



Margaret Thornton

# **The Flexible Cyborg: Work-Life Balance in Legal Practice**

Rechtswissenschaftliche  
Beiträge der  
Hamburger Sozialökonomie

Heft 8

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## Abstract\*

‘Work-life balance’ (‘WLB’) emerged as the catchcry of workers everywhere in the late 20<sup>th</sup> century. It was particularly appealing to women lawyers as it was thought that if a balance could be effected between work and life, satisfying careers and the raising of children could be combined. The key to effecting this balance, it was believed, was flexible work. Technology has facilitated this flexibility as all that is required is a computer, or other device with internet connection, and a mobile phone. Provided that the firm is agreeable, the lawyer would have a degree of autonomy in determining *when* and *where* the work is carried out. However, flexible work has not always proved to be the boon that it was hoped, for the shift from face-to-face time to virtual time has blurred the boundary between work and life, insidiously extending the hours of work and impinging on the realm of intimacy. Drawing on a web-based survey and interviews with lawyers Australia-wide, this article considers the ramifications of perpetual connectivity for lawyers in private practice, with particular regard to its gender significance.

## A. Introduction

### I. Perpetually Connected

Over 20 years ago, Haraway described the cyborg as ‘a hybrid of machine and organism, a creature of social reality as well as a creature of fiction’.<sup>1</sup> I am invoking the cyborg to signify the idea of a lawyer who is always ‘connected’ — to the internet or mobile phone — although Turkle has suggested that ‘[w]e are all cyborgs now’.<sup>2</sup> The metaphor captures the fluidity, hybridity and permeability associated with the dramatic pace of technological change. Despite the eagerness with which the latest apparatus is greeted, its impact is not politically neutral — for as each iteration of the relationship between the human and the technological is normalised, a new field of power comes into play. The impact on law firms of the explosion in technological innovation has been profound.<sup>3</sup> As technology does not recognise borders, the ‘law of any place’ prevails. Technology is now of such importance to legal practice that it has even been suggested minimum competency might need to be demonstrated as a prerequisite for lawyers to hold a practising certificate,<sup>4</sup> thereby elevating knowledge of technology to the same level as legal competencies presently required for admission, such as negotiation, advocacy or drafting.

Hardt and Negri describe legal practice as a form of immaterial labour, which they define

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1 Donna J Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (Free Association Books, 1991) 149.

2 Sherry Turkle, *Alone Together: Why We Expect More from Technology and Less from Each Other* (Basic Books, 2011) 152. Cf Haraway, above n 1, 150.

3 Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services* (Oxford University Press, 2008).

4 Leanne Mezrani, ‘Opting Out of Technology No Longer an Option’, *Lawyers Weekly* (online), 10 March 2015 <<http://www.lawyersweekly.com.au/news/16247-opting-out-of-technology-no-longer-an-option>>.

as labour that produces a continual exchange of information, knowledge and affect in the form of services.<sup>5</sup> Nevertheless, as with material labour, the aim is one of capital accumulation. The global law firms located in strategic parts of the world emulate the modus operandi of their multinational clients in the way they flit from place to place in the pursuit of profits. The analytic and symbolic tasks associated with processing and transmitting vast quantities of knowledge and information are dependent on accessible technology. This has significant ramifications for the conditions of lawyers' work compared with fixed sites, such as factories, that are associated with material labour.

Globalisation has hastened the reliance on technology by law firms because of the need to be available to corporate clients anywhere in the world 24 hours a day, seven days a week ('24/7'). The series of amalgamations that took place between Australian national law firms and elite London-based firms in 2011–12 had the effect of heightening competition not only between the burgeoning number of global firms, but also between individual lawyers in the competition for partnership,<sup>6</sup> which resulted in what Wald refers to as a 'hypercompetitive professional ideology'.<sup>7</sup> While promotion to partner was once the normal expectation of lawyers, the growth of global firms with several thousand employees has meant that few associates now have any prospect of becoming partner, despite working harder and longer.

Hypercompetition means that a small percentage of elite lawyers — the equity partners — dominate the apex of the organisational pyramid of law firms, while the productivity of associates is managed through techniques of surveillance such as billable hours. The pyramidal structure of law firms is highly gendered despite the fact that women now comprise nearly 50% of practitioners.<sup>8</sup> Women nevertheless constitute only 17.8% of equity partners and 22.4% of all partners (equity plus salary) in top-tier Australian firms,<sup>9</sup> which highlights the ongoing concern regarding gender equity, particularly as women are now the majority of senior associates.<sup>10</sup> The result, as Bolton and Muzio point out in the United Kingdom ('UK') context, is that male elites are able to extract an increasing share of surplus labour from the expanding cohorts of female subordinates: '[W]omen solicitors are opportunistically deployed as a reserve of relatively cheap salaried labour, which is subjected to work intensification ... and the presence and exploitation of female solicitors has become essential to the legal profession's profitable survival'.<sup>11</sup>

5 Michael Hardt and Antonio Negri, *Commonwealth* (Harvard University Press, 2009) 132.

6 Margaret Thornton, 'Hypercompetitiveness or a Balanced Life? Gendered Discourses in the Globalisation of Australian Law Firms' (2014) 17(2) *Legal Ethics* 153.

7 Eli Wald, 'Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms' (2010) 78(5) *Fordham Law Review* 2245, 2245.

8 A national demographic profile of the practising profession in 2014 revealed that women comprised 48.5% of solicitors, with the proportion of women increasing more rapidly than that of men in all jurisdictions other than the Northern Territory: Urbis Pty Ltd (for the Law Society of New South Wales), 2014 Law Society National Profile' (Final Report, 2015) 3–4 <<http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1005660.pdf>>.

9 These figures are based on a survey of 46 firms conducted by Beaton for *The Australian* newspaper. See Nicola Berkovic, 'Women Trail in Legal Partnerships Despite Dominating Graduate Intake', *The Australian* (Sydney), 3 July 2015, 26. The gendered organisational pyramid is a familiar phenomenon elsewhere. In the United States ('US'), for example, women constitute 17% of equity partners: American Bar Association, 'A Current Glance at Women in the Law' (July 2014) 2 <[http://www.americanbar.org/content/dam/aba/marketing/women/current\\_glance\\_statistics\\_july2014.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/current_glance_statistics_july2014.authcheckdam.pdf)>. In the UK in 2013, 9.4% of equity partnerships in the top 100 firms were held by women: Nicky Richmond, 'Part-Time Partners: Why the Legal Profession is Changing', *The Guardian* (online), 18 June 2013 <<http://www.theguardian.com/women-in-leadership/2013/jun/18/part-time-partners-legal-profession-changing>>. In Canada, the figure for equity partners is somewhat less than 30%: Twila Reid, 'Make it Happen', *Canadian Lawyer* (online), 16 March 2015 <<http://www.canadianlawyermag.com/5505/Make-it-happen.html>>.

10 Felicity Nelson, 'Women Dominate Senior Associate Positions, Excluded from Partnerships', *Lawyers Weekly* (online), 7 July 2015 <<http://www.lawyersweekly.com.au/news/16782-women-dominate-senior-associate-positions-excluded-from-partnerships>>.

