

Gender Discrimination in the Legal Profession

an Honors Thesis

by

Angela M. (Claypool) Service

Thesis Director


Dr. Fred Meyer

Ball State University

Muncie, Indiana

May, 1990

Expected date of Graduation: May, 1990

SpColl
Thesis
LD
2489
.24
1990
.547

GENDER DISCRIMINATION IN THE LEGAL PROFESSION

In an 1873 Supreme Court opinion, Justice Joseph Bradley wrote:

. . . the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

Bradwell v. State of Illinois, 83 U.S. 442 (1873). The case involved Myra Bradwell's fight to become a practicing attorney in the state of Illinois when state law excluded married women from practicing law. Mrs. Bradwell lost her fight.

In 1990 no laws, state or federal, prohibit women, married or single from entering the legal profession. Today women account for 41% of law students and 16% of practicing attorneys ("Gender" 1209). After decades of virtually no movement, women's enrollment in law schools rose dramatically in the seventies and eighties, from 13,000 to 62,000, and proportionately from 4% in 1963 to 8% by 1970 and 33% by 1980 (Epstein 5).

The influx of women into the legal profession and other professional careers during this period reflected the demographic trend of the time (Rhode 1171). "Traditional assumptions about full-time homemaking were growing out of step with family patterns," writes Professor of Law and Director of the Institute for Research on Women

and Gender, Deborah L. Rhode (1176). According to Rhode, at the turn of the century life expectancy for a woman was 48 years and the average woman could only anticipate living 10 to 15 years after her last child left home (1176). By the 1960's life expectancy had increased to 73 years and with the decline in birth rates due to oral contraceptives, the average mother could spend as much as two-thirds of her adult years with no children under age 18 (Rhode 1176). Another factor in women's increasing employment aspirations was the lack of marital stability; women could no longer build their entire lives around their marriages (Rhode 1176). It became necessary for many women to become self-supporting, and in an era when the Equal Rights Amendment and a social revolution were at the forefront, the legal profession became the obvious choice for many women seeking professional careers.

However, the dramatic number of women entering the legal profession has not necessarily made their situation better. Author Carrie Menkel-Meadow writes in "The Comparative Sociology of Women Lawyers: The 'Feminization' of the Legal Profession":

Since the 1970s women have entered the legal profession in dramatic numbers, but the entrance of women into the profession has come at a time when the profession in general has been growing. Women for the most part entered the profession without displacing men and therefore without disturbing the male dominated power structure (901).

In fact, even in 1988 women still only represent approximately 8% of the partners in major firms (Repa 75). Women are moving into the profession in greater numbers but are not attaining the positions of greatest power, prestige and economic reward (Rhode 1163). The median income of women 10 years out of law school is 40% lower than men, and

women are less likely to be partner, married, or have children (Wald 75). "Overall," states Judge Patricia Wald of the United States Court of Appeals for the District of Columbia, ". . . female attorneys in the mid 1980s were less than half as likely as male attorneys to be partners in a firm, earned approximately 40% less than men, and were disproportionately represented in low prestige specialties" (Wald 75).

Women attorneys are also disproportionately represented among the unemployed, part-time employed and underemployed (Menkel-Meadow, "Comparative" 901). While private and corporate practices are more lucrative in this country, women outnumber men in federal and state government positions. Twenty-one percent of women attorneys work in government positions compared to twelve percent of men (Menkel-Meadow, "Comparative" 909).

One should also note that these problems are even greater for black women who face double discrimination. Northwestern University Law Professor Joyce Hughes contends that, "The profession is dominated by white males, so white females represent at least their mothers or their wives or their daughters. We [black women] don't have that kind of leverage to get even that authority" (Burleigh 65).

In general women in the legal profession are also more dissatisfied with their careers overall than men. A 1989 survey on job dissatisfaction in the profession reported in Barrister found the following (Hirsch 23-24):

Table 1

	JOB SATISFACTION			
	Private Practice		Corporate Counsel	
	<u>Males</u>	<u>Females</u>	<u>Males</u>	<u>Females</u>
Satisfied or neutral	86%	71%	86%	84%
Dissatisfied	14	29	14	69

Table 2**JOB SATISFACTION: PRIVATE FIRMS**

	Male		Female	
	<u>Sat.</u>	<u>Dis.</u>	<u>Sat.</u>	<u>Dis.</u>
Partner	88%	9%	84%	15%
Senior Associate	84	13	74	25
Junior Associate	77	19	57	40
Solo	77	18	75	21
All	83	13	69	29

The researchers concluded that, "We find that women experience less of the positive and more of the negative work environmental factors. The result is greater dissatisfaction," (Hirsch 25).

