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FEMINISM, STALLED: THOUGHTS ON THE LEAKY PIPELINE

Judge Nancy Gertner (Ret.)

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In my last year on the bench, I had two extraordinary women law clerks. They were smart, interesting, and dogged individualists, to boot. One had been a student in my sentencing class at Yale Law School, where I taught for ten years while I was a district court judge. After graduation and before clerking for me, she went to Liberia to write a manual for sexual assault cases and help set up specialized gender violence courts. The conditions were challenging, not to mention extremely dangerous, and made even more difficult when she found out that she was pregnant with her first child. The second woman was a Stanford Law School graduate who was committed to working on fair housing issues as she had before and during law school, no matter how many more lucrative and high status jobs she could have gotten given her stellar academic record.

One day, while the three of us were en route to my courtroom, I noticed that they were dressed the same—black suits, black skirts, plain stockings, white shirts, pumps, little jewelry. To me, they looked like undertakers—while I, the judge, over thirty years older, was resplendent in red, my favorite color. I asked why and they sent me to a website to which women law students across the country were directed.¹ The website described the importance of ““sticking to a dress code” and the “appropriate attire for women” in extraordinary detail down to the design and heel for the shoes.² (Indeed, later at a talk at another law school, one woman described wearing a floral blouse to a moot court argument along with her black skirt, black jacket and black pumps. Her advisor insisted she go back and change into a plain white blouse).

Now, I am hardly a fashionista; indeed, quite the contrary. My wardrobe ranges from fire engine red, to shades of purple, to coral, etc. Because of my color preference, I have perfected the art of shopping in a minute and a half: walk into a store and pick out the red or reddish clothes. They are easy to see immediately, and I am done in a half a minute.

*1474 While I understand that men and woman have to assume a different identity in the work world, there was something uniquely disquieting about this particular fashion directive. To the men, the dress code was perhaps a more buttoned-down version of their usual business attire. To the women, it was a more dramatic change. In effect, the distance women had to go to conform was farther than men; they seemed to have to work harder to fit themselves into this less-than-comfortable setting. To be sure, I don't want to take this theme too far. It was appropriately a metaphor for problems I have seen from my graduation from law school in the 1970s to the present time.

The past three decades have provided a natural experiment through which we can evaluate women's progress in the law. For this talk, I have looked generally to the large- to medium-size law firms to track the patterns of women's employment. I do so not because I believe that law firms provide the best opportunities for practice; indeed, just the opposite. I worry that law students are too often directed away from more meaningful, if less lucrative, opportunities. Rather, I choose law firm practice because it is often from where the leadership of the bar comes or judges are recruited.

Twenty years ago, women began graduating from law school in equal numbers to men.³ Law firms began to hire equal numbers of men and women associates.⁴ The playing field for women was apparently level at law school admissions, then at graduation,

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and even in the entry-level classes at law firms. When did it begin to tilt? What happens to women after they make it into the law firms' doors?

The statistics are familiar and troubling. Chief Justice Judith Kaye has written poignantly about it—50% of law school classes are female and have been for nearly twenty years, the entry-level class for the firms was close to half female, and yet, “women accounted for 16% of equity partners, 26% of nonequity partners, and 30% of ‘of counsel’ lawyers.”⁵ While the number of female partners climbed during the late 1980s and early 1990s, the male-to-female ratios leveled off and “have remained relatively stagnant since 1992, hovering at just over 15% for equity partners for the last fifteen years.”⁶ In effect, the pipeline of qualified women lawyers has been spewing forth for decades, and yet, as then Harvard Law School Dean Elena Kagan noted, *1475 “Women lawyers are not assuming leadership roles in proportion to their numbers.”⁷

These findings have mirrored those of Catalyst, studying law school graduates from Harvard, Columbia, Berkley, Michigan, and Yale.⁸ While the number of women in law schools has often outpaced that of men, the report makes a chilling comment: Conventional wisdom has held that it is just a matter of time for women to advance to the senior-most ranks of the legal profession. This familiar rationale loses its luster when applied to a profession that has had a critical mass of women in the pipeline for an extended period.⁹

We—members of my generation—thought that numbers mattered. Numbers of women in the workforce would keep employers from saying, as they had said to me and my peers, “I would love to hire or promote women, but there are simply no qualified women for the job.”

