

JUSTICE, TECHNOLOGY AND THE *STRUGGLE* FOR HOPE*

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Introduction

The existence of the bitsphere enables an unprecedented acceleration of the deconstruction of traditional work patterns. When people no longer work together in the same place - the shop floor, the typing pool, the warehouse or the factory - opportunities for social interactions, for social learning and community building disappear, just as the implicit learning opportunities in the classroom can vanish when the cohesion of learning in a group is eclipsed by the device-assisted, individually-paced acquisition of knowledge. *But where, if not in school and workplace, is society built and changed?*¹

In *The Real World of Technology*, Ursula Franklin confronted the challenge of technology for the twenty-first century. For Franklin, the idea of *technology as practice*, a way of organizing work and people, represents more than new electronic or mechanical inventions. It is how new ways of doing things shape human relationships and the social and political organization of global communities. In this context, she suggested that many recent developments in technology represent profound, even violent, transformations of our human society. Significantly for lawyers, Franklin focused on *the practice of justice* as a way of confronting these challenges of technological change. She argued that nothing short of a global reformation of major social forces can now provide security for the world and its citizens, a process which requires lawyers' expertise and imagination in rethinking the concept of justice:

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¹ U.M. Franklin, *The Real World of Technology*, revised ed. (Toronto: Anansi, 1999) at 172-73 [Emphasis added].

Such a development will require the redefinition of rights and responsibilities, and the setting of limits to power and control. There have to be completely different criteria for what is permissible and what is not. Central to any new order that can shape and direct technology and human destiny will be a renewed emphasis on the concept of justice. The viability of technology, like democracy, depends in the end on *the practice of justice* and on the enforcement of limits to power.²

Although Franklin did not confine her ideas about the practice of justice to members of the legal profession, her comments seem to require that legal educators take a hard look at current arrangements for legal education. To what extent can legal education resist the demands of the market which appear to have captured the ethos of legal practice (if not all of those who are legal practitioners)? Do legal educators have tools and strategies with which to challenge dominant ideologies of corporate agendas? Do law teachers have a responsibility to support voices that resist defining the world primarily in terms of the market pressures of globalization?

Taking seriously Ursula Franklin's rhetorical question: "where, *if not in school and workplace*, is society built and changed?" means that we need to focus on both *undergraduate law teaching* as well as *continuing legal education in lawyers' workplaces*. This latter focus is particularly important because, at least in Canada, continuing legal education has more often been shaped by the relatively narrow, doctrinal needs of practitioners – with little sense of the larger framework within which they work. As Deborah Rhode recently suggested in the American context, "Lawyers [increasingly] know more and more about less and less, and their intellectual horizons have correspondingly narrowed... [with many lawyers finding] too much of their work dispiritingly dull or relentlessly repetitious."³

² *Ibid.* at 5 [Emphasis added]. Franklin explicitly connected her ideas about technology to those of C.B. Macpherson about democracy:

Technology, like democracy, includes ideas and practices; it includes myths and various models of reality. And like democracy, technology changes the social and individual relationships between us. It has forced us to examine and redefine our notions of power and of accountability.

Ibid. at 2.

³ D. L. Rhode, *In the Interests of Justice: Reforming the Legal Profession* (Oxford: Oxford University Press, 2000) at 29:

While innovative technology has eliminated some of the most tedious tasks, it has imposed new burdens and constraints. In many high-volume practices, lawyers' services need to fit within limited time frames and standardized programs, which narrows opportunities for

Franklin's critique of the new world of technology provides the context for some reflections in this paper about innovative educational programmes concerning gender equality goals, one of which I designed for large law firms in Toronto over a period of several years in the late 1990s.⁴ The paper begins with a brief examination of the literature about gender, law and justice, focusing especially on the 1993 recommendations of a task force established by the Canadian Bar Association to promote greater gender equality in the law and the legal profession in Canada.⁵ One recommendation suggested that law firms should engage in seminars about issues of gender equality, and as a result, I was requested to design and implement a series of seminars for three of the largest law firms in Toronto between 1994 and 1997.⁶ Franklin's insights seem especially relevant to an assessment of the tensions which lawyers experience between increasingly excessive work demands and firms' stated goals of gender equality in their practices and culture. In the context of the narrowing of lawyers' work and the challenge to promote equality goals in the legal profession, there are profound implications for *the practice of justice*.

Gender Equality and the Legal Profession

intellectual challenge and personal problem-solving.... As the pace of communication accelerates, the pressures of practice intensify. Legal life lurches from deadline to deadline, and in some fields, unpredictable and oppressive demands are disturbingly predictable....

⁴ This paper is part of a larger project, examining both historical and contemporary contexts for women lawyers, which seeks to map the intersection between the entry of women to the legal profession and related developments in social equality movements and in the "formation" of professional culture in law. For an earlier examination of these relationships, see M.J. Mossman "The Paradox of Feminist Engagement with Law" in N. Mandell, ed., *Feminist Issues: Race, Class and Sexuality*, 2nd ed. (Scarborough: Prentice Hall Allyn and Bacon, 1998) 180.

⁵ Canadian Bar Association, *Touchstones for Change: Equality, Diversity, Accountability* (Ottawa: Canadian Bar Association, 1993) [hereinafter *Touchstones*]. The CBA Task Force was chaired by former Justice Bertha Wilson of the Supreme Court of Canada.

