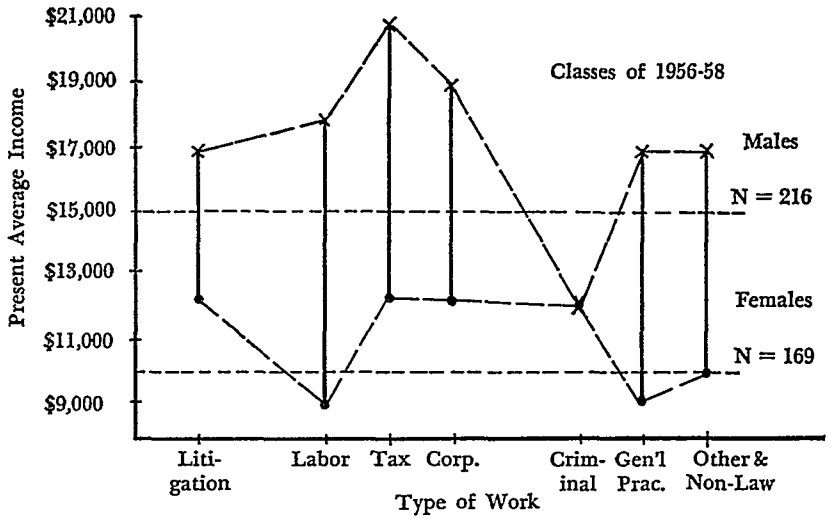
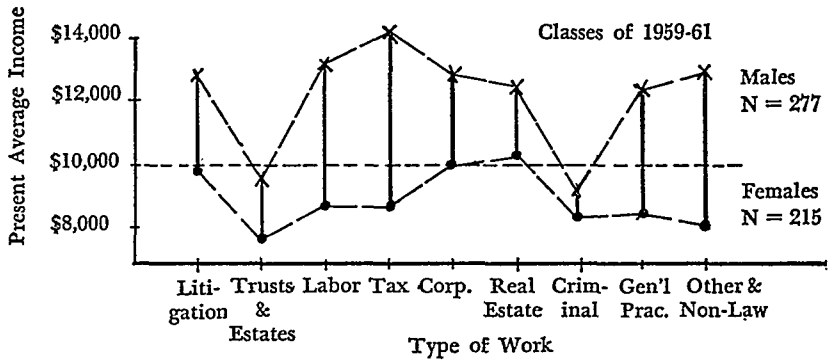
38. See text accompanying note 20 *supra*.

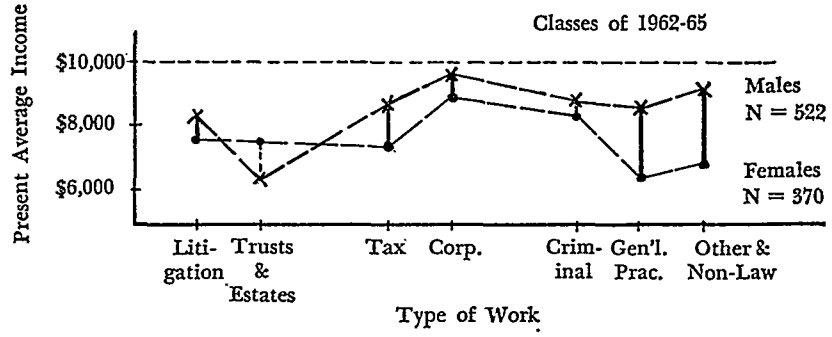
39. In at least one case, the data do hint that women of comparable experience with men are performing different functions for certain employers. These data (reported more fully in the text accompanying note 64 *infra*) are that females see significantly fewer clients in firms of 16 or more than do males in those firms; perhaps they also have less authority and responsibility.

EXHIBIT 13[40]

PRESENT INCOME BY TYPE OF WORK







40. Those categories not represented on the graphs had five or fewer responses for the females.

E. *Type of Job Sought*

The data presented above show that a substantial income differential exists between the men and the women even when one limits the examination to a single kind of employer. However, the data also show that both men and women earned more money from certain employers than from others. If, therefore, a larger percentage of the women found employment with the higher-paying employers than is presently the case, and if there were no corresponding shift by males, the aggregate income differential between the males and females would be reduced. Consequently, it may be argued that at least a part of the income differential is attributable to the fact that women seek employment in those jobs which pay less money.

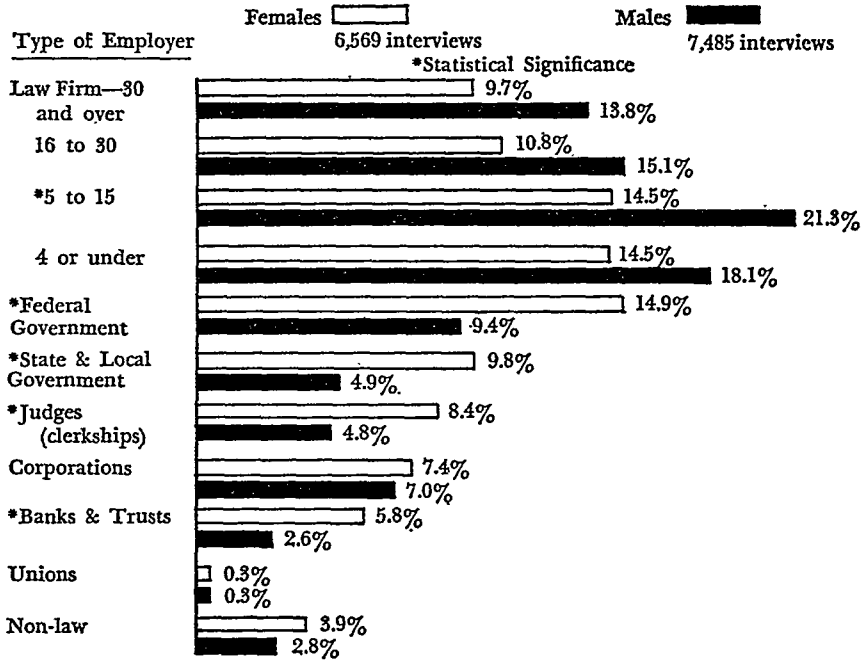
The law student's typical method of seeking employment is to write a prospective employer, interview the employer, or both. The questionnaire asked each respondent to state the number of such interviews he had and the number of such letters he wrote with respect to various kinds of employers. The results are reflected in Exhibit 14. At least insofar as the type of job sought is reflected by the numbers of letters sent and interviews held, the data show a significant difference in the kinds of jobs sought by men and women. A significantly larger portion of the women sought jobs in federal, state, and local governments, as judicial clerks, and in banks and trust companies. A significantly smaller share sought jobs with firms of 5 to 15. An examination of Exhibit 13 suggests that the female decision to seek more jobs with the federal government and to seek fewer jobs with the firms of 5 to 15 may have actually caused them to earn more, not less, money and that it reduced, rather than increased, the income differential between the males and females. On the other hand, it appears that the jobs with banks and trust companies and in state and local government probably paid less money than the women might have earned elsewhere, thereby contributing to the income differential. Had each kind of employer hired a percentage of women equal to the percentage of interview and letter contacts, and had they been hired at the average income of the women in fact employed by that type of employer, the female income would have increased rather than decreased.[41] To put it another way, the women appeared to be seeking higher paying jobs than those they ultimately acquired. However, because of the wide

41. The increase in income would be as follows: The graduating classes of 1956–1958, 8.4% increase; 1959–1961, 1.9% increase; and 1962–1965, 4.5% increase.

male-female income difference with respect to almost every kind of employer, it appears that no amount of female job seeking would have significantly closed the income gap.

EXHIBIT 1442

RESPONDENTS' INTERVIEWS WITH INITIAL EMPLOYERS



F. *The Silent 35 Per Cent*

That tantalizing, silent portion of the sample who received a questionnaire but did not return it are the bane of the mail interviewer's existence. In this study, approximately 790 men and 887 women to whom questionnaires were sent did not return them. One who would generalize about the population on the basis of his returns is always faced with the argument that the non-respondents were significantly, even radically, different from those who did re-

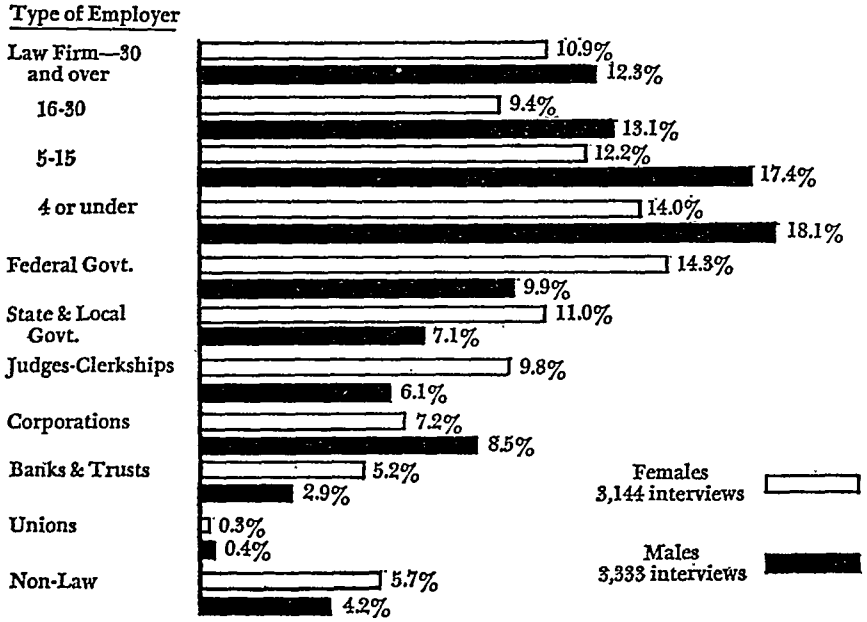
42. These data pertain only to the first permanent job sought after graduation and do not include interviews for second or third jobs. The following is a graph of the data reflected in Exhibit 14 except that in the following graph each respondent was counted only once with respect to each type of employer no matter how many interviews he had with that type of employer. If, for example, a respondent reported 5 interviews with law firms of 30 or more and 2 interviews with federal governmental agencies, he is counted only once in the firms of 30 or more category and once in the federal government category. In Exhibit 14, each of his 7 interviews would have been reflected.

See graph on facing page.

spond. Of course, if those who did not respond are spread over the same spectrum as those who did respond, they present no problem. Since this study focuses on the differential between males and females, the non-respondents do not present any substantial problem, even if they are different from those who did respond, as long as the male and female non-respondents are like one another. If, for example, most of those who did not respond had very low incomes, this factor would reduce the aggregate male income, but it would also reduce the aggregate income of the females. There might be a net change in the male-female differential, but it would probably not be an important one. Thus the silent 35% can destroy the validity of the survey's findings only if we assume both that the male and female non-respondents are different from each other and that at least one of the non-responding groups is different from the respondents of its own sex.

The data collected give no basis for concluding that such differences exist between the non-respondent males and females. Indeed, in the one case where it appears that a substantial group might not have responded (those in the bottom quarter of their law school classes), the percentages of apparent male and female non-respon-

RESPONDENTS WHO HAD AT LEAST ONE INITIAL JOB INTERVIEW WITH THESE EMPLOYERS



[Female data was not tested for statistically significant difference from male data.]

dents do not differ significantly.[43] One might hypothesize that the very busy lawyer might not respond simply because he lacks the time. One might also guess that the lawyer who is not earning much money might not respond because he would be unwilling to disclose his income. However, unless the females take some masochistic pleasure in revealing their low incomes, one would assume that these factors would affect the males and females in roughly the same way.

A comparison of the average income of the men and women from the classes of 1960 and 1957 reveals the improbable situation which would have to exist before the returns of the silent 35% would eliminate the observed income differential. If the male income for the class of 1960 did not change with the addition of the new 35%, the silent women would have to average $19,500 a year to make their overall average match that of the men.[44] Thus the non-responding 1960 women graduates would have to have an average income approximately two and a half times greater than that of their 90 classmates who did respond. The corresponding figure for the class of 1957 is $27,800 a year, or nearly three times the income of the responding women in the class of 1957.[45] It is incredible that such differences would exist both between the men and women who did not respond and between the respondents and non-respondents.

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43. See Exhibit 11 *supra*. Of course this fact suggests similar patterns of non-response only if one assumes that males and females are equally spread throughout the class.

