



FOREWORD

The Modern Family Fragmented or Don't Let Your Children Grow Up to be Lawyers

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When asked by the *Law Review*, I originally suggested this Symposium's topic, "The Changing Role of the Family in the Law." My thought was that, without anyone knowing it, the family was possibly being separately defined in dozens of specialty areas. I thought this after seeing what seemed like the 200th report in the *New York Law Journal* on who was a relative and so entitled to succeed to a dead tenant's rent-regulated Manhattan apartment.¹

I suggested that the *Law Review* invite scholars who did not consider themselves family law people to comment on the family's definition in their own specialties. I imagined pieces on family as defined for rent control purposes, for class gift purposes,² for land use purposes³ and the

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¹ See Note, *All in the Family: Succession Rights and Rent Stabilized Apartments*, 53 BROOKLYN L. REV. 213 (1987); *Relative Entitled to Rent-Stabilized Lease*, N.Y.L.J., Dec. 20, 1988, at 1, col. 3.

² See Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917 (1989).

like. I further suggested that the *Law Review* ask someone to read all the papers I imagined being written and describe the patterns, if any, that emerged. I even suggested several authors who accepted. My reward for my modest contribution was that I was given the job of introducing the Symposium. For that I am honored.

As is often the case, the child turned out somewhat different from what the parent imagined, and since this splendid Symposium is somewhat different from what I imagined, I feel licensed to write a Foreword that is somewhat different, too.⁴

As I write this I wonder what can a Northeast Corridor, trusts and estates professor, turning fifty, obsessed these days by what my colleague Jack Ayer calls "the middle class going broke [in discharging family duties],"⁵ born and bred in a traditional family in a small city in upstate New York (the land that time forgot⁶), living in a new age "traditional" family in a smaller city, contribute to a Northern California law review symposium on family law in an era when the family spectrum is broadening and the political spectrum, almost as if to balance things, is narrowing? In my current writing and thinking I find myself standing on a particular, unfashionable patch of ground, and I feel that I have little choice except to declaim from there.

And what patch is that? It is the patch of the leftover liberal,⁷ trying

³ See Korngold, *Single Family Use Covenants: For Achieving a Balance Between Traditional Family Life and Individual Autonomy*, 22 U.C. DAVIS L. REV. 951 (1989).

⁴ This is not the only such symposium. See *Current Issues in Family Law*, 40 RUTGERS L. REV. 1023 (1988). One can hardly pick up a law review without finding a family law item. See, e.g., Note, *Custody Denials to Parents in Same-Sex Relationships: An Equal Protection Analysis*, 102 HARV. L. REV. 617 (1989). Indeed, if one looks at the *Michigan Law Review 1988 Survey of Books Relating to the Law*, one might be forgiven for concluding that family law is all that the law is about. See 86 MICH. L. REV. 1067 (1988).

⁵ See Dobris, *A Policy View of Medicaid Asset Planning by the Elderly: Expectations, Entitlement and Inheritance*, 24 REAL PROP. PROB. & TR. J. — (1989) (forthcoming) (including authorities cited therein); see also Otten, *Extended Families*, Wall St. J., Jan. 27, 1989, at 1, col. 1.

⁶ See W. KENNEDY, *IRONWEED* (1983).

⁷ See generally Collins & Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189 (1988); see also Soifer, *Beyond Mirrors: Lawrence Friedman's Moving Pictures*, 22 LAW & SOC'Y REV. 995 (1988). Liberalism may once again have its day. While the Property Section at the 1989 AALS Convention seemed to acknowledge only three valid approaches to teaching property: Critical Legal Studies, Law and Economics, and Feminism, the Professional Responsibility Section seemed willing to add a fourth, De Facto Liberalism. I believe that when the three have had their day and made their mark, we will have a need for action and pragmatism and will have

to write in plain English,⁸ who favors muddling through; who is a non-Marxist inheritor of Legal Realism, fascinated by questions and distinctions of social class; a close reader of texts who is not a would-be critic or neo-Derridaean; a nonfeminist who is constantly taken aback by the problems women face and the treehouse ("What's the password?") complexity of law professor feminism; a born again defender of the petty bourgeoisie;⁹ a person interested by deconstruction who is appalled by much of the fragmentation taking place in our society; a pragmatist and a white male of the species who is also somewhat taken aback by the responsibilities of middle age, middle class, and middle income. In short, a person who Katherine O'Donovan¹⁰ said, in great anger, had no principles. Perhaps no ideologies might be more accurate.

I thus find myself taken, with a little help from my friends, to the point of discussing men and women in law firms,¹¹ the changing role of the trust and estates lawyer, lawyers and their children, and whether children should grow up to be lawyers. In truth, I do not think very much about children and the law. My focus tends to be on women in the law and the law and women. I would say much of this was once called the battle of the sexes.¹²

As I read about corporate lawyers who work around the clock and "part-time" lawyer-moms who work nights and weekends and have no hopes of partnership because they do not work long enough hours,¹³

little choice. Thus, liberalism may still have another day. Of course, it will have to go forward under another flag such as mainstream, neodoctrinal Jeffersonianism or something similar.

⁸ See R. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (2d ed. 1985).

⁹ See generally Dobris, *supra* note 5.

¹⁰ K. O'DONOVAN, *SEXUAL DIVISIONS IN LAW* (1985).

¹¹ See Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 *FORDHAM L. REV.* 111 (1988). See generally J. ABRAMSON & B. FRANKLIN, *WHERE THEY ARE NOW, THE STORY OF THE WOMEN OF HARVARD LAW 1974* (1986); Grech & Jacobs, *Women and the Legal Profession, A Bibliography of Current Literature*, 44 *THE RECORD* 215 (1989).

¹² The expression is not a new one. See S. WESLEY, *THE BATTLE OF THE SEXES: A POEM* (2d ed. London 1724). The battle of the sexes is clearly grist for the law review mill. See, e.g., Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified* (Book Review), 82 *NW. U.L. REV.* 352 (1988) (reviewing C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987)); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497 (1983); see also K. O'DONOVAN, *supra* note 10. It also spills over onto family ground. See, e.g., Bartlett, *Re-Expressing Parenthood*, 98 *YALE L.J.* 293 (1988); see also *Symposium on Feminism and Political Theory*, 99 *ETHICS* 219 (1989). See generally Grech & Jacobs, *supra* note 11.

¹³ See Kaye, *supra* note 11; Kingson, *Women in the Law Say Path is Limited by*

and as I hear of women who want to raise children asking to be taken on board as trusts and estates lawyers after having worked in litigation or in mergers and acquisitions, I am convinced I have come upon a modest truth. That modest truth is that men are arranging the practice of law in large firms in large cities so that many women will choose to opt out of the richer and more prestigious specialties. It seems clear to me that one cannot raise a child and even remotely approach a traditional standard of what a home is plus have a partnership-level career in mergers and acquisitions or big time litigation. If for no other reason, this trend exists because these days, in those specialties, one has to be ready not to go home for days at a time.¹⁴ Someone else can raise the child (*e.g.*, a home spouse, a spouse with a nine-to-five job, a relative, or an employee) but not the ambitious, full-time lawyer-parent following a traditional path in a glamorous specialty.¹⁵ When all is said and done, that means that for all practical purposes, women who want to have children need not apply.

I suspect that this trend will cause an upswing in the use of boarding schools and at an earlier and earlier age. The English gentry are ready to send their children off to prep school after the third grade, and it seems to me that this will soon be common for ambitious American two-career couples. This boarding will keep the parent(s) (read mother) out of the "full-time" work force for the shortest period of time and will, I think, prove attractive in future years.

What this business of running certain specialty practices like war rooms or medical residencies in big city teaching hospitals has done is to halt the incipient downgrading in status, or the "feminization," of the legal profession. This is accomplished by marking off the areas in which the most money and the most prestige are to be found and where, as a practical matter, there are very few women lawyers. Five years ago I assumed that equal opportunity for women lawyers was the order of the day and that the downgrading of the profession's status via "feminization" was inevitable. It now seems to me that this trend will not be the case.¹⁶ I assume that stratification will be the rule instead of

"*Mommy Track*", N.Y. Times, Aug. 8, 1988, at A1, col. 5; *see also* Rimer, *Women, Jobs and Children: A New Generation Worries*, N.Y. Times, Nov. 27, 1988, at A1, col. 6. *But see* Margolick, *At the Bar, Beating the Odds and Jumping the "Mommy Track" on a Crooked Path to Partnership*, N.Y. Times, Nov. 11, 1988, at B10, col. 1. *See generally* Grech & Jacobs, *supra* note 11.

¹⁴ *See* Eichenwald, *Lead Lawyer for Carbide Relieved by End of Case*, N.Y. Times, Feb. 15, 1989, at C3, col. 5.

¹⁵ *See generally* Lacovara, *Mothers in the Law Office*, 3 WASH. LAW. 6 (1988).

¹⁶ *See generally* C. WILLIAMS, GENDER DIFFERENCES AT WORK (1989).

dilution of the whole profession's status.¹⁷

This is related to the continued or even increased interest of women lawyers with children in the trust and estates specialty and the apparent downgrading of the status of that specialty. As I read law journals and listen around I sense a serious surplus of trusts and estates lawyers. In addition, they are under siege. They are not profitable enough, financial planners are "stealing" their business, and there is no prestige in the practice.¹⁸ At the same time, women seem attracted to it because there is more time flexibility, a number of the clients are women and arguably more open to the idea of a woman lawyer, and the practice goes on successfully without the appearance of war.

The world I think I see¹⁹ is one turned inside out, with middle-aged,

¹⁷ Although my heart is not in it, I am not uncomfortable arguing that the new large law firm acceptance of new categories of nonpartner, career, lawyer employees is just a tool to accommodate the crop of women lawyers. For a discussion of these new categories from an economics perspective, see Gilson & Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567 (1989). The article says nothing about the question of women lawyers. That issue of the *Stanford Law Review* does, however, say much about feminism (or feminisms if you will). See Littleton, *Feminist Jurisprudence: The Difference Method Makes* (Book Review), 41 STAN. L. REV. 751 (1989) (reviewing C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987)).

¹⁸ See Pennell, *Report of the ACPC Colloquy on Estate Planning, Financial Planning and Beyond: The Next Progression; the Role for Lawyers and Law Schools*, 14 PROB. NOTES 18 (1988). Indeed, a book about a classic trusts topic — The Prudent Trustee Investor — is reviewed under the heading "Tort and Commercial Law" in the *Michigan Law Review 1988 Survey of Books Relating to the Law*. See 86 MICH. L. REV. 1067, 1237 (1988).

¹⁹ It is surely a world gone mad in the law reviews. It seems to be a world in which comments in the *Yale Law Journal* can be poor reproductions of works of visual art which consist of pictures of public and commercial buildings, one with a misty, Ghost Busters-like lush female face and lips imposed over it. It is entitled, "Thwart the Law; Baffle the Father." See Kruger, *Art-Commentary*, 97 YALE L.J. 1105 (1988). We are informed that the "author" is associated with a Yale Law School graduate and with the ultra-chic Mary Boone Gallery in New York. Traditional law review articles, with or without words, seem to be passe. See Mootz, *The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas and Ricoeur*, 68 B.U.L. REV. 523 (1988). What should a disgruntled reader do? Is she to send the *Yale Law Journal* a "ransom note" of cut-out letters that say: "Loose Lips Sink Ships" or "The Kiss of Death." The lips in question are women's lips, the artist is a woman, the Yale Law School graduate is a woman, and the works are displayed in a fashionable New York Gallery owned by a woman, the said Mary Boone. If I were Mary Boone I would be very concerned that I was passing from *Vogue*. Lawyers used to love pictures of little girls with big eyes; now it is buildings with big lips. This would have all been inconceivable twenty years ago, just as much as what is taking place in family law. Nobody wants to be a lawyer anymore. See Macneil, *Contractland In-*

middle-class white men, the supposed masters of the universe, running like frogs in front of the lawn mower.²⁰ Men are being forced to work harder for less money and less satisfaction,²¹ and they are pressed to discharge domestic duties.²² Ambitious and adventurous women are also discovering that work and single motherhood²³ do not make them free, although it seems superior to whatever else is around.²⁴ Indeed, as I have said, one sees women lawyers, working brutal schedules that would have appalled male lawyers of the 1960s, being relegated to the "mommie track" at major firms.²⁵ I see this relegation as a refusal to concede to the "feminization" of the legal profession that seemed to be

vaded Again: A Comment on Doctrinal Writing and Shell's Ethical Standards, 82 NW. U.L. REV. 1195 (1988); Margolick, *At the Bar, Alienated Lawyers Seeking Counsel in Making Transition to Other Careers*, N.Y. Times, Feb. 10, 1989, at B13, col. 1; Margolick, *At the Bar, Conclave in Herringbone Ponders Lofty and Mundane in Legal Education's Muddled Mission*, N.Y. Times, Jan. 13, 1989, at B8, col. 1. However, they all want to earn a lawyer's real or imagined wage, so they publish articles about hermeneutics and they publish pictures from New York galleries. On February 12, 1989, a Lexis search indicates that word Habermas appears in the Lexis law review data base 137 times but that it appears in no cases. Of course, someday it probably will. John Locke does.

²⁰ Trost, *Men, Too, Wrestle With Career-Family Stress*, Wall St. J., Nov. 1, 1988, at B1, col. 3.

²¹ See Kolata, *Secret of Surviving Mid-Career Malaise: Just Look Elsewhere*, N.Y. Times, Sept. 27, 1988, at B1, col. 1.

²² Trost, *supra* note 20, at B1, col. 3.

²³ I quote in its entirety the following letter to the editor in the New York Times:
To the Editor:

Did we miss something in your front-page report on women searching for ways to balance children and jobs (Nov. 27)? We were under the impression that having a family takes two: one father, one mother. The idea that a woman must unilaterally plan and raise a family is preposterous, and a prescription for familial and career disaster. What happened to dad?

Suzanne O. Rosenberg, Robert C. Rosenberg

N.Y. Times, July 2, 1988, at 14, col. 5.

²⁴ The shrinking American pie is perhaps forcing women to work to maintain living standards. Feminism may be as easily explained as a way to double the work force without increasing the population as it is explained in terms of justice, fairness, and human realization. See *Equality: The Power and Limits of the Law* (Book Review), 95 YALE L.J. 1769, 1779-80 (1986) (reviewing Z. EISENSTEIN, *FEMINISM AND SEXUAL EQUALITY* (1984)) ("The Reagan strategy, while causing enormous pain to millions of people, cannot reconstruct the patriarchal family. Too much has changed, both in the economy and in the aspirations of women and men."); see also Passell, *Economic Scene, Earnings Plight of Baby Boomers*, N.Y. Times, Sept. 21, 1988, at C2, col. 1.

²⁵ See Kingson, *supra* note 13, at A1, col. 5. Of course, all of this discussion assumes that women lawyers seek traditional, "successful" careers in the hierarchical world of law firms.

looming five years ago, when it appeared that increasing numbers of women in the legal profession would lead to a lowering of lawyer status. The "solution" seems to be that top-tier lawyers are expected to stay awake and away from home for abnormal amounts of time. An ambitious first cabin lawyer seemingly cannot have meaningful domestic responsibilities. No current definition of motherhood of which I am aware allows for multiday absences from a household that includes an infant. I fervently believe in great personal freedom, but it is not at all clear that turning things inside out is the answer when families are concerned.

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This essentially female population of young lawyers who are cheap because they are beginners and who then leave to have babies and not come back, or who permanently work at lower wages, is a boon for law firms' bottom lines.²⁶ Cheap help means more profits. Indeed, in nonlaw contexts, I have little doubt that young management women are replacing older middle management men at great savings to payrolls and pension plans.

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My final point is this. I find myself fascinated by whether lawyers can be and will be happy. The ultimate translation of this is, "Should my child grow up to be a lawyer?" To put it differently, I often wonder if our graduates go off to live good lives, which I would define, perhaps ethnocentrically, as family lives. I ask this in the context of this Symposium because it seems to me that a major purpose of family life is to perfect our children's lives.²⁷ If the world of law is hostile to families and if human potential cannot be realized in law practice, this Foreword is an occasion to note it. I obviously have my concerns and doubts. However, I do believe that many lawyers want their kids to be lawyers, and that is an optimistic thought. I think that they agree with Harrison Tweed who said, as we are so often reminded, "I have a high

²⁶ See Kaye, *supra* note 11, at 120-21. The ultimate expression of all this is the lawyer "temp," a growing phenomenon. See Berkman, *Temporarily Yours: Associates for Hire*, AM. LAW., Mar. 1988, at 24 (cited in Gilson & Mnookin, *supra* note 17, at 592 n.71). See generally Grech & Jacobs, *supra* note 12, at 215.

²⁷ For an economically oriented discussion of altruism towards children, see Becker & Murphy, *The Family and the State*, 31 J.L. & ECON. 1, 3-8 (1988). The matters discussed in this Foreword are considered in many places including Menkel-Meadow, *The Comparative Sociology of Women Lawyers: The "Feminization" of the Legal Profession*, 24 OSGOODE HALL L.J. 897 (1986); Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163 (1988); Schwartz, *Management, Women, and the New Facts of Life*, 57 HARV. BUS. REV. 65 (1989).

opinion of lawyers. With all their faults, they stack up well against those in every other occupation or profession. They are better to work with or play with or fight with or drink with, than most other varieties of [hu]mankind.”²⁸

²⁸ M. MAYER, *THE LAWYERS* 3 (1967).