11 Sharon C Bolton and Daniel Muzio, 'Can't Live with 'Em; Can't Live without 'Em: Gendered Segmentation in the

Two decades ago when society was on the cusp of the technological revolution, the new technology was viewed as the way of the future for women lawyers, for it was believed that it would enable them to work flexibly in order to combine work and family.<sup>12</sup> Women lawyers have continued to argue that if they had the opportunity to work flexibly, they would have a modicum of control over their working hours, they would be more likely to be represented in the upper echelons of law firm hierarchies and the haemorrhage of women from legal practice would be staunch.<sup>13</sup>

The genesis of flexibility in the labour market is in fact less benign as the concept was introduced to enable employers to exert greater control over workers by avoiding the rigidities of Fordism.<sup>14</sup> The idea was that workers who worked part-time or casually would be employed to supplement the primary labour market when required. More significantly, this peripheral labour force would make it easier to exploit the labour power of women.<sup>15</sup>

Just as the cyborg tends to be associated with the feminine in science fiction,<sup>16</sup> ‘being connected’ by ‘working from home’ *during normal working hours* is a manifestation of flexible work that is overwhelmingly feminised. While Haraway’s fable draws strength from her vision that there is an alternative to a male-centred society, it is far from clear that worker-cyborgs possess the ability to create an alternative society, although women lawyers are undoubtedly challenging orthodoxy through the establishment of new forms of legal practice, as I will suggest. At the same time, portable technology, or what Bauman refers to as ‘Light Capitalism’,<sup>17</sup> has niftily adapted in order to colonise the private sphere as a new site of productivity.

There is a substantial literature on the advantages of flexible work for women lawyers;<sup>18</sup> I am not suggesting that they are all necessarily exploited in the way Harvey identifies,<sup>19</sup> but the deleterious impact of ‘working from home’ has undoubtedly been accorded short shrift. In focusing on this issue, I also consider the significance of flexible work for full-time workers — male, as well as female — who remain ‘connected’ by continuing to work and respond to email at night, at weekends, and on vacation. As a result, I conclude that the economic sphere is in danger of colonising the sphere of intimacy by stealth.

Legal Profession’ (2007) 41(1) *Sociology* 47, 60.

12 Mary Jane Mossman, ‘Lawyers and Family Life: New Directions for the 1990’s (Part Two)’ (1994) 2(2) *Feminist Legal Studies* 159, 167.

13 See, eg, Victorian Women Lawyers, ‘Flexible Work Protocols: A Best Practice Guide for Productive and Engaged Legal Workplaces’ (2015); Law Council of Australia, ‘National Attrition and Re-Engagement Study (NARS) Report’ (2014) (*NARS Report*); Victorian Equal Opportunity and Human Rights Commission, ‘Changing the Rules: The Experiences of Female Lawyers in Victoria’ (30 November 2012); Law Society of New South Wales, ‘Thought Leadership 2011: Advancement of Women in the Profession’ (Report, 2011); Alicia Patterson, ‘Bendable or Expendable? Practices and Attitudes towards Work Flexibility in Victoria’s Biggest Legal Employers’ (Report, Law Institute of Victoria, 2006); Victorian Women Lawyers, ‘A 360° Review: Flexible Work Practices — Confronting Myths and Realities in the Legal Profession’ (Report, November 2005); Sue Kaufmann and Georgina Frost, ‘Flexible Partnership — Making it Work in Law Firms’ (Report, Victorian Women Lawyers, 2002).

14 David Harvey, *The Condition of Postmodernity: An Enquiry into the Origins of Cultural Change* (Blackwell, 1990) 147.

15 *Ibid* 133, 153.

16 J Andrew Brown, *Cyborgs in Latin America* (Palgrave Macmillan, 2010).

17 ‘Light Capitalism’ is contrasted with ‘Heavy Capitalism’, which refers to buildings and machinery. See Zygmunt Bauman, *Liquid Modernity* (Polity, 2000) 54, 57–9.

18 See above n 13.

19 Harvey, above n 14.



## II. Methodology

To acquire a better understanding of the way legal work is encroaching on private life, I conducted an Australia-wide web-based survey completed by male (25%) and female (75%) lawyers in private firms (n=424) in 2012–13. I also conducted 54 follow-up interviews, six of which were with Australian lawyers working for global firms based in London. Information about the survey and the website was distributed with the assistance of women lawyers associations and state and territory law societies, which agreed to bring the survey to the attention of their members. The focus was on work-life balance ('WLB') in private law firms, particularly large corporate law firms (ie 100+ lawyers).

I was interested in establishing lawyers' own perceptions of the impact of WLB, individual wellbeing and family harmony in light of the increased competition both within and between law firms following the acceptance of competition policy at the turn of the 21<sup>st</sup> century. Competition was ratcheted up as global law firms based in the northern hemisphere began to enter the legal services market and to amalgamate with prominent Australian national firms.

In terms of firm type, 25% of respondents worked for global firms, 32% for national firms, 28% for single state or territory firms and 15% for other employers, a number of whom had formerly worked for a large law firm. In terms of firm size, most respondents (59%) worked in large firms: more than 1,000 lawyers (31%); 500 to 1,000 (14%); 100 to 500 (14%); while 41% worked in small firms (less than 100 lawyers).

As respondents to the survey self-selected, the possibility of skewed responses is acknowledged, but similar flaws may also beset alternative methods of selection, such as targeting firms or individuals. In any case, the survey was not intended to be a strict quantitative exercise, particularly as the concept of flexible work is beset with ambiguity. I was interested in exploring the views of respondents as to whether they thought WLB was attainable or whether work was leaching into the private sphere and the intimacy of the home. In this regard, the textual responses were of greater interest than quantitative rigour.

The survey was anonymous, although respondents were asked to indicate whether they were willing to be interviewed — face-to-face or by telephone — to elaborate on their responses. Confidentiality was thereby forfeited, but anonymity was guaranteed as a condition of informed consent in accordance with ethics approval obtained from the Human Research Ethics Committee of the Australian National University. The semi-structured interviews focused on interviewees' perceptions and experiences of change in the culture of the law firm, and the impact of those changes on WLB, including the effect of flexible work on the respondent's career and family life. I was also interested in respondents' perceptions of factors that contributed to the high rate of attrition of women from private law firms. The interviews were recorded and transcribed.

This article follows an earlier article, arising from the same study, which examined the meaning of the 'good life' for lawyers in law firms in light of the pressure to embrace the long-hours culture and to improve productivity.<sup>20</sup> Respondents' experiences of WLB and the differential impact of the flexibility stigma on men and women were also considered.

20 Margaret Thornton, 'Work/Life or Work/Work? Corporate Legal Practice in the 21<sup>st</sup> Century' (2016) 23 *International Journal of the Legal Profession* 13.

## B. The Elusiveness of a Balanced Life

The feminisation of work refers to the rapid increase of women in wage labour that has occurred all over the world since the 1990s.<sup>21</sup> The feminisation of the legal profession is a notable manifestation of the phenomenon. It is remarkable that women now comprise 62.3% of Australian law students,<sup>22</sup> given that only a century ago, women were struggling to be ‘let in’ to the profession.<sup>23</sup> The liberal view was that once women had been admitted to law school in equal numbers, the momentum would be maintained and equal numbers would automatically flow through into all areas of the practising profession, including the upper echelons. However, this ignores the entrenched masculinity of the profession and the residual antipathy towards women in authoritative positions, which is buried deep within the legal culture but continues to manifest itself in discrimination, harassment and bullying.<sup>24</sup>

As paid work has become numerically feminised, a qualitative shift towards what Hardt and Negri refer to as ‘temporal “flexibility”’ has occurred regarding when and where work is performed.<sup>25</sup> While the eight-hour working day was regarded as a great achievement of the labour movement for the working man in the 19<sup>th</sup> century,<sup>26</sup> it was based on the normative male artisan with an ‘economically inactive wife’,<sup>27</sup> but this model has been resistant to conversion to the ‘working woman’ or the ‘economically *active* wife’. Women have continued to assume and are expected to assume responsibility for the domestic sphere, or realm of necessity, without any real accommodation of this reality in the workplace. It is women themselves who have been expected to adapt to the prevailing norms of work, including the long hours culture that typifies professional legal work.

