

Leslie H. Arps Memorial Lecture
Women and the Legal
Profession—A Status Report¹

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Thank you Barry, for that great introduction. And thank you Betsy, for your welcome—and for all your wonderful work on the issues that I'll be talking about tonight.

It's a pleasure and a privilege to be giving the Leslie H. Arps Memorial Lecture. The firm Leslie Arps co-founded—now Skadden, Arps, Slate, Meagher and Flom—is, of course, one of the world's most celebrated law firms, known to do extraordinary corporate and transactional work. Equally impressive to my mind is Skadden's longstanding leadership in the field of public service, an issue that was of deep importance to Leslie Arps, an HLS alumnus whose career included work on the historic investigation into corruption on New York City's waterfront. Skadden celebrated its fortieth anniversary by establishing a pioneering fellowship program that provides funding for new lawyers starting public interest careers. I'm honored to sit on the board of this Fellowship Foundation.

1. A version of this text was originally delivered as the Leslie H. Arps Memorial Lecture at the House of the Association on November 7, 2005. I am very grateful to Amy Gutman for her superb help in preparing this speech and to Harvard Law students Yael Aridor Bar-Ilan and Lauren Popper for additional research assistance.

2. Dean and Charles Hamilton Houston Professor of Law, Harvard Law School.

Tonight I'm here to talk to you about a vitally important issue: the status of women in the legal profession. Preparing these remarks gave me a chance to pull together—and reflect on—a number of facts, trends, stories, and ideas that have been on my mind for some time. The issues are complex, and while I'll talk about some recent research, I can't possibly give a full picture of the subject. My goal is more modest: What I hope to do is start a conversation between law schools and the legal profession about where we go from here—about how we might work together to expand women's choices and, by doing that, improve our profession and society.

Looking around this room, I'm heartened that so many of you have chosen to be here tonight. Not that I'm surprised. For years, this Association has done groundbreaking work aimed at expanding access for women and minorities. That mission has gained added strength from Betsy Plevan's dedication during her tenure as President and from the opening of your new Office for Diversity, which is taking the lead in providing guidance on this issue to law firms and corporate law departments.

It's especially fitting that I'm making these remarks here in New York City, and not just because I'm originally from here (as you can probably tell by now). As I see it—and as I often say—Harvard Law School is the New York City of law schools. Like New York, Harvard is in large part defined by its scale and scope. And like New York, Harvard is the remarkable place it is because of its diversity—because of the incredible range of talents that take root and thrive there.

And that's what I want to focus on tonight—on concrete steps that we can take to foster this diversity. And when I use the word *we*, I mean it quite literally. As I see it, this is an area in which law schools and practitioners must make common cause. This is not just *your* problem; it is *our* problem too, and all of us need to look for common solutions.

But before we consider these solutions, we need to take stock. Let's start with the good news: by the turn of the twenty-first century, women accounted for almost one-third of the nation's lawyers and a majority of the nation's law students.³ In just over a decade, the number of women law partners, general counsels, and federal judges doubled.⁴ At Harvard, women now make up almost half of the JD student body—quite a contrast to the first class of thirteen women that graduated in 1953. Two years ago, we celebrated fifty years of women at Harvard Law School.

3. ABA COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 5 (2001) [hereinafter UNFINISHED AGENDA].

4. *Id.*

That event drew close to 1,300 people, making it the largest alumni gathering in the Law School's history.

Such a celebration has special meaning in light of the huge obstacles faced by past generations of women—obstacles that now might seem laughable if they hadn't been so destructive. In a recent address, Justice Ruth Bader Ginsburg recalled several inglorious cases from the world of law schools. There was Columbia's denial of admission to several women in 1890, when one board member reportedly said: "No woman shall degrade herself by practicing law in New York especially if I can save her. . . ."⁵ Or consider a 1911 student resolution, widely supported—though ultimately defeated—at the University of Pennsylvania Law School: a resolution that would have introduced a twenty-five cents per week penalty on students without mustaches.⁶ Or the words of Harvard University's president, when asked how the Law School was faring during World War II. His reported response: That it wasn't as bad as he'd expected—"We have 75 students, and we haven't had to admit any women."⁷

Thankfully such attitudes have pretty much vanished from our legal landscape; they are to be heard from only the most lunatic fringe. But despite the enormous progress made—and we don't want to lose sight of the advances—it's also true that women lawyers still lag far behind men on most measures of success. Now, as I said before, this is an issue for all of us. And since I'm the dean of a law school, that's where I'll start.