Why has progress stalled? There are the usual popular myths like the one found in a New York Times Magazine article in 2003.¹⁰ The banner headline was: Q: Why Don't More Women Get to the Top? A: They Choose Not To.¹¹ They chose not to? To some of the women interviewed by Lisa Belkin, the author of the article, the woman's movement had only been about choice—the choice to be a mother or a worker.¹² They were where they were simply because they chose the former—to stay home with their children.¹³

At first glance, it sounded wonderful—to be with one's children, to live a more human life. But when you read further, it was more complicated. The women interviewed talked about social expectations, even social pressures channeling them in one direction. Motherhood, after all, was the identity upon which they could always fall back.¹⁴ One woman noted, “Maybe they have higher standards for job satisfaction because there is always the option of being their child's primary caregiver. When a man gets that dissatisfied with his job, he has to stick it out.”¹⁵

*1476 And apart from social pressures or expectations driving them towards home, the workplace they were leaving was less than comfortable. They left because they did not feel welcome. One woman conceded that “seeking clout in a male world does not correlate with child well-being.”¹⁶ It was not that women are not competitive, the women interviewed assured the New York Times.¹⁷ It was just that they did not want to compete along lines that are not compatible with their other goals.¹⁸ In short, they left because the workplace had not changed materially over the past three decades, even with the new numbers of women, and neither had the family. So it was more than the idyllic pull of motherhood on the one hand; it was the push of real obstacles in the workplace on the other.¹⁹

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The women's movement that I participated in was about far more than "choice." It was about transformation—changing the lines between public and private spheres, and releasing the potential for change in each. It was about revolutionizing the workplace, with support services for families and altered expectations for both men and women. And it was about transforming the family, so that the traditional roles would more easily be shared.²⁰

There are four problems: first, the "maternal wall;" second, gender discrimination more broadly—difficult to prove, often opaque, even implicit; third, women's declining expectations; and fourth, the patent inadequacy of the discrimination laws to deal with these issues.

Joan C. Williams, the founder of the Center for Work/Life Law at the University of California Hastings College of Law, describes the extent to which discrimination against mothers, the "maternal wall bias," is "the strongest and most open form of gender bias."²¹ She chronicles the onset of negative assumptions about a woman's career aspirations once a woman *1477 becomes pregnant or seeks maternity leave.²² Moreover, with the workplace organized for the paradigmatic male employee, either single or with a wife caring for the children—the 24/7 clock, work expectations on weekends, evenings, holidays—it is no wonder that women with the lion's share of family responsibilities feel driven out.²³

Women's progress at the major law firms mirror this pattern. While many have written about the high attrition rates for both men for women from the large firms, the phenomenon is different for each.²⁴ Men and women leave the firms for different reasons, and end up in different places. More women leave because of the lack of a family friendly environment; and many (although not all, particularly in these economic times) go home.²⁵ In the Catalyst study, 34% of women graduates had worked part time; only 9% of the men had.²⁶ Greater flexibility is among the top five reasons why women law graduates leave the firm; but it did not make the top five list for men.²⁷ Half of the women wanted to have the option of a reduced work schedule; men do not consider the option.²⁸ And everyone—men and women alike—agree that opting for flexible arrangements affects their advancement.²⁹

Second, in the twenty-first century, gender discrimination is more and more difficult to prove. Discrimination continues to masquerade in the form of ostensibly neutral requirements (e.g., "You have to be on call 24/7 for our Asian clients.") that have a disproportionate impact on women because of women's disproportionate family responsibilities.³⁰ It is often subtle? what one law student described as the "opacity" of discrimination. When I was turned down for a position in the 1970s and the employer told me that he did not think women could hack it as lawyers, I was angry but my anger was other directed. I was furious at the employer. When women today are turned down—for not meeting the "neutral" criteria for the job, for some pretextual reason, etc., they walk away assuming they have failed.