Indeed, the hours that women expend in paid work have increased greatly, which has led to intense friction. Hypercompetitiveness between global law firms has exacerbated this problem for lawyers, who were never subject to the eight-hour day. Despite the rhetoric, the ideal legal worker is still expected to be unencumbered by private sphere responsibilities in order to be able to devote [him]self unconditionally to work.<sup>28</sup> The hope of the women’s movement that men would share in the demands of family life equally with women has not been realised.<sup>29</sup> While there is some evidence that fathers in general have been taking a more active role in child care responsibilities,<sup>30</sup> the long hours culture of corporate law firms militates against this trend.<sup>31</sup> Indeed, so far as the two-career heterosexual family is concerned, it was usually agreed

21 Hardt and Negri, above n 5, 133–4.

22 Graduate Careers Australia, *Grad Job and Dollars: Law — Bachelor Graduates (All)* (2015) <<http://www.graduatecareers.com.au/Research/GradJobsDollars/BachelorAll/Law/index.htm>>.

23 Margaret Thornton, *Dissonance and Distrust: Women in the Legal Profession* (Oxford University Press, 1996).

24 Joanne Bagust, ‘The Culture of Bullying in Australian Corporate Law Firms’ (2014) 17(2) *Legal Ethics* 177. Exceptionally high levels of discrimination, harassment and bullying were reported by practitioners in the *NARS Report*, above n 13, 32–7, 76–7.

25 Hardt and Negri, above n 5, 133.

26 Julie Kimber and Peter Love, ‘The Time of Their Lives’ in Julie Kimber and Peter Love (eds), *The Time of Their Lives: The Eight Hour Day and Working Life* (Australian Society for the Study of Labour History, 2007) 1, 4.

27 Guy Weir, ‘The Economically Inactive Who Look After the Family or Home’ (2002) 110(11) *Labour Market Trends* 577, 579.

28 Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do about It* (Oxford University Press, 2000).

29 Judy Wajcman, *Pressed for Time: The Acceleration of Life in Digital Capitalism* (University of Chicago Press, 2015) 69.

30 Kerstin Aumann and Ellen Galinsky, ‘The Real “Opt-Out Revolution” and a New Model of Flexible Careers’ in Bernie D Jones (ed), *Women Who Opt Out: The Debate over Working Mothers and Work-Family Balance* (New York University Press, 2012) 57, 69.

31 Richard Collier, ‘Naming Men as Men in Corporate Legal Practice: Gender and the Idea of “Virtually 24/7 Commitment”’

by interviewees in my study that it was economically rational for the male partner to remain in full-time employment (because he was invariably paid more) and for the woman either to put her career on hold for a few years or to work flexibly; it was not feasible for them both to work 12-hour days. Whether opting out or working flexibly, the impact on a woman's career is marked, a factor that operates to entrench the gendered configuration of power in the organisational hierarchy.

The feminisation of labour brought part-time work and irregular hours in its wake in order that women might continue performing traditional caring and household responsibilities, but law firms have been slow to accommodate the needs of women, and law societies have been hesitant about mounting a wholesale critique of the long-hours culture.<sup>32</sup> The median weekly hours worked by survey respondents (calculated from the previous month) was fifty hours, with hours worked ranging from four hours to over 100 hours. The long-hours culture,<sup>33</sup> in conjunction with systemic gender discrimination, has resulted in an exceptionally high rate of attrition of women from private practice.<sup>34</sup> A study by the Law Society of New South Wales in 2011 revealed that approximately 50% of women typically left private practice within five years of admission.<sup>35</sup> Figures provided by Victorian Women Lawyers suggest that 75% of women leave the profession between the ages of 35 and 55 years.<sup>36</sup> In addition, some global firms have an 'up or out' policy, which means that senior associates have to leave if they have not made partner by a certain time.<sup>37</sup>

Support for WLB was nevertheless boosted with the passage of the *Fair Work Act 2009* (Cth), which included a limited 'right of request' on the part of employees with young children or children with a disability to request a change in working arrangements. The request can be declined by the employer on a range of reasonable business grounds, including cost, which would be difficult for a law firm to justify.<sup>38</sup> While falling short of conferring a legal right to flexible work, this legislation, together with the *Paid Parental Act 2010* (Cth), placed WLB firmly on the public agenda.

While it might be averred that the term 'work-life balance' suffers from a lack of conceptual clarity,<sup>39</sup> it is commonly understood in terms of the absence of work-life conflict — that is, work should not consume all of one's energies and there should be time for family life, socialising, rest and relaxation, as well as time to pursue interests in music, theatre, art or sport. However, Drew, Datta and Howieson suggest that inadequate attention is paid to positive aspects of WLB, such as enrichment, which refers to the benefits that both work and life

in Law' (2015) 83(5) *Fordham Law Review* 2387, 2393.

32 Melissa Gregg, *Work's Intimacy* (Polity, 2011) 4.

33 'Long hours' are defined as 48+ hours per week based on the International Labour Organization standard together with the European 'Working Time Directive' (*Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning Certain Aspects of the Organisation of Working Time* [2003] OJ L 299/9): see Natalie Skinner, Claire Hutchinson and Barbara Pocock, 'Australian Work and Life Index 2012 — The Big Squeeze: Work, Home and Care in 2012 (Report, Centre for Work + Life, University of South Australia, August 2012) 30 ('AWALI 2012'). In *AWALI 2012*, 28% of men and 9.7% of women worked 48 hours or more per week: at 39.

34 *NARS Report*, above n 13, 57; Iain Campbell, Sara Charlesworth and Jenny Malone, 'Part-Time of What? Job Quality and Part-Time Employment in the Legal Profession in Australia' (2012) 48(2) *Journal of Sociology* 149. Wald notes a similar phenomenon in the US: see Wald, above n 7, 2255.

35 Law Society of New South Wales, above n 13, 14.

36 Stefanie Garber, "'Outdated Attitudes' Holding Back Women', *Lawyers Weekly* (online), 17 April 2015 <<http://www.lawyersweekly.com.au/news/16395-firms-outdated-attitudes-holding-back-women>>.

37 Michael C Jensen, *Foundations of Organizational Strategy* (Harvard University Press, 1998) 215.

38 *Fair Work Act 2009* (Cth), s 65(5A). See also Australian Human Rights Commission, 'Supporting Working Parents: Pregnancy and Return to Work National Review' (Report, 2014) 28.

39 Natalie Mei-Chuen Drew, Doita Datta and Jill Howieson, 'The Holy Grail: Work-Life Balance in the Legal Profession' (2015) 38(1) *University of New South Wales Law Journal* 288, 294.

bring to the other. Drawing on Carlson, Grzywacz and Zivnuska,<sup>40</sup> the authors identify development, affect, capital and efficiency as examples of work-to-life enrichment and life-to-work enrichment,<sup>41</sup> although they do not address the way these characteristics, especially affect, are gendered. As caring for young children is intense and requires a disproportionate amount of 'life-time' for a few years, balancing work and caring responsibilities tends to be the primary understanding of WLB. This is despite the fact that lawyers juggling both are sceptical that any sort of balance is achievable:

Sometimes work demands more time, sometimes family. It is a see-saw or a roller-coaster, not a balance.

(Survey Respondent #262, female, managing solicitor, state/territory single office)

WLB simply means more connectivity and so a greater ability to be contactable and working at all hours. There has been a shift from face time to virtual time.