Last year, a working group of Harvard Law students issued a study on women's experiences.⁸ What they discovered closely tracked findings from other top schools that have studied these questions: While women and men arrive at law school with basically the same credentials, there's a real difference in how they experience their three years of legal study.

Most troubling are disparities in the academic arena in major law schools. Women law students are less likely to speak up in class.⁹ They graduate with fewer honors.¹⁰ And when asked to assess their own abili-

5. Ruth Bader Ginsburg, *Remarks on Women's Progress at the Bar and on the Bench*, 89 *CORNELL L. REV.* 801, 802 (2004).

6. *Id.*

7. *Id.* at 803.

8. WORKING GROUP ON STUDENT EXPERIENCES, HARVARD LAW SCH., *STUDY ON WOMEN'S EXPERIENCES AT HARVARD LAW SCHOOL* (2004), <http://www.law.harvard.edu/students/experiences/FullReport.pdf> [hereinafter *STUDY ON WOMEN'S EXPERIENCES*].

9. *See id.* at 4, 18-19.

10. *See id.* at 6, 25-26.

ties, they give themselves far lower marks than men do on a range of legal skills.¹¹ Here's an interesting statistic: according to the Harvard student survey, 33 percent of men considered themselves in the top 20 percent of their class in legal reasoning while only 15 percent of women did.¹² Women also gave themselves lower marks in their ability to "think quickly on their feet, argue orally, write briefs, and persuade others."¹³ Reading this list, I had to shake my head: What exactly is left? Studies at other schools have found very similar trends.¹⁴ In the disturbing words of one female law student from the University of Pennsylvania: "Guys think law school is hard, and we just think we're stupid."¹⁵

Now I'm not entirely sure what to make of such studies. Do women arrive at law school predisposed to self-doubt? Or does something happen in law school that contributes to these perceptions? In any case, we know one thing: There's a problem here, and we need to figure out why it exists.

And as most of you know, law school is just the beginning. Recent decades have spawned something of a cottage industry in reports exposing stark differences in the career paths of men and women. These reports are rife with metaphor—we've read about glass ceilings and sticky floors, about clogged or leaking pipelines, about scenic highways and feeder roads, and off-ramps and on-ramps. Regardless of the image, the bottom line stays the same: *Women lawyers are not assuming leadership roles in proportion to their numbers.* And that is troubling not only for the women whose aspirations are being frustrated, but also for the society that is losing their talents. What we have here is a kind of brain drain, and we are all the poorer for it.

11. See *id.* at 22 & app.XX.

12. *Id.*

13. *Id.*

14. See, e.g., LANI GUINIER, MICHELLE FINE & JANE BALIN, BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE 37-38, 41, 48-56 (1997) (reporting disparities in academic achievement, class participation and self-perception between female and male students at the University of Pennsylvania Law School); YALE LAW WOMEN, YALE LAW SCH., YALE LAW SCHOOL FACULTY AND STUDENTS SPEAK OUT ABOUT GENDER: A REPORT ON FACULTY-STUDENT RELATIONS AT YALE LAW SCHOOL (2002) (reporting gender disparities in various classroom dynamics at Yale Law School); Janet Taber et al., *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1239 (1988) (presenting survey results indicating lower class participation by female students than male students at Stanford Law School). The Taber study also found female Stanford Law School graduates reporting lower satisfaction with their performance in law school and less favorable feelings about the school than male graduates (there was no reported difference among current students). Taber, *supra*.

