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## Bibliographical Essay: Women and the Legal Profession

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# BIBLIOGRAPHICAL ESSAY:

## WOMEN AND THE LEGAL PROFESSION

CYNTHIA GRANT BOWMAN\*

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### I. INTRODUCTION

“Paradox” and “double bind” are terms frequently used in the literature regarding women and the legal profession.<sup>1</sup> “Paradox” describes the contradiction between the socially defined images of “woman” and “lawyer,” whereas “double bind” looks at this same issue

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1. See Eve B. Burton, *More Glass Ceilings Than Open Doors: Women as Outsiders in the Legal Profession*, 65 *FORDHAM L. REV.* 565, 570 (1996) (referring to double bind faced by women lawyers who do not exhibit behaviors based on male models); Elizabeth A. Delfs, *Foul Play in the Courtroom: Persistence, Cause, and Remedies*, 17 *WOMEN'S RTS. L. REP.*, 309, 313 (1996) (discussing the contradictory stereotypes of male and female lawyers); Jennifer A. Freyer, Note, *Women Litigators in Search of a Care-Oriented Judicial System*, 4 *AM. U. J. GENDER & L.* 199, 201-04 (1995) (describing women litigators as caught in a double bind between care-oriented personal morality and a rights-oriented professional role).

from the point of view of the woman attorney caught in this dilemma. Shall she model herself upon the stereotypically male image of an attorney and risk being accused of inappropriate aggressiveness? Or shall she heed the advice given to Ann Hopkins<sup>2</sup>— to act more femininely, talk more femininely, walk more femininely — and risk the judgment that she is passive and unsuited to the life of the courtroom? In one form or another, women lawyers have faced these dilemmas ever since Myra Bradwell was denied admission to the bar in 1869 on the grounds that “[t]he natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.”<sup>3</sup> Women lawyers have been writing about these dilemmas at least since shortly after Myra Bradwell’s case,<sup>4</sup> analyzing what they were up against, strategizing about how to meet the common obstacles they faced, sharing experiences, and giving as well as receiving support.

The recently published letters of the Equity Club are some of the earliest examples of this type of literature.<sup>5</sup> The Equity Club was a correspondence organization of women lawyers from 1887 through 1890 which brought together women who practiced law in a variety of settings across the nation.<sup>6</sup> These lawyers discussed their problems finding acceptance within the profession and strategies for dealing with professional and personal problems.<sup>7</sup> They also acted as a support organization for one another.<sup>8</sup> Their letters sometimes resound with complaints all too familiar to women lawyers today. Consider the following excerpt from a letter by Catharine G. Waugh, an attorney practicing in Rockford, Illinois, in 1889:

Speaking of the courtesy of attorneys, there is only one here whom I have ever heard of saying anything but kind words and he remarked with the refinement which characterizes all of his utterances, “Let me once meet Miss Waugh in a case and I will wipe the

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2. See *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109 (D.D.C. 1985) (discussing how gender discrimination plaintiff Ann Hopkins was advised by male partners to act more femininely), *aff’d*, 825 F.2d 458 (D.C. Cir. 1987), *rev’d and remanded*, 490 U.S. 228 (1988), *judgment aff’d*, 920 F.2d 967 (D.C. Cir. 1990) (finding that the firm refused Hopkins’ admission as partner because of her gender).

3. *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring).

4. See generally VIRGINIA G. DRACHMAN, *WOMEN LAWYERS AND THE ORIGINS OF PROFESSIONAL IDENTITY IN AMERICA: THE LETTERS OF THE EQUITY CLUB, 1887 TO 1890* (1993) (publishing letters that women in the Equity Club wrote to each other).

5. *Id.*

6. *Id.* at 1-2.

7. *Id.*

8. See *id.* at 2 (describing that, unlike other associations, the Equity Club was not exclusive). See generally *id.* at 1-38.

floor with her." We met and he didn't and we met again and still he didn't either literally or figuratively. Then he became kindly and to my disgust referred to me in open court several times as "Kitty" so that an outsider would have thought us great friends. I told him with intense coldness that when he found it necessary to address me, he should call me Miss Waugh, as only my family and *friends* were privileged to call me by my home name.<sup>9</sup>

This description of openly hostile and intimidating verbal harassment of a woman lawyer, followed by denigration of her in court by use of a diminutive of her first name, is strikingly similar to dozens of accounts published by state gender bias task forces more than a century later.<sup>10</sup>

This essay discusses literature that falls into this tradition of collective strategizing and support. This literature takes many forms: historical accounts and biographies; personal accounts; attempts to describe and quantify; state gender bias reports; studies of women in law firms, law schools and the judiciary; and legal strategies to remedy continuing discrimination against women in the legal profession. The essay concludes with a description of some of the attempts of feminist theory to come to terms with the situation of women lawyers and to speculate about ways in which the entry of women into the law may transform the profession.