In general, most of the overt and severe discrimination women lawyers faced in the work environment in the past is gone. For women who pioneered the field such as Myra Bradwell, the treatment women receive might even seem tame. The responses women get today vary from firm to firm, client to client, ranging from reception to rejection but all with a high component of ambiguity (Epstein 21). The fact is that, however subtle the difference, there is a difference in the treatment of men and women within the profession. Discrimination still exists. A recent American Bar Association study on women in the profession concluded that: 1) Women in the profession still must face both overt and subtle bias; 2) there is a lack of upward mobility for women in the profession; and 3) there should not be "a sense of complacency that the sheer numbers of women entering the profession will eliminate barriers to their advancement," (Kaye 119).

The discrimination women face in the legal profession begins in law school and is follows them throughout their careers as they are

stereotyped by colleagues and clients, as they are forced to walk a tightrope between family and career and as they are consistently denied the upward mobility available to male attorneys.

I. Law School

Women get their first tastes of the gender bias in the profession in law school. It was not even until 1972 that all accredited law schools admitted women (Rhode 1173). And many female students feel that women are still treated as second class citizens in the classroom (Moss 51).

Although the most obvious form of discrimination is sexual harassment, law school professors have many subtle ways of preventing women from participating including sexist or sexual jokes in class, not calling on women, using all male pronouns in classroom hypotheticals and using fact patterns that focus on predominately male experiences such as football and auto racing (Czapanskiy 138). Male students can also prevent women from participating by making sexually oriented comments, belittling their opinions, and preventing women from joining them in study sessions.

Women are almost twice as likely never to volunteer in class (Moss 52). Part of the problem is that women in law school are in a system created by men for men and predominately run by men. Women are forced to accommodate to the system rather than the system accommodating to women.

Many women have difficulties with the Socratic method in which most law school classrooms are conducted. One Harvard student queried, "Why teach only in a combative way when the actual work of lawyering involves cooperation, negotiation, settlement and management?" (Wald 75). Women are at a disadvantage in this system because in general they speak with more hesitancy than men. Where a man would state "It's cold in here," a woman would be more likely to say "It's cold in here, isn't it?" (Moss

52). A woman would also be more likely to begin a statement with an apology such as "Maybe I'm wrong, but . . .," (Moss 54). Bernice Sandler, director of the Project on the Status and Education of Women for the Association of America Colleges concludes that, "'In law school, the forceful way of talking is the valued way of speech, so those speaking more hesitantly are more likely to be viewed as less intelligent, less sure of themselves,'" (Moss 54).

Law schools also reflect the gender bias of the legal profession in their treatment of women professors. Women law school professors face exactly the same kinds of discrimination that women attorneys face, i.e. low pay, underrepresentation, and the lack of upward mobility. Women professors must fight to become tenured as women attorneys fight to become partners. In a 1988 study Debra Cassens Moss found the following numbers of women in tenured positions in the country's top law schools (53):

<u>School</u>	women/positions
U.C. Berkely	3/44
U.C.L.A	5/36
U. of Chicago	0/22
Columbia U.	5/42
Cornell	1/27
Duke	4/31
Georgetown	6/46
George Washington U.	3/35
Harvard	5/56
U. of Illinois	1/19
U. of Michigan	1/39
U. of Minnesota	1/39
New York U.	7/53
Northwestern	4/38
U. of Pennsylvania	1/22
U.S.C	2/26
Stanford	2/36
U. of Texas	5/49
Vanderbilt	2/23
U. of Virginia	2/42
U. of Wisconsin	3/42
Yale	2/34

As late as 1987 women students have reported going through their law school career without having one woman professor (Wald 75).

Women professors also report that scholarship in areas of concern primarily for women is undervalued by other faculty members (Moss 52). Gender discrimination and sexual harassment are not considered serious subjects in most law schools although the subject material could prove vital for many female students.

The treatment women law students receive by male professors, the treatment they see women professors receive, the lack of female role models/authority figures to provide guidance, and the lack of credibility given to legal issues of importance to women, just foreshadow of the treatment they will receive when they enter the profession.