⁶ In earlier writing, I have also focused on the special pedagogical challenges involved in such educational programming, and the need for problem-solving approaches quite different from most forms of continuing education for lawyers: see M.J. Mossman, "Engendering the Legal Profession: the Education Strategy" in U. Schultz & G. Shaw, eds., *Women in the World's Legal Professions* (Oxford: Hart, 2002) forthcoming; and M.J. Mossman, "Gender Equality Education and the Legal Profession" (2000) 12 Supreme Court L.R. (2d) 187.

Women have been becoming lawyers in Canada for more than a century.⁷ Yet, until relatively recently, women have represented only a tiny minority of lawyers and an even smaller number within the judiciary,⁸ a pattern which is similar to the trends in other western jurisdictions. As a result, there has been a noticeable increase in scholarly attention to women's entry to the legal profession, both monitoring the rate of this changing demography and attempting to assess its potential to change the profession's traditional (male) culture.⁹ Thus, in the 1990s, legal scholars in a number of jurisdictions examined the impact of gender on law and the legal profession.¹⁰ For example, in her theoretical analysis of women lawyers in Australia,

⁷ For an excellent overview, see F. Kay & J. Brockman, "Barriers to Gender Equality in the Canadian Legal Establishment" (2000) 8 *Feminist Legal Issues* 169. For an overview of the experiences of the first women lawyers in Canada and in some other jurisdictions, see also M.J. Mossman, "Portia's Progress: Women as Lawyers, Reflections on Past and Future" (1988) 8 *Windsor Y.B. Access Jus.* 252.

⁸ *Supra* note 5 at 48-50. For example, in British Columbia, only 3.2% of members of the Law Society were women in 1971, but they represented 21.1% of members in 1990; while in Ontario, 83% of practising women lawyers, compared to 42% of male lawyers, had been called to the bar in the previous decade. Statistics assembled by the CBA task force indicated that the percentage of women members of the legal profession increased dramatically in all parts of Canada after 1970. By 1993, the task force report stated that women lawyers comprised 27% of the practising profession, although only 12% of federally-appointed judges; the report also concluded that women were generally under-represented in private practice and over-represented among those employed in government. See also Kay & Brockman, *supra* note 7; and S. Boyd, E. Sheehy & J. Bouchard, eds., "Canadian Feminist Perspectives on Law: An Annotated Bibliography of Interdisciplinary Writings" (1999) 11 *C.J.W.L.*

⁹ For example, in her comparative essay about women lawyers in several different countries around the world, Carrie Menkel-Meadow confirmed the trend of increasing numbers of women lawyers almost everywhere in the world. However, she also posed a question about the meaning of increased numbers of women lawyers, suggesting that whether women will be changed by the legal profession, or whether the legal profession will be changed by the increased presence of women is a different - and more important - question. C. Menkel-Meadow, "The Comparative Sociology of Women Lawyers: The 'Feminization' of the Legal Profession" (1986) 24 *Osgoode Hall L.J.* 897; Menkel-Meadow also explored these issues in R. Abel & P. Lewis, eds., *Lawyers in Society: Comparative Theories*, vol. 3 (Berkeley: University of California Press, 1989), where her research relied on reports prepared for the legal profession project in Canada, the United States, the United Kingdom, Scotland, New Zealand, Belgium, Germany, Norway, France, Italy, Spain, Yugoslavia, Brazil, Venezuela, Japan and India. The national report prepared for Canada provided only a few paragraphs, however, about gender issues: see H. Arthurs, F. Zemans & R. Weisman, "Canadian Lawyers: A Peculiar Professionalism" in Abel & Lewis, eds., *Lawyers in Society: The Common Law World*, (Berkeley: University of California Press, 1988) vol. 1. For an early study of the stratification of the Ontario legal profession, see B. Adam & K. Lahey "Professional Opportunities: A Survey of the Ontario Legal Profession" (1981) 59 *Can. Bar Rev.* 674.

¹⁰ In the United Kingdom, Clare McGlynn's 1998 study of women members of the legal profession documented the barriers and opportunities which continue to exist, as well as women's perseverance and optimism as revealed in personal stories of their experiences in academe, and as solicitors, barristers and judges. McGlynn also argued that it is necessary to connect the concerns and struggles of these

Margaret Thornton focused on the reality of legal work and examined how it posed formidable barriers to the achievement of gender equality goals. As she argued, in spite of the increasing number of women in the legal profession, women continued to be only “fringe-dwellers of the jurisprudential community.”¹¹ Thornton’s conclusions were reinforced by research in the United States¹² and in Canada,¹³ and

individual women lawyers to broader, institutional arrangements: “the economic structure of the firm and the legal profession, the nature of the law and legal culture, [and ...] the fact that women as a whole are disadvantaged in society as well as in the legal academy and profession”—C. McGlynn, *The Woman Lawyer: Making a Difference* (London: Butterworths, 1998) at 3. In the United Kingdom, see also H. Sommerlad & P. Sanderson, *Gender, Choice and Commitment: Women Solicitors in England and Wales and the Struggle for Equal Status* (Aldershot: Ashcroft/Dartmouth, 1998); and S. Fredman, *Women and the Law* (Oxford: Clarendon Press, 1997). In the United States, see M. Harrington, *Women Lawyers: Rewriting the Rules* (New York: Plume, 1994); and for earlier studies, C. Fuchs Epstein, *Women in Law* (New York: Basic Books, 1981), and 2nd ed. (Chicago: University of Illinois Press, 1993); and R. Moss Kanter, “Reflections on Women and the Legal Profession: A Sociological Perspective” (1978) 1 Harv. Women’s L.J. 1.