(Survey Respondent #90, female, paralegal, national firm)

### C. Temporal Flexibility

The ease of managing large quantities of documents,<sup>42</sup> including their storage and portability, is hastening the embrace by the legal profession of working remotely:

There would be 50 archived boxes plus documents on a USB stick. So a consultant working from home would have to be able to store all of those boxes safely, and that could be a real issue for people who live in apartments and units; it's a huge amount of documentation. So a USB stick is so much easier for everybody ... There's been a big increase in clients providing jobs to us on a stick, so we're all getting better at working electronically.

(Interviewee, female, managing solicitor, state/territory single office)

The technology is also regarded as a source of liberation by lawyers from the office:

The Blackberry gives you the freedom not to be in the office ... There were many, many nights that I would've sat in the office 'til three o'clock, four o'clock because you had to be by the telephone or the fax machine. Now you don't. You can go out to dinner. You put the Blackberry on the table. You say to the person you're having dinner with, 'I'm sorry, I'm gonna have to look at this ... You can go to the theatre and check your emails in the interval. I mean, it's given so much freedom. People forget that you [once] just sat in the office all night.

(Interviewee, female, consultant, former partner, global firm)

As mentioned, 'flexible work' is an indeterminate term, encompassing both formal and informal dimensions. The formal understanding refers to alternative arrangements that workers

40 Dawn S Carlson, Joseph G Grzywacz and Suzanne Zivnuska, 'Is Work-Family Balance More than Conflict and Enrichment?' (2009) 62(10) *Human Relations* 1459.

41 Drew, Datta and Howieson, above n 38, 295.

42 Brittany Stringfellow Otey, 'Buffering Burnout: Preparing the Online Generation for the Occupational Hazards of the Legal Profession' (2014) 24(1) *Southern California Interdisciplinary Law Journal* 147.

might negotiate with their employers in lieu of regular hours spent at the office. The informal understanding of flexible work refers to the time (and place) that workers might spend working in addition to the formal hours of work. This usually means ‘working from home’ at night or at weekends. These two meanings of flexible work merge with one another as I shall show, but the language does not distinguish between them.

In the formal understanding, respondents used flexible work to refer to a variety of arrangements, such as an adjustment of hours (not necessarily fewer), including compressing the working week into several very long days, working remotely from a few hours to several days per week, time in lieu, working part-time on a regular basis, working casually, taking unpaid leave from time to time (such as on school holidays), purchasing additional leave and job-sharing, with many variations in between:

We leave it to them because it’s not one size fits all...She took nine months, I think, and then came back three days a week and then came back four days a week. Then, because her mother wasn’t available, I think it’s three days one week and then four days the next but we can be flexible around then...The risk in part-time inevitably is that because they’re not going to be there the whole time they don’t get the really significant work where the expectation of the client will need access to someone the whole time.

(Interviewee, male, partner, global firm)

I’m a single man with two young children, a ten-year old and a six-year old, whom I have only half the time, and the ability for me to work extremely long Mondays and Tuesdays, get out the door at five o’clock on a Wednesday to pick them up, leave at three o’clock on a Thursday to meet them when they arrive home from school...the ability to work with extended days and short days, and masses of time in the week when I don’t have them in the school holidays, and then work shorter days and juggle things when the kids are around ... has been absolutely fantastic.

(Interviewee, male, partner, global firm)

In some cases, the ‘flexibility’ appeared to be minimal. One survey respondent who identified himself as a ‘young single male’ said: ‘I can leave work at 5.00 pm on Tuesdays and Thursdays during the summer to attend cricket training’ (Survey Respondent #308, lawyer, national firm). Flexible arrangements of the formal kind were not available to everyone. In some firms, those engaged in transactional work, junior lawyers, childless lawyers and male lawyers were ineligible: ‘Categorically a man wouldn’t have been allowed to have the flexible work arrangements that I’ve got’ (Interviewee, female, litigator, national firm). The ability to work remotely — even if it is for only a few hours per week — represents the heart of the technological revolution that is threatening to collapse the walls of the office.

On its face, it would seem that (formal) flexible work has been widely accepted by the legal profession. A 2014 poll revealed that 89% of Australian firms offered flexible work arrangements,<sup>43</sup> and in the survey that I conducted, 40% of respondents indicated that they were theoretically able to undertake some form of flexible work, but only 6% indicated that they presently had a formal flexible arrangement, while 16% worked part-time. Numerous respondents alluded to the gap between the rhetoric and the reality so far as their firm was concerned. While lawyers who work full-time and who undertake additional work at home at night

43 John MacLean, ‘Closing the Gender Gap’, *Lawyers Weekly* (online), 17 October 2014 <<http://www.lawyersweekly.com.au/careers/closing-the-gender-gap>>.



or at weekends (informal flexible work) attract approbation, suspicion frequently attached to those who work at home during business hours, despite having an approved arrangement:

If you work from home it is perceived by my partners as not actually working.

(Survey Respondent #42, male, lawyer, state/territory single office)

I think most firms pay lip-service to flexible practices. It does not suit most men in firms who are generally the leaders and they only say they provide flexible practices because they want to get government clients.

(Survey Respondent #365, female, associate, national firm)

There was a sense that when times were more difficult and competition increased, there was greater resistance to approving formal flexible work arrangements:

Flexibility and WLB is a challenge for all firms, largely because of the demands of clients and the competitive pressure firms face.

(Survey Respondent #76, male, partner, global firm)

With the advent of the global firm, firms are more interested in profit than employee retention.

(Survey Respondent #108, female, partner, state/territory single office)

The deleterious impact of flexible work on a lawyer's career has been noted elsewhere.<sup>44</sup> While approximately one-quarter of survey respondents took carer's leave at some stage of their career, which may have included a formal flexible work arrangement, 33% of them recorded having suffered negative repercussions as a result, such as being placed on the 'mummy track' because they were 'no longer viewed as fully committed'.<sup>45</sup> This meant not just being offered inferior assignments, but also finding that their career progression had stalled:

I think people are reluctant ... to be involved in a flexible work arrangement because that is seen in practice as somebody who's not willing to commit entirely to their career. So if you want to progress in your career, you certainly wouldn't put your hand up for flexible work arrangement.

(Interviewee, female, special counsel, national firm)

Despite the rhetoric and the functionality of formal flexible work, the ongoing stigma was not easily sloughed off, even when a period of working flexibly came to an end.<sup>46</sup> There was also guilt on the part of the flexible worker for being absent from the office, a factor that was likely to be exacerbated by the resentment of colleagues. Nevertheless, some respondents thought that leave had a positive effect on their career as it gave them the confidence to reassess their priorities:

I reflected on what I was passionate about ... and it gave me the opportunity to give up half of my practice and ... focus on the area I was passionate about. I returned a much more efficient practitioner.

(Survey Respondent #145, female, partner, global firm)

44 Margaret Thornton and Joanne Bagust, 'The Gender Trap: Flexible Work in Corporate Legal Practice' (2007) 45(4) *Osgoode Hall Law Journal* 773, 787–800.

45 Cf Australian Human Rights Commission, above n 37, 23; Campbell, Charlesworth and Malone, above n 33, 158; Thornton and Bagust, above n 43.

46 *NARS Report*, above n 13, 30–31.

Seeking to work flexibly in order to realise a balanced life unrelated to family responsibilities may also carry with it a heightened degree of stigma. Uelmen writes of the likelihood of ‘professional suicide’ about which she was warned, even though the ‘part-time’ schedule she sought amounted to a 40-hour week.<sup>47</sup> What is more, the stigma against women who work flexibly — for whatever reason — would not appear to have a rational basis as the Australian evidence reveals that they are generally the most productive members of the workforce.<sup>48</sup> The flexibility stigma may therefore be a trope for the residual animus against women in law.

