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RATIONALES AND REALITIES: SOCIAL CHANGE, WOMEN AND THE LAW

*Cynthia Fuchs Epstein**

INTRODUCTION

The legal profession has undergone a revolution and incremental changes of enormous significance in the last two decades. For many affected by these changes it has been the best of times, for others it has been the worst of times. Some of these changes developed internally from forces within the profession, and some were generated by pressures in other institutions and in the larger society.

There is a changing culture in the workplace of law, in the law schools, and in the nation. But by no means does this mean that the changes are consistent. On the contrary, we are witnessing tugs and tensions on both the ideological or normative level and the structural, organizational level. This paper will enumerate some of these specifically.

First and foremost is the incredible growth of the legal profession and the change in its profile. Its growth rate in the last decade has been without precedent in the last 140 years.¹ Of course the shift began earlier than ten years ago. Between 1951 and early 1984, the lawyer population in the United States increased by 427,600, from 221,605 to 649,000.² Important changes in the shape of the profession accompanied this increase.

Some sectors of the profession, especially the large Wall Street type firms, have multiplied geometrically in size and spawned satellites far from home. There also has been growth in large corporations, many of which now maintain legal departments equivalent to firms in themselves. On the other hand, solo and other small practices are decreasing proportionately, not in absolute numbers, but in comparison to other spheres.

A change in the collective mentality of lawyers accompanied this change in the size of firms. Many observers have noted that a number of time-

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1. See generally, Halliday, *Six Score Years and Ten: Demographic Transitions in the American Legal Profession*, 20 *LAW & SOC'Y REV.* 53 (1986) (reviewing the historical demography of the legal profession in the United States between 1850 and 1980).

2. Curran, *American Lawyers in the 1980's: A Profession in Transition*, 20 *LAW & SOC'Y REV.* 19, 20 (1986) (outlining growth of legal profession in United States and employment patterns within profession between 1951 and 1984).

honored practices and assumptions governing client commitment no longer hold, and a new aggressiveness is appearing in professional domains formerly characterized by established traditions of behavior. Some believe this aggressiveness translates into a more avaricious and competitive spirit in firms and a lessened emphasis on loyalty and courtly behavior by lawyers. Yet, at the same time, young lawyers, and lawyers from sectors which were not part of the "establishment," have not mourned the loss of traditions and institutionalized behavior they see as rooted in a culture of protected privilege. The old guard—members of the brotherhood who closed deals with a handshake, who did not advertise, and who imposed minimum fee schedules—must now share the legal arena with the newly recruited lawyers of the past decade and a half in a somewhat more democratic if competitive arena.

Another factor, albeit a contradictory one, in the changing mood of the profession, is the movement toward conciliatory mechanisms and a questioning of the use of confrontational modes of practice. Still another element of no small importance is the democratization of legal teaching, i.e., with regard to who teaches, what is taught, and the method by which it is taught.

Of course, the most revolutionary change the profession encountered was the movement of women into this formerly exclusive male domain, and in impressive numbers. Terrance Halliday of the American Bar Foundation has called it "perhaps the single most radical transformation in the modern legal profession"³ Not only were the numbers impressive, but so too was the entry of women into a wide range of practices and specialties, many of which were regarded as outside their realm of interest or beyond their capacities.⁴ Their integration into the profession is still problematic, an issue I shall explore later.

A review of the numbers shows that for most of the past century, women have comprised between one and five percent of the profession. They accounted for only about 3 percent of the profession in 1960 and 4.7 percent in 1970 (about 14,000), but today they constitute about 18 percent (close to 100,000). Women also comprise some 40 percent of the students of law, and that figure is holding.⁵

I. THE IMPETUS FOR SOCIAL CHANGE

The entry of women lawyers into the profession is of special interest for several reasons. First, as an issue of social justice; second, because it can

3. Halliday, *supra* note 1, at 62.

4. C. EPSTEIN, *WOMEN IN LAW* 381 (1981) (provides analysis of increasing role of women in legal profession, and pressures encountered by women in profession).