15. GUINIER, FINE, & BALIN, *supra* note 14 at 8 (1997).

This Association recently released a study of eighty-two New York law firms confirming this pattern of disparity.¹⁶ Some of the study's findings come as no surprise. It's pretty clear to anyone who's walked the halls of major firms that the ranks of associates tend to be more diverse than the partnerships.¹⁷ For years, the assumption has been that this is a pipeline issue—that over time partnerships would come to mirror the associate pool. But this isn't happening. Rather than seeing the predicted gradual shift, law firms are seeing the continuation of the status quo, with women and minorities promoted at rates only slightly higher than before.¹⁸ In other words, partnerships are basically replicating themselves. And this isn't just because women are voluntarily leaving law firms in greater numbers in the early years. In 2004, women made up one-third of associates in their eighth year at a law firm, but only one-fifth of that year's new partners.¹⁹

The experience of women in New York seems to reflect trends all across the country. What's more, a major new study shows that these differences become visible at the very start of legal careers.

The *After the JD* project—sponsored by the non-profit NALP Foundation and the American Bar Foundation—involves a number of law schools and organizations, including Harvard Law School's Program on the Legal Profession. (Indeed, HLS Professor David Wilkins—who is also spearheading work on gender differences among black lawyers—is one of its principal researchers.) The first phase of results—released last year—provides an intriguing snapshot of lawyers two to three years into their careers.²⁰ Even at this stage, there are striking differences. Disparities first show up in the choice of practice settings, with women more likely to work in government, public interest, and education.²¹ This may not be altogether surprising. In the Harvard study of law students, the percentage of women who said that “helping others” was one of the most important factors to consider in picking a career was double that of men.²² (Just as an aside:

16. ASS'N OF THE BAR OF THE CITY OF N.Y., DIVERSITY BENCHMARKING STUDY (2005), http://www.abcnyc.org/pdf/report/Public_benchmarking_report.pdf.

17. See *id.* at 4.

18. See *id.* at 5.

19. See *id.* at 5-6.

20. RONIT DINOVITZER ET AL., NALP FOUND. & AM. BAR FOUND., *AFTER THE JD: FIRST RESULTS OF A NATIONAL STUDY OF LEGAL CAREERS* (2004), available at <http://abfn.org/ajd.pdf> [hereinafter *AFTER THE JD: FIRST RESULTS*].

21. *Id.* at 57, 59 tbl.8.1.

22. *STUDY ON WOMEN'S EXPERIENCES*, *supra* note 8, at 32.

That's a disparity we should do something about in the opposite direction.) But there are also differences, even at this early stage, in how men and women experience the same practice setting. Men were far more likely to engage in informal networking—such as joining partners for breakfast and lunch or serving on key firm committees.²³ And men out-earned women in most practice settings. Within the largest law firms (those with more than 250 attorneys) the median salary earned by men was \$15,000 higher than that earned by women.²⁴

If the past is any indication, these differences are likely to grow as legal careers advance. The 2001 report cited above from the ABA's Commission on Women in the Profession found that despite recent progress, women were still underrepresented in top positions all across the legal profession.²⁵ According to the most recent figures I could find, while women account for almost 30 percent of lawyers, they account for only about 15 percent of general counsels of Fortune 500 companies, 17 percent of law firm partners, and 23 percent of federal district and circuit judges.²⁶ At law schools, women account for roughly 19 percent of deans and 25 percent of tenured professors.²⁷

Now, I want to note that this shortage of women is hardly unique to the legal profession. The same point can be—and has been—made with regard to top business and political posts. But it seems to me that there's something especially troubling about these disparities in the legal profession—a profession dedicated to the pursuit of justice. Here, the concern about equal opportunity should be at its very highest.

So where do we go from here? One of the first questions we must grapple with is “What do the numbers mean?” What accounts for the documented difference in male and female career paths? This simple question has sparked enormous controversy.

Fanning the debate in recent years are reports of an “opt-out revolution,” to use the phrase coined by *New York Times* reporter Lisa Belkin.²⁸ In this supposed revolution, some of the nation's most highly educated young women plan to put aside their careers once they have children;

23. AFTER THE JD: FIRST RESULTS, *supra* note 20, at 58.

24. *Id.* at 58, 60 tbl.8.2.