II. Stereotype

The first barrier women must face in the profession is being stereotyped. Even in 1990 women are perceived by many to be the weaker sex. They are characterized as being less assertive, more emotional and less competent than their male counterparts. This is not just a problem women have with colleagues, but also with clients. The stereotype of an attorney is the competent, aggressive male, and it is very difficult for many women to fit that mold.

Deborah Rhode contends that women face a "double bind":

. . . gender stereotypes remain remarkably resilient. Females aspiring to non traditional or high status positions remain subject to a familiar double bind. Those conforming to traditional characteristics of femininity are often though lacking the requisite assertiveness and initiative, yet those conforming to a masculine model of success may be ostracized in work settings as bitchy, aggressive and non-cooperative.

Women continually must prove themselves to colleagues, judges and clients. Lynn Hecht Schafran, Director of National Education Program to Promote Equality for Women and Men in the Courts, has found this to be especially true in litigation:

Because the status set 'litigator male' still is operative, it is assumed that every male attorney will be able to do his job. The surprise comes when he proves ineffective. With a female litigator, the assumptions are reversed. The surprise comes when it is realized how competent she is (38).

III. Motherhood v. Career

The most formidable obstacle to women's advancement in law firms is having children (Wald 78). If women want to have children, they usually have to bear them, and, in our culture, they most likely will be the primary caregiver for those children (Wald 78).

Having children takes a serious toll on a woman attorney's career. It takes about seven years to become a partner which requires a primary commitment to one's career, and thousands of billable hours, during the best years of fertility (Menkle-Meadow, "Comparative" 905). Taking time out or working flexible work schedules put women on the "Mommy Track," that will at least delay, and possibly forego, the hope of making partner (Brown, 89). Flex time, part-time and job sharing schedules are not even an option in many firms, and in most firms a woman must be well in the door before they are an option she could choose (Kaye 122).

Most managing partners of firms are vary wary of flexible work schedules. After all, most managing partners and others within the decision making structure of firms are men. They never had an option of a flexible work schedule and feel that woman who fit in should "tow the

line" as well.

In a way flexible work schedules (the "Mommy Track"), however detrimental they may be to a woman's career, discriminate against men because it is more acceptable for a woman to opt to work part-time to be a "mommy" than for a man to have a flexible work schedule to stay home with the children. Law firm work schedules were established by men who dominated the "public" commercial spheres of life and who had wives at home to dominate the more "private" domestic spheres. And in 1990, although those very spheres have become interconnected and intermingled for men and women, work schedules and the expected commitment to work in law firms are based on those principles. It does not make sense that flexible work schedules are considered a "woman's issue" and have become entangled in gender discrimination battles when they could benefit all employees (Menkle-Meadow, "Exploring" 296).

All working mothers face problems in dealing with a career and a family, but they become more dramatic in this intensely competitive profession that is so highly demanding of commitment and time (Epstein, 7). Sixty hour work weeks, travel and high levels of stress are not unusual for many attorneys.

Women face an additional burden and additional discrimination at home. In our society even though women have entered the workforce with men, men have not entered the arena of household drudgery. Most women still perform about seventy percent of the household tasks in an average home (Rhode 1183). Employed wives spend twice as much time on domestic activities as husbands, and, when paid labor and domestic labor are combined, employed females average two hours of more work per day than employed males (Rhode 1183).

Although they may do less around the house, men, too, find it difficult to find a balance and to separate the spheres of work and family life. However, men tend to let their work intrude on family life while women tend to permit (or feel forced to permit) family life to intrude on work (Chambers 253). The reality in our culture is that women bear the vast majority of family obligations, and women lawyers do so in an occupational environment designed by and for men. The result is that most women attorneys with children must choose between compromising their caretaking values to dedicate more time to their career or compromising their career goals to dedicate more time to their children (Rhode 1185).

Many women in the sixties and early seventies sacrificed having children to have a career and to fit in with their male colleagues. They chose the life of a workaholic to find that, yes, they could find a job, but that it was something else to become a "real insider", a real part of the decision making structure (Kaye 120). Many have succumbed to the killing pressure of "trying to be a first rate lawyer, first rate wife and the best mother on the block," (Wald 78) and have either dropped out of the profession entirely or sought legal work traditionally deemed appropriate for women [i.e. specializing in jobs offering more predictable work schedules and less travel] (Kaye 120). It leaves women attorneys in the nineties searching for some kind of balance--maybe the only solution is for men to shoulder more of the domestic burden.