5. Although enrollment of first year law students declined for the fifth consecutive year, the number of women (and minorities) increased according to the American Bar Association. As a percentage of total enrollment, women made up 40.2 percent compared with 39.2 percent in 1985-86. See Mataxas, *First Year Enrollment Still Drops, But Women, Minorities, Enter*, *Nat'l Law J.*, March 16, 1987, at 4, col. 2.

teach us the nature of change in this institution; and third, because it is a source of data that serves in judging how stereotypes misguide the evaluation of women's competence and attitudes about professional careers.

Social change, such as the influx of women into the legal profession, should never be attributed to one factor. The profession responded to the growing insistence of women for legal training and entry into practice more favorably than it otherwise would have done because legal practice expanded as a result of increased government regulation, economic growth, and expanded services. Expansion meant that women did not compete for scarce resources, although it should be noted that some men have always regarded women as unfair competitors.

The demographic and cultural changes in the profession were dramatic, given the enormous resistance to permitting women to practice law prior to the 1970's. For one thing, women (as well as most minority persons) in the profession are young. More than three-quarters of all women practicing law today entered the profession in the years 1971 to 1979,⁶ when legal education began to open its doors to those it had formerly excluded. This has had and will continue to have consequences for the profession. As Professor Richard Abel of the UCLA Law School has pointed out "a very small cohort of elderly white men are governing associations that deeply affect the lives of a very large younger cohort with significant female and minority membership."⁷ Professor Abel suggests rather despondantly that "the divergence of interests, styles and demography between rulers and ruled is likely to generate considerable tension."⁸

My own prognosis is less bleak. The positive, sometimes radical, changes affecting women in the profession are rather awesome—even though there are residual constraints on their full participation at the top levels of decision making. Certainly, women have become even more articulate about their expectations for further change, and these views are not falling on deaf ears.

Women's entry into the profession occurred as the youth movement, the black movement, and the women's movement all were raising objections to traditional channels of opportunity. It was a time when many became sensitive to issues of discrimination. People also were alerted to the ways in which their institutions contributed to prejudice and discrimination. In 1965 there were only 7,000 women lawyers in the United States.⁹ Law was then a stodgy profession beset with stereotypes. Attitudes were not so different than those expressed in the 1875 opinion of Chief Justice Ryan of the Wisconsin Supreme Court, who sought to exclude one Lavinia Goodell from the bar. He argued:

6. Curran, *supra* note 2, at 42-43.

7. Abel, *The Transformation of the American Legal System*, 20 LAW & SOC'Y REV. 7, 13 (1986).

8. *Id.*

9. C. Epstein, *Women and Professional Careers: The Case of the Woman Lawyer* (unpublished Ph.D. dissertation, Columbia University Department of Sociology (1968)).

Nature has tempered woman as little for the judicial conflicts of the courtroom as for the physical conflicts of the battlefield. Woman is modeled for gentler and better things. . . . [Our] . . . profession has essentially and habitually to do with all that is selfish and extortionate, knavish and criminal, coarse and brutal, repulsive and obscene in human life. It would be revolting to all female sense of innocence and sanctity of their sex . . . that woman should be permitted to mix professionally in the nastiness of the world which finds its way into the courts of justice . . . the habitual presence of women . . . would tend to relax the public sense of decency and propriety.¹⁰

Up until the 1970's, and even today, many men and some women shared similar views. A survey by the Harvard Law Record in 1963 reported that women were among the least wanted recruits in firms of every size and specialty regardless of their law school performance.¹¹ The protective stance that the legal profession was no place for a noble woman joined with other less lofty rationales to make it difficult for women to get law jobs. Both structural impediments and cultural obstacles limited women's careers in law. So the revolution was not only about numbers. It was about a new set of attitudes and behavior on the part of the legal establishment toward women, and on the part of women themselves.

Of course, any revolution makes certain people and groups nervous—including the revolutionaries themselves—and this revolution is no exception. The current position of women in the law reflects that no revolution accomplishes complete change. Women have moved into sectors of the law previously barred to them and have proved they possess capacities they were not supposed to have. At the same time, they are reassessing their success and whether they ought to be doing what they are. Women have gone far in the law in a short time, and some worry about the rightness of it and whether they can maintain other values and qualities of life while pursuing a demanding career.

Both men and women now question how one can handle family life and a law career. While fewer men than women ask this question, it is noteworthy that some men do ask the question. There is a growing reassessment of priorities being undertaken by those who find themselves in domains of law that are seven day a week commitments. Some women have gone so far as to believe a complete retreat from law is necessary. Although this choice is the one most highly publicized in the media, it is not the choice characteristic of most women attorneys. Furthermore, the choice to retreat is probably based as much on frustrations and restrictions that come from factors within the profession as it is on the competitive stresses of personal life.

A little more than a decade ago restrictions not of their own making clustered women in specialties of relatively low prestige, pay, and responsi-

10. A. SACHS & J. HOFF WILSON, *SEXISM AND THE LAW*, 96-97 (1978) (citing *State v. Goodell*, 39 Wis. 232, 245 (1875)).

11. *Harvard Law Record*, March 26, 1963, at 1, col. 2.

bility; real estate closings, some trust and estate work, domestic relations, and of course, voluntary work defending the disadvantaged.¹² One can easily see how convenient and self-serving this rationale remains today. This rationale enables the profession's gatekeepers, who of course reflect more general cultural attitudes, to insist that women's own choices account for their still second class position in the profession.

II. ADVANCES IN LAW SCHOOLS AND BIG FIRMS

Prejudices against women students in the law schools resulted in quotas limiting their admission. Until relatively recently, several important schools did not admit women at all. The most prominent of these was Harvard, which admitted women students only beginning in 1950, effectively keeping them from competing for the important clerkships and positions that a degree from Harvard, the largest Ivy League school, guaranteed. The symbolism of Harvard's exclusion of women extended far beyond its gates because what happened there legitimated subtle methods of exclusion at other places that had no such formal barriers.

Today we are very much aware that there is something called corporate culture. We understand that the culture of an institution has a lot to do with how people behave within it and what kind of product they yield. What then of the culture of the law schools as they were before the dramatic changes of the 1970's? The law school culture punished everyone in the not too distant past. The book and the film *The Paper Chase*,¹³ captured some of this ethos, albeit somewhat sentimentally. Students were subjected to antagonistic questioning in a crude version of the Socratic method. The idea was to develop the skill to stand on the firing line and to thereby become a good courtroom attorney. Many people question the efficacy of this method today. No doubt it was good training for some. The way women were exposed to this method in many places, however, was not likely to develop anything but resistance and fear, and served to underscore the fact that women were outsiders.

In some schools, women were required to sit in a separate section. In some classes they were never called on at all, and when they were, they sometimes drew cries of "go back to the kitchen," if their answers fell short or their delivery was hesitant. Women also were picked on during scheduled "Ladies' Days," when only women were questioned about cases chosen to embarrass them. At Columbia University, one professor was known to begin his Ladies' Day by proclaiming: "Will all the little virgins move to the front of the class." In the years before the women's movement, women students did not refuse to attend such classes, terrified of their professors or of being criticized for not having a sense of humor. By the 1970's, Ladies' Days went

12. This analysis, and that which follows, is drawn from this writer's earlier work, C. EPSTEIN, *WOMEN IN LAW* (1981).

13. J. OSBORN, *THE PAPER CHASE* (1971).

the way of other obnoxious behavior, with male students often joining with female students to protest humiliating treatment. But this is not the end of the story.

The treatment women received in the schools was mirrored in other ways in many law firms. Few firms employed women, and those that did placed restrictions on their mobility and the kinds of specialties in which they could work. Women's best chances for employment were in family firms or in government work; a place where minority persons also found some opportunity. Yet women attorneys as a group had done as well as men while in law school, and often better. Once they became lawyers they worked hard, harder than men many claimed, in order "to prove themselves." This is a theme I have heard over and over again in research over the past twenty years.

The incorporation of women into the legal profession beginning in the late 1960's is an instructive example of the power of law to achieve social change. But other conditions were right as well. Had there been no Civil Rights Act of 1964,¹⁴ and no women's movement to mobilize small corps of interested women attorneys and sympathetic male colleagues, I doubt the profession would have opened up as it has.

These corps of attorneys, and the spirited law school associations formed by women students and some of the small number of women faculty members, instituted suits and won settlements that opened the profession's doors. About 1972 the big firms started hiring young women in response to sex discrimination suits brought against a number of prominent law firms. The settlement of two of these suits, with the firms of Rogers & Wells and Sullivan & Cromwell, set new norms that were seized upon by many women with a sense of efficacy and empowerment.

On the demand side, firms found in their search for talent that there was a large pool of women, with fine credentials, to choose among. In addition, law schools insisted that firms interview their women students as well as men, and barred recruiting at their schools if firms refused to interview women or interviewed them in ways that might be considered discriminatory. The rapid turnaround in the treatment of women candidates and the attitudes of hiring partners in law firms was amazing. This turnaround has not occurred across the board, but it is true of the large firms, a major employer of women law students.

At last count, women make up 20.9 percent of all lawyers at the top 250 U.S. law firms, and 6 percent (up from 3.5 percent in 1981) of all partners in large firms.¹⁵ Thirty-one percent of all associates (up from twenty percent in 1981) are women. Indeed, only about two percent of large firms do not have women partners.

14. 42 U.S.C. § 2000e (1982).

15. Stille, *Little Room at the Top for Blacks, Hispanics*, Nat'l Law J., Dec. 23, 1985, at 6, col. 1.

But other elements, undetected by these statistics, lurk beneath the surface. They affect all attorneys, but may disproportionately affect women. Partnership figures reportedly reflect a new hierarchical arrangement in firms.¹⁶ Many firms now employ two-tier partnerships. For example, two large firms in Chicago (Kirkland & Ellis and McDermott, Will & Emery) make some attorneys income partners after five years and equity partners after ten years. There is disagreement about the meaning of the new tiered systems, including the expanding category of permanent associate, but many observers predict that a disproportionate number of women will find themselves in the lower ranks. Certainly these are not decision making positions, and job security may be somewhat more precarious in bad economic times. Furthermore, the jump in numbers of salaried lawyers is momentous, reflecting the rise in corporate legal staffs—the most rapidly growing sector of the legal profession. In a recent book,¹⁷ Eve Spangler asks a question on many people's minds, namely, whether prestigious private practices once again will be dominated by men while less prestigious salaried positions will be disproportionately held by women.

III. THE FUTURE FOR WOMEN LAWYERS AND THE PROFESSION

The larger firms seem to have retained their prestige intact, but they are certainly under assault. Many male attorneys worry whether the presence of women will undermine the standing of law in terms of prestige and income. This line of inquiry alone is worth separate study, but it should be noted that many analysts believe the autonomy of the legal profession has declined. This perceived decline comes from many sources, including technical expertise lawyers must share with other professions and disciplines, and the competition lawyers face from various kinds of quasi-legal services.

The ambivalence toward female attorneys that remains is indicated by the all too often heard suggestion that women's participation in the legal profession is deleterious to male attorneys. Both in law school and the profession, the haunting presence of prejudice and often outright discrimination remains, along with the residue of old and subtle practices and processes.

One continuing source of bias may be law school casebooks. In spite of many attempts to remove gender bias from law school casebooks, a study by Mary Jo Frug¹⁸ of the New England School of Law, indicates that bias is still present and impedes both learning and legal analysis. She observes that "our ideas about gender have a profound impact on our lives: they divide us from one another and from ourselves."¹⁹ Gender bias in casebooks is of particular concern, because "casebook editors are responsible for

16. Wise, *Psst! Wanna Make Partner*, Nat'l Law J., Oct. 26, 1987, at 1, col. 2.

17. E. SPANGLER, *LAWYERS FOR HIRE: SALARIED PROFESSIONALS AT WORK* 68 (1986).

18. See Frug, *Rereading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065 (1985).

19. *Id.* at 1069.

creating works of significant power over readers"²⁰ Professor Frug found that contracts casebooks, the focus of her study, were full of cases where stereotypes about women rather than legal reason guided the opinion of the courts. Use of these casebooks to instruct law students serves to perpetuate the stereotyping of a new generation of students.²¹

Stereotypes about the essential nature of women also guide the evaluations of women attorneys by their peers and employers. In my own studies I have found that although women's technical competence as lawyers is no longer called into question, views about how women ought to act make women seem impaired if they deviate from stereotyped feminine behavior. Often their interpersonal competence is questioned. For example, if women deal with colleagues in a direct, forthright manner, some men regard them as "stiff." If they do not give in to male pressure, they are regarded as "inflexible." Male colleagues seem to feel that men are friendly and warm, but that women attorneys tend to be cold (and often, therefore, not good "partners").

Surveys of women attorneys,²² and the conclusions of a major study on sexism in the courts of New York,²³ report that women still face serious problems in the profession. The panel in New York, set up by the state's chief judge, found that women lawyers, clients, and judges face a range of discriminatory treatment that undermines both their dignity and access to justice. The 23 member panel concluded that female lawyers routinely were demeaned and patronized by male judges and attorneys. It found that the credibility of female witnesses was sometimes questioned as emotional, untrustworthy, and communicative of their "feelings." Testifying about the treatment of women in the courtroom, Judge John D. H. Strickhouse of the Civil Court of New York stated: "I have seen them disparaged sometimes to their face, sometimes behind their backs."²⁴ The panel's report concluded in summation: "Women are uniquely, disproportionately, and with unacceptable frequency made to endure a climate of condescension, indifference and hostility."²⁵ Despite the tone of these findings, the report probably reflects a major improvement over past conditions. Women are more alert to discrimination than they were in the past. Likewise, observers are more keen about the consequences of casual slurs and joking, and are somewhat more aware of the subtle processes of exclusion.

20. *Id.* at 1070.

21. *Id.* at 1087. For further analysis of bias in law school casebooks, see N. Erickson, *Sex Bias in Law School Courses: Some Common Issues* (unpublished manuscript presented at the Workshop on Women in Law: Assimilation or Innovation, August 3-5, 1987, University of Wisconsin Law School).

22. See Silas, *Women Lawyers*, 70 A.B.A. J. 33 (Sept. 1984) (reviewing results of survey conducted in Minnesota regarding earnings and opportunities in legal profession).

23. See NEW YORK TASK FORCE ON WOMEN IN THE COURTS, SUMMARY REPORT (March 1986).

24. *Id.* at 132.

25. *Id.* at 17-18.

IV. SOME TROUBLING QUESTIONS

In the past few years, a number of questions have been raised about changes in the profession and the perceptions and motivations of women in the law as their numbers have grown from a very small minority to a somewhat more significant proportion of American attorneys. I will raise some of the questions, but only provide a limited response to them in this paper.