This leads me to the third factor: women's diminishing expectations. When Working Mother Magazine touted the fifty best firms for women, I noted that several Boston firms were on the list—with women equity partners as low as 10%. I co-wrote (with Pamela Berman) an op-ed entitled, The *1478 Revolution of Declining Expectations.³¹ Sheryl Sandberg of Facebook had a different name for the phenomenon—women "leave before [they] leave."³² Women plan for their professional exit years in advance. They do not pursue the most difficult specialties or challenging jobs because someday they will want to have a better work/life balance. Perhaps, they do not even try for that equity partnership, knowing that it will wreak havoc with her child-rearing responsibilities. The moment a woman starts thinking about having a child, she does not raise her hand anymore at work—no promotions, no new projects, no taking a seat at the table.³³ If women lawyers do "lean[] back," and leave the firms long before they qualify for partnership consideration, the pool of qualified women will surely diminish, making it harder and harder to prove discrimination, and letting the firms more and more off the hook in their promotion decisions.

Finally, discrimination law could not be more inadequate to the task of addressing these issues. I recently published an article I have called Losers' Rules.³⁴ I describe how hostile the federal courts were to discrimination cases³⁵:

Although the judges may have thought they were entirely unbiased, the outcomes of those cases told a different story. The law judges felt “compelled” to apply had become increasingly problematic. Changes in substantive discrimination law since the passage of the Civil Rights Act of 1964 were tantamount to a virtual repeal. This was so not because of Congress; it was because of judges.³⁶

Just as more and more studies are done about implicit race and gender bias, federal discrimination law “lurches in the opposite direction,” ignoring, or worse, trivializing, evidence of explicit bias.³⁷ And I noted, in decision after decision:

[J]udges search for explicitly discriminatory policies and rogue actors; failing to find them, they dismiss the cases. It is as if the bench is saying: “Discrimination is over. The market is bias-free. The law's task is to find the aberrant individual who just did not get the memo.” The complex phenomenon that is discrimination can be *1479 reduced to a simple paradigm of the errant discriminator or the explicitly biased policy, a paradigm that rarely matches the reality of twenty-first-century life.³⁸

Part of the reason was the phenomenon I described as “Losers' Rules.” When the defendant successfully moves for summary judgment in a civil rights case, the case is over.³⁹ The judge has to write a decision justifying his conclusion, but when the plaintiff wins, summary judgment is denied and the case simply moves on to trial.⁴⁰ Typically, the judge writes nothing—just “denied” on the margins of the motion.⁴¹ The result of this “asymmetric decisionmaking” is the evolution of a one-sided body of law, with ever more cogent and compelling accounts of why the plaintiffs have lost.⁴² “But the problem is more than just the creation of one-sided precedent”: the lens through which the judges view these cases fundamentally changes.⁴³ As I noted: “If case after case recites the facts that do not amount to discrimination, it is no surprise that the decisionmakers have a hard time envisioning the facts that may well comprise discrimination. Worse, they may come to believe that most [of these] claims are trivial.”⁴⁴

Litigation of discrimination cases at the highest levels is fraught with danger, likely to be costly, and given this law, unsuccessful. Until the discrimination laws are amended, until the Losers' Rules are overturned, the courts are not the place to find the remedy for these problems.

What to do? The response to discrimination has to be a collective one, not an individual response. Women's failure to achieve the success their numbers would have predicted is not because of inadequate mentoring or insufficient networking. We have to critique the structural impediments to women's progress—the very organization of the legal workplace, the policies that enforce the “maternal wall,” the inadequacies and costs of daycare, and the government and private employment policies that reinforce traditional stereotypes about mothers and workers.⁴⁵

In short: once again, we have to organize.

Footnotes

¹ See BECKY MANGOLD, THE DRESS CODE HANDBOOK (2008), <https://www.law.harvard.edu/current/careers/ocs/jd/secure/interviews/dressing-for-the-interview/index.html>. Another site to which I had been directed not only suggests clothing, but also links

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to stores where the clothing can be purchased. See CORPORETTE, <http://corporette.com> (last visited Feb. 13, 2013). It describes itself as “fashion, lifestyle, and career advice for overachieving chicks.” Id.

2 See MANGOLD, *supra* note 1.

3 Judith S. Kaye & Anne C. Reddy, [The Progress of Women Lawyers at Big Firms: Steadied or Simply Studied?](#), 76 *FORDHAM L. REV.* 1941, 1944 & n.6 (2008).

4 Id.

5 Id. at 1941, 1944-46 (citing NAT'L ASS'N OF WOMEN LAWYERS, NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 4 (2007), available at <http://nawl.timberlakepublishing.com/files/FINAL%survey%Creport%11-14-07%for%website.pdf>).