IV. Lack of Upward Mobility

As previously noted the issue of motherhood is the biggest impediment to women in their climb up the partnership ladder, but there are other obstacles for women due to gender bias.

One significant problem women face is a lack of role models. Part of the secret to success for many young attorneys in larger firms is having a mentor or someone with influence to help guide their careers. Although the percentage of women law students has grown rapidly in recent years, the number of women lawyers practicing for more than a decade is relatively few (Czapanskiy 14). Older attorneys looking to take someone under their wings will be more likely to pick someone like themselves, and, since older lawyers are mostly men, their proteges are also usually men (Blodgett 57).

Women also suffer substantial disadvantages in "rainmaking," bringing in new, big-money clients, which is crucial for success in many firms (Wald 77). One reason women tend to have fewer business contacts in upper corporate echelons is because there are few women in those ranks to channel business to them (Wald 77). Also women are usually excluded from "private" social and athletic clubs in which many male attorneys make client contacts and "network." In essence, women are more likely to win over clients by their professional reputations than by their golf games (Repa 70). Rainmaking is especially difficult for women with families who cannot spare the "after hours" time to wine and dine prospective clients.

Women face what has been termed a "Glass Ceiling" (Kaye 120). They can see the top, the partnerships, the financial rewards, etc., but there is an invisible barrier that prevents them from reaching it.

V. LEGAL RESPONSE

Obviously there are many forms of discrimination that remain in the legal profession, and it has become increasingly apparent that conventional legal strategies are not broad enough to prevent them.

Equal employment legislation and current case law seem to be effective at getting more women into the profession, but even Supreme Court Justice Sandra Day O'Connor admits, ". . . the Equal Protection Clause of the 14th Amendment has proved a formidable weapon against statutes that discriminate on the basis of gender. But, as we have seen, women's equality under the law does not effortlessly translate into equal participation in the legal profession" (9).

The standard approaches used in fighting overt gender discrimination, and discrimination in general, have been the Equal Protection Clause of the 14th Amendment, Title VII of the Civil Rights Act of 1964, and E.E.O.C. and affirmative action guidelines. They have barred intentionally discriminatory practices especially in the areas of hiring and compensating employees. However, it is very difficult to determine how successful this conventional equal opportunity framework has been. The increase of women in the profession could have been due to governmental intervention, but it could have been due to the growth of the profession in general over the last two decades and/or the changes in societal attitudes toward women (Rhode 1193). Most likely it is a combination of the three, but there is no concrete evidence to show to what extent conventional legal methods have actually helped.

The fact remains that: 1) there is a tremendous wage gap that persists despite the law (Abella 187) and women in 1990 are still only making approximately 66¢ to every dollar made by a man (Brown 85); 2) women are disproportionately represented at the bottom of the professional hierarchy (Menkle-Meadow, "Comparative" 902); and 3) as more women cluster into those available positions it creates an oversupply which in turn contributes to an even lower pay rate (Olsheveski 239).

Catherine McKinnon, author of Feminist Discourse, Moral Values, and the Law: A Conversation, argues that the problem with the traditional, conventional equal protection doctrines are that they are designed by men who determine what the standards for women should be ("Gender" 1217). MacKinnon concludes that women will always come out losers as long as it is men who set the standards and determine what is equal ("Gender" 1217). One must take into account that, in this country, it is predominately men who make the laws, enforce the laws and determine if those laws and their enforcement are constitutional.

Equal treatment for women is not just about being employed and paid well, it is also about being accepted and being a true part of the profession, and many times women are prevented from becoming fully integrated by the structure of the profession and cultural attitudes about men and women (Epstein, 265). The traditional legal strategies have been used successfully to fight overt and intentional discrimination, but they have not confronted the deeper institutional and ideological forces that contribute to gender disadvantage (Abella 186).

Although there is a definite need for new legal approaches and new ideas to battle the subtle, deep-seated discrimination, the law will always be limited. Cynthia Fuchs Epstein, professor of Sociology and author of Women in Law, contends that it is not possible for all gender barriers to be removed by legal methods:

There are barriers that are not to be remedied by legal action, but rather by informal means. They come from prejudices and stereotypes lodged in habits of thought, unstated agendas, informal verbal and non-verbal communication, and from the nature of the practice of law in this country: confrontational and combative. The barriers come from the culture of the society as a whole and the culture of the profession in particular, both of which create images of who the lawyer ought to

be--and that is male; of what the work of law ought to be--and that is largely business; of how the work ought to be carried out--and that is with primary allegiance to work; and of where it ought to be carried out--and that is in a social environment associated with male preferences and habits, often club settings actually or symbolically restricted to men.

