

The Profession and Its Discontents*

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In this lecture, Professor Rhode provides an overview of the sources of lawyer discontent. Discussion begins by exploring the structure of practice, with an eye to differentiating causes of disaffection that are inherent in the nature of the lawyer's role and those over which lawyers individually or collectively have some control. Some discontent is an inevitable byproduct of practice given the circumstances in which lawyers and their clients tangle with the law. Other difficulties reflect changes in the market for legal services, particularly the recent increases in size, competitiveness, commercialization, specialization, and time pressures. However, The lecture suggests that lawyers have responded to those changes in ways that are often self-defeating, by attaching priority to profits at the expense of other values that could make for greater workplace satisfaction, such as public service, manageable working hours, and accommodation of work/family conflicts. The lecture also notes the need for better responses to the racial and gender biases that contribute to lawyer discontent and compromise the profession's commitment to equal opportunity.

INTRODUCTION

It is a great honor and pleasure to be here. Speakers always say that with varying degrees of sincerity, but those of us who teach ethics don't make the claim lightly and this occasion is a particular delight. Ohio has the good fortune of having a Dean whose work I admire greatly and who is deeply committed to the topics I'd like to explore with you today.

They draw from a chapter in a forthcoming book on lawyers that suggests that all is not entirely well for the profession and that many of its members share that view. The profession, we are constantly told, is "lost," "betrayed," "in crisis," or "in decline."¹ And its reportedly sorry state has attracted a cottage industry of committees, conferences, commissions, centers, and codes. Although if asked directly, the vast

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¹ See generally, ANTHONY KRONMAN, *THE LOST LAWYER* (1993); SOL M. LINOWITZ, *THE BETRAYED PROFESSION* (1994); Deborah Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 284n.3 (1998).

majority of lawyers express satisfaction with their current position, other evidence paints a gloomier picture.² A majority of lawyers report that they would choose another career if they had the decision to make over, and three quarters would not want their children to become lawyers.³ Symptoms of professional malaise are also reflected in health-related difficulties. An estimated one third of American attorneys suffer from depression or from alcohol or drug addiction, a rate that is two to three times higher than in the public generally.⁴

My aim here is to promote a clearer understanding of the sources of lawyers' discontent and the dynamics of race and gender bias. My focus is primarily on lawyers in private practice because about three quarters of the nation's some 900,000 attorneys work in such settings, and because many of their problems are representative of other workplaces as well. The point is to gain a clearer sense of the effects of practice structures on lawyers themselves, and on their own stake in altering current trends.⁵ For the American bar, Ogden Nash had it right: "Progress may have been all right once, but it [has gone] on too long."⁶

I. THE STRUCTURE OF PRACTICE

Some of lawyers' disaffection is an inevitable by-product of legal practice, given the circumstances in which they and their clients tangle with the law. Individuals who are not ordinarily difficult to deal with may become so as clients. Divorces, bankruptcies, personal injuries, and other civil or criminal litigation seldom bring out the best in human nature. Moreover, as Walter Bachman points out in *Law v. Life*, some clients have ended up as clients because their behavior deviates from any acceptable standard; they are irresponsible or deceitful in personal dealings, and their relations with lawyers are no exception.⁷ For solo and small firm practitioners with narrow profit margins, unpaid fees are a chronic difficulty.⁸ Even attorneys who have attempted to avoid these difficulties by taking salaried legal aid, public defender, or public interest work find that "not all clients are as attractive as their causes."⁹ And for lawyers in other practice settings, not all causes are particularly attractive.

² John P. Hein et al., *Lawyers and Their Discontents: Findings from a Survey of the Chicago Bar*, 74 IND. L.J. 735, 736 (1999).

³ MARY ANN GLENDON, A NATION UNDER LAWYERS 85 (1994); Nancy McCarthy, *Pessimism for the Future*, CAL. BAR J., Nov. 1994, at 1, 1.

⁴ GLENDON, *supra* note 3, at 87.

⁵ See Clara N. Carson, *Lawyers in Profile: A Statistical Portrait of the U.S. Legal Profession*, RESEARCHING LAW (Am. Bar Found., Chicago, Ill.), Summer 1999, at 1.

⁶ SAMUEL L. OGDEN, AMERICA THE VANISHING: RURAL LIFE AND THE PRICE OF PROGRESS viii (1969).

⁷ WALT BACHMAN, LAW V. LIFE 117 (1995).

⁸ See CARROLL SERON, THE BUSINESS OF PRACTICING LAW 116-17 (1996).

⁹ EVE SPANGLER, LAWYERS FOR HIRE 167 (1986).

The problem is compounded when attorneys become scapegoats for problems not of their own making. They often bear unwelcomed messages about what the law requires and what adversaries can extract, and certain legal contexts invite unpleasantness. Clients in family disputes can be unstable, unyielding, and irrational in their demands on counsel as well as on each other.¹⁰ In some business settings, lawyers look like deal breakers, or a drain on time and money that could be more profitably spent.¹¹ Individuals represented by legal aid or court-appointed lawyers may be understandably unhappy about having to rely on someone whom they do not know and did not choose.¹² Affluent clients may be equally displeased about paying through the nose for legal tussles that they do not want and cannot escape.

Other unappealing aspects of the legal practice reflect forces that lawyers can do little to control. In many fields of law, increasing complexity has encouraged increasing specialization.¹³ Lawyers know more and more about less and less, and their intellectual horizons have correspondingly narrowed. The problem cuts across many practice areas.¹⁴ Generalists in solo or small firm practice may find it difficult to maintain competence in multiple fields, while specialists in large firms may feel stifled by restricted subject matter.¹⁵ Associates doing scut work on complex litigation, partners trapped in narrow "niche" fields, or franchise firm attorneys handling high volume routine caseloads all may find too much of their work dispiritingly dull or relentlessly repetitious.¹⁶

While innovative technology has eliminated some of the most tedious tasks, it has imposed new burdens and constraints. In many high volume practices, lawyers' services need to fit within limited time frames and standardized programs, which narrows opportunities for intellectual challenge and personal problem-solving. As more information becomes accessible on-line, more information needs to be reviewed. At any moment, some court may be reversing, distinguishing, or extending a relevant precedent. As the pace of communication accelerates, the pressures of practice intensify. Legal life lurches from deadline to deadline, and in some fields,

¹⁰ SERON, *supra* note 8, at 107–13; DEBORAH L. RHODE, *PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD* 689–95 (2d ed. 1998).

¹¹ SPANGLER, *supra* note 9, at 77.

¹² RANDY BELLOWS, *Notes of a Public Defender*, in *THE SOCIAL RESPONSIBILITY OF LAWYERS* 70, 78–99 (Phillip B. Heymann & Lance Liebman eds., 1988).

¹³ See AM. BAR ASS'N, *THE REPORT OF AT THE BREAKING POINT* 4 (1991) [hereinafter *AT THE BREAKING POINT*].

¹⁴ See generally DEBORAH ARRON, *RUNNING FROM THE LAW: WHY GOOD LAWYERS ARE GETTING OUT OF THE LEGAL SYSTEM* (1989); see also KRONMAN, *supra* note 1.

¹⁵ See Sherri Kimmel, *Alone and On Your Own: The Growing Allure of Solo Practice*, PA. LAWYER, July–Aug. 1997, at 12; JERRY VAN HOY, *FRANCHISE LAW FIRMS AND THE TRANSFORMATION OF PERSONAL LEGAL SERVICES* 21 (1997).

¹⁶ VAN HOY, *supra* note 15, at 131; Stephen Gillers, *Great Expectations: Conceptions of Lawyers at the Angle of Entry*, 33 J. LEGAL EDUC. 662, 669 (1983).

unpredictable and oppressive demands are disturbingly predictable. With email, beepers, cell phones, and faxes, lawyers can be perpetually on-call, and instant responses can be expected. The pressures are particularly intense for solo practitioners, who lack colleagues to provide backup assistance, but attorneys in any setting can become tethered to transportable worksites.¹⁷ Stories of lawyers in hospital delivery rooms drafting documents while timing contractions are disturbingly common.¹⁸

The result has been a kind of a civilian arms race with escalating personal and financial costs. Although lawyers as a group would benefit if schedules were less extended and frenetic, many practitioners are unwilling to risk a unilateral withdrawal from the competition. And lawyers who have opted out of the competitive struggle in private practice may face similar pressures in different settings.¹⁹ Attorneys serving low income clients and public interest causes cope with staggering caseloads and grossly inadequate resources.²⁰ The stress of cutting so many corners in the face of so many critical needs takes a substantial toll.²¹

Other difficulties relate to increases in the size and competitiveness of the profession. Over the past three decades, the number of attorneys has more than doubled.²² Supreme Court decisions on advertising and solicitation of clients have reduced anticompetitive restraints. Consumer demand also has limited the bar's ability to preempt competition by nonlawyers for certain law-related services such as divorces, real estate closings, tax, and financial planning.²³ Accounting firms have made especially threatening inroads on the legal profession's traditional turf.²⁴

¹⁷ See SERON, *supra* note 8, at 124.