25. See UNFINISHED AGENDA, *supra* note 3, at 5, 14.

26. See ABA COMM'N ON WOMEN IN THE PROFESSION, A CURRENT GLANCE AT WOMEN IN THE LAW 2005, at 1-3 (2005), <http://www.abanet.org/women/ataglance.pdf>.

27. *Id.* at 1-2.

28. Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 26, 2003, § 6 (Magazine), at 42.

they decide, in essence, that they can't—or don't want to—"have it all." A front-page *Times* story this September carried the headline "Many Women at Elite Colleges Set Career Path to Motherhood."²⁹ This article noted results of a recent survey of Yale undergraduates in which roughly 60 percent of women students responding said they'd cut back or stop work once they had children.³⁰ Not surprisingly, this piece triggered a flood of letters to the editor, with readers staking out deeply felt and sharply divergent positions:

"I cannot comprehend the ultimate passivity with which some women of my generation have resigned themselves to maintaining the status quo," said one letter writer.³¹

"But why shouldn't the raising of children be considered a career as well?" asked another.³²

Along with judgments grounded in social and political views, came practical concerns:

"I hope that they have a backup strategy: things do not always work out as planned," cautioned one writer.³³

And then—amidst all the strongly held views—came the following musing:

*"I'm glad that the things I declared when I was 19 . . . didn't make front-page news."*³⁴

Now this last comment is a good reality check. Who knows what these young women will be doing in five or twenty years?

And in fact, there's reason to think that the so-called "opt-out revolution" may be something of a mirage. As one letter to the editor astutely observed, of the Yale students who said they planned to curtail careers for kids, about half said they planned to work part-time while the other half said they planned to stop work—but perhaps for only a few years. The writer of this letter—herself a member of Princeton's Class of '73, the first

29. Louise Story, *N.Y. TIMES*, Sept. 20, 2005, at A1.

30. *Id.*

31. Amy L. Breglio, Letter to the Editor, *N.Y. TIMES*, Sept. 22, 2005, at A30.

32. David English, Letter to the Editor, *N.Y. TIMES*, Sept. 22, 2005, at A30.

33. Barbara Reisman, Letter to the Editor, *N.Y. TIMES*, Sept. 22, 2005, at A30.

34. Carolyn Gang Irving, Letter to the Editor, *N.Y. TIMES*, Sept. 22, 2005, at A30 (emphasis added).

to admit women—proposed an alternate (albeit somewhat unwieldy) headline for the *Times* story: “Majority of Women in Elite Colleges to Opt for Lifetime Careers Either Full Time or With a Short Pause for Children.” This, she noted, is precisely the path she and her friends followed some thirty years ago.³⁵

Backing up this hypothesis is a recent research report from the Center for Work-Life Policy that examined career paths of highly qualified women across a range of fields including law, business, medicine, and academia.³⁶ The study—which was published as a *Harvard Business Review* Research Report and whose lead author is gender-and-workplace expert Sylvia Ann Hewlett—makes the notable finding that 93 percent of women who have stepped out of the labor force want to return.³⁷

Ninety-three percent—that’s huge.

But the story doesn’t end there. What happens to these women when they try to opt back in? The data suggest that far too many face impassable roadblocks. All in all, only about three-quarters of women who have left the workforce succeed in rejoining it, according to the report.³⁸ And even those who leave for only a few years usually lag far behind in earning power throughout the rest of their careers. The researchers conclude that businesses have failed to take the steps needed to enable women who take some time off to resume their careers in a successful manner.³⁹

This issue is especially pressing because of its enormous scope. The report found that close to 40 percent of highly qualified women are “off-ramping”—voluntarily leaving their careers for some period of time.⁴⁰

What are the exit markers on this journey? What prompts women lawyers to turn off the career highway? Just over two-thirds of women—and nearly half of men—think personal and family responsibilities are the single largest barrier to women lawyers’ advancement, according to a 2001 study of top law school graduates by the women’s think tank Catalyst.⁴¹ But while women struggle with such obligations, it’s not clear that these are what finally drive them out the door. In fact, the Center for

35. Robin Herman, Letter to the Editor, *N.Y. TIMES*, Sept. 22, 2005, at A30.

36. SYLVIA ANN HEWLETT, CAROLYN BUCK LUCE, PEGGY SHILLER, AND SANDRA SOUTHWELL, *THE HIDDEN BRAIN DRAIN: OFF-RAMPS AND ON-RAMPS IN WOMEN’S CAREERS* (2005) [hereinafter *OFF-RAMPS AND ON-RAMPS*].