## II. THE FASCINATION WITH HISTORICAL ACCOUNTS

The newly published book about the Equity Club<sup>11</sup> addresses the hunger of contemporary women lawyers to know about the lives and struggles of those who went before them. Professor Carol Sanger has noted the current fascination of legal scholars with the lives of the first women lawyers.<sup>12</sup> This fascination has led busy women who face the stresses of their own legal practice and/or teaching to devote substantial periods of time to researching and retelling the stories of some of these "first women." Among the results have been Professor Barbara Babcock's articles about Clara Shortridge Foltz, the first woman lawyer in California,<sup>13</sup> and Professor Jane Friedman's biogra-

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9. DRACHMAN, *supra* note 4, at 175-76 (emphasis in the original).

10. *See infra* Part V.B.

11. DRACHMAN, *supra* note 4.

12. *See* Carol Sanger, *Curriculum Vitae (Feminae): Biography and Early American Women Lawyers*, 46 STAN. L. REV. 1245, 1247 (1994) (noting the efforts of several contemporary scholars to record the history of women and the law).

13. Barbara Allen Babcock, *Clara Shortridge Foltz: "First Woman,"* 30 ARIZ. L. REV. 673 (1988); Barbara Allen Babcock, *Clara Shortridge Foltz: Constitution-Maker*, 66 IND. L.J. 849 (1991).

phy of Myra Bradwell.<sup>14</sup> We can read how Bradwell, although she never practiced law, was an extremely influential legal publisher, commentator, and lobbyist, as well as a wealthy woman and wife in late 19th century Chicago.<sup>15</sup> We can also read how Foltz, among other things, represented indigents in both civil and criminal matters, drafted the statute creating California's parole system, and proposed a bill providing for government-funded representation of indigent criminal defendants.<sup>16</sup> Another excellent source of stories about women who were first — in law schools, in the bar, in law firms, on law faculties, on the bench, and women attorneys of color — is Karen Berger Morello's 1986 book *The Invisible Bar*.<sup>17</sup> Morello's book contains lively anecdotes, quotes, even photographs, along with historical facts about each of the women she discusses; the book's pervasive tone is one of outrage mixed with humor at the obstacles that these women faced as well as their creative responses to them.

What explains the fascination with accounts of these "first women?" The most obvious explanation might be the inspiration gained from the examples of other women who faced phenomenal obstacles and prevailed. This undoubtedly provides some of the attraction of the stories of early women lawyers: they awe, they inspire, and they help "set" women's current experiences in the law in the context of what has gone before — the fight for admission to the bar and to law schools, the outright refusal to hire women in law firms and law schools, and the persistence of the women who hammered at those doors and ultimately opened them to those who came after. Moreover, as Professor Carrie Menkel-Meadow has pointed out, a common theme of the stories of Bradwell, Foltz, and others is that of a woman who challenged the dominant conception of womanhood as well as the stereotypical notion of what it means to be a lawyer.<sup>18</sup> This theme makes us confront our own stereotypical views of both the excluded woman and the included lawyer. Thus, the "first women" take on the proportion of a myth, one that transforms our notions of what is and must be.

Something much deeper seems to be at work in the hunger for bi-

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14. JANE M. FRIEDMAN, *AMERICA'S FIRST WOMAN LAWYER: THE BIOGRAPHY OF MYRA BRADWELL* (1993).

15. *Id.*

16. Barbara Allen Babcock, *Western Women Lawyers*, 45 *STAN. L. REV.* 2179, 2183-84 (1993).

17. KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA: 1638 TO THE PRESENT* (1986).

18. Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 *U. MIAMI L. REV.* 29, 38 (1987) (discussing the stories of women who were at first excluded from legal education and the legal profession).

ography and anecdote, however, something satisfied only by a much thicker, richer description than mythology could provide. As Carol Sanger has noted, a good biography makes its subject "real"; we gain a sense not only of what the woman lawyer did, but also of who she was.<sup>19</sup> Thus, Sanger notes, it is important to know about Myra Bradwell's undesirable qualities as well as her accomplishments, her cruelty as well as her beneficence, her dependence upon her husband's social and economic position, and her anti-Semitism.<sup>20</sup>

More "trivial" accounts of these women's lives attract us as well. Some of the most compelling letters of the Equity Club members are those in which they discuss how to dress in court and, specifically, whether to wear a hat.<sup>21</sup> As the editor of their letters remarks, "the matter of the hat, seemingly a frivolity of fashion [more likely of the stringent etiquette surrounding women's roles at that time], posed in actuality a perplexing problem for the woman lawyer seeking to balance her femininity and her professional identity."<sup>22</sup> We are also anxious to know how these first women handled their family lives — if they had children and how they cared for them while forging a new profession for us all. Painted in this detail, these foremothers become real, not idols. We see their imperfections, their emotions, and their struggles, which are often eerily similar to our own. In this sense, they become not just inspirations but also attainable models. Who could become a lawyer if it required the virtue and the courage of Joan of Arc?