Despite the popular discourse of ‘flexibility for dads’,<sup>49</sup> the impact of the flexibility stigma for men may be even more severe than for women.<sup>50</sup> This is because men who assume the role of primary carer for young children are subjected to a ‘femininity stigma’ arising from the feminisation of caring in the social script.<sup>51</sup> As a result, if men had time off for family reasons, it was usually restricted to one or two weeks’ paternity leave. This factor, together with the financial disincentive for men to become primary carers sustains the masculinisation of equity partnerships and the control of capital within law firms.

It has been suggested that the flexibility stigma that affects both men and women may be explained partly in terms of a generational difference. Palfrey and Gasser single out the millennial generation who, as ‘digital natives’, are at ease with the technology.<sup>52</sup> The ‘Millennials’, or ‘Generation Y’, are those born between the early 1980s and the mid-2000s who have grown up with digital media. As Otey notes, there is something of a gap in the use of technology between the Millennials and the older generation.<sup>53</sup> While the older generation of lawyers use computers and laptops, they are less likely to feel the need to be connected all the time. Millennials and ‘Generation Xers’ (those born between the mid-1960s and early 1980s) may also place high importance on schedule flexibility as they are more likely to be at the stage of starting a family.<sup>54</sup>

Nevertheless, given the rapidity with which technology has become central to legal practice, the generational distinction would no longer seem to be compelling as a basis for the flexibility stigma, although it is the older [male] lawyers who continue to dominate the ranks of the equity partners. They are inevitably going to be ultra-sensitive to the needs of corporate clients as a potential source of wealth for the firm, a factor that does not sit easily with (formal) flexible work:

It’s part of client service. The rhetoric ... is that to stand out from the rest, your client should have access to you 24/7 and that’s unfortunately the view perpetuated across the board. So if your partners are available, that trickles down and you’re then forced to become available ... outside of work hours. I don’t understand why. If you look at accounting firms by comparison, the number of hours they’re required to write on their

47 Amelia J Uelmen, ‘The Evils of “Elasticity”: Reflections on the Rhetoric of Professionalism and the Part-Time Paradox in Large Firm Practice’ (2005) 33(1) *Fordham Urban Law Journal* 81.

48 Amy Poynton and Louise Rolland, ‘Untapped Opportunity: The Role of Women in Unlocking Australia’s Productivity Potential’ (Report, Ernst & Young Australia, 2013) 3 <[https://www.wgea.gov.au/sites/default/files/EY-\(2013\)-Untapped-opportunity-The-role-of-women-in-unlocking-Australias-productivity-potential.pdf](https://www.wgea.gov.au/sites/default/files/EY-(2013)-Untapped-opportunity-The-role-of-women-in-unlocking-Australias-productivity-potential.pdf)>.

49 Stefanie Garber, ‘Caregiver Dads Face Lack of Support’, *Lawyers Weekly* (online), 10 June 2015 <<http://www.lawyersweekly.com.au/news/16641-caregiver-dads-face-lack-of-support>>; Collier, above n 30, 2395.

50 See, eg, Scott Coltrane, Elizabeth C Miller, Tracy DeHaan and Lauren Stewart, ‘Fathers and the Flexibility Stigma’ (2013) 69(2) *Journal of Social Issues* 279.

51 Joan C Williams, Mary Blair-Loy and Jennifer L Berdahl, ‘Cultural Schemas, Social Class, and the Flexibility Stigma’ (2013) 69(2) *Journal of Social Issues* 209, 226; Nicole Buonocore Porter, ‘Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities’ (2014) 66(3) *Florida Law Review* 1099.

52 John Palfrey and Urs Gasser, *Born Digital: Understanding the First Generation of Digital Natives* (Basic Books, 2008).

53 Otey, above n 42, 154.

54 Aumann and Galinsky, above n 30, 76.

budget are significantly less than law firms.

(Interviewee, female, litigator, national firm)

The client is always king ... Often the client will ring in at five o'clock on a Friday afternoon, expecting something first thing Monday morning and then sit on it for two weeks before responding. Clearly, it wasn't that urgent, but they feel they're entitled to expect things from a law firm straightaway — because they're paying for the service — but it places unrealistic pressure on those who work part-time to meet those unrealistic demands ... Part of the solution is trying to encourage more creative ways of working, whether you work from home, or work remotely. Part of it is actually re-educating the client as to what is realistic to expect. But no law firm's going to do that because if they do, they'd lose the client. I'd like to see a shift in time recording to just charging for a particular job and then working to get that job done within a reasonable amount of time and it doesn't matter if you're in the office or out of the office when you get it done.

(Interviewee, female, community lawyer, formerly with global firm)

I was in a position for about three years where I worked under two senior women who were job-sharing. And the only way it worked for them was because I was there *all* the time to fill in all the gaps. That wasn't their fault; the clients expected us to be a full service — 24-hour pretty much — resource for them that we'd turn everything around when they needed it and that's why they paid us a lot of money for our services. So I think maybe in the mid-tiers or in certain niche areas where the work is less transactional and urgent, working part-time might be more viable, but in my area, I just don't feel that optimistic about how it will work.

(Interviewee, female, senior associate, global firm)

Despite the pro-flexibility rhetoric espoused by law firms, the physical workplace, which necessitates 'face time', visibility or 'presenteeism', remains at the heart of private legal practice, even though it does not necessarily equate with optimal performance.<sup>55</sup> While it was one thing for independent contractors to be working from home during normal working hours, employees were viewed differently and respondents thought that the lack of visibility exercised negative ramifications on their careers. The occasional woman who works flexibly may be promoted to partner, but this is still regarded as newsworthy;<sup>56</sup> no comparable examples involving male lawyers were encountered. A partnership is usually awarded only after several years of demonstrated loyalty, rainmaking (generating new business for the firm) and exceptional productivity. Presence has for so long been associated with the conjunction of power and masculinity in law firms that the absence of male lawyers is regarded as more significant than that of women, who may still be regarded as dispensable. While the concerted pressure from women lawyers associations in favour of formally-approved flexible work, together with the increasing sophistication of the technology may diminish the flexibility stigma over time, the issue of conservative law firms having to adapt to the new norms remains unresolved:

The firm is full of women. They are now having babies and I think this is the real test for the firm. They need to figure out how they're going to deal with the situation and there have been incidents of people leaving because it just didn't work, or the partners that supervised them kind of couldn't accept the arrangements — I'd like

55 Cf *NARS Report*, above n 13, 89.

56 Nicola Berkovic, 'Juggling Justice and Kids: Women Find Part-Time Fix', *The Australian* (Sydney), 3 July 2015, 27. Cf Campbell, Charlesworth and Malone, above n 33, 158–9.



to say, ‘needed a bit more training’ ... We’ve had to kind of work it out ... and the partner who was supervising me for most of these past years had to remember when I wasn’t around and be aware of and sensitive to that. The hours are flexible and I’m flexible too. So if I knew there was a pressing matter that just takes me two minutes to fill in the gap, I would. That might be on a day that I’m at home and not, in a sense, contactable. I will say if I’m not and that’s respected ... What’ll be interesting is those who are in real, fast-paced corporate work and the ones who are just on the cusp of getting partnership ... It’s hard when you’re primarily responsible for a client ... And clients — it’s not their job to be reasonable — the demands are still there and you can understand where they’re coming from because they have to meet deadlines and nobody is going to say, ‘But this poor person is only able to work these days’. They need the results.