¹¹ M. Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Sydney: Oxford University Press, 1996) at 3-4. Thornton concluded that “neither an increase in the number of women nor the passing of time can provide an automatic remedy.” In such a context, she suggested that women who “make it in a man’s world” can do so only by assimilating the traditional (male) characteristics of the profession. In terms of effecting goals of gender equality, “there is nothing potentially radical about such women because they do not wish to change any aspect of legal practice as it is. . . .” moreover, according to Thornton, conformity on the part of some women lawyers to the traditional culture of the profession confirms for many that gender is not an issue, a conclusion which absolves the profession from taking any initiatives which might further gender equality goals. See Thornton, at 290-91.

¹² For example, see B. Lentz & D. Laband, *Sex Discrimination in the Legal Profession* (Westport, Conn: Quorum Books, 1995). In their 1995 study of thousands of responses to the *National Survey of Career Satisfaction/Dissatisfaction* administered by the American Bar Association in 1984 and again in 1990, the authors concluded (in relation to pay and promotion criteria) that there was little overt discrimination against women lawyers in the United States, a finding which they acknowledged to be different from the conclusions of some other studies. However, they also asserted that differences in rates of pay or promotion would be “relatively easy to prove in a court of law,” thus making these forms of discrimination risky. Instead, Lentz and Laband argued at xvi-xix that forms of discriminatory behaviour against women lawyers were much more subtle and covert, making them harder to identify and challenge:

Relative to comparable men lawyers, women lawyers report a sense of powerlessness in the workplace, and they do not believe that their performance is evaluated on the basis of merit.... [Female] lawyers apparently experience subtle discrimination on margins that are not easily provable in a court of law.... Given that those women who are most knowledgeable about their rights suffer multidimensional discrimination, the effectiveness of existing civil rights law is called into question.

¹³ J. Brockman, *Gender in the Legal Profession: Fitting in or Breaking the Mould* (Vancouver: UBC Press, 2001) at 200:

many of these studies about women members of the legal profession recognized, at least to some extent, the broader context of changes within the profession, some of which may exacerbate women's opportunities as lawyers.¹⁴ Both in Thornton's study of Australian women lawyers,¹⁵ and in the Canadian longitudinal study of Toronto law firms undertaken by sociologists John Hagan and Fiona Kay in the early 1990s,¹⁶ for example, the conjunction of major organizational change in the profession with the increasing representation of women lawyers was addressed specifically. In their study, Hagan and Kay concluded that the profession of law had become "a contested domain" by the end of the 1980s, with increased opportunities at the entry-level for both male and female lawyers but a shrinking proportion of partnership opportunities: a "glass ceiling" which "became an increasing reality for women but also for men":

Discrimination in the legal profession can come from a variety of sources.... [Some] men will discriminate against women simply because they are women. Although there was no measure of this in this study, the proportion of men who fell into this category seems to be small. Most of them are identified as belonging to the "old boys' club," and are thought to be becoming relics of the past. However, according to some respondents, "baby dinosaurs" are growing up to replace them. Some women in this study sacrificed their personal lives and sold their souls to their law firms in order to become partners. They were being let go with glowing recommendations, rather than being invited into partnerships. The men who were poised for partnership, on the other hand, saw little standing in their way. It is difficult to conclude that the legal profession has rid itself of discrimination.

Brockman's study is important because it takes account of links between gender equality in the legal profession and in the broader society, and because it recognizes how personal "choices" on the part of women lawyers must be understood within a social context. For British and American analyses of the issue of choice, see Sommerlad & Sanderson, *supra* note 10; J. Williams, "Gender Wars: Selfless Women in the Republic of Choice" (1991) 66 N.Y.U.L. Rev. 1559; and J. Williams, *Unbending Gender: Why Family and Work Conflict and What to do About It* (New York: Oxford University Press, 2000).

¹⁴ To some extent, emerging literature about critical changes in the nature and processes of legal work has tended to exist in isolation from much of the literature about women lawyers (and other recent entrants to the profession): a kind of "two solitudes" in critical legal scholarship. For example, see R. L. Nelson, D. M. Trubek, & R. L. Solomon, eds., *Lawyers' Ideals/Lawyers' Practices: Transformations in the American Legal Profession* (Ithaca: Cornell University Press, 1992); J. P. Heinz, E. O. Laumann, R. L. Nelson, & E. Michelson, "The Changing Character of Lawyers' Work: Chicago in 1975 and 1995" (1998) 32:4 Law & Soc'y. Rev. 751; G. Hanlon, *Lawyers, the State and the Market: Professionalism Revisited* (London: MacMillan Press Ltd, 1999); J. Flood, "Megalaweyering in the Global Order: the Cultural, Social and Economic Transformation of Legal Practice" (1996) 3:1/2 International Journal of the Legal Profession 169; and H. Sommerlad, "Managerialism and the Legal Profession: A New Professional Paradigm" (1995) 2:2/3 International Journal of the Legal Profession 159.

¹⁵ *Supra* note 11.

¹⁶ J. Hagan & F. Kay, *Gender in Practice: A Study of Lawyers' Lives* (Oxford: Oxford University Press, 1995).