37. *Id.* at 42.

38. *Id.*

39. *See id.* at 2.

40. *Id.* at 2, 14, 16.

41. CATALYST, *WOMEN IN LAW: MAKING THE CASE* 17 (2001).

Work-Life Policy found that the biggest reasons women lawyers quit are because they're dissatisfied with work or feel stalled in their careers.⁴² Even just two to three years into practice, women are far more dissatisfied than men with every aspect of their jobs except the work itself, according to the *After the JD* study.⁴³ Given women's disproportionately high levels of discontent on such issues as relationships with and recognition by colleagues, control over work, compensation, and opportunities for advancement, it's not surprising that far more women than men said they planned to leave their jobs within two years.⁴⁴

Now I could go on about these issues at much greater length, but I think you get the idea. So I'd like to turn to solutions—to the question I asked at the start of this talk: *Where do we go from here?*

As we look for answers, it makes sense to consider women's actual choices and stated preferences. But while this is important information, it's just a starting point. That's because women's actual choices often reflect unnecessary structures and constraints—ways of ordering the workplace that prevent the people in it from creating the worklives they most desire. Even women's stated desires are often the result of contingent circumstances.

This issue comes to the fore when women talk about power. The Center for Work-Life Policy study found that only 20 percent of highly qualified female lawyers singled out "a powerful position" as a very important career goal.⁴⁵ Now to me this finding raises a red flag. Do women care so little about having an impact? About finding ways to bring their considerable talents to bear on the world's problems? I just don't believe it. I think women express themselves in this way only because in our society the concept of power unfortunately has become disconnected from the goal of improving our society. In any event, you see the general point I'm making: Women's actual choices and stated preferences are crucially important, but it makes sense also to look behind them and ask what kinds of workplace and other conditions they are reflecting.

And in this vein, women's disproportionate interest in public service activities seems to me worthy of some further thought. It is intriguing to consider whether women see public interest work not only as more personally fulfilling but also as more open to them—more likely to provide

42. OFF-RAMPS AND ON-RAMPS, *supra* note 36, at 93 ex.L1.1.

43. See AFTER THE JD: FIRST RESULTS, *supra* note 20, at 58.

44. Unpublished data analysis (on file with the author).

45. OFF-RAMPS AND ON-RAMPS, *supra* note 36, at 54.

opportunities for advancement and recognition, more prone to generate mutually appreciative relationships, more flexible regarding leave-taking and reentry. Closer study of the differences across practice settings, linked to the experiences of women in those settings, could help us to improve workplaces throughout the profession.

Now as I said at the start, these are issues for law schools no less than for the rest of the legal profession, and I'd like to turn now to some concrete steps we might take to address them. This is far from a complete list but I do think it gives an idea of where we need to go. Specifically, I want to talk about career counseling, mentorship, and—more broadly—collaboration between law schools and practitioners. Something noteworthy about all these responses is that they will assist both men and women. And this is not surprising, because many of the issues that women face in the workplace are issues for men as well. Women are what my colleague Professor Lani Guinier calls a “miner’s canary”—an allusion to the bird that alerted miners to toxins in the air.⁴⁶ They are a group whose greater vulnerability to certain conditions signals the dangers of those conditions for the whole population.