6 Id. at 1946.

7 See Honorable Ruth Bader Ginsburg, Women's Progress at the Bar and on the Bench, *FED. LAW.*, Nov./Dec. 2007, at 50, 51 (emphasis omitted) (quoting Elena Kagan, Leslie H. Arps Memorial Lecture: Women and the Legal Profession?A Status Report, 61 *RECORD* 37, 40 (2006)).

8 See CATALYST, WOMEN IN LAW: MAKING THE CASE 1, 3 (2001), available at <http://womenlaw.stanford.edu/pdf/law.inside.fixed.pdf>.

9 Id. at 2.

10 Lisa Belkin, The Opt-Out Revolution, *N.Y. TIMES MAG.*, Oct. 26, 2003, at 42.

11 *N.Y. TIMES MAG.*, Oct. 26, 2003.

12 Belkin, *supra* note 10, at 44-45.

13 Id. at 42, 44-45, 47.

14 Id. at 85-86.

15 Id. at 86.

16 Id. at 47.

17 See *id.* at 45-47.

18 Id. at 47.

19 See JOAN C. WILLIAMS, JESSICA MANVELL & STEPHANIE BORNSTEIN, “OPT OUT” OR PUSHED OUT?: HOW THE PRESS COVERS WORK/FAMILY CONFLICT 6-8, 29-31 (2006), available at www.worklifelaw.org/pubs/OptOutPushedOut.pdf.

20 Sadly, about ten years after The Opt Out Revolution, Anne-Marie Slaughter sounded a similar theme. See Anne-Marie Slaughter, Why Women Still Can't Have It All, *ATLANTIC*, July/Aug. 2012, at 85, 86-89. Hardly someone ““opting out of anything,” Slaughter describes the problem of equality not as a function of “personal determination,” but rather a structural one, that has to be addressed be reformation of schools, day care, leave policies, through government and private industry. Id. at 89-90, 96.

21 Joan C. Williams, Distinguished Professor of Law, UC Hastings Foundation Chair and Director of the Center for WorkLife Law, U. CAL. HASTINGS C.L., [http:// www.uchastings.edu/academics/faculty/facultybios/williams/index.php](http://www.uchastings.edu/academics/faculty/facultybios/williams/index.php) (last visited Feb. 20, 2013); Joan C. Williams, [Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism](#), 63 *HASTINGS L.J.* 1267, 1269 (2012) (citing Shelley J. Correll, Stephen Benard & In Paik); Getting a Job: Is There a Motherhood Penalty?, 112 *AM.*

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J. SOC. 1297, 1297 (2007); and Faye J. Crosby, Joan C. Williams & Monica Biernat, *The Maternal Wall*, 60 J. SOC. ISSUES 675, 677 (2004).

22 Joan C. Williams & Stephanie Bornstein, *The Evolution of “FReD”: Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1326-30 (2008).

23 *Id.* at 1322-24.

24 See, e.g., CATALYST, *supra* note 8, at 4.

25 See *id.* at 10.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 Williams & Bornstein, *supra* note 22, at 1344.

31 **Nancy Gertner**, *The Revolution of Falling Expectations*, MASS. LAW. WKLY. (Sept. 17, 2007, 1:00 AM), <http://masslawyersweekly.com/2007/09/17/the-revolution-of-falling-expectations/>.

32 Sheryl Sandberg, *Ted: Sheryl Sandberg: Why We Have Too Few Women Leaders*, TED (Dec. 2010), http://www.ted.com/talks/sheryl_sandberg_why_we_have_too_few_women_leaders.html.

33 *Id.*

34 **Nancy Gertner**, *Losers' Rules*, 122 YALE L.J. ONLINE 109 (2012), <http://yalelawjournal.org/2012/10/16/gertner.html>.

35 See generally *id.*

36 *Id.* at 109 (emphasis in original) (footnote omitted).

37 *Id.* at 110.

38 *Id.* at 111-12 (footnotes omitted).

39 *Id.*

40 *Id.*

41 *Id.*

42 *Id.* at 113-14.

43 *Id.* at 115.

44 *Id.*

45 See *supra* text accompanying notes 19-23.

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