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Essay

Gender Equality in the Legal Profession

**\*989** WHAT WOMEN ARE TEACHING A MALE-DOMINATED PROFESSION

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As a perceptive observer-participant over the past twenty-five years, Judge Kaye has experienced first hand the insults and rebuffs of what she refers to as the “pioneering years” for women lawyers in the 1960s; [FN1] felt the later pressure to “do it all” as the “superwoman,” to submerge one’s womanhood and pliantly to assimilate into the male legal culture; [FN2] and finally, upon reaching her “third plateau,” heard women, out of their “genuinely different concerns,” [FN3] questioning whether “the hard-won prize” of professional acceptance was worth “the price being exacted.” [FN4]

Such questioning comes at an opportune time; women account for more than 40 percent of the new entrants into the profession and their viewpoints are at last coming to matter in the world of law. [FN5] But the striking phenomena of the late 1980s is the persistence of old attitudes and masculine myths regarding the inherent nature of law practice, and the ignorance, if not resistance of many lawyers to the profound changes that call insistently for a reevaluation of the practice of law. It is of these conditions that Judge Kaye speaks so effectively.

In appointing the American Bar Association’s Commission on Women in the Profession in August 1987, I focused upon the need to raise consciousness regarding the current status of women lawyers. I asked the Commission to identify the barriers preventing women lawyers from full participation in the work, the responsibilities and the rewards of the profession. [FN6] The Commission’s initial report in June 1988 found that women encounter

- fewer opportunities for advancement;
- a greater degree of personal and professional scrutiny; and
- greater pressures to balance work and family responsibilities. [FN7]

The Commission concluded that a variety of discriminatory barriers remain a part of the professional culture, making it difficult for women to participate fully in all aspects of the profession, and that “a thorough **\*990** reexamination of the attitudes and structures in the legal profession must occur.” [FN8]

Clearly, the quest for gender equality must become a central objective of the legal profession if we are to be faithful to the professional ideal of opposing all forms of discrimination, and if we are to achieve full integration and equal participation of women. [FN9]

Only in this century have Americans gradually come to the realization that equality is a value for all, and it

has only been in the second half of the century that Americans have begun to understand the nature of equality amid diversity. In 1954 the Supreme Court put an end to the fiction of “separate but equal” in *Brown v. Board of Education*, [FN10] but not until 1971 did the Court first hold that a law that treated men and women differently violated the equal protection clause. [FN11]

Today we are beginning to realize that acknowledgment of differences is an essential step in articulating equality. This is why Judge Kaye posits that “recognizing differences is essential to true gender equality.” [FN12] Similarly, Professor Martha Minow has elucidated various versions of the “dilemma of differences,” pointing out that differences can be created either by noticing them or by ignoring them. [FN13] In an analysis of the decisions of the 1986 Supreme Court term, [FN14] Professor Minow illustrates how justice has been “engendered” by judicial commitment to giving equality meaning for people once thought to be different. [FN15] This “engendering” in turn depends on seeking out and appreciating a perspective other than one's own. [FN16]

Thus, both Judge Kaye and Professor Minow suggest that “the significance to be given to women's differences” must be seriously addressed if we are to achieve further progress toward “gender equality.” [FN17] Only as the distinctive viewpoint of women directly influences the culture of the legal workplace can we accommodate the differences that matter to both women and men. True equality in legal employment will be achieved only when the perspective of women becomes an integral part of law firm culture.

There are indications, however, that the different perspectives of women increasingly are making their way into law firm culture. Pregnancy, parenting, child-care, part-time work, job-sharing and flexible practice **\*991** schedules increasingly are subjects of consideration in law firms and public law offices. [FN18] Each year the questionnaire sent to law firms by the National Association for Law Placement adds questions that reflect the broadening concerns of those considering law firm employment. [FN19] Firms are reexamining the partnership track and in some instances are redesigning it to accommodate a woman's biological clock. [FN20]

Judge Kaye has shed light on what is taking place within many law firms today. She has provided her distinctive and authoritative perspective on the overall changes within the profession and has offered a challenge to those who seek renewal for the profession.