Of utmost importance to women's ultimate equality within the legal profession is the extent to which the patterns of social structure that cement the brotherhood of men and at the same time enforce the outsider role of women (266).

Women in law are bound by the restraints of the profession and by our society, and they cannot break free. In 1990 it is ultimately attorneys (as most legislators are lawyers) who make the laws and set the policy agenda for this country, yet women attorneys cannot break through the "glass ceilings" into the upper echelons of power and prestige to gain the power needed to change those laws and that agenda.

In Women and Law, Cynthia Fuchs Epstein also writes:

The dimensions of discrimination, its tonality, the consequences it has had for the patterning of women's experience in law, and the way it has changed and is changing are complex. Some practices have endured long after the formal rules that supported them. Today no law or Supreme Court ruling specifies that women are not full citizens or 'persons.' No rules prohibit married women from practice. Yet sexist prejudice remains as does the necessity for affirmative guarantees of women's rights to opportunities open to men (81).

Men have created legal strategies that exist now to fight gender discrimination. New strategies are needed so that women do have the same opportunities that are open to men, and who better to find them than the women who have been discriminated against. Perhaps the biggest bias against women in the legal profession, and all women in general, is that the culture and the profession do not allow women attorneys to

rise high enough to contribute to the legal strategies of fighting gender bias.

Conclusion

Women have made great strides in the legal profession within the last thirty years. In 1990 it would be unacceptable for a Supreme Court Justice to write in an opinion that women belong in domestic spheres and not in the legal profession, and at least today there would be a woman of his rank to challenge him. However, women cannot become complacent about how far they have come within this profession and hope that time will solve these problems. After all, it did take well over a hundred years after the Bradwell decision to get just one woman in the Supreme Court.

WORKS CITED

- Abella, Rosalie Silberman. "Employment Equity." Manitoba Law Journal 16 (Spring 1987): 185-201.
- Blodgett, Nancy. "Whatever Happened to the Class of 1981?" ABA Journal (June 1, 1988): 56-60.
- Brown, Scott, Melissa Ludtke and Martha Smilgis. "Onward Women!" Time 34 (June 1, 1988): 80-89.
- Burleigh, Nina. "Black Women Lawyers, Coping with Dual Discrimination." ABA Journal (June 1, 1988): 64-68.
- Chamber, David L. "Accomodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family." Law and Social Inquiry: Journal of the American Bar Foundation 14 (Spring 1989): 251-287.
- Czapanskiy, Karen B. and Jana B. Singer. "Women in Law School: It's Time for More Change." Law and Inequality 7 (November 1988): pp. 135-146.
- Epstein, Cynthia Fuchs. Women in Law. New York: Anchor, 1983.
- "Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduate." Stanford Law Review 40 (May 1988): 1209-1290.
- Gilligan, Carol. In a Different Voice. Cambridge, Massachusetts: Havard University Press, 1982.
- Hirsch, Ronald Leslie. "Will Women Leave the Law." Barrister 16 (Spring 1989): 22-25.
- Kaye, Judith. "Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality." Fordham Law Review 57 (October 1988): 111-126.
- Menkel-Meadow, Carrie. "Exploring a Research Agenda of the Legal Profession: Theories of Gender and Social Change." Law and Social

Inquiry: Journal of the American Bar Foundation 14 (Spring 1989):
289-319.

----- . "The Comparative Sociology of Women Lawyers: The 'Feminization'
of the Legal Profession." Osgood Hall Law Journal 24 (Winter 1986):
897-918.

Moss, Debra Cassens. "Would This Happen to a Man?" ABA Journal
(June 1, 1988): 50-56.

O'Connor, Sandra Day. "Introduction: Achievements of Women in the Legal
Profession." New York State Bar Journal 57 (October 1985): 8-10.

Olsheveski, V. "Understanding Pay Equity." Manitoba Law Journal 16
(Spring 1987): 237-244.

Repa, Barbara Kate. "Is There Life After Partnership?" ABA Journal
(June 1, 1988): 70-75.

Rhode, Deborah L. "Perspectives on Professional Women." Stanford Law
Review 40 (May 1988): 1163-1207.

Schafran, Lynn Hecht. "Women as Litigators." Trial 24 (November 1988):
75-80.