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## Myths About Women's Careers in Law

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## MYTHS ABOUT WOMEN'S CAREERS IN LAW

PATRICIA M. WALD

### **Abstract:**

Judge Wald discusses several "myths" about women's careers in the law that she has encountered in hers, including the presence of hearty pioneers who despite obstacles and a cold climate pursued satisfying legal careers decades before the "women's movement" of the 1970's; the current status of women in the profession and the impediments to their further advancement, the enduring problems they confront in maintaining the "delicate balance" between marriage, motherhood and careers and the institutional reticence to accommodate their dual role, the need for vigilance to keep the gains they have already made from slipping away, whether men and women judges decide cases differently, weathering the inevitable setbacks and disappointments that show up in most legal careers and some modest advice on priorities in life and the law.

### **Author:**

Hon. Patricia M. Wald was the Chief Judge U.S. Court of Appeals (D.C. Circuit) (ret) and also served as a Justice for the International Criminal Tribunal for the former Yugoslavia (1999-2001).

I feel privileged to talk to this group of women lawyers and women law students who are embarking upon a career that I still consider to be one of the most satisfying ones I know, despite all the recent talk about decreasing law school enrollments and difficulties in navigating the job market. One of its most attractive aspects is the infinite variety of places (not just geographical) it can take you and its adaptability to the many different life styles and situations in which women especially, though not exclusively, may find themselves over a life span. My own legal journey went from law clerk, to private practice, to fulltime wife and mother, to part-time government lawyer, public policy writer, legal services lawyer, public interest lawyer, Department of Justice legislative liaison, federal appellate judge, international war crimes tribunal justice, NGO board member, Weapons of Mass Destruction investigator, law professor, pro bono adviser to a major law firm, and currently part-time privacy and civil liberties oversight Board member for counterterrorism programs. As one of my critics wryly observed, not entirely as a compliment, I have had a spotty employment record.

But I have had a great time. Along the way I learned a few things I will share with you tonight about women and legal careers, which I will categorize under the rubric of myths or perhaps more accurately, half-truths. I know women's career successes and obstacles are a topic much discussed in the news recently, especially Sheryl Sandberg's opus "Lean In: Women, Work and the Will to Lead."<sup>1</sup> I can only comment that at my age, if I lean in too far, I'm liable to fall down and break a knee or hip. So I hope you'll be indulgent with my somewhat more nuanced take on what the last sixty years have meant for women in the law and what's still ahead.

Myth No 1: There was no significant movement toward career opportunities for women in the law until Betty Friedan's book "The Feminine Mystique"<sup>2</sup> spurred the women's movement of the 1960s and '70s. This may be a personal pique since I was part of a fairly vigorous group of women lawyers in the '40s and '50s before "the movement" got going. No question the surge came more than a decade later, but feminist historians have documented the parade of women lawyer pioneers that preceded it. In my 1948 entering class at Yale Law School there were 10 women out of 180. Some women were former

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<sup>1</sup> SHERYL SANDBERG, LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD (2013).

<sup>2</sup> BETTY FRIEDAN, THE FEMININE MYSTIQUE (1963).

WAVE and WAC officers on the GI Bill of Rights; seven of my classmates went on to become judges, high government officials, tenured law professors (including the first professor at Harvard Law School which didn't admit women when I applied), and successful practitioners.

Yes, in Virginia, there were women judges in the first half of the 20th century and ironically I remember as a child many of the movie stars of the '30s and '40s—Myrna Loy, Katherine Hepburn, Rosalind Russell—playing the roles of judges and crusading lawyers. In real life too there were several women federal district judges and a woman circuit judge, Florence Allen, appointed by President Roosevelt in the 1930s. He also had appointed a woman Secretary of Labor, Frances Perkins, and women agency heads in the New Deal. Not many for sure, but there were a few role models for persistent young women to hang onto. There is no debate that women lawyers still had a far piece to go back in 1951 when I graduated from law school, but it is a myth that there was no movement, no role models, no awareness among the admittedly small number of women lawyers that we deserved and in fact we would work for greater recognition and our rightful places in the profession. There were indeed also a few brave and farsighted men lawyers in those days who went out of their way to advance women lawyers; my clerkship on the 2nd circuit with Judge Jerome Frank, a pioneer of the legal realism school who had already hired two women law clerks before me, was one example and I was recommended to him by two male law professors.