The practice of law became much more highly centralized and concentrated in large firms during the 1970s and 1980s.... [The growth rate of lawyers accelerated in private firms, government and business, but it also] involved, in relative terms, a shrinking pool of centralized and concentrated partnerships in large firms, with increasing numbers of lawyers in intermediate and lower positions. In short, this was a period of growth with a ceiling on upward outcomes.... Although the actual numbers of women and men lawyers at partnership levels of these firms increased in absolute terms during this period, their relative shares of partnership positions declined, and this ceiling effect was more pronounced for women than for men. During this period, men and women were developing careers in a legal profession whose parameters were changing in ways that traditional conceptions of professional autonomy would not predict.¹⁷

According to the data in the study conducted by Hagan and Kay, even when women invested in their careers to the same extent as men, women lawyers were not rewarded at levels comparable to male lawyers; thus, explanations for women lawyers' relative disadvantage in the profession based on "different choices" were rendered unpersuasive.¹⁸ Instead, they argued that gender stratification theory, an explanation focusing on the structural constraints of law practice and legal culture, and the extent to which they impose constraints on women lawyers' choices, was more persuasive. Their focus on a more structural approach shifts attention "away from employees in order to focus on employers who are the source of many of their problems."¹⁹ As is evident, these recommendations do not focus primarily on the

¹⁷ *Ibid.* at 181-182. Hagan and Kay's study offers a careful analysis of competing explanations for the differing experiences of men and women who are lawyers. In particular, they examined the explanation that gendered experiences among lawyers occur primarily as a result of different choices being made by men and women about their careers in the legal profession. According to this explanation, women lawyers who experience a relative lack of career progress have made "choices" to invest less in their careers than in their families, by contrast with male lawyers. Significantly, this explanation for the different experiences of men and women lawyers assigns responsibility for choices to individual lawyers - if women lawyers wish to succeed, it is simply a matter of them behaving more like men in the legal profession. According to this theory, women lawyers bear individual responsibility for improving their career options; there is no need for the profession itself to change. Sommerlad and Sanderson also provide a sustained critique of the explanation of "choice" in relation to differing gendered experiences in the practice of law: see *supra* note 10, especially at 27 ff.

¹⁸ *Supra* note 16 at 187-88.

¹⁹ *Ibid.* at 196. Using this approach, Hagan and Kay recommended the adoption of broadly-based initiatives, including systematic tracking of firms' partnership decisions; tax incentives and other governmental policies to create more workplace flexibility; support from professional associations in designing ways to minimize work/family conflicts; education and prevention programmes; and the development of innovative model policies by law societies: *ibid.* at 198-203. See also K. Hull & R.

“choices” of individual lawyers, but rather on systemic change in the practices of law firms and other legal institutions.

Yet, although Hagan and Kay, like other scholars of the legal profession, have suggested a need for change in the legal profession, it is less clear exactly how these necessary changes will occur. Particularly if appropriate changes depend on the intervention of firm managers, law societies, or other professional associations, it will be necessary to convince them of the long term benefits of gender equality initiatives, including employer self-interest in retaining women lawyers.²⁰ Significantly, Hagan and Kay recommended education programmes for firms and other legal employers regarding the nature and consequences of gender inequality for the profession. This focus on education as a strategy for achieving gender equality goals in the legal profession was similarly reflected in the recommendations of the Canadian Bar Association’s 1993 report²¹ – recommendations which became the catalyst for my seminars for Toronto law firms in the late 1990s.

The 1993 CBA Recommendations and Gender Equality Education Programmes

The CBA task force recognized that its report was being presented in a context of significant change in the structure and organization of legal work in Canada, and elsewhere.²² Indeed, one of the most interesting features of the report is its

Nelson, “Gender Inequality in Law: Problems of Structure and Agency in Recent Studies of Gender in Anglo-American Legal Professions” (1998) 23:3 *Law & Soc. Inquiry* 681. Moreover, according to Deborah Rhode:

By choice or necessity, many lawyers with noncompetitive orientations or strong commitments to family or nonprofit pursuits drift out of [large] firm hierarchies, leaving management composed largely of those who accept revenue-maximizing priorities. That selection process perpetuates a culture well insulated from alternative values.

See D.L. Rhode, “Ethical Perspectives on Legal Practice” (1985) 37 *Stan. L. Rev.* 589, at 634.

²⁰ Such strategies may be problematic in the long term; for an analysis in the UK, see C. McGlynn, “Strategies for Reforming the English Solicitors’ Profession: An Analysis of the Business Case for Sex Equality” in U. Schultz & G. Shaw, eds., *Women in the World’s Legal Professions* (Oxford: Hart, 2002) forthcoming.

²¹ Hagan and Kay were also involved in research for the *Touchstones* report, *supra* note 5: see Kay and Hagan “The Structural Dynamics of the Law Firm” (Appendix 13 of *Touchstones*). John Hagan was also a member of the CBA task force which produced the *Touchstones* report.

²² At the outset, the report focused on the motivations for change in the legal profession in relation to goals of gender equality; one motivation identified was the need for “enlightened self-interest and accountability of the profession”: *supra* note 5 at 17-19.

characterization of the challenge of gender equality in the legal profession as an integral part of the re-shaping of the profession. For example, in the introductory comments of the task force chair, former Justice Bertha Wilson, the problem was presented as one about identity for members of the legal profession in relation to these new developments:

[The entry of women to the legal profession] “shook up” the profession and men as well as women were forced to confront issues to which they had never given really serious thought before.... Lawyers realized that this was a time for moral and intellectual stocktaking, for taking a cold dispassionate look at where their profession was going. How was their profession faring in the larger context of society? Was it a profession they were proud to belong to? Or had it become a little tarnished over the years? Had it, as some suggested, become “too commercialized”? Were people now in it for the money? Were we still the moral and intellectual leaders in our communities or were we just high-priced technicians at the beck and call of the corporate elite? In sum, did the profession still warrant the description “noble and learned”?²³

Although phrased rhetorically, Justice Wilson’s questions clearly characterized goals of gender equality as part of an overall professional commitment to justice;²⁴

²³ *Supra* note 5 at 1.