First, there is the question of whether women will "change the profession." This is typically posed in the context of assumptions that women will bring a measure of humanitarianism, of "caring," to the profession. The short answer is that some will and some will not, because women's interests and values run as much of a gamut as do men's. But there is a caveat to this. Women's presence raises issues about the interface of work and family that the profession is only beginning to address. Furthermore, a small group of articulate and activist women lawyers are writing and speaking about humanitarian issues and keeping alive concerns about such matters as the treatment of victims, the poor, women, and disadvantaged persons. This sensitivity and concern is not shared, however, by all women attorneys, and there are many male faculty writing and speaking out on these same issues.

Another question is whether women have the commitment and energy to be full professionals according to the standards set by men: to work as hard, to bring in business, and to have a continuous attachment to professional activity. The short answer is that although some women will not, or can not, perhaps a majority will, especially if they are given the opportunity for the same rewards as men. In the face of recent media attention on women who have dropped out of the profession, it is important to be aware of evidence which reveals that of the most successful attorneys, the greatest proportion are married with children. This may be because lawyer husbands are a source of contacts, business, and empathy, which single women attorneys do not get in the same measure.²⁶ A corollary of the last question is whether women can produce their share of "rainmaking" as well as contribute to the technical side of legal practice. The short answer is that as women become better connected in the business world, they will, but this partly depends on male cooperation in including women in business networks. These are only a few of the important questions that are being raised today as the profession's population changes.

V. SOME FINAL OBSERVATIONS

In some ways, this is the best of times in the legal profession. The new recruits, among them women, whether they know it or not, work in a

26. C. EPSTEIN, *supra* note 9, at 343. Chapter 18, HUSBANDS, WIVES, AND LOVERS, discusses at length effect of marital status and intimate relationships on woman's success in the law. *Id.* at 329-57.

profession that is more open than at any time in history. That does not mean their position is secure and that progress will continue in a linear progression toward absolute equality. Economic, social, and cultural forces shape the profession, but these forces are not always inevitable, faceless pressures. People make decisions that set them in motion, and may make them on the basis of bias, tradition, or open inquiry. Open inquiry being preferred, it is important that there be diversity among the information gatherers and among the decision makers. Diversity reduces the autonomy of the few who monopolized decision making in the past, and increases the base of those who may make decisions in the future.

Edmund Burke, the British political theorist, claimed that legal training sharpened men's minds by making them narrow. Many women lawyers, like members of other formerly excluded groups, are denied the luxury of narrowness because, as outsiders in their own profession, they are sensitized to the insular qualities of law practice. Certainly many men possess breadth of vision and women are as capable as men of narrowness. But the outsider role, no matter what its pains and handicaps, does give a perspective different from that of insiders with vested interests in the existing structure. Yet women must become insiders, because only as insiders can they translate their insights into programs.

The law schools and the profession today are marked by diversity.²⁷ Judge Richard Posner of the Seventh Circuit Court of Appeals wrote in the *Harvard Law Review*, on the eve of its 100th anniversary, that authority, once rooted in law, is now shared:

The spectrum of political opinion in law schools which in 1960 occupied a narrow band between mild liberalism and mild conservatism, today runs from Marxism, feminism and left-wing nihilism and anarchism on the left, to economic and political libertarianism and Christian fundamentalism on the right. We now know if we give a legal problem to two equally distinguished legal thinkers . . . we may get completely incompatible solutions²⁸

I opt for diversity, but with caution. The law formulates many of the rules for the society in which we live. It sets the standards and it legitimates various behavior and practices. Law was used to open the profession in terms of training and employment. Law has been the most effective weapon that women and minorities have had to progress toward equality in this country.

In spite of this history, there is again disagreement about the use of law as an instrument for social change. I believe, however, that opposition to the use of law to attain personal rights or equality of opportunity is itself in the process of change. Judgments in law are determined by values which

27. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 766 (1987).

28. *Id.*

often are implicit. The recruitment of potential decision makers must be viewed as part of the process of change. For those of us who hope that the legal profession will be a guardian of the value of equality, it is important to specify our goals and act accordingly. It is to the law's honor that it has accomplished so much in so short a time.