So first, career advising and the role law schools can play in this area. Many of the issues women face are issues that occur mid-career. We see this, in particular, in the challenges facing “off-ramped” women as they begin looking for work—often with hopes of taking their careers in new directions. Women’s careers tend to be non-linear. Indeed, the Center for Work-Life Policy report found that only 34 percent of female lawyers—and 42 percent of all the highly qualified women studied—saw their careers as progressing through a professional hierarchy.⁴⁷

Given these facts, law schools need to think about new ways of serving alumni—a role that should include services aimed at helping off-ramped women find work. And the need for mid-career advising is not just a women’s issue. Unlike their predecessors, all of today’s young lawyers—both women and men—are likely to hold multiple jobs in the course of their careers, making a series of transitions. Their biggest career decisions may well come five or ten or even twenty years after law school graduation.

For this reason, Harvard Law School is exploring ways to expand alumni advising, moving toward the concept of lifelong career services. Here’s an amazing statistic: The Center for Work-Life Policy study found more than half of on-ramping women want to change professions or fields, with

46. See LANI GUINIER & GERALD TORRES, *THE MINER’S CANARY* (2002).

47. *OFF-RAMPS AND ON-RAMPS*, *supra* note 36, at 28, 94 exh.L1.3.

more than 60 percent of these wanting to move from the corporate to the not-for-profit sector.⁴⁸ We have the ability—and the responsibility—to help them to do this.

Next, mentorship. I think we all know that mentors are key to success in the legal profession—as they doubtless are in most others. In addition to giving advice, mentors often model possibilities. Among other things, they can help other women see that power and authority are compatible with an ethic of decency and a fulfilling personal life. At law schools, women faculty and deans have a big role to play here. But there are other things law schools can do as well, such as finding ways to broker connections between students and alumni. To this end, Harvard has been working to build an active Alumni Network—a way for women, as well as men, to forge ties with others who share their professional interests. Of course, the most important mentors in a lawyer's life are likely to be on the job, so this is an even larger issue for law firms and other employers. But I think that law schools can play an important role in ensuring that women gain the kind of mentors who help them advance in the profession.

Most broadly, we must have greater collaboration between law schools and the profession in providing a forum for discussion and in otherwise addressing the whole panoply of issues affecting women's worklives.

At Harvard Law School, we're in the early planning stages for a Women's Leadership Summit—something I'm very excited about. We'll be bringing together women—and interested men—from the world of practice to brainstorm around the issues relating to women in the legal profession and to come up with concrete steps aimed at making a difference. I know our alumni. And I know that they're going to come up with some amazing ideas. This is still a ways off—we're thinking sometime in the next school year—but I have great hopes for this collaboration.

More generally, if we're to succeed in any of these undertakings, we must form a new partnership between the academy and the profession. This is a critical time in our profession's history—not just for women but for all lawyers, and indeed for all those who depend upon what we do here in the U.S. and around the globe. Charting a course for the profession in these times will require sustained cooperation between practitioners with the experience and wisdom to identify problems and implement solutions, and academic researchers with the ability to generate the systematic and unbiased research on which these solutions must be based. We at Harvard Law School are committed to forging this new partner-

48. *Id.* at 46.

ship, and we have established the Program on the Legal Profession to foster interdisciplinary research on the changes affecting lawyers and related professionals—very much including issues involving gender—and to build closer links between the bar and the academy.

I'll close with an anecdote involving a former and different Harvard Law School. Some years back, a young woman named Hillary Rodham faced a tough decision between the law schools of Harvard and Yale. She writes in her book *Living History* that she made her choice after attending a cocktail party at Harvard. At that party, a Harvard Law professor she describes as "straight out of the Paper Chase" responded to her question about the two schools in the following way: "Well, first of all, we don't have any close competitors"—(this is still something we believe, but we try not to say it)—"Secondly, we don't need any more women at Harvard."⁴⁹

Needless to say, that reply made her choice quite easy.

Flash forward to 2003. When Senator Hillary Clinton inscribed her book for me, she wrote—"to my friend Elena—who would have made sure I went to Harvard." Of course, I like to think she's right. And I also like to reflect on how those few words show how much has changed. A female senator from New York. A female Dean of Harvard Law School.

There's no doubt that much progress has been made. There's no doubt we need much more. Again, thank you for being here. I look forward to hearing from you—both now and in the future.

49. HILLARY RODHAM CLINTON, *LIVING HISTORY* 38 (2003).