It is difficult to exaggerate the magnitude of the changes in the legal profession and in the practice of law that have taken place since World War II, but all too often these are viewed as one-dimensional. Critics inveigh against a perceived decline in professionalism on the one hand, and the pre-occupation with law as a business and the bottom line on the other. In fact, however, the changes have been multi-faceted and infinitely complex, many reflecting a greater availability and the substantially improved delivery of legal services.

Changes in the size and in the demographics of the lawyer population are perhaps the most striking. During World War II the profession adapted to the demands of military services with a decline in law student enrollment and a temporary increase in the percentage of woman law students from 3 percent to 12 percent. [FN21] As male veterans returned, however, the percentage of women entering the profession quickly dropped back to the pre-war level. [FN22]

During the 1950s, once the veterans' bulge had worked its way through the law schools, the total enrollment in ABA-accredited law schools remained at approximately the pre-World War II level. [FN23] Only at the end of the decade did enrollments begin to climb, [FN24] but the profession remained completely male-dominated. Dual career families were still an anomaly and the surge of women into the profession had not yet begun. Young

lawyers entering the profession clearly felt that their primary commitment was to their careers in the law. Other responsibilities \*992 just were not permitted to interfere; the law was truly a jealous mistress and one whose demands were designed for men only.

Meanwhile, the role of law in American society escalated steadily. The response in the 1930s to the Great Depression had been an attempt to construct a safety net under the national economy and to provide greater security for the individual citizen. [FN25] Regulation of business and new entitlements for individuals meant not only new laws, but also provision for their administration and enforcement. During the war years of the 1940s, consumer shortages, rationing, price controls, and emergency regulations temporarily dominated legal activity, but in the 1950s law and regulation within American society resumed their expansion with attendant new complexities. The civil rights initiatives of the 1950s and 1960s further increased the need for lawyers by invoking the law to foster and protect individual rights and liberties. [FN26]

In 1956, the Federal Aid Highway Act [FN27] launched the enormous Interstate Highway System, and by legal process tens of thousands of miles of right of way were taken for which owners had to be compensated. As new interstate highways crisscrossed the nation, the first United States communications satellite was launched in 1962 and space law became the latest new field for development. In 1962, the publication of Rachel Carson's *Silent Spring* [FN28] and an environmental movement sought legal protection for air, soil and water. [FN29]

The next year a national call for more lawyers went out when the Supreme Court in *Gideon v. Wainwright* [FN30] ruled that all criminal defendants must be provided with counsel. Later in the decade, the Council on Legal Education for Professional Responsibility [FN31] stimulated the development of clinical legal education, a new dimension in the education of lawyers with profound implications for both the law schools and the profession. During the same years, both the bar and the public began to acknowledge a shared responsibility to ensure that legal services were available in civil matters to those who could not afford to pay for them. [FN32]

Other changes followed the Supreme Court's decisions striking down minimum fee schedules [FN33] and the prohibition upon lawyer advertising. [FN34] Prepaid legal service plans and legal clinics brought legal service to thousands of middle class clients who had not previously had a lawyer. [FN35]

\*993 With the ever-increasing demand for legal services, the practice of law became increasingly remunerative for some lawyers. At the same time, the productivity of many lawyers greatly increased with the advent of new technologies and the growing corps of paralegals joining the staffs of lawyers' offices.

During this time, legal tabloids promoted a competitive atmosphere among lawyers by headlining the "big deal" and the "big suit" as lawyers' triumphs to which clients were simply necessary appendages. [FN36] Management consultants flocked to give counsel to lawyers on how to function in a competitive environment, placing a new focus upon the economics of legal practice. [FN37] At the same time, a new breed of lawyer-headhunters and law firm merger-and-acquisition specialists made their appearance, marketing their services as essential to the successful practice of law. [FN38] Growth by whatever means and increasing market share were depicted as being as important to lawyers as to tooth paste and soap manufacturers. The client-centered nature of lawyers' services was obscured by the focus on rainmaking and billable hours. Many lawyers came to see the purported demands of a competitive market as the inevitable and necessary norms for the profession.

It was into the middle of this changing legal environment that women arrived in ever-increasing numbers, bringing with them a fresh perspective upon the law and lawyering. Since 1950 the profession grew from some 200,000 lawyers to approximately 700,000 in 1988, [FN39] but in the most recent years women accounted for

the dominant part of that increase with a ten-fold rise in the number of women choosing law as a career. [FN40] Female enrollment in law school rose from 4 percent to 40 percent in a span of ten years. [FN41]

While women at first, accepted the legal environment as they found it, [FN42] as they grew in number and significance within the profession, their acute awareness of parenting and family responsibilities compelled them to look beyond law practice to life circumstances in their entirety. Increasingly, they enlisted their male contemporaries in confronting together\*994 the realities faced by their generation. The result has been a further conflict between traditional legal culture and life circumstances faced by the new generation of lawyers now entering the profession. [FN43]

Along with all the changes in law practice affecting the legal culture, the profession has gradually accepted that family responsibilities are a reason for adjustment in lawyer's schedules. It has recognized that the existence of such responsibilities should not be a reason for questioning the seriousness of a lawyer's commitment to the law and its practice. Historically, law practice has accommodated male responsibilities for military service, political activity and government service. Today a new generation of lawyers is asking their seniors to accommodate the parenting responsibilities of what is now commonplace, the two-career family.

Confronted by life circumstances not faced by any prior generation, they are asking for a reevaluation of how law is practiced and for help in balancing work and family obligations. By their Socratic questioning they are teaching new lessons to a profession that seems to have lost some of its traditional bearings in recent years. They are asking what effect changes in the practice of law will have upon services to clients-the very reason for which lawyers and law firms exist. They are asking what would be the effect of accommodating more part-time work, permitting flexible schedules, providing home computer and fax terminals, and encouraging work at home options with time reported for work wherever performed.

By bringing a fresh perspective to bear in a reevaluation of the practice of law we could yet restore the focus on the quality of service to clients rather than on the comparative business success of the law firm or lawyer. Perhaps the woman lawyer will prove to be the source of a revitalization of a profession of services and the ultimate salvation of lawyers' professionalism.

Professor Minow has underscored the value of a commitment to examine what we are doing from the perspective of others. She offers this reassuring appraisal of the result in Supreme Court jurisprudence: "when the Court struggles with our differences" "our common humanity wins." [FN44]

I believe that the legal profession today is beginning to struggle with the differences between women and men. Moreover, it is being forced to look at the practice of law from the different perspective of the new generation of lawyers. In so doing, I suggest that the profession can reclaim its central values of service, of putting the client first. If that is the result, it will be in no small measure due to what the woman lawyer in the closing years of the 20th century has brought with her to the profession.

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[FN1]. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 Fordham L. Rev. 111, 121 (1988).

[FN2]. *See id.* at 120-21.

[FN3]. *See id.* at 116.

[FN4]. *See id.* at 121.

[FN5]. *Cf. Minow, The Supreme Court 1986 Term, Foreward: Justice Engendered*, 101 Harv. L. Rev. 10, 32 (1987).

[FN6]. *See* Press Release from American Bar Association (August 21, 1987) (available in the files of the *Fordham Law Review*).

[FN7]. *See* American Bar Ass'n Comm'n on Women in the Profession Report to the House of Delegates 17 (Aug. 1988) (available in the files of the *Fordham Law Review*).

[FN8]. *See id.*

[FN9]. For reading on this subject, see Grech and Jacobs, *Women and the Legal Profession: A Bibliography of Current Literature*, 44 The Record of the Association of the Bar of the City of New York, No. 2, 215-29.

[FN10]. 347 U.S. 483 (1954).

