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SEX DISCRIMINATION OR GENDER INEQUALITY?*

*LESLIE BENDER***

Judge Judith Kaye, in her October 1988 Noreen E. McNamara Memorial Lecture,[1] took on the big Wall Street law firms. She praised the progress that these firms have made in the last thirty-five years by increasing the numbers of women in their ranks. She gave us statistics and stories about women in big firms, and after carefully setting the stage and preparing us for a continued accolade, she let loose her critique. With finesse and aplomb, she clandestinely played Antony's role in *Julius Caesar*, by backhandedly implying that the powerful partners in big law firms, like Brutus, "[s]o are they all, all honourable men."[2] Or perhaps that is what I read because that is what I wanted her to say.

I.

The prestigious male bastions of Wall Street law firms have finally done the honorable thing and opened their conclaves to significant numbers of women.[3] Women who conform to male expectations and predictions of success may now enter and play by their rules. These institutional rules of the game, by which one "wins" success, power, prestige, security and money, were designed for persons like the named

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1. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 Fordham L. Rev. 111 (1988).

2. W. Shakespeare, *Julius Caesar*, act 3, scene 2.

3. Actually, big law firms have only admitted significant numbers of *white* women, not all women. In employment discrimination, the category "women" cannot serve as a universal, all-inclusive category, because there are meaningful disparities in the power, job opportunities, and salaries of minority women vis-a-vis non-minority women. United States Census Bureau data from 1985 illustrated that while white women earned 63% of white men's annual earnings, Afro-American women earned 57.1%, and Hispanic women earned even less—only 52.1%. *See The Wage Gap: Myths and Facts*, in P. Rothenberg, Racism and Sexism: An Integrated Study 69, 70-71 (1988). For an example from the legal profession, see Peschel and Linden, *The Gender Gap: Employment and Pay Differences*, Nat'l L.J., Mar. 27, 1989, at 22, 24 ("Minority women reported the lowest average starting salaries in the survey—$34,819. The average starting salary for minority men, by contrast, was $2,326 higher ($37,145). Non-minority women received starting salaries slightly lower than non-minority males."). The same survey indicated that minority women were least represented in very large law firms. *See id.* In a breakdown of large law firms by numbers of women and minority lawyers (are minority women counted twice?), it is clear that minorities fare much worse than women generally. *See* Weisenhaus, *Still a Long Way to Go For Women, Minorities*, Nat'l L.J., Feb. 8, 1988, at 1, 48-53. Since we can fairly presume that not all of the minority lawyers listed in the survey are women, minority women are even a smaller subset of the minority statistics. *See id.*

partners themselves, people without primary interpersonal caregiving responsibilities.[4] Judge Kaye noted the irony that as more women have been granted admission to the world of professional lawyering, the rules have changed.[5] The required billable hours have escalated so that it has become physically impossible to participate in a big firm practice while taking personal responsibility for the care of others, be they children, parents, lovers, siblings, friends or the needy in our communities.[6] Wo-

4. Joan Williams has recently written about this model of wage earner as the "ideal worker with no child care responsibilities," referring her readers to Professor Mary Joe Frug's insightful analysis of this phenomenon in *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. Rev. 55 (1979). *See* Williams, *Deconstructing Gender*, 87 Mich. L. Rev. 797, 822 (1989). The "ideal big firm lawyer" is someone without regular interpersonal responsibility for the care of others, whether they are children, parents, siblings, lovers, or the community needy. This ideal presupposes that someone else will care for and plan for these people, and that these cared-for people will not object that "the ideal lawyer or professional" does not do it personally. *See generally* Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 Harv. C.R.-C.L. L. Rev. 79, 100-10 (1989) (stressing structural features of workplace which privilege economic parent as separate from caregiving parent). The only interpersonal relationship truly compatible with the ideal lawyer's work/career demands is a lawyer with a supportive "wife."

Because of role expectations and gendered socialization into marital and parenting roles, the ideal woman lawyer or professional is unmarried and childless, whereas the ideal male lawyer has a wife who cares for him and their children. These "ideal" models tend to be replicated in labor market statistics. *See* Dowd, *supra*, at 84-110. Whereas "[s]ome 95% of top-level male executives are married. Only 50% of top-level women executives are married." Chen, *Women at Work: A New Debate is Born*, L.A. Times, Mar. 19, 1989, § 4, at 3, col. 1 (quoting Kirk O. Hanson, corporate ethics consultant who teaches at Stanford.) In addition, "[w]hile 95 percent of men in management have children, only 35 percent of their female counterparts do." Sly, *Firms Look For Ways to Keep Moms on the Job*, Chi. Tribune, Mar. 19, 1989, at 1. This must be understood in light of the fact that "[o]nly about 2% of corporate officers at major public companies are women." Ehrlich, *The Mommy Track*, Bus. Wk. Mar. 20, 1989, at 126.