When I finished the clerkship, the newly formed law firm of Thurman Arnold, Abe Fortas, and Paul Porter took me on as an associate. They assigned me to work on their most high profile cases including defending victims of the McCarthy era like Owen Lattimore, the Johns Hopkins professor accused of writing on Asian Pacific affairs in a way that “helped” the Communists in China (he was not charged as a Communist himself, and a courageous, former Republican governor then sitting as a district judge dismissed the case twice).<sup>3</sup> Several of the partners at AF&P had lawyer wives themselves. Indeed in many cases in the '60s and '70s, when the move toward putting more women in government jobs took root, it was my generation of women lawyers, already trained and with some experience under their belts, that provided the initial pool from which the new wave of appointments would come. My return to the law, by way of the Bobby Kennedy

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<sup>3</sup> United States v. Lattimore, 112 F. Supp. 507 (D.D.C. 1953).

Justice Department after ten years of homemaking and child raising in the early '60s, was only possible because I already had my degree and some work experience.

My message here is not to undercut the enormity of the women's movement of the '60-'70s and the daunting deficit in women's career opportunities it had to overcome, a work still in progress, but rather to give a small historical plaudit to the cluster of women lawyers and their male allies who did make some progress, however tentative, for women in a very dense thicket.

Myth No. 2: Women lawyers have made enormous strides in the past decades and can be expected to keep advancing in a linear fashion in the future. Actually, most commentators do not adhere to this myth anymore and indeed some like Stephanie Coontz of the Washington Post say just the opposite—women are stalled in their rise to positions of power and affluence.<sup>4</sup> The truth I think is somewhere in between, especially for women lawyers. It is certainly true we have made significant progress numbers-wise in the profession, in judgeships, on law faculties (37% of law professors are women), in entry level opportunities in law firms, and in high level government jobs, including prosecutors and bar leadership).<sup>5</sup> The incidence of palpable bias against hiring women in legal jobs has diminished dramatically. No longer, as at the time of my own first job search, are women turned away because the firm already has their “woman” (singular), or are women asked at interviews if they plan to have children, or when an offer is forthcoming, it is for a lower salary than for a man because of a perception that women do not have the same family financial obligations as men. But, and there are some big buts, Sheryl Sandberg says “Women face real obstacles in the professional world, including blatant and subtle sexism, discrimination, and sexual harassment.”<sup>6</sup> We know about the still largely un-shattered glass ceiling for equity partnerships in big firms among the top 200 law

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<sup>4</sup> Stephanie Coontz, *Why Gender Equality Stalled*, N.Y. TIMES, Feb 17, 2013 at SR1.

<sup>5</sup> 2008-2009 AALS Statistical Report on Law Faculty, THE ASSOCIATION OF AMERICAN LAW SCHOOLS, <http://www.aals.org/statistics/2009dlt/gender.html> (last visited Mar. 12, 2014).

<sup>6</sup> SANDBERG, *supra* note 1, at 8.

firms, 64% of women are associates but only 17% of partners are women.<sup>7</sup>

The causes are disputed, but observations from my own daughters and their friends and from the dozens of women law clerks I hired over 2 ½ decades, focus on subtle differences in how much more difficult it can be for women to locate and manipulate the levers of personal influence inside and outside the firm, with supervisors, senior partners, and clients. These factors have as much, if not more, to do with the rapidity of their upward progress in the firm culture as individual talents and work ethic. We may have the beginnings of an old girl's network (though I haven't seen much of in evidence) but even if it does exist, it is much thinner than the old boys' muscular one which has been around for a much longer time.

As a result, the kind of informal relationships with potential and actual clients that are spawned on golf dates, squash courts, through sports and private club memberships, and through old school ties still do not appear as accessible for women as men lawyers. Private practice nowadays is a rainmaker-dominant enterprise, which is not to say many women lawyers are not good at it, but rather that the traditional background of male lawyers and their relationships with business leaders and other potential clients often gives them an advantage. A recent Washington Post review of the book *Blind Spot: Hidden Biases of Good People* points out, most of today's discrimination stems not from attempts to harm anyone but from selective helping.<sup>8</sup> We're each part of several groups defined by race, gender, religion, family, alma mater and so on, and when we go out of our way to help an in-group member, we don't see that as a bad thing. We're being 'good people.' But such selective privileging reinforces the status quo. "The rich get richer and the rest fall behind."<sup>9</sup> That syndrome applies to women in the marketplace as well.<sup>10</sup>

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<sup>7</sup> Stephanie A. Scharf et al., Report of the Eighth Annual NAWL National Survey on Retention and Promotion of Women in Law Firms, National Association of Women Lawyers, (Feb. 25, 2014), <http://www.nawl.org/p/cm/ld/fid=82#surveys>.