¹⁸ See Meredith K. Wadman, *Family and Work: The Delicate Balance*, WASH. LAWYER, Nov.-Dec. 1998, at 28; see, e.g., CAMERON STRACHER, *DOUBLE BILLING* 32, 42 (1998) [hereinafter *DOUBLE BILLING*].

¹⁹ See Tom Wells, *A Quarter-Century of Change*, WASH. LAWYER, Mar.-Apr. 1997, at 25, 26.

²⁰ See Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1240 (1993); see also BOSTON BAR ASS'N., *TASK FORCE ON PROFESSIONAL FULFILLMENT, EXPECTATIONS, REALITY, AND RECOMMENDATIONS FOR CHANGE* 15-17 (1997).

²¹ See Ogletree, *supra* note 20, at 1240-41.

²² See generally BARBARA A. CURRAN & CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN THE 1990S* (1994); Jill Schachner Chanen, *A Wake-Up Call*, A.B.A. J., June 1997, at 68.

²³ Ward Bower, *Law Firm Economics and Professionalism*, 100 DICK. L. REV. 515, 521-22 (1996); see generally Deborah L. Rhode, *Professionalism in Perspective: Alternative Approaches to Nonlawyer Practice*, 22 N.Y.U. REV. L. & SOC. CHANGE 701 (1996).

²⁴ Bower, *supra* note 22, at 521; see generally AM. BAR ASS'N COMM'N ON MULTIDISCIPLINARY PRACTICE, *REPORT TO THE HOUSE OF DELEGATES* (1999); Stephen Gillers, *The Anxiety of Influence*, 27 FLA. ST. U. L. REV. 123 (1999); Mary C. Daly, *Choosing Wise Men*

Globalization has added to the appeal of those firms and brought more foreign competitors to American financial centers. Moreover, corporate clients, who are facing increased pressures in their own markets, have responded by curtailing legal costs. Businesses have moved more routine work in-house, more actively supervised billing practices, and parceled out more projects based on short-term competitive considerations rather than long-term lawyer-client relationships.²⁵

From the consumer's perspective, these developments have had some positive effects in reducing prices and promoting efficiency. For lawyers, however, many of the consequences have been less favorable. As Richard Posner points out, competitive markets are "no fun for most sellers."²⁶ Law is not an exception and fun is not the only casualty. The bar's increase in size has brought decreases in collegiality and in informal reputational sanctions that traditionally helped control unprofessional behavior.²⁷ So too, the more time that lawyers need to spend on marketing their craft, the less time they have available for practicing and improving it, and for pursuing other, more fulfilling interests, such as family and pro bono activities. The more price-conscious the client, the more difficult it becomes to bill for training junior lawyers and for providing the mentors necessary for their professional growth and satisfaction.²⁸

The decline of long-term client relationships also has compromised lawyers' abilities to provide informed and candid counseling. Practitioners scrambling for business have difficulty refusing cases or resisting pressures to cut ethical corners. The trend in private practice is often described as "leaner and meaner." It is scarcely surprising that many lawyers find this trend disturbing; it would be even more disturbing if they did not.

What is, however, surprising and unsettling is how reluctant attorneys have been to address conditions of practice over which they have control. Much of what drives dissatisfaction is a function of the profession's own priorities. And in private practice, where discontent is most intense and most avoidable, the preoccupation with profit is at the root of the problem. The mood of contemporary private practice is aptly captured in a *New Yorker* comic featuring a limousine conversation in which one seemingly well-heeled lawyer announces to his colleague: "I may be overcompensated, but I'm not overcompensated enough."²⁹

Over the last half century, lawyers' income has increased substantially in comparison with the population at large. Even before recent salary increases, the

Wisely: The Risks and Rewards of Purchasing Legal Services from Lawyers in a Multidisciplinary Partnership, 13 GEO. J. LEGAL ETHICS 217 (2000).

²⁵ Bower, *supra* note 22, at 520.

²⁶ See GLENDON, *supra* note 3, at 91 (quoting Posner).

²⁷ CAL. STATE BAR, THE FINAL REPORT OF THE COMM'N ON THE FUTURE OF THE LEGAL PROFESSION AND THE STATE BAR 53 (1995).

²⁸ See KRONMAN, *supra* note 1, at 277.

²⁹ Robert Weber, NEW YORKER, June 6, 1998, at 5.

median income for attorneys was about five times that of other full-time employees, and the legal profession was the second highest paying occupation.³⁰ Yet while wealth has been rising, satisfaction levels have been falling, and there is little relationship between income and fulfillment across different fields of practice. Discontent is greatest among well-paid, large firm associates and least pronounced among relatively low earning academics and public sector employees.³¹

Lawyers' experiences confirm the cliché: above a certain minimal subsistence level, money doesn't buy happiness.³² Income explains less than two percent of the variation in satisfaction levels.³³ Most studies find equally little correlation between job status and job enjoyment.³⁴ People's greatest fulfillment generally comes from opportunities to develop skills in contexts where they feel in control and competent.³⁵ The star-studded achievements that many lawyers strive for—landmark verdicts, huge bonuses, or professional honors—may yield little enduring satisfaction.³⁶ Such rare moments have a less positive effect than the accumulation of much smaller but repeated satisfactions.³⁷ Paradoxically enough, grand achievements can even work against long-term satisfaction by skewing expectations upwards and diluting the pleasure of more modest but attainable goals. As researchers note, "Better to have our best experiences be something we experience fairly often than to sacrifice daily sources of pleasure in pursuit of occasional but elusive brass rings. . . . Satisfaction is less a matter of getting what you want than wanting what you have."³⁸

Yet although researchers consistently find that differences in income bear little relationship to differences in satisfaction, the desire for wealth has intensified both among lawyers and the public generally.³⁹ Although this is not the occasion for a

³⁰ Oregon State University, *Government Information Sharing Project*, available at <http://govinfo.library.orst.edu/stateis.html> (last visited Nov. 15, 2000) (on file with the *Ohio State Law Journal*).

³¹ Patrick J. Schiltz, *On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy and Unethical Profession*, 52 VAND. L. REV. 871 (1999); BOSTON BAR ASS'N TASK FORCE ON PROFESSIONAL FULFILLMENT, EXPECTATIONS, REALITY AND RECOMMENDATIONS 4 (1998).

³² See DAVID MEYERS, *THE PURSUIT OF HAPPINESS: WHO IS HAPPY AND WHY* 32–38 (1992) [hereinafter *THE PURSUIT OF HAPPINESS*]; ROBERT H. FRANK, *LUXURY FEVER: WHY MONEY FAILS TO SATISFY IN AN ERA OF EXCESS* 133 (1999) [hereinafter *LUXURY FEVER*].

³³ *LUXURY FEVER*, *supra* note 31, at 112; Daniel Goleman, *Forget Money; Nothing Can Buy Happiness, Some Researchers Say*, N.Y. TIMES, July 16, 1996, at C1, C9.

³⁴ David G. Myers & Ed Diener, *Who Is Happy?*, PSYCHOL. SCI., Jan. 1995, at 10, 13.

³⁵ See MIHALY CSIKSZENTMIHALYI, *BEYOND BOREDOM AND ANXIETY* 182–99 (1975).

³⁶ Robert E. Lane, *Does Money Buy Happiness?*, PUB. INT., Fall 1993, at 56, 58–59.

³⁷ *See id.*

³⁸ Myers & Diener, *supra* note 34, at 13.

³⁹ *See LUXURY FEVER*, *supra* note 32, at 72, 112–13; Myers & Diener, *supra* note 34, at 12–13; JULIET B. SCHOR, *THE OVERSPENT AMERICAN: UPSCALING, DOWNSHIFTING, AND THE NEW CONSUMER* 7 (1998).

comprehensive analysis of materialism and its discontents, neither is it possible to understand the conditions of legal practice without some reference to broader cultural trends.