5. *See* Kaye, *supra* note 1, at 116-17.

6. The alternative to taking personal responsibility for the care of others is to pay someone else to do it for you. Stories about "fast-track" women who are mothers usually note that they have full-time child care and often live-in help. *See e.g.*, Abramson, *For Women Lawyers, an Uphill Struggle*, N.Y. Times, Mar. 6, 1988, § 6 (Magazine), at 36, 73, 75 (Skadden, Arps, Slate, Meagher & Flom partner Peggy Kerr, a single woman who adopted two children, is able to continue her intensive working schedule because her salary "as a midlevel partner—about $600,000 annually—provides for full-time care for her children. . . . Live-in help is mandatory for Kerr; . . .") While this is taking a certain kind of responsibility, it does not have the relational, interpersonal component of caregiving.

Many career women hire less well-paid women to care for themselves, their families and their homes, perpetuating class and race hierarchies. *See e.g.*, J. Rollins, Between Women: Domestics and Their Employers (1985); Kamerman, *Women, Children, and Poverty: Public Policies and Female-headed Families in Industrialized Countries*, in Women and Poverty 41 (B. Gelpi, N. Harstock, C. Novak, M. Strober eds. 1986); Cock, Maids and Madams: A Study in the Politics of Exploitation (1980). Data from the National Committee on Pay Equity indicates that women of color are in the lowest paying jobs in the United States (such as child care workers, sewing machine operators, private household workers, and food handlers) and earn an average annual income of under $8,000, which is below the poverty line for a family of three. *See The Wage Gap: Myths and Facts*, *supra* note 3, at 70-71.

men (and men), unencumbered by such responsibilities, may be able to adjust their lifestyles to meet these unreasonable professional demands, at least temporarily. They are required to make their work the entire focus of their lives. Women (and men) who are primary caregivers and take those responsibilities seriously, whether because of externally-imposed or internalized gender role stereotypes, natural inclination, happenstance, or unfettered choice, often are forced to seek alternative career choices. Such alternatives include part-time employment; flextime and job-sharing; career "sequencing"; more flexible legal practices in small firms or as sole practitioners; teaching; in-house corporate counsel positions; government lawyering; perhaps public interest work; or even to drop out of law entirely.[7]

Rather than losing the talent of many of these women lawyers whom they have already trained, some big firms have begun to accommodate women with family responsibilities by permitting them more manageable working schedules in light of their other responsibilities.[8] This is a mixed blessing for career women.[9] While it permits caregiving women to continue in their careers and have some job security, Judge Kaye worries that having enabled women to take these career options, often denigrated as the "mommy track,"[10] firms may use those choices to legitimate glass

7. *See, e.g.*, Mairs, *Bringing Up Baby*, Nat'l L.J., Mar. 14, 1988, at 1, 7 ("There are indications that even part-time attorney/mothers are finding it difficult to cope. In a recent survey of its members, the Part-Time Lawyer's Network, a chapter of The Chicago Bar Association and the Women's Bar Association of Illinois, found that 26 percent of its lawyer/mothers who participated in the survey were not working.").

8. Judge Kaye explained that this accommodation has often been labeled the "mommy track." She used examples of the special private arrangements such as "a 9:00 to 6:30 five-day 'part-time' workweek for a big firm litigator—no nights or weekends, no travel." Kaye, *supra* note 1, at 123. This is hardly a manageable accommodation to personal caregiving responsibilities.

9. Many women who have tried part-time big law firm work on a regular career path say it is a "mirage." Mairs, *supra* note 7, at 8 (Speaking of a part-time position in a Washington, D.C. law firm, a lawyer/mother explained: "That policy required the associate to work 9-to-5, five days a week, for a substantial reduction in pay. It was 'designed to make part-time [work] very unattractive.' ").

10. The denomination of this alternative career path as the "mommy track" carries enormous social meanings. Its gendered basis is illuminated by the term "mommy" instead of "daddy" or "parent" or "caregiver." John Leo suggests calling it the "harassed parent track." Leo, *Reality Check For Harassed Parents*, 106 U.S. News & World Report 64 (Apr. 3, 1989). Since our social construct of gender is that "woman" is unempowered or subordinated, *see infra* Part II, and a mommy is clearly a woman, the "mommy track" connotes less power and undervaluation. But calling it the "mommy track" does more than that. Even if we kept its gendered nature intact and for the moment ignored the connotations of less power and less value, why not have called it the "mother" or "mothering" track? Use of the term "mommy" in naming the "track" makes it a joke; pokes fun at or belittles it; makes it appear childish or not serious; exaggeratedly highlights how clearly incongruous it is with the unchallenged norm of the "fast track;" and, as my colleague Peter Bell has observed, makes sure that men will not try to get on it. The "mommy track" is the exception; the accommodation. The norms for career success remain unchallenged.