<sup>8</sup> Matthew Hutson, *Discovering a World of Discreet Prejudice*, WASH POST, Feb. 10, 2013, at B6. (reviewing Mahzarin R. Banaj and Anthony G. Greenwaldi, *Blind Spot: Hidden Biases of Good People*).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

I am aware that women's network groups are being organized to fill this gap and it is essential they do so. Gail Sheehy, the chronicler of women's passages, says the "new feminism" is "women mentoring and helping other women to rise in formerly male hierarchies...[i]t's our obligation to help one another, to sponsor one another, to hire one another, to vote for one another, to uplift one another."<sup>11</sup> But as I will discuss in the next "myth," all women do not operate that way. In my experience, the United States government has always been somewhat of a more equal opportunity employer than private practice, but even there, subtle traditional and cultural obstacles to women lawyers' advancement linger. For instance, women lawyers are less likely to run for elected judgeships or prosecutorial positions because they are not solicited or encouraged by those already in office or by bar officials, mostly men, who have a strong voice in nominations.<sup>12</sup> The rising influence of money in state judicial elections, much of which is directed to more well-known male candidates, makes fundraising for women an essential component of mentoring.<sup>13</sup> Women's bar associations like this one are extraordinarily important as antidotes to these obstacles in mobilizing support for women candidates.

Back in 1979 when I was nominated to the Court of Appeals, the D.C. Women's Bar Association as well as women in the ABA played a strong role in securing my confirmation over the opposition of some evangelical groups who labeled my stands on juvenile rights and drug education anti-family. One declared I was "an instrument of the devil." On the international scene, I have seen the influence of women's NGOs in pushing women for judgeships and prosecutors in

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<sup>11</sup> Gail Sheehy, *New Feminists: Young, Cultural, Strategic, and Looking Out For Each Other*, THE DAILY BEAST, (Feb. 26, 2013), <http://www.thedailybeast.com/articles/2013/02/26/new-feminists-young-multicultural-strategic-looking-out-for-each-other.html>.

<sup>12</sup> *But see* Sylvia Ann Hewlett, *Mentors Are Good. Sponsors Are Better.*, N.Y. TIMES, Apr. 14, 2013, at BU7 ("To get ahead women need to acquire a sponsor — a powerfully positioned champion — to help them escape the 'marzipan layer,' that sticky middle slice of management where so many driven and talented women languish" . . . "When it comes to figuring out whom to sponsor, senior leaders—typically white men—most readily turn to the people they feel most comfortable with. Most often, that means other white men.") *Id.*; Ben Pershing, *Women Rule Va Ballot Box but are Absent From Ballot*, WASH. POST, June 15, 2013, at A1.

<sup>13</sup> *See* Hewlett, *supra* note 12.

international courts, and substantively for recognition and prosecutions of sexual crimes under international law.<sup>14</sup>

We also hear about the dangers of women handicapping themselves by self-stereotyping, and that is one of Sandberg's main points.<sup>15</sup> She believes women are not assertive, even "bossy" enough and don't take enough risks in striving for top leadership positions.<sup>16</sup> In a 2004 survey, 40% of women said that it was "much better for everyone involved if the man is the achiever outside the home and the woman takes care" of the household.<sup>17</sup> I trust most women lawyers have now evolved beyond such thinking. Still, U.S. Supreme Court Associate Justice Sonia Sotomayor, in her recent autobiography, refers to a former colleague from the private practice she worked in after leaving the DAs office describing her approvingly as a "tough bitch".<sup>18</sup> That is, unfortunately, too often a term of endearment for upwardly mobile women. But many women lawyers are not and do not wish to be described as "tough bitches," and in my view it should not be an essential mark of success.<sup>19</sup> Certainly the equivalent label for a male lawyer, "tough bastard" is not as clearly complementary. There is no doubt in my mind that women, including female lawyers, still face substantial challenges to the ideal of acceptance and rewards based on aptitude and performance. I also agree that women have to watch their backs so they—and not male colleagues—get full credit for their work and innovative ideas. I am less sure about the stress on combat

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<sup>14</sup> See Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles*, 21 BERKELEY J. INT'L L. 288, 317 (2003).