44. The following calculations are based upon two assumptions: (1) that 60 females from the sample in the class of 1960 failed to return questionnaires; (2) that the males who failed to respond from the class of 1960 earned the same average salary as those who did respond.
Calculation:

90 females returned surveys and averaged $8,000 income
60 females failed to reply
Males averaged $12,600 for the same year of graduation (1960)
Let Y = average income which the 60 non-responding females must earn to equalize the total female average income with that of the males.
Then: $90 \times \$8{,}000 + 60 \times Y = \$12{,}600 \times 150$
$Y = \$19{,}500$

45. The calculations below are based upon the assumptions made in note 44 *supra* except that these figures are for those graduating in 1957.
Calculation:

86 females returned surveys and averaged $9,500 income
57 females failed to reply
Males averaged $16,800 for the same year of graduation (1960)
Let Y = average income which the 57 non-responding females must earn to equalize the total female average income with that of the males.
Then: $86 \times \$9{,}500 + 57 \times Y = \$16{,}800 \times 143$
$Y = \$27{,}800$

G. *Is the Male Sample Representative?*

Since the female sample constitutes approximately 85% of all the female graduates of all of the accredited law schools in the country in the time span covered, the female sample in a very real sense is the female lawyer population of this period. The same of course is not true of the males: the 2,151 males in the sample constitute only a small part of the male graduates of the accredited law schools in the period covered.[46] Moreover, not all of the males were selected on a truly random basis. We instructed each of the law schools from whom we received male names to select them by picking one male name from a class for each female name from that same class. Approximately 28% of all the males were selected by the truly random method of taking the male name on the alphabetical class list next following the female name. Another 25% were selected by methods characterized as "random" by the law schools, but which may or may not have been truly random methods of selection. 22% were selected by unknown methods, and 24% were selected by taking a male whose grade point was most nearly the same as that of the female with whom he was matched.

Statistical comparisons of the males selected by taking the next name on an alphabetical list with the males selected by the other methods show no difference of statistical significance among the four groups in income (either starting or present), in year of graduation, or in class standing. Of course this does not prove that the male sample is precisely representative of all male law graduates, for the sample has been selected from the schools and years from which the female sample was drawn. If a larger percentage of all females graduated from one group of law schools or classes, the male sample will be disproportionately biased toward those schools and classes.[47]

A conclusion that the male sample was so unrepresentative that no income differential actually existed between women lawyers in the classes of 1956 through 1964 and *all* male graduates of *all* law schools in those years would require the same kind of improbable assumption as was considered above.[48] For example, the average

46. There were approximately 104,000 lawyers admitted to the bar during the period between 1956-1965. Thus our male sample of 2,151 constitutes roughly 2% of this group. See HANKIN & KROHNKE, *op. cit. supra* note 2, at 43. Figures from the 1964 Lawyer Statistical Report contain estimates for 1964-1965.

47. The male sample is slightly biased by the fact that it was chosen only from schools which had female graduates. See note 5 *supra* for a list of schools which did not have female graduates during the period of the study or which sent no names.

48. See notes 44 and 45 *supra* and accompanying text.

income of all men in the class of 1956 would have to be about half the average income of the males in the sample for the male-female income differential to be eliminated. The size of the male sample and the fact that it was collected by largely random methods from approximately 100 of the 134 accredited law schools and from 10 classes makes it most unlikely that the sample differs by such a large margin from the general male lawyer population.

Because the men who were randomly selected did not differ in a statistically significant way from the other men in income, in year of graduation, or in class standing, and since there were no other facts which would indicate that the total male sample is not representative, we have assumed for the purposes of the remainder of the article that the males are representative of the male lawyer population from the last ten years' graduating classes.

H. *Evidence of Discrimination*

As it is used in this article, "discrimination" includes every differentiation, whether or not it is rational or functional. It includes both the racist's selection of one of his own race in preference to a more able member of another race and an ill person's selection of the best neurosurgeon in preference to the next best one. Initial support for the conclusion that the male-female income differential is caused principally by discrimination against women comes from the fact that our statistics rule out or render unlikely the other most plausible explanations. On the basis of the figures and analysis set out above, one can conclude with near certainty that the income differential between the men and women was not caused by any of the following factors: (1) the fact that women were employed only part time; (2) a lack of experience on the part of the women lawyers; (3) lower class rank and less law review participation by the women; (4) a difference in schools attended; or (5) different types of employers. In addition, the statistics and analysis indicate, although with less certainty, that the income difference was not caused by (1) response bias among the members of the sample; (2) differences between the general type of work performed by the men and women; or (3) differences in the type of jobs sought. If one rejects forgetfulness and lying as plausible explanations for the large income differential which was observed, he is left with only one plausible hypothesis[49] to explain the income

49. If a disproportionate share of the females are Jewish, some of the income differential may be explained by discrimination against them because they are Jewish. Since the questionnaire did not collect any information on race, religion or ethnic background, we could not calculate the effect, if any, of such discrimination, and,

differential, namely discrimination on the basis of sex against women lawyers by employers and clients.

A second and more direct piece of evidence of this discrimination is the response of the 63 placement directors and deans who answered our placement questionnaire: 6 stated that any discrimination against female law graduates is "insignificant;" 43 believed that such discrimination is "significant"; and 14 stated that it is "extensive." These observers speak with authority and from long and extensive experience with the interviewing and hiring processes at a number of our busiest law school placement offices.[50]

Further evidence of discrimination is provided by the response of women to the question: "Do you believe that you have been the object of discrimination because of your sex by your present, former, or by any potential employer from whom you sought a job?" The following exhibit shows that more than half believe they probably have been the object of such discrimination and that more than a third are "certain" that they have been discriminated against.

EXHIBIT 15
BELIEFS OF FEMALES CONCERNING DISCRIMINATION

Degree	Per Cent of Females (N = 1148)
Certainly discriminated against	38.2%
Almost certainly	9.6%
Probably	17.6%
Probably not	15.8%
Certainly not	18.8%

Doubtless many disappointed female lawyers blame their lack of success upon discrimination and, for that reason, the figures on the above table should probably be discounted by a certain percentage. The question gave the respondent an opportunity to say that she was only "almost" certain or that it was only "probable" that she had been discriminated against, yet 38% of the women chose to state that they were "certain" that they had been the victims of discrimination. In view of lawyers' notorious propensity to qualify and equivocate, the absolute quality of these answers, made exclusively by lawyers who had the opportunity to select several degrees of equivocation, suggests that one should not discount the answers too greatly.[51]

absent data showing a disproportionate percentage of Jews among the females and lacking evidence about the extent and effect of anti-Semitic discrimination against lawyers, I have chosen to classify this hypothesis as "not plausible."

50. Among those indicating a belief that discrimination against women in hiring is significant or extensive are representatives of the placement offices at six out of the nine schools which we classified as prestige institutions.

51. The women who were most certain they had been discriminated against also earned the least money. Perhaps this fact proves the accuracy of their opinion. On the other hand, it may only indicate that their belief is a rationalization for low

Finally, discrimination against women lawyers is suggested by the female response to the question, "How many of each of the following types of employers stated a policy to you against the hiring of women as lawyers?" On 1,963 separate occasions, potential employers are reported to have actually stated to a female respondent a policy against the hiring of women lawyers. Even if we discount this number by a considerable margin, it still constitutes persuasive evidence of employer discrimination on the basis of sex.

EXHIBIT 16[52]

EMPLOYERS WHO STATED A POLICY AGAINST THE HIRING OF WOMEN LAWYERS

Type of Employer	Number of Statements of Discrimination Policies	Number of Women to Whom at Least One Statement Was Made
Law firm—30 and over	474	218
16 to 30	322	141
5 to 15	325	149
4 or under	271	125
Federal government	88	79
State & local government	95	63
Judges	78	52
Corporations	125	66
Banks & trust companies	111	56
Unions	22	5
Non-law jobs	52	28
Totals:	1963	982

It does not necessarily follow that one who states he has a policy against the hiring of women in fact has and carries out such a policy.

income. The average present income of full-time employed women in relation to their responses to the discrimination question is as follows:

1964 INCOME

Discrimination	Classes of 1956-58	Classes of 1959-61	Classes of 1962-65
"certain"	$8,700	$7,000	$6,400
balance of responses	$9,100	$8,100	$6,600

52. The large ratio of reported statements of a discrimination policy to the total number of interviews is consistent with our data in some cases but inconsistent with other data which we have collected. As indicated in Exhibit 3 *supra*, the percentage of female lawyers finding an initial job with a law firm of 30 or more is not statistically different from the percentage of males finding jobs with that employer. If these firms in fact discriminate as extensively as the reported policies would indicate, it is difficult to understand how such a large percentage of females could find employment with them. The explanation may lie in the fact that some other firms of 30 or more in fact hire more than their proportionate share of females. Since females make up less than 3% of the lawyer population, anyone who has 30 to 50 employees and who hires two women will have employed a higher percentage of the female lawyer population than of the male lawyer population, and thus will have offset somewhat the aggregate discrimination. Another explanation may be found by an examination of the positions which women hold with those firms. Some women may have responded that law firms who in fact hire women for second-class positions nevertheless have a "policy against hiring women."

However, one can imagine few circumstances under which it would be beneficial for the employer to state a policy of discrimination which he did not practice. In some southern societies, the pressure to discriminate against Negroes might be so great that even one who did not oppose Negroes would feel compelled to express opposition, but surely the pressure to discriminate against women has not reached such a pitch.

The combination of this evidence—the apparent failure of other hypotheses to explain the income differential, the statements of the placement officers and deans, the opinions of the female respondents, and finally the reported statements of the employers themselves—convinces me that discrimination against women lawyers by their potential employers is at least a substantial cause, and probably the principal cause, for the income differential which we have observed between men and women.

III. Is the Discrimination Functional?

For present purposes, discrimination by any private employer may be considered functional to the extent that it is likely to produce a greater economic gain for him than he would have received had he not so discriminated. For example, the failure of the Green Bay Packers to select women as defensive linemen is discrimination, yet it is entirely functional and appropriate; women do not exhibit the massive size, strong backs, and powerful limbs which are the requisites of the position. Similarly, women may have psychological or intellectual limitations which make them less effective lawyers than are men. If this is true, some or all of the discrimination against women lawyers is functional and, perhaps, defensible.

Because the qualifications of a defensive lineman are relatively simple and obvious, it is easy to tell which discriminations in selections for that position are dictated by its function and which are not. However, there is no such agreement about the necessary, or even the desirable, attributes of an "effective lawyer." Indeed, such attributes are kaleidoscopic, elusive, and difficult to generalize. At one end of the legal spectrum is the lawyer who does nothing but appear before juries; at the other end is the man employed by a governmental agency or a very large firm who is an expert on some obscure and complex statute or body of law. The latter in his relish for and mastery of the statutory intricacies resembles the scholar; the former in his enjoyment of the pomp and show of the courtroom resembles the actor. The same personal characteristics which are vital to the success of one of these men would spell the doom of the other. And between these two extremes lie 300,000 American lawyers who ex-

hibit infinitely varied mixtures of a number of roles, including actor, scholar, and counselor.

Nonetheless, it probably is possible to identify a few characteristics which are desirable for the performance of every lawyer function (for example, intelligence), and others which would be helpful to sizeable slices of the legal profession (for example, ability to inspire confidence in clients). The data produced by this study are not extensive, but they do provide a basis for comparing men and women as to certain of these functional attributes—intelligence, emotional suitability, probable length of service, and ability to inspire confidence in clients.

A. *Intelligence*

Both class standing and law review participation probably bear a direct relation to intelligence.[53] These are two common indicators of intellectual ability used by employers, who often specify that only persons on law review or with certain grades or class standing may apply for jobs with them. The data provide no basis for discrimination against women on either of these grounds. There was no statistically significant difference between the men and women in either class standing or law review participation.[54]

B. *Emotional Suitability*

I know of no data which give a suitable inventory of the emotional makeup of women lawyers, nor do I know of any which compare female lawyers either with other women or with male lawyers.[55] Absent a systematic psychological inventory, one should take care to avoid two inviting errors in analyzing the emotional composition of women lawyers. The first is to attribute the common characteristics of all women to that tiny percentage of women who happen to be lawyers. One random selection of 15,663 female college graduates netted only 44 who were going to become lawyers.[56] Whatever the process which culled out these 44, it is a hasty judgment which says that they exhibit all of the attributes of the remaining 15,619. On the contrary, it is entirely possible that "women" exhibit certain

53. Since law review participation is usually determined in part by class standing, the former may be only an additional indication of the latter's effect.