Like other Western industrialized societies, the United States is experiencing an erosion in civic and community values that could serve as counterweight to market priorities. Being well-off financially is now the most important life goal of American college students. Three-quarters rate it as essential or very important, a figure that has doubled over the past quarter century.⁴⁰ What counts as well off has also escalated. As economist Juliet Schor notes in *The Overspent American*, the standard of living of top earners is more widely watched and envied.⁴¹ The more money that individuals earn, the more they believe is necessary to achieve satisfaction.⁴² Among those in lawyers' income range, over two-thirds think that they need an increase of fifty to one hundred percent in earnings in order to achieve satisfaction.⁴³

The desire for such affluence reflects a variety of causes apart from objective needs, although those needs clearly play a significant role. Many lawyers enter the profession with large educational debts. Some are planning or supporting families, and live in areas with high housing costs and poor public schools and services. Parents working long hours find that quality child care seldom comes cheap. To provide what most attorneys generally consider an adequate lifestyle under those circumstances requires a substantial income. However, what constitutes adequate is a subjective matter, and lawyers' needs are skewed upwards for several reasons.

One explanation involves frames of reference and standards of comparison.⁴⁴ For attorneys in private practice, who work with and for corporate managers, investment bankers, and other highly paid professionals, expectations of similar rewards can be hard to resist. Especially if these individuals have similar credentials and shorter hours, their attorneys often feel entitled to comparable pay scales.⁴⁵ So too, the more direct exposure lawyers have to luxury lifestyles, the more natural and necessary they seem.⁴⁶ And desires, once satisfied, beget more desires. The eighteenth-century French philosopher Diderot described this pattern in his now famous autobiographical account of how the acquisition of an expensive scarlet dressing robe left him dissatisfied with its shabby surroundings.⁴⁷ Gradually, all of his study's threadbare

⁴⁰ See Myers & Diener, *supra* note 34, at 12.

⁴¹ See SCHOR, *supra* note 39, at 7.

⁴² See generally LUXURY FEVER, *supra* note 32; Mike Papantonio, *Legal Egos on the Loose*, A.B.A. J., Sept. 1999, at 108.

⁴³ SCHOR, *supra* note 39, at 7.

⁴⁴ *Id.* at 12.

⁴⁵ See DOUBLE BILLING, *supra* note 18, at 28.

⁴⁶ Michael D. Goldhaber, *Greedy Associates Emy I-Bankers*, NAT'L L. J., Dec. 21, 1998, at A17; Susan Orenstein, *Down and Out on \$100,000*, AM. LAWYER, Oct. 1998, at 52; see also DOUBLE BILLING, *supra* note 18, at 74; SCHOR, *supra* note 39, at 7-8.

⁴⁷ SCHOR, *supra* note 39, at 145.

furnishings came to need replacement to conform to the robe's "imperious . . . elegant tone."⁴⁸ Similarly, for contemporary lawyers, business entertaining calls for upscale dining and clothing; upscale apartments invite upscale furnishings; all require upscale incomes.

Yet expensive purchases often fail to yield enduring satisfactions. Once their novelty wears off, new sources of pleasure are required. This psychological cycle helps explain why people believe that additional income will make them happier, but it so rarely does. Desires, expectations, and standards of comparison tend to increase as rapidly as they are satisfied.⁴⁹ Moreover, for many lawyers, the work required to generate high income creates a heightened sense of deprivation that fuels heightened demands. Attorneys working sweatshop hours feel entitled to goods and services that will make their lives easier and their leisure time more satisfying. This pattern of compensatory consumption can then become self-perpetuating. Lawyers often use the "substantial income from their jobs in an attempt to fill the voids created by their jobs!"⁵⁰ Part of the reason many professionals accept grueling schedules is to afford "extras" that they have no time to enjoy.⁵¹ Yet after lawyers become accustomed to this lifestyle, they often find it hard to give it up in exchange for more satisfying working conditions.⁵²

A desire for relative status and "positional goods" pushes in a similar and equally self-defeating direction.⁵³ For many individuals, including lawyers, money is a way of keeping score and spending money is a way to signal achievement and social status.⁵⁴ The increasingly public nature of personal salaries has made the scoring competition easier to play and harder to win. As Steven Brill, the former editor of the *American Lawyer*, has noted, once legal periodicals began comparing law firm salaries, "[s]uddenly, all it took for a happy partner making \$250,000 per year to become a malcontent was to read that his classmate at the firm on the next block was pulling down \$300,000."⁵⁵ Of course, as Brill and other commentators have pointed out, such disclosures have had some positive effects in discouraging misrepresentations about earnings and in exposing unjustified disparities in compensation.⁵⁶ But the publicity has also launched an arms race for relative status with almost no winners and many losers. There is, in fact, no room at the top.

⁴⁸ *Id.* (quoting Diderot).

⁴⁹ Lane, *supra* note 36, at 61, 63.

⁵⁰ WILLIAM R. KEETES, *PROCEED WITH CAUTION: A DIARY OF THE FIRST YEAR AT ONE OF AMERICA'S LARGEST, PRESTIGIOUS LAW FIRMS* 126 (1997).

⁵¹ *Id.* at 126, 144.

⁵² *Id.* at 126.

⁵³ ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER TAKE ALL SOCIETY* 41 (1995) [hereinafter *THE WINNER TAKE ALL SOCIETY*].

⁵⁴ *See id.*; *see also* KEETES, *supra* note 50, at 144; Papantonio, *supra* note 42, at 108.

⁵⁵ Steven Brill, "Ruining" the Profession, *AM. LAWYER*, July-Aug. 1996, at 5, 5.

⁵⁶ *Id.*

“Addictive ambition” fuels desires not readily satisfied. Attorneys who look hard enough will always find someone getting something more, and the purchases that signal status today may look inadequate tomorrow.⁵⁷ Well paid professionals can always find another category in which to compete: trips, cars, fashion, charity, even children’s parties. The market is inexhaustibly obliging.

Not only do individual lawyers tend to overvalue income, organizations employing lawyers have difficulty giving priority to anything else. Because money is high on almost everyone’s scale, it is easier to reach consensus on financial rewards than on other values such as shorter hours or substantial pro bono commitments.⁵⁸ Firms that sacrifice compensation for other workplace satisfactions risk losing talented members and recruits who prefer greater earnings and have ample options.⁵⁹ Once high pay scales are established, they can readily become self-perpetuating; downward mobility is painful and generous earnings attract those who are looking for large incomes.⁶⁰ The working conditions necessary to sustain such incomes then help create the sense of deprivation and entitlement that fuel desires for further material rewards.⁶¹ Even attorneys who initially entered law school with modest financial aspirations often become trapped in these reward cycles. If they can’t afford to do the kind of public-interest work that they would really like, they want at least to be very well paid for what they are doing.

The priority of profit has, in turn, encouraged practice structures that carry other costs. Once lawyers have gained some expertise, they usually can earn more by retailing the labor of subordinates than by relying on their own.⁶² The result is that most private practice has a pyramid structure.⁶³ Partners at the top profit from their skills, experience, reputation, and relationships by supervising and marketing the work of associates. Under this arrangement, junior lawyers accept salary structures that give the firm a surcharge for their labor in exchange for training and for the chance to compete for partnership.⁶⁴ A central objective is to provide all participants with incentives to avoid “shirking,” “grabbing,” or “leaving”—evading work, hoarding business, or departing with clients in tow.⁶⁵

Whatever their effectiveness in accomplishing this objective, profit-driven pyramids come at a price. Part of that price involves the increase in size that such structures encourage. Growth is inevitable unless promotions occur only when a

⁵⁷ See THE WINNER TAKE ALL SOCIETY, *supra* note 53, at 41.

⁵⁸ MARC GALANTER & THOMAS PALAY, TOURNAMENT OF LAWYERS 128 (1991).

⁵⁹ *Id.* at 129; see also BACHMAN, *supra* note 7, at 106–07.

⁶⁰ GALANTER & PALAY, *supra* note 58, at 129.

⁶¹ See *id.*

⁶² See *id.* at 94–98.

⁶³ Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911, 923 (1996).

⁶⁴ See GALANTER & PALAY, *supra* note 58, at 94–100.

⁶⁵ See *id.*

partner departs.⁶⁶ In firms committed to remaining small, associates may be left in lingering limbo, with no ground rules about the timing or chances of advancement.⁶⁷ Because such a system makes it hard to recruit and retain associates, many firms promote some critical mass beyond the vacancies left by partners' departure. This growth pattern is encouraged by the cultural tendency to view size as a measure of status and to assume that the largest firms are also the leading firms. The result is that an increasing number of lawyers, about a third of those in private practice, are in firms with over fifty lawyers, and a growing number are in midsize firms or branch offices of nationally franchised firms.⁶⁸

Yet with increases in size comes increases in bureaucratization, impersonality, and pressure to generate business for additional attorneys. As organizations expand, a sense of collegiality, institutional loyalty, and collective responsibility also becomes harder to sustain.⁶⁹ These difficulties are compounded when firms attempt to meet their needs for increased business by expanding their geographic reach or fields of expertise through branch offices and mergers.⁷⁰ Associates in these large firms often report a sense of anonymity and alienation, particularly when a partner they have never met imposes a tedious assignment in a case they have never heard of.⁷¹ So too, firms that cannot generate sufficient business to support their increased size must generally resort to painful downsizing strategies. Rather than reduce partner salaries or publicly admit their economic difficulties, many firms pass off their pruning as merit decisions. Lawyers dismissed under such circumstances pay a substantial and unnecessary price.