<sup>15</sup> Ruth Marcus, Op-Ed., *Sheryl Sandberg's valuable advice*, WASH. POST (Mar. 5, 2013), available at [http://www.washingtonpost.com/opinions/ruth-marcus-sheryl-sandbergs-valuable-lesson/2013/03/05/fc3612bc-85cb-11e2-98a3-b3db6b9ac586\\_story.html](http://www.washingtonpost.com/opinions/ruth-marcus-sheryl-sandbergs-valuable-lesson/2013/03/05/fc3612bc-85cb-11e2-98a3-b3db6b9ac586_story.html).

<sup>16</sup> See generally *id.*

<sup>17</sup> Coontz, *supra* note 4.

<sup>18</sup> SONIA SOTOMAYOR, *MY BELOVED WORLD*, 216 (2013).

<sup>19</sup> See generally Brigid Schulte, *The Business Double Standard*, WASH. POST, April 12, 2013, at C.1 (an anecdotal account of women in Washington and elsewhere who "pick on" other women, and are terrible bosses and the other side of the coin, whether women in top positions are caught in a "double bind", "their every move...closely watched, harshly judged and often found wanting...[e]specially when it comes to how they treat other women").

readiness as an essential; on the extreme, it can backfire and hurt women as well as men in terms of colleagues' respect, loyalty, and the efficiency of team-related tasks.<sup>20</sup> We do not all work in the social media world where individual accomplishment is at a premium.

And, of course, there is the enduring truth—I refuse to refer to it as a problem – that men and women are biologically different and that nature chose women to bear and feed children. Anthropologists and sociologists differ in opinion as to whether this foreordains that women should also remain the principal caretakers throughout childhood; certainly in our society there is a presumption that they should.<sup>21</sup> A recent Pew survey showed that mothers spend twice as much time in housework and childcare as fathers, even in households with two working parents.<sup>22</sup> However, the rate at which fathers are contributing has tripled since 1965.<sup>23</sup> And let's face it: many women want to assume a substantial and even primary role in the upbringing of their children.<sup>24</sup>

Sally Quinn, former Washington Post Editor Ben Bradley's wife, wrote recently that was her choice.<sup>25</sup> I also timed-out for over 10 years at home, though I had perhaps the most supportive and joyful participant spouse ever. I agree with Quinn, it is a choice that should be left to women without guilt that they are deserting the feminist cause. My own mother had to work fulltime throughout my childhood (without any nannies or other paid help), so admittedly, I came to my own decision with some preconceived notions about the choice. Kathleen Parker, another Washington Post columnist, writes: “[u]nlike

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<sup>20</sup> Brigid Schulte, *Dads Feeling the Pinch*, WASH. POST, March, 14, 2013 at B3 (citing a Pew Research Center Report).

<sup>21</sup> Jennifer C. Kerr, *Poll Finds Attitude Shift Among Working Moms*, ASSOC. PRESS, Mar. 14, 2013, <http://bigstory.ap.org/article/poll-finds-attitude-shift-among-working-moms>.

<sup>22</sup> Brigid Schulte, *More Fathers Than Mothers say they Aren't Spending Enough Time With Their Kids*, WASH. POST, Mar. 14, 2013, [http://www.washingtonpost.com/local/more-fathers-than-mothers-say-they-arent-spending-enough-time-with-their-kids/2013/03/13/1f969de8-8bf9-11e2-b63f-f53fb9f2fcb4\\_story.html](http://www.washingtonpost.com/local/more-fathers-than-mothers-say-they-arent-spending-enough-time-with-their-kids/2013/03/13/1f969de8-8bf9-11e2-b63f-f53fb9f2fcb4_story.html)

<sup>23</sup> *Id.*

<sup>24</sup> Sally Quinn, *Once Again, Feminists Engage in a Fight We Shouldn't Have*, WASH. POST, Mar. 14, 2013, [http://articles.washingtonpost.com/2013-03-14/lifestyle/37716935\\_1\\_gloria-steinem-betty-friedan-women](http://articles.washingtonpost.com/2013-03-14/lifestyle/37716935_1_gloria-steinem-betty-friedan-women).

<sup>25</sup> *Id.*

Friedan, I wasn't tethered to home but to a job. Rather than resenting the prospect of staying home with a baby, I was stricken by the realization that I couldn't."<sup>26</sup> The Pew survey showed that among women with children under eighteen, 32% would like to work fulltime, up from 20% in 2007 (though the authors attribute this in part to economic pressures).<sup>27</sup> But there is still 68% who would prefer part time or no time.<sup>28</sup> Balancing work and family life is not for sissies—rich or poor—and it never will be.

I find it interesting that Parker, and several other commentators, say that Friedan and the original women's movement focused mainly on the need for women to change their attitudes and aspirations, to reject the notion that they were destined to sacrifice their ambitions and potential to home duties.<sup>29</sup> It (the movement and especially Friedan) did not tackle the legal and cultural obstacles in the workplace that stymied any attempts by women to break through the stereotypes and seek dual roles<sup>30</sup>, nor did it pay attention to women of color or working class women—like my mother—who had no real choice.<sup>31</sup> Sandberg is criticized in some quarters along the same lines; putting a priority on changing women's attitudes about leadership rather than reform of the social and economic institutions that impede women's career tracks.<sup>32</sup>

Witness the controversy about Yahoo CEO, Marissa Mayer, who built a nursery next to her office for her newborn, but subsequently vetoed working at home for her employees on the ground that “communication and collaboration . . . [are] important, so we need to be working side-by-side” . . . ‘Speed and quality are often sacrificed

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<sup>26</sup> Kathleen Parker, Op-Ed., *Myths of the 'Mystique'*, WASH. POST, Feb. 13, 2013, at A21.

<sup>27</sup> Jennifer C. Kerr, *Pew Study on Modern Parenthood: Working Mothers Increasingly Want Full-Time Jobs*, HUFFINGTONPOST.COM (Mar. 14, 2013), [http://www.huffingtonpost.com/2013/03/14/pew-study-modern-parenthood-working-mothers\\_n\\_2875598.html](http://www.huffingtonpost.com/2013/03/14/pew-study-modern-parenthood-working-mothers_n_2875598.html).

<sup>28</sup> *See id.*

<sup>29</sup> *See Parker, supra* note 26.

<sup>30</sup> *See id.*

<sup>31</sup> *Id.*

<sup>32</sup> *See generally* Marcus, *supra* note 15 (discussing the “snarky” reaction to Sandberg's book).

when we work from home.”<sup>33</sup> Women are divided on this one as well. Ruth Marcus tells us, “working from home isn’t just a girl thing . . . it is an important tool in the arsenal of parental juggling and parental sanity.”<sup>34</sup> She wonders “whether . . . Mayer [is] demonstrating that she is as tough—or as boneheaded—as any guy.”<sup>35</sup> The New York Times editorial chimes in with surveys that allegedly show working at home is more productive, cuts down on peak traffic, improves employee morale and produces less turnover. Moreover, ten percent of American workers work at home at least 1 day a week.<sup>36</sup> Yet as the Times continues, “the rate at which home-based workers were promoted dropped by 50 percent.”<sup>37</sup> Michael Winerip, writing in the New York Times as an enthusiastic sharer in the home/child care business, questions whether:

A more parent friendly attitude about the workplace will catapult women upward . . . I’ve seen very few people reach the top or even near the top while working full time at home . . . [t]hose jobs that refuse to be friendly are often the hardest, most unpredictable, require the most personal sacrifices and . . . deserve the best compensation and most corporate status.<sup>38</sup>

Parker opines in a similar vein, calling for a Mommy Truce:

The Mommy wars will never end. There’s no winning because except for the best educated and wealthiest it isn’t possible to reach the top of the corporate ladder and also take care of babies. In a saner world we wouldn’t try.<sup>39</sup>

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<sup>33</sup> Ruth Marcus, *A Real Yahoo Move*, WASH. POST, Feb. 27, 2013 at A15.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Editorial, *Location, Location, Location*, N.Y. TIMES, Mar. 2, 2013, at SR10.

<sup>37</sup> *Id.*

<sup>38</sup> Michael Winerip, *A Man’s View on ‘Having It All’*, N.Y. TIMES, Mar. 24, 2013, at SR11.

<sup>39</sup> Kathleen Parker, *Declare a Mommy Truce*, WASH. POST, Mar. 6, 2013, at A17.

I am not that pessimistic but it is a battlefield whose contours are still to be defined. Women lawyers are the best educated, if not always the wealthiest, and they do have an opportunity to pave new ground as to how or how much can be done; a lesson that might have benefits for their less privileged sisters. But in the end, I am convinced that our institutional patterns have to change, as well as our attitudes.

Our legal institutions tell us they are adjusting to time outs or special tracks for women lawyers who want both careers and mothering experience and some may have created truly workable schemata to achieve that duality. But I do know that there are still many young women lawyers with young children trying to achieve both who find that their assignments are not so juicy once they specify that they cannot leave town for long periods or at a moment's notice, or work late hours. Actually, it is shortsighted for legal firms or agencies not to realize that a woman lawyer's career can last up to seven decades, and that a delay of one hundred percent devotion to a career in the early years, because of timeouts or part time, evens out over the long run. But the old traditions that partnership or tenure decision must be achieved in x years persists and continues to work against the realization of women lawyers' full potential.

Coontz points out that nearly 30% of opt out moms could not find jobs when they wanted to go back, and 60% of those that did go back did not resume work in a professional capacity.<sup>40</sup> She goes on to argue that work hours and demands have intensified in the last several decades, but family friendly work and public policies have not kept pace; 70% of children live in families where all adults work and the average working couple works 82 hours per week.<sup>41</sup> The Family and Medical Leave Act of 1996 was only a modest step. It mandated unpaid leave of twelve weeks for family emergencies, but covered only one half of the nation's work force.<sup>42</sup> In 1990 the United States ranked 6th in female participation among the twenty-two wealthiest nations. It now ranks 17th. Unlike in other western nations, women here do not require paid maternity leave, and we have no upper limit on the number of hours in a work week.<sup>43</sup> The European Union issued a directive that

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<sup>40</sup> Coontz, *supra* note 4.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> ECONOMIC REPORT OF THE PRESIDENT, March 2013, 127, 129; *See also* Rosa DeLauro & Constance A. Morella, *20 Years, 100 Million Families Helped*, ROLL CALL (Feb.8, 2013, 5:34 PM),

member nations must allow parents of both genders to petition for part time, flexible, or home based work in addition to paid leave.<sup>44</sup>

One thing, however, is crystal clear to me from all the surveys and varying viewpoints: even if women believe they have arrived at or are approaching an equal place in some segments of the legal firmament, they cannot relax. Eternal vigilance is the price of staying put, let alone going forward. I had this brought home to me when I was a judge at the war crimes tribunal at the Hague, a UN court which insisted in all its public proclamations on gender equality. Nonetheless, when I came on the court in 1999, there were fourteen judges all elected by the UN General Assembly on nominations from member states. But there were only two women out of the fourteen judges; and I would replace one of them. A few years later, when I left, I was replaced by a man and only one woman remained, and she was reelected only by the skin of her teeth due in large part to aggressive campaigning by international women's groups. Years later, when I revisited the court, there was only one woman among the nine judges in the all important appeals chamber which reviews both the Yugoslav and the Rwanda trial chambers. The International Criminal Court drafters wrote into its charter a requirement that States nominating judges take account of the goal of a "fair representation of female and male judges" on that court.<sup>45</sup> And so far, elusive as that formula is, it has worked—even when successive elections had to be held, and at one point it produced a majority of women on the court. Since women and children are most often the victims of war, it is especially important that women have adequate representation on these international war crimes courts.<sup>46</sup>

Myth No. 3: Women lawyers and judges make the same legal decisions as men. Now, I have heard the old saw about wise old women and wise old men coming to the same conclusion for as long as

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[http://www.rollcall.com/news/delauro\\_and\\_morella\\_20\\_years\\_100\\_million\\_families\\_helped-222293-1.html](http://www.rollcall.com/news/delauro_and_morella_20_years_100_million_families_helped-222293-1.html) (providing a more upbeat appraisal of the FMLA).

<sup>44</sup> Coontz, *supra* note 4; see also Catherine Rampell, *Lean In, Dad*, N.Y. TIMES MAG., Apr. 7, 2013, at 18.

<sup>45</sup> Rome Statute of the International Criminal Court, art. 36, July 17, 1998, 2187 U.N.T.S. 90.

<sup>46</sup> *UN Says Women, Children Are Biggest Victims of War*, VOANEWS.COM (Nov. 2, 2009), <http://www.voanews.com/content/a-13-2009-03-08-voa9-68678402/408727.html>.

I can remember. There is research on both sides of this issue but minimally we know they do not always make the same decisions.<sup>47</sup> Every judge brings to her decisions the totality of her prior experience, and in the case of a woman, her gender is a heavy contributor. An example can be found in Supreme Court arguments about how severe an invasion of privacy it is for a teenage girl to be forced to submit to a body search for bringing aspirin to school.<sup>48</sup> Some of the male Justices suggested it was not a big deal for boys to strip down in the locker room; however Justice Ginsburg strongly indicated there was a world of difference between that and a young girls feelings about her adolescent body being investigated.<sup>49</sup>

There are other examples of female judges recognizing subtle forms of discrimination that male judges had never experienced. It is interesting that we hear about the value of a Secretary of Defense with combat experience, but never the value of a woman's childbirth or childrearing experience even for jobs that require empathy or understanding of the impact of violence or unjust treatment on such victims. The Rome statute speaks to the need to include judges with legal expertise on violence against women and children; is the single recognition of that need that I know of.<sup>50</sup> My experience at the ICTY trying war crimes against women cemented my beliefs that women bring special experiences to judging. This is why they need to be represented on tribunals that judge the effects on civilians of strategies and tactics initiated by male dominated military or nationalistic civilian leaders in wartime. It was a female judge who insisted on the recognition of rape as a war crime in its own right rather than hidden under the rubric of a crime of honor or a crime against dignity (where it languished for centuries). It may not be a coincidence that female judges have been on the bench during the most important breakthroughs for gender crimes: when international courts declared rape as a form of torture and an instrument of genocide, compulsory

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<sup>47</sup> See SALLY J. KENNEY, GENDER AND JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER 28-43 (2013).

<sup>48</sup> See *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) (holding, in part, that middle school principal's reasonable suspicion of impermissible possession of pain relief pills did not justify strip search of 13-year-old female student).

<sup>49</sup> *Id.*

<sup>50</sup> Rome Statute of the International Criminal Court, *supra* note 45.

naked dancing before troops as a war crime, and forced marriages as a crime against humanity.<sup>51</sup>

That said, my experience also dictates that not all women judges (or lawyers) are fungible; some have little or no interest in women's issues; some feel no need to take any women law clerks so as to build a pool of future judges and law teachers or to participate in mentoring younger women in any form. Indeed, my younger friends in practice and in corporate offices say the "queen bee" is not a thing of the past: the woman who has made it (she is convinced on her own) and sees other women coming up the ladder as competitors rather than worthy successors. Some actually feel they must affirmatively show their impartiality by bending over backwards not to give other women any breaks. Parker commented wryly in her column on the *Mommy Wars* "Mayer didn't just irk her employees; she did the unthinkable. She thwapped the sisterhood."<sup>52</sup> A Washington Post article challenged Sandberg's thesis that, "[m]ore female leadership will lead to fairer treatment for all women"<sup>53</sup> by citing empirical research showing that:

[f]emale bosses do seem to make life better for rank-and-file female workers-but they might make it harder for other female executives . . . [t]he presence of a woman in a top management position reduces rather than increases the probability that a woman will occupy another top position . . . particular true when a woman is chief executive.<sup>54</sup>

I tend to agree that however attractive concepts of new feminism or sisterhood may be, we are not yet there. In short, one must still pick one's women to support, publicly or inside organizations with care; feminism can be only skin deep.<sup>55</sup>

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<sup>51</sup> Askin, *supra* note 14, at 338, 342.

<sup>52</sup> Parker, *supra* note 39.

<sup>53</sup> Mike Konczal, *What Really Happens when Women 'lean in'*, WASH. POST, Mar. 24, 2013, at G2.

<sup>54</sup> *Id.*

<sup>55</sup> Brigid Schulte, *'Queen Bee' CEOs Get Scrutiny and Flak While 'King Wasps' Get a Free Pass*, WASH. POST, Apr. 11, 2013, [http://articles.washingtonpost.com/2013-04-11/lifestyle/38460161\\_1\\_marissa-mayer-new-yahoo-ceo-hubert-joly](http://articles.washingtonpost.com/2013-04-11/lifestyle/38460161_1_marissa-mayer-new-yahoo-ceo-hubert-joly).

Very recently, I was discouraged to see a talented woman's candidacy for a seat on my old court, the D.C. circuit, and who had been a law clerk of mine, filibustered—wrongfully, in my opinion—by the Senate despite the highest of qualification and an incomparable record of service in both the public and private sectors. The vote was squarely along party lines, but, most disappointingly, only one Republican woman broke ranks to support her on two separate cloture votes. I think women at the top have a responsibility to open opportunities for women down the line—my law clerks were pretty evenly divided among the genders and I make an extra effort to find suitable women candidates for top administrative posts at the court which had previously been almost exclusively male domains—as well as to create “job shares” for new mothers. But women have also to watch out for the “good daughter/bad daughter” syndrome I have encountered where male colleagues embrace one woman and favorably compare her to another not on merit, but in an effort to show they are not gender biased when, in fact, they are looking for a docile colleague who will not challenge continued male dominance. Women are not fungible any more than men, and while we should support more women in more new seats of power, we are entitled to exercise due diligence in choosing which ones.<sup>56</sup>

Myth No. 4: This one is about navigating a career and a life in the law and reflects my own lessons learned. Actually, it encompasses a cluster of related myths. The first half truth is you can be anything you want if you aim high enough and work hard enough. That is unfortunately not true. Luck plays a big part in all our lives. What partner or supervisor are you assigned to work for? What political party is in power during your peak years when you might be eligible for public office or a judgeship? Do you have a child with a disability requiring constant care? All of these can enter the calculus of your ambitions. We mostly are constrained to play the hand we are dealt; however, that doesn't mean of course that you don't try hard to overcome obstacles. But if you fail—and this may be controversial—then yes, do settle for second best. I have known too many talented lawyers, women included, who having missed the great ambition of their lives (after all there are a limited number of Supreme Court vacancies in any lifetime) consign themselves thereafter to a life of disgruntled passivity or wistful “what ifs” or “if only.” In my humble opinion, our profession, perhaps especially women in our profession, spend too much time and attention focusing on the handful of “stars” at

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<sup>56</sup> *Id.*

the expense of building those networks and recognizing the troops in the field who are preparing the way for generations of women at all levels of the profession.

One other hard lesson I learned was that one's career, like women's search for equality, does not move linearly. Several times I found I had to go back to square one, begin again at the bottom of the heap and start a down a new route. In each case that new start turned out to be essential to getting something I really wanted later on. In 1968, after writing several conference publications for the Kennedy Justice Department, savoring the taste of reform and working with high level officials, my party was voted out of power and swept me along with it. For the next few years I served as a legal service lawyer on the frontlines learning how to file complaints in Superior Court, make motions, and mimeograph briefs. That was the start of my litigating experience which led to public interest law and complex class actions, and years later proved to be decisive in my judgeship since a key senator from my home state, not of my party, declared that he would not support a candidate who did not have actual courtroom litigating experience.

Two decades later when I left the D.C. Circuit, where I had been Chief Judge, to serve on the ICTY, I was assigned to a trial court despite my 20 years of appellate judging. Yet that turned out to be a lucky break for me since that is where the heart of the war crimes tribunal was—hearing firsthand the hundreds of victim witnesses, seeing and listening to the justifications of perpetrators who had ordered or sanctioned the killing of thousands of innocent civilians, amassing the factual findings that would, or would not, support convictions of crimes against humanity and genocide. The lesson for me is that periodically going back into the weeds of the process where law and facts and human beings interface before your eyes can be an energizing experience. Although it may seem like a backward step in a career plan, it can be a necessary way to achieve something you ultimately want.

Lastly, your legal career can provide sustaining ballast to your life, but it should not be your entire life. You need to be a part of your community, your friends, and the world around you. A wise judge used to say “He who is ‘nothing but’ is ‘not even.’”<sup>57</sup> As Holmes said,

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<sup>57</sup> Stephen Breyer, Assoc. J., U.S., Ann. Meeting of the A.B.A. (Aug. 4, 2001).

the life of the law is not logic, but experience.<sup>58</sup> Make sure you get legal experience, as well as experience outside of the law. It is important to use outside experiences (including your unique experiences as a woman) in your legal career, for that is how the law can truly reflect the greatest good for the greatest number. Most importantly, the most important investment you will ever make is the person you choose to spend your life with, so don't neglect that relationship. It is your family—however defined—not your office or your scrapbook of clippings that will tell you, as you approach the end, whether your life in the law has truly been a success. Thanks for your patience, and Godspeed on your own journeys and in navigating the law and life.

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<sup>58</sup> See generally OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 167 (1920).







