

CHAPTER 5

Women Entering the Legal Profession

Change and Resistance

Nature has tempered women as little for the judicial conflicts of the courtroom as for the physical conflicts of the battlefield. . . . Our . . . profession has essentially . . . 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 the sanctity of their sex.

(Chief Justice C. J. Ryan of the Wisconsin Supreme Court
opposing admitting Lavinia Goodell to the bar,
1895, cited in Epstein, 1993, p. 269)

Though the practice of the criminal law occasionally may be “coarse,” this decision reflects the images and stereotypes that associate the law with masculinity. These images were used to justify the virtual exclusion of women from the prestigious and powerful legal profession in the United States until the 1970s. Despite Justice Ryan’s vivid language, the reasons for men’s resistance to women lawyers “likely has to do with the law’s close relationship to power in our society” (Morello, 1986, p. x). The legal profession structures power relations between groups and classes by shaping the rules and laws that open or limit opportunities without resort to force, making it the quintessential male power role (Hagan, Zatz, Arnold, & Kay, 1991).

For many years, by controlling its own membership, the legal community was able to limit both the number of lawyers and the social diversity of those admitted to practice. It did this by exercising both formal control over admissions to law school and bar membership, and informal referral and social mechanisms. These processes enforced the understanding that outsiders such as women and racial minorities would be excluded from the legal community or would be kept on its fringes in low-visibility, low-prestige specialties, serving others like themselves (Epstein, 1993).

Since the 1960s, the legal world has undergone several major changes. The number of lawyers has more than doubled. The nature and organization of legal work have also changed. There are fewer lawyers in solo practice and more who work in large law firms and in salaried positions with corporations and government agencies. Law firms have greatly increased in size and become more bureaucratized and hierarchical. New areas, such as public interest law, have emerged, and the number of women lawyers has mushroomed. Thus, women's growing presence in the law beginning in the 1970s occurred as part of the changing legal context, while the growing representation of women stimulates further change in the organization and activities of lawyers.

Women now comprise more than a quarter of the legal profession and about half of all law students, but their numerical gains have not yielded equivalent increases in power and opportunities. As the report of the American Bar Association (ABA) Commission on Women in the Profession, *The Unfinished Agenda* (2001, p. 5), concluded,

Despite substantial progress toward equal opportunity, the agenda [established by this group in 1987] remains unfinished. Women in the legal profession remain underrepresented in positions of greatest status, influence and economic reward. . . . The problems are compounded by the lack of consensus that there are in fact serious problems.

This chapter explores the history of women in the legal profession, the nature and organization of the work done by attorneys, the changes that have occurred across the legal landscape, and the ways that gendered legal culture and its images have severely disadvantaged women lawyers. Chapter 6 looks more closely at the organizational logic that prevails in key legal settings and the strategies adopted by women lawyer to address the barriers that inhibit legal careers. In these chapters, we present a general discussion of women's integration into the legal profession rather than focusing explicitly on criminal law because no such specialized data are available and because most of the barriers to women are encountered across legal settings.

Historical Overview: Barriers to Women in Law Before 1970

In 1638, Margaret Brent became executor of the estate of Lord Calvert, governor of the Maryland colony (Morello, 1986). Although it is known that she was the first woman to practice law in colonial America, little else is known about women

practicing law until the mid-1800s. Women were barred from both law schools and state bar associations. It is possible that a few women appeared in court in their own behalf and others practiced law in the frontier areas (Bernat, 1992). However, few women pursued legal careers.

In 1869, Iowa became the first state to admit a woman, Arabella Mansfield, to the bar (Morello, 1986). Three years later, Charlotte E. Ray, daughter of leaders of New York's underground railroad, became the first African-American woman admitted to the bar (Siemsen, 2006). In other jurisdictions, however, women applicants were denied membership. For example, in 1872, Myra Bradwell, who was denied admittance by the Illinois State Supreme Court, appealed to the U.S. Supreme Court claiming that her rights under the Equal Protection Clause of the Fourteenth Amendment had been violated. The Court, denying her appeal, stated,

The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for the practice of law. . . . [Additionally] a woman has no legal existence separate from her husband . . . [so that] . . . a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him, whereas unmarried women are "exceptions to the general rule" of marriage. (Cited in Morello, 1986)

The Court's decision in *Bradwell* permitted states to exclude women from practicing law. Since admission to a state bar is the prerequisite for practicing law in that state, women had to challenge their exclusion state by state in order to gain the right to practice law. It was not until 1920, 51 years after women first became lawyers in the United States, that women were permitted to practice law before the courts in every state (Feinman, 1986). Women also were excluded from membership in the ABA until 1918 (Abel, 1989) and from the prestigious Association of the Bar of the City of New York until 1937 (Epstein, 1993). Consequently, they were kept from the networks through which lawyers gain contacts, referrals, and power.

Between 1870 and 1950, American lawyers as a professional group successfully controlled the market for their services. They developed local, state, and national bar associations; created codes of ethics; and established disciplinary procedures to control the quality of legal services. They also maintained tight entrance requirements into the profession through control over the standards and admission practices of the emerging law schools (Abel, 1986). Thus, the ABA and state bars limited the numbers and controlled the characteristics of new lawyers. As a result, despite the vast economic growth during the first half of the 20th century in the United States, the population-to-lawyer ratio was the same in 1950 as it was in 1900, and the legal profession consisted of white men mostly in solo practice.

By the end of the 19th century, the professionalization of legal practice had led to an increasing proportion of lawyers with formal legal education. Until 1900, the most common route to the bar was "reading the law" and serving as an apprentice or "clerk" to a working lawyer. As apprenticeship routes disappeared, even these limited opportunities for women to enter law were reduced by women's exclusion from the academic route. Although Washington University in St. Louis was the first law school to admit women in 1869 (Morello, 1986), access to legal education

remained very limited. Many law schools, particularly the most elite, denied admittance to women altogether. Columbia only opened its doors to women in 1928, and Harvard did so in 1950.

Even when women were admitted, quotas and other restrictive barriers kept their numbers small (Epstein, 1993). With a sufficient supply of qualified men applicants and in the absence of antidiscrimination laws, the academic gatekeepers excluded or limited the numbers of men and women of color and white women. For many decades, law classes typically had a maximum of three women. Although academics protested that the low numbers were due to women's disinterest, statistics that appeared in the *Harvard Law Record* in 1965 suggest a pattern of discrimination. Despite increasing numbers of women applicants, women constituted about 3 percent in each class between 1951 and 1965 (cited in Epstein, 1993). Women remained less than 5 percent of the enrollment at ABA-approved law schools until the 1970s (Abel, 1989). Both faculty and men students made the educational environment inhospitable to women. While all students were subject to ridicule, particularly if they did not provide the right response when called on in class, women were rarely called on, and on such occasions, they were subjected to questions designed to embarrass them (e.g., being asked to explain the details of rape cases) or were humiliated by such comments as "better go back to the kitchen" if they stumbled in recitation. Additionally, women knew they would be expected to respond on "Ladies' Day," which for many professors and men students was a show put on at the women's expense. For example, one professor sat in the audience asking questions and told all the women in the class to stand at the podium "rather like performing bears" (Epstein, 1993, p. 66).¹

In 1972, passage of Title IX of the Higher Education Act prohibited discrimination based on sex in the enrollment of students and hiring of faculty. Facing denial of federal financial assistance if they continued to discriminate, law schools finally began to admit more women and allow them to compete equally with men. Since that time, women's enrollments have grown dramatically; in 2004, they constituted about half (48 percent) of the students enrolled in law school and 51 percent of those awarded JDs (ABA, 2006).

The next hurdle for women lawyers was finding a job. Even women with training from elite schools faced employment discrimination that was openly practiced well into the 1970s. For example, a 1963 survey of 430 law firms found that "female status" was the characteristic that got the most negative rating in selecting new recruits (Epstein, 1993). Thus, it is not surprising that in 1965, fewer than 20 percent of the 104 firms responding to a *Harvard Law Record* questionnaire employed any women lawyers (cited in Epstein, 1993).

Women who were able to obtain legal work often were offered opportunities in low-status specialties deemed appropriate for women, such as domestic relations and probate law. They received lower pay and were denied partnerships and opportunities for leadership in bar associations. For example, when former Supreme Court Justice Sandra Day O'Connor graduated third in her class at Stanford Law School in 1953, the only job that she was offered was as a legal secretary (*Time*, July 20, 1981, p. 12, cited in Epstein, 1993, p. 84).

Women also were rarely found on the bench. The first woman justice of the peace was appointed in 1890, but it was not until 1979 that a woman had served at some level of the judicial system in all 50 states (Slotnick, 1984). Similarly, the first woman on the federal bench, Francis Allen, was appointed by President Roosevelt to the Circuit (Appellate) Court in 1934. The next was appointed to the U.S. District Court in 1949 by President Truman. By 1977, only eight women had ever served in the federal judiciary at the District or Circuit Court level (E. Martin, 2004).

Women were not the only group excluded from the practice of law. In fact, the club-like homogeneity of law firms that hired only white Anglo-Saxon Protestant men has only gradually, and often grudgingly, moved toward greater representativeness. The first step was made by Jewish and Catholic men during the 1950s and 1960s. White women broke through by the late 1970s. Informal barriers against persons of color remain high.²

The history of the struggle of women in the United States to enter the legal profession was similar to women's struggles in England, other Commonwealth nations, and Europe. In England, the Inns of Court controlled entry into the ranks of barristers (as well as the judiciary that is drawn from this group) and succeeded in excluding women who sued for admission through several judicial interpretations of the law until 1918. In that year, Parliament passed the Sex Disqualification (Removal) Act largely as a reward for women's performance during World War I. But as in the United States, admission did not end discrimination, and through the 1950s, the number of women admitted to the bar grew even more slowly than in the United States (Corcos, 1998). In Canada, Clara Brett Martin sought but was denied admission to the Ontario Bar in 1891. The provincial government, however, swiftly asked the Ontario legislature to permit the Law Society of Upper Canada to admit women, although it took several years and two separate acts of the legislature in 1897 before Ms. Martin was called to the bar. In Australia, the various territories admitted women to the legal profession separately but mostly before the mother country did. Women were admitted to the bar in Victoria in 1903, followed by Tasmania (1904), Queensland (1905), South Australia (1911), New South Wales (1918), and Western Australia (1923; Corcos, 1998). Nevertheless, Australian women as late as 1980 were underrepresented in the profession and were consigned to certain areas of practice (primarily family law).

In France, much of the argument over the admission of women to the legal profession took place after their admission to the bar in 1900. Although the government had little difficulty in overturning what it considered a grievous wrong in a court ruling in 1897 that denied a woman the right to admission, the majority of members of the legal profession were not happy about the government's policy. Questions about women's competence lingered, and few women sought legal careers for the next several decades after they were permitted to do so. Across these diverse nations, many of the arguments used to exclude or limit women were similar: the law was and continues to be "constructed as male" (i.e., presumed to be rational, logical, dispassionate, objective, professional, intimidating and demanding), while women are presumed to lack these qualities (Corcos, 1998).³

Changing Laws and Job Queues: Opening Legal Practice to Women

In the past four decades, there have been a number of major changes in the legal profession. These include an enormous increase in the number of law schools and lawyers; an opening of the profession to white women and people of color; a shift in the type and organization of legal employment, including increases in firm size and bureaucratization; increases in the number of hours worked and the salaries paid to lawyers (particularly those in private practice); and a diminution of the legal profession's control over lawyers' behavior. Each of these changes has affected and been affected by the expanded role of women in law.

Changing Labor Queues and Demographics in the Legal Profession

From 1960 to the present, there has been a phenomenal growth in the number of lawyers and in the ratio of lawyers to the general population. The number of lawyers in the United States grew from about 222,000 in 1950 to 355,000 in 1971, 542,000 in 1980, 806,000 in 1991, and 909,019 in 2000 (Carson, 2004, p. 28). The growth rate was about 25 percent during the 1950s and 1960s and rose to about 50 percent in the 1970s and 1980s, but slowed down in the 1990s. The ratio of lawyers to the population of the United States also increased markedly. Between 1950 and 1991, the number of lawyers almost quadrupled, but the size of the U.S. population did not even double. Thus, while there was one lawyer for every 679 people in 1950, by 1991 this ratio stood at one lawyer for every 313 people (Kornhauser & Revesz, 1995), and in 2000 that ratio was 264 to 1 (Carson, 2004, p. 27).

One consequence of this growth is the legal profession's gradual loss of control over its composition. Restrictions on the training of lawyers prior to 1960 led to a shortage of lawyers, expansion in the number of law schools in the 1960s, and willingness to turn to less expensive women lawyers by the 1970s. Greater demand also led to higher starting salaries that, in turn, made the law a more attractive career option. The civil rights, women's, consumers, and environmental movements of the 1960s expanded new areas of the law and the demand for lawyers. As racial and sexual barriers to entry into law fell, the number of aspiring lawyers more than doubled, while the number of law schools rose by 25 percent. The number of new lawyers being trained in the mid-1980s was three times greater than that in the mid-1960s (Abel, 1986, p. 11); since then, the expansion of the profession has continued, but the rate of growth is slower.

There have been dramatic changes in the demographic composition of the legal profession over the past 30 years. These include a vast increase in the proportion of white women and a small increase in men and women of color. But this increasingly young and diverse profession remains dominated by elderly white men. Since men's enrollment in law schools has remained stable while women's has multiplied, most of the growth in the profession represents an increase in the number of women law students and lawyers. In 1960, women comprised only 3.5 percent of the enrollees

at ABA-approved law schools; in 1970, they comprised 8.5 percent; in 1980, they comprised 33.6 percent; and in 1986, they comprised 40.2 percent (Abel, 1989, p. 285). As of 2005, women represented virtually half (48 percent) of all law students in the United States (ABA, 2006). Of the new entrants to the bar in 2003, 46 percent were women, 17 percent were nonwhite (compared to 5 percent in 1970), and 2.5 percent were openly gay or lesbian (*After the JD*, 2004, p. 19).

Similarly, the number of women lawyers in Canada and Australia in the past 25 years has mushroomed. In 2004, women comprised just under 50 percent of law students in Australia compared with only 20 percent in 1970 (Thornton, 2004). In Canada, in 2003 women represented 53 percent of the law school graduates (*Women in Law in Canada*, 2005).

Changes in the Type and Nature of Legal Employment

The organization of legal work also has changed enormously since 1960. Most lawyers still work in private settings and either serve large corporations or serve small businesses and individuals. However, an increasing proportion of attorneys now work in law firms rather than as solo practitioners, and their work is increasingly specialized. Not only are there more law firms, but they are much larger in size and are increasingly hierarchical and bureaucratic. For example, the proportion of lawyers in solo practice declined from 61 percent in 1960 to about 34 percent in 2000 (Carson, 2004). At the same time, the number of lawyers in firms with 50 or more lawyers grew from 7.3 percent in 1980 to 18.2 percent in 2000 (Carson, 2004, p. 29). Increases in size and bureaucratization have occurred not only in private law firms but in corporation counsel's offices and government legal departments. A study of lawyers in Chicago (Heinz, Nelson, Laumann, & Michelson, 1998) found that the average number of lawyers in the private law firm in 1975 was 27; by 1995, the average firm had 141 lawyers. Similarly, the average size of house counsel offices (lawyers working in corporations and other private organizations) grew from 17 in 1975 to 55 in 1995, and on average, government law offices grew from 64 to 399 between 1975 and 1995. A result of these changes is an increase in the proportion of lawyers who are salaried workers. More lawyers work for government and private industry now than 50 or 20 years ago. The nature of the work also shifted, as an increasing proportion of lawyers' activities involved work for corporate/business clients rather than individuals.

The ideal of professional practice represented in the law firm traditionally rested on service to clients, the production of knowledge, and adherence to an ethical code. Partnerships were granted to associates on the basis of craftsmanship, the individual's skills in business development, and personal qualities and "fit" within the "brotherhood" of the firm. The social structure of firms began to change in the late 1970s and 1980s and accelerated in the 1990s as law firms mushroomed in size, hired persons from diverse backgrounds, and began recruiting associates laterally from competing firms by offering more money and a swifter move to partnership. Within the firm, competition and stress replaced "fraternity" and collegiality. Clients, once property of the firm, became property

of individual lawyers. To support their rising costs, firms put growing emphasis on the bottom line, and with it came a change in compensation systems from those based on seniority to those emphasizing productivity, particularly client development (i.e., “rainmaking”). This shift advantaged men and disadvantaged women since much of rainmaking activity occurs on the golf course and in extra-work hours activities at bar association meetings and social clubs among persons who give single-minded attention to the job and avoid outside obligations. Firms compete by adding specialty departments in areas of high demand and striving to enhance profitability by increasing the ratio of associates to partners, as well as creating several types of partnerships.

With the economic downturn in the early 1990s, law firms for the first time laid off lawyers and decreased the proportion of associates elevated to partner. Currently, both partners and younger associate lawyers face enormous pressures to win and hold client. In addition, the number of billable hours (i.e., those chargeable to a particular client or account) per year expected of and actually worked by lawyers has increased from 1,800 to as much as 2,300 hours annually to meet the costs of spiraling salaries and growing demands of clients. For example, a study of practicing lawyers in Calgary, Alberta, Canada, found that they average 50 hours per week in the office and that more than half (52 percent) take work home, and their evening and weekend work adds another 5.5 hours, resulting in a median of 53 hours a week of work (Wallace, 2002).

These changes in the size, composition, structure, and function of the legal profession have affected its self-governance by breaking down the control formerly exercised by the ABA and state bar associations and subjecting lawyers to more external regulation. The changes also have increased stratification of the legal profession according to practitioner background, clientele, function, and reward. As sociologist Richard Abel (1986) predicted, and as will be elaborated shortly, increasing heterogeneity within the profession has resulted in differential ranking within the legal profession and segregation associated with racial and gender differences. Changing job queues and expanded demand for women lawyers have enabled them to enter the field, but these changes have occurred at the same time as the legal profession has become more stratified, bureaucratized, competitive, and specialized. Consequently, as will be shown, the legal profession remains gendered despite dramatic changes in the past three decades. To understand why, it is necessary to examine other factors that also have affected both changes in the profession and women's place in it in the past 40 years.

The Changing Legal Environment

Civil rights laws have contributed to change in the legal profession by opening the doors to law schools and legal work for women and persons of color. Title VII of the Civil Rights Act of 1964, the 1972 Amendments to Title VII, and the 1972 Educational Amendments Act were of particular importance to aspiring women lawyers.

The 1972 Amendments to Title VII extended antidiscrimination provisions to all employers with 15 or more workers, including many law firms, as well as to state and local government agencies and educational institutions. It also allowed the

Justice Department to bring “pattern or practice” lawsuits. When this provision was applied to include the placement offices of law schools that served as employment agencies and made them targets for lawsuits, they radically altered their gatekeeping functions.

The 1972 Educational Amendments Act prohibited sex discrimination in all public institutions of higher learning receiving federal monies, including major university law schools. This not only opened enrollment to women students, but affected the distribution of scholarships and the hiring and promotion of women faculty members. It also made it illegal for law firms to openly refuse to interview or hire women.

Women Lawyers Using the New Laws

Opening employment opportunities in law to women required lawsuits against the legal establishment. These suits have gradually brought about changes in the legal profession’s treatment of women in practice, teaching, and the job market. At first, women students at New York University and Columbia Law Schools, with the participation of Columbia Law School’s Employment Rights Project, set out to end exclusionary practices in elite Wall Street firms. Pooling information about job interview experiences, they concluded that these firms were not taking their applications seriously. They complained to their school’s placement office, and with help from the Employment Rights Project (and funding from the Equal Employment Opportunity Commission), several women filed complaints with the New York City Human Rights Commission against 10 firms on behalf of all women law students in New York. In 1976, seven years after initiation of their suit, all of the firms agreed to settlements similar to those reached following findings of employment discrimination in two test cases.

In the first case decided, *Kohn v. Royall, Koegel and Wells*, the court determined that the firm had systematically discriminated against women in hiring. The firm agreed to a complex formula, including a guarantee that it would offer at least 25 percent of its positions each year to women. In the other case, the court found that Diane Blank’s interviewer from the firm of Sullivan and Cromwell had admitted that the firm was biased, discouraged her interest in the firm, failed to examine her resume, and asked about her lawyer-husband’s career. Sullivan and Cromwell also agreed to a settlement that included the provision that in addition to hiring women, it would not hold social events in clubs that excluded women. The other eight firms cited in the initial complaint adopted similar guidelines (Epstein, 1993, pp. 184–189).

Despite antidiscrimination laws, women law students and faculty had to keep up pressure on law school placement offices through the 1970s to force law firms to recruit women seriously or face sanctions. In some instances, women students sued placement offices (e.g., University of Chicago Law School). By the end of the decade, law firm recruiting had changed; while old prejudices remain, most firms have eliminated blatant discrimination.

The next legal barrier was posed by the partnership decision. In *Hishon v. King & Spalding* (1984), the U.S. Supreme Court legally recognized that promotion to partnership is an area covered under Title VII. Earlier, the courts had treated

partnerships as voluntary associations that must be congenial for all concerned, because partners are liable for the negligent acts of any copartner. In *Hishon*, the Court rejected the argument that the choice of partners was protected under the First Amendment right to freedom of association. It ruled that Title VII does not force partnerships to accept less qualified individuals. Nevertheless, consideration for partnership is a “term, condition, or privilege” of the original employment contract covered under Title VII, and, as such, a partnership decision must be made on a fair and equal basis without regard to the applicant’s sex (Madek & O’Brien, 1990).

The next hurdle for women was addressing discrimination in the actual decision-making process. Since the decision to admit an individual to a partnership usually involves both objective and subjective factors and a collaborative decision, identifying the “real cause” of such decisions often is impossible. In a 1989 decision, *Price Waterhouse v. Hopkins* (which actually dealt with issues of partnership in an accounting firm, but the issues raised in this case apply more generally to partnerships), a fragmented Supreme Court failed to establish either clear grounds for determining when discrimination has occurred or the rules of the fight.

The facts of the case were clear. Ann Hopkins, a senior manager at the Price Waterhouse accounting firm, was denied a partnership in a “mixed motive” case (i.e., one in which there were multiple reasons for denying partnership, only some of which were related to her gender). Ms. Hopkins had generated more new business for the firm than any of the 85 men who also applied for partnership at the same time; she was also known to be a demanding and difficult supervisor. In the usual manner, Price Waterhouse solicited comments from partners about candidates who had applied for partnership. Among the 32 comments regarding Ms. Hopkins were 13 supporting admittance and 8 for rejection. The decision was put on hold, and when two of Hopkins’ supporters withdrew their support, partnership was denied.

The lower courts ruled that once a plaintiff has established that an illegal motive played a significant part in the decision to deny partnership, the burden of proof shifts to the defendant to show that no discrimination actually occurred. In the *Price Waterhouse* case, the lower court suggested that Ms. Hopkins’ management style was a legitimate reason for putting her partnership application on hold. Nevertheless, the firm still was liable because the partnership process gave unacceptably great weight to negative comments that reflected unconscious sexual stereotypes by male evaluators. Among the suspect comments were statements that Ms. Hopkins needed a “course at charm school” and, from her primary supporter, that she would improve her chances of becoming a partner if she would “wear make up, have her hair styled, and wear jewelry” (at 1116–1117).

The Supreme Court overruled the lower courts and raised the threshold for showing discriminatory intent. The Court was split, with Justice O’Connor in the middle as the swing vote on two issues: the amount of evidence needed to show a discriminatory motive that triggers a shift in the burden of proof from plaintiff to the defendant, and the degree to which discriminatory intent is the cause of the decision.

As Madek and O’Brien (1990) predicted, such a split decision led to legislation to resolve these issues. In 1991, Congress amended Title VII of the Civil Rights Act with the provision that stated,

An unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice. (Civil Rights Act of 1991, Pub.L. No. 102-166, 105 Stat.1071 [1991])

In a recent case interpreting the scope of the statute with respect to the amount of evidence, *Desert Palace v. Costa* (2003), the Supreme Court unanimously adopted a straightforward application of the statutory provision. It ruled that “a motivating factor” means that if race or gender plays any role, however minor, in an employer’s decision, the plaintiff has established liability. In that instance, all the employer can do is limit the amount of award for the plaintiff’s full remedies. Thus, the requirement for “direct” evidence of discriminatory intent called for in Justice O’Connor’s decision in *Price Waterhouse* was eliminated (Zimmer, 2004).

Challenging Discriminatory Practices: Gender Bias Task Forces

Women lawyers soon encountered discriminatory practices and gendered interactions in the courthouse that threatened their livelihoods. Because these practices often were perpetrated or tolerated by judges, women lawyers could not safely challenge them individually. Instead, attorneys from the National Organization for Women’s Legal Defense and Education Fund, in cooperation with the National Association of Women Judges, designed a program to call attention to “gender bias” in the law, decision making, and courtroom interaction in state judicial systems. To make this change strategy palatable to judges and other gatekeepers in the legal system, the program was focused on collecting state-specific information about “gender bias.” Such bias was defined as existing when

people are denied rights or burdened with responsibilities solely on the basis of gender; . . . people are subjected to stereotypes about the proper behavior of men and women which ignore their situations; people are treated differently on the basis of gender in situations where gender should make no difference; [and] men or women as a group can be subjected to a legal rule, policy or practice which produces worse results for them than for the other group. (Maryland Special Joint Committee, 1989, p. iii)

Thus, gender bias includes both overt discrimination and more subtle practices.

The program was designed as part of the judiciary’s continuing judicial education efforts and employed a new approach, creation of gender bias task forces, to document such bias in the courts (Schafran, 1987). The first such body, the New Jersey Supreme Court’s Task Force on Women in the Courts, was established in November 1982 by that state’s Chief Justice to investigate three issues: whether gender stereotypes affect the substantive law or impact on judicial decision making; whether a person’s gender affects his or her treatment in the legal and judicial environment; and, if so, how to ensure equal treatment for women and men in court.

Its “First Year Report,” published in June 1984, found substantial gender bias and led to creation of similar task forces, similar findings across jurisdictions, general acceptance of the findings, and the introduction of judicial education about gender bias in many states. During the 1990s, several Federal Circuit courts also created task forces to focus on gender bias. However, in response to the Washington, D.C. Circuit Court’s report that revealed slights experienced by many women involved in the justice system similar in nature to those identified in other reports, several men judges, upset at the report’s recommendations, got Congress to block funding for further gender bias studies that had been proposed in the judiciary budget (Wald, 1996). Nevertheless, the tide has clearly turned; as of 2001, 45 states and most Federal Circuits had created similar task forces on gender bias in the courts (Schafran, 2004). Their findings have been both consistent and troubling. As will be further detailed in Chapter 6, a substantial proportion of women lawyers (and a much smaller proportion of men) has experienced various forms of gender bias including sexual harassment and demeaning behavior in courtroom proceedings. These task forces also inspired creation of similar task forces on racial and ethnic bias in many states as well as reports by the ABA’s Multicultural Women Attorneys Network (Schafran, 2004).

In addition to the bench, in 1987 the ABA created the Commission on Women in the Profession chaired by Hillary Rodham Clinton to address gender discrimination throughout the legal profession. Its 1988 report to the ABA House of Delegates called on that body to recognize the persistence of discrimination against women in the legal profession and to affirm its commitment to ending barriers that prevent “full integration and equal participation of women in all aspects of the legal profession” (ABA, 1988, p. 1). Since putting the legal establishment on record as opposing discrimination more than 20 years after the first surge of women into the profession, the ABA has also amended both its Model Code of Judicial Conduct and the Model Rules of Professional Conduct to include prohibitions on bias. Additionally, it has issued a number of reports that document continuing progress as well as continuing discrimination against women and men of color throughout the legal profession, and has recommend agendas for change (ABA, 1994, 1995, 2001a, 2001b).

Lawyers’ Jobs, Specialties, and the Division of Legal Labor

Although women comprised 27 percent of the legal profession as of 2000 (Carson, 2004, p. 27), their numerical gains have not yielded equivalent increases in power, status, and income. Table 5.1 shows that male and female lawyers have different employment patterns. In brief, women are proportionally underrepresented in private practice and overrepresented in government, corporate/private industry, and legal aid and public defender (PD) work. Additionally, within each of these organizational hierarchies, women are concentrated in the bottom rungs of prestige and income; they are underrepresented in the ranks of partner, general counsel, and

Table 5.1 Employment Distribution of Men and Women Lawyers in 2000

<i>Employment Setting</i>	<i>Male Lawyers</i>		<i>Female Lawyers</i>		<i>Females as Percentage of Category</i>
	<i>Number</i>	<i>Percent</i>	<i>Number</i>	<i>Percent</i>	
Private practice	506,829	75.0	166,072	71.2	24.7
Federal judiciary	2,221	0.3	939	0.4	29.7
Federal government	18,572	2.7	10,049	4.3	35.1
State/local judiciary	16,231	2.4	4,548	1.9	21.9
State government	25,698	3.8	14,476	6.2	36.0
Private industry	54,972	8.1	14,476	6.2	36.0
Private association	3,285	0.5	20,973	9.0	27.6
Legal aid/public defender	5,060	0.7	2,443	1.0	42.7
Legal education	5,060	0.9	3,997	1.7	44.1
Retired or inactive	5,908	5.5	3,135	1.3	15.3
Total	675,729	100	233,290	100	

Source: From Carson (2004). © The American Bar Association. All rights reserved.

supervisors. This section looks at the organization and work of lawyers as well as their distribution across specialties and workplaces to set the stage for examination of the factors responsible for and the impact of these employment patterns.

The Organization and Work Activities of Lawyers

In complex societies, the critical rules of social life are codified in law, and their meanings are interpreted and enforced by a group of experts on their proper application and use. These specialists in legal rules are lawyers, whose occupational specialty often is traced back to ancient Rome. The work of lawyers is advocacy or action directly or indirectly in defense of a client's interests in the courts and other forms of dispute resolution. Law is a theoretical and abstract discipline, and lawyers' work represents the practical application of legal theory and knowledge to solve real problems or advance the interests of those who have retained them for legal services. This occurs through the court system, where the rules of the legal system are applied. Legal work revolves around the court setting, where the rules of the legal system interact with specific interests of clients or relationships between clients and the state.

The public image of lawyers' activities focuses on the drama of the adversarial process in highly publicized criminal trials pitting the prosecution against the defense, with the judge serving as a referee. However, not all proceedings in court are adversarial. Most laws actually relate to civil matters that involve facilitating, regulating, or channeling activities (e.g., transmission of property, divorce, interpreting tax laws) in a given society. In handling cases, the lawyer's role is to adjust the needs, requests, and rights of the client in response to another party's assertion of rights, the rights of the state, or requests of the state for certain behavior (e.g.,

the payment of taxes). The judge's role is to exercise the authority of the legal system to constrain the activities of lawyers in their role as advocates.

In the United States, the division of legal work may be examined along two major dimensions: the specific kind of legal work done and the particular setting of the practice. In each, there is stratification based on the nature of the client served. Criminal law generally deals with the poor, whereas much of civil law has to do with business matters. More prestige and rewards accrue to lawyers who work for the elite since they become identified with the kind of clientele they associate with. Similarly, types of work settings also involve stratification. Usually, lawyers in solo practice work with poor or middle-class individuals; Wall Street and other lawyers in large and established law firms have powerful corporate clients. In between are smaller group practices, governmental legal activities, and house counsel work. Siemsen (2006) asserts that given the "moral division of labor" among lawyers, the attorneys who do society's "dirty work" by handling criminal defendants and the social problems of the poor and downtrodden are contaminated by their work and given low status; those who litigate (do trial work) with other populations are higher ranked; and at the top of the hierarchy are those who handle civil matters.

Lawyers also are stratified by specialty. Most lawyers enter civil work, and the elite among these go into business-related legal specialties. The work of Wall Street lawyers often involves helping corporate clients manage the private sector of the world economy. However, most lawyers work in smaller firms on the cases involving middle-class individuals and families and deal with wills, accidents (torts), and divorces. In addition to practicing attorneys, a number of persons with law degrees pursue careers in business, politics, teaching, or government and often move from one practice setting to another over their career.

In the past quarter century, there has been an erosion of the independence and autonomy of lawyers, resulting in the "postprofessional world" (Kritzer, 1999). Three key forces have undermined professional control: increasing specialization, the loss of exclusivity, and the growth of technology to access information. As a result, services previously provided exclusively by lawyers now are being delivered by other occupational groups (e.g., accountants and public relations firms), and at the same time, individuals now access legal services and information on the Internet, without having to consult lawyers.

The practice of law rests on an institutional foundation, organizational constraints, and professional tasks. Although it is assumed that there are boundaries between a lawyer's work and private life, these are fluid because they are subject to open-ended demands from clients and from processes such as networking. At the task level, lawyers are expected to be endlessly available to pursue their careers in a single-minded manner. At the organizational level, they are assumed to be willing to work overtime without direct compensation as a sign of "commitment" (Epstein, Saute, Oglensky, & Gever, 1995; Sirianni & Welsh, 1991, p. 424). At an institutional level, professional autonomy rests on a system of private social support that is required to ensure release time from private (e.g., home and family) obligations. In addition to long work hours, professional success also requires some "leisure" time to pursue professional networking to make contacts and garner new clients (Seron & Ferris, 1995).

With respect to both work time and “leisure” time, professional men have an advantage over women because they can expand hours spontaneously, flexibly, and informally and thus can more easily meet the organizational expectation of professions that they put work first. The professional model thus rests on men’s experience of release from domestic burdens; it gives men an implicit advantage that becomes visible by focusing on the ability to control professional time. This, in turn, rests on a “negotiated release from private time to have access to professional time” (Seron & Ferris, 1995, p. 27).

Private Law Practice

About three quarters of lawyers are in private practice, as shown in Table 5.1. However, there is wide variation in the kinds of practice, their positions within firms, the types of legal work they do, and their incomes. Women currently are only slightly less likely to enter private practice than their male counterparts; however, they leave private practice earlier and at a higher rate than their male counterparts in both the United States and Canada (Kay, 1997; Reichman & Sterling, 2004). The turnover rate is compounded for women who encounter discrimination (Kay, 1997) and women of color. A recent study found that from 1998 to 2003, nearly two thirds (64.4 percent) of minority females left private firms within 55 months of being hired (National Association for Law Placement Foundation, 2003).

Women are more likely than men to be in solo practice (53 percent versus 47 percent, respectively (Carson, 2004, p. 29). Among lawyers in firms, women are more likely than men to enter large firms that offer higher starting salaries, greater prestige, and more advancement potential than small or medium-sized firms. This apparent initial advantage was offset during the 1990s, however, by the reduction in the percentage of lawyers in private practice elevated to partnership, just as large numbers of women became eligible for elevation. In practice, this change has had a more pronounced effect on women’s chances for partnerships than men’s. As a result, a disproportionate number of women lawyers have remained at the associate level, and the rate at which women have moved from private practice to other employment sectors is higher than that of men. For example, in a recent survey of law graduates between 1970 and 1999 from five elite law schools (Columbia, Harvard, Boalt Hall, University of Michigan, and Yale), 51 percent of the men but only 40 percent of the women who entered private practice remained with a law firm in 2000, and 55 percent of the men but only 33 percent of the women remaining in firms had become partners (*Women in Law*, 2001). Additionally, women move up firm mobility ladders 37 percent more slowly than men and appear to be increasingly ghettoized within the legal profession (Kay, 1997).

In-House Counsel and Corporate Law

In 2000, about 8 percent of lawyers worked in corporations or for private industry (Table 5.1). Women constituted nearly a quarter of this group in the mid-1990s and more than a third in 2000 (Catalyst, 2002, note 22, cited in ABA, 2001b). However, they are not distributed evenly across in-house counsel departments of

different sizes or types of business firms. They comprise 15 percent of the general counsels (i.e., top legal officers) in Fortune 500 organizations (ABA, 2006).

Despite similarities in their educational credentials, there are gender differences in the routes by which men and women found such jobs and in their current positions, salaries (Roach, 1990), and promotion opportunities (*Women in Law*, 2001). Men employed as in-house counsels disproportionately worked for corporations in the manufacturing sector and in large departments that offer substantial salaries and opportunities for advancement. In contrast, women holding in-house counsel positions were concentrated in the financial services sector and in medium-sized legal departments offering lower pay and fewer mobility opportunities. In the study of graduates from five elite law schools, the women and men in corporate legal departments differed regarding advancement. In 2000, more than half of the men but only one third of the women were general counsels; women were disproportionately represented at the assistant and associate general counsel ranks despite having two years more tenure than the men (*Women in Law*, 2001).

Women and Men in Government Work

A disproportionately large number of women attorneys are employed in government work, particularly at the state and local levels. In 1980, 17 percent of women lawyers but only 9 percent of men lawyers worked for a government. An additional 4.8 percent of women and 1.2 percent of men worked in legal aid or PD offices (Curran, 1986). In 2000, as shown in Table 5.1, the gender gap was reduced, as 10.5 percent of women and 6.5 percent of men lawyers worked for federal, state, or local governments, and 1.7 percent of women and 0.7 percent of men worked for legal aid or PD offices (Carson, 2004). As women have increased their representation in law, more have found work in private practice. Nevertheless, as column 5 in Table 5.1 indicates, more than a third of the lawyers in each of the government and PD settings are women. Women of color are especially likely to work in these settings (ABA, 2001b).

Several factors have contributed to the concentration of women in government and PD legal work. It may be attractive to women because it offers more regular and flexible hours, requires little “rainmaking” activity (i.e., bringing in clients), and is a less hostile work environment given the greater presence of other women. It also may be a “fallback” rather than the preferred option, particularly for African-American women. In a study of black women lawyers in New York, Simpson (1996) found that of the 44 percent who began their careers in government, only 21 percent stated that was their first choice of position they sought. Despite these advantages, women rated the government work environment lower than the environment in private legal settings in terms of opportunities for salary increases, professional development, and achieving career goals than did women in law firms (Rosenberg, Perlstadt, & Phillips, 1993).

Prosecutors constitute the small fraction of government lawyers involved directly in the criminal justice system. National data on the number and positions of women in these offices are not available. Nevertheless, several individual women have achieved high visibility as chiefs of important prosecutor’s offices. The best

know is Janet Reno, who was Attorney General of the United States during the Clinton administration (1992–2000).

The Judiciary

Because judges have great power and prestige and appointment to the bench usually occurs as a “reward” for a successful legal career, it is not surprising that women comprise a smaller proportion of the judiciary than the legal profession. There were very few women judges before 1970, but since that time, the number of female judges at both the state and federal levels has grown, particularly in the 1990s. Despite recent gains, women still are underrepresented on the bench.

At the start of 2001, women accounted for 22 percent of federal district and appellate judges (166 out of the 760 judges serving on the U.S. Court of Appeals and U.S. District Courts (ABA, 2001b). This is double the percentage in the early 1990s. At the state and local level, there has been similar growth: in 1970, there were only 200 women state court judges, when they comprised 1 percent of the state court judiciary (Feinman, 1986, p. 118). In 1991, 10 percent of the judges on courts of last resort and 10 percent of intermediate appellate court judges were women (ABA, 1988). By 2005, women comprised 22 percent of district court judges, 25.6 percent of circuit (appellate) court judges, and 28 percent of the justices on state courts of last resort (ABA, 2006).

The first breakthrough for women at the federal level came during President Carter’s term (1976–1980), when 40 new women, including seven blacks and one Hispanic, were appointed to the bench. President Reagan appointed the first woman, Sandra Day O’Connor, to the U.S. Supreme Court in 1981. President Clinton appointed 100 women judges (29 percent of his judicial appointments), nearly triple the number appointed by Presidents George H. W. Bush and Reagan; he also appointed a second woman, Ruth Bader Ginsberg, to the Supreme Court in 1993. Additionally, 25 percent of Clinton’s appointees were persons of color, compared with 15 percent of Reagan’s and 12.4 percent of G. H. W. Bush’s appointees (Pastore & Maguire, 2005, pp. 57–58).

Women have also slowly increased their representation on the bench in England, Wales, Canada, and Australia. In England and Wales, in 1998 women comprised 10.3 percent of the judiciary. By October 2004, they comprised 15.4 percent of court judges (and ethnic minority group members comprised 3.4 percent). Nevertheless, the representation of each group decreases the higher one goes in the judicial system. Thus, only 9 of the 107 High Court Judges and 1 of 12 Law Lords (the most senior judges) are women (Smith-Spark, 2004).

In Australia, the first woman judge, Dame Roma Mitchell, was appointed to the judiciary in 1965, but few women were appointed to the bench for another 30 years. A major catalyst for addressing “gender bias in the judiciary” occurred in 1993. A judge of the South Australian Supreme Court, during the course of a marital rape trial, stated that “rougher than usual handling” was acceptable on the part of a husband toward a wife unwilling to engage in conjugal relations. This led to a public outcry, government reviews of practices for making judicial appointments, and several commissions of inquiry. Although the number of women in the judiciary has

grown, there currently are no women on Australia's High Court. In contrast, three of Canada's nine Supreme Court justices (including the Chief Justice) are women (Thornton, 2004).

Law School Teaching

Only 1 percent of lawyers go into full-time law school teaching, as shown in Table 5.1, yet they have a disproportionate effect on the law as role models, gatekeepers, and shapers of the next generation of practitioners. In addition, their legal writing affects lawyers' arguments and judicial decisions.

Initially, the barriers to women achieving faculty positions in law schools were even higher than those facing legal practitioners. In 1950, there were only 5 women law faculty members; they accounted for less than 0.5 percent of tenure-track faculty in law schools (Fossum, 1980). By 1977, the number of women had grown to 391 professors, who made up 8.6 percent of the tenure-track faculty, mostly at a few new and generally low-status law schools (Epstein, 1993). A decade later, Richard Chused's (1988) survey of law school faculty composition during the 1986–1987 academic year indicated that women comprised 20 percent of full-time faculty, including 45 percent of the professional skills teachers of legal writing and clinical law (who often are not considered regular faculty). His study also provided evidence that women were being denied tenure at high-prestige law schools at disproportionate rates. While about half of both the men and women law faculty candidates overall were given tenure, schools with a low proportion of women faculty, including a disproportionate share of prestigious schools, granted tenure to women at lower rates (41 percent) than men (51 percent). Additionally, he found that data on the representation of men and women of color on law school faculties suggested continuing discrimination in hiring (Chused, 1988, p. 539).

In the past two decades, women in legal education have made substantial progress, although they still are not fully represented in leadership positions and are clustered in the least prestigious academic specialties and positions. As of the 2004–2005 school year, women comprised 35 percent of law school faculty but only 25 percent of tenured faculty. They also were 19 percent of law school deans but 67 percent of the assistant deans who generally have staff positions that are not stepping-stones to deanships (ABA, 2006). Of the women faculty and deans, 11 percent were African-American women, 4 percent were Hispanic, and 3 percent were Asian-American (ABA, 2006).

Angel (2000) documented the continuation of the trend earlier noted in Chused's (1988) study that suggests that within legal education a new caste system is emerging. The majority of legal writing and clinical skills instructors, who usually are not on a tenure track, comprise the new lowest caste in that emerging system, and most of these instructors are women. In both clinical practice and legal writing fields, men are a minority, but they are overrepresented in tenured or tenure-track positions, while women disproportionately occupy the nontenure contract slots and receive lower pay. For example, women comprise 50 percent of clinical skills teachers. However, 55 percent of the men but only 37 percent of these women clinicians are tenured or in tenure-track positions. Similarly, women

comprise 70 percent of the legal writing teachers, but men are twice as likely as women legal writing instructors to be tenured (13 percent versus 7 percent, respectively; Angel, 2000).

Angel's (2000) study also indicates a new trend in law schools and universities: a decrease in the percentage of faculty hired for tenure-track positions and the replacement of tenured faculty with contract faculty. Thus, just as women appear poised to make substantial gains in legal teaching and other academic specialties, they encounter new barriers that disproportionately limit their career opportunities.

During the 1990s, the gender balance in law faculty hiring changed to women's disadvantage. In 1992–1993, women made up 50 percent of the newly hired associate professors (i.e., those who were presumably on tenure track). In 1997–1998, they comprised only 39.6 percent of those hired. At the same time, they made up 60 percent of the new lecturers and instructors in 1992–1993 and 66 percent of those hired in 1997–1998 (presumably in contract rather than tenure-track positions), suggesting the growth of the “women's ghetto” in law school faculties (Angel, 2000, p. 10).

As these data suggest, women and men lawyers have different career paths. A study of Chicago lawyers who graduated after 1970 clearly illustrates the ways these paths increasingly diverge over time. At the start of their careers, women are underrepresented in solo practice and small firms and overrepresented in public sector jobs. These differences grow over the course of the career as women move out of both large and small firms and into non-firm settings in government, legal aid, and corporate work. Conversely, men are less likely to leave large firms and more likely to leave government employment as their careers develop (Hull & Nelson, 2000). These patterns suggest that women “choose” to leave firms due to inflexible work schedules that create tension between the competing demands of practice and family. But Hull and Nelson (2000, p. 253) also question whether this should be characterized as an exercise of “choice” or is, “in significant part, the product of the dynamics of gender inequality within legal employment” (labeled “gender constraints,” which we will explore next. The issue of career patterns and “choices” also differs for white and black women. Simpson's (1996) study of black women lawyers in New York found that of the 42 percent who stated a desire to work in a law firm on completion of law school, only 27 percent found employment with a firm.

Gendered Legal Occupational Culture and Barriers to Women

In many ways, the legal culture is a quintessentially male world from which women have been excluded. Professional opportunities are defined by informal social networks, private (formerly all-men's) clubs, and bar associations that order status and power. Each serves as a barrier that reinforces the other. Thus, in circular fashion, the images of the law as “masculine” strengthen men's resistance to including women in informal socializing and bar association activities; their absence from informal networks and professional activities, in turn, supports the view that women do not “fit” in the profession, are not skilled at client development, and lack “commitment” to the practice of law.

Participation in the informal social world of lawyers occurs before or after long hours of legal work and means that a legal career is defined as total commitment to a “workaholic” schedule. Such work-related expectations were created when the prototypic lawyer had a wife taking care of the home and family. Most men regard the expectation of round-the-clock availability as an aspect of the legal culture that simply is one of the inevitable and necessary norms of the profession. While most women lawyers now share these professional norms, for many these work-related expectations generate difficult choices on a daily basis. When women opt not to or cannot create the impression of open-ended availability, their commitment is questioned, particularly that of women with families. Conversely, men with families are assumed to be committed out of financial necessity and are rewarded with higher salaries.

Because the prototype of the lawyer is a man, the characteristics generally associated with masculine dominance are used to explain men’s successes; their failures are explained as “bad luck.” Thus, men’s success is regarded as a function of innate analytic and rhetorical abilities that presumably make them more suitable for practicing law. But women’s success is attributed to luck, chance, or inappropriate use of their sexuality; their failures are explained as inability to “think like a lawyer” (D. Rhode, 1988). Such gender-based schemas affect promotion and salary decisions as well.

Women lawyers encounter a number of gender stereotypes and “second generation” gender bias that affect their careers. In contrast to “first generation” patterns of bias that resulted largely from deliberate intentional exclusion, “second generation” bias involves social practices and patterns of interaction among groups within the workplace that gradually exclude nondominant groups (Sturm, 2001, p. 259). Often, these behaviors rest on subtle cognitive processes including “homophily preferences” (i.e., tendencies for people to prefer to associate with others like themselves) and “status expectations” (i.e., beliefs about the superiority of some people over others in relation to some task; Roth, 2004). Together, these generate barriers for women since the men in the firm prefer to associate with others who are like themselves with whom they can communicate easily and share common interests. They also tend to expect superior performance from men compared with women and from whites compared to persons of color. Because men are valued as having higher status than women, women’s competence is often evaluated more harshly than men’s regardless of their numerical proportions in work groups, even when they exhibit equal performance. These disparities arise even in the absence of the evaluator’s motivation to discriminate; rather, they rest on such stereotypic beliefs as the assumption that women lack aptitude for dealing with complex financial matters, are presumed not to be competent, lack commitment, and tend to overreact to criticism. Women have to work to overcome stereotypes by which they are evaluated by demonstrating superior performance (confirming women’s assertion that they have to work harder to be seen as equally competent).

Bias also may take the form of excluding a woman from key social interactions, mentoring, assignment to “big” cases, or exposure to important clients. Such behaviors individually may appear gender neutral when considered in isolation since they also are experienced by men associates. However, they cumulatively produce a pattern of gender bias when connected to broader exclusionary patterns. For example,

even if a woman is willing to work around the clock, often firms make decisions based on stereotypes and assume that she will not be available or believe that she should not be (Reichman & Sterling, 2002). Opportunities for such a woman are limited if the partner does not give her an assignment based on the assumption that she does not want to travel or because she is pregnant. These assumptions would not be made about an otherwise equally qualified male associate and cumulatively create a pattern of bias.

Scripts prescribe norms of professional interaction such as who can do what, with whom, and under what circumstances. They also reflect the broader cultural beliefs about gender dominance and deference. Men's positions of power and authority as partners and their general status superiority give them the right to control the structure and content of professional conversation. By controlling the professional context, men behave in ways that show that other men are taken seriously and accorded respect. Conversely, the way men talk about women and their appearance treats women as invisible, devalues them, and affects their ability to perform effectively.

For example, when a judge allows the opposing attorney to label a woman attorney's appearance a "distraction," it signals to others that it is acceptable to use a woman's looks as the basis for objecting against other women attorneys. Similarly, a judge may defer to a man attorney who monopolizes argument time or displays an aggressive style, but penalize a woman who displays the same behavior as "shrill" or too aggressive. Yet, if a woman adopts a less combative, more soft-spoken lawyering style, it is assumed to be because she is a woman, and she is regarded as "not tough enough" and treated as less effective. When a man displays a similarly non-combative style, it is viewed as simply a different style and may be regarded as "negotiating skill."

This dilemma was made clear by sociologist Jennifer Pierce (1995) in her study of litigation attorneys. In the adversarial system, where cases have winners and losers, these lawyers' emotional presentation of self is an element of their strategy and a means to dominate and control others. Litigators, who are mostly men, rely on intimidation and "strategic friendliness" to accomplish their professional goal. As Pierce notes, "Rambo litigators" do masculinized emotional labor since intimidation is associated with domination and control, and strategic friendliness is a form of emotional manipulation in competitive gamesmanship. Women litigators must contend with a situation in which the emotional labor associated with their work clearly conflicts with their gender identity and others' expectations. They face a double bind in doing litigation at the same time that they do gender in the courtroom. If they are aggressive and manipulative as zealous advocates, they risk being seen as pushy and unfeminine; if they adopt a less confrontational style, they risk being seen as too nice and ill-suited to the litigator role.

By not fitting the professional image, women lawyers are highly visible and face constant behavioral dilemmas. They must either model their professional behavior after a masculine image and suppress their femininity, or "act like women" and thus exhibit characteristics incongruent with the professional prototype, which leads to being discounted by men colleagues. Women lawyers who act "like men" are resented for being inflexible or too tough; those who act "like women" are, by definition, not

acting in a “professional” (i.e., masculine) manner. Thus, women lawyers have to seek ways to be “demure but tough” (D. Rhode, 1988). Women are presumed not to be competent while their male counterparts receive the presumption of competence. In addition, feminist legal scholars encounter gendered expectations when they produce legal scholarship that gets labeled “feminist propaganda.” Their critics assume that traditional legal canons are value-free, rather than representing a masculine perspective and interests.

Mentors are important teachers, advocates, and career launchers for junior associates. They help polish their mentees by giving them expanding responsibilities, opportunities to prove themselves, and exposure to clients. Many men do not want to mentor a woman because they are uncomfortable interacting with women as peers, are concerned about accusations of sexual intimacy, or do not want to invest time and energy in a woman whom they expect to leave legal work when she starts a family. The few senior women who might become mentors often lack power within the firm and have limited time for mentoring given their work and family obligations. With few mentors available, women have had difficulty learning the norms of informal behavior in the male-dominated community, “fitting in,” and forming client and collegial relationships.

When women do find mentors, they tend to experience the mentoring process differently from men. Men’s mentoring talk is full of ways that they are helped to belong. In contrast, Reichman and Sterling (2002) found that women describe mentoring as making them feel good about themselves, but the sense of friendship and personal bonding characteristic of the mentoring men experience is largely absent and sometimes based on a parent-child model where traditional gender roles spill over and affect the mentoring relationship.

The result of the lack of mentoring is that many female lawyers remain out of the loop of career development. For women who are denied challenging high-visibility assignments, excluded from social events that yield career opportunities, and unaided in efforts to develop marketing skills, the barriers to success often become self-perpetuating. Senior attorneys are reluctant to spend time mentoring women whom they perceive as likely to resign; women who are not aided are, in fact, more likely to leave, which “perpetuates the assumptions that perpetuate the problem,” particularly for women of color (ABA, 2001, p. 6). Thus, what appears to be a choice to leave private practice “may be as much about a push away from work as it is about the pull of family” (Reichman & Sterling, 2002, p. 975).

Lawyers meet, socialize, secure clients and business contacts, plan policy, provide leadership opportunities, and set the rules of their profession through informal gatherings and formal meetings of the ABA and in the 1,700 state and local bar associations in the United States. Through the 1970s, women lawyers were denied memberships in many private clubs and positions of influence within local, state, and national bar associations. These exclusionary practices greatly hampered their legal careers.

Today, women are no longer denied membership in clubs, and some hold leadership roles in bar associations (i.e., in 2005 women comprised about one third of the membership, 27 percent of the ABA Board of Governors, and more than a quarter of its section/division chairs and committee chairs; ABA, 2006), but the

continued importance of informal networks and mechanisms for securing clients and making informal social contacts with powerful bar members puts them at a disadvantage. Men and women very early in legal careers show different networking patterns. Men are more likely than women to have breakfast or lunch with partners where they strengthen informal bonds and foster “affiliating masculinities” (P. Y. Martin, 2001, p. 206), through “sucking up,” doing self-promotion, and giving the partners a chance to get to know them personally and professionally so that they will be remembered when partners assign “big cases.” The men join law firm governance committees; women are more likely than men to be asked to participate in less influential firm committees (e.g., recruitment) that provide service to the firm but do not translate into advancement (*After the JD*, 2004). In this way, their work “disappears” because it is seen as the so-called “softer” side of organizational practice and not as “real work.”

In the courtroom, law office, and informal work-related activities, women lawyers encounter an occupational culture uncomfortable with their presence. Bringing business into the firm is an important criterion for success that generally occurs through participation in informal networks. Women now are permitted to participate in private clubs and bar association activities, but these organizations remain male dominated, and their structures, decision-making logic, and controlling images continue to pose problems for women lawyers. Participation requires that women extend their workday and “socialize” primarily with men who may be uncomfortable with their presence.

Even informal interactions such as making small talk with colleagues pose dilemmas (Epstein, 1993). A woman lawyer who is friendly is suspected of “coming on”; one who is too serious is rejected as unfriendly. Ignoring sexist jokes and comments signals tacit approval; failure to laugh leads to the label “humorless.” Women get touched and interrupted more but cannot make “a thing” about this without being labeled “thin-skinned.” They cannot simply behave “like lawyers”; they must negotiate their interpersonal power and find an acceptable style. Thus, gender serves as a “screen” for professional interactions so that a woman lawyer is evaluated, above all else, as a woman.

Women perceive that they are “at a disadvantage because they are operating in an alien culture” (ABA, 1988, p. 13) but have difficulty in conveying their perceptions convincingly to men. For example, between two thirds and three quarters of women lawyers report experiencing bias, but only a quarter to a third of men state they have observed it, and even fewer report experiencing it (ABA, 2001b). Worse yet, the men often trivialize women’s complaints. Women’s disadvantage becomes cumulative through the organizational logics and opportunity structures in the profession that calls for total career commitment, raising tensions between family and workplace issues. These and women’s coping mechanisms are the focus of Chapter 6.

Summary

Before the 1970s, the number of women in law and their career opportunities were very limited. They were excluded from many law schools and denied job opportunities and

bar association leadership roles. In the past three decades, large numbers of women have entered law and have made remarkable advances in the profession. At the same time, the legal profession has undergone several major changes. These include rapid expansion of the number of lawyers, changes in the nature of practice (e.g., a decline in solo practice and growth in large firms and in salaried work in public sector and corporate organizations), development of new areas of law (e.g., public interest law), and the opening of the profession to white women and to persons of color. Within private practice, changes include increased pressure for billable hours and “rainmaking,” competition that has reduced collegiality within firms, and lower rates of partnership along with increasing firm size, specialization, and bureaucratization. Despite these changes, the law remains stratified by specialty and type of practice and, increasingly, by gender and race-ethnicity.

Men and women follow different legal career paths that increasingly diverge over the course of a career. To a large extent, these different trajectories are the result of the dynamics of gender inequality within the legal world. Women are more likely than men to begin in government employment and public interest work, and their representation in these sectors increases over time as they move out of private practice. Those in private practice are concentrated in less prestigious and remunerative specialties, are less likely to have mentors, and are less likely to become partners than their male counterparts. Nevertheless, it is important to recognize the enormous strides made by women lawyers. They have become partners as well as judges, law school deans, and general counsels for large corporations in increasing numbers despite the remaining obstacles posed by the legal culture.

A number of informal and sometimes invisible barriers posed by the legal culture limit women’s career mobility. The prototype of the lawyer is a man with a continuous career trajectory and total availability day and night. Behavioral scripts and images of the successful recruit or partner are gendered. Referrals of clients and opportunities for leadership rest on opportunities provided by a mentor and participation in social networks and bar association activities. Women are excluded from these networks and often lack mentors. Tracked into lower status specialties, they lack visibility in the “right” specialties and do not appear to “fit in” or demonstrate “commitment” through total dedication to the law and unlimited availability. Thus, women are perceived as less competent, insufficiently committed, and too emotional to succeed in law. Less frequently given the opportunity to move onto the occupational fast track, women face subtle but often self-perpetuating cycles of gender bias that limit their career choices.

Endnotes

1. To help end “Ladies’ Day” at Harvard, women of the class of 1968 on the designated day simultaneously dressed in black, wore glasses, and carried black briefcases. When the professor asked the question whose punch line was “underwear” and which was supposed to embarrass the women, the women opened their brief cases and threw fancy lingerie, instead humiliating the professor (Epstein, 1993).