### III. PERSONAL ACCOUNTS OF THE FAMOUS AND NOT-SO-FAMOUS

Closely connected to the historical accounts described above are the personal accounts of women of the generation(s) just before us. Unlike the stories of 19th century women lawyers, these accounts have often been available in the first person,<sup>23</sup> because it has not been very long since women began entering many of the most closely

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19. Sanger, *supra* note 12, at 1257, 1280.

20. Sanger, *supra* note 12, at 1271-72.

21. Letter of Margaret L. Wilcox (June 1, 1889), in DRACHMAN, *supra* note 4, at 177-78; Letter of Catharine G. Waugh (May 2, 1888), in *id.* at 134-35; Letter of Lelia Josephine Robinson (Apr. 7, 1888), in *id.* at 127.

22. DRACHMAN, *supra* note 4, at 30.

23. In 1985, for example, Ronald Chester published an oral history of women who had practiced law in the 1920s and 1930s and were graduates of three law schools that early had encouraged women — Portia Law School (now New England School of Law) in Boston; Washington College of Law (at American University) in the District of Columbia; and the Chicago-Kent College of Law, where the first women's legal sorority was founded. Like the histories and biographies, the focus was upon the lives of specific women. RONALD CHESTER, *UNEQUAL ACCESS: WOMEN LAWYERS IN A CHANGING AMERICA* (1985).

guarded citadels of the legal profession. For example, the first woman associate, the daughter of a federal appellate court judge, was hired on Wall Street in 1924 and did not become a partner until 1942.<sup>24</sup> The well-known firm of Sullivan & Cromwell did not hire its first woman associate until 1930 and did not name its first woman partner until more than fifty years later, in 1982.<sup>25</sup> Even when law firms did hire women, they were often consigned to tasks that men of comparable merit were not asked to perform, and women's advancement through the ranks was less than certain. Associate Justice Sandra Day O'Connor, who in 1981 became the first woman appointed to the Supreme Court, was unable to find work as a lawyer upon graduating with honors from Stanford in 1952 and was offered employment by a law firm only as a stenographer.<sup>26</sup> The most prestigious law firms were among the last to hire women, doing so in more than token numbers only since 1970.<sup>27</sup>

One has only to glance at a symposium issue of a law journal or review regarding women and the law or the program of a conference on women and the legal profession to become aware of the continuing fascination with how these women coped as one of nine females in a law school class of 500 students (in the case of Justice Ginsburg)<sup>28</sup> and how they faced a job market that was openly hostile to women. A retrospective article or speech by one of these women, preferably now famous, is a desired addition to any collection of articles about women and the law.<sup>29</sup> What do these communications tell us, and what do we want to hear? Several themes recur in the articles and speeches of these women to the next generation of women lawyers. First, they document the discrimination of the past, telling their own stories of prevailing over bias.<sup>30</sup> Next, they express varying degrees of

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24. MORELLO, *supra* note 17, at 201-02.

25. MORELLO, *supra* note 17, at 197.

26. MORELLO, *supra* note 17, at 194.

27. See MORELLO, *supra* note 17, at 196-97 (noting that even though women have an increased place in the legal market, "no one disagrees that at the partner level, women are not significantly increasing their numbers in the large and powerful firms"). Additionally, *National Law Journal* statistics revealed that in 1984 "[t]he typical large law firm still can count the number of its women partners on one hand." *Id.* at 195-96. Statistics showed that Sidley & Austin had eleven females out of 177 partners, and Shearman & Sterling had two women out of 115 partners. *Id.* at 197.

28. See Ruth Bader Ginsburg, *Women at the Bar — A Generation of Change*, 2 UNIV. PUGET SOUND L. REV. 1, 1 (1978) (revealing Justice Ginsburg's "acute sense something was amiss in the resemblance, the sameness our classmates displayed").

29. See generally Ruth Bader Ginsburg, *Remarks on Women's Progress in the Legal Profession in the United States*, 33 TULSA L.J. 13 (1997) (reflecting upon both her own and Justice O'Connor's achievements making women's participation in all manners of legal work commonplace).