The profit-driven priorities of many organizations have had other unhappy consequences. To maximize partners' income and control, many firms have reduced the percentage of associates who obtain partnership status, and have pushed out even senior colleagues who are not "fully employed."⁷² When demand declines for a particular specialty, able attorneys may be asked to leave before they have a chance to retool. Insecurity and competition have increased at all levels.⁷³ As chances for advancement dwindle, many associates experience La Rochefoucauld's insight that it is not enough to succeed; others have to fail. Among partners, the premium placed

⁶⁶ See *id.* at 103–07.

⁶⁷ See SERON, *supra* note 8, at 71.

⁶⁸ See CURRAN & CARSON, *supra* note 22, at 7–8.

⁶⁹ See GALANTER & PALAY, *supra* note 58, at 103–07.

⁷⁰ See Jim Schroeder, *Slowing the Revolving Door*, AM. LAWYER, Oct. 1998, at 5.

⁷¹ See *id.*

⁷² See Chanen, *supra* note 22, at 68; Lawrence J. Fox, *Money Didn't Buy Happiness*, 100 DICK. L. REV. 531, 535 (1996).

⁷³ See David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1663 (1998); Chris Klein, *Big-Firm Partners: Profession Sinking*, NAT'L L.J., May 26, 1997, at A1, A25.

on attracting business has encouraged “eat what you kill” compensation structures that exacerbate internal rivalries and undermine teamwork. Hoarding business and squabbling over who made the kill are increasingly common, and have led to more lateral departures. At large firms, only half of surveyed partners feel supported by other partners.⁷⁴

A preoccupation with profit also drives the escalation in billable hours that so adversely affects most lawyers in private practice. Billable hour requirements have increased dramatically over the last two decades, and what has not changed are the number of hours in the day. Close to half of these lawyers bill at least nineteen hundred hours per year, and a substantial number, particularly at large firms, meet much higher quotas.⁷⁵ Only about two-thirds of the time spent in the office can honestly be billed to clients; the remainder is taken up by personal and organizational needs such as dealing with internal firm matters and keeping current in areas of specialization. As a consequence, lawyers often work sixty hours or more per week.⁷⁶ Especially in large firms, where demands can be even higher, all work and no play is fast becoming the norm rather than the exception.⁷⁷ Recent salary wars have compounded the problem by encouraging a corresponding increase in billable hours.⁷⁸ For too many practitioners, “quality of life is a non-issue. What life?”⁷⁹ Unsurprisingly, most lawyers feel that they do not have enough time for themselves and close to half feel that they lack sufficient time for their families.⁸⁰

For employed women, who still spend about twice as much time on domestic responsibilities as employed men, the puritan ethic run amok poses special difficulties.⁸¹ Excessive hours are the leading cause of professional dissatisfaction among surveyed female practitioners.⁸² Recent reports on women’s status in law firms describe, in deadening detail, the sweatshop schedules for many full-time attorneys and the glass ceilings for part-time practitioners.⁸³ Those with greatest

⁷⁴ Klein, *supra* note 73, at A25.

⁷⁵ See LORRAINE DUSKY, *STILL UNEQUAL* 175 (1996); Bogus, *supra* note 63, at 924; Nancy D. Holt, *Are Longer Hours Here to Stay?*, A.B.A. J., Feb. 1993, at 62.

⁷⁶ See Bogus, *supra* note 63, at 926.

⁷⁷ See Holt, *supra* note 75, at 62; JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 71 (2000).

⁷⁸ Cameron Stracher, *Show Me the Misery*, WALL ST. J., Mar. 6, 2000, at A31.

⁷⁹ Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291, 385 (1996) [hereinafter *Women’s Advancement in the Legal Profession*].

⁸⁰ See *id.* at 62–64.

⁸¹ DEBORAH L. RHODE, *SPEAKING OF SEX* 6–7 (1997) [hereinafter *SPEAKING OF SEX*]; see also WILLIAMS, *supra* note 77, at 71.

⁸² *Women in the Law Survey: Analyzing Job Dissatisfaction*, CAL. LAWYER, Jan. 1990, at 84.

⁸³ *Women’s Advancement in the Legal Profession*, *supra* note 79, at 387–88, 391–99; WILLIAMS, *supra* note 77, at 71; see generally HARVARD WOMEN’S LAW ASS’N, *PRESUMED*

family commitments often drift off the partnership track, leaving behind a decision-making structure insulated from their concerns.⁸⁴ Such patterns help account for the persistent underrepresentation of women in positions of greatest professional status and reward.⁸⁵

Although law firms often blame sweatshop hours on client demands, other factors are clearly at work. Although extended hours and total availability may be important to some clients under some circumstances, such expectations cannot account for the routinely oppressive schedules at many firms. Clients do not get efficient services from bleary, burned-out lawyers. If concerns other than profit maximization were priorities, firms could structure workloads to provide quality service under more reasonable conditions.⁸⁶ The problem is that the predominant hourly billing system pegs profits more to the quantity of time spent than the efficiency of its use, and profits have become the dominant concern.⁸⁷

A preoccupation with the bottom line has squeezed out other values that are central to a satisfying professional life. It has preempted time not only for families but also for community involvement and cultural pursuits. In the process, it has stunted opportunities for lawyers to develop the broad-gauged experience that qualifies them for counseling and leadership roles. And it has foreclosed opportunities for the pro bono legal work that lawyers traditionally have ranked among their most satisfying professional experiences.

Nowhere is the gap between professional ideals and professional practice more apparent than on issues of pro bono service.⁸⁸ Few lawyers come close to satisfying the American Bar Association's Model Rules, which provide that "a lawyer should aspire to render at least 50 hours of pro bono publico legal services per year," primarily to "persons of limited means or to organizations" assisting such persons.⁸⁹ In fact, about half of attorneys perform no pro bono work. The average for the profession as a whole is less than half an hour per week and half a dollar per day.⁹⁰ Much of the assistance that is provided goes not to low-income clients, but to family,

EQUAL: WHAT AMERICA'S TOP WOMEN LAWYERS REALLY THINK ABOUT THEIR LAW FIRMS (Suzanne Nossel & Lisa Westfall eds., 1995) [hereinafter PRESUMED EQUAL] (containing evaluations of the nation's top law firms by the women who work at those firms).

⁸⁴ *Women's Advancement in the Legal Profession*, *supra* note 79, at 411.

⁸⁵ CYNTHIA FUCHS EPSTEIN et al., THE PART TIME PARADOX: TIME NORMS, PROFESSIONAL LIVES, FAMILY AND GENDER 14 (1998) [hereinafter THE PART TIME PARADOX]; *see generally* AT THE BREAKING POINT, *supra* note 13.

⁸⁶ *See* Renee M. Landers, James B. Ribtzer & Lowell J. Taylor, *Rat Race Redux: Adverse Selection in the Determination of Work Hours in Law Firms*, 86 AM. ECON. REV. 329 (1996).

⁸⁷ *Id.* at 346.

⁸⁸ Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 FORDHAM L. REV. 2415 (1999) [hereinafter *Cultures of Commitment*].

⁸⁹ MODEL CODE OF PROF'L CONDUCT R. 6.1 (1998).

⁹⁰ Deborah L. Rhode, *Access to Justice*, 69 FORDHAM L. REV. (forthcoming 2001).

friends, clients who fail to pay their fees, and middle-class organizations like hospitals and schools that might become paying clients.⁹¹ Involvement in public interest and poverty law programs remains minimal at many of the nation's leading law firms and in-house corporate counsel's offices. Only about a third of the nation's five hundred largest firms have agreed to participate in the ABA Pro Bono Challenge which requires an annual contribution of three percent or five percent of the firm's total billable hours. Less than a fifth of the nation's one-hundred most financially successful firms meet the ABA's fifty hour standard; their lawyers average eight minutes per day in pro bono service.⁹² Attorneys at these firms often would like to pursue such work but are deterred by firm policies that refuse to count pro bono activity toward billable hour requirements or to value it in promotion and compensation decisions.