Furthermore, both mommy and mother contain implicit assumptions about gender roles and wage work. For example, we usually modify the word "mother" when we

ceiling barriers to promotion, firm power, salary and prestige, creating a "new substratum that will be largely populated by women."[11] This would only compound the existing problems of women in the legal profession who are generally thwarted by lower status and lower pay.[12] Judge Kaye intimated that despite some significant progress, this disadvantaged position of professional women may not be a coincidence.[13] While she judiciously applauded law firms for beginning to accommodate women lawyers' desires to combine lives inside and outside the law

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mean a woman with children who works for wages outside the home by saying "working mother." When we refer to a man with children who works for wages outside the home, we do not say "working father."

11. Kaye, *supra* note 1, at 124. *Accord*, Kingson, *Women in the Law Say Path is Limited by 'Mommy Track'*, N.Y. Times, Aug. 8, 1988, at A15, col. 3. Judge Kaye seems to have reneged on this concern in a more recent exegesis on the "mommy track." *See* Kaye, *'Mommy Track' in Practice*, Nat'l L.J., May 22, 1989, at 13, 15.

For interesting uses of the term "mommy track" in the media, and open discussion of the idea, see the recent responses to Felice Schwartz's article, *Management Women and the New Facts of Life*, Harvard Bus. Rev. 65 (Jan.-Feb. 1989). Ms. Schwartz, who wrote about "career-primary" and "career-and-family" women, did not use the term "mommy track," but commentary on her article often mentioned terms like mommy and mom. *See e.g.*, Lewin, *'Mommy Career Track' Sets off a Furor*, N.Y. Times, Mar. 8, 1989, at A18, col. 1; Randolph, *'Mommy Track': The Label May Sound Cute, But it Fits All Too Well*, Chi. Tribune, Apr. 2, 1989, Tempo, at 4; Ehrlich, *supra* note 4; Mendels, *The Stigma Facing Mommies*, Newsday, Mar. 27, 1989, Business, at 1; Seligman, *Mommy's Problems*, Fortune, Apr. 24, 1989, at 339; Castro, *Rolling Along the Mommy Track; Is Motherhood Putting Some Women on a Slower Career Path?*, Time, Mar. 27, 1989, at 72; Goodman, *Is the 'Mommy Track' Really a Trap? Women Who Want it All May Get 2d Best*, Chi. Tribune, Mar. 19, 1989, Tempo, at 9; Sly, *supra* note 4; Beck, *'Mommy track'? Ugh! Try ASC for this Good Concept*, Chi. Tribune, Mar. 16, 1989, at 25; Chen, *supra* note 4.

12. *Women Lawyers Get Less Pay, Respect, Survey Says*, Wall St. J., Feb. 12, 1989, Sec. 1, at 18, col. 2; Mann & Hellwig, *The Truth About the Salary Gap(s)*, Working Woman, Jan. 1988 at 62 ("Women lawyers still make only 63 percent of what male lawyers make. . . . [Even comparing] two lawyers — a woman and a man — of the same age, say 29 . . . [t]he woman is paid 77 cents to every dollar the man earns."); Weisenhaus, *Still a Long Way to Go For Women, Minorities*, Nat'l L.J., Feb. 8, 1988, at 1, col. 2 (1987 survey revealed that women constituted only 8% of partners in 247 of nation's top 250 law firms); Peschel and Linden, *supra* note 3, at 24, col. 2 ("Regardless of race, the 1987 figures show that women on average, earn less than their male counterparts. The explanation lies partly in women's choice of positions in lower-paying categories, and lower representation among the higher-paying law firms.").

It is not only subtle sex discrimination that creates disadvantages. Race and ethnicity also correlate with lower paying jobs and less powerful positions, for both men and women. *See e.g.*, Peschel and Linden, *supra* note 3, and the National Association for Law Placement (NALP) study data for 1987, reported in Linden, Peschel and Studley, *What Happened to Class of '87?*, Nat'l L.J., Mar. 27, 1989, at 16, col. 3.

In the context of my argument about gender inequality in the big law firms' standardized models of lawyering and success which were developed without consideration of women's acculturated role as primary caregiver, the category "women" seems capable of including both minority and white women. This argument for gender equality does not substitute for (nor does it clearly include) similar arguments for racial, ethnic or class equality, which also require reconceptualizations and restructurings of our institutions and cultural meanings from perspectives that include experiences of people of color and people from divergent ethnic and class backgrounds.