30. *Id.* at 14-16.

optimism about the future, depending upon their assessments of the changes that have occurred, which are usually substantial, since they entered the practice of law.<sup>31</sup> Finally, they express solidarity with the women who have followed in their footsteps, along with a commitment to ensure that younger women will not have to face the same barriers they encountered themselves.<sup>32</sup>

These accounts almost invariably move the audiences who hear them. I have attended dinners where distinguished older female lawyers reduced tough young practitioners to tears with their words. This occurs for at least two reasons. First, we feel a lively empathy with the pain our predecessors have suffered and a continuing emotional identification based upon our own personal knowledge of similarly experienced pains of exclusion. Second, we desperately want to see real women who have made a career of the law in the past, to listen to their personal stories, and to be assured of their support. We want this, I believe, in order to hold on to the hope that it will be possible to weave a fabric in our own lives that contains both professional satisfaction and personal fulfillment, despite the recognition that the composition will be a difficult one.

The personal accounts which have made their way into the literature of women in the legal profession are not just those of famous women who have prevailed over great obstacles to reach the heights of their profession. The literature also includes studies of groups or cohorts of women, usually those who traversed law school together, which describe their experiences — both legal and personal — since graduation. One of the earliest and best-known of these works is Jill Abramson and Barbara Franklin's book *Where They Are Now: The Story of the Women of Harvard Law 1974*.<sup>33</sup> The authors interviewed seventy women who graduated in 1974 soon after their ten-year reunion and chronicled their paths during that decade, presenting their findings in a lively story-telling manner and in the first person whenever possible. This study revealed that many of the women of Harvard '74, while initially quite enthusiastic about their jobs, in time began to re-examine their priorities.<sup>34</sup> Not only did they begin to wrestle with the "one dimensional life of a workaholic lawyer,"<sup>35</sup> but many of the

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31. *Id.* at 20.

32. *Id.* at 18-19.

33. See JILL ABRAMSON & BARBARA FRANKLIN, *WHERE THEY ARE NOW: THE STORY OF THE WOMEN OF HARVARD LAW 1974* (1986) (tracking the women who graduated from Harvard Law School in 1974).

34. See *id.* at 296 (noting that this reexamination of priorities occurred as they approached age 35).

35. *Id.*



women also felt that their profession failed to accommodate working mothers.<sup>36</sup> This study revealed that many of the women of Harvard '74 had left private practice within five to ten years, primarily because they wanted to give more priority to their personal lives.<sup>37</sup>

The notion that women would leave the legal profession after fighting so hard to enter and succeed in it caught on in the popular and legal press. Descriptions such as those in the Harvard study were soon amplified by "pop" accounts of women who had succeeded in the workplace but had then abandoned it all for marriage and children — the journalism containing what Deborah Rhode has so aptly called "morality plays of ambition and renunciation."<sup>38</sup> Another type of personal account, one which rejects the assimilationist philosophy underlying the accounts of women who either had it all or left it all, was that of the woman who left legal practice, especially litigation, because its male norms and models of behavior sat uncomfortably with the caring qualities she valued in herself.<sup>39</sup> Still other articles heralded women's disproportionately high levels of job dissatisfaction.<sup>40</sup> As will be shown below, some of these observations regarding women in the legal profession have been called into question by more recent research.

#### IV. EARLY ATTEMPTS TO ANALYZE GENDER DISCRIMINATION IN THE LAW

Many consider Professor James J. White's 1967 article *Women in the Law*<sup>41</sup> to be the first major scholarly attempt to address women's status within the legal profession. Although this article was clearly a path-breaking study, I'd like to suggest, in a revisionist vein, that a study written by Beatrice Doerschuk for the Bureau of Vocational Information in 1920 may actually provide the first scholarly treatment of the "woman question" in law, although it was written as a guide for

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36. See *id.* at 297 (voicing concerns that working part-time can jeopardize a woman's chances of remaining at the same level).

37. *Id.* at 121-63.

38. Rhode points out that the popular press in the 1980s first tended to chronicle "Superwomen," women who had succeeded both in their professions and as mothers without requesting or requiring any accommodation from the legal workplace. This was soon followed by accounts of mothers who fled corporate America for the sandbox. Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1203-04 (1988).

39. See, e.g., Priscilla Fox, *Good-bye to Gameplaying*, 8 JURIS DR. 37 (1978).

40. See, e.g., Ronald Hirsch, *Will Women Leave the Law?*, BARRISTER, Spring 1989, at 24 (stating that women's job dissatisfaction resulted, inter alia, from such factors as political intrigue, backbiting, and a lack of time for themselves).