²⁴ The relationship between goals of gender equality and an overall professional commitment to justice were evident, for example, in her endorsement of the views of two American authors who asked:

What is a reasonable response to the fact that large numbers of people entering law find basic incompatibility with the [lawyer’s] role? One attorney suggests, “if you can’t stand the heat, get out of the kitchen.” A more thoughtful reply would be to ask what is wrong with the kitchen that so many bright, competent people find it difficult to work there? What happens if people work all day in a kitchen that is too hot?... What [can] we learn about the legal system and about the possible changes which need to be made?

Supra note 5 at 268; quoting D. Jack & R. Jack, “Women Lawyers: Archetypes and Alternatives” in C. Gilligan, J. V. Ward & J. McLean Taylor et al., eds., *Mapping the Moral Domain* (Boston: Harvard University Press, 1988). The *Touchstones* report systematically examined current policies and practices affecting women lawyers in private law firms and also in government, academe, administrative tribunals and the judiciary, and made a long list of recommendations (some quite controversial) which were subsequently considered in public discussions by the National Council of the Canadian Bar Association. In spite of the dramatic rate of increase for women members of the legal profession, the CBA’s 1993 report concluded that there had been all too little change in the legal profession in relation to the reception of women lawyers:

The dimensions of the problems experienced by women in the legal profession are staggering.

for her, lawyers have independent responsibilities to promote justice, not merely their (corporate) clients' interests. Although not everyone would agree with this characterization of the challenge, there was no ambiguity about the nature of the professional values adopted by the CBA report. For Justice Wilson and the CBA task force, ideas about justice were fundamental to concepts of lawyering. Thus, *Touchstones* suggested that any transformation of the profession²⁵ would require change at a number of different levels: "behaviours, attitudes, institutional policies and practices, and in the structure of the profession itself."²⁶ Accordingly, the report concluded that the process of change would require the profession to question the way that law is practised as well as the profession's assumptions underlying the status quo.²⁷ And significantly, the report identified "education about the nature of gender inequality in the legal profession [as] crucial":

What is needed for the legal profession is "remedial human rights jurisprudence"

In a country where gender equality is entrenched as a primary constitutional value, and in a self-governing profession knowledgeable about law and concerned with justice, women continue to be discriminated against in numerous overt and covert ways.

Supra note 5 at 10. Although a number of provincial law societies sponsored similar studies during the same period, the national scope of the CBA study and its process of consultation over several years made it a primary focus of discussion for both the legal profession and the public on issues about gender equality in Canadian law. For other examples, see Law Society of British Columbia, *Women in the Legal Profession: A Report of the Women in the Legal Profession Subcommittee* (Vancouver: The Law Society, 1991); Law Society of British Columbia, *Gender Equality in the Justice System: A Report of the Law Society of British Columbia Gender Bias Committee* (Vancouver: The Law Society, 1992); and F. Kay, *Transitions in the Ontario Legal Profession: A Survey of Lawyers Called to the Bar Between 1975 - 1990* (A report to the Law Society of Upper Canada, Osgoode Hall, Toronto: 1991). A number of provincial reports were also prepared as part of the research for *Touchstones*: see Appendices.

²⁵ Only in the last chapter of the report was there a concerted effort to assess the problems and possibilities of achieving fundamental institutional change. In chapter fifteen, the report identified the reform challenge as "momentous," and recognized a need for *both* individual *and* institutional change to achieve gender equality objectives for lawyers. Moreover, the report recognized that change might not occur all at once, advocating that "incremental change [was] possible and necessary." Just as significantly, *Touchstones* identified some of the points of resistance to proposed changes to achieve gender equality goals, including the "myth" that progress is being made already; the harsh economic climate; issues of reverse discrimination; complacency and "a consensus of denial;" ideas about the proper role for women; and problems of backlash that silence legitimate complaints. *Supra* note 5 at 267-271.

²⁶ *Supra* note 5 at 271.

²⁷ *Ibid.* For another assessment of the problems of the status quo for law and lawyers, see M.J. Mossman, "Gender Equality and the Canadian *Charter*: Making Rights Work for Women?" in P. Smith, ed., *Making Rights Work* (Dartmouth: Ashgate, 1999).

accessible to non-specialists....These messages should be repeated until they form the basis of a common understanding of our legal duties to our colleagues in the profession and beyond....We must develop a culture of "problem-solving" for our own profession. Lawyers are trained to criticize and demolish arguments. In order to achieve gender equality, we must learn how to find creative solutions for our own internal problems.²⁸

This "education strategy" promoted by *Touchstones* needs to be examined carefully. In the first place, the report's emphasis on education as a strategy for accomplishing institutional change in the legal profession in relation to gender equality goals suggested that current problems of gender inequality in the profession are mainly the result of a lack of knowledge; as a result, *Touchstones* assumed that the provision of knowledge through education would engender appropriate changes. In this way, education about gender equality becomes a means to an end, a process that is somehow separate from issues of power, economic resources, or human will within the profession. Second, the emphasis on education appeared to assume that it is possible to provide information about the jurisprudence on gender equality which will *per se* engender new and different practices within the profession, as if education about gender equality were no different from information about new legislative amendments which regularly have to be incorporated into legal practice. This approach tends to underestimate the power of entrenched ideas about gender roles in the profession, and in the larger society.²⁹ As well, the report's emphasis on education to remedy gender inequality overlooked the extent to which these challenges within the profession might require fundamental re-structuring of institutions as well as profound changes in individual attitudes and behaviours. At the very least, such goals would require highly specialized education.