(Interviewee, female, consultant, global firm)

Although Haraway believed that women must use technology as a means of both power and pleasure,<sup>57</sup> competition policy and capitalism have been able to seize upon the positive aspects of ‘being connected’ to turn flexible work to their advantage. Technology is proving to be a means of reaffirming the masculinity of the power and wealth of the legal profession just when confronted by the prospect of feminisation. This is because presence and visibility in situ are still accepted not only as tacit criteria for promotion, but also for the allocation of work:

I missed opportunities in the lead up to being away and while I was away, and possibly too once I was back as it took a while for people to realise I was back for good.

(Survey Respondent #92, female, partner, global firm)

## D. The Theft of Time

The internet has enabled the relentless financialisation and commodification of more and more regions of individual and social life. Technology was meant to facilitate flexibility and ease of working, but the tyranny of email requiring instant responses generates pressure. Thus, in hastening the pace of life, we have less time, not more.<sup>58</sup>

Crary suggests that work time, consumption time and marketing time have taken over so that no possible harmonisation between living things and 24/7 capitalism is possible,<sup>59</sup> despite the trend towards ‘work/life integration’. This phenomenon is apparent as globalisation has caused the large corporate law firms to become multinational entities for which capital accumulation is the *modus operandi*. This has hastened the introduction of practices directed towards greater efficiency, such as offshoring, and the use of new technologies. Marx is very relevant for this new phase of capitalism, as Wendling notes.<sup>60</sup> Just as the machinery of the industrial revolution was regarded as an affront to pastoral time and the rhythm of the natural world, technology has hastened the shift to abstract time. Marx recognised ‘free time’ as the

57 Haraway, above n 1, 180-81.

58 Wajcman, above n 28, 2. Cf *AWALI 2012*, above n 32, 25-9.

59 Jonathan Crary, *24/7: Late Capitalism and the Ends of Sleep* (Verso, 2013) 100.

60 Amy E Wendling, *Karl Marx on Technology and Alienation* (Palgrave Macmillan, 2009).

end product of the accumulation of wealth,<sup>61</sup> but temporal flexibility means that there is no end. If there were no need for sleep, capital would take the full 24 hours of the day.<sup>62</sup>

Numerous writers, such as Arendt, have also expressed the view that a protected sphere away from the harsh glare of public activity is necessary so that regeneration can occur.<sup>63</sup> However, technology has assisted in penetrating the private sphere. The incipient conflation of the economic and the domestic spheres has attracted little attention to date as it has occurred by stealth — beginning with the occasional email when the technology was a novelty and potentially expanding to full-time virtual work. Also, the opportunity to work flexibly was eagerly sought by women lawyers as a step towards effecting work-life balance, but without regard to the possible pitfalls.

Temporal flexibility has significant ramifications for the intimacy of home life. Although working from home is often restricted by law firms to one day per week, this arrangement may be augmented by the informal understanding of flexible work, or ‘job creep’.<sup>64</sup> This means that lawyers working from home are expected to be available, not just at the specified times, but also at other times of the day or night. The idea of having received a ‘favour’ from the firm may be internalised by employees who feel guilty for spending time away from the office. They are grateful for being able to work at home; they love their work and want to do the best job they can. In addition, meeting billable hours targets may be impossible in an official working week in the office, which necessitates that time be made up at home.<sup>65</sup> Thus, in the contest between home and work, work all too often emerges as the winner. Gregg describes the ‘partial presence’ of the worker who is ‘connected’ at home and only partially present to his or her family.<sup>66</sup> This may arise not only from the pressure to meet targets, but also from a form of ‘internet addiction’,<sup>67</sup> in which emails are frequently checked, including at mealtimes and late at night:

For that precise reason, I do not have a Blackberry (‘crackberry’). I don’t want to take work home. I’ll take work home when I have to, if I have a hearing or something, but if I’m not at work, I’m not working. If I need to work, I go to the office to do it.

(Interviewee, male, Associate, national firm)

I think if you get into the habit of checking emails and that kind of thing late at night you are setting yourself up for being constantly available. Some people prefer to be very flexible, maybe not work so much during the day and be available at all hours ... and I think your clients get used to that way of working as well.

(Interviewee, female, senior associate, global firm)

Time poverty has been described as the ‘modern malaise’ arising from ‘longer working hours and fewer boundaries between work and free time’.<sup>68</sup> ‘The potential for work to invade

61 Ibid 197.

62 Karl Marx, *Capital* (Eden and Cedar Paul trans, J M Dent & Sons, 1962) 268 [trans from the 4<sup>th</sup> German edition]. Cf Crary, above n 56.

63 Hannah Arendt, *The Human Condition* (University of Chicago Press, 1958) 71.

64 Ellen Ernst Kossek, Rebecca J Thompson and Brenda A Lautsch, ‘Balanced Workplace Flexibility: Avoiding the Traps’ (2015) 57(4) *California Management Review* 5, 8.

65 Cf Campbell, Charlesworth and Malone, above n 33, 161–2; Christine Parker and David Ruschena, ‘The Pressures of Billable Hours: Lessons from a Survey of Billing Practices inside Law Firms’ (2011) 9(2) *University of St Thomas Law Journal* 619, 620.

66 Gregg, above n 31, 126.

67 Ibid 129–30.

68 Josh Fear, Serena Rogers and Richard Denniss, ‘Long Time, No See: The Impact of Time Poverty on Australian Workers’ (Policy Brief No 20, The Australian Institute, November 2010) 5.

every nanosecond is said by some to spell the end of pure, uninterrupted leisure time.<sup>69</sup> Although the use of technology at home undermines domestic and family time, it is encouraged, for it extends working time:

Firms ... are freely providing laptops, Blackberries, that sort of thing ... under the pretence of making it easier for you to work. Now, of course, the flipside is that you never leave the office because while you're not physically standing or sitting in it, you have your Blackberry and people can call you or email you at all times of the day — and I mean at all times of the day. You get emails at, like, three o'clock in the morning. And if you've got a laptop and it has the Citrix system, you can log in remotely to their server and access all your documents ... and it becomes infinitely easier to work at home ... So there is certainly intrusion on your out-of-work time in that respect, but it's got some benefits, like when I go to hearings ... but for other people, it's, 'I can do more work; I can do it at home after I've spent my mandatory hour with my family'. (Interviewee, male, Associate, state/territory single office, formerly with national firm)

I have had different types of flexible working. I did purely working from home for six weeks after my son was born. And then flexible hours in the work day in the office and then also working from home both during business hours and working from home in the evenings ... I don't like working at home ... I'd rather be in the office doing my work. It just feels like a better environment to do it in. I don't like taking the stress of work home with me.

(Interviewee, female, In-house, formerly with national firm)

So seamlessly are the practices of message-monitoring and email-checking absorbed into home life that employees frequently discount these activities as work.<sup>70</sup> Workloads are thereby insidiously increased with employees reporting that they work not only at night and on weekends, but also on sick leave and holidays.<sup>71</sup> Thus, while flexible work is ostensibly a source of liberation, it is also a new form of theft of workers' time, or what Cottle, Keys and Masterman-Smith refer to as 'time banditry'.<sup>72</sup> The AWALI 2012 study computed that Australian workers who work from home donate on average 17 days a year of unpaid labour to their workplaces.<sup>73</sup> While figures are unavailable for the legal profession, and it would be impossible to disaggregate informal and formal flexible work, I suggest that the windfall for law firms would be at least comparable as so many survey respondents and interviewees alluded to this factor:

I'm working full-time. So I do four days in the office and Friday is my work-from-home day, although ... the actual work hours I perform on the weekends or in the evenings. On the Friday, I'm expected to be available on the phone to do business and checking my emails.