41. James J. White, *Women in the Law*, 65 MICH. L. REV. 1051 (1967).

women considering law as a career.<sup>42</sup> The Bureau sent questionnaires to a very large sample of women practicing law at that time — 827 women from a list of some 1700 women law graduates and a list of women admitted to the bar (who then totalled 1599 from the date of the earliest records).<sup>43</sup> Two hundred ninety-seven women replied, allowing the Bureau to compile substantial information and statistics on women in the legal profession as well as to provide advice for women seeking to follow their lead.<sup>44</sup>

The study reported that 171 of the 272 respondents were employed prior to undertaking legal training and that about half of them had definite intentions of practicing law.<sup>45</sup> Of those already admitted to the bar, commentators estimated that less than half were still practicing law.<sup>46</sup> The author concludes, however, that many of these women left practice for the same reasons men did: it was hard to get established, business could be hard to find, and the financial returns were unsatisfactory.<sup>47</sup> One respondent remarked upon how these problems were more severe for women than for men:

The law has to do largely with property and business and both are at present managed chiefly by men. Men lawyers naturally meet more men than women do, in business, in politics, and socially; in the give and take of casual and informal association woman is at a disadvantage. Since she has less opportunity to come in contact with prospective good clients, her field for getting business is limited; big cases are not entrusted to her; she has had small chance for a wide experience to date. Coincident with this, there has been a traditional prejudice against the professional woman . . . . A man is naturally taken as competent, while a woman must demonstrate what she can do . . . .<sup>48</sup>

In short, lack of mentoring, lack of opportunities for easy socializing with other lawyers and prospective clients, lack of close relationships with persons who controlled property and business (all of whom

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• 42. See BEATRICE DOERSCHUK, THE BUREAU OF VOCATIONAL INFORMATION, WOMEN IN LAW (Bulletin No. 3, 1920) (describing, *inter alia*, how to train prior to law school, how to set up shop, what kinds of legal work are available, and the advantages and disadvantages of each, as well as what non-legal work is available).

43. *Id.* at 9, 36, questionnaire 134.

44. *Id.* at 9.

45. See *id.* at 28-31 (describing the eclectic employment backgrounds of these women, many of whom had been typists, stenographers, teachers, publishers, singers and actresses).

46. *Id.* at 58.

47. See DOERSCHUK, *supra* note 42, at 58-61 (explaining that women also left because the work was hard; because they grew disheartened while awaiting success; and because they were timid, lacked initiative or confidence).

48. DOERSCHUK, *supra* note 42, at 47.

were men), the presumption of incompetence, and the inability to gain experience and to prove themselves – were all key to the difficulties women suffered (and, as I discuss below, continue to suffer) in the private practice of law.<sup>49</sup> Despite early obstacles that women faced, however, the author counseled women against revealing their stenographic skills to legal employers, lest the employers consign them to exercising such skills instead of gaining legal experience.<sup>50</sup> Women in the Equity Club disagreed, however, seeing stenography as a good means to get one's foot in the door.<sup>51</sup>

Almost fifty years after the Bureau of Vocational Information's study, Professor White conducted his study, obtaining data from a large sample of recent graduates from a number of law schools and comparing the female graduates' responses with those of a matched group of male graduates from each school.<sup>52</sup> Based upon this data, White reached three very clear conclusions: (1) there was a large income differential between men and women lawyers, with the men increasing their lead over the years;<sup>53</sup> (2) there was substantial sex segregation of legal work, with men getting jobs with large firms and women with state and local government, and the difference in job setting becoming more marked over the years;<sup>54</sup> and (3) after controlling for other possible explanations, such as hours worked, amount of experience, class rank, school attended, type of employer, type of work, and type of job sought, only discrimination based upon gender could explain the results.<sup>55</sup>

White's data also disproved the common assumptions that married women and mothers did not remain in full-time practice and that women changed jobs more frequently than men.<sup>56</sup> In the face of this evidence, the only possible conclusion was that the enormous income differential between male and female lawyers was attributable to what White called "nonfunctional discrimination," i.e., discrimination not producing an economic advantage to the employer.<sup>57</sup> White pointed

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49. DOERSCHUK, *supra* note 42, at 47.

50. See DOERSCHUK, *supra* note 42, at 35 (noting the advantages and disadvantages for women if they are capable stenographers).

51. DRACHMAN, *supra* note 4, at 122.

52. See White, *supra* note 41, at 1053 (detailing the methods used for obtaining the data).

53. White, *supra* note 41, at 1057.

54. See White, *supra* note 41, at 1057-58 (describing male and female migrations from initial to current jobs).

55. White, *supra* note 41, at 1086-87. For a discussion of the other possible explanations, see *id.* at 1072-80.

56. White, *supra* note 41, at 1090-92.

57. See White, *supra* note 41, at 1087, 1095 (using the data from the survey to disprove the

to the newly passed Title VII as a possible remedy, but he voiced little hope that it would prove useful because of the difficulty of proof and the reluctance of women to risk lawsuits.<sup>58</sup> Within years, however, such lawsuits were indeed filed,<sup>59</sup> and — whether as a result of the changed legal situation or of other factors — legal employers began at last to open their doors to women.