In spite of these potential limitations, three Toronto firms responded to the *Touchstones* recommendations and took up the challenge of my education seminars about gender equality for several years after 1993.³⁰ As a result, the seminar experiment provided an interesting opportunity to examine the usefulness of an educational initiative in the context of legal practice demands. Equally significantly,

²⁸ *Supra* note 5 at 271-272.

²⁹ For one analysis, see M.J. Mossman, "Gender Issues in Teaching Methods: Reflections on Shifting the Paradigm" (1995) 6:2 *Legal Educ. Rev.* 129. In the United States, see R. Nelson & W.P. Bridges, *Legalizing Gender Inequality: Courts, Markets, and Unequal Pay for Women in America* (Cambridge: Cambridge University Press, 1999).

³⁰ The seminars were provided on a confidential basis; thus, no identifying information is available.

it offered an occasion to reflect on the extent to which the task force report could be characterized as an important “voice of resistance” within the legal profession, and whether its recommendation for continuing education for lawyers provided useful insights about processes of change, especially in the context of Franklin’s concept of the practice of justice.³¹

In assessing the seminars, and the role of education generally as a strategy for change, a number of constraints can be easily identified. For example, a one-time-only seminar of two and one-half hours is unlikely to accomplish more than an introduction to the issues and problems, especially in the context of education about gender equality, where ideas may challenge longstanding attitudes, traditional and well-established practices, and stereotypical views about gender roles. Indeed, gender equality programmes which go beyond merely providing information to challenge fundamental values, attitudes and behaviour require time for reflection and further discussion, a commodity all too rare in the environment of most large law firms. By contrast, as I conducted these relatively unique educational programmes for law firms over a number of years, the reality of workplace demands for lawyers in these firms meant that the gender equality education programme frequently had

³¹ Even though all of the firms had well-established programmes for continuing legal education, they approached the arrangements for offering these seminars with special care. Since they had all conducted internal surveys of their members’ experiences on a variety of issues related to gender equality, the firms were able to identify some issues of special concern to be addressed by the programmes. The creation of an appropriate seminar required a good deal of energy and creative pedagogy in the context of highly sophisticated and articulate members of the profession - many of whom had never (or hardly ever) analyzed these issues before. After a period of consultation with some firm lawyers, I designed a programme which could be presented to fifteen to twenty lawyers in an interactive seminar format, using both video problems and written materials on three aspects of gender equality: issues about work assignment, performance assessment and promotion criteria and procedures; issues about the work environment, including problems of sexual harassment as well as issues about collegiality and client development; and issues about the relationship between work and family responsibilities. The seminar programme devoted about one-third of its time to discussion of each of these three groups of issues. For each group of issues, there was a short introduction, often providing an overview of legal principles (using an overhead projector), and an opportunity for questions or initial comments from participants. Each segment then turned to a short video presentation of some aspects of the problem, and participants were asked to consider how to define the problems and the options for solutions along with their probable costs and consequences. In addition to the video problems, each segment also included analysis and discussion of written problems which demonstrated related, but somewhat different, aspects of the issues illustrated in the video problems. At the end of all three segments, there was frequently time for only a brief conclusion, and participants were referred to written materials which were available for them to take away from the seminar for further reference. The three video segments used were produced in the United States: see “Further Adventures in Legal Ethics” (Professor S. Gillers, NYU Law School); and “All in a Day’s Work” (Ginzberg Video Productions, California). For an analysis of the pedagogical challenges presented by these seminars, see Mossman, *supra* note 6.

to be “fit into” other, *more important*, pressures on them. In fact, it became increasingly clear that solutions to problems of gender inequality in legal practice could be addressed effectively only if they did *not* challenge the priority accorded to work demands, or if they could be easily accommodated *within* the prevailing law firm culture. Thus, to the extent that the literature suggests that gender equality goals may require major changes to practices and cultures, fundamental changes are unlikely to be adopted readily in law firms. Such a conclusion clearly limits the usefulness of gender equality educational programmes, at least in terms of effective strategies for accomplishing substantive change in the legal profession.

Reflecting on Lawyers’ Work and *the Practice of Justice*

As Margaret Thornton suggested in her analysis of lawyers’ work in Australia, successful strategies for accomplishing change in the legal profession would have to confront *the nature of legal work and the culture within which legal work is done*, a context characterized by an increasing “corporatism” of law practice and by the “commodification” of lawyers.³² As Thornton suggested, law firm “corporatism” tends to undermine equality goals at the same time as they render gender invisible.³³

³² Thornton also identified how both the nature of legal work and law firms’ expectations have been changing in recent decades, exactly the same period in which women have begun to enter the legal profession in significant numbers:

...[W]hile acceptance of women within legal practice is hailed as a sign of progress, the dramatic changes that have occurred simultaneously in the structuring of law firms have rendered the advances a pyrrhic victory. The lawyer in the modern corporate law firm is subject to disciplinary practices that are a far cry from the claimed independence and autonomy of the past. The filling in of time sheets and the need to generate specific levels of income signify the most notorious manifestations of control.... The focus on income generation, effected through the phenomenon of billable hours, engenders a great deal of ambivalence among women, as employed solicitors are expected to dedicate themselves totally to their careers and to the firm.... Loyalty to the firm includes never complaining about its practices to an outside body....