This absence of support is shortsighted in several respects. Particularly for young attorneys, voluntary public service can provide valuable training, contacts, and trial experience that are hard to come by in early years of practice.⁹³ And for lawyers at all stages of their careers, such work can give purpose and meaning to their professional lives.⁹⁴ Pro bono contributions have been responsible for many of the nation's landmark public interest cases, and have helped millions of low-income families meet basic needs.⁹⁵ The lawyers involved have generally found such representation to be a crucial way of expressing their professional identity and moral commitments. Attorneys who lack the time or support for such experiences may feel short-changed. As previously noted, the greatest source of disappointment among surveyed lawyers is the sense that they are not "contributing to the social good."⁹⁶ The failure to provide more support for pro bono activities represents a significant lost opportunity for the profession as well as the public.

A further casualty of the dominant profit orientation has been mentoring relationships. Experienced lawyers who are under growing pressure to generate business and billable hours often have inadequate time or incentive to train junior colleagues, most of whom will never become partners.⁹⁷ This lack of mentoring frustrates associates and often accelerates their departures.⁹⁸ The cycle can then

⁹¹ *Cultures of Commitment*, *supra* note 88, at 2423; see SERON, *supra* note 8, at 129–36.

⁹² Rhode, *Access to Justice*, *supra* note 90; see generally Aric Press, *Eight Minutes*, AM. LAW., July 2000, at 13.

⁹³ See DONALD W. HOAGLAND, *Community Service Makes Better Lawyers*, in THE LAW FIRM AND THE PUBLIC GOOD 109 (Robert A. Katzmann ed., 1995).

⁹⁴ See *id.*; David E. Rovella, *Can the Bar Fill the LSC's Shoes?*, NAT'L L.J., Aug. 5, 1996, at A1.

⁹⁵ See HOAGLAND, *supra* note 93, at 104; Harvey Berkman, *Past Struggles Echo as Clinton Makes a Pitch for Pro Bono Work*, NAT'L L.J., Aug. 2, 1999, at A8.

⁹⁶ AM. BAR ASS'N YOUNG LAWYERS DIVISION, CAREER SATISFACTION 11 (1995).

⁹⁷ See MACKLIN FLEMING, LAWYERS, MONEY & SUCCESS 94 (1997).

⁹⁸ See JOEL F. HENNING, MAXIMIZING LAW FIRM PROFITABILITY §§ 1.06–.08 (1997).

become self-perpetuating, and ultimately self-defeating. Over forty percent of associates leave within three years, frequently before their firms have had time to recover their initial investment in recruiting and training.⁹⁹ Moreover, those most likely to fall by the wayside are attorneys whose race, gender, ethnicity, or sexual orientation imposes additional barriers to mentoring relationships. As the following discussion makes clear, this selective attrition process compounds other biases, and compromises commitments to diversity and equal opportunity.

II. MYTHS OF MERITOCRACY

“Don’t have any. Don’t want any.”¹⁰⁰ That was one employer’s response to a mid-1990s Los Angeles bar survey about gay and lesbian attorneys.¹⁰¹ For most of this nation’s history, that also was the prevailing view towards women and racial and ethnic minorities. Over the last several decades, all of these attitudes have changed dramatically. Women’s representation grew from 3% of new entrants to the bar in the 1960s to 45% by the late 1990s; minorities increased from 1% to 20%. Whether or not the proportion of gays and lesbians has changed remains unclear, given their traditionally closeted status, but the number who are able to be open about their sexual orientation has grown significantly.

However, as bar commissions repeatedly acknowledge, while progress has been substantial, the agenda remains “unfinished.”¹⁰² Women and minorities remain overrepresented at the bottom and underrepresented at the top of professional status and reward structures. For example, women constitute only about 13% of equity partners in law firms, 10% of law school deans, 10% of top in-house legal positions at *Fortune* 500 companies and 5% of large firm managing partners.¹⁰³ Minorities account for 9% of law school deans, 3% of law firm partners, and 2% of general counsel at *Fortune* 500 companies. Salaries are substantially lower for women, minority men, and openly gay and lesbian attorneys than for other lawyers with comparable qualifications and positions.

⁹⁹ NAT’L ASS’N FOR LAW PLACEMENT FOUND., KEEPING THE KEEPERS: STRATEGIES FOR ASSOCIATE RETENTION IN TIMES OF ATTRITION 53–57 (1998) [hereinafter KEEPING THE KEEPERS]; see also Debra Baker, *Cash-and-Carry Associates*, A.B.A. J., May 1999, at 40.

¹⁰⁰ *The Los Angeles County Bar Association Report on Sexual Orientation Bias*, 4 S. CAL. REV. L. & WOMEN’S STUD. 305, 312 (1995).

¹⁰¹ *Id.*

¹⁰² See generally AM. BAR ASS’N COMM’N ON WOMEN IN THE LEGAL PROFESSION, UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR (1995) [hereinafter OVERCOMING THE SISYPHUS FACTOR].

¹⁰³ Amy Singer, *Numbers Too Big to Ignore*, AM. LAW., Mar. 1999, at 122, 125; Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 587 (1996) [hereinafter *Myths of Meritocracy*].

Women are half as likely to achieve partnership as similarly situated men.¹⁰⁴ And the limited data available on minority, gay, and lesbian lawyers document significant disparities in retention and promotion.¹⁰⁵

The bar's response has been a mix of confession and avoidance. Commissions have been created, reports issued, policies developed, and educational programs implemented. Concerns about diversity are on the profession's reform agenda, and that itself represents significant progress. But ironically enough, this progress has created its own obstacles to further change. A widespread perception is that barriers are coming down, women and minorities are moving up, and equal opportunity has been substantially achieved. Whatever racial or gender differences remain are attributed to different choices and capabilities. To many lawyers, bias either is not a significant issue or whatever happens in their own workplaces is not an example. As attorneys in a Texas bar survey put it, "The so-called gender gap is vastly overblown. If people who enter the arena will concentrate on the job and get the chip off their shoulders . . . they should do fine in today's society."¹⁰⁶ "Women should grow up and stop whining."¹⁰⁷ "Of all the problems we have as lawyers . . . discrimination is low on the list of important ones."¹⁰⁸

This "no-problem" problem has itself become a central problem. Over the last two decades, some sixty surveys have been completed on bias in the profession, and they consistently find substantial race and gender gaps in perceptions of discrimination. Between two thirds and three quarters of women report experiencing gender bias, while only a quarter to a third of men report observing it.¹⁰⁹ In the ABA's most recent survey, about two-thirds of African-

¹⁰⁴ CAL. BAR ASS'N, REPORT AND RECOMMENDATIONS REGARDING SEXUAL ORIENTATION, DISCRIMINATION IN THE CALIFORNIA LEGAL PROFESSION 2 (1996); see also Kathleen E. Hull & Robert L. Nelson, *Divergent Paths: Gender Differences in the Careers of Urban Lawyers*, RESEARCHING LAW (Am. Bar Found., Chicago, Ill.), Summer 1999, at 1, 4.

¹⁰⁵ David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 496, 502-03, 570-71 (1996) [hereinafter *An Institutional Analysis*]; see also AM. BAR ASS'N COMM'N ON OPPORTUNITIES FOR MINORITIES IN THE PROFESSION, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION (1999); *Survey of Women Lawyers Shows Inequalities in Pay, Partnership*, SAN FRANCISCO DAILY J., Aug. 25, 1998, at 31; CAL. BAR ASS'N, *supra* note 104, at 2; The Special Comm'n on Lesbians and Gay Men in the Legal Profession, *Report on Findings from the Survey on Barriers and Opportunities Related to Sexual Orientation*, THE RECORD OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., Mar. 1996, at 130 [hereinafter *Report on Findings from the Survey on Barriers and Opportunities Related to Sexual Orientation*].

¹⁰⁶ STATE BAR OF TEX., THE GENDER BIAS TASK FORCE OF TEXAS FINAL REPORT 25 (1994).

¹⁰⁷ *Id.*

¹⁰⁸ Diane F. Norwood & Arlette Molin, *Sex Discrimination in the Profession: 1990 Survey Results Reported*, TEX. BAR J., Jan. 1992, at 50, 51.

¹⁰⁹ *Myths of Meritocracy*, *supra* note 103, at 585-86.

American attorneys, but only about ten percent of white attorneys, believe that minorities are treated less fairly in hiring and promotion processes.¹¹⁰ A study by the National Association for Law Placement revealed similar race and gender gaps concerning selections for partnerships.¹¹¹ Significant progress will require a clearer understanding of these differing perceptions of the problem and the challenges involved in addressing it.