13. *See* Kaye, *supra* note 1, at 118-22.

firm—family, however defined, and career—she wondered about the authenticity of their commitment to gender equality.[14] Herein lies the power and strength of her essay and the part to which I wish to respond.

Is there an important distinction between including more women lawyers in law firms and affirming gender equality? Between avoiding sex discrimination and eliminating gender inequality? I would argue that there is.

What is it that big law firms have sought to achieve by increasing the numbers of women lawyers in their corps? In our slightly-raised national consciousness, after the struggles of the women's liberation movement, are they merely attempting to avoid public censure and damages from claims of sex discrimination? Or are they responding to the labor market demographics which indicate that women are the largest growing sector of the workforce?[15] Perhaps they finally recognize that women can do effectively whatever men have been doing as lawyers, and therefore women can make substantial contributions to the success of the firms. If this is what has motivated the integration of women into these big law firms, I suggest that this might be how women, as women, have ultimately been undermined by our own "success."

Women ought not be satisfied with being allowed into male-created big law firm practices and playing by *their* rules, or with being given less empowered, less prestigious, less remunerative options. We should not commend law firms for offering permanent part-time, temporary part-time, or dead-end tracks to accommodate those of us not willing or able to make our careers our entire lives. We ought not accept the implicit assumptions of the current construction of law practice that depend on dichotomies between devotion to family and to career, and that require unswerving fealty to work over all else. Women should demand no less than an opportunity to redefine the meanings of lawyering, law firm practice, professionalism, and professional success, all of which were created without our input, insights, needs and gender culture taken into account. The elimination of sex discrimination is not enough. We must have gender equality.

II.

My argument begins with some observations about gender, so that I

14. *See* Kaye, *supra* note 1, at 126. Even if gender equality was achieved for women lawyers and professionals, equality would still be elusive for non-"professional" staff women until they were given the same opportunities as professional women and men to blend work and family.

15. As reported in Business Week, *see* Ehrlich, *supra* note 4, before the end of the century, "women will make up 65% of the new entrants into the work force." *Id.* The Bureau of Labor Statistics predicts that "[b]y the year 2000, white males, once the mainstay of the economy, will account for just 15 percent of new recruits to the labor force. . . . Women, meanwhile, are joining the work force twice as fast as men and will account for 13 million of the 20.5 million net additions to the labor force in the next decade." Sly, *supra* note 4.

can better explain the import of the phrase "gender equality." This involves distinguishing between sex and gender, recognizing our acculturated association of caregiving responsibilities with women, and illuminating the power dynamics that undergird gender differences.

It is self-evident that females and males are biologically different from each other because of certain physical attributes, in particular our primary and secondary sexual characteristics and life-giving capacities.[16] Discriminating against women because of our biological sex and stereotypical physical characteristics is prohibited sex discrimination.[17]

But the current prohibitions against discrimination based on sex and physical characteristics do not address all the kinds of inequalities women face in the work force. Our general experiences as women and men suggest that there are also non-physical differences between our sexes that affect the ways in which we understand the world, our roles in it, and our relationships to other people. These differences are learned from birth as we are socialized into the dominant ideological systems of our culture.[18] The cultural/social construction and attribution of qualities to different biological sexes is called gender.[19]

16. Physically constitutive features of biological sex also include aspects of our skeletons, musculature, genetic make-ups and our hormonal cycles. But our biological sex is only one facet of our physical selves. Other features, such as hair color, blood type, facial features, coordination, race, height, and weight, are not necessarily correlated with our sexes. Females come in many physical shapes and forms, with many different traits, talents, concerns, interests, mannerisms, values, disabilities, abilities, orientations, races, ethnicities, classes, religions, and sexual preferences. We are, in many ways, as different from one another as we are from males.

17. U.S. Const., amend. XIV; Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17 (1982).

18. I worry that exploring and naming this distinction between sex discrimination based on physical features and gender equality based on acculturated gender differences might hurt some women who have been struggling to succeed. What if an acknowledgement of gender difference is used to disable rather than empower women? We have a blatant and unfortunate example of that in Equal Employment Opportunity Comm'n v. Sears, 839 F.2d 302 (7th Cir. 1988), where gender differences were used to justify the segregation of women into low-paying, non-commission sales jobs. *See generally*, Milkman, *Women's History and the Sears Case*, 12 Feminist Studies 375 (Summer 1986) (describing awkward debate between feminist historians used as expert witnesses in *Sears* case to explicate meaning of gender differences). I am also concerned that talk of gender difference might feel exclusionary or silencing to women who do not experience these differences. That some women have been acculturated without these characteristics does not make those people any less women; nor does it invalidate the discussion of a women's gender culture. With these concerns in mind and with a desire for dialogue and continuing conversation, I offer these thoughts.