[FN11]. *Reed v. Reed*, 404 U.S. 71 (1971).

[FN12]. Kaye, *supra* note 1, at 118.

[FN13]. *See* Minow, *supra* note 5, at 12.

[FN14]. *See generally id.* at 10.

[FN15]. *See id.* at 16.

[FN16]. *See id.* at 14.

[FN17]. *See* Kaye, *supra* note 1, at 118; Minow, *supra* note 5, at 14-17.

[FN18]. *See* Comments of Henry L. King, Charlene E. McGraw and Pamela Jones Harbour at panel *Women Lawyers in the Next Decade*, 61 New York State Bar Journal (May 1989).

[FN19]. National Ass'n for Law Placement Law Firm Questionnaire (1989) (available in the files of the *Fordham Law Review*).

[FN20]. *See* Panel Discussion, *supra* note 18 (comments of Henry King).

[FN21]. 1987-88 Annual Report of the Consultant on Legal Education to the American Bar Association 105-06 (available in the files of the *Fordham Law Review*).

In 1942, 7,887 people were enrolled in law schools, 12% (880) were women. *See* Note from ABA's Consultant's Office to Robert MacCrate's office (April 27, 1988) (available in the files of the *Fordham Law Review*).

[FN22]. *Id.* at 105.

[FN23]. *Id.*

[FN24]. *Id.*

[FN25]. See K. Hall, *The Magic Mirror: Law in American History* 267-77 (1989).

[FN26]. *Cf. id.* at 322-27.

[FN27]. 70 Stat. 374 (1956).

[FN28]. R. Carson, *Silent Spring* (1962).

[FN29]. See Hall, *supra* note 26, at 304-08.

[FN30]. 372 U.S. 335 (1963).

[FN31]. Funded by the Ford Foundation.

[FN32]. See Robert MacCrate, Remarks at the National Legal Aid and Defender Association Annual Awards Dinner (Dec. 3, 1987) (available in the files of the *Fordham Law Review*).

[FN33]. See *Goldfarb v. Virginia State Bar*, 421, U.S. 773 (1975).

[FN34]. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

[FN35]. See, e.g., *ABA Supports Prepaid Legal Services*, N.J. L.J., Feb. 26, 1981, at 14, col. 4; Berreby, *Will Prepaid Legal Plans Catch On?*, Aug. 3, 1981, at 1, col. 4; Bolger, *Group Legal Plans: Toward Better Justice*, Nat'l L.J., Sept. 5, 1983, at 12, col. 3; Shayne, *Prospects for Prepaid Legal Services Renewed*, N.Y. L.J., Oct. 28, 1982, at 5, col. 1.

[FN36]. See, e.g., *Big Cases, Period*, 4 American Lawyer 42 (April 1982); Crossen, *Cases, Not Clients*, 3 American Lawyer 28, 28-29 (April 1981).

[FN37]. See, e.g., Herron, *How a Management Consultant Can Help Your Firm*, 1 Cal. Lawyer 39 (Nov. 1981); Jacques, *Use of Management Consultants In the Law Firm*, 43 Tex. B.J. 1113-18 (Dec. 1980).

[FN38]. *The Headhunting Business in Philadelphia*, Penn. L.J. Rep., March 14, 1983, at 93, col. 1; Brandt, *What You Can Expect From a Legal Headhunter*, 73 A.B.A.J. 88-90 (Sept. 1987).

[FN39]. Letter from Barbara A. Curran to Robert MacCrate (Jan. 16, 1989) (available in the files of the *Fordham Law Review*).

[FN40]. See ABA's Consultant's Report, *supra* note 21, at 105-06.

[FN41]. See *Id.*

[FN42]. See Kaye, *supra* note 1, at 119-26.

[FN43]. See Panel Discussion, *supra* note 18 (Comments of Henry King); ABA Young Lawyers Div., Affiliates Outreach Program, National Public Service Leadership Conference (May 13, 1988).

[FN44]. Minow, *supra* note 5, at 17.  
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