#### V. NOW THAT WOMEN ARE IN THE DOOR, WHERE ARE THEY?

In the period from 1971 to 1991, as women graduated from law schools in record numbers and law firms expanded rapidly in size, the numbers of women in the legal profession mushroomed: the percent of women lawyers jumped from 3% to 20% over this period.<sup>60</sup> Federal law at this time also prohibited legal employers from refusing to hire women and from discriminating against them once they were hired.<sup>61</sup> The 1980s and early 1990s saw a plethora of studies which attempted to evaluate the status and experiences of women lawyers after these changes had taken place.<sup>62</sup> Some of these studies followed the statistical/quantitative approach of the White study,<sup>63</sup> while others amplified statistics by returning to the personal voice of women engaged in practicing law in this new environment.<sup>64</sup> Many writers also directed their attention to exploring legal remedies for the continuing discrimination against women in the practice of law.<sup>65</sup>

##### A. Attempts to Quantify

Another study, in 1981, this time of women law graduates of the University of Illinois, tended to support many of Professor White's 1967 findings.<sup>66</sup> The study showed that, although the majority of

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idea that discrimination against female attorneys is functional).

58. White, *supra* note 41, at 1109.

59. See, e.g., MORELLO, *supra* note 17, at 209-13 (discussing the cases filed against New York law firms in the early 1970s — Kohn v. Royall Koegel & Wells and Blank v. Sullivan & Cromwell — both of which ultimately settled).

60. ABA COMM'N ON WOMEN IN THE PROFESSION, WOMEN IN THE LAW: A LOOK AT THE NUMBERS 8 (1995) [hereinafter ABA LOOK AT THE NUMBERS].

61. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1994); Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994) (providing equal pay for equal work without discrimination based on gender).

62. See, e.g., Rita J. Simon & Kathryn Gardner, *Career Patterns Among University of Illinois Women Law Graduates*, 67 WOMEN LAW. J. 19 (1981); Lee E. Teitelbaum, Antoinette Sedillo Lopez & Jeffrey Jenkins, *Gender, Legal Education, and Legal Careers*, 41 J. LEGAL EDUC. 443 (1991).

63. See *infra* Part V.A.

64. See *infra* Part V.B.

65. See *infra* Part V.C.

66. See Simon & Gardner, *supra* note 62, at 22 (supporting findings that the income gap between the genders increased over time, that a large portion of women attorneys work full-

women practiced law on a regular and continuing basis after law school, their career paths differed from those of men.<sup>67</sup> Specifically, they were more likely to work for public rather than for private institutions,<sup>68</sup> and they made an average of \$10,000 less per year.<sup>69</sup> Also, fewer women lawyers were married than their male counterparts.<sup>70</sup> The statistics on the different practice settings in which men and women lawyers cluster have been supported by other studies, including the American Bar Foundation Statistical Reports on women in the legal profession.<sup>71</sup>

A study of graduates of the University of New Mexico Law School<sup>72</sup> a decade later, however, resulted in quite different findings — findings that may to some extent reflect changes since the earlier cohort studies. This study showed that there was no statistically significant difference between the initial work settings of the New Mexico men and women law school graduates.<sup>73</sup> Although the study did show some disparity in men's and women's areas of specialization (with more men in corporate, criminal, personal injury and real estate practice, and more women in domestic relations and natural resources), few areas of practice were ghettoized.<sup>74</sup> A major longitudinal study by David Chambers of University of Michigan Law graduates also found that the gap between men and women was closing over time, as more recent graduates took jobs in private or public settings with equal frequency.<sup>75</sup> An in-depth study of Stanford graduates replicated this finding.<sup>76</sup> Other studies, however, show that the disparity in

time, and that women on the average changed jobs at the same rate as men).

67. Simon & Gardner, *supra* note 62, at 20.

68. Simon & Gardner, *supra* note 62, at 20.

69. Simon & Gardner, *supra* note 62, at 21.

70. See Simon & Gardner, *supra* note 62, at 25 (reporting that 46% of women lawyers vs. 77% of men lawyers were married).

71. See, e.g., BARBARA A. CURRAN & CLARA N. CARSON, *THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1988* at 7 (Supp. 1991); ABA *LOOK AT THE NUMBERS*, *supra* note 60 (relying on lawyer statistical reports published by the American Bar Foundation).

72. Teitelbaum, Lopez & Jenkins, *supra* note 62, at 452.

73. Teitelbaum, Lopez & Jenkins, *supra* note 62, at 464.

74. See Teitelbaum, Lopez & Jenkins, *supra* note 62, at 465 (finding that few areas of legal practice were found to be the sole or nearly sole domain of one gender).