Supra note 11 at 149-51.

See also M. Cain & C. Harrington, eds., *Lawyers in a Postmodern World: Translation and Transgression* (New York: New York University Press, 1994) at 2.

³³ *Supra* note 11 at 288-91. The inherent resistance to change in relation to gender equality goals within the legal profession was described in relation to the reports of Gender Bias Task Forces in the United States:

The powerful structures of the law ... can even authorize inquiry, ask forbidden questions,

These insights about legal practice are important in the context of Ursula Franklin's analysis of the concept of "asynchronicity" in relation to new technologies within the global community:

...while synchronicity evokes the presence of sequences and patterns, fixed intervals or periodicities, coordination and synchronization, asynchronicity indicates the decoupling of activities from their functional time or space patterns....The current widespread use of computer networks...has led to...the prevalence of asynchronicity, indicated by the loosening, if not the abandonment, of previously compulsory time and space patterns. This is a most significant change. No longer is one pattern superseded by another pattern; the change now appears as a move from an existing pattern to no discernable structure. *I consider the evolving destructuring by asynchronicity as an extremely important, if not the crucial facet of the new electronic technologies.*³⁴

For Franklin, the role of asynchronicity in "unravelling social and political patterns" within workplaces is troubling. Instead of procedures which encourage engagement among workers, asynchronicity enables patterns of work and thinking which relentlessly undermine a sense of community and responsibility. In this context, the features of lawyers' work identified by Margaret Thornton reveal the impact of asynchronicity in the practice of law:

- the adoption of billable hours in large law firms is not so much related to the *product* as it is to providing a means of *control* over the work and lives of lawyers;
- the increasing specialization of legal work means that almost no one sees a transaction from beginning to end; as a result, there is a separation of work being done from accountability/responsibility in terms of its goals or its overall impact;

obtain information, and still remain impenetrable to profound change. The fundamental accusation - oppression intrinsic in the delivery of justice - remains beyond comprehension.

See J. Resnik, "Ambivalence: The Resiliency of Legal Culture in the United States" (1993) 45 Stan. L. Rev. 1525 at 1535. See also E. Skordaki, "Glass Slippers and Glass Ceilings: Women in the Legal Profession" (1996) 3:1/2 International Journal of the Legal Profession 7; and J. Rosenberg, H. Perlstadt & W. Phillips, "Now that We are Here: Discrimination, Disparagement, and Harassment at Work and the Experience of Women Lawyers" (1993) 7:3 Gender and Society 415.

³⁴ *Supra* note 1 at 151 [Emphasis added].

- legal work requires acceptance of the normativity of existing practices; there is no encouragement to challenge existing practices or to see things in new ways; and
- paid work is seen as the major focus of human activity and good lawyers are those who work the longest hours.³⁵

In the context of Thornton's analysis, *Touchstones* acknowledged the existence of workplace demands and argued³⁶ that the emphasis on work should be tempered by the legal profession's fundamental responsibility to promote equality as a matter of justice. Challenging the idea that lawyers must respond fully to market demands, *Touchstones* argued that the legal profession must take seriously its public role, aspiring to meet the traditional ideal of lawyers as "noble and learned," and refuse to succumb to the role of "high priced technicians" who respond only to the needs of the corporate elite. In this way, *Touchstones'* conception of the profession and its responsibility for justice challenged dominant ideas of the legal profession as market-driven and tending to corporatism and commodification, a voice which presented both challenge and resistance to the dominant discourse. Yet, in the context of the profession as a "contested domain,"³⁷ *Touchstones* articulated an

³⁵ *Supra* note 11 at 75ff., argued that the impact of technocentrism on legal work and legal education was an "ideological desensitization," citing Charles Derber's insights about how legal practitioners are "absolved from ethical responsibility" when they serve dubious interests; according to Thornton, "technocentrism permits the normalization of property and profit-making enterprises" and similar views in relation to racism and sexism: C. Derber, *Professionals as Workers: Mental Labor in Advanced Capitalism* (Boston: GK Hall & Co, 1982). Thornton suggested, moreover, that law students as well as legal practitioners may be affected by technocentrism:

Law students need to undergo a process of ideological desensitisation in preparation for practice. Hence, issues of ethics and justice are likely to be given short shrift and to be treated as subordinate to mastery of technocratic rules. Derber reports that studies involving first-year students in a wide range of professions, including law, reveal a rapid shift from a predominantly moral orientation to a technocratic one....

³⁶ For example, see *Touchstones*, *supra* note 5 at 17:

The demands for gender fairness and equality are not the claims of a special interest group. They are legal and ethical issues of fairness and justice for the profession as a whole. They are not "women's issues" but evidence of a serious flaw in the structure and organization of the profession.

³⁷ *Supra* note 16 at 179.

alternative vision of justice without providing really effective strategies for implementing its vision in the *practice of justice*.