(Interviewee, female, In-house, formerly state/territory single office)

Ultimately, I reverted to full-time because I was effectively performing a full-time workload but only being paid for four days per week.

(Survey Respondent #286, female, partner, national firm)

69 Wajcman, above n 28, 137.

70 Gregg, above n 31, 167.

71 Cf Turkle, above n 2, 165.

72 Drew Cottle, Angela Keys and Helen Masterman-Smith, 'A Political Economy of Labour Time' in Julie Kimber and Peter Love (eds), *The Time of Their Lives: The Eight Hour Day and Working Life* (Australian Society for the Study of Labour History, 2007) 205.

73 AWALI 2012, above n 32, 11.

Q: So do you find that you have to work during the night sometimes because of your clients being overseas? A: Yes. I have to catch them if, say, we've got a deadline coming up and I can't waste another day for them to get instructions to me. I do that when there are major filing projects on and instructions need to go overnight. Most of the time if I do work at night it's more to catch up on time. So I see it as a flexibility issue...I'm willing to spend some of my time at home to do the work after the children have been dealt with. I think that's fair enough, you know, because the firm is a business; they have to make money.

(Interviewee, female, consultant, global firm).

While some donors of time are the guilt-ridden lawyers who feel that they always have to do more because their request to work flexibly has been accommodated, others felt that the exploitation of staff was a conscious endeavour to maximise the extraction of surplus labour from them, regardless of their formal work arrangements:

The more 'flogged' their staff are, the better the business. The partners I work for barely bother to disguise this hard truth. Despite the rhetoric of the top-tier firms, from my experience they do not offer genuine working-from-home options, rather the ability to contact you at any time of the day when you are at home and for you to be equipped to work there and then.

(Survey Respondent #57, female, Associate, national firm)

There is no choice but to take work home in the evenings and weekends to meet a budget that acts both as a billing mechanism for clients and an (often false) representation of a lawyer's performance.

(Survey Respondent #118, female, lawyer, state/territory single office)

To justify the intrusiveness of the technology, Phillip Hunter, in-house senior legal consultant at Dolman (a legal recruitment and search consultancy firm in Sydney) tells us that the term 'work-life balance' is passé and should be replaced by 'work/life integration': 'Work/life integration means checking emails and doing work outside of business hours and taking time out of work to take care of personal affairs.'<sup>74</sup> Here, we have explicit managerial recognition of the fact that the line of demarcation between work and home has not just blurred but collapsed altogether. This reflects the findings of a number of studies regarding the intrusive effect of smart devices and social networking.<sup>75</sup> Work/life integration is undoubtedly the reality for many women, if not the ideal, in which juggling and multi-tasking are the norm — speaking to corporate clients on the telephone while supervising their children, for example. Once seen as a blight, multi-tasking has been recast as a crucial skill that enables work to secure the upper hand by stealth.

Gregg, in her study *Work's Intimacy*, perceptively captures the way new technology is invading the home.<sup>76</sup> She shows how the effect of the dissolution of the boundary between work and home has expanded the time allocated to work. In emphasising the blurred boundaries between labour and life, and between production and reproduction, Hardt and Negri draw attention to the distinctly feminised connotations of these relationships.<sup>77</sup> Thus, far from flexible

74 Felicity Nelson, 'Jury Still Out on In-House vs Law Firms', *Lawyers Weekly* (online), 12 March 2015 <<http://www.lawyersweekly.com.au/news/16263-in-house-vs-law-firms-the-verdict>>.

75 Turkle, above n 2; Gregg, above n 31; Otey, above n 41.

76 Gregg, above n 31.

77 Hardt and Negri, above n 5, 134.

work being able to produce equality for women in the legal profession, as was hoped, it may be producing a new iteration of subordination.

Not only does the zeal for ‘being connected’ mean that the firm receives a windfall, but temporal flexibility has significant ramifications for the gendering of work in law firms. It is well established that male lawyers without domestic or familial responsibilities are able to satisfy the unstated promotion criteria of ‘presenteeism’ and are more likely to be rewarded in their careers.<sup>78</sup> These ‘ideal workers’, about whom Joan Williams has written persuasively,<sup>79</sup> not only dominate the upper echelons of the profession and control the accumulation of capital, but also assist in countering the fear of feminisation of corporate power.

As suggested, men are discouraged from working flexibly in order to care for children — even if they would like to do so — and may suffer a flexibility stigma because of the feminised connotations of caring. This entrenches the homologous relationship between masculinity and the long-hours culture so that male lawyers remain consistently visible to gatekeepers and clients, thereby strengthening their position as favoured candidates for promotion. ‘Homosocial reproduction’<sup>80</sup> (replacing like with like) allows male lawyers to retain domination of the apex of the legal and professional hierarchy where power, influence and the control of capital reside in conjunction with equity partnerships:

The real rewards go to a few in equity who do nothing in reality to promote equity or fairness in the workplace.

(Survey Respondent #216, male, special counsel, national firm)

The control of capital in corporate law firms therefore remains highly masculinised either via a traditional partnership formation, incorporating the firm, or floating it on the stock exchange, as with Slater & Gordon.<sup>81</sup> These initiatives reveal how the norms of legal practice are subtly moving away from professionalism and closer to those of business and capital accumulation, replicating the *modus operandi* of a corporate firm’s multinational clients.

The shifting relationship between capitalism and the regulatory state is captured by Bauman’s allusion to the ‘melting of solids’ that has become a feature of ‘fluid modernity’.<sup>82</sup> This proposition is illustrated by the expansion of the market as a result of the neoliberal turn, leading to a rolling back of state regulation and a privatising of many of the functions of the state. So important has the economy become, Davies suggests that neoliberalism has done away with the liberal conceit of ‘separate economic, social and political spheres, evaluating all three according to a single economic logic’.<sup>83</sup>

As noted, being able to work anywhere at any time is an example of ‘light capitalism’ in contrast to the ‘solid modernity or heavy capitalism’ of the past.<sup>84</sup> Thus, the incidence of ‘working from home’ suggests that Davies’ insight regarding the application of ‘a single economic

78 Mary Jane Mossman, ‘Lawyers and Family Life: New Directions for the 1990’s (Part One)’ (1994) 2(1) *Feminist Legal Studies* 61, 70.

79 Williams, above n 27.

80 See Jean Lipman-Blumen, ‘Toward a Homosocial Theory of Sex Roles: An Explanation of the Sex Segregation of Social Institutions’ in Martha Blaxall and Barbara Reagan (eds), *Women and the Workplace: The Implications of Occupational Segregation* (University of Chicago Press, 1976) 15.

81 Slater & Gordon offers an employee share scheme to encourage greater productivity, but most law firms are not publicly listed and cannot provide such incentives. See, eg, Steven Mark and Tahlia Gordon, ‘Innovations in Regulation — Responding to a Changing Legal Services Market’ (2009) 22(2) *Georgetown Journal of Legal Ethics* 501.

82 Bauman, above n 17, 6.

83 William Davies, *The Limits of Neoliberalism: Authority, Sovereignty and the Logic of Competition* (Sage, 2014) 20.

84 Bauman, above n 17, 139, 144.



logic<sup>85</sup> to the economic, social and political spheres might also fruitfully be extended to encompass the domestic sphere. In this way, it can be seen that the multiple incarnations of flexible work all contribute to the way capital is colonising private life.

## E. Conclusion

The imbrication of flexible work with new technologies is beset with ambiguity. On the one hand, being able to work flexibly is appreciated, particularly by women lawyers with caring obligations. They are able to continue with meaningful work at their own pace while raising their children, caring for an elderly parent or sick partner. However, the numbers in large law firms who avail themselves of (formal) flexible work arrangements appear to be small at any one time. As studies have shown that workers are more productive when they are happy — producing as much as an additional 12% of output<sup>86</sup> — there is a clear economic incentive for law firms to accede to formal requests to work flexibly. At the same time, there are negative connotations for workers as flexibility has meant that work has the potential to leach into their personal space and colonise it. This is the case with lawyers who work long hours in the office, but also work at home after hours (informal flexibility). Some lawyers are obliged to work at night when their corporate clients operate in a different time zone, but work-work can quickly become a habit, or even an addiction.

For others, dissatisfaction with the model of the large law firm, with its rigid hierarchy, long-hours culture and relentless billable hours has resulted in the search for alternative models of practice. Williams, Platt and Lee have carried out a thorough study of ‘New Law’ developments in legal practice in the US, which they describe as ‘disruptive innovations’.<sup>87</sup> As a reaction against the marble, mahogany and Monets favoured by large law firms, for which clients have to pay,<sup>88</sup> New Law may do away with offices altogether to keep overheads low.<sup>89</sup> One of the most significant factors regarding the new models is their exceptionally flexible work schedules, which allow lawyers to choose their hours of work. These models have frequently been initiated by women lawyers and make a point of hiring women, some of whom elect to work as few as ten hours per week. By starting off with a clean slate rather than accepting the prevailing masculinist norms, New Law has largely eliminated the flexibility stigma.<sup>90</sup> There is still a risk that the need to ‘be connected’ sustains the applicability of the cyborg metaphor. However, a seemingly radical measure to avoid trespassing on intimate space may include informing clients that lawyers do not check emails after-hours or at weekends.<sup>91</sup>

While the virtual features of New Law are appealing to women lawyers when faced with the needs of small children, presenteeism and visibility in traditional law firms continue to ensure preservation of the masculinity of the apex of the organisational pyramid of the law

85 Davies, above n 80, 20.

86 William Davies, *The Happiness Industry: How the Government and Big Business Sold Us Well-Being* (Verso, 2015) 108.

87 Joan C Williams, Aaron Platt and Jessica Lee, ‘Disruptive Innovation: New Models of Legal Practice’ (Legal Studies Research Paper Series, University of California Hastings College of Law, 2015) 5–6 <<http://www.uchastings.edu/news/articles/2015/06/Disruptive-Innovation-New-Models-of-Legal-Practice.pdf>>.

88 Ibid 9.

89 Ibid 5. Lawyers at Hive Legal in Melbourne work from whatever location suits them best: see Monique Hurley, ‘The Case for a More Flexible Workplace’ (2015) 60 *Young Lawyers Journal* <<http://liv.asn.au/LIV-Young-Lawyers/Young-Lawyers-Journal/2015/Issue-60-Winter-2015/The-case-for-a-more-flexible-workplace>>.

90 Williams, Platt and Lee, above n 84, 10.

91 Ibid 11.

firm hierarchy where wealth and power are concentrated. Wald suggests that hypercompetitive meritocracy ‘forecloses, by its very nature, the possibility of reduced or flexible schedules and reliance on technology to allow for work-from-home alternatives’.<sup>92</sup> While the technology facilitates working remotely, the prevailing ideology in corporate legal practice requires ‘physical attendance as a symbolic measure of loyalty, 24/7 commitment, and near-instant responsiveness’.<sup>93</sup> The conservative ideology that positions motherhood, children and families in opposition to careers is endorsed by many senior men in law firms. If married, their female partners are frequently not in the paid workforce, at least not full-time. Even if they are well qualified lawyers, the women tend to abandon their careers in favour of their male partners when choices have to be made as to who should be the primary carer in the relationship — not only because men’s earning potential is greater,<sup>94</sup> but a lingering suspicion remains that once a woman has had a child, she is not really serious about her career.

Substantive feminisation of the legal profession is thereby counteracted by the entrenched masculinist norms of homosociality. If women are dissatisfied with the prevailing conditions, they are free to leave, and large numbers do, as illustrated by the high attrition rates. They frequently go in-house: ‘They still work reasonably hard there but there’s no billing and it’s not as crazy’ (Interviewee, female, Associate, state/territory single office). The sustained attempts by women lawyers to change the prevailing norms of private legal practice, including the long-hours culture, have exerted remarkably little impact. Indeed, it has been suggested that the proliferation of law graduates ‘sustains poor working-time conditions and high turnover rates’,<sup>95</sup> as those who exit can be quickly replaced. It may well be that the issue of supply outweighs competing factors such as the retention of top talent, improved performance, commitment, morale and satisfaction.<sup>96</sup>

Of course, the use of technology in the home was never going to remain a stable social form; as a new productive site, it was inevitably going to be deployed by capitalism as Marx predicted.<sup>97</sup> The ramifications are so profound that they are changing the traditional configuration of the public/private dichotomy as the division between the economic realm and the home dissolves.

While law firms have been able to maintain surveillance over employees working flexibly through conventional disciplinary mechanisms, such as billable hours, the technology also harbours new and untried forms of surveillance that have the potential to be utilised in respect of those working at home. We are told that televisions are now able to record conversations in our living rooms and transmit them to the manufacturer,<sup>98</sup> and a similar technology is built into mobile phones and other devices.<sup>99</sup> The Highster Mobile, for example, a device that enables ‘parental and employee monitoring’ includes a ‘stealth camera’ as well as facilitating the logging of calls and emails.<sup>100</sup> This technology not only further blurs the distinction between

92 Wald, above n 7, 2283.

93 Ibid.

94 Lara Bullock, ‘Promotion Quotas Could Solve Gender Pay Gap’, *Lawyers Weekly* (online), 8 January 2016 <<http://www.lawyersweekly.com.au/news/17775-quotas-could-solve-gender-pay-gap>>.

95 Campbell, Charlesworth and Malone, above n 33, 162. The number of law graduates increased from 6149 in 2001 to 12 742 in 2012: see Felicity Nelson, ‘New Law School May Leave Grads Stranded’, *Lawyers Weekly* (online), 29 September 2015 <<http://www.lawyersweekly.com.au/news/17221-new-law-school-may-leave-grads-stranded>>.

96 Drew, Datta and Howieson, above n 38, 292.

97 Crary, above n 56, 37.

98 Alyssa Newcomb, ‘Samsung Clarifies Privacy Policy: What Your Smart TV Can Really Hear’, *ABC News* (online), 10 February 2015 <<http://abcnews.go.com/Technology/samsung-clarifies-privacy-policy-smart-tv-hear/story?id=28861189>>.

99 Yana Welinder, ‘Facing Real-Time Identification in Mobile Apps & Wearable Computers’ (2013) 30(1) *Santa Clara High Technology Law Journal* 89, 101, 113.

100 Highster Mobile, *Remote Cell Phone Tracking & Spy Software* <<http://www.highstermobile.com>>.

the body of the worker and the technology, but totally eradicates the idea of an intimate space where the lawyer/worker can be free of the pressures of work.

While Haraway argues that the cyborg possesses a subversive power to transgress boundaries,<sup>101</sup> I am less optimistic as the contemporary cyborg must be alert to the deployment of power from unexpected sources. Hence, it would appear that flexible work may not represent the great advance for women lawyers that it was initially believed to be. Not only does it enable work to leach into the private sphere and colonise it, it is being deployed to retain the subordination of women in private legal practice just when the tipping point has been reached.

101 Haraway, above n 1, 152.



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