A place to start is competing definitions of discrimination. To many attorneys, discrimination implies overt intentional prejudice. The professional workplaces they inhabit produce few clear examples. Lawyers with the strongest racial and gender biases generally have the sense to not share them openly. Less egregious conduct may pass unnoticed among those who don't need to notice because it doesn't affect *their* lives. And much of what they do see—demeaning assumptions, inadvertent slights, petty harassment—will seem like isolated instances, not institutionalized patterns. But the legal landscape looks different to attorneys who are on the receiving end of repeated forms of bias, however unintended. The black woman partner of a Chicago firm sees patterns when she is mistaken for a stenographer at *every* deposition she has attended.¹¹² For lawyers with these experiences, the problem has less to do with intentional discrimination than with unconscious stereotypes, unacknowledged preferences, and workplace policies that are neutral in form but not in practice.

Both psychological research and empirical surveys underscore the lingering influence of gender and racial stereotypes.¹¹³ Women and minorities do not enjoy the same presumption of competence as their white male colleagues. Traditionally disfavored groups find that their mistakes are more readily noticed and their achievements are more often attributed to luck or special treatment.¹¹⁴ For African-American and Hispanic attorneys, longstanding myths of intellectual inferiority, coupled with lower average grades and test scores, make these stereotypes particularly difficult to overcome.¹¹⁵ So too, the mismatch between characteristics traditionally associated with women and those typically associated with professional success leave female lawyers in a persistent double bind. They

¹¹⁰ Arthur Hayes, *Color-Coded Hurdle*, A.B.A. J., Feb. 1999, at 56, 57.

¹¹¹ NAT'L ASS'N FOR LAW PLACEMENT FOUND. FOR RESEARCH & EDUC., PERCEPTIONS OF PARTNERSHIP: THE ALLURE AND ACCESSIBILITY OF THE BRASS RING 33 (1999) [hereinafter PERCEPTIONS OF PARTNERSHIP].

¹¹² MULTICULTURAL WOMEN ATTORNEYS NETWORK OF THE AM. BAR ASS'N, THE BURDENS OF BOTH, THE PRIVILEGES OF NEITHER 26 (1994).

¹¹³ See generally CLEAR AND CONVINCING EVIDENCE: MEASUREMENT OF DISCRIMINATION IN AMERICA (Michael Fix & Raymond J. Struyk eds., 1992).

¹¹⁴ *An Institutional Analysis*, supra note 105, at 527; see also PERCEPTIONS OF PARTNERSHIP, supra note 111, at 37; see also THE BAR ASS'N OF SAN FRANCISCO, GOALS '95 REPORT: GOALS AND TIMETABLES FOR MINORITY HIRING AND ADVANCEMENT 14–15 (1996).

¹¹⁵ *An Institutional Analysis*, supra note 105, at 557–58.

are faulted as too “passive” or too “pushy,” too “feminine” or not “feminine” enough.¹¹⁶ What is assertive in a man is abrasive in a woman.

Women with children face another double standard and another double bind. Working mothers are held to higher standards than working fathers and are often criticized for being insufficiently committed, either as parents or professionals. Those who seem willing to sacrifice family needs to workplace demands appear lacking as mothers. Those who want extended leaves or reduced schedules appear lacking as lawyers.¹¹⁷ These mixed messages leave many women with the uncomfortable sense that whatever they are doing, they should be doing something else. Lawyers who ignore those cues may be reminded by irate colleagues, although seldom with the candor of one Washington, D.C., lawyer. On learning that a woman partner was about to adopt a baby from Russia, he responded with incredulity: “You can hardly handle one child. What are you doing going for another?”¹¹⁸ The problem is compounded by workplace structures that resist part-time work. Less than three percent of firm lawyers take reduced schedules and most surveyed women believe, with considerable justification, that accepting such status would seriously compromise their careers.¹¹⁹

Of course, the difficulty of reconciling work and family demands is not exclusively a “women’s issue.” Workplaces that are reluctant to accommodate mothers often have even less tolerance for fathers. A common attitude among male partners is that “I have a family and I didn’t get time off—why should you?”¹²⁰ Ironically enough, some lawyers interpret these attitudes as evidence that gender bias is not a problem. After all, women are more likely than men to receive ‘special treatment’ concerning family leaves and flexible schedules.¹²¹ But that interpretation misses a central part of the problem. Penalizing men with family commitments also penalizes women. “It discourages male attorneys from assuming an equal division of household responsibilities” and reinforces traditional gender roles. Working women end up with most family responsibilities and pay a professional price.

The force of traditional stereotypes is compounded by other cognitive biases. People are more likely to notice and recall information that confirms their prior

¹¹⁶ See Kathleen E. Hull & Robert L. Nelson, *Gender Inequality in Law: Problems at Structure and Agency in Recent Studies of Gender in Anglo-American Legal Professions*, 23 LAW & SOC. INQUIRY 681, 688–91 (1998).

¹¹⁷ *Myths of Meritocracy*, *supra* note 103, at 592; see also *Women’s Advancement in the Legal Profession*, *supra* note 79, at 391–99.

¹¹⁸ Wadman, *supra* note 18, at 33.

¹¹⁹ PERCEPTIONS OF PARTNERSHIP, *supra* note 111, at 99.

¹²⁰ *Women’s Advancement in the Legal Profession*, *supra* note 79, at 409; see also *Myths of Meritocracy*, *supra* note 103, at 592.

¹²¹ *Myths of Meritocracy*, *supra* note 103, at 592.

assumptions than information that contradicts them.¹²² Many lawyers assume that a working mother is unlikely to be fully committed to her career, and they more easily remember the times when she left early than the times when she stayed late. So too, attorneys who assume that their minority colleagues are beneficiaries of affirmative action, not meritocratic selection, will recall their errors more readily than their insights.¹²³ A related problem is that people share what psychologists label a “just world” bias.¹²⁴ They want to believe that individuals generally get what they deserve and deserve what they get. Perceptions of performance frequently are adjusted to match observed outcomes. If women and minorities are underrepresented in positions of greatest prominence, the most psychologically convenient explanation is that they lack the necessary qualifications or commitment.

However, a more adequate explanation would acknowledge that careers can also be waylaid by adverse stereotypes and inadequate access to mentoring and client networks. As a wide array of research demonstrates, people feel more comfortable with those who are like them in important respects and are more likely to assist those with similar backgrounds.¹²⁵ Women, minority men, gay, and lesbian attorneys frequently report being left out of the loop of advice, collaboration, and business development.¹²⁶

For each of these groups, the dynamics of exclusion are somewhat different, but the adverse consequences are much the same. Women with substantial family commitments and high billable hour requirements lack time for informal socializing. Men worried about inappropriate appearances or unintended sexual harassment also are reluctant to initiate invitations. Lawyers of color often find that differences in socioeconomic or cultural backgrounds impose an additional obstacle.¹²⁷ So too,

¹²² See generally Linda Hamilton Kreiger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

¹²³ See PERCEPTIONS OF PARTNERSHIP, *supra* note 111, at 93; see also Cecilia L. Ridgeway & Shelley J. Correll, *Limiting Inequality Through Interaction: The End(s) of Gender*, 29 CONTEMP. SOC. 110, 114 (2000).

¹²⁴ MELVIN LERNER, THE BELIEF IN A JUST WORLD: A FUNDAMENTAL DELUSION vii–viii (1980); see also Virginia Valian, *The Cognitive Bases of Gender Bias*, 65 BROOK. L. REV. 1037, 1059 (1999).

¹²⁵ See FED. GLASS CEILING COMM’N, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION’S HUMAN CAPITAL 26-28, 64-72, 93-96, 104-06, 123-25 (1995); PERCEPTIONS OF PARTNERSHIP, *supra* note 111, at 37.

¹²⁶ See JUDITH LORBER, PARADOXES OF GENDER 237–38 (1994); PERCEPTIONS OF PARTNERSHIP, *supra* note 111, at 54–58; see generally BAR ASS’N OF SAN FRANCISCO COMM. ON MINORITY EMPLOYMENT, GOALS AND TIMETABLES FOR MINORITY HOUSING AND ADVANCEMENT 19 (2000) [hereinafter GOALS AND TIMETABLES]; *The Los Angeles County Bar Association Report on Sexual Orientation Bias*, *supra* note 100, at 444–49; William B. Rubenstein, *Queer Studies II: Some Reflections on the Study of Sexual Orientation Bias in the Legal Profession*, 8 UCLA WOMEN’S L.J. 379, 394 (1998).