One concrete example in my seminars illustrates the limits of the *Touchstones* analysis and the radical potential of Franklin's approach to the impact of technological change. In discussions in my seminars about the problem of evening work, a frequent topic of discussion, the issue was usually presented as a question about the need for evening work; not surprisingly, most of the time, lawyers in these major firms accepted that work during the evening was often essential. In the context of our discussions, however, it became clear that both male and female lawyers who were the parents of small children *in practice* left the firm about 6 p.m. in order to spend time with the children; and that by about 8:30 p.m., both male and female lawyers returned to work. Significantly, however, male lawyers, much more frequently than their female counterparts, physically returned to the law firms; whereas female lawyers were more likely to plug into a technological equivalent through a home computer system. Both males and females with small children frequently worked until midnight; however, it was only the male lawyers who were "visibly" at work at the firm late at night.³⁸ As a result, it was often possible to have conversations about why male lawyers, who had increased "face" time at the firm, were thought to have worked harder than female lawyers, particularly when all of these lawyers might well have all of their work products completed by 8 a.m. on the following morning. Why, we pondered, was it so important for people to be physically present in the late evening at these firms?

Such questions raise a number of interesting issues. Certainly, in the context of the law firm seminars, it was possible to identify biases based on physical presence. Indeed, I often tried to promote the idea that the issue should be whether the *work is done*, and not *the location in which work is done*. Yet, this kind of solution may segregate workers from each other, and also from connections to their work, processes which reveal the substantial impact of asynchronicity in law firms. By contrast, if it is important to think about *the need for community in workplaces*, physical presence may be necessary – but even this conclusion does not really address whether people who regularly work more than ten or twelve hours each day have much energy to create a community, either during the day or in long evenings at work.

³⁸ Indeed, compounding the gender equality issue, female lawyers sometimes indicated that their resistance to returning to the office was related to the lack of safety at night in underground parking garages in downtown Toronto, the location of most of these large law firms.

In considering the issue of long hours of work in relation to gender equality, *Touchstones* offered recommendations which would permit women lawyers to undertake maternal responsibilities without penalty in terms of promotion to partnership.³⁹ Not surprisingly, its recommendations were controversial, even though they were generally consistent with Canadian human rights legislation and jurisprudence. Yet, from the perspective of Franklin's critique of how technological change shapes human relationships and work places, the *Touchstones* recommendations were limited because they simply "fit gender" into existing workplace practices, rather than examining the more fundamental issues about the organization of legal work, including the need for long hours. As Hilary Sommerlad argued, the social construction of the lawyer's job as one which demands full-time commitment and long hours of work is "central to the maintenance of the gendering of the profession,"⁴⁰ an arrangement which ensures that the "community" of (mostly male) lawyers involved in late-night work is as privileged as it is gendered. In this way, the *Touchstone* recommendations also failed to challenge norms of (male) individualism in legal culture to consider what a law firm would look like if it took seriously the idea of a workplace community,⁴¹ "envisioning more humane ways of administering the entire justice system"⁴² and increasing access to it for the benefit of everyone.

Thus, the law firm seminars demonstrated the limits of the *Touchstone*

³⁹ *Supra* note 5, recommended that law firms recognize the need for alternate work arrangements for all lawyers with parental responsibilities, including part-time partnerships (5:30); that law firms promote a more flexible model of career advancement in large law firms so that both partnership and firm structure can take into account the differing work histories of male and female lawyers (5:32); and that law firms establish alternate work arrangement policies that make restructured full time and reduced work options available to members of the firm with parental responsibilities (5: 33). More controversial were the report's recommendations that law firms set realistic targets of billable hours for women with child rearing responsibilities pursuant to their legal duty to accommodate (5: 18); and that law firms evaluate lawyers on a basis that gives due weight to the quality of time expended rather than exclusively to the quantity of time expended (5: 20).

⁴⁰ H. Sommerlad, "The Myth of Feminization: Women and Cultural Change in the Legal Profession" (1994) 1:1 *International Journal of the Legal Profession* 31 at 39.

⁴¹ Some Canadian research concluded that lawyers work long hours because of internal commitments to work but also because of external work demands which are excessive; it was suggested that high rates of remuneration created a sense of obligation to work long hours. See J. E. Wallace, "It's about Time: A Study of Hours Worked and Work Spillover among Law Firm Lawyers" (1997) 50 *Journal of Vocational Behavior* 227.

⁴² S.O'Donovan-Polten, *The Scales of Success: Constructions of Life-Career Success of Eminent Men and Women Lawyers* (Toronto: University of Toronto Press, 2001) at 200.

recommendations for gender equality educational programmes as a means of transforming the legal profession to achieve a different vision of justice. At the same time, however, both the recommendations and the seminars provided resistance to dominant voices of a market-driven legal world. Moreover, in spite of the power of corporatism and commodification to silence other perspectives about human relationships, there is a need for resistant voices which imagine other ways of organizing the practice of law. Perhaps, especially for law teachers, there is a need to challenge the dominant paradigm, not just in forging a critical law school curriculum for LL.B. students, but also in working to challenge the dominant paradigms of legal work within the profession so as to promote *the practice of justice*. In such a context of justice and technology, voices of resistance need to understand “hope” not just as a goal, but more often as an active verb which requires renewed commitment and energy and which will often be experienced as a struggle. Yet, only by engaging in the *struggle* for hope can we respond meaningfully to Ursula Franklin’s challenge: “*Where, if not in school and workplace, is society built and changed?*”