54. See Exhibit 11 *supra*.

55. Alice S. Rossi, who is with the National Opinion Research Center at the University of Chicago, is conducting a study of a large sample of female college graduates. This study should ultimately produce information about the characteristics of women who undertake practice in the traditional male professions, but it probably will not give specific information about female lawyers.

56. This sample is random in the sense that it was chosen from colleges which were randomly selected.

attributes and that "women lawyers" exhibit substantially different ones. The second error is to color all 7,000 female lawyers with the attributes of one or two of them. Since women make up no more than 3% of the bar, it is possible to engage actively in practice and yet not have extensive contact with women lawyers. Nevertheless, I have quizzed few lawyers or law teachers who did not have definite, and often outspoken, views about the emotional composition of that group, although often these generalizations are based on only a handful of experiences with one or two women lawyers. Since this study is limited to women who are lawyers and includes approximately 1,300 of them, it suffers from neither of these errors.

Two areas of our study—one dealing with trial practice and the other with motives for attending law school—yielded information which is relevant to the question of emotional suitability. First, the idea that women shrink from the combat of litigation is not supported by the data, which show that the women appeared in court with nearly the same frequency as did the men.[57] Seven per cent of the full-time employed women listed "litigation" as the type of work (singular) they performed; 7.2% of the men listed litigation. Moreover, 45.6% of all the females in full-time private practice stated that they engaged in litigation[58] and 27.7% stated that they did criminal work. The study did not compare male and female success in litigation, but it showed at a minimum that a sizeable body of the women were actively engaged in trial practice.

It is sometimes suggested that women are less able at certain kinds of practice because, unlike men, they are not motivated by a wholesome ambition to earn money and get ahead. However, the thought that women are exclusively or even principally motivated to enter law by "bleeding heart" motives or that they are untouched by crasser motives is contradicted by the data discussed above.[59]

57. The difference between the average number of court appearances made by the males and the females is statistically significant.

AVERAGE NUMBER OF COURT APPEARANCES PER YEAR

Year Graduated	Females	Males
1964	2.4	4.1
1963	4.0	7.7
1962	5.8	7.9
1961	9.2	10.0
1960	7.4	9.2
1959	9.6	10.2
1958	7.3	9.1
1957	7.8	10.5
1956	8.2	10.3

58. See text at note 18 *supra* for a discussion of the ambiguities in the definition of "litigation."

59. See text at pages 1069-70 *supra*.

We know far too little about the psychological composition of the female lawyer to state with certainty how she differs from other females or from male lawyers. Clearly some current ideas about the female lawyer's psychological composition cannot be empirically supported. Such incidental data as the study produced on motives for attending law school and frequency of court appearance should inspire a vigorous skepticism about other notions concerning a woman's emotional suitability for various kinds of practice.

C. *Probable Length of Service*

It is often stated that a woman is a less desirable employee-lawyer than is a male because she will quit working to get married, to have a child, or to devote more time to her family just when she is gaining sufficient experience to be a valuable employee. The data show that many women had changed jobs several times at the time they answered the questionnaire and that a larger share of the women than men had ceased practice entirely.[60] However, they do not support the common expectation that there is a vast difference between male and female performance on this point. Rather, the striking thing about the data is that both men and women changed jobs quite frequently. At the end of three years, only 30% of the males in the class of 1962 and 29% of the females in that class were still at their first jobs. At the end of seven years, the corresponding percentages fall to 14.5% and 11.1% respectively. Except for the class of 1959, the percentage of women in each class who were still at their first jobs at the time they answered the questionnaire did not differ from the corresponding percentage of the males by a statistically significant margin. However, if the men from all classes are compared with all of the women, the difference is statistically significant. [Exhibit 17]

As is indicated in Exhibit 18, a significantly larger percentage of women than men had left their *second* jobs, in four of eight classes. The fact that the male turnover with respect to the second job is lower by a significant margin in the three oldest classes might suggest that this job turnover differential grows wider with the passage of time, as more women leave practice because of growing family commitments. Yet the first job data show no such trend, and the number of women permanently re-entering practice after a spell of child-rearing and housekeeping may actually cause a reduction in turnover among female lawyers who have been out of law school for

60. Exhibit 8 *supra* shows that only 65.5% of the female respondents reported that they were in full-time practice and that 85.5% of the males reported that they were in full-time practice.

EXHIBIT 17

JOB MOVEMENT

(Still at First Job in 1965—No Job Changes)

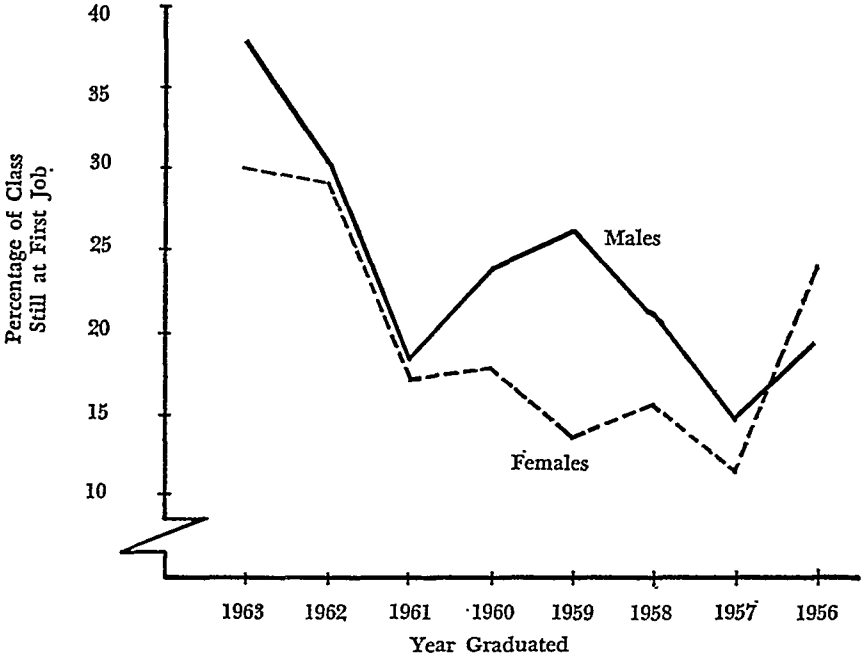

EXHIBIT 18

JOB MOVEMENT

(Still at Second Job in 1965—1 Job Change)

more than ten years. The data give us no reliable answers to these questions.

In summary, our gross data show a slightly greater female job turnover in the first job after law school;[61] they also suggest that job turnover of women is higher than that for men thereafter. Moreover, if a large share of the female non-respondents are housewives,[62] and if no corresponding percentage of the male non-respondents are not working, the actual job turnover of all female lawyers may be even higher than that reflected in our data.

But, even if the total female job turnover is higher than our data suggest, that fact alone does not prove that a woman is a less desirable employee than is a man, for high turnover can result from many causes. It can be caused by employee fickleness, but it can also be caused by poor pay or other inadequacies of the job. If women are as effective lawyers as are men but are nevertheless paid less money than are comparably employed men, one might expect women to seek new jobs more frequently. On the other hand, some of the standard female motivations for job change—the urge to motherhood, the need to devote time to one's family or to move with one's husband to a new location—are all peculiar to women and may be less subject to control by employer offers of more money and greater status than are the typical male motivations for job change. Without information indicating which changes are caused by employer discrimination and which are caused by the demands of a husband or a family, high job turnover neither proves nor disproves that discrimination against women is functional. The naked statistic of frequent job change is equally consistent with either hypothesis.

The data do explode the myth that few married women and no mothers practice law. Few women ceased work because of marriage alone,[63] and more than 25% of the full-time employed women were mothers of small children. One can only guess how many more might work full time if more employers tailored positions so that the hours and responsibilities were compatible with a mother's other responsibilities.

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61. Because the sample was not large enough, we could not make a meaningful comparison of female turnover by type of job. Such data might reveal quite different patterns among jobs and between male and female employees depending upon the type of job.

62. We have no reason to believe either that they are or are not.

63. See text at note 24 and Exhibit 8 *supra*.

D. *Client Confidence*

Every law firm, except one with a shrinking practice, has the problem of transferring a client's sometimes fragile allegiance from senior men to competent younger men without losing the client's patronage. If the young lawyer is a Jew, a Negro, or a woman, this problem may be aggravated by the clients' own prejudices.[64] One of the most frequently stated fears about women lawyers is that clients will not place their confidence in them. Our data did indicate that women see fewer clients than do men by a statistically significant margin. This difference was particularly great among those who were employed by large firms and who had been out of law school for four or more years.

Despite this statistically significant difference in the frequency of client contact, the data do not really support the conclusion that clients will not place their confidence in women lawyers. First, it is not possible to tell from our data whether the lower frequency of female client contact was due to clients' resistance or to mistaken beliefs of women lawyers and their employers about client resistance. Second, the data show a very substantial amount of client contact on the part of women employed by corporations and by firms of 15 or under. If the hypothesis about client resistance were correct, one would expect women to be concentrated in jobs which required little or no client contact. Yet in the smaller firms and corporations, women saw approximately seven clients for every ten seen by men.

Of course these data do not prove that all clients will place their confidence in a woman lawyer as readily as in a male lawyer. The figures tell nothing about the kind of clients which the women saw. Perhaps they were spread across the spectrum of legal practice, but they may have been concentrated in the probate and domestic relations field.[65] Furthermore, the figures do not indicate whether the clients were satisfied with the service, nor do they indicate whether the employers had to undertake a more extensive and careful introduction than would have been required with a male. They do show, however, that any vision of the woman as exclusively a back-room and library worker is badly distorted.

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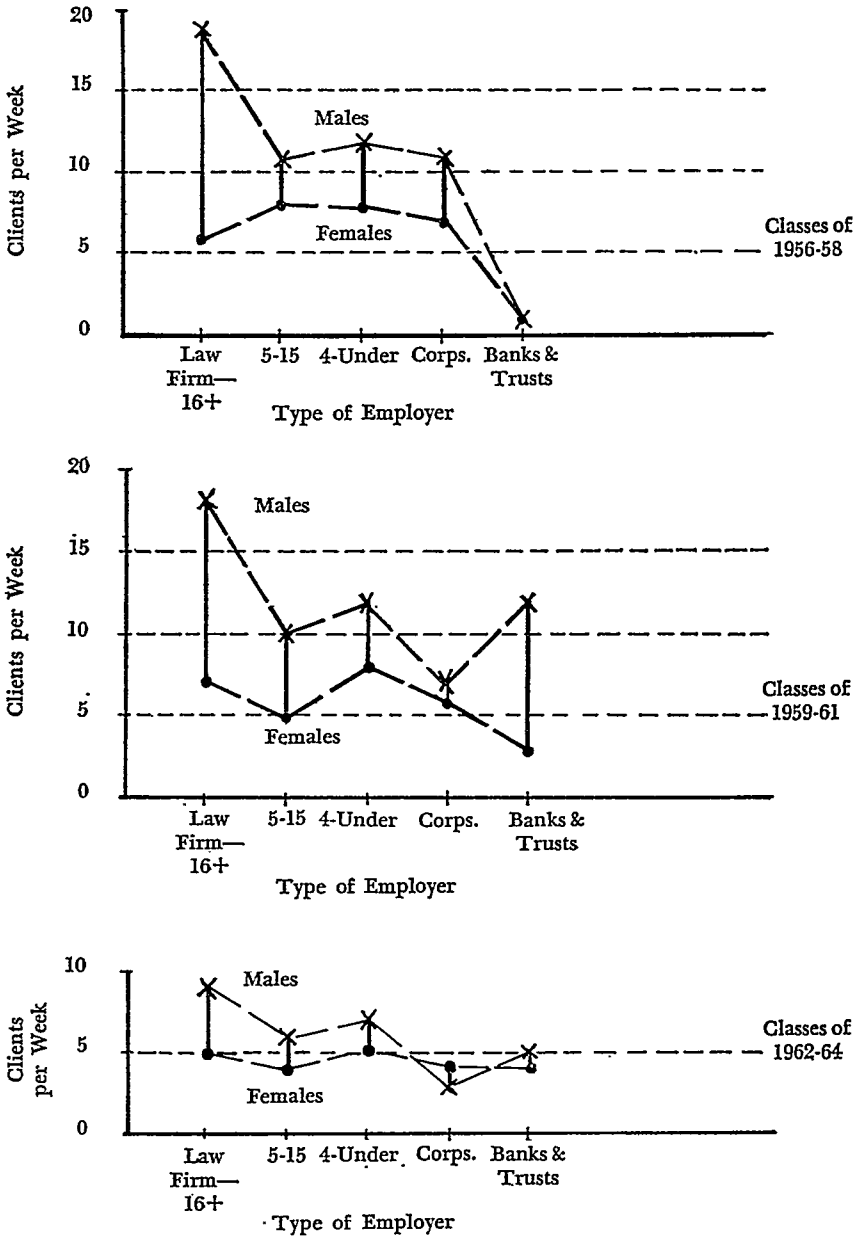
64. Despite the fact that employer discrimination based on clients' prejudices is functional, it has been prohibited by the Civil Rights Act of 1964. See text at notes 79-82 *infra*.