75. See David L. Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 L. & SOC. INQUIRY 251, 261 n.49 (1989) (stating that the differences between men and women entering firms and government jobs in 1981 showed a decrease from 1974 figures).

76. See Janet Taber, Marguerite T. Grant, Mary T. Huser, Rise B. Norman, James R. Sutton, Clarence C. Wong, Louise E. Parker & Claire Picard, Project, *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209, 1243 (1988) [hereinafter *Stanford Project*] (finding that there were few significant differences between the types of jobs men and women held).

job settings persists for women of color.<sup>77</sup> Unlike white attorneys, minority women are still substantially less likely to find employment with private firms when entering practice and are overrepresented in entry-level jobs with the government.<sup>78</sup>

Both the Michigan and New Mexico studies showed that women with children worked only slightly fewer hours than men, but billed far less.<sup>79</sup> However, both genders worked what Chambers described as "brutal weeks."<sup>80</sup> Despite these developing convergences in initial job setting and hours billed, the New Mexico study continued to show significant differences in the income levels of women and men.<sup>81</sup> Professor Chambers' Michigan study also showed that women were substantially more likely than men to leave private firms five years after graduation.<sup>82</sup>

These empirical studies were done about the same time as the popular accounts of women's job dissatisfaction and high attrition were appearing.<sup>83</sup> Yet the Michigan, Stanford and New Mexico studies seemed to disprove many of these popular impressions. All three found little difference between men and women regarding job dissatisfaction.<sup>84</sup> Both genders were stressed and dissatisfied with their jobs to some extent, and, astonishingly, the Michigan study concluded that women with children were the *most* satisfied of any group!<sup>85</sup> This

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77. See ABA COMM'N ON WOMEN IN THE PROFESSION, OPTIONS AND OBSTACLES: A SURVEY OF THE STUDIES OF THE CAREERS OF WOMEN LAWYERS 4 (1994) [hereinafter OPTIONS AND OBSTACLES] (pointing to the negative impact of the double impediment of sex and race that can be traced throughout the career data).

78. See *id.* (summarizing the difficulties of minority women in law); see generally Wilma Williams Pinder, *When Will Black Women Lawyers Slay the Two-Headed Dragon: Racism and Gender Bias?*, 20 PEPP. L. REV. 1053 (1993) (discussing African-American women's struggle in the legal profession).

79. See Teitelbaum, Lopez & Jenkins, *supra* note 62, at 470-71 (noting that women with children worked a comparable number of hours as men, except when their children were two to five years old); see also Chambers, *supra* note 75, at 268-69 (explaining that all women and men have very long work weeks, and that women with children worked, on average, three fewer hours per week than women without children and worked only four fewer hours per week than men).

80. See Chambers, *supra* note 75, at 269 (stating that women with children averaged forty-nine hours every week, and other women and men averaged fifty-two hours per week).

81. See Teitelbaum, Lopez & Jenkins, *supra* note 62, at 466 (stating that women averaged \$43,000 per year while men averaged \$50,000 per year).

82. See Chambers, *supra* note 75, at 261 n.48 (reporting that five years out of law school 17% of men and 34% of women who had ever worked in private practice had left to work in other settings).

83. See *supra* text accompanying notes 38-40.

84. See Chambers, *supra* note 75, at 258 (discussing the Michigan data); Stanford Project, *supra* note 76, at 1259 (discussing the Stanford data); Teitelbaum, Lopez & Jenkins, *supra* note 62, at 479 (discussing the New Mexico data).

85. See Chambers, *supra* note 75, at 252, 274-77 (noting that having children was the third strongest factor in determining the degree of career satisfaction among women).

result surprised even the study's author, who recognized that this group of women experienced the most, and the most conflicting, demands on their time as well as significant discrimination in the workplace.<sup>86</sup> Professor Chambers surmised that their relative satisfaction level could only be explained because their children bring them immense pleasure and because handling multiple stresses may make an individual stress less intense — because it is traded for another type of stress for part of the day.<sup>87</sup>

In sum, the attempts to quantify the status of women within the legal profession during the 1980s by surveying groups of women law graduates tend to show a convergence in the initial work experiences of women and men. Both male and female graduates found their initial jobs in similar settings. Both men and women tended to change jobs with some frequency and for reasons that were more similar than dissimilar. Both labored under increasing stress and job dissatisfaction. Based on these studies alone (and setting aside the New Mexico finding about differential incomes), one might conclude that discrimination against women in the profession was a thing of the past — and that the problem had become instead a profession that was inhospitable to both genders.