19. Gender, as a term of art in feminist theory, means more than social construction. It is a statement about power relations based on acculturated differences. *See e.g.*, Flax, *Postmodernism and Gender Relations in Feminist Theory*, 12 Signs 621, 628-29 (1987).

A conceptualization of a person requiring a dichotomy between sex and gender with both viewed as separate phenomena is problematic. I tend to think there is a strong interactive, dialectical relationship between our bodies and our social construction. *See* Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. Legal Ed. 3, 25 (1988). Gender ought not be understood solely as a short-hand for socialization. Its meaning is malleable, though its import for feminist practice is consistent and solid. Regardless of

There are two gender cultures, one for women and one for men, each with its own accepted customs, norms, practices, behaviors and rituals. We need not suppose that there are any universal, ahistorical, acultural gender traits that are the essence of womanhood or manhood.[20] Even though different cultures may have different gender expectations, and even though socially assigned gender traits are not universally applicable within sexes or even between them, each culture presumes distinctions between men and women that broadly apply within that culture.[21]

Women are socialized to be more relational, interdependent, caring and responsive to others' needs than men.[22] Caregiving is a role/characteristic attributed to the gender "woman."[23] Women are acculturated as mothers, wives, nurses and homemakers—caring for children, spouses, the sick, and their homes.[24] Sara Ruddick names the acculturated behavior of women in protecting, nurturing and training children and families "maternal practice" and notes that although it is not biologically fixed,

> women not only have borne but have also disproportionately cared for children . . . . Although some individual mothers may be men, the practices and cultural representations of mothering are strongly affected by, and often taken to epitomize, prevailing norms of femininity . . . . [I]n most cultures the womanly and the maternal are conceptually and politically linked.[25]

Women are trained to be caregivers and we learn to expect that of ourselves. Throughout our lives, we continuously construct our identities from gendered expectations, whether we accept the structure of gender as

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whether gender differences are biological or cultural or mixed, they are real and they matter in the world as it currently functions.

20. Feminist theorists have a wide range of views about whether or not there is a female essence or an essential femaleness. Many of them are articulated by French feminists and cultural feminists. *See, e.g.*, Cixous, *The Laugh of the Medusa*, in New French Feminisms 245 (E. Marks and I. de Courtivron, eds. 1981); Cixous, *Sorties*, in *id.* at 90; Irigaray, *The Sex Which is Not One*, in *id.* at 99. *See generally* Alcoff, *Cultural Feminism versus Post-Structuralism: The Identity Crisis in Feminist Theory*, 13 Signs 405 (1988); Echols, *The New Feminism of Yin and Yang*, in Powers of Desire: The Politics of Sexuality (A. Snitow, C. Stansell and S. Thompson, eds. 1983) (both discussing debates about essentialism in cultural feminism); Schultz, *Room to Maneuver (F)or a Room of One's Own? Practice Theory and Feminist Practice*, 14 Law and Social Inquiry 123 (1989) (breaking down feminist theory into structuralist—cultural feminism and radical feminism—and post structuralist).

21. Gender is the fulcrum of our identity *within* our cultural contexts, although it appears to be complementary across racial, ethnic and class cultural differences.

22. *See, e.g.*, C. Gilligan, In a Different Voice: Psychological Theory and Women's Development (1982); N. Noddings, Caring: A Feminine Approach to Ethics and Moral Education (1984); Whitbeck, *A Different Reality: Feminist Ontology*, in Beyond Domination (C. Gould ed. 1983).

23. *See* Dowd, *supra* note 4, at 91-100, 116-18.

24. *See generally* Hunter College Women's Studies Collective, Women's Realities, Women's Choices, chs. 5 (social roles); 7 (wives); 8 (motherhood) (1983).

25. S. Ruddick, Maternal Thinking 41 (1989).

given to us, or we resist it.[26] As we are constructed by gender, so do we socially construct it. Although gender cultures are fluid rather than fixed, they provide norms and practices for our biological sexes.[27]

Gender is more than role and characteristic differences attributed to biological sex; it is a structural experience of relational power reproduced through ideology.[28] The patriarchal structure of our society employs a male gender norm and privileges male gender attributes.[29] For example, what men do is considered work worthy of monetary compensation and esteem; the caregiving work many women do is not considered "work" in the same sense, and hence, is often unpaid or paid minimum wage and given low esteem. Yet society depends equally on both kinds of work.

Gender-based power differences (male power over females) are assumed by our institutions to be natural and intrinsic, rather than coerced

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26. Our gendered selves are dialectic relationships between free agency and the structures of our gendered cultures. A combination of force and consent leads to our adoption of gender attributes, much as it does to our adoption of other aspects of the hegemonic ideology. We acquire gender through observation, systems of positive and negative reinforcements by authority, and mimicking of existing social roles in our homes, families, schools, religions, media, and workplaces. Yet, within gender structures there are spaces for resistance and opposition to gendered norms.

27. We may be able as a social group to alter the construction of the gendered qualities attributed to each sex, but it is questionable whether we could ever achieve a nongendered culture (or whether we would want to). There are post-structuralist feminist theorists that entirely reject the idea of defining "women" as a category, because any definition perpetuates a gendered culture with its built-in expectations and power imbalances. *See, e.g.*, Kristeva, *Woman Can Never Be Defined*, in New French Feminisms 137 (E. Marks and I. de Courtivron, eds. 1981); *see also* Alcoff, *supra* note 20 (explaining problems created by a post-structural feminism that denies the category "woman").

28. *See, e.g.*, C. MacKinnon, Feminism Unmodified: Discourses on Life and Law 40-45 (1987). If we deviate from the cultural construction of gender, then we are deemed to be "more like men" or less like "true women". This is not a matter of physical sexuality, but social construct. If there were no characteristics culturally assigned to the concept of woman, the idea of a biological female not being a true woman would be inconceivable.

Once a gender culture exists, and we become acculturated within our assigned gender, our experiences of the world become markedly different from persons of the other assigned gender. Despite multifarious differences among us, women do have one common experience—being treated as, or interpreted as, or viewed as "women" within specific cultural contexts. If we are female (whether our self-definition begins with our gender; whether we are woman-identified; or whether we never think of ourselves as women), we are viewed as women first and foremost to the world outside our self-consciousness. We will be reacted to as women, however that gender is defined within our culture. We cannot escape this sex/gender system, no matter how hard we try.

29. In patriarchal cultures, men have the power—political, economic, physical, opportunity—to define the world and structure it so that it is based on their experiences of a gendered self. Men in our western patriarchal culture, understanding themselves to be independent, competitive and aggressive, reasoned and unemotional, have constructed institutions that reward and valorize those attributes. They have excluded women's self-perceptions and gendered characteristics from the design of those institutions.

Instead, men in patriarchal cultures have interpreted women's experiences and natures for us from their perspectives. Women are the objects or "others" in patriarchal epistemologies. We are measured against the other-imposed, preconceived notions about how we should act and feel, how we do or do not think, what we can and cannot do, and what is ultimately important to us. *See* Bender, *supra* note 19. In a fitting coup de grace, the qualities and roles so attributed to women, such as caregiving, are then devalued.

and relational.[30] Gender difference does not cause gender inequality; gender inequality is gender difference translated into hierarchical power relations in which one gender (male) is privileged. Women have learned painfully that it is not especially important whether gender characteristics are biologically-linked, culturally constructed, spiritual, or a dialectic between nature and culture, but it is critical who has the power to define and characterize those traits and to design the institutions that depend upon them. So long as men have the power to name, describe, construct and continue our cultural institutions with their patriarchal biases, women will share an experience of gendered Otherness and inequality.

What it means to be a woman within any specific culture blurs at the margins, but the core meaning is crystal clear. It means being subordinated to men, having less power, and having to acquire some of their gender attributes to succeed in traditional male-created institutions and professions, like law. Regardless of racial, ethnic, age, or class solidarity with men, women across cultural chasms have a shared experience of subordination based on their sex and the undervaluation of their gender culture, and particularly their caregiving work, by men within their cultural contexts.

III.

Our business/professional world has been constructed by men to reinforce and reward their gendered male characteristics. Interpersonal caregiving, which was not part of the male gender culture, was excluded and perceived as inappropriate or interruptive of the important functions of professional work. Although women have succeeded in entering the pre-constructed professional world and sharing it with men, we have not succeeded as well in shedding our primary responsibility for caregiving and in sharing the interpersonal caregiver role equally with men.[31] Our entrance into the professional world has also not succeeded in bringing our gender culture into accepted facets of the professional culture. Interpersonal caregiving to our friends, family and community remains separate and distinct from our activities in the office. Women are now permitted to do both (participate in the professional world and continue in our caregiving), so long as we do not integrate them. The parts of our daily activities that reflect our gender culture are specifically excluded from and deemed inappropriate to our professional environment. As a consequence, in our professional communities, and, in particular, in the world of high-powered law firms, gender inequality predominates. Therefore, our goal must be to reconstruct legal institutions based on gender equality—empowering both genders and eliminating the privilege/power of one gender over another.

30. Minow, *Foreword: Justice Engendered*, 101 Harv. L. Rev. 10, 34-38 (1987).

31. *See, e.g.*, Dowd, *supra* note 4, at 83-88 & nn. 9, 11, 14 (data and studies). *Accord*, A. Hochschild, The Second Shift: Working Parents and the Revolution at Home (1989).

Feminism has approached the issues of gender inequality and sex discrimination in several ways.[32] The women's liberation, liberal-humanist feminist approach began with the assimilationist premise that women can do anything men can do and can do it at least as well if given a fair opportunity and equal access to positions and offices.[33] The goal of this model of feminism was getting women accepted into the big law firms based on traditional criteria of merit, competing on existing terms, and being treated equally to, that is the same as, men. A later variation on this theme developed the idea that where there are biological differences in women from men, for example, pregnancy and childbirth, women should be treated specially and not disadvantaged by these female physical differences, so that they could continue to compete equally for the brass rings.[34]

Both models accept the implicit male norm of existing legal institutions and attempt to mold women to its expectations and demands. If success as a lawyer requires women to be aggressive, competitive, superrational, emotionally detached; to work at our careers for more than ten or twelve hours a day; to depend upon others to care for our families and our homes; to perpetuate status hierarchies within our working environment; and to create sharp divisions between family and career, then so be it. Even though we add more and more females to the quotient of persons doing the job, women who demonstrate aspects of the gendered women's culture are discouraged, badly evaluated, and seen as unfit.[35] This is the infamous "add women and stir" model of reform. We add members of our sex to a profession, but we do not add "acceptance" of gender

32. *See, e.g.*, A. Jaggar, Feminist Politics and Human Nature (1983); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 Yale L.J. 1373 (1986); Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. Rev. 589 (1986).

33. *See, e.g.*, Ginsburg, *Gender and the Constitution*, 44 U. Cin. L. Rev. 1 (1975). For further explanation of this approach, see Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. Rev. 581 (1977); West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 Wis. Women's L.J. 81, 83 (1987); *see also* D. Kirp, M. Yudof & N. Franks, Gender Justice (1986).

34. For overviews of these formal equality/substantive equality, equal treatment/special treatment, or symmetrical/asymmetrical equality debates, see Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 Colum. L. Rev. 1118 (1986); Littleton, *Reconstructing Sexual Equality*, 75 Calif. L. Rev. 1279 (1987); Taub and Williams, *Will Equality Require More than Assimilation, Accommodation or Separation From the Existing Social Structure?*, 37 Rutgers L. Rev./Civ. Rts. Devs. 825 (1985); Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. Rev. L. & Soc. Change 325 (1984-5).

35. For example, women who are primary caregivers for children will necessarily have to allot their work time differently from the standard non-caregiver model and will be subject to more interruptions. Even though the quality of their work product might be comparable to any other employee, they may be evaluated as unreliable, slow, insufficiently committed or even uncongenial when expected to perform in an identical manner to a non-caregiving employee.

differences.[36] Those women who can make themselves act and think most like the gendered male culture succeed. One of the surest ways to do this is to remain unencumbered by caregiving responsibilities. Women's participation and complicity in this structure perpetuate its inequalities for women who seek to maintain their interconnectedness with others and their women's gender culture identities, and for men who resist many of the traditional male gender traits. Despite gender assimilation, we find that these women do not "succeed" at equal paces and in equal numbers with their male counterparts.[37] Women who have tried to deemphasize their female-gendered characteristics to prove their worth in the male world are nonetheless disadvantaged by their physical differences and the politics of gender power relations.[38]

It is not gender equality for women to assume characteristics of the male gender or to attempt to take a male perspective and then do those jobs. Just because we are talented enough to assimilate male characteristics for the business world does not mean that that is what we want or what is best. Getting inside the law firms is a start, but if the only women who succeed and achieve the power to change the institutions are the women who are most like men and least woman-identified, then gender inequality continues unabated. Sex discrimination may be eliminated in the workforce, but gender inequality still cries out for response.

Some other feminists have advocated a modification of existing institutional requirements to accommodate women's traditional caregiving responsibilities.[39] This approach moves beyond sex discrimination to issues of gender difference.[40] While it recognizes women's gendered role expectations and choices, it does not solve the problem of gender inequality. This model argues that the practice of law must incorporate or accommodate the reality of women's actual life experiences—not as viewed from the outside, but as lived and experienced. It offers an option for women (and men) who want an alternative career choice to meet their family or interpersonal responsibilities, but it leaves the rest of the system

36. *See* Littleton, *supra* note 34 (rejecting traditional symmetrical (assimilationist and androgyny) and asymmetrical (special rights, accommodation and empowerment) models of equality and suggesting an alternative asymmetrical model based upon "equality as acceptance").

37. *See, e.g.*, J. Abramson & B. Franklin, Where They Are Now: The Story of the Women of Harvard Law 1974, at 201 (1986); *ABA Report: Women in Law Face Overt, Subtle Barriers*, N.Y.L.J., Aug. 19, 1988, at 1, col. 1.

38. *See, e.g.*, Price Waterhouse v. Hopkins, 57 U.S.L.W. 4469 (U.S. May 1, 1989) (No. 87-1167). (Where a women's potential partnership in a big eight accounting firm was impaired by her failure to meet other partners' expectations of appropriate feminine conduct).

39. *See, e.g.*, Schwartz, *supra* note 11.

40. It does not matter whether women have been the primary caregivers to children and the infirm because we want to or because we have been forced to do so; it does not matter whether it is part of our innate being or part of our acculturation; nor does it matter that we might change this in the future and that principal caregiving responsibility for the young, old and sick may eventually be evenly distributed between the sexes. What matters in this analysis is that women most often do have those responsibilities.

intact. It does not question institutional assumptions about the gendered characteristics for or definitions of the norms of professional conduct and success.[41]

The addition of a "mommy track," "parenting track," or "family track," which this analysis suggests as a solution, does not end gender inequality. It is an exception to the "normal" work style, a less valued (in terms of money, power, prestige), genderized woman track. This approach fails to consider the power aspects of gender-based norms and privileges, and looks only to accommodating difference. Women (and men) who are caregivers and spend time out of the wage force (or in lower paying jobs while caring for others) are subordinated and undervalued because of it. At best, with extraordinary effort and hard work, they can "rehabilitate" their careers after their aberrational and deviant behavior.

Had women been included in designing our workplaces, opportunities for caregiving and sensitivities to its requirements would have been an integral part of their structure. Since primary and cooperative caregivers now participate in legal practices and professional institutions, it has become eminently clear that the structure is deficient. We must collectively decide that caregiving is something we value as a constitutive aspect of our ideal lawyer/citizen/worker and then re-imagine a professional world that fosters that value.[42] We must restructure the professional world of law firm practice (for that matter, the entire wage work world) from the perspective of people responsible for others in an actual caregiving sense.[43]

Caregiving is not the only aspect of women's gender culture that must be attended to in a search for gender equality in the legal profession.[44] Our concepts of success and how the business world "must" be are not natural or necessary—they are but social creations. If we made them, we can unmake and remake them. We participate in our professional culture and feel powerless to change it, but we are not powerless unless we silently and passively accept it.

We must formulate legitimate, productive, and healthy expectations for our legal careers, and in doing so, we must carefully reexamine all of

41. It assumes a gendered norm of total career devotion and the exception of family caregiving responsibility. Yet in our contemporary culture, women are still characterized as primary caregivers, and hence not the norm.

42. Why is there a premise that a "good lawyer" will give all her waking hours and time to lawyering—a total immersion and devotion? What makes that "good"? That is part of the current gender of lawyering—the maleness. This narrow vision of success or excellence in lawyering is not any better for men than it is for women. It may be assumptions and gender norms like these that lead to lawyers' growing dissatisfaction and alienation from their work, themselves, their families and their communities.

43. *See, e.g.* Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183 (1989) (advocating the removal of the boundary dividing work and family as a threshold to obtaining gender equality in the workplace).

44. *See, e.g.*, Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 Berk. Women's L.J. 39 (1985).

our goals and assumptions. Restructuring for gender equality requires an examination of our values and their underlying assumptions. How can we achieve gender equality by allowing for differences without subordinating them? If we take the institutions that exist and add in women's gender culture, we accept the system with its implicit gendered male norms and values, leaving women's gender as the exception. If we reconstruct it from the perspective of people who have been excluded, we can begin to achieve true gender equality.[45] Imagine major law firms constructed with a sensitivity to the needs and experiences of previously excluded groups, and including and reinforcing the positive values and traits of those people. How different it would look.

IV.

When Judge Judith Kaye entitled her talk "Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality," what challenge did she make to the big firms? Was she saying that permitting women access to the profession is not enough? Was she making a subtle distinction between sexual discrimination and gender inequality? Was she challenging us to uncover the ways in which our legal institutions are still gendered and how they privilege male cultural attributes over female ones? Was she quietly asking us to reexamine our values?

There must be room for gender difference in law and legal institutions, but no room for gender privilege or gender inequality. Both genders should be treated as the norm, treated equally, and permitted to contribute and flourish. Definitions of success should be reconstructed without hidden assumptions about one's willingness or ability to adopt the attributes of male gendered culture, or to split one's life into separate, noncontiguous spheres of work and interpersonal relationships, where relationships are clearly subordinated to career. In order to achieve gender equality, as well as equality for people of different races, ethnicities, classes, sexual preferences, cultures, ages, religions, and for persons differently abled, we must take responsibility for ourselves, toward others, for the structures, assumptions and values in our institutions, and for our world. I thought I heard these ideas reverberating in the undertones of Judge Judith Kaye's speech.

45. *Accord* Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 Harv. C.R.-C.L. L. Rev. 323 (1987).