65. Some members of the bar assume that probate and domestic relations clients find female counsel more acceptable than other clients do. One can question why these clients should react differently to female lawyers than do others.

EXHIBIT 19

AVERAGE NUMBER OF CLIENTS SEEN PER WEEK



E. *The Weight of the Evidence*

The survey did not solicit conclusive or comprehensive data on the question whether discrimination against women lawyers is functional. It tells us nothing about the relative ability of men and women to acquire clients or about the importance of that function

to employers. Moreover, the information on court appearances and frequency of client contact fall far short of the systematic psychological inventory which we need in order even to begin evaluating the contention that discrimination against women lawyers is functional. Nonetheless, the information which the survey did gather makes some of the stoutest citadels in the rational discrimination fortress look vulnerable. "Women can't stand the rigors of trial practice"—but the full-time employed women appeared in court nearly as often as did the men. "Clients won't put up with a woman"— but, except in one kind of practice, the women saw seven clients for every ten that men saw. "Women quit work to marry and have children"—but 27% of the full-time employed women were married *and* had children. "Women lawyers are just bleeding hearts who do not understand the usual business motives"—but equally as many men admitted the importance of the "bleeding heart" motive and a large share of the women rated monetary motives very important in their choice of law as a career. These data have convinced me that much of the enormous income differential between the males and females is attributable to nonfunctional discrimination.

IV. Forces for Change

A. *Goals*

To avoid wasting his resources in fruitless and unjustified causes, and in order to nurture the support of the largest possible segment of American society, one who attacks discrimination should select his particular goals with some care. Surely few enlightened persons in twentieth-century America will support any substantial *nonfunctional* employment discrimination against any group in our society —whether it be Jews, Negroes, or women—and therefore most would agree that the elimination of nonfunctional discrimination against women lawyers is an appropriate goal. Some would go further and seek the elimination of nearly all employment discrimination based on sex, whether functional or not. For example, the guidelines of the Equal Opportunity Commission, published under the Civil Rights Act of 1964, come close to prohibiting all sex discrimination, including some which may ultimately prove to be functional.[66]

I would urge a goal which falls short of the elimination of all sex discrimination in employment, but which goes beyond a mere attack on proved nonfunctional discrimination. Because I believe that most of the sex discrimination is not functional, and because we are not likely soon to get definitive data on whether or not it is, I would

66. For a discussion of these guidelines, see text at notes 79-95 *infra*.

establish a presumption that, until proved otherwise, all discrimination against female lawyers is not functional and I would counsel an attack on all such discrimination except for that which has been proved to be functional. In addition, and irrespective of its functional nature, I would urge an attack on that peculiar kind of discrimination which is based upon clients' or employees' prejudices.

As a general proposition, I see no merit in striking down functional discrimination in hiring against the female lawyer.[67] This discrimination stands on no different footing than a variety of other discriminations which the employer routinely makes on the basis of grades, experience, school, and personality.[68] If, for example, an employer were able to prove that, despite equal treatment, women were more likely to leave a given position than were men, I would permit him to consider that fact in his employment formula. One may argue that each woman must be considered "on her own merits" and that the characteristics of female lawyers—even the proved and undisputed characteristics—should not be attributed to any single individual. However, that argument begs the question, for a woman's relevant physical and psychic attributes are no less "her merits" than

67. Because an employer may use probabilities in making his hiring decisions, it does not necessarily follow that he should be permitted to use probabilities in establishing the terms or conditions of employment. That is another and more complex problem.

68. Arguments for the prohibition of functional sex discrimination will have a familiar sound to one who has considered the current issue of preferential treatment for the Negro. In many cases the other side of the preferential treatment coin is prohibition of a functional discrimination against the Negro; likewise prohibition of functional sex discrimination may mean preferential treatment for the female.

Whatever their merit in the Negro's case, the arguments given to support Negro preference do not justify female preference. Kaplan, in his article *Equal Justice in an Unequal World: Equality for the Negro—the Problem of Special Treatment*, 61 Nw. U.L. Rev. 363, 364-66 (1966), summarizes these arguments as follows: (1) without special help Negroes will be condemned to a perpetual deprivation in a functionally discriminating society; (2) Negroes, like the handicapped, should be treated according to their current need; (3) white society has an obligation to atone for past exploitations; (4) it is in society's self-interest to give preferential treatment to the Negro and thus benefit from the potential which will be so realized; and (5) it is in society's interest to give the Negro special treatment in order to avoid the kind of explosive and dangerous conflict which the past several years' riots suggest is in store for us.

Arguments 1, 2, and 4 all assume that the persons against whom the discrimination is directed are functionally and substantially inferior. However, there is nothing to suggest that the female lawyer suffers from any such substantial functional inferiority by comparison with her male counterpart. She has had training in the same schools from kindergarten through law school and to our knowledge she comes from no different environment or socio-economic background than does the male. Thus we have no basis from which we could assume that she will be eternally deprived if she does not get help, that she has any special need, or that her potential for society cannot be realized simply by the elimination of nonfunctional discrimination.

Since the "social dynamite" argument does not apply to the woman lawyer, one has only the slender reed of the obligation arising from past inequities upon which to base an argument for preferential female treatment. As indicated in the text, it is my judgment that this argument alone is not sufficient to justify female preference in light of all of the problems which that would bring.

the grades of the D student are "his merits." In a given case, the generalization that women will behave in a certain way can be wrong, but the same is true of the generalization that all D students are intellectually inept. Moreover, since by definition there will be some economic cost to the employer if he must cease functional discrimination, he can be expected more strongly to resist the cessation of functional discriminations than nonfunctional ones. It is not at all clear that the combined powers available to attack discrimination can eradicate even nonfunctional sex discrimination in the foreseeable future; how much smaller are the chances if the attack is widely spread out and there is a justifiable basis for opposition.

Secondary discrimination—that rationalized on the basis of one's clients' or employees' discrimination—is a different breed of cat. It differs from most other functional discriminations in two ways: (1) it is a half-breed, part functional and part nonfunctional; and (2) it will often be subject to change or mitigation by the employer.

The first point can be illustrated by comparing two hypothetical discriminations. Assume first that women prove to be less able negotiators than men and, therefore, functionally inferior labor lawyers. From every viewpoint, that of the employer, the opposing lawyer, the client, and the distinterested third party, they will appear to be functionally inferior. Compare this with the case of "secondary discrimination" based upon a client's unwillingness to have a woman as his lawyer. From the employer's viewpoint, the discrimination against the woman in this case is perfectly functional; he must please his clients and any employee who cannot promote that objective does not perform his function properly. But, if one views this case from the vantage point of an opposing lawyer, an unprejudiced client, or a disinterested third party, it is a nonfunctional discrimination since here our hypothetical female lawyer can negotiate and carry on all of the other lawyer functions as effectively as can a man—her only flaw lies in the prejudice of the client. Thus, although this discrimination is functional from the employer's point of view, I would select the vantage point of the disinterested third party and treat secondary discrimination as basically nonfunctional.

The second difference between secondary discriminations and other functional discriminations also arises from the fact that the sources of the two discriminations are different. Since secondary discrimination springs from the attitudes of employees and clients, it is more readily amenable to change than are those sex discriminations which inhere in the female's peculiar physical or psychic composition. An employer can exercise some control over his employees; he

may also be able to influence the attitudes of his clients. At a minimum, he can take extra pains in introducing the woman to the client and can use extra care in selecting the clients which she is to serve. Because secondary discrimination is thus subject to his change and control, the cost to the employer of ceasing it may not be as high as if he were asked to discontinue other functional discriminations; with respect to secondary discrimination, the employer can mitigate and perhaps avoid the loss, whereas, in the case of other functional discriminations, we would simply be asking him to absorb the loss. For two reasons, then—because it is fundamentally nonfunctional and because it is subject to some change by the employer—secondary discrimination should be a target of attack.

Thus, I propose these goals: first, to eliminate all sex discrimination in employment which cannot be shown to be functional; and second, to eliminate functional discrimination in the special case in which it is based upon the nonfunctional discrimination of clients or employees.

B. *Further Study*

An important step in mobilizing society's opinion to combat a discrimination is to convince society that the discrimination is an unfair one. One has only to demonstrate that a discrimination exists against Negroes or Jews and a substantial segment of American opinion will assume that such discrimination is not functional and therefore unfair. However, it is doubtful that nearly as large a segment of American society is willing to make the same assumption about discrimination against women. The physical difference between males and females is more fundamental than that which exists between Jews and non-Jews or between Negroes and Caucasians. Because of this physical difference and the attendant requirements of motherhood, certain discriminations against women may be functional and appropriate. Moreover, some respected scholars hold the view that women have fundamental psychic differences from men,[69] and surely a large segment of American opinion agrees with this view.

Thus, if one is to call forth the kind of reaction on behalf of women which the past quarter century has seen on behalf of Negroes, he probably will have to demonstrate that these physical and psychic

69. See, *e.g.*, Bettelheim, *The Commitment Required of a Woman Entering a Scientific Profession in Present-Day American Society*, in MATTFELD & VAN AKEN, WOMEN & THE SCIENTIFIC PROFESSIONS 3 (1965); Erikson, *Inner & Outer Space: Reflections on Womanhood*, 93 DAEDILUS 581 (1964).

differences, if they exist, either do not justify any discrimination or do not justify the amount of discrimination which presently exists. Perhaps the magnitude of discrimination which has been displayed on the foregoing pages will persuade many (as it did me) that neither the physical nor psychic differences between males and females, even operating at their maximum possible effect, could justify such discrimination. But, to the skeptical, neither the magnitude of this discrimination nor the fragmentary evidence which we have collected concerning its nonfunctional basis will be persuasive. Thus, a thorough and sophisticated study of the effectiveness of women as lawyers is needed.

Among other things, such a study should:

(1) make a thorough psychological inventory of the female lawyer and compare it with a similar male lawyer inventory;
(2) systematically investigate the reaction of all varieties of clients to female lawyers;
(3) study female court appearances and compare their success with that of males;
(4) examine the comparative ability of females and males to attract clients; and
(5) study the reasons which cause males and females to leave various jobs.

The results of such a study might not be conclusive, but they would give a sound basis for estimating the extent to which discrimination against women lawyers is functional. Such a study might also produce more sophisticated culling devices for distinguishing between those who are going to be effective lawyers and those who are not. Finally, it might reveal areas of peculiar female expertise which are not now commonly recognized.

C. *Present Legislation*

The federal government and many of the states now have legislation which prohibits discrimination on the basis of sex in certain circumstances.[70] The federal law is embodied in Title VII of the Civil Rights Act of 1964. Section 703 of that act prohibits an employer from discriminating "against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national

70. For a current listing of state anti-discrimination statutes which deal with sex, see CCH EMPL. PRACT. GUIDE ¶ 1400 (July 26, 1966).

origin . . . ."[71] After July 2, 1968, that provision will apply to most employers of twenty-five or more persons who are "engaged in an industry affecting commerce . . . ."[72]

This language surely reaches the many lawyers who are employees of covered corporations. In addition, the General Counsel of the Equal Employment Opportunities Commission has ruled that law firms with the requisite number of employees are covered by the act.[73] The statutory language and the analogous cases support this conclusion. By a two-step process, Congress adopted for Title VII of the Civil Rights Act of 1964, the broad jurisdictional sweep of the National Labor Relations Act[74] which the Supreme Court has summarized as follows: "Congress intended to and did vest in the [National Labor Relations] Board the fullest jurisdictional breadth constitutionally permissible under the commerce clause."[75] It is difficult to conceive of a law firm of twenty-five employees which does not exhibit those miniscule interstate contacts necessary to "affect commerce" and thus invoke the coverage of the commerce clause of the

71. 78 Stat. 255 (1964), 42 U.S.C. § 2000e-2(a) (1964). The proponent of the amendment covering sex was Howard Smith, Democrat from Virginia, Chairman of the House Judiciary Committee, and arch-foe of the bill. One can question the sincerity of Congressman Smith's protestations that concern for the "minority sex" was his sole motivation, 110 CONG. REC. 2577 (1964). Congressman Smith may have had just a tinge of hope that the proposal would cause dissention among the bill's proponents. In fact, the supporters of the bill did disagree over the sex issue; Emmanuel Celler of New York opposed the amendment but found himself pitted against Mrs. Martha Griffiths of Michigan and several of her female colleagues. Mrs. Griffiths eventually won, and the amendment was passed 168 to 133. 110 CONG. REC. 2584 (1964).

72. 78 Stat. 253 (1964), 42 U.S.C. § 2000e-Definitions (1964).

73. His ruling [in the form reported in CCH EMPL. PRACT. GUIDE ¶ 17,304.18 (Sept. 23, 1966)] is as follows:

> Finally, with respect to your inquiry regarding law firms, the fact that the firm renders legal assistance to clients engaged in interstate commerce would, in the opinion of the Commission, be sufficient to determine that the law firm is engaged in an "industry affecting commerce" and therefore subject to the provisions set forth in Title VII. *Cf. NLRB v. National Survey, Inc.*, [53 LC ¶ 11,165] 361 F.2d 199, 204 (CA 7, 1966).
>
> As to the treatment of junior partners of a law firm, we have not as yet had occasion to pass on a particular fact situation, but we incline to the view that the term "partner" is not decisive if their perquisites and tenure are more consistent with the status of employee than of co-owner of the enterprise.

74. Section 701(h) of the Civil Rights Act defines "industry affecting commerce" to include "any activity or industry . . . within the meaning of the Labor-Management Reporting and Disclosure Act of 1959." Section 3(c) of the Labor-Management Reporting and Disclosure Act in turn incorporates the provisions of the National Labor Relations Act by the following language:

> "[I]ndustry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor Management Relations Act, 1947, as amended, or the Railway Labor Act, as amended. 73 Stat. 520 (1959), 29 U.S.C. § 402 (1964).

75. NLRB v. Reliance Fuel Oil Corp., 371 U.S. 224, 226 (1963).

Constitution;[76] the typical firm of that size will represent many clients who do business in several states, and most such firms frequently will represent clients outside their own states.

There will probably be a few skirmishes on the jurisdictional grounds discussed above, but if there is to be a real battle, it will be waged over the scope and meaning of the two provisions which permit certain kinds of discrimination against women. These are section 703(e), which permits discrimination on the basis of a "bona fide occupational qualification," and subsection (h) of the same section, which specifically allows discrimination based upon "quantity or quality of production . . . ."[77] In enacting the former subsection, Congress doubtless had in mind such clear cases as discrimination against women in the selection of professional football players or the discrimination against men in the selection of brassiere models. With respect to the latter subsection, Congress was probably most concerned with merit pay provisions in blue collar work. Yet both sections may ultimately find application in the female lawyer's case.[78]

76. See, *e.g.*, Polish Nat'l Alliance v. NLRB, 322 U.S. 643 (1944); Wickard v. Filburn, 317 U.S. 111 (1942). Compare the tighter jurisdictional requirements of the Fair Labor Standards Act as applied in Mitchell v. Lublin, 358 U.S. 207 (1959) (architectural and engineering firm); Rausch v. Wolf, 72 F. Supp. 658 (N.D. Ill. 1947) (CPA firm). *But cf.* Harder v. Anderson, 173 F. Supp. 135 (D. Minn. 1959) (CPA firm).

77. Sec. 703(e) Notwithstanding any other provision of this title, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

. . .

Sec. 703(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production . . . .

78 Stat. 256 (1964), 42 U.S.C. §§ 2000e-2(e), (h) (1964).

78. A final objection to the application of the act to the case of the female lawyer is found in the last sentence of § 703(h), which reads as follows: "It shall not be an unlawful employment practice under this title for any employer to differentiate on the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is *authorized by the provisions of Section 206(d) of Title 29.*" (Emphasis added.) Section 206(d) is part of the minimum wage provision of the Fair Labor Standards Act. "Professional" employees, *e.g.*, lawyer-employees, are excluded from the minimum wage provisions of the Fair Labor Standards Act by § 213 of that act. Thus if one reads the words "differentiation . . . authorized by . . . 206(d)" to be equivalent to "differentiation not prohibited under the minimum wage provisions of the Fair Labor Standards Act," he can conclude that lawyers are not covered by Title VII of the Civil Rights Act.

Such an interpretation of the reference in § 703 to the minimum wage exclusions

An examination of the following four questions which may arise in many employment situations will illustrate the application of the occupational discrimination provisions and will illuminate some of the interpretative difficulties with those provisions: (1) Does the refusal to hire a woman on the ground of clients' unwillingness to deal with her constitute a bona fide occupational discrimination which is permissible under the act? (2) May an employer legally require higher credentials of a female applicant than of a male if he has reliable data from which he can predict that a female will be a somewhat less desirable employee than a male (for reasons other than client resistance)? (3) May a firm maintain "female" positions which bear less responsibility and demand less skill but which also offer less pay than other positions which are open to males? (4) Must firms treat women equally even to the extent of allowing them to compete for places in the partnership?

1. *Does the refusal to hire a female on the ground of clients' unwillingness to deal with her constitute a bona fide occupational discrimination which is permissible under the act?* The guidelines say no: "Refusal to hire because of the preference of co-workers, the employer, clients or customers . . ." is not a bona fide occupational discrimination.[79] The act itself is less specific; its language permits discrimination against one lacking "qualification[s] reasonably necessary to the normal operation of that particular business or enterprise . . . ."[80] Thus, one may argue that a woman lacks a qualification reasonably necessary to the normal operation of this particular job—namely, the ability to inspire confidence in the firm's clients.

However, Congress surely did not intend the act's exception to be read so broadly. The words "occupational" and "operation" direct one's attention to the performance of a function, not to the reaction

is inaccurate for several reasons. First, § 703 permits discrimination which is "authorized" by the provisions of a specific section of the Fair Labor Standards Act. The only discriminations "authorized" by that section (§ 206d) are the four listed there—those based on seniority, merit systems, differing quantity or quality of production, or factors other than sex. A second reason for rejecting the argument that lawyers are not covered by the Civil Rights Act is that Congress could have excluded them simply and directly by stating that anyone who is excepted from the minimum wage coverage by § 213 of the Fair Labor Standards Act is excepted from the provisions of Title VII of the Civil Rights Act of 1964. Finally, the physical position of the reference to the Fair Labor Standards Act, the legislative history on this point, and the ruling of the Equal Employment Opportunities Commission all support the conclusion that Congress did not intend to give a blanket exception for all types of employment which are excepted under the Fair Labor Standards Act but instead intended only to dovetail the seniority and merit systems exceptions of the Civil Rights Act with those in the Fair Labor Sandards Act.

79. 29 C.F.R. § 1604.1(1)(c) (1966).
80. 78 Stat. 256 (1964), 42 U.S.C. § 2000e-2(e) (1964).

of a third party to that performance. Furthermore, the sentence contains several restrictive adjectives and phrases: it applies only "in those certain instances" where there are "bona fide" qualifications "reasonably necessary" to the operation of that "particular" enterprise. The care with which Congress has chosen the words to emphasize the function and to limit the scope of the exception indicates that it had no intention of opening the kind of enormous gap in the law which would exist if an employer could legitimately discriminate against a group solely because his employees, customers, or clients discriminated against that group. Absent much more explicit language, such a broad exception should not be assumed, for it would largely emasculate the act. Finally, the legislative history supports the conclusion that Congress did not intend to permit discrimination on the basis of the discrimination of one's clients or customers.[81] Thus, a firm's refusal to hire a woman on the ground that she would be unacceptable to its clients would be a violation of the act.[82]

2. *May an employer legally require higher credentials of a female applicant than of a male if he has reliable data from which he can predict that a female will be a somewhat less desirable employee than a male (for reasons other than client resistance)*? The guidelines prohibit an employer from refusing to hire a woman on the basis of a single past experience. "The bona fide occupational qualification" does not permit "the refusal to hire a woman because of her sex based on the assumption of comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than men."[83] If our employer's sole past experience had been with one woman, his judgment would probably constitute no more than an "assumption" concerning the "characteristics of women" lawyers. If he based his "refusal" exclusively on the female applicant's sex, he would fall squarely within the guidelines and his actions would properly be found to be in violation of the act.

Two slight modifications of the case raise the problem posed by question 2. First, assume that the employer does not absolutely refuse to hire women, but, because he believes that they have a greater

81. The congressional debates suggest that the proponents of the bill intended that the bona fide occupational qualification clause be read narrowly. See, *e.g.*, 110 CONG. REC. 2550; *id.* at 7212, 7213, 7217 (memorandum of Mr. Clark).

82. In this and the following four hypotheticals, we have assumed that the firm has sufficient employees to be covered by the act.

83. 29 C.F.R. § 1604.1(1)(a) (1966).

propensity to leave the job earlier than men, he requires somewhat better credentials from them than he would require of males. (For example, he will consider men whose grade average is 3.0 and better but he requires a minimum grade point of 3.2 for women.) Thus the fact that an applicant is a woman is not the basis for outright refusal but is only one factor among several in his employment formula. Second, assume that the prospective employer possesses data which give him a broader and more reliable basis for his belief that women are more likely than men to leave a given job.

In construing the guideline, the first interpretive problem is defining the phrase "refusal to hire because of sex." It is not clear whether the guidelines use this phrase to describe only the case in which sex is an absolute bar to employment or to describe also the situation in which the employer gives some lesser weight to sex and allows it to be offset by other positive features of the applicant. One seeking only to maximize the efficiency of his employees could reasonably require that a woman have better grades or come from a better school than a man before he was willing to take a proved risk that she would leave his employ. I would urge the interpretation of the statute and the guidelines to permit the employer to discriminate against a female to the extent that sound data about female functional disabilities show such discrimination to be necessary for him to maximize the efficiency of his employees.

The second interpretive difficulty is defining the word "assumption." Since refusals to hire cannot be based upon "assumptions" about women, if "assumption" is used to mean all generalizations based upon past experience, the employer would be denied the right to consider the probability that a woman would leave even if he has had extensive experience showing that women of her kind are ten times more likely to leave a job than are men. Such an interpretation is suggested by the language of the guidelines: "[I]ndividuals [should be] considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."[84] This interpretation would deny the employer the right to generalize about women in the same way that he routinely generalizes about persons with certain class standings, from certain schools, and with certain personalities. For the reasons discussed above,[85] it seems to me that such a reading is undesirable and that one should give the word "assumption" its ordinary meaning—namely, a generalization made without a sufficient foundation of supporting experience.

84. 29 C.F.R. § 1604.1(1)(b) (1966).
85. See notes 67 & 68 *supra* and accompanying text.

If the words "assumption" and "refusal" are defined as I have suggested, the employer will be permitted to consider a woman's sex as one of the factors in his employment formula as long as he has a sound basis for predicting that women will be functionally inferior lawyers and provided that he does not give the factor of sex greater weight in his formula than is necessary to offset that factor.[86]

3. *May a firm maintain "female" positions which bear less responsibility and demand less skill but which also offer less pay than other positions which are open to males?* Some law firms have "permanent associate" positions. Assume that a hypothetical firm has several such positions which have been held by women who have been paid less than regular associates with comparable seniority. Their work has been limited to keeping the firm docket, doing research, and doing a limited amount of drafting. The employees who fill these positions do not and are not expected to work as long hours as are the other associates. Assume finally that one of these jobs is now open; may our employer advertise it as a "woman lawyer" position?

The guidelines state that it is "an unlawful employment practice" to qualify a job as "male" or "female" or "to maintain separate lines of progression or separate seniority lists based on sex where this would adversely affect any employee unless sex is a bona fide occupational qualification for that job."[87] If the job is offered only to women and if the other associate jobs are not open to them, the employer has probably violated the act by establishing male and female jobs with differing privileges and pay. However, the act does not prohibit the classification of various jobs in accordance with their utility and value to the employer.[88] Therefore, if the job were classified as one which carried lower pay and had fewer rights but was open to males and females alike, the discrimination would be per-

86. Determining the appropriate weight for the sex factor and deciding whether a given employer has given it only that amount of weight are not small tasks. Indeed, in some cases they may be impossible tasks. For guidance one might look to the particular employer's treatment of other factors in his employment formula and to other employers' treatment of the sex factor. Yet much of the balancing of various factors in deciding whom to employ is done subconsciously, and even the cooperative employer may not be able to assign a specific value to the various factors which he considers. Perhaps the only solution is to presume that every employer is giving undue weight to the sex factor and to permit him to bring forward evidence to prove his good faith. Of course, this may simply mean that no employer can practice functional discrimination until he has proved his good faith by employing or offering employment to females.

87. 29 C.F.R. § 1604.2(a) (1966).

88. § 703(h), 78 Stat. 256 (1964), 42 U.S.C. § 2000e-2(h) (1964). See note 77 *supra* for the text of the provision.

missible as long as it were not simply a ruse to discriminate against women.[89]

4. *Must firms treat females equally even to the extent of allowing them to compete for places in the partnership?* Assume that our employer offers a job to a woman with the understanding that she will receive the same advancement and pay as any male associate of equal ability, but that she will never become a partner. This means that she will not have the responsibilities and concerns of a partner but it also means that she will not have the remuneration which a partner in this firm may expect. Whether the suggested arrangement is illegal is a hard question, but I believe that it does violate the act. One can argue that the act only prohibits discrimination in "employment" and that whether one is eligible to become a partner has nothing to do with his status as an employee. However, to say that the prospect of becoming a partner is not one of the attributes or "privileges" of employment with a law firm is to ignore reality. The difference in status between the permanent associate and the young man on his way up illustrates this fact,[90] as do the attitudes of the job-seeking law student and the sales talk of the hiring partner.[91] Undoubtedly the prospect of an early partnership and the added compensation which it is expected to bring can offset other detriments of a job, such as comparatively low beginning pay or undesirable working conditions. Thus I classify the opportunity to compete for a partnership position as one of the "privileges" of employment of which the act speaks. To deny this opportunity to the woman is to discriminate against her in a way prohibited by the act.[92]

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89. Of course the employer will still have violated the act if he excludes women from the regular associate positions on the basis of sex.

90. See SMIGEL, THE WALL STREET LAWYER 231 (1964):

> Associates also divide into strata. . . . [T]hey can be broken down (though this is not done formally) into permanent, senior, middle and junior associates. The permanent associates are divided into two categories—those with relatively high status in the firm and those who are regarded as failures. The first classification is composed of men who because of their specialty (labor law), or their origin are not asked to be partners. These men often are doing important, imaginative jobs. The recognition of this lies in their secure tenure and in their salaries. These men earn between $18,000 and $30,000 a year. One reported a much higher salary. In the second segment of this category, where the majority of this group are found, are the "failures"; models not to follow. They do the routine work. Their salaries however are only slightly lower than those of the other permanent associates. Perhaps what distinguished these subcategories as much as anything else is that those who are engaged in creative work and are not made partners are supported by group rationalization. Those who are engaged in routine work and are considered failures have to depend upon their own rationalizations.

91. When it is to his advantage, the hiring partner emphasizes the probability of becoming a partner with his firm, for he recognizes that this probability is an important consideration in the student's choice among firms.

92. In its recent opinion letter, the EEOC has suggested that in some cases it may consider persons who are labeled "partners" to be "employees" under the act. See note 77 *supra*. If one adopts the position that some partners are employees in substance, if not in form, then it becomes easier to find that the woman is discriminated

A logically similar, but more difficult, question would be raised if our female applicant will remain an associate forever but will be paid the same amount of money as if she were a partner. She still has been denied the privilege of competing for a partnership position, but she has lost only the status and the voice in decisions which membership in the partnership may carry. In a firm whose de facto control is in the hands of one man or a small group of men, her power to control the activities of the firm may be no greater as a junior partner than as a senior associate and, therefore, in those cases, she has lost only the status which may attend being a partner. When I balance the virtue of letting a lawyer freely choose his own partners against the minimal discrimination which the woman suffers in this case, I am hard-put to find a violation of the act. Moreover, the employer could make a plausible argument that it would be a violation of his constitutional rights to penalize him for failing to take a woman into his partnership.[93]

The previous discussion has focused on some of the interpretive difficulties posed by the occupational discrimination provisions of the Civil Rights Act of 1964. In addition, there are a number of practical obstacles to effective enforcement of the act. For example, each of the foregoing hypothetical cases assumed an employer who is utterly candid and without guile; each also assumed a woman who

against, for she would be receiving unequal compensation as compared with other "employees."

93. The firm's most forthright argument would be that the due process clause of the fifth amendment protects the rights of its members to associate in partnership with whomever they please. A second less forthright but more fashionable argument would be that the penumbra cast by the first, and perhaps other, amendments protect this right. However, it is not likely that the present Supreme Court would be persuaded by either of these arguments. The first is a revival of the "freedom of contract" doctrine which is exemplified by Lochner v. New York, 198 U.S. 45 (1905). It is doubtful whether, at least in the business context, any life remains in the *Lochner* doctrine after West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), and 30 years of similar cases, although the doctrine may be viable in certain non-business contexts. See, *e.g.*, the opinions of Mr. Justices Harlan and White in Griswold v. Connecticut, 381 U.S. 479, 499-507 (1965).

In making its "penumbra" argument, the firm would have to depend upon *Griswold* and upon the NAACP cases, *i.e.*, NAACP v. Alabama, 357 U.S. 449 (1958); NAACP v. Button, 371 U.S. 415 (1963). A most obvious distinction between the role of the law firm and that of the NAACP is that the former, despite its protestation to the contrary, will be cast as an opponent to individual civil rights whereas the latter will be cast as the proponent of those rights. More important, the Court has said that the first amendment penumbra extends to the NAACP case because membership in it is "a form of expression" of particular ideas, attitudes, and ideology. With rare exceptions, membership in a law firm is not the same kind of "expression." There are similar obvious difficulties in arguing the applicability of the *Griswold* case here.

Because the Court in the past 30 years has allowed the state and federal government wide latitude in restricting the business activities and because a law firm is essentially a business activity, albeit one with strong personal, social, and perhaps even political overtones, it is unlikely that a law firm would be successful in arguing that it has a constitutionally protected right to deny a partnership to a female.

would be hired but for the single fact of her sex. Yet one seldom meets such a guileless and candid lawyer, and he does not often see such clear-cut cases. Nearly every employer may weigh intangibles such as grades, background, experience, and personality in selecting a lawyer-employee. Consequently, the first problem is proving that any specific refusal to hire a woman was caused by sex discrimination. For every female an employer has rejected, he may be able to show ten rejected males of apparently equal credentials. Thus even if one hypothesizes a situation in which one hundred employers were uniformly discriminating on the basis of sex, one would be fortunate if he were able to prove discrimination on the part of even a few of them unless his case were aided by powerful presumptions of discrimination.[94] However, no such presumptions exist in Title VII of the Civil Rights Act of 1964.[95]

A second limitation on the effectiveness of such legislation is that, in practice, a complaint will probably be required to set the act's enforcement machinery in motion.[96] Where does one find a female lawyer complainant? Since no female employee of a law firm who wishes to remain with that firm will enter a complaint against her employer,[97] the only possible sources of complaints are disappointed job applicants and those who complain about their former employers.[98] Yet one can seriously question how many female lawyers

94. The admissions of employers may be one possible source of proof: nearly 2,000 cases of explicit admissions of sex discrimination were reported in the survey. One would guess that the threat of the act would at least cause employers to stop making such statements, but it is possible that lying is so odious to some employers that they would admit their sex discrimination. Such an admission against interest would be good evidence of violation of the act.

95. Some of these difficulties inherent in proving discrimination have been solved in the housing cases by having a white attempt to rent or buy a dwelling from which a Negro has been turned away. Iglauer, *A Nice Place to Live*, The New Yorker, Sept. 24, 1966, p. 188. For a variety of reasons this technique would not work well in the lawyer's case. Unlike the landlord, the lawyer may turn away many applicants before he hires one and for that reason, one cannot infer from his refusal to hire a female and his hiring of a male that he discriminated on the basis of sex. Second, there is no assurance that the male "plant" would be hired even if the employer discriminated against the female.

96. The act permits the Commission to bring court action without a complainant in certain cases, see 78 Stat. 259 (1964), 42 U.S.C. §§ 2000e-5(a), -6(a) (1964), but unless the Commission gets only a few complaints or acquires a large investigatory staff, most of its action is likely to be in response to complaints.

97. Because he may be effectively insulated from management by his union, a shop employee may be able to complain without rendering his working conditions intolerable. But the lawyer-employee is not so protected.

98. The thought of "Maud Jones' case" appeals to my sense of whimsy. Assume that Maud has been a faithful lawyer employee at a large Wall Street law firm for the 20 years from 1965 to 1985. Finally, in 1985, she quits work in anger. Ultimately she goes to the EEOC and commences suit against the law firm alleging a violation of the Civil Rights Act of 1964. She seeks $100,000 back pay on the theory that she has been underpaid by an average of $5,000 per year by comparison with male employees of the firm of similar experience and ability. One can picture the pandemonium which Maud's subpoena for the last 20 years of payroll records might set loose in her old

are anxious for the notoriety such a conflict might bring or are willing to risk the kind of stigmatization which such a complaint about former or prospective employers might cause.

Because proof of sex discrimination will be difficult at best and because no more than a small fraction of those in a position to complain can be expected to do so, I hold little hope for change through direct application of anti-discrimination legislation. It is possible, of course, that the mere existence of the 1964 act may affect the behavior of lawyer-employers who are included within its coverage; surely lawyers and judges have often counseled others about the virtues of obeying the law. Perhaps some will now feel compelled to comply with the law despite the fact that its sanctions inspire no real fear.

D. *Other Governmental Activities*

Any government as sophisticated as our own controls its citizens' behavior by a variety of means besides the prohibiting of undesirable conduct. Persuasion, and particularly persuasion reinforced by the potential use of power, is one common method of controlling behavior. Establishing an example for others to follow is a second.[99]

The Civil Rights Act of 1964 charges the Equal Employment Opportunities Commission with the "persuasion" function which is now carried out, with varying degrees of success, by a number of other governmental agencies.[100] Although the commission has ruled that law firms are subject to the act's coverage,[101] it remains to be seen how effective it will be. Racial discrimination will surely receive

firm. Of course, the problems of proof, the statute of limitations, and other legal hurdles might stand in the way of Maud's recovery, but she will have a strong bargaining lever if she can find a judge willing to order the production of such sacrosanct records.

99. A third method is to give some kind of subsidy in order to encourage desired behavior. The subsidy is both the most direct and the least likely solution to female lawyer discrimination. In his flights of fancy one can imagine what would happen to the market for female lawyers if Congress enacted a female equivalent of a depletion allowance which authorized an employer to deduct 200% of any female lawyer's salary from his gross income or allowed her partners to deduct twice her share of the partnership profits. The government could give other less imaginative and direct subsidies in the form of stipends for continued education and specialized training either in school or with another specialist. Our data suggest that such specialization often substantially improves the income of female lawyers. See Exhibit 13 *supra*. The likelihood of a subsidy's enactment probably varies directly with the proposed beneficiaries' political power. Unless the country's 7,000 female lawyers ride a wave generated by the demands of a large segment of the women in our society, it is most unlikely that they will be subsidized.

100. The Securities and Exchange Commission's bargaining with corporation attorneys over the content of prospectuses is a good example of this function at work. The process is fully described in Jennings, *Self-regulation in the Securities Industry: The Role of the SEC*, 29 LAW & CONTEMP. PROB. 663 (1964).

101. See note 73 *supra*.

the bulk of the commission's attention, and the resources which it can devote to sex discrimination must cover a field in which the female lawyer is a nearly inconspicuous part. When one also considers the difficulty of proving discrimination against a lawyer, the probability of large-scale commission action on behalf of the woman lawyer becomes remote.

On the other hand, if the federal government itself faithfully carries out its stated policies on employment of women, it will offer a useful example for others' emulation and study. For example, the federal civil service hiring rules provide that a woman may not be considered unfit for a job just because she must travel with males, do outdoor work, or work in teams or units with males.[102] The data collected from the federal government's experience with women in many of these jobs—particularly in supervisory capacities—will greatly increase the available knowledge about women's performance. If the data are favorable, they will form a basis for attacking some of the common arguments against the employment of women.

E. *Collective Action*

The power exerted in Congress, in the courts, and in disputes with public officials by the NAACP, CORE, and other Negro organizations is a striking aspect of the current Negro revolution. Surely the fact that the Negro has been able to form these large and comparatively cohesive groups has lent great weight to his threats and demands and has made his boycotts, sit-ins, and lie-ins much more effective than they otherwise would have been.[103] However, an attempt to apply the learning of the Negro's case to the female lawyer reveals

102. The Federal Personnel Manual lists the following conditions which may *not* be used as bases for sex discrimination:

(1) Travel including extensive travel, travel in remote areas, or travel with a person or persons of the opposite sex.
(2) Rotating assignments or other shift work.
(3) Geographical location, neighborhood environment, or outdoor work.
(4) Contact with public or a particular group or groups.
(5) Exposure to weather.
(6) Living or working facilities, except where the sharing of common living quarters with members of the opposite sex would be required.
(7) Working with teams or units of opposite sex.
(8) Monotonous, detailed, or repetitious duties.
(9) Limited advancement opportunities.

UNITED STATES CIVIL SERV. COMM'N, FEDERAL PERSONNEL MANUAL ch. 713-7 & -8 (1963). For a general discussion of the application of these provisions to the entire field of sex discrimination, see Murray & Eastwood, *Jane Crow & the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232 (1965).

103. The collective action of the Jewish community has blunted the effect of discrimination in a different way. By patronizing the "Jewish" law firms, Jewish businessmen have probably rendered the discrimination which existed against Jewish lawyers less damaging to those lawyers than it might otherwise have been. SMIGEL, *op. cit. supra* note 90, at 173-75, discusses the "Jewish" law firm and suggests that this combination of Jewish businessmen with Jewish firms is not universal and may be waning.

the uniqueness of her status. The woman, unlike many Negroes, lives in intimate daily contact with members of the discriminating group. Indeed, some of the most important relationships in her personal life—those with her husband, son, father, and brothers—are with members of the discriminating group. Moreover, a substantial body of American women may regard the goals of the working woman as improper. For these reasons, few women, even few women lawyers, can be expected to attack the discriminating male with the vigor with which the Negro attacks discriminating whites.[104]

Of course, the thought of a group of women lawyers sitting-in is outrageous. Even if one could find women lawyers who were willing to take such action, such gross force might not be able to accomplish the female lawyer's selective goals. Such action has succeeded in opening segregated restaurants to Negroes, but one can doubt its ability to produce the kind of acceptance and treatment which a woman seeks from a law firm.

Nevertheless, collective action in a different dimension offers some possibilities. There are many women-lawyer groups in the country: some independent, others associated with state bar associations.[105] The literature of one of these groups gives the impression that they have been more interested in denying the existence of discrimination and in playing the males' Uncle Tom than in seeking to overcome discrimination.[106] Yet it is these associations of women lawyers that offer the greatest hope for collective action. Such orga-

104. Our female lawyer also differs from the Jew in that she cannot look to other members of her group to form a desirable clientele. Through their shareholdings, women may own a large part of American industry, but they do not manage it. They can bring probate and domestic relations matters to their female cohorts, but they cannot offer the lawyer's staple—business practice. Moreover, many women may prefer male lawyers because they disapprove of working women. Thus women lawyers cannot expect the kind of collective support from other women which Jewish lawyers have apparently been able to count on from other Jews.

105. The largest single group is the National Association of Women Lawyers (N.A.W.L.), which publishes the Women Lawyers' Journal. In addition to the national groups, there are many state and local organizations such as the Women's Bar Association of Illinois and the Women's Bar Association of the District of Columbia.

106. See, *e.g.*, Talley, *Women Lawyers of Yesterday, Today, and Tomorrow*, 46 WOMEN LAW. J. 21 (Summer 1960). Her opening statement is indicative of the tone of the article.

> There might have been a time when a women lawyer could have been referred to as an oddity because the general public was unaccustomed to the idea of women entering this career; but in today's enlightened world it is indeed an "odd" community which does not accept upon full and equal status, the woman and the man lawyer of equal training, ability, and experience.

Ibid. Even a report made by Esther Peterson, a member of the President's Commission on the Status of Women, discloses the belief that women lawyers have already conquered discrimination. She points out the inspiring qualities of women lawyers "because the career of each of you exemplifies the conquest of circumstances which the Report finds tend to handicap women." Peterson, *Report of the Commission on the Status of Women*, 50 WOMEN LAW. J. 47 (1964).

nizations might at least prick the male conscience by advocating the female lawyer's just due, and they could encourage or extend studies such as this one.

F. *Law Schools*

There are no women on the teaching faculty of which I am a member, and everyone who is familiar with the law school world knows that this situation is the rule, not the exception.[107] Whether or not this absence of female teachers is due to discrimination in the hiring practices of law schools (and it is possible that it is), it may reinforce the propriety of discrimination in student and alumni minds. Surely the law schools could do more than they have done to erase this impression by finding and hiring able women lawyers as teachers. Moreover, exposing male law students to a hard-minded and able female law teacher might overcome some of their Victorian ideas about the intellectual and emotional abilities of women.[108]

Those law schools which maintain active placement offices have at their disposal a second and more powerful lever by which to effect change. Law firms often depend upon good relations with the placement director, the faculty, or both, to attract desirable graduates, and many firms acquire new associates principally by interviewing at law school placement offices. If any such firm were barred from contact with the placement offices of a number of the largest law schools, the minimum result would be a large increase in their cost of recruiting. Although the survey response from placement directors and deans revealed little to support such a suggestion, placement officers and faculties at some schools may have contributed to the apparent reduction of discrimination against Jews over the past quarter of a century. Help with respect to discrimination against women could conceivably come from an association of law schools which is currently attempting to exert some control over the hiring practices of employers who interview at their schools.[109] Because of

107. The 1966 Directory of Law Teachers published by West Publishing Co. lists 92 persons with common female names on the faculties of the 134 accredited law schools in the country (The name of a *male* faculty-member at the University of Michigan Law School, Beverley Pooley, discloses the fallibility of this method of determining sex). From the biographical listings in the same book, it appears that 51 of these are full-time teaching members on the faculties of 38 schools. Each of the other persons appears to hold a librarian's position or holds that position and teaches only a legal bibliography course. Our best estimate from the same source of the total number of teaching faculty members at these schools is 2,335. The female teaching members make up slightly more than 2% of this group, a figure not greatly different from female representation in the bar generally.

108. It is possible that a law student's propensity to discriminate would be increased by his suffering under the lash of a tough female teacher.

109. A group of law schools have already established some rules which are embodied in a statement entitled "Interviewing Procedures for Law Students and Prospective

the power which the law school has through its placement office and because of the respect which many alumni have for the faculties of their law schools, it is possible that those employers who presently discriminate against women would give serious consideration to changing their policies if the faculties of the various law schools, by deed and word, expressed their belief that such discrimination was not justified and should not be continued.

Conclusions and Proposals

The rapid change in the American Negro's status during the middle of the twentieth century after nearly a century of apparent stagnation will provide fodder for more than one generation of sociologists. At present we are still arguing about what has happened to the Negro; we have barely given serious consideration to why it is happening. This difficulty in understanding and explaining a phenomenon which is clearly in full swing illustrates the problem (and folly) of one who would suggest the means of accomplishing a similar change in outlook with respect to women.

The prospects for reducing discrimination against female lawyers by applying the forces presently at hand, at least when exercised at their present strength, are not bright. The Civil Rights Act of 1964 is hardly the weapon with which the female lawyer can slay her opponents. Despite the commission's recent ruling that law firms are subject to the act, surely lawyers will not freely acknowledge that they are covered by the act until the courts have passed on the question. Even then, the difficulty of proving a violation and of finding a willing complainant will restrict the Civil Rights Act's effect upon the legal profession. The probability of a collective female uprising on the scale of the current Negro activity also is remote—the current female lawyer organizations show little inclination to tackle the male bar.

Thus if substantial change is to come about in the reasonably early future, other more effective weapons must be brought into play. The first and perhaps most important effort, one which should be undertaken immediately, is a more thorough and sophisticated study of the woman's effectiveness as a lawyer. Such a study might prove that the woman is a somewhat less effective lawyer than is the male, yet it is difficult to believe that she could be found sufficiently inferior to her male counterpart in lawyer skill to justify more than a part of the income differential described above. In this mysterious process by which society's collective conscience is pricked, the pro-

Employers." There is no reason why these rules could not be expanded to provide some sanctions against persons who discriminate unjustly against women.

posed study may be a more effective stimulus for change than any of the other tools available.

The second most likely source of aid to the woman lawyer is the law schools. The faculties of American law schools have been the proponents of change in many other ways and there is no reason why they cannot at least display their willingness to hire female lawyers; in addition, they can impress upon their alumni and others using their placement facilities that they doubt the propriety of much of the present discrimination against women lawyers.

Finally, women lawyers themselves should undertake increased collective action. Although the responses to our questionnaire showed that many women lawyers deny the existence of discrimination and could not be counted upon for help,[110] many others responded with a feeling and intensity which suggests a willingness to support collective action by a female bar group.[111] This action could take the form of research and writing to stimulate the consciences of male lawyers, or it might press the new Civil Rights Section of the American Bar Association to undertake an early consideration of the problem of lawyer sex discrimination.

No one can predict with certainty whether it will take five years, five decades, or longer for the cumulative impact of the various forces at hand to produce a substantial change in the status of women lawyers. We can only hope the time is closer to five than to fifty years.

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110. The following are excerpts from letters which we received from some such female respondents:

> My personal feeling is that discrimination against women in the law has largely been caused by the women themselves. A woman must earn her place in the profession the same as a man. She cannot sit on her femininity and expect success to come to her merely because she is a fragile flower who has become accustomed to having things done for her. She must learn to compete, and if she is not successful in the competition she should search for reasons within herself and not simply declare, "I lost, because I am a woman lawyer, and women are discriminated against."
>
> * * *
>
> I have found little or no prejudice, discrimination or whatever, where I have been co-operative, courteous and informed as to the "law." I believe this to be the case with most "female" attorneys. If it is not, then perhaps they should re-examine their position.
>
> * * *
>
> The only "citadel of discrimination against women lawyers" is the one they have created themselves and then have not been able to cope with. . . . The more these men are harrassed by the fight for women's rights, the more they are going to be against them.

111. The following show the converse:

> Congratulations. It is good to see that you are taking an interest in this matter of discrimination against women lawyers—a most deplorable state of affairs.
>
> * * *
>
> I am gratified to learn that someone outside our group recognizes that there *is* a problem.
>
> * * *
>
> God bless you for taking on "our" cause, and forgive me for being so late in lending my support. . . . [S]uch an "assault upon the citadel," is long overdue.

APPENDIX A

1. Initial Letter to Female Lawyers

This is a form letter; however we beseech you not to throw it into the wastebasket. You and a number of other female lawyers have a vital part in a study we are conducting at the University of Michigan Law School. We are attempting to examine the discrimination which we fear exists against women lawyers. In order to gather data about that discrimination we are writing to you, to a number of other women lawyers, and to a number of male lawyers whom we will use as a control group. It is fully as important that those of you who are out of practice, either temporarily or permanently, answer our questionnaire as it is that those of you who are in practice answer it. It is only through a uniform response that we will be able to gather statistics which may form a basis for an assault upon the citadel of discrimination against women lawyers.

We ask, therefore, that you fill out the enclosed questionnaire carefully and fully and that you return it to us. If there are questions which appear presumptuous to you, I hope you will not be offended by them. We ask them only in an attempt to get all the information which will be relevant to the determination of the nature and effect of discrimination against women lawyers.

Be assured that our findings will not reveal the names or identities of any of our respondents. We ask that you put your name on the portion of the last page below the dotted line only because we wish to know who has not responded so that we can resolicit their answers. As soon as your questionnaire is received and before it is examined, a secretary will tear off the portion with your name on it and the questionnaire will be anonymous thereafter.

We enlist your support in a common cause. We look forward to, and thank you for, your cooperation.

Sincerely yours,
James J. White
Assistant Professor of Law

2. Second Letter to Female Lawyers

Some months ago we sent you a questionnaire in the hope that you could aid our investigation of the question of discrimination against women lawyers. Since we have received no response from you and because the information which you can provide is important to us, we are enclosing another copy of the questionnaire. Whether or not you are now practicing law, we hope that you can take a few minutes out of what is probably a busy day to fill out our questionnaire and furnish us with the information we need. Thank you for your help.

Sincerely yours,
James J. White
Assistant Professor of Law

3. Initial Letter to Male Lawyers

I'm certain that you have better things to do than to fill out questionnaires for crackpot professors. Nevertheless I ask you to take fifteen

minutes to fill out this one crackpot questionnaire. I must acknowledge that this act will produce absolutely no reward for you, no money, no favor in return, probably not even a good feeling in the bottom of your heart, yet your individual cooperation is important to us.

We are conducting a nationwide study of the opportunities, difficulties, and successes of women lawyers. Your law school has given us your name to use as part of our control group. Needless to say, your response as a member of that small group is more important than the response of any individual among the female group.

Be assured that no respondent will be named or otherwise identified in our study and that we will keep your response in confidence. We ask that you put your name on the portion of the last page below the perforation only because we wish to know who has not responded so that we can re-solicit their answers. As soon as your questionnaire is received and before it is examined, a secretary will tear off the portion with your name on it and the questionnaire will be anonymous thereafter.

We ask, then, that you indulge this one crackpot scheme by giving us some time, some thought, and by returning a completed questionnaire to us. Thank you.

Sincerely yours,
James J. White
Assistant Professor of Law

4. Second Letter to Male Lawyers

Some months ago we sent you a questionnaire in the hope that you could aid our investigation of the question of discrimination against women lawyers. Since we have received no response from you and because the information which you can provide is important to us, we are enclosing another copy of the questionnaire. Whether or not you are now practicing law, we hope that you can take a few minutes out of what is probably a busy day to fill out our questionnaire and furnish us with the information we need. Thank you for your help.

Sincerely yours,
James J. White
Assistant Professor of Law

P.S. You are part of a *male* control group. Because we are attempting to elicit the same data from our male control group as we get from the females, the questionnaire will seem more appropriate for a female.

5. Questionnaire

[The questionnaires sent male and female respondents were exactly the same except that the italicized material was included only on the *female* questionnaire.]

1. Law school from which graduated
2. Year of graduation from law school
3. What was your approximate class rank in your law school graduating class? (Circle one)
   upper 10%; upper quarter but below upper 10%; second quarter; third quarter; fourth quarter

4. Were you on the law review? Yes No
5. Are you married? Yes No If yes, what was the date of your marriage?
6. If you have any children please state the ages of each of them.
7. Name each of the states (including D. C.) in which you are authorized to practice law.
8. Approximately how many of each of the following types of prospective employers did you interview or write to when you were seeking your first permanent job after law school? (Include all those you contacted while still in school. Place number contacted next to the type of employer.)
   law firms—of 30 or more lawyers ....., 15 to 30 ....., 5 to 15 ....., 4 or under .....; federal governmental agencies .....; state or local governmental agencies .....; judges .....; corporations .....; banks and trust companies .....; unions .....; non-law jobs (describe type) .....
9. Identify below the sources of all offers of employment which you received when you were seeking your first permanent job after law school. (Include all offers you received while you were in law school. Place number of offers next to employer making offer.)
   law firm—of 30 or more lawyers ....., 15 to 30 ....., 5 to 15 ....., 4 or under .....; federal governmental agencies .....; state or local governmental agencies .....; judges .....; corporations .....; banks and trust companies .....; unions .....; non-law jobs (describe type) .....
10. How many of each of the following types of employers stated a policy to you against the hiring of women as lawyers?
    law firm—of 30 or more lawyers ....., 15 to 30 ....., 5 to 15 ....., 4 or under .....; federal governmental agencies .....; state or local governmental agencies .....; judges .....; corporations .....; banks and trust companies .....; unions .....; non-law jobs (describe type) .....
11. In the order in which you held them, please list each of the non-temporary jobs and activities which you have held since graduation from law school.

	Type job	Type employer	Type work	From-To	Full-Part time	Reason for Leaving
SAMPLE	Assoc. in law firm	Private firm-21	General practice	9/60-10/62	Full —	Slow advancement
Sample	*Housewife*	—	—	*10/62 present*		—

12. If you are not presently practicing, do you plan to practice again sometime in the future?
13. If you are not presently practicing, why not? (Circle one or more)
    I found other work more interesting
    I found other work more remunerative
    I lost interest in law practice
    I ceased practice to get married
    I ceased practice to have a baby
    I ceased practice to devote time to my family
14. Which, if any, of your relatives were lawyers?
    father; mother; uncle; aunt; grandfather; grandmother
15. How would you describe your motivation to attend law school on the following scale: (List your motivation with respect to each motive)

	Very important	Imp.	So-so	Not imp.
Desire to help society				
Desire for prestigious position				
Continuing intellectual stimulation				
Good way to make an honorable living				
Interesting field to know				
Good remuneration				

16. What was or will be your approximate adjusted gross income (gross income less business expenses) in your first non-temporary job after law school? (Do not include income earned by your spouse.)
    less than $1,000; $1,001-$5,000; $5,001-$8,000; $8,001-$10,000; over $10,000
17. What was your approximate adjusted gross income in the calendar year 1964? (Do not include income earned by your spouse. If you graduated from law school in *1964* or *1965*, report your estimate of your adjusted gross income in your first full calendar year after law school.)
    less than $1,000; $1,001-$5,000; $5,001-$8,000; $8,001-$10,000; $10,001-$14,000; $14,001-$17,000; $17,001-$20,000; $20,001-$25,000; $25,001-$30,000; over $30,000
18. If you work for a federal governmental agency please answer the following:
    By which agency are you employed?
    What is your G.S. level?
    When were you raised to your present G.S. level?
    How long ago did you receive your last raise within your present G.S. level?
    What type of work do you perform? (Circle one or more)
    litigation; labor; tax; corporate; real property; criminal; other (specify)

Have you had offers of employment from lawyers in private practice with whom you have had professional contact?
never; a few; frequently
If you are able to identify a person who preceded you in your present job, what was the sex of that person?
male; female

19. If you are presently in practice with a private firm or as a counsel employed by a corporation, association, union, bank or trust company, please answer the following questions:
How frequently do you meet with and counsel clients?
less than one client a week; 1-5 clients a week; 5-10; 10-15; 15-20; 20-25; more than 25
What percentage of these clients are women?
less than 25%; 25-50%; 50-75%; more than 75%
Do you try cases in court on behalf of your clients?
none last year; 1-5 last year; 5-10 last year; 10-15 last year; 15-20 last year; more than 20
Do you appear before state, local or federal administrative tribunals on behalf of your clients?
none last year; 1-5 times last year; 5-10 last year; 10-15 last year; 15-20 last year; more than 20
What type or types of work do you perform among the following?
litigation; trusts, estates and probate; labor; tax; corporate; real estate; criminal; domestic relations; other (specify)
Have you experienced resistance on the part of male clients to accept your advice and counsel?
never; occasionally; frequently; almost always
Have you experienced resistance on the part of female clients to accept your advice and counsel?
never; occasionally; frequently; almost always

20. If you have experienced such resistance on the part of male clients, have you found that you were able to overcome it after a period of association with a client?
always; usually; seldom; hardly ever

21. If you have experienced such resistance on the part of female clients, have you found that you were able to overcome it after a period of association with a client?
always; usually; seldom; hardly ever

22. What techniques have you used and would you suggest in overcoming such resistance? (You may use additional pages if necessary.)

23. Do you believe that you have been the object of discrimination because of your sex by your present employer, by your former employer, or by any potential employer from whom you sought a job?
certainly; almost certainly; probably; probably not; certainly not

24. What advice about seeking employment as a lawyer would you give a present-day female law graduate?

25. If you "had it to do over" would you again become a lawyer?

6. Letter to Placement Directors and Deans

I am writing to make a burdensome—perhaps unreasonable—request of you. We are preparing to do a study of discrimination against women lawyers. We believe that this problem is deserving of attention and concern by every placement office and faculty member in our schools; therefore our request is in the name of a serious and important cause.

Without the assistance of yourself and others like you, we will not be able to accomplish our study, for it is only through you that we will be able to contact any substantial number of male and female lawyers from which we hope to get most of our data. Our principal request, and the one which I fear is quite burdensome, is that you send us the names and last known addresses of each of your women graduates in the classes of 1956 through 1965. Secondly, we request that you also send us an equal number of names of male students in the same classes together with their last known addresses in order that we might use these male students as a control group. If you have lists or directories from which we would be able to select names ourselves, that would be perfectly acceptable to us.

We propose to write to each of the male and female graduates whose names you give us and ask them questions about their present employment and about what jobs they have had and about job changes. It is our hope to determine whether or not there is discrimination against female lawyers, and secondly to determine whether or not the discrimination, if any, is based upon sound reasons. For instance, we hope to determine whether it is true that many women lawyers do get married and quit practicing and are therefore poorer employment risks than male students. Doubtless you are aware that this is a reason frequently given for the refusal to hire a woman. In short we wish to compare the actual performance of women with that of their male counterparts to see if this reason and others often given stand up in practice.

Be assured that all material in our study will be presented anonymously and that no individual or school will be identified unless we first receive permission to identify such person or school.

I am sure this brief explanation reveals that our study will be only as good as the data we can collect. I am sure, too, that you can see that you are a most important link in the chain through which we hope to procure the data. I hope that you will do us the very great favor of sending us the list of names which we have requested and of filling out the enclosed questionnaire. When we conclude our study we will be happy to share it with you.

Thank you.

Sincerely yours,
James J. White
Assistant Professor of Law

7. Questionnaire to Placement Directors and Deans

Name
Address

1. How many prospective employers (firms, companies, and agencies) interviewed students at your school in the 1964-65 school year?

2. How many of these actually interviewed women students?
3. How many, if any, refused to interview women students?
4. How many, if any, refused to interview women students unless the women met a higher or different standard than the male students whom they were interviewing?
5. In the last three years how many specific requests for female law students, if any, have you had?
6. If you have had some such requests, from what kind of employers (e.g., private firms, corporations, government) did you receive them?
7. Of the women graduates in the classes of 1965, '64, and '63, how many acquired jobs upon graduation in the following situations:
   a. law firm of 30 or more lawyers
   b. law firm of 15 to 30
   c. law firm of 5 to 15
   d. law firm of 4 and under
   e. house counsel of a corporation
   f. clerkship with a federal or state judge
   g. federal governmental agency
   h. state or local governmental agency
   i. job if any unknown
   j. non-legal work
8. In your opinion is the percentage of women graduates from your school who accept non-legal jobs greater than the percentage of male students who accept such jobs?
9. If during your tenure in office you have observed discrimination in hiring against Negroes or other minority groups, have the amount and type of that discrimination changed during your tenure?
10. If you have found that there has been discrimination against Negroes or other minority groups and if you have found that the pattern of discrimination has changed or has disappeared, what in your opinion were the causes for such change or disappearance?
11. Did any activity on the part of the law school itself or the law faculty have anything to do with promoting such change? If so, please describe that activity.
12. If two law students, one a male and one a female, with equal records are competing for a job, is the female student (as likely) (more likely) (less likely) to get the job (as) (than) the male student?
13. In your opinion is there discrimination against women in hiring?
14. If you believe there is discrimination, would you describe it as (insignificant) (significant) (extensive)?

Please feel free to include an additional page or pages if you have additional information which might be helpful to us.

APPENDIX B

RESPONSE RATES

	First Mailing	Second Mailing
Questionnaires Sent Out	4326	2036
Returned Unclaimed	303	—
Refused to Participate	26	—
Actual Mailing Sample	3997	2036

COMPLETED QUESTIONNAIRES RETURNED

	First Mailing	Per Cent of First Mailing Returned	Second Mailing	Per Cent of Second Mailing Returned	Total	Per Cent of Actual Mailing Sample Returned
Male	988	49.4%	341	33.5%	1329	66.4%
Female	975	48.7%	323	31.7%	1298	64.8%
	1963	49.1%	664	32.6%	2627	65.7%

APPENDIX C

STARTING INCOME DISTRIBUTION

Range	Females	Males
less than $1,000	72	9
$1,001-$5,000	417	314
$5,001-$8,000	561	699
$8,001-$10,000	81	139
over $10,000	43	116
	1,174	1,277

PRESENT INCOME DISTRIBUTION

Range	Females	Males
less than $1,000	45	18
$1,001-$5,000	155	83
$5,001-$8,000	270	337
$8,001-$10,000	194	256
$10,001-$14,000	136	312
$14,001-$17,000	17	113
$17,001-$20,000	8	41
$20,001-$25,000	6	63
$25,001-$30,000	1	25
over $30,000	2	29
	834	1,277

PRESENT AVERAGE INCOME BY YEARS SINCE GRADUATION

	Years Since Graduation								
	0-1	2	3	4	5	6	7	8	9
Males	$8,000	$8,500	$9,900	$11,300	$12,600	$14,100	$15,700	$16,800	$17,300
Females	$6,500	$6,600	$6,700	$ 7,400	$ 8,000	$ 7,500	$ 8,100	$ 9,500	$ 9,000