At the same time, statistics compiled by the American Bar Association (“ABA”), American Bar Foundation, legal journals, and other sources showed that while women were entering the profession in large numbers, they were not making it into its more prestigious positions and that their success, even at the entry level, varied by race.<sup>88</sup> The road to partnership is a long and difficult one for women. The ABA Commission on Women in the Profession reported that, in 1991, while 32% of all associates in private law firms were women,<sup>89</sup> only 10% of partners were female, although enough women had graduated from law school for a long enough time to have the potential to increase these figures.<sup>90</sup> Some would explain this by the coincidence of women's arrival upon the scene with the years of belt-tightening and bottom-lining in law firms.<sup>91</sup> This explanation, how-

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86. Chambers, *supra* note 75, at 272.

87. See Chambers, *supra* note 75, at 282 n.106 (stating that “[t]he family demands help you keep perspective on what is important”). The Stanford study suggested, by contrast, that women lawyers experience higher levels of stress than their male counterparts, at least in part due to the strain of the multiple roles they are expected to fulfill. Stanford Project, *supra* note 76, at 1229-30.

88. See OPTIONS AND OBSTACLES, *supra* note 77, at 4, 29 (stating that “[t]he fact of being a woman and a minority creates an obstacle greater than being either one”).

89. ABA LOOK AT THE NUMBERS, *supra* note 60, at 26-27.

90. ABA LOOK AT THE NUMBERS, *supra* note 60, at 25.

91. See Abbie Willard Thorner, *Gender and the Profession: The Search for Equal Access*, 4 GEO. J.

ever, fails to dispel the inference of discrimination. A study of women up for promotion to partnership in major law firms in 1969 to 1973 and in 1980 showed that women were half as likely as men to become partner even in those years of relative plenty.<sup>92</sup> When controlling for academic distinction, prestige of law school, and productivity, the probability of partnership for men was 38.6% and 17.9% for women.<sup>93</sup>

More recent studies also show that women are still much less likely than men to be in private practice seven to ten years after law school, which is approximately the amount of time it takes to become — or fail to become — a partner in a large law firm. Mona Harrington reports, concerning women who graduated in the class of 1980 from Harvard Law School and were in practice in New York City in 1982 and 1989, that 54% of these women were in large firms in 1982, but only 33% remained there in 1989.<sup>94</sup> She further reports that 70% of men from that class in New York City were in large firms in 1982 and 78% in 1989.<sup>95</sup> Moreover, this disparity appears to be getting worse. A 1995 study of eight large New York firms reported increasing gender disparity in the route to partnership.<sup>96</sup> Although approximately 21% of male associates and approximately 15% of female associates made partner between 1973 and 1981, after 1981, only 17% of males made partner, and the female rate declined to 5%.<sup>97</sup> This failure of women to progress beyond entry-level jobs has become known more generally as the “glass ceiling.”<sup>98</sup>

The glass ceiling phenomenon is also apparent in the judiciary and in academia, two of the most prestigious work settings for attorneys. As of 1993, although more than 20% of lawyers were women,<sup>99</sup> only 62

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LEGAL ETHICS 81, 99 (1990) (explaining that women entered the legal marketplace at the end of the economic surge of the 1980s when law firms were either maintaining or decreasing their size, thus putting women at a great disadvantage).

92. See Stephen J. Spurr, *Sex Discrimination in the Legal Profession: A Study of Promotion*, 43 INDUS. & LAB. RELS. REV. 406, 409 (1990) (analyzing information taken from Martindale-Hubbell Law Directory and following each individual's career).

93. *Id.*

94. MONA HARRINGTON, *WOMEN LAWYERS: REWRITING THE RULES* 37 (1994).

95. *Id.*

96. See Cynthia Fuchs Epstein, Robert Saute, Bonnie Oglensky & Martha Gever, *Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession*, 64 *FORDHAM L. REV.* 291, 358-59 (1995) [hereinafter *Glass Ceilings*] (discussing percentages listed in Martindale-Hubbell Law Directory).

97. See *id.*

98. See Pinder, *supra* note 78, at 1058 (defining “glass ceiling” as a euphemism which describes how minorities and women are prevented from advancing beyond a certain level in many professions, especially law).

99. See ABA LOOK AT THE NUMBERS, *supra* note 60, at 3 (reporting that 24% of lawyers



out of 801 federal district judges<sup>100</sup> and 20 out of 241 federal appeals court judges were women.<sup>101</sup> These numbers were improved somewhat by the Clinton Administration appointments, which were almost one-third women.<sup>102</sup> By 1986, when 41% of first-year law students were women, only about 20% of full-time law faculty were women;<sup>103</sup> and many of those were confined to lower-paying and less-recognized positions such as clinical and legal writing instructors.<sup>104</sup> Compared to men, moreover, the women who are hired do not teach the subjects considered the most prestigious within the traditional law school hierarchy.<sup>105</sup> