

1994

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Recommended Citation

Deborah L. Rhode, *Gender and Professional Roles*, 63 Fordham L. Rev. 39 (1994).

Available at: <https://ir.lawnet.fordham.edu/flr/vol63/iss1/5>

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Cover Page Footnote

Professor of Law, Stanford University; Director of the Keck Center on Ethics and the Legal Profession. B.A., 1974, J.D., 1977, Yale University. This legal Article is adapted from a lecture given as the Pope, Cahil, and Devine Lecture on Professionalism, in April 1994 at Northwestern Law School, and from an article appearing in a forthcoming anthology, *Ethic Issues in Professional Life* (Joan C. Callahan ed., forthcoming). I am grateful for the comments of Ralph Cavanagh, Cynthia Epstein, Edward Frueh, Lawrence Friedman, Ronald Gilson, Robert Gordon, Judith Resnik, William Simon, and Kim Taylor-Thompson.

ARTICLES

GENDER AND PROFESSIONAL ROLES

DEBORAH L. RHODE*

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INTRODUCTION

IN commenting on women's admission to Harvard Law School in 1950, then Dean Erwin Griswold reassured anxious alums that this development was not "very important or very significant." "Most of us," he noted, "have seen women from time to time in our lives and have managed to survive the shock. I think we can take it, and I doubt that it will change the character of the School or even its atmosphere to any detectable extent."¹ Such perceptions remain common. In one representative survey, less than half of the male attorneys

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1. Erwin Griswold, *Developments at the Law School*, 1950 Harv. L. Sch. Y.B. 10.

(compared with three-quarters of females) believed that women's entry would have major consequences for the profession.²

Such perceptions are not without irony. For centuries, women were excluded from the professions on the assumption that they were different; once admitted, the assumption typically has been that they are the same. By and large, women have been expected to practice within established structures; those structures have not sufficiently changed to accommodate women.

Feminism seeks to alter these patterns. In the process, it raises concerns both about the role of women and about professional roles. This Article, informed by contemporary feminist jurisprudence, proceeds along two dimensions. Discussion first centers on challenges to professional roles, relationships, and the delivery of services. Analysis then turns to issues of gender bias in the workplace and women's underrepresentation in positions of the greatest power, status, and reward. Both discussions build on values traditionally associated with women that are undervalued in traditionally male-dominated professions. Before turning to these main areas of concern, some preliminary observations are in order about feminism as an organizing framework.

I. FEMINIST FRAMEWORKS

Any exploration of feminist perspectives needs some working definition of feminist theory. And any effort to provide such a definition runs up against a threshold problem. The term encompasses an increasingly diverse body of work that does not readily coexist under any single label. Although this is not the occasion for a full review, a few general comments are in order about feminists' differences over gender difference and feminists' theories about theory.

A. *Differences over Difference*

Feminist theory grows out of a substantive commitment to gender equality and a methodological commitment to gender as a focus of analysis. By definition, feminism presupposes commonalities among women and differences between the sexes that demand attention. Yet the extent and origins of those differences are a matter of longstanding dispute. How much importance should be attached to biology, to the experience of subordination, to sex-based divisions of labor, or to social constructions of masculinity, femininity, and sexuality, are all issues of intense debate even (indeed, particularly) among feminists.

For those interested in professionalism, the most contested issue is whether women approach their occupational role from a distinctive perspective. One important strand of feminist theory, represented by

2. Bill Winter, *Survey: Women Lawyers Work Harder, Are Paid Less, But They're Happy*, 69 A.B.A. J. 1384, 1388 (1983).

Carol Gilligan, argues that women tend to reason in a "different voice": they are less likely than men to privilege abstract rights over concrete relationships, and are more attentive to values of care, connection, and context.³ Building on this relational approach, some feminists argue that women bring a distinctive perspective to professional roles, and that their values may foster more humane, less hierarchical structures for professional life.⁴ Other feminists, including Catherine MacKinnon, have emphasized women's subordination as a source of women's distinctive interests and concerns.⁵

Claims about gender difference in the profession draw on a variety of narrative accounts and empirical research. For example, some small-scale studies find that women rank competitiveness as less desirable than do men;⁶ that women in certain decision-making contexts are more inclined than men to prefer collaborative, interactive leadership styles;⁷ and that women professionals are more likely to value interpersonal client relationships,⁸ public service work,⁹ and empathetic reasoning processes.¹⁰

The strength of such analyses lies in their demand that values traditionally associated with women be valued and that we focus on transforming social institutions, not just assimilating women within them.

3. Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (1982).

4. See Mona Harrington, *Women Lawyers: Rewriting the Rules* 251 (1993); Rand Jack & Dana Crowely Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* 56-58 (1989); Naomi Cahn, *Styles of Lawyering*, 43 *Hastings L.J.* 1039, 1045 (1992); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 *Berkeley Women's L.J.* 39, 55 (1985); see also Richard J. Maiman et al., *Gender and Specialization in the Practice of Divorce Law*, 44 *Me. L. Rev.* 39, 51 (1992) (finding female lawyers more likely than male lawyers to be client rather than craft oriented); sources cited *infra* notes 10-14.

5. Catherine MacKinnon, *Feminism Unmodified* (1989); *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 *Buff. L. Rev.* 11 (1985) (comments of Catherine MacKinnon).

6. Jean Lipman-Blumen, *Connective Leadership: Female Leadership Styles in the 21st-Century Workplace*, 35 *Soc. Persp.* 183, 200-01 (1992).

7. *Id.*; Patricia Yancey Martin, *Rethinking Feminist Organizations*, 4 *Gender & Soc'y* 184 (1990); Judith B. Rosener, *Ways Women Lead*, *Harv. Bus. Rev.*, Nov.-Dec. 1990, at 120.

8. John M. Smith, *Women and Doctors* 146-48 (1992); see also Carrie Menkel-Meadow, *Feminization of the Legal Profession, in Lawyers in Society: Vol. 3 Comparative Theories* 227-28 (Richard L. Abel & Philip S.C. Lewis eds., 1989) (citing studies on academics, medicine, and law); Natalie Angier, *Beside Manners Improve as More Women Enter Medicine*, *N.Y. Times*, June 21, 1992, § 4, at 18 (noting that women spend longer with patients).

9. Angier, *supra* note 8, § 4, at 18 (citing Association of American Medical Colleges surveys finding young female physicians more willing to work in impoverished areas and to treat poor patients); Menkel-Meadow, *supra* note 8, at 226, 228 (indicating that women lawyers are more likely to cite social service as reason for entering the profession and for entering legal aid, public interest, and government service work).

10. Jack & Jack, *supra* note 4, at 56-58; Menkel-Meadow, *supra* note 4, at 55.

Yet efforts to claim an authentic female voice illustrate the difficulty with theorizing from experience without homogenizing it. To divide the world solely along gender lines is to ignore the ways in which biological status is experienced differently by different groups under different circumstances. There is no "generic woman,"¹¹ and relational feminism has not sufficiently acknowledged variations across culture, class, race, ethnicity, age, and sexual orientation.¹² Nor have relational frameworks addressed the contextual forces that lead the same women to vary in their expression of "women's" values and characteristics in different social circumstances.

The celebration of gender difference risks not only oversimplifying, but also overclaiming. Recent research raises substantial questions about how different women's voice in fact is. Psychological surveys generally find few attributes on which the sexes consistently vary.¹³ Even for these attributes, gender typically accounts for only about five percent of the variance.¹⁴ The similarities between men and women are far greater than the disparities, and small statistical distinctions do not support sweeping sex-based dichotomies. Most empirical studies of moral development or altruistic behavior do not find significant gender distinctions.¹⁵ Nor does related research on managerial behavior reveal the consistent sex-linked variations that relational feminism

11. See Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought* 114, 117 (1988).

12. Cynthia Fuchs Epstein, *Deceptive Distinctions: Sex, Gender, and the Social Order* 185 (1988); Catherine G. Greeno & Eleanor E. Maccoby, *How Different is the "Different Voice"?*, 11 *Signs* 310, 312-16 (1986). For an anthology reviewing this line of work, see *An Ethic of Care: Feminist and Interdisciplinary Perspectives* (Mary Jeanne Larrabee ed., 1993).

13. Alice H. Eagly, *Sex Differences in Social Behavior: A Social-Role Interpretation* 31 (1987); Eleanor E. Maccoby, *Gender and Relationships: A Developmental Account*, 45 *Am. Psychologist*, 513, 513-15 (1990); see also Kay Deaux & Brenda Major, *A Social-Psychological Model of Gender*, in *Theoretical Perspectives on Sexual Difference* 89 (Deborah L. Rhode ed., 1990).

14. Eagly, *supra* note 13, at 115; see also Linda D. Molm & Mark Hedley, *Gender, Power and Social Exchange*, in *Gender Interaction and Inequality* 1, 6 (Cecelia B. Ridgeway ed., 1992); Kay Deaux, *From Individual Differences to Social Categories: Analysis of a Decade's Research on Gender*, 39 *Am. Psychologist* 105, 110-11 (1984); Janet Shibley Hyde, *Meta-Analysis and the Psychology of Gender Differences*, 16 *Signs* 55, 64-68 (1990).

15. For altruism, see Alfie Kohn, *The Brighter Side of Human Nature: Altruism and Empathy in Everyday Life* 82 (1990); Carol Tavris, *The Mismeasure of Woman* 63-67 (1992). For moral behavior, see Epstein, *supra* note 12, at 76-77; Greeno & Maccoby, *supra* note 12, at 315.

would suggest.¹⁶ Employees who confront the same occupational pressures tend to converge in work-related responses.¹⁷

What emerges from these and related studies is the importance of context in eliciting traits traditionally associated with women.¹⁸ Changes in the gender composition and social expectations of a particular professional setting significantly affect the likelihood that "feminine" attributes will be expressed. A representative case in point involves female judges. Surveys of judicial decision-making reflect no consistent gender differences even in areas involving women's rights or sentencing for violent crimes against women.¹⁹ Yet all-female judicial associations display greater sensitivity to traditionally female values than their male-dominated counterparts. Programs for women judges often focus on issues such as combatting bias, accommodating family concerns in courthouse administration, and ensuring more empathetic treatment of vulnerable witnesses.²⁰ Similarly, feminist political groups and all-female law firms generally have established less hierarchical, more participatory structures than comparable male-dominated institutions.²¹

B. *Theories about Theory*

Taken together, these divergent findings on sex-based difference underscore the need for greater contextual analysis. To that end, some strains of feminist jurisprudence have sought to recognize difference without universalizing its content. Drawing on postmodern and pragmatic traditions, these frameworks emphasize multiple sources of identity and avoid abstract, acontextual theory. Both postmodern and

16. Epstein, *supra* note 12, at 173-84; Barbara Forisha, *The Inside and the Outsider: Women in Organizations, in Outsiders on the Inside: Women and Organizations* 9, 23 (Barbara L. Forisha & Barbara H. Goldman eds., 1981); Sue Joan Mendelson Freeman, *Managing Lives: Corporate Women and Social Change* (1990); Rosabeth Moss Kanter, *The Impact of Hierarchical Structures on the Work Behavior of Women and Men, in Women and Work: Problems and Perspectives* 234, 236-45 (Rachel Kahn-Hut et al. eds., 1982).

17. Paula England & George Farkas, *Households, Employment, and Gender: A Social, Economic, and Demographic View* 137-41 (1986); Epstein, *supra* note 12, at 179-81; Luis R. Gomez-Mejia, *Sex Differences During Occupational Socialization*, 26 *Acad. Mgmt. J.* 492, 495 (1983).

18. See England & Farkas, *supra* note 17, at 137-41; Epstein, *supra* note 12, at 130-61; Molm & Hedley, *supra* note 14, at 6-8; Tavis, *supra* note 15, at 290-96; *Ways Men and Women Lead*, 69 *Harv. Bus. Rev.* 150, 150-51, 154-56, 159-60 (1991) (comments of Cynthia Fuchs Epstein, Jane Mansbridge, and Jeffrey A. Sonnenfeld).

19. John Gruhl et al., *Women as Policymakers: The Case of Trial Judges*, 25 *Am. J. Pol. Sci.* 308, 319-20 (1981) (finding no gender difference among judges, except for female judges' greater propensity to sentence female offenders to prison); Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 *J. Pol.* 596, 607 (1985) (finding no significant male/female difference on issues of criminal law and women's rights).

20. Carolyn Heilbrun & Judith Resnik, *Convergences: Law, Literature, and Feminism*, 99 *Yale L.J.* 1913, 1948-50 (1990).

21. Cynthia Fuchs Epstein, *Women in Law* 131-61 (2d ed. 1993).

pragmatic approaches to difference recognize that women's voice speaks in more than one register; its expression depends heavily on the social circumstances and cross-cutting affiliations of the speaker, including not only gender but class, race, ethnicity, age, and sexual orientation.²²

Such approaches can also recognize the strategic costs as well as values in asserting a "woman's point of view." Emphasizing males' interest in abstract principles and females' concern for interpersonal relationships reinforces longstanding stereotypes that have restricted opportunities for both sexes. However feminist in inspiration, any dualistic world view is readily appropriated for non-feminist objectives. For example, as analysis of gender bias in part III suggests, professional women too often find that emphasis on their distinctive capacities and needs reinforces structures that are separate but not equal.

A more effective strategy would neither exaggerate nor deny gender differences. We can avoid sweeping claims about woman's essential nature while noting that particular groups of women under particular social conditions practice their professions based on different expectations and experiences than men. We also can observe that values traditionally associated with women—care, cooperation, context—have been undervalued in traditionally male-dominated professions, and that their absence impoverishes the lives of both sexes. In short, we can advocate visions of professionalism that resonate with women's experiences, but on the basis of feminist commitments, not biological categories.

The following analysis offers one such vision. Given the diversity within contemporary feminism, this Article makes no claim to represent *the* feminist perspective. Discussion does, however, focus on issues where most feminists have found common ground.

II. PROFESSIONAL ROLES, RELATIONSHIPS AND PROVISION OF SERVICES

About a decade ago, when feminist theories first began to influence work on the legal profession, they often provoked considerable skepticism. I particularly recall one discussion of an article on relational values and legal practice. A prominent leftist scholar summed up widespread views among his male colleagues by observing that "twenty years ago we called this socialism. All that's new here are the

22. For example, see Nancy Fraser & Linda J. Nicholson, *Social Criticism Without Philosophy: An Encounter Between Feminism and Postmodernism*, in *Feminism/Postmodernism* 13, 35 (Linda J. Nicholson ed., 1990); Judith Grant, *Fundamental Feminism: Contesting the Core Concepts of Feminist Theory* 107, 124, 160-63 (1993); Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 884 (1990); Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 Stan. L. Rev. 581, 585 (1990); Margaret J. Radin, *The Pragmatist and the Feminist*, 63 S. Cal. L. Rev. 1699, 1707 (1990).

citations.” When I circulated an early draft of this Article to some of my colleagues, part of its analysis met with greater politeness but similar reservations. In critics’ view, much of the feminist critique of role morality, lawyer-client relationships, and the provision of legal services does not seem uniquely feminist.

My response may not entirely satisfy either feminists or critics, although for different reasons. While feminists are not always eager to relinquish claims of originality, it does not undercut their critique to acknowledge its overlap with other critical perspectives. The values that traditionally have been associated with women are not solely women’s values. They also have played an important part in other traditions from which critics of professional norms have drawn, such as humanism, critical legal studies, Kantian moral theory, and Judeo-Christian ethics.

Yet what feminism offers is much more than a new set of references. It also offers a new constituency, a new urgency, and a new rationale for transformative visions. What drives feminists’ critiques is the dissatisfaction and disadvantage that women disproportionately experience under traditional professional structures. What gives those critiques broader force is the universality of their underlying values—equality, empathy, care, and cooperation.

Twenty years ago, socialism was right in much of its critique, if not always in its proposed solutions, just as earlier legal profession critics were right in their diagnoses, if not always effective in their strategies for reform. If a new “ism” can refocus attention on longstanding problems and build new alliances for change, that is contribution enough.

A. *Role Morality Reconsidered*

The mayor and Montaigne have always been two people, clearly separated An honest man is not responsible for the vices or the stupidity of his calling²³

During the early 1930s, anthropologist Ralph Linton introduced the term “role” into the social science literature to describe rights and duties belonging to a particular status. Ethical theorists have borrowed the term to differentiate role morality and personal or ordinary morality. The conventional assumption, captured by Montaigne, is that individuals holding certain occupational positions assume ethical obligations that may diverge in significant ways from those acceptable within society generally. The theory is that some institutions can function effectively only if participants adjust their sense of moral responsibility in light of particular institutional needs.

23. Montaigne, *quoted in* Charles P. Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3, 20 (1951).

Conventional accounts of professional ethics rest on related premises about professional roles. The prevailing assumption is that individuals' ability to assert legal rights rests on having lawyers who defend, not judge, their clients.²⁴ Fulfilling professional responsibilities may require actions that run counter to individuals' personal moral values.

From a feminist perspective, this traditional concept of role-differentiated morality is unsatisfying in several respects. At the most fundamental level, feminists join other critics in questioning the distinction between ordinary morality and role morality. As they note, "no one is ever an abstract moral agent."²⁵ Individuals always function within relationships and make ethical choices in view of their particular responsibilities as parents, friends, spouses, employees, and so forth. If, as feminists have long insisted, the personal is political, it is also professional. Both role morality and ordinary morality assume that individuals "in different circumstances and with different abilities have different obligations."²⁶

A related criticism is that traditional concepts of role do not advance analysis about what those different obligations demand. All too often, individuals deny personal accountability for professional acts on the ground that they are just "doing their jobs." Yet this strategy attempts to avoid responsibility even as it is exercised. The choice to defer to role is itself a moral choice and needs to be justified as such. Conventional approaches to professional ethics fail to provide adequate justifications. By encouraging deference to abstract role-based norms, these approaches devalue the contextual and relational dimensions that are central to feminist theory and that should be central to ethical analysis. The result is to impoverish both personal and professional identity.

Conventional understandings of role morality for lawyers illustrate what is lost under these traditional conceptions of professional ethics. To understand what feminists find problematic about current ethical norms, it is helpful first to review the obligations that those norms entail. In general, attorneys are expected to act as neutral partisans who should represent their clients zealously within the bounds of the law regardless of their own views concerning the justness of the cause.²⁷ Although lawyers may not assist fraudulent, harassing, or il-

24. For critical accounts of the conventional view, see David Luban, *Lawyers and Justice* (1988); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 *Stan. L. Rev.* 589, 589-659 (1985); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *Hum. Rts.* 1, 1-24 (1975).

25. Alisdair MacIntyre, *What Has Ethics to Learn from Medical Ethics?*, 2 *Phil. Exchange* 37, 46 (1978).

26. Virginia Held, *The Division of Moral Labor and the Role of the Lawyer*, in *The Good Lawyer: Lawyers' Roles and Lawyers' Ethics* 60, 67 (David Luban ed., 1984).

27. See Model Code of Professional Responsibility DR 4-101, DR 7-101, EC 7-1 (1980); Model Rules of Professional Conduct Rule 1.2 (1992); William Simon, *The*

legal conduct, they are given wide latitude to protect client interests at the expense of broader societal concerns. For example, they may present evidence that they reasonably believe to be inaccurate or misleading as long as they do not know it to be false; they may withhold material information in civil cases that the other side fails to discover; they may invoke technical defenses to defeat rightful claims; and they may remain silent about a client's prior wrongful conduct even when disclosure would prevent substantial financial harm or physical risk to innocent parties.²⁸

The rationale for this morally neutral partisanship rests on two primary lines of argument. The first invokes utilitarian, instrumental reasoning. It assumes that the most effective way to achieve justice is through the competitive clash of two zealous adversaries, and that their effectiveness depends on trusting relationships with clients. On this view, an adversarial system will function fairly only if individuals have full confidence in the loyalty and confidentiality of their advocates.

From feminists' standpoint, this conventional justification for the partisanship role is too abstract and acontextual to yield morally satisfying outcomes. The assumption that truth or fairness necessarily results from adversarial clashes is neither self-evident nor supported by empirical evidence. It is not the way most professions or most legal systems pursue knowledge.²⁹ Moreover, the conventional paradigm presupposes a fair contest between combatants with roughly equal resources, capacities, and incentives. Such equality is all too infrequent in a social order that tolerates vast disparities in wealth, renders most legal proceedings enormously expensive, and allocates civil legal assistance largely through market mechanisms.³⁰

In response to such criticisms, defenders of partisan norms rely on an alternative rights-based justification. On this view, respect for clients' individual autonomy implies respect for their legal entitlements and requires undivided loyalty from their legal advisors. By absolving attorneys from accountability for their clients' acts, the traditional advocacy role encourages representation of those most vulnerable to public prejudice and state oppression. The promise of non-judgmental advocacy also encourages legal consultation by those most in need

Ideology of Advocacy: Procedural Justice and Professional Ethics, Wis. L. Rev. 29, 36 (1978).

28. For an overview, see Marvin E. Frankel, *Partisan Justice* 25-29 (1980); Deborah L. Rhode & David Luban, *Legal Ethics* 221-56 (1992); Deborah L. Rhode, *Institutionalizing Ethics*, 44 Case W. L. Rev. 665, 667-76 (1994).

29. Luban, *supra* note 24, at 67-103; Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1031, 1036-37 (1975).

30. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95, 97-114 (1974); Rhode, *supra* note 24, at 595-605.

of ethical counseling. Any alternative system, it is argued, would threaten rule by an oligarchy of lawyers.³¹

Feminists join other critics in raising two central objections to this rights-based defense of neutral partisanship. The first is that it collapses legal and moral entitlements. It assumes that society benefits by allowing clients to pursue whatever objectives the law permits. Yet conduct that is antithetical to the public interest in general or to subordinate groups in particular sometimes remains legal. For example, prohibitions may appear too difficult or costly to enforce, or decision makers may be uninformed, overworked, or vulnerable to interest-group pressures. In such contexts, lawyers may have no particular moral expertise, but they at least have a more disinterested perspective than clients on the ethical dimensions of certain practices. For attorneys to accept moral responsibility is not necessarily to impose it. Unless the lawyer is the last in town (or the functional equivalent for indigent clients), his or her refusal of the neutral partisan role does not preempt representation. It simply imposes on clients the psychological and financial cost of finding alternative counsel.³²

A second problem with rights-based justifications for partisanship is that they fail to explain why rights of clients should trump those of all other individuals whose interests are inadequately represented. For feminists, that failure is most apparent when it threatens the welfare of disadvantaged groups including women, or of especially vulnerable third parties, such as children in divorce cases and consumers of hazardous products. In such circumstances, partisanship on behalf of organizational profits inadequately serves values of individual autonomy. Case histories of the Dalkon Shield and asbestos litigation, as well as less politicized financial scandals, illustrate the human misery and social costs that can accompany unqualified advocacy.³³

Finally, the submersion of self into role carries a price not only for the public in general, but for lawyers in particular. The detachment of personal and professional ethics often

encourages an uncritical, uncommitted state of mind, or worse a deep moral skepticism In a large portion of his daily experi-

31. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613, 629-30. For a critical perspective, see Wasserstrom, *supra* note 24.

32. Luban, *supra* note 24, at 166-74; Rhode, *supra* note 24, at 621-26.

33. See Paul Brodeur, *Outrageous Misconduct: The Asbestos Industry on Trial* (1985); *OPM Leasing Sources, Inc.*, in *The Social Responsibility of Lawyers* 184 (Phillip Heymann & Lance Liebman eds., 1988); Susan Perry & Jim Dawson, *Nightmare: Women and the Dalkon Shield* (1985); Susan Koniak, *When Courts Refuse to Frame the Law and Others Frame it to Their Will*, 66 S. Cal. L. Rev. 1075 (1993); Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext and Context*, 41 J. Legal Educ. 29 (1991); Rhode, *supra* note 28, at 671-72; Stuart Taylor, *Ethics and the Law: A Case History*, N.Y. Times, Jan. 9, 1983, § 6, at 30.

ence, in which [a lawyer] is acting regularly in the moral arena, he is alienated from his own moral feelings and attitudes and indeed from his moral personality as a whole

The social costs of cutting off professional deliberation and action from their sources in ordinary moral experience are even more troubling. First, cut off from sound moral judgment, the lawyer's ability to do his job well—to . . . effectively advise his clients—is likely to be seriously affected

. . . .

[M]ost importantly, when professional action is estranged from ordinary moral experience, the lawyer's sensitivity to the moral costs in both ordinary and extraordinary situations tends to atrophy. The ideal of neutrality permits, indeed requires, that the lawyer regard his professional activities and their consequences from the point of view of the uninvolved spectator.³⁴

From most feminists' perspective, a preferable alternative would break down the boundary between personal and professional ethics. In essence, lawyers should accept direct moral accountability for their professional acts. Attorneys' decisions should not depend on a reflexive retreat into role; rather, individuals need to consider how the purposes of that role can best be served within a particular context. In some instances, those purposes call for deference to collectively determined legal and ethical rules. But such deference is justifiable only if the rules themselves allow room to take account of all the morally relevant factors in a given situation. So, for example, lawyers need to evaluate the rationale for zealous partisanship not by reference to some abstract model of an equal adversarial contest before a neutral tribunal. Instead, they need to consider a realistic social and economic landscape in which legal rights and resources may be unevenly distributed, applicable laws may be unjustly skewed, and the vast majority of cases settle without ever reaching an impartial decision maker.³⁵

Oscar Wilde once reminded us that to be virtuous according to common conventions of behavior was not necessarily demanding. All it required was a certain reflexive timidity and lack of imaginative thought.³⁶ To have moral character is something else again, and we need to recognize the difference.

B. *Lawyer-Client Relationships*

Feminists' second line of challenge to conventional professional structures involves their power dynamics. Lawyer-client relationships

34. Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63, 77-80 (1980).

35. See Luban, *supra* note 24; Postema, *supra* note 34, at 81-89; Rhode, *supra* note 24, at 617-26.

36. Oscar Wilde, *The Critic as Artist, in The Artist as Critic* 388 (Richard Ellmann ed., 1969).

frequently display patterns of dominance that ill-serve broader societal interests.

The problems often start in law school. Conventional classroom hierarchies encourage extremes of both unreflective passivity and aggressive competition. The structure of professorial control over the content and evaluation of learning processes discourages independent thought and encourages participation designed more to impress than inform. All too often, the "search for knowledge" becomes a scramble for status that undermines broader educational objectives. Authoritarian structures and inadequate clinical and seminar opportunities shortchange capacities that feminists believe should be central to professional practice. Certain skills, such as collaboration, empathetic listening, and ethically reflective decision making, call for more interactive, egalitarian teaching formats.³⁷

The patterns of dominance reinforced in legal education are replicated in later workplace relationships, particularly those involving subordinate groups. Authoritarian, paternalistic interactions between lawyers and clients often obscure the needs that prompted professional consultation in the first instance. One study involving low-income legal aid clients found that lawyers frequently interrupted and attempted to control the topic in over ninety percent of their comments.³⁸ Yet professionals who constantly redirect the conversation of those they purport to serve cannot effectively connect their skills to real human needs. Nor can such strategies enable individuals to assess and assert their own best interests. Empirical research consistently indicates that clients who actively participate in decision-making do better and have greater satisfaction than those who do not.³⁹

The adverse effects of professional dominance are compounded by other status inequalities such as class, race, ethnicity, and gender. The most egregious cases of manipulating, circumventing, or simply overlooking client objectives have involved subordinate groups. Women's experiences in divorce proceedings offer a case in point. Legal aid lawyers frequently have refused to handle such proceedings on the

37. Ervin Staub, *Promoting Positive Behavior in Schools, in Other Educational Settings, and in the Home*, in *Altruism and Helping Behavior: Social, Personality and Developmental Perspectives* 109, 126-27 (J. Phillippe Rushton & Richard M. Sorrentino eds., 1981); see also James Rest & Stephen J. Thoma, *Educational Programs and Interventions*, in James R. Rest, *Moral Development: Advances in Research and Theory* 59, 59-78 (1986).

38. Carl J. Hosticka, *We Don't Care About What Happened, We Only Care About What Is Going to Happen: Lawyer-Client Negotiations of Reality*, 26 *Soc. Probs.* 599, 604 (1979).

39. Douglas Rosenthal, *Lawyer and Client: Who's in Charge?* 56-61 (1974); J.A. Hall et al., *Meta-Analysis of Correlates of Provider Behavior in Medical Encounters*, 26 *Med. Care* 657, 665 (1988).

ground that they present no pressing need or important law reform issues even though clients give high priority to these cases.⁴⁰

Even for middle and upper-income parties, a mismatch persists between what many women seek and what many attorneys supply. Empirical studies reveal participants occupied with two different divorces: lawyers with the financial and legal consequences of separation, and clients with the social and emotional ones.⁴¹ Attorneys receive little training in how to respond to individuals in stress, and often end up talking past the concerns that are most central to the parties. The problem is apparent in many dialogues recorded in recent research on divorce practice. For example:

Client: There was harassment and verbal degradation. No interest at all in my furthering my education. None whatsoever. Sexual harassment. If there was ever any time when I did not want or need sex, I was subject to, you know, these long verbal whiplashings. Then the Bible would be put out on the counter with passages underlined as to what a poor wife I was. Just constant harassment from him.

Lawyer: Mm uh.

Client: [I] could lock myself in the bathroom and he would break in. And I was just to listen, whether I wanted to or not . . . There was no escaping him, short of getting in a car and driving away. But then he would stand outside in the driveway and yell, anyhow. *The man was not well.*

Lawyer: Okay. Now how about any courses you took?⁴²

Clients are like performers playing before bored, but dutiful legal audiences; lawyers do not "interrupt the aria, but [they do not] applaud much either for fear of an encore."⁴³ As a result, the process becomes for many clients "at best a distraction and at worst an additional trauma."⁴⁴ While lawyers cannot substitute for trained therapists, neither can they function effectively as legal advisors without adequate skills in empathetic listening.

Attorneys accustomed to dominating clients' decision-making for "their own good" may too readily replicate those patterns when it

40. Samuel Brakel, *Judicare* 71 (1974) (pointing out that representation in divorce is the most frequently requested service under voucher plans); National Center on Women and Family Law, *Challenges Facing Legal Services in the 1990s* 4 n.6 (1988) (noting that during the 1980s, half of sampled legal service programs eliminated representation in divorce and custody issues). For discussion of longstanding restrictions on representation for family cases, see Richard Abel, *Law Without Politics: Legal Aid Under Advanced Capitalism*, 32 U.C.L.A. L. Rev. 474, 608 (1985); Silverstein, *Eligibility for Free Legal Services in Civil Cases*, 44 J. Urb. L. 549, 571-81 (1967).

41. Cf. Austin Sarat & William Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer-Client Interaction*, 22 L. & Soc'y Rev. 737, 742 (1988).

42. *Id.* at 744-55.

43. *Id.* at 750.

44. Austin Sarat, *Lawyers and Clients: Putting Professional Service on the Agenda of Legal Education*, 41 J. Legal Educ. 43, 53 (1991).

serves practitioners' own interests. One of the most obvious examples involves lawyer-client sexual relationships. Although the extent of the practice is difficult to measure, almost a third of surveyed attorneys are aware of one or more such relationships.⁴⁵ Research involving a variety of professions finds that such sexual intimacy puts clients at substantial risk.⁴⁶ These relationships are likely to compromise independent judgment by both parties. Attorneys who want to prolong or terminate sexual intimacy may skew their legal advice accordingly. And clients who are involved in such relationships do not always feel able to challenge the quality of assistance provided, the strategies proposed, or the fees requested.⁴⁷ Nor is intimacy wholly consensual if parties fear that rebuffing their lawyer would adversely affect their legal representation or impose the expense and delay of hiring other counsel.⁴⁸

Although almost three-quarters of surveyed lawyers acknowledge that sexual involvement with clients causes problems, no state imposes a categorical prohibition, and only a few address the issue explicitly.⁴⁹ Many practitioners oppose bar regulation on the ground that it would interfere with lawyers' privacy and associational rights, create "oppressive bureaucracies," discourage relationships that promote "fervent[]" advocacy, and force single lawyers to "revert to celibacy."⁵⁰

45. J.L. Bernard et al., *Dangerous Liaisons Survey: Most Disapprove of Lawyer-Client Sex*, 78 A.B.A. J. 82, 82 (1992).

46. Jacqueline Bouhoutsos et al., *Sexual Intimacy Between Psychotherapists and Patients*, 14 Prof. Psychol. Res. & Prac. 185, 194-95 (1983) (finding that 90% of patients reported adverse effects); Shirley Feldman-Summers & Gwendolyn Jones, *Psychological Impacts of Sexual Contact Between Therapists or Other Health Care Practitioners and Their Clients*, 52 J. Consulting Clinical Psychol. 1054, 1060 (1984); see also John M. O'Connell, Note, *Attorney-Client Sex*, 92 Colum. L. Rev. 887, 920 n.175 (1992); Geoffrey C. Hazard, Jr., *Lawyer-Client Sex Relations are Taboo*, Nat'l L.J., Apr. 15, 1991, at 13.

47. See sources cited *supra* note 46; Howard W. Brill, *Sex and the Client: Ten Reasons to Say "No!"*, 33 Santa Clara L. Rev. 651 (1993); see also Caroline Forell, *Lawyers, Clients and Sex: Breaking Silence on the Ethical and Liability Issues*, 22 Golden Gate U. L. Rev. 611, 613 (1992).

48. See sources cited *supra* notes 46-47.

49. Bernard et al., *supra* note 45, at 82. In 1991, California became the first state to pass a general rule on the subject. That rule prohibits attorneys from demanding or requiring sexual relationships with clients, from employing coercion or undue influence in entering into sexual relationships, and from continuing representation if a relationship causes incompetent performance. California Rules of Professional Conduct Rule 3-120 (1988); see also Section 6106 of the California Business and Professions Code (1992). Other bar associations have considered categorical prohibitions on attorney-client sex (e.g., Oregon) or on sexual relationships that involve duress, intimidation, undue influence, or consent impaired by emotional or financial dependence or other relevant factors (e.g., Chicago). William T. Barker & C. Harker Rhodes, Jr., *Draconian Sex Rules Premature*, Nat'l L.J., June 29, 1992, at 17-18.

50. David Margolick, *At the Bar: Are Lawyers Violating Professional Ethics When They Have Sexual Affairs with Their Clients?*, N.Y. Times, May 6, 1988, at B5 (quoting divorce attorney Raoul Felder); see also Bernard et al., *supra* note 45, at 83; Forell, *supra* note 47, at 635; Yael Levy, *Attorneys, Clients and Sex: Conflicting Interests in the California Rule*, 5 Geo. J. Legal Ethics 649, 662-69 (1992).

A widespread view is that attorneys "should be able to sort out their sexual activities without any advice from the state bar."⁵¹

On some level, most feminists would agree. Attorneys should. But as a review of recently reported cases makes clear, too many lawyers need better advice from somewhere, and they aren't getting it from courts or disciplinary authorities.⁵² Sanctions and reporting structures are far from adequate.⁵³ More bright line rules are necessary, preferably ones prohibiting such involvement. Other professions have implemented such prohibitions without the dire consequences that opponents have invoked.⁵⁴ At the very least, if a client complains, the burden should fall on the attorney to prove that the sexual relationship was consensual and that professional services were not adversely affected.⁵⁵

51. Joanne Pitulla, *Unfair Advantage: When Lawyers Have Sex with Clients Are They Violating Professional Ethics? More and More, the Answer Is Yes.*, A.B.A. J., Nov. 1992, at 76 (quoting Joseph Hurley).

52. Professor John Elson of Northwestern University Law School, who has litigated some cases involving attorney-client sex, has "found the legal system to be not only unresponsive, but actively hostile to women who complained of having been coerced by a divorce lawyer into sexual relations Judges trivialized and even ridiculed the harm the women suffered and took great pains to seal their cases in order to protect the accused lawyer from public embarrassment." *Id.* at 80; *see also* sources cited *supra* note 47 and *infra* note 53.

53. *See* Linda Mabus Johnson & Pamela K. Sutherland, *Lawyer-Client Sexual Contact: State Bars Polled*, Nat'l L.J., June 15, 1992, at 26 (noting that of 47 responding bars, about a third kept no statistics on sexual conduct, and over half had fewer than five complaints over the past two years). For examples of inadequate sanctions, *see* *Suppressed v. Suppressed*, 565 N.E.2d 101, 105 (Ill. 1990) (holding that sexual relationships did not violate fiduciary obligations even though the client's consent was not knowledgeable or voluntary); *Drucker's Case*, 577 A.2d 1198 (N.H. 1990) (imposing two-year suspension on lawyer who had sex with divorce client while knowing she was under psychiatric care and who subsequently terminated their affair); *United States v. Babbitt*, 26 M.J. 157, 159 (C.M.A. 1988) (rejecting defendant's claim that she was denied effective assistance of counsel because she was involved in a sexual relationship with her defense attorney; a review of the record indicated that the attorney was "if anything, spurred on" by the relationship (quoting lower court, 22 M.J. 672, 677-78 (1986))); *see also* *Doe v. Roe*, 756 F. Supp. 353, 355 (N.D. Ill. 1991), *aff'd*, 958 F.2d 763, 768 (7th Cir. 1992) (dismissing RICO complaint against same lawyer involved in *Suppressed v. Suppressed* who threatened client with reprisals from "very Italian friends" if she did not pay her bill and suggested that she work off the charges through sexual relations). Under the court's analysis in *Doe*, because the client complied and paid her bills with sex, she suffered no federally cognizable economic loss. *Id.*

54. For discussion of prohibitions on sexual involvement between patients and mental health practitioners, *see* Johnson & Sutherland, *supra* note 53, at 26; Lawrence Dubin, *Sex and the Divorce Lawyer: Is the Client Off Limits*, 1 Geo. J. Legal Ethics 585, 615-16 (1988).

55. For a description of the rules, *see supra* note 49. The ABA advises attorneys to avoid sexual relationships with clients and indicates that if such relationships occur, lawyers should bear a heavy burden to demonstrate that their representation was not adversely affected. ABA Standing Comm. on Ethics and Professional Responsibility, Formal Op. 364 (1992).

C. Professional Services

Lawyer-client conflicts of interest also arise in the delivery of legal services. American legal norms encourage unduly expensive assistance for individuals who can afford it and tolerate inadequate representation for those who cannot. The situation persists in part because the bar's financial interest lies more in perpetuating the first problem than in addressing the second. That is not to imply that attorneys are driven only by economic concerns; overbilling and litigiousness are fueled by a complex set of structural, psychological, and financial pressures. All professionals have a natural desire to believe in their own effectiveness and to leave no stone unturned, especially if they can charge by the stone.⁵⁶ By contrast, where the costs of effective representation exceed what clients or legal service programs can subsidize, the tendency is to revise expectations for assistance in accordance with financial realities.⁵⁷

Feminist approaches offer no simple solutions to these problems. But a commitment to relational values and the concerns of subordinate groups makes addressing such issues a more central priority. As the following discussion suggests, a feminist understanding of professional responsibilities implies a fundamental redistribution of professional services.

One obvious step toward that end involves changing lawyers' relationships with providers of similar services. Traditionally, the legal profession has asserted inherent authority to define the practice of law, to limit that practice to lawyers, and thus to determine the scope of its own monopoly. Repeatedly, bar leaders have insisted that it is consumers, not attorneys, who suffer from unqualified lay assistance, and that the "fight to stop it is the public's fight."⁵⁸ If so, the public has been curiously unsupportive of the war effort. On the relatively few occasions when consumers' opinions have been solicited, they have endorsed greater access to legal services provided by non-lawyers.⁵⁹

56. Eliot Freidson, *Profession of Medicine* 257-58 (1970); Rhode, *supra* note 24, at 635; Rhode, *supra* note 28, at 679.

57. Thus, overburdened and underpaid criminal defense lawyers often will "cool a client out" and influence decisions in favor of a quick guilty plea rather than extended proceedings. Albert Alshuler, *Personal Failure, Institutional Failure and the Sixth Amendment*, 14 N.Y.U. Rev. L. & Soc. Change, 149, 150 (1986); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 Yale L.J. 1979, 1988 (1992).

58. ABA, National Conference on the Unauthorized Practice of Law 101 (1962) (remarks of former ABA President John C. Satterfield, quoting Iowa Supreme Court). For contemporary variations on this theme, see Thomas R. Curtin, *Nonlawyers Are Not the Answer*, A.B.A. J., Apr. 1994, at 28; sources cited in Deborah L. Rhode, *The Delivery of Legal Services by Non-Lawyers*, 4 Geo. J. Legal Ethics 209, 220-21, 233 (1990).

59. In one survey, over 82% of the respondents agreed that "many things that lawyers handle—for example, tax matters or estate planning . . . can be done as well and less expensively by nonlawyers;" Barbara A. Curran, *The Legal Needs of the*

Such services could help address this nation's vast array of unmet legal needs, particularly those concentrated among women and other subordinate groups. Research focusing on low-income populations finds no services available for fifty to eighty percent of their reported needs.⁶⁰ Middle income consumers also lack affordable services for matters that carry special importance for women, such as those concerning divorce and domestic violence.⁶¹ Many of these unmet needs involve relatively routine, specialized services for which professional education is neither necessary nor sufficient. Graduating from law schools and passing bar exams provides no assurance of expertise in matters such as uncontested divorces, landlord-tenant disputes, bankruptcy filings, welfare claims, or protective orders against domestic violence. In many jurisdictions here and abroad, non-lawyers frequently provide services in these areas with no apparent adverse effects.⁶²

Relaxation of the professional monopoly over legal assistance not only might promote more competitive services, but also could encourage reforms that would decrease the need for such services in the first instance. Reducing lawyers' financial stakes in certain legal proceedings could reduce the obstacles to procedural simplification and innovation. Such initiatives might include citizen advice bureaus, court-affiliated ombudspersons, self-help services, no-fault insurance programs, and various alternative dispute resolution procedures such as mediation and arbitration. These approaches have the potential to serve values that are central to feminist agendas. Such initiatives can decrease the costs and acrimony associated with traditional adversarial processes, explore root causes of disputes as well as their legal

Public: The Final Report of a National Survey 231 (1977). For other examples, see Deborah L. Rhode, *Policing the Professional Monopoly: A Constitutional and Empirical Analysis of Unauthorized Practice Prohibitions*, 34 Stan. L. Rev. 1, 3-4 (1981).

60. See Barbara A. Curran, Report: 1989 Survey of the Public's Use of Legal Services (1989); Illinois Legal Needs Study 2 (Chicago: Chicago Bar Association, Oct. 6, 1989); The Spangenberg Group, National Survey of the Civil Legal Needs of the Poor 3, 18 (1989); see also ABA Consortium on Legal Services and the Public, Legal Needs and Civil Justice (1994) [hereinafter ABA Consortium] (noting that three-quarters of the legal needs of low-income households and nearly two-thirds of the needs of moderate-income households were not taken to the civil justice system, and over half of the low-income households and over a third of the moderate income households were dissatisfied with the outcome of their action or inaction).

61. For domestic violence, see *Developments in the Law—Legal Responses to Domestic Violence*, 106 Harv. L. Rev. 1498, 1525-26 (1993). For other family cases, see Gender Bias Study Committee, Supreme Judicial Court of Mass., Report of the Gender Bias Study of the Supreme Judicial Court 21 (1989) [hereinafter Gender Bias Study]; National Center on Women and Family Law, *supra* note 40, at 4 n.6.

62. See John H. Merryman & David S. Clark, *Comparative Law: Western European and Latin American Legal Systems* 456-57 (1978); Michael Zander, *Legal Services for the Community* 329-35 (1978); Rhode, *supra* note 58, at 215; Rhode, *supra* note 59, at 85-90.

symptoms, and draw on skills of non-legal experts with experience in facilitating relationships.

This is not to suggest that all forms of delegalization or alternative dispute resolution are socially desirable. Rather, as feminists have often emphasized, what is needed is contextual analysis. In some circumstances, informal mediation between parties with unequal bargaining power can reinforce inequality and encourage negotiation of rights that should be nonnegotiable. Divorcing wives may trade property rights to avoid custody fights or battered spouses may agree to stop "nagging" in exchange for their partners' promises to refrain from assaults.⁶³ Informal processes oriented toward private settlements may also undervalue society's interest in having publicly accountable officials apply collectively determined standards.⁶⁴ How best to structure the delivery of professional services cannot be resolved in the abstract. Rather, that question requires a more particularized analysis of the social context and power relationships from which a given legal need arises.

Feminists also seek a fundamental restructuring of the priorities underlying judicial administration and subsidized legal services. The reason was well illustrated in testimony before the California Gender Bias Commission. As one prominent state judge noted, in general civil court she had recently spent ten days presiding over a jury trial involving a \$100,000 dispute between two companies. In family court, she had a docket of thirty to forty custody and child abuse cases per day, involving an average of two to three children per case. In ten days, she was expected to address the needs of 1000 children.⁶⁵ Such disparities are by no means unique to California.⁶⁶ Nor are resource problems confined to the judicial system. Legal aid and court-connected services are shockingly underfunded for family-related needs.⁶⁷

Although the shape of necessary reforms is beyond the scope of this Article, the general direction of feminist concern is clear. Our society must spend more, and spend more wisely, in areas such as domestic violence, child support enforcement, custody disputes, and child abuse and neglect. If our nation is truly committed to "family values," we

63. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 Yale L.J. 1545, 1549-51, 1555-96, 1605-07 (1991); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 Harv. Women's L.J. 57, 75 (1984).

64. Owen H. Fiss, Comment, *Against Settlement*, 93 Yale L.J. 1073 (1984).

65. *How Gender Bias Creeps Into Courts*, L.A. Times, Nov. 27, 1990, at B6.

66. See Lois G. Forer, *Money & Justice: Who Owns the Courts* 14-29 (1984); Harriet Chiang, *Sexism Pervades State's Courts, Committee Says Study Finds Discrimination at All Levels, Suggests New Rules for Lawyers, Judges*, S.F. Chron., Mar. 4, 1990, at 1.

67. ABA Consortium, *supra* note 60; Gender Bias Study, *supra* note 61, at 21; National Center on Women and Family Law, *supra* note 40, at 4.

need a better match between our legal structures and resource priorities.

III. COLLEGIAL RELATIONS AND WORKPLACE STRUCTURES: GENDER BIAS AND GENDER ROLES

A final area of feminist concern, and the one that has attracted greatest bar attention, involves gender bias in the professional workplace. Over the last decade, that problem has come under increasing scrutiny, not because it has become more acute, but rather because its dimensions have grown more visible and because women have gained sufficient leverage to get the issue onto the bar's agenda.

Both developments are apparent in the work of gender bias commissions. During the 1980s and early 1990s, one federal circuit and about two thirds of state judiciaries established such commissions to consider gender bias in the courts. About a third formed analogous groups to consider racial or ethnic bias, and a few states gave one task force jurisdiction over both issues.⁶⁸ In addition, the American Bar Association and some national, state, and local bar organizations established commissions on the status of women and on racial and ethnic minorities in the legal profession.⁶⁹ These initiatives reflect and reinforce a growing perception within the bar about the extent of bias and the need for further strategies to address it. Although diagnoses of the problem vary, certain common themes emerge.

As a definitional matter, most task forces have interpreted bias to include stereotypes or misconceptions about the nature, roles, and life circumstances of men and women, as well as the devaluation of women and tasks traditionally perceived as "women's work."⁷⁰ In general, these bias studies have focused on the judicial system and the professional workplace. They have not given significant consideration to other law-related contexts, such as legal education, and they have varied considerably in their attention to substantive doctrine. This Article similarly restricts its focus. Emphasis centers on professional workplaces, although effective strategies for change obviously must include other institutional settings.

Taken as a whole, this recent work on bias has made major contributions in both substantive and methodological terms. It has identified the nature of the problem and has assessed appropriate responses

68. Kathleen L. Soll, *Gender Bias Task Forces: Have They Fulfilled Their Mandate and Recommendations for Change*, 2 *Rev. Law & Women's Studies* 633, 634, 638 (1993) (noting that as of May 1993, 35 states, the District of Columbia, and two federal judicial circuits had established gender bias task forces, and that 26 had published reports).

69. Examples include the National Consortium on Race and Ethnic Bias in the Courts, the ABA Commission on Women in the Profession, and the ABA Task Force on Minorities in the Legal Profession.

70. Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 *Ariz. St. L.J.* 237, 238-39 (1989).

through a process responsive to women's experiences. Rather than simply compiling existing research on female underrepresentation and unequal treatment, state bias commissions generally have insisted on providing direct opportunities to be heard. The result has been an accumulation of stories as well as statistics, striking for both their "endless variety and monotonous similarity."⁷¹ Patterns that male professionals have long denied, dismissed, or discounted have acquired new credibility, and the gender-related effects of ostensibly gender-neutral practices have become more difficult to ignore.

The discussion that follows attempts to convey the experiential qualities of this work, not simply because they enliven the account, but also because they enrich the analysis. Standard academic fare often excludes relevant material that might appear too anecdotal. But as skeptics have observed in other contexts, the plural of anecdote is data. And in this context, what has reportedly converted some of the previously unconverted are the narratives about the personal costs of professional devaluation.⁷² As the social science consultant to one task force notes:

Statistical data on employment patterns, case outcomes, and other "objective" phenomena may satisfy those who require concrete evidence of differential treatment [and assurances]. . . that individuals' testimonials about their experiences are not aberrational. But statistical analytic results, reported coldly and impersonally. . . give little sense of the pain and difficulties associated with less powerful groups' struggles for equality. Feelings of exclusion and disadvantage are as much a part of the objective reality of gender bias, as are unequal treatment in hiring and promotion and judicial decisionmaking.⁷³

Viewed not as substitutes but as supplements to other approaches, women's stories are part of the story that needs to be told.

A. *Professional Opportunities*

Women, particularly women of color, are significantly overrepresented in the least prestigious and least remunerative areas of practice and significantly underrepresented among the most elite positions. For example, women account for close to forty-five percent of new entrants to the profession, and over twenty percent of all lawyers,

71. The phrase comes from Gayle Rubin's description of sex-based subordination across varied cultural settings. Gayle Rubin, *The Traffic in Women: Notes on the "Political Economy" of Sex*, in *Toward an Anthropology of Women* 157, 160 (Rayna R. Reiter ed., 1975).

72. See sources cited *supra* note 71 and *infra* notes 113, 126, 130-31.

73. Deborah R. Hensler, *Studying Gender Bias in the Courts: Stories and Statistics*, 45 *Stan. L. Rev.* 2187, 2187 (1993); see also Penelope Eileen Bryan, *Toward Deconstructing the Deconstruction of Law and Lawyers*, 71 *Denv. U. L. Rev.* 161, 164 n.19 (1993); Judith Resnik, *Ambivalence: The Resiliency of Legal Culture in the United States*, 45 *Stan. L. Rev.* 1525, 1534-35 (1993).

but only about eleven percent of the partners in the nation's 250 largest firms, eight percent of the federal bench, sixteen percent of full professors in law schools, and seven percent of law school deans.⁷⁴ Female lawyers also earn substantially less and express more dissatisfaction with practice than male lawyers.⁷⁵ Although data are disturbingly hard to come by, these disparities are still greater for women of color.⁷⁶

What accounts for such gender differences is a matter of dispute. Many observers believe that factors other than discrimination explain most differences. One common view is that current gender inequalities reflect women's historic underrepresentation in the profession. With recent changes in legal norms and cultural attitudes, any sex-biased disparity naturally will erode. As one (male) attorney put it in a Ninth Circuit study, "I really don't think there is any substantial gender bias. If there is, then in a few years it will be gone when the new generation takes over. So relax, and let time take care of the problem."⁷⁷

74. For lawyers, see Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 Case W. Res. L. Rev. 345 (1994); Claudia MacLachlan & Rita Henley Jensen, *Progress Glacial for Women, Minorities*, Nat'l L.J., Jan. 27, 1992, at 1. For judges, see Miriam Goldman Cedarbaum, *Women on the Federal Bench*, 73 B.U. L. Rev. 39, 42 (1993) (explaining that of approximately 801 federal district judges, there are 62 women; of approximately 250 court of appeals and supreme court judges, 22 are women); Resnik, *supra* note 73, at 1535 n.51 (noting that in the early 1990s, 60 of 94 federal district courts had no life tenured judges who were women). For law professors, see Richard A. White, Association of American Law Schools Statistical Report on Full Time Law School Faculty tbl. 1 (1994) (indicating that women constitute 15.8% of full professors, 39.6% of associate professors and 50.6% of assistant professors). For law school deans, see Marilyn J. Berger & Kari A. Robinson, *Women's Ghetto Within the Legal Profession*, 8 Wis. Women's L.J. 71, 88, 95 (1992-93). See also Deborah J. Merritt et al., *Family, Place, and Career: The Gender Paradox in Law School Hiring*, 1993 Wis. L. Rev. 395.

75. Margaret Cronin Fisk, *Lawyers Give Thumbs Up*, Nat'l L.J., May 28, 1990, at 52; see also ABA Young Lawyers Division, *The State of the Legal Profession 1990* 54, 63-64 (1991); Menkel-Meadow, *supra* note 8, at 218, 226; Stacy Caplow & Shira Scheindlin, "Portrait of a Lady": *The Woman Lawyer in the 1980s*, 35 N.Y.L. Sch. L. Rev. 391, 408, 418 (1990); Deborah K. Holmes, *Structural Causes of Dissatisfaction Among Large-Firm Attorneys: A Feminist Perspective*, 12 Women's Rts. L. Rep. 9, 20-23 (1990).

76. See ABA Task Force on Minorities and the Justice System, *Achieving Justice in a Diverse America: Report of the ABA Task Force on Minorities and the Justice System* (1992); White, *supra* note 74, at tbl. 1 (showing that women of color account for 1.6% of full professors at law schools supplying information). Statistics on the legal profession typically do not include a separate category for women of color. See sources cited *supra* note 74. However, even without gender breakdowns, the classifications by race and ethnicity support the general statement in the text. See MacLachlan & Jensen, *supra* note 74, at 1 (noting that minorities account for 2.4% of large firm partners); see also 1 Report of the New York State Judicial Commission on Minorities (1991).

77. The Preliminary Report of the Ninth Circuit Gender Bias Task Force: Discussion Draft 60 (1992) [hereinafter Discussion Draft].

A related claim, reinforced by classic economic theories, maintains that a well functioning market will eliminate discriminatory patterns. According to these theories, employers who do not indulge arbitrary preferences will have a competitive advantage. As Richard Epstein argues, "constraints of reputation and survival are powerful checks against any firmwide effort to engage in sex discrimination."⁷⁸

In practice, however, recent research makes clear that gender bias in attitudes and occupational structures can be highly resistant to change, and that professional employment markets are far from perfectly competitive. Within the bar, studies that have controlled for age do not find substantially greater sensitivity to bias among younger male attorneys than their older colleagues.⁷⁹ Status and income disparities between women and men cannot be explained by length of time in legal practice or other objectively quantifiable factors. In law, as in other elite professions, female members advance less far and less quickly than male colleagues with comparable qualifications.⁸⁰ For example, the ABA's recent survey found that of some 3,000 young lawyers with similar backgrounds, men were twice as likely to have attained partnership status.⁸¹

1. Individual Choice and Institutional Constraints

To explain these disparities, some researchers and many practitioners place primary importance on men's and women's different choices. According to human capital theories, women seek to reconcile competing job and family demands by making a lower investment in their professions. Leading economists argue that the "conflicts between career and family . . . are stronger for women than for men . . . [An

78. Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 390-91 (1992); see also Gary S. Becker, *The Economics of Discrimination* (2d ed. 1971).

79. *The Effects of Gender in the Federal Courts: The Report of the Ninth Circuit Gender Bias Task Force* 18-20 (1993).

80. For lawyers, see ABA Comm. on Women in the Profession, *Report to the House of Delegates* (1988). See also Spurr, *Sex Discrimination in the Legal Profession: A Study of Promotion*, 43 *Indus. & Lab. Rel. Rev.* 406, 413 (1990); ABA Young Lawyers Division, *supra* note 75, at 63; Menkel-Meadow, *supra* note 8, at D18; Holmes, *supra* note 75, at 19. For other professions, see Henry J. Aaron & Cameran M. Lougy, *The Comparable Worth Controversy* 12-13 (1986); U.S. Dep't of Labor, *A Report on the Glass Ceiling Initiative* 4-5 (1991); Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 *Yale L.J.* 1731, 1758 (1991) (sources cited therein).

81. ABA Young Lawyers Division, *supra* note 75, at 63 (finding 18% of women as compared with 45% of men were partners); see also Special Committee on Gender in the District of Columbia United States Court of Appeals, *Preliminary Report to the Task Force of the District of Columbia Circuit on Gender, Race and Ethnic Bias* (May 1994) [hereinafter *Special Committee on Gender*] (finding that of surveyed lawyers graduating after 1979, 42% of men, but only 28% of women were partners); Sandra Torrey, *Female Lawyers Face Sexism, Study Finds: Most Problems Are in Pretrial Work, Women Say*, *Wash. Post*, May 28, 1994, at B1.

average woman] feel[s] a stronger desire for children than do men and a greater concern for their welfare after they are born."⁸² Richard Epstein similarly maintains that the "extensive differences in occupational patterns for men and women . . . [are attributable] not to discrimination by employers but to the different preference structures of men and women."⁸³

Feminists respond to these claims on several levels. As a threshold matter, they generally agree that women experience greater difficulties than men in reconciling work and family obligations. Female professionals continue to assume the vast majority of responsibilities in the home and to pay a price in the world outside it.⁸⁴ Most feminists, however, do not view this gender difference solely as a function of natural preferences. Rather, these commentators emphasize that sex-based socialization patterns and employment cultures condition women to form lower aspirations for vocational achievement and to assume a greater share of family responsibilities.⁸⁵

Moreover, as considerable feminist research makes clear, women's career sacrifices are attributable to the choices not simply of individual women but also of employer and societal decisionmakers. Inadequacies in policies involving parental leave, part-time work, child care, and related issues contribute greatly to professionals' problems in accommodating work and family commitments.⁸⁶

My own exposure to the problem first occurred almost two decades ago when I was interviewing for a summer job. From one distinguished Chicago litigator I learned that there was "no woman problem" at his firm. His female partner (one out of about forty) reportedly had no difficulties reconciling her personal and professional life. Why, just last fall she had given birth to her first child. It happened on a Friday and she was back at the office the following Monday.

The novelty of these "faster than a speeding bullet" maternity leaves is wearing thin, but variations on the theme continue to develop. Thus far, the record for reconciling personal and professional

82. Victor R. Fuchs, *Women's Quest for Economic Equality* 4 (1988); see also Gary S. Becker, *Human Capital: A Theoretical Perspective and Empirical Analysis*, with Special Reference to Education 178-80 (2d ed. 1975).

83. Epstein, *supra* note 78, at 77 n.16.

84. According to most estimates, employed wives spend about twice as much time on household tasks as employed husbands. See Arlie Hochschild & Anne Machung, *The Second Shift: Working Parents and the Revolution at Home* 266 (1989); Alison L. Cowan, *Poll Finds Women's Gains Have Taken a Personal Toll*, N.Y. Times, Aug. 21, 1989, at A1.

85. See, e.g., sources cited in Deborah L. Rhode, *Justice and Gender* 165-67 (1989); Rhode, *supra* note 80, at 1731, 1758, 1768-70.

86. Kathryn Abrams, *Gender Discrimination and The Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1220-23 (1989); Carrie Menkel-Meadow, *Culture Clash in the Quality of Life in the Law*, 44 Case W. Res. L. Rev. 621, 647-48, 659 (1994); see also *infra* notes 87-91, 101 and accompanying text.

rhythms may go to the woman who finished interrogatories while timing her contractions during labor. If you're billing at six minute intervals, why waste a moment?

Although well over two-thirds of legal employers now have formal maternity policies, their adequacy varies.⁸⁷ Many fall far short of what child development experts generally recommend.⁸⁸ Moreover, most workplaces have yet to develop satisfactory part-time arrangements. In the ABA's recent national survey, only eight percent of lawyers in private practice were working a reduced schedule, and sixty percent of practitioners believed that taking part-time status would limit their advancement.⁸⁹

Workplace cultures that only grudgingly accommodate mothers' obligations are still less tolerant of fathers'. About two-thirds of firm policies do not provide paid paternity leave.⁹⁰ National surveys find that even in organizations offering such leaves, less than two percent of eligible fathers take them, and those that do generally are absent for only a brief period.⁹¹ Peer pressures, socialization patterns, and personal convenience all war against egalitarian roles. Thus, a wide gap persists between many men's rhetorical commitments and daily practices. Women lawyers often have husbands who perceive their own professional aspirations and obligations as fixed, but those of their wives as negotiable. As a male attorney in one study of dual career couples put it, "[i]t's not a question of what I want."⁹² After all, "a demanding practice is a demanding practice."⁹³

Such attitudes, which deny choice even as it is exercised, contribute to women's problems in coping with their own demanding practices. Increasing competitiveness and commercialization have driven billable hour requirements to unprecedented levels. Until the last few decades, the conventional wisdom was that "lawyers could not reasonably expect to charge for more than 1200 to 1500 hours per

87. ABA Young Lawyers Division, *supra* note 75, at 28.

88. See *Recommendations of the Yale Bush Center Advisory Committee on Infant Care Leave*, in *The Parental Leave Crisis: Toward a National Policy* 343 (Edward F. Zigler & Meryl Frank eds., 1988).

89. ABA Young Lawyers Division, *supra* note 75, at 25. Many female attorneys at large firms believe that taking part-time status is "career suicide." Emily Couric, *Women in the Large Firms: A High Price of Admission*, Nat'l L.J., Dec. 11, 1989, at S2, S10.

90. ABA Young Lawyers Division, *supra* note 75, at 29.

91. Shari Rudavsky, *New Fathers Reluctant to Take Time Out*, Wash. Post, July 7, 1992, at A3 (surveying 1000 of the nation's largest companies and finding that 31% offered some form of paternity leave, but only about 1% of eligible employees took it); see also Deborah L. Rhode, *Perspectives on Professional Women*, 40 Stan. L. Rev. 1163, 1184 n.115 (1988); Rhode, *supra* note 80, at 1772 n.202.

92. Hochschild & Machung, *supra* note 84, at 113 (1989) (quoting a male attorney whose wife also worked).

93. *Id.*

year.”⁹⁴ Recent surveys find that almost half of private practitioners bill over 2000.⁹⁵ “What has not changed is the number of hours in a day.”⁹⁶

For women, this puritan ethic gone amok, coupled with the inadequacy of part-time arrangements, imposes substantial costs. Other evidence similarly indicates that in promotion and compensation decisions, billable hours function as a proxy for other harder to measure characteristics, such as dependability and commitment.⁹⁷ One result is that most attorneys report working longer schedules than they would like.⁹⁸ The inadequacy of time for personal and family needs is, in turn, a leading cause of lawyers’ exceptionally high rates of job dissatisfaction, stress, and related problems such as depression and substance abuse.⁹⁹

2. Structural Responses

These are obviously not just “women’s issues,” although women have a special stake in finding more effective responses. As female attorneys constitute an increasing part of the profession, it becomes increasingly costly to discount their needs and devalue their talents.

That is not to ignore the difficult issues involved in designing equitable part-time policies. Conflicting values inevitably arise in allocating overhead costs, distributing onerous work assignments, and determining eligibility. Among the most controversial questions is whether

94. Rhode, *supra* note 28, at 711; see also James Robertson, *The Beginning of the End of the Billable Hour?* Wash. Law., July-Aug. 1991, at 7.

95. ABA Young Lawyers Division, *supra* note 75, at 22; Nancy D. Holt, *Are Longer Hours Here to Stay: Quality Time Losing Out*, A.B.A. J., Feb. 1993, at 62, 64.

96. Rhode, *supra* note 28, at 711.

97. Renee M. Landers et al., *Rat Race Redux: Adverse Selection in the Determination of Work Hours* 23 (Dec. 14, 1993) (unpublished manuscript, on file with the authors).

98. ABA Young Lawyers Division, *supra* note 75, at 64 (reporting that 61% of women and 55% of men don’t have sufficient time for themselves); Holmes, *supra* note 75, at 14; *Women in the Law Survey: Analyzing Job Dissatisfaction*, Cal. Law., Jan. 1990, at 84 [hereinafter *Women in the Law Survey*] (in explaining sources of dissatisfaction, 93% of women cited too many hours and 92% cited difficulties balancing personal and professional lives).

99. For research on dissatisfaction and stress, see ABA Young Lawyers Division, *supra* note 75, at 54 (reporting that 41% of women and 28% of men in private practice are dissatisfied); *Women in the Law Survey*, *supra* note 98, at 84; Menkel-Meadow, *supra* note 86, at 623; Andrew Herrmann, *Depressing News for Lawyers*, Chi. Sun Times, Sept. 13, 1991, at 1 (reporting survey findings that lawyers top the list of professionals likely to suffer major depression); Shelly Phillips, *Lawyers Who Want Out: Nearly Half Say They Would Change Jobs If They Felt There Was a Reasonable Alternative, A National Survey Finds*, Phila. Inquirer, June 8, 1993, at F1; Benjamin Sells, *Counsel on the Verge of a Nervous Breakdown*, S.F. Daily J., May 25, 1994, at 3A. For estimates suggesting that the percentage of lawyers with substance abuse problems is twice the national average, see Anne Fahy Morris, *Justifiable Paranoia Afflicts Lawyers, Psychologist Says*, L.A. Times, May 1, 1994, at A27; *Substance Abuse in the Workplace*, Mich. Law. Wkly., May 4, 1992, at 23.

anyone should be able to take part-time status for any period of time. If not, what reasons should be acceptable, what limitations should be applicable, and who should decide? In general, the narrower the policy, the more resentment and stigma it causes; the broader the policy, the more employer costs it imposes.¹⁰⁰

How best to respond to these concerns varies across practice contexts. Much may depend on the size and profit margins of the institution and the predictability of work in part-time employees' areas of specialization. What feminism demands is not a generic solution, but a genuine commitment to eliminating structural biases and to furthering relational values. However other issues are resolved, accommodating family obligations should be a central priority. That priority rests in part on the social importance of caretaking, in part on the unfairness of restricting caregivers' career opportunities because of temporary constraints, and in part on the value to employing institutions of accommodating family needs.

In the long run, failure to develop adequate part-time and parental leave policies proves expensive to all concerned. It cannot help but increase turnover, impair recruiting, compromise job performance, and jeopardize the well-being of caretakers as well as their families.¹⁰¹ Restructuring both work and domestic roles is essential to achieving equal opportunity in fact as well as theory. Gender hierarchies will persist until concerns about the quality of life become more central professional priorities, and more men begin to see equality for women in personal as well as political terms.

B. *Gender Stereotypes and Unconscious Bias*

1. Defining the Problem

The insensitivity to work/family conflicts is symptomatic of broader patterns of gender bias within the legal profession. Virtually every bar commission and serious scholar in the field has documented persistent forms of discrimination, as well as substantial disparities in men's and women's perceptions of such behavior. In nearly all studies, between two-thirds and three-fourths of the women surveyed indicate that they have experienced some form of discrimination or bias, while only one-fourth to one-third of the men report observing such conduct.¹⁰² As

100. See ABA Comm. on Women in the Profession, *Lawyers and Balanced Lives: A Guide to Drafting and Implementing Workplace Policies for Lawyers* pt. 2, § 2, at 1 (1990); Gary W. Loveman, *The Case of the Part-Time Partner*, in *Reach for the Top* 113-28 (1994); Shiela Nielsen, *The Balancing Act: Practical Suggestions for Part-Time Attorneys*, 35 N.Y.L. Sch. L. Rev. 369 (1990).

101. ABA Comm. on Women in the Profession, *supra* note 100, pt. 2, § 1, at 22; Nielsen, *supra* note 100, at 373-74; Katrina M. Dewey, *A New Reality Sets In*, Cal. Law Bus., May 16, 1994, at 2024; Joan H. Stern, *Female Talent at Law Firms*, Nat'l L.J., Mar. 18, 1991, at 15.

102. Ann J. Gellis, *Great Expectations: Women in the Legal Profession, A Commentary on State Studies*, 66 Ind. L.J. 941, 971 (1991); see also Judicial Council Advi-

one male lawyer responding to the Ninth Circuit Survey put it, "I have never witnessed nor heard of a single incident of gender bias."¹⁰³ Moreover, men who do perceive such bias often discount its significance. As a Texas practitioner noted, "[o]f all the problems we have as lawyers, gender discrimination is low on the list of important ones."¹⁰⁴ Other men's responses to bias studies were less restrained: "'a complete waste of time and money!'; 'a pile of garbage'; 'much ado about nothing.'"¹⁰⁵

These differing perceptions in part reflect men's privileged status and the resiliency of unconscious bias. A major problem involves lingering skepticism about female competence, a problem compounded for women of color. Although such doubts are rarely aired in mixed company, their influence is still apparent in studies of unconscious bias. So, for example, surveys involving various professions find that the same work or the same resume is rated lower if it is attributed to a woman rather than a man.¹⁰⁶ Female lawyers, particularly racial and ethnic minorities, frequently report that they lack the same presumption of competence that their white male colleagues enjoy.¹⁰⁷ The persistence of adverse stereotypes is also apparent from minority lawyers' common experience of being mistaken for low-income clients, or for clerical and janitorial staff. In one recent report by the ABA's Multicultural Women Attorneys Network, a black woman partner from a major Chicago firm noted that she had been taken for a court reporter at every deposition she had ever attended.¹⁰⁸

Such biases also are reflected and reinforced through various forms of demeaning and harassing treatment. Women's contributions are

sory Committee on Gender Bias in the Courts, *Achieving Equal Justice for Men and Women in the Courts: Achieving Equal Justice in Litigation and Courtroom Interaction* 91 (1989); Discussion Draft, *supra* note 77, at 171; Dewey, *supra* note 101, at 19.

103. Judith Resnik, *Gender Bias: From Classes to Courts*, 45 Stan. L. Rev. 2195, 2206 n.36 (1993).

104. Diane F. Norwood & Arlette Molina, *Sex Discrimination in the Profession: 1990 Survey Results Reported*, Tex. B.J., Jan. 1992, at 50, 51.

105. Resnik, *supra* note 103, at 2207.

106. Barbara F. Reskin, *Bringing the Men Back In: Sex Differentiation and the Devaluation of Women's Work*, in *The Social Construction of Gender*, 141, 145-46 (Judith Lorber & Susan A. Farrell eds., 1991); Lott, *The Devaluation of Women's Competence*, 41 J. Soc. Issues 43, 50 (1985); Michele A. Paludi & William D. Bauer, *Goldberg Revisited: What's in an Author's Name*, 9 Sex Roles 387 (1983).

107. Lynn Hecht Schafran, *Eve, Mary, Superwoman: How Stereotypes About Women Influence Judges*, 24 Judges J. 12, 15 (1985); see also Special Committee on Gender, *supra* note 81; ABA Multicultural Women Attorneys Network, *The Burdens of Both, The Privileges of Neither* (1994); Deborah Ruble Round, Note, *Gender Bias in the Judicial System*, 61 S. Cal. L. Rev. 2193, 2201 (1988); Edward A. Adams, *ABA Finds Minority Women in Law Face Twice the Hurdles*, N.Y.L.J., Aug. 8, 1994, at 1; Dewey, *supra* note 101, at 20-22.

108. ABA Multicultural Women Attorneys Network, *supra* note 107; Adams, *supra* note 107, at 1.

often dismissed, devalued, or attributed to men.¹⁰⁹ Individuals who have complained about sexual harassment have been dismissed as "irrationa[l]" or "bounty hunter[s]," even when the harasser has a history of abusive conduct.¹¹⁰ The overwhelming majority of female lawyers report experiencing discriminatory practices that convey a lack of respect.¹¹¹ Women attorneys have had to cope with labels such as "little lady," "young girl," "lawyerette," "pretty eyes," "baby doll," "sweetie," "sweetheart," and "attorney generalette."¹¹² Litigators have encountered comments such as "Ladies and gentlemen, can you believe this pretty little thing is an Assistant Attorney General?" or "Do you really understand all the economics involved in this [anti-trust] case?"¹¹³ Women of color face biases on two fronts. Racial slurs have ranged from the obviously invidious, such as "tarbaby," to the ostensibly benign, such as congratulations for being a "credit to your race."¹¹⁴

Except for overt racism, such comments rarely prompt any remedial response. Women who object are frequently ridiculed as humorless or oversensitive.¹¹⁵ A representative case in point involved a male attorney who questioned prospective jurors on voir dire whether their deci-

109. For examples in the legal context, see Maryland Special Joint Committee, *Gender Bias in the Courts: Report of the Maryland Special Joint Committee on Gender Bias in the Courts* 260 (1989) (reporting that over half of surveyed women believe judges give less weight to female attorneys' arguments); Gellis, *supra* note 102, at 941, 969-971 (noting that surveyed women believe women lawyers have less credibility, and carry a greater burden of proof regarding their credibility). For examples in legal education, see sources cited in Deborah L. Rhode, *Missing Questions: Feminist Perspectives on Legal Education*, 45 *Stan. L. Rev.* 1547, 1549-50 (1993). For more general discussion, see Language, Gender and Society (Barrie Thorne et al. eds., 1983); Kathleen Reardon, *The Memo Every Woman Keeps in Her Desk, in Reach for the Top* 75, 76-77 (Nancy A. Nichols ed., 1994).

110. See the discussion of the sex harassment suit against Baker & McKenzie, which resulted in a \$7.1 million punitive damages award. Jane Gross, *Cautionary Tale for Lawyers: Suit on In-House Harassment*, *N.Y. Times*, July 29, 1994, at A1; Victoria Slind-Flor, *Baker & McKenzie: Megafirm Socked on Punitives*, *Nat'l L.J.*, Sept. 12, 1994, at A4.

111. Gellis, *supra* note 102, at 971.

112. *Principe v. Assay Partners*, 586 N.Y.S.2d 182, 184 (N.Y. Sup. Ct. 1992); *Complaint Concerning the Honorable John J. Kirby*, 354 N.W.2d 410, 414 (Minn. 1984); Marina Angel, *Sexual Harassment by Judges*, 45 *U. Miami L. Rev.* 817, 820 (1991).

113. ABA Comm. on Women in the Profession, *supra* note 80, at 10; Judicial Council Advisory Committee on Gender Bias in the Courts, *supra* note 102, at 29.

114. Barbara Rabinovitz, *Race Bias Commission Hears from Worcester*, *Mass. Law. Wkly.*, Oct. 14, 1991, at 3; see also Salvatore Arena, *Racial Slam for Courts: Panel Faults State System*, *N.Y. Daily News*, June 5, 1991, at 5; Jeannie Wong, *Panel Hears How Minorities See Court System*, *Sacramento Bee*, Apr. 11, 1992, at B2.

115. ABA Comm. on Women in the Profession, *supra* note 80, at 10. Judith Resnik gives a representative example of the cost of complaining. "As one male lawyer [responding to the Ninth Circuit Gender Bias Questionnaire] wrote: 'There are a small number of female attorneys . . . who seem to infer gender bias from almost any situation. These attorneys can be very unpleasant to be around and, in my opinion, hurt their clients' cause.'" Resnik, *supra* note 103, at 2208 (quoting Discussion Draft, *supra* note 77, at 60).

sion would be influenced by the fact that his female opposing counsel was "younger and prettier." When she objected, the judge responded with a chuckle that she was "younger and prettier," although not apparently a very good sport.¹¹⁶

Yet women who attempt to invoke humor themselves run other risks. One California attorney, whose opposing counsel repeatedly addressed her as "young lady," earned the judge's irritation when she referred to her adversary as "old man." "I could hold you in contempt," the judge pointed out. And he was not amused by her response that she "wasn't the one who brought up age and sex."¹¹⁷ Such reactions both compound women's injury and discourage protests that might prevent it. Even well-intentioned gallantry or seemingly trivial asides can undercut female lawyers' status and credibility.¹¹⁸

The mismatch between characteristics traditionally associated with women and those typically associated with professional success also leaves female lawyers in a long standing double bind. They remain vulnerable to criticism for being "too feminine" or "not feminine enough."¹¹⁹ What is assertive in a man is abrasive in a woman. A wide array of experiential and clinical evidence indicates that profiles of successful professionals conflict with profiles of normal or ideal women.¹²⁰ The aggressiveness, competitiveness, and emotional detachment traditionally presumed necessary for advancement in the most prestigious and well-paid occupations are incompatible with traits commonly viewed as attractive in women: cooperativeness, deference, sensitivity, and self-sacrifice.¹²¹ From most feminists' perspective, what needs to change are workplaces, not women.

116. Lynn Hecht Schafran, *The Obligation to Intervene: New Direction from the American Bar Association Code of Judicial Conduct*, 4 *Geo. J. Legal Ethics* 53, 67 (1990).

117. For a related version of this story, see *Women Lawyers Get Advice on Countering Sexual Bias*, *L.A. Times*, March 5, 1993, at B1. For general discussion of the penalties for complaining about such treatment, see ABA Comm. on Women in the Profession, *supra* note 80, at 10; Gellis, *supra* note 102, at 971-72.

118. See ABA Comm. on Women in the Profession, *supra* note 80, at 10.

119. Ann M. Morrison et al., *Breaking the Glass Ceiling* 54, 61-62 (1994). When asked what constituted "too feminine," a typical manager's response was "it's hard to explain." *Id.* at 79; see also Beth Milwid, *What You Get When You Go For It* 140 (1987) ("From some people I hear I have a reputation for being tough, but from other people I hear the question, 'Is she tough enough?' I suppose it depends on who is dealing with me.").

120. See sources cited in Dewey, *supra* note 101, at 21; see also Rhode, *supra* note 91, at 1164-66.

121. See *supra* note 106. Female attorneys have reported being called menopausal or being asked if they were suffering from PMS when they objected to court rulings. Hensler, *supra* note 73, at 2192. For an historical account of the mismatch between traits viewed as desirable in women and in lawyers, see Michael Grossberg, *Institutionalizing Masculinity: The Law as a Masculine Profession, in Meanings for Manhood: Constructions of Masculinity in Victorian America* 133, 145-49 (Marc C. Carnes & Clyde Griffen eds., 1990); D. Kelly Weisberg, *Barred from the Bar: Women and Legal Education in the United States, 1870-1890*, 28 *J. Legal Educ.* 504 (1977).

Under current norms, female lawyers face continuing problems of "fitting in" and forming the client and collegial relationships necessary for advancement. In one representative survey, virtually all women partners reported losing business because of gender.¹²² Female professionals still do not have access to the same informal networks of advice, collaboration, and contacts on which successful careers depend.¹²³

To be sure, in many practice settings, the entrance of a critical mass has brought significant improvements. Few female attorneys today confront the situation that leaders of the bar can still recall, when large institutions had only one or two women. Sol Linowitz, in recently recounting such a description of his law school class, recalls that his male colleagues were "somewhat uncomfortable when [their two female classmates] were around." And, he acknowledges, "it never occurred to us to wonder whether *they* felt uncomfortable."¹²⁴

Yet insensitivity to women's isolation and underrepresentation remains a problem, particularly for lesbians and women of color. They face unconscious discrimination on two fronts and their small numbers amplify problems such as the absence of mentors and role models.¹²⁵ Racial and ethnic minorities often have additional recruitment and committee responsibilities, while many lesbians are denied benefits or social acceptance for their domestic partners.¹²⁶

Given all of these biases, women must work harder than men to succeed. Those who do not advance under such circumstances or who become frustrated and opt for different employment confirm the adverse stereotypes that worked against their advancement in the first

122. Dewey, *supra* note 101, at 21.

123. Of the 55% of men who believe in the "old boy" network, 70% believe that it helps male lawyers more than females. Over 90% of women believed that the "old boy" network helps male lawyers more than females. Gellis, *supra* note 102, at 952; see also ABA Comm. on Women in the Profession, *supra* note 80, at 10; Epstein, *supra* note 21, at 175; Rhode, *supra* note 91, at 1192; Louise A. LaMothe et al., *Women as Rainmakers*, Litig., Spr. 1991, at 29.

124. Sol M. Linowitz with Martin Mayer, *The Betrayed Profession* 6 (1994).

125. See Judicial Council of California, *Achieving Equal Justice for Women and Men in the Courts: Draft Report of the Judicial Council Advisory Committee on Gender Bias in the Courts* § 10 (1990); Kentucky Task Force on Gender Fairness in the Courts, *Equal Justice for Women and Men* 8, 22, 35 (1992); Report and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Study Commission, "Where the Injured Fly for Justice": Reforming Practices Which Impede the Dispensation of Justice to Minorities in Florida (1991); Geraldine Segal, *Blacks in the Law* (1983); Steven Keeva, *Unequal Partners: It's Tough at the Top for Minority Lawyers*, A.B.A. J., Feb. 1993, at 50 (discussing problems of minority lawyers in large firms); see also R. Mohr, *Gays/Justice* (1988); E.R. Shipp, *Homosexual Lawyers Keep Fighting Barriers*, N.Y. Times, Feb. 3, 1989, at B11.

126. See sources cited *supra* note 120. For guidelines set forth by the San Francisco Bar Association on improving treatment of lesbian and gay attorneys in areas concerning recruitment, hiring, retention, mentoring, compensation, benefits, childcare, and social events, see Jane Goldman, *Coming Out Strong*, Cal. Law., Sept. 1992, at 31, 35.

instance. The perception remains that women cannot succeed by conventional standards, or are less committed to doing so than men. In either event, female professionals do not warrant the same investment in training, assistance, and other opportunities as their male counterparts. Women disproportionately drift off the occupational fast track, leaving the most powerful sectors of the professions insulated from alternative values. Again, the result is a subtle but self-perpetuating cycle in which individual choices are constrained by gender biases.¹²⁷

2. Institutional Responses

Responses to these problems follow fairly obviously from the diagnoses. One set of strategies involves strengthening professional regulations and enforcement structures. In 1990, the American Bar Association amended its Model Code of Judicial Conduct to require judges to perform duties "without bias or prejudice" and to impose similar mandates on others under their supervision, including any lawyer practicing before them.¹²⁸ Some states have adopted or considered similar prohibitions on discrimination for lawyers, and such a proposal is pending before the ABA.¹²⁹ Although these later provisions to some extent replicate existing state and federal civil rights

127. See Epstein, *supra* note 21, at 215-16; Harrington, *supra* note 4, at 253-54; Rhode, *supra* note 85, at 165-75.

128. Model Code of Judicial Conduct Canon 3B(5) & (6) (1990).

129. Joanne Pitulla, *Banning Bias—An Update*, 5 Prof. Law. 1, 1 (1994) (discussing proposed Model Rule 8.4 which would make it professional misconduct for a lawyer to

knowingly manifest by words or conduct, in the course of representing a client, bias or prejudice based upon race sex, religion, national origin, disability, age, sexual orientation or socio-economic status. This paragraph does not apply to a lawyer's confidential communications to a client or preclude legitimate advocacy with respect to the foregoing factors).

California's Rule 2-400, effective Mar. 1, 1994, prohibits unlawful discrimination in employment and in accepting or terminating representation of a client on the basis of race, national origin, sex, sexual orientation, religion, age, or disability. The State Bar, however, may not initiate an investigation of such conduct "unless and until a tribunal of competent jurisdiction . . . shall have first found that unlawful conduct occurred." Cal. Rules of Professional Conduct 2-400 (1994). The New Jersey Rules of Professional Conduct state:

It is professional misconduct for a lawyer to . . . engage in a professional capacity, in conduct involving discrimination (except employment discrimination unless resulting in a final agency or judicial determination) because of race, color, religion, age, sex, sexual orientation, national origin, marital status, socioeconomic status, or handicaps where the conduct is intended or likely to cause harm.

N.J. Rules of Professional Conduct Rule 8.4(g) (1990).

A Michigan proposal would prohibit lawyers from engaging in "invidious discrimination on the basis of gender, race, religion, disability, age, sexual orientation, or ethnic origin" or belonging to an organization which the lawyer knows "invidiously discriminates." Susan D. Gilbert & Michael P. Allen, *Overcoming Discrimination in the Legal Profession: Should the Model Rules be Changed?*, 6 Geo. J. Legal Ethics 933, 941 n.32 (1993).

law, they may have symbolic importance, as well as practical value for complainants seeking an additional or alternative enforcement forum.¹³⁰

A second set of initiatives involves workplace modifications. Increasing numbers of institutions have developed policies concerning sexual harassment, hiring, retention, and mentoring, as well as the family leave and part-time work provisions noted above. Many bar associations and commissions also have developed model proposals and training programs.¹³¹ Some continuing legal education programs and many law school professional responsibility courses include materials on racial, ethnic, and gender issues.¹³² Efforts are also underway to enlist organizational clients. For example, under the California Minority Counsel Program, each participating corporation agrees to hire and promote more lawyers of color, to use more minority-owned firms for outside legal work, and to encourage other firms that it employs to assign lawyers of color to its cases.¹³³

Some of these provisions are relatively uncontroversial, at least in principle, and are responsible for substantial progress. Perhaps most significantly, "gender bias and the concerns of women are on the agenda."¹³⁴ That of itself represents a major advance. Although a wide gap persists between documenting the problem and addressing it effectively, the efforts obviously are related. In commenting on his own attitude change, the judge who co-chaired the California Gender Bias Task Force noted, "until I was on this . . . Task Force, there never was any gender bias in my court."¹³⁵ At least some men who initially

130. Gilbert & Allen, *supra* note 129, at 944-46. The usefulness of these provisions is obviously limited if they require a prior finding of discrimination, or if they exclude employment related conduct. See Randall Samborn, *Ethics Codes Seek to Bar Discrimination*, Nat'l L.J., Nov. 29, 1993, at 1, 23 (noting that most states' anti-bias rules exclude attorneys' non-employment-related actions); *supra* note 129.

131. See Barbara Allen Babcock, *Introduction: Gender Bias in the Courts and Civic and Legal Education*, 45 Stan. L. Rev. 2143, 2149 (1993) (describing the Ninth Circuit project on fairness in the courts, which instructs that the "distinct issues of women of color" be part of the mandate to a relevant task force); Lynn Hecht Schafran, *Gender and Justice: Florida and the Nation*, 42 Fla. L. Rev. 181, 199-204 (1990); Soll, *supra* note 68, at 633-35.

132. For example, California's continuing legal education requirement includes coverage of bias, and such coverage is increasingly part of major legal ethics casebooks. See Stephen Gillers, *Regulation of Lawyers: Problems of Law and Ethics* (1992); Geoffrey C. Hazard Jr. et al., *The Law and Ethics of Lawyering* (2d ed. 1993); Geoffrey C. Hazard, Jr. & Deborah L. Rhode, *The Legal Profession: Responsibility and Regulation* (3d ed. 1994); Deborah L. Rhode & David Luban, *supra* note 28, at 969-71; Deborah L. Rhode, *Professional Responsibility: Ethics by the Pervasive Method*, 42 J. Legal Educ. 31, 38 (1994).

133. *The Minority Report*, Cal. Law., June 1991, at 22.

134. New York Judicial Committee on Women in the Courts, *Five Year Report of the New York Judicial Committee on Women In the Courts* 44 (June 1991).

135. Discussion Draft, *supra* note 77, at 171 (quoting David Rothman); see also Schafran, *supra* note 70, at 69 (reporting that 19 of 22 surveyed male judges had never observed a female litigator, witness or attorney being treated in a sex stereotyped

perceive such issues as something only "militant" feminists or the "girls want to talk about," subsequently come to recognize problems initially assumed to be nonexistent.¹³⁶

Unsurprisingly, however, initiatives that appear to involve preferential treatment often cause resentment, particularly when they benefit white women. As critics note, these women have not suffered the same history of economic and educational deprivation as minorities, and are no longer grossly underrepresented in the profession's hiring pool. Singling out either group for what appears to be "special assistance" can also reinforce the very assumption of inferiority that feminists seek to challenge. Even when white women or minority lawyers perform effectively, if their presence can be attributed to affirmative action, their performance can be devalued accordingly.

Yet while the price of preferential policies may be substantial, so too is the cost of doing nothing. Special treatment risks stigmatizing underrepresented groups, but the fact of underrepresentation is stigmatizing as well. Patricia Williams made the point in her description of a 1990 MacNeil/Lehrer profile of faculty hiring at Harvard Law School. Administrators explained that:

Harvard Law School cannot find one black woman on the entire planet who is good enough to teach there, because we're all too stupid. (Well, that's not precisely what was said. It was more like they couldn't find anyone smart enough. To be fair, what Associate Dean Louis Kaplow actually said was that Harvard would have to 'lower its standards,' which of course Harvard simply cannot do.)¹³⁷

Four years later, when this article went to press, Harvard's sixty-some faculty still had never hired a woman of color.

Preferential treatment may carry a price, but the relevant question is always, compared to what? Barbara Babcock, former Assistant Attorney General in the Carter Administration, put the point directly when asked how she felt about gaining her position because she was a woman. "It feels better than being denied the position because you're a woman." In contexts where equality in form is insufficient to secure equality in fact, preferential treatment generally is worth the cost. To reach a social order in which wealth, power, and status are not distributed by gender, we must first dispel the stereotypes contributing to this distribution. Affirmative action is often crucial to that effort. Only by insuring a critical mass of professional women and men of color can we counter the prejudices that underpin subordination.¹³⁸

manner); Judicial Council Advisory Committee on Gender Bias in the Courts, *supra* note 102, at 90.

136. Schafran, *supra* note 131, at 204 (quoting New Jersey Judge Scalera); Soll, *supra* note 68, at 640 (quoting members of the Supreme Court Committee on Judicial College Seminars and members of the New Jersey bench).

137. Patricia J. Williams, *The Alchemy of Race and Rights* 5 (1991).

138. For more extended discussion, see Rhode, *supra* note 85, at 184-90.

American lawyers have long been leaders in the national struggle for gender equality. The challenge remaining is to confront the problems in their own profession and to translate egalitarian commitments into workplace reorganization.

CONCLUSION

Throughout the nineteenth century, anti-feminists based much of their opposition to women professionals on assumptions about women's difference. As one state judge explained when excluding female candidates from the bar, the "peculiar qualities of womanhood, its gentle graces, its quick sensibility, its tender susceptibility" were surely not qualifications for "forensic strife."¹³⁹

Ironically enough, these are the same sensibilities that many contemporary feminists hope will transform professional culture. Yet unlike their predecessors, these latest invocations of difference need not rest on some exaggerated perception of woman's essential nature. Rather, contemporary feminists can ground their aspirations in values traditionally associated with women under particular social circumstances.

For centuries, as Virginia Woolf observed, women were spectators at the "procession of educated men."¹⁴⁰ From the sidelines, women watched as men marched. Once the bars to membership broke down, women could ask some fundamental questions. Should women join the existing parades? On what terms? "Above all, where is it taking us, the procession of educated men?"¹⁴¹ The challenge for contemporary feminists is to refocus attention on these issues. With the entrance of new members in the profession comes an opportunity to rethink its traditional destinations.

139. *In re Goodell*, 39 Wis. 232, 245 (1875).

140. Virginia Woolf, *Three Guineas* 62-63 (1938).

141. *Id.*