¹²⁷ See *An Institutional Analysis*, *supra* note 105, at 570.

many of these lawyers report being pressured to specialize in areas where their racial identity is thought particularly useful, or being included on matters only to provide a token presence.¹²⁸ For example, black associates have been assigned to defend race discrimination cases, or invited to meetings with potential minority clients where their only real function is to “sit there and be black.”¹²⁹ Gay and lesbian attorneys have been excluded not only from contexts where colleagues feel uncomfortable, but also where colleagues worry that others, such as judges or clients, might feel uncomfortable. Over time, these policies can become self-perpetuating. Senior lawyers do not want to invest time mentoring those whom they expect to leave. Women and minorities who are not mentored and are not persuaded that they have equal opportunities are more likely to leave. Their disproportionate attrition then reduces the pool of mentors for lawyers of similar backgrounds, and perpetuates the expectations that perpetuate the problem.¹³⁰

The problem is compounded by the disincentives to raise it; a common response is to shoot the messenger. Women who express concerns learn that they are “overreacting” or exercising “bad judgment.”¹³¹ Most colleagues are “not really comfortable” with complaints about discrimination and they don’t want to work with people “who make [them] uncomfortable.”¹³² Gay and lesbian attorneys who would “rather have a career than a lawsuit” similarly learn to let even explicit homophobia pass unchallenged, particularly because formal complaints are seldom effective.¹³³ In one New York bar association survey, less than four percent of reported incidents of discrimination based on sexual orientation resulted in any remedial action.¹³⁴ The result is to prevent candid discussions of diversity-related issues. Targets of bias are reluctant to appear confrontational, and decision-makers are reluctant to air performance-related concerns that could make them appear biased. Moreover, because most employment decisions are subjective and confidential, clear proof of bias is hard to come by. Discrimination claims involving lawyers are expensive to litigate in both personal and financial terms. Plaintiffs risk having all of their deficiencies publicly aired, and the rare individual who wins in court may lose in life.

¹²⁸ GOALS AND TIMETABLES, *supra* note 126, at 17, 25; see also David B. Wilkins, *Do Clients Have Ethical Obligations to Lawyers? Some Lessons from the Diversity Wars*, 11 GEO. J. LEGAL ETHICS 855, 863 (1998) [hereinafter *Do Clients Have Ethical Obligations to Lawyers?*].

¹²⁹ *Do Clients Have Ethical Obligations to Lawyers?*, *supra* note 128, at 863.

¹³⁰ PERCEPTIONS OF PARTNERSHIP, *supra* note 111, at 54–58; see also *An Institutional Analysis*, *supra* note 105.

¹³¹ *Green Pastures*, PERSP., Summer 1995, at 3.

¹³² *Id.*

¹³³ See *The Los Angeles County Bar Association Report on Sexual Orientation Bias*, *supra* note 100, at 355.

¹³⁴ See *Report on Findings from the Survey on Barriers and Opportunities Related to Sexual Orientation*, *supra* note 105, at 153.

As one Chicago practitioner put it, an attorney who sues for discrimination “may never eat lunch in this town again.”¹³⁵

Paul Barrett’s recent profile of “the good black” provides a case history of these dynamics.¹³⁶ Lawrence Mungen, an African-American graduate of Harvard College and Harvard Law School, attempted to fit the model that Barrett’s title invokes. As a senior associate, he joined the Washington, D.C., branch office of a Chicago law firm, Katten, Muchen and Zavis, and attempted to “play by the rules.”¹³⁷ After being hired to do complex bankruptcy work in an office that generated too little of it, he fell through the cracks, and landed off the partnership track.¹³⁸ But until late in the process, he failed to complain or to raise other race-related concerns. He didn’t want to be typecast as the “angry black,” and he declined to support or mentor any of the small number of other minority lawyers at the firm.¹³⁹ When his difficulty in obtaining work became clear, some partners made a few well meaning, but ineffectual responses. They slashed his billing rate, which enabled him to take over some routine matters, but also undermined his reputation as someone capable of demanding, partnership-caliber work.¹⁴⁰ Although the senior partners eventually offered to relocate him in another office, they did not provide assurances of opportunities that would lead to promotion.¹⁴¹ He sued for race discrimination and alleged multiple examples, such as the firm’s failure to provide formal evaluations, informal mentoring, invitations to client meetings, or help with business development.¹⁴² A largely black District of Columbia jury found in his favor, but a divided appellate panel reversed.¹⁴³ Unable to find another comparable position, Mungen made do with temporary, low-level assignments at other firms and, by the end of the book, was contemplating an alternative career.¹⁴⁴

As many commentators have noted, the case was a kind of “racial Rorschach test” in which observers saw what they expected to see.¹⁴⁵ To lawyers in the firm and sympathizers outside it, including the appellate court, this was a morality play in which no good deed went unpunished. From their perspective, Mungen was treated no worse than white associates, and in some respects considerably better.¹⁴⁶ The

¹³⁵ PAUL M. BARRETT, *THE GOOD BLACK* 59 (1998).

¹³⁶ *Id.*

¹³⁷ *Id.* at 43.

¹³⁸ *Id.* at 44.

¹³⁹ *Id.* at 103.

¹⁴⁰ *See id.* at 98–99.

¹⁴¹ *Id.* at 144.

¹⁴² *Id.*

¹⁴³ *Id.* at 238–39, 271.

¹⁴⁴ *Id.* at 286–87.

¹⁴⁵ David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924, 1924 (1999).

¹⁴⁶ BARRETT, *supra* note 135, at 280.

slights and oversights that he alleged at trial were "business-as-usual mismanagement."¹⁴⁷ And the extra efforts that the firm made to keep Mungen were evidence of a commitment to equal opportunity. By contrast, critics, including Barrett, saw this as a textbook case of "a reckless indifferent affirmative action."¹⁴⁸ From their vantage, the firm's efforts were too little too late. Not surprisingly, these competing perceptions usually divide along racial lines and typify attitudes within the profession generally. In a 1999 ABA survey, only 8% of blacks, but 41% of whites, believed that firms had a genuine commitment to diversity.¹⁴⁹

Much, of course, depends on what counts as commitment. Katten's management, like that at many firms, undoubtedly did want minority lawyers to succeed. Even from a purely pragmatic standpoint, it helps in recruitment and business development if a firm includes more than the single black lawyer that Katten's Washington office had during Mungen's employment. But while many attorneys want to achieve greater diversity, they do not necessarily want to rethink the structures that get in the way. Nor do they support preferential treatment. The ABA's survey found that only 42% of white lawyers, compared with 92% of blacks, favored affirmative action.¹⁵⁰ To opponents, reliance on race, ethnicity, or gender perpetuates a kind of preferential treatment that society should be seeking to eradicate. In critics' view, such treatment implies that women and men of color require special advantages, which reinforces the very assumptions of inferiority that we should be trying to counteract.

Yet while these lawyers are correct that affirmative action carries a price, the question is always, "compared to what?" The costs of inaction are also substantial. Only by insuring a critical mass of minorities and women in top positions can we secure a workplace that is fair in fact as well as in form. Although the stigma associated with diversity initiatives can present substantial problems, critics mistake its most fundamental causes and plausible solutions. Assumptions of inferiority predated affirmative action and would persist without it. The absence of women and men of color in key legal roles is also stigmatizing. Moreover, we are unlikely to reduce racial or gender prejudices if we ignore their continuing effects, or treat all forms of preferential treatment as equally objectionable. Disfavoring women and minorities stigmatizes and subordinates the entire group. Disfavoring white males does not. In some contexts, "special" treatment may be essential to counteract the special obstacles facing underrepresented groups.¹⁵¹

Contrary to critics' assertions, the measures necessary for diversity do not compete with quality, but rather enhance it. Adequate representation of lawyers with different backgrounds and experiences is critical for success in an increasingly diverse

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Wendell Lagrande, *Getting There, Staying There*, A.B.A. J., Feb. 1999, at 54, 55.

¹⁵⁰ *Id.*

¹⁵¹ For a fuller development of these justifications for affirmative action, see *SPEAKING OF SEX*, *supra* note 81, at 163-71.

marketplace.¹⁵² Moreover, as the following discussion indicates, many strategies that promote equal opportunity for women and minorities can improve the quality of life for all attorneys. Better management of human resources is an issue in which the entire profession has a stake.

III. ALTERNATIVE STRUCTURES

In a celebrated essay, *The Importance of What We Care About*, philosopher Harry Frankfurt underscored an obvious but often overlooked truth. Individuals are most fulfilled when they are engaged in work that they find meaningful and when they have reflected, at the deepest level, about what work meets that definition.¹⁵³ It is, Frankfurt emphasized, worth “caring about what [we] care about” and refusing to settle, at least in the long term, for workplaces that fall short.¹⁵⁴ Lawyers, both individually and collectively, need to ask hard questions along the lines that Frankfurt proposed. Although some gap is inevitable between idealized aspirations and daily realities, it, by no means, follows that current conditions of practice are the best we can achieve. Increased competition may be a given, but lawyers can change what they are competing over. The legal profession has much more control over workplace priorities than most occupations. The vast majority of lawyers work in organizations owned or run by lawyers. They can choose to place greater emphasis on values other than profit, and they can create structures that permit such choices. Law schools, law firms, bar associations, and other legal institutions also can do more to promote conditions that are central to professionally fulfilling lives.

A place to start is with educating attorneys who hold managerial positions. Despite the outpouring of complaints about the decline of the profession into a business, many lawyers have failed to incorporate effective business management strategies in structuring their workplaces. As experts often note, the state of human resources management in most law offices is nothing short of “Dickensian.”¹⁵⁵ Law schools offer few if any courses on such subjects or on other marketing, technological, and financial aspects of running a practice. Seldom do managing attorneys receive formal training in personnel issues and seldom have they made adequate use of research on employment satisfaction. In general, that research identifies several conditions that are most likely to yield professional fulfillment: tasks that individuals view as challenging and valuable; some measure of responsibility and control over their work; sufficient time for personal, public service, and family

¹⁵² David A. Thomas & Robin J. Ely, *Making Differences Matter: A New Paradigm for Managing Diversity*, HARV. BUS. REV., Sept.–Oct. 1996, at 79, 83.

¹⁵³ See Harry Frankfurt, *The Importance of What We Care About*, 53 SYNTHESE 257, 260 (1982).

¹⁵⁴ *Id.* at 265.

¹⁵⁵ JOEL F. HENNING, MAXIMIZING LAW FIRM PROFITABILITY §§ 1.08, 1.17 (1997).

concerns; and supportive collegial environments.¹⁵⁶ Lawyers, particularly those with managerial responsibilities, need more systematic information about how well their own practice settings satisfy these conditions. However, the preceding discussion suggests certain general directions for reform.

One obvious goal should be better accommodation of lawyers' public service commitments. Pro bono opportunities are an effective way of enabling attorneys to gain skills and recognition in pursuit of causes that they find meaningful. Legal workplaces need to provide more support for such involvement: pro bono work should count fully in meeting billable hour requirements and should carry positive weight in performance evaluations and compensation decisions. Bar associations could encourage such policies by requiring all lawyers to contribute a specified amount of time, such as fifty hours per year, or the financial equivalent, to pro bono service primarily for persons of limited means.

Such proposals have previously been rejected on both ethical and pragmatic grounds. One concern involves the fairness of requiring lawyers, but not other professionals, to provide charitable assistance; another involves the enforceability and efficiency of having inexperienced or unmotivated attorneys dabbling in pro bono work. Such concerns are not without force, but it is also the case that lawyers have special privileges imposing special obligations. American attorneys have obtained a much more extensive and exclusive right to provide essential services than lawyers in other nations or members of other occupations. The organized bar has closely guarded that prerogative, and its success in restricting lay competition has helped to price services out of the reach of many consumers. Under these circumstances, it is not unreasonable to expect lawyers to make some modest pro bono contributions in exchange for their privileged status. Concerns about efficiency can be addressed by allowing a buyout option and by providing the kind of brief but effective training and backup assistance that voluntary programs already have developed for routine services. Even if pro bono requirements could not be fully enforced, they would at least point us in socially useful directions. For many impoverished clients, some assistance, however limited, is preferable to what they have now, which is none. And for many lawyers, who would like to provide pro bono service, but are in unsupportive working environments, bar requirements could provide the necessary leverage for change.¹⁵⁷

Another priority for reform should be better accommodation of lawyers' family commitments. Lawyers should have opportunities to choose alternative career paths and reduced schedules without paying a permanent professional price. As a NALP survey put it, "up or out" should be "dead and gone."¹⁵⁸ Both individuals and

¹⁵⁶ THE PURSUIT OF HAPPINESS, *supra* note 32, at 133; J.P. OGLVIE et al., LEARNING FROM PRACTICE: A PROFESSIONAL DEVELOPMENT TEXT FOR LEGAL EXTERNS 240 (1998); *see also* KEEPING THE KEEPERS, *supra* note 99, at 45–46.

¹⁵⁷ For a fuller discussion, see *Cultures of Commitment*, *supra* note 88, at 2421–25.

¹⁵⁸ PERCEPTIONS OF PARTNERSHIP, *supra* note 111, at 38.

organizations can benefit from more flexible structures. Establishing adequate part-time and family leave policies, as well as more humane and flexible working schedules, would be steps in the right direction. The greater challenge, however, is to insure that lawyers who take advantage of these options are not relegated to second class status and penalized in assignment and promotion decisions.¹⁵⁹ Commitment should be measured less in terms of the quantity of hours billed and more in terms of the quality of work performed.

Other strategies should focus directly on diversity and equal opportunity. Many legal employers still need policies that prohibit discrimination on the basis of sexual orientation, extend benefits to domestic partners, and create adequate channels for raising diversity-related concerns. Many workplaces also lack formal mentoring programs that insure adequate support for women and minorities. Too few employers have realistic goals for hiring and retention of under-represented groups, and fewer still hold supervising attorneys accountable for meeting those goals. Insuring that a critical mass of women and minorities occupy decision-making roles is often crucial for securing these other strategies for change. To assist that process, an increasing number of organizations have made effective use of diversity training and consultants. In other legal workplaces, however, these strategies have functioned more as substitutes than as catalysts for change. As one disillusioned associate put it, firms "can put on programs until the cows come home" but significant progress will require lawyers to act on the recommendations they hear.¹⁶⁰

So too, bar associations should do more to assist those efforts. One obvious strategy is for more local bars to follow the lead of associations that have developed model policies, training materials, and continuing legal education programs on diversity issues.¹⁶¹ Greater support should be available for Minority Counsel Programs, in which participating firms and in-house counsel departments pledge to increase their employment of minority lawyers and their referrals of business to minority-owned firms.¹⁶² More effort should also focus on evaluating the effectiveness of these initiatives. Anecdotal reviews are mixed, and systematic research is necessary to identify strategies that are most useful.

The bar also can work in partnership with law schools and public interest organizations to address issues concerning the quality of professional life. For example, more attention should focus on helping solo and small firm practitioners develop financially viable ways to meet the needs of underserved communities. Such initiatives are beginning to emerge through cooperative networks providing advice, referrals, mentoring, and technological assistance. Additional strategies along these lines are crucial, as are law school and continuing legal education courses concerning

¹⁵⁹ See *id.* at 44; see generally PRESUMED EQUAL, *supra* note 83.

¹⁶⁰ Stephanie Francis Cahill & Pearl J. Platt, *Bringing Diversity to Partnerships Continues to Be an Elusive Goal*, SAN FRANCISCO DAILY J., July 28, 1997, at 1, 2.

¹⁶¹ See AM. BAR ASS'N, PROMOTING PROFESSIONALISM 61-62 (1998).

¹⁶² See *Do Clients Have Ethical Obligations to Lawyers?*, *supra* note 128, at 864-65.

quality of life and managerial issues. Collaborative efforts could also be made to develop the best practice standards to evaluate legal employers on dimensions such as diversity, ethical practices, and pro bono programs. Survey data could be used to assess not just formal policies, but actual experiences. Legal employers are now ranked primarily in terms of size, profitability, and income. They need more incentives to compete on other levels.

Changes in legal practice along the lines identified here will, of course, require broader changes in the legal culture. Lawyers will need to rethink their priorities as well as their policies. But current levels of dissatisfaction make some reassessment seem plausible. A number of years ago at a Stanford symposium on corporate law firms, a distinguished group of managing partners were invited to engage in that reexamination. "Why," they were asked, "didn't more firms give lawyers a choice to meet family or pro bono commitments by opting for saner schedules and lower salaries?" "Because," one senior partner explained impatiently, "reduced workloads cost money. Getting additional lawyers up to speed, accommodating those with restricted availability, and paying extra overhead are expensive. And who is going to pay for all that?" The answer, which appeared to come somewhat as a shock, was, "you will," at least in the short term. But over the long run, the investment can pay off from gains in morale, recruitment, and retention. Moreover, especially at major law firms, where partners' salaries are over ten times those of the average American worker, some modest short-term financial sacrifice in the interest of long-term professional fulfillment does not seem unreasonable.

Oscar Wilde once observed that "[i]n this world there are only two tragedies. One is not getting what one wants, and the other is getting it."¹⁶³ Most lawyers want not only a comfortable lifestyle, but also a supportive practice environment and socially useful work. Ironically enough, attorneys' success in achieving the first objective has limited their ability to achieve the others. The result may not be a tragedy, but neither is it all that lawyers should aspire to achieve.

¹⁶³ OSCAR WILDE, *LADY WINDERMERE'S FAN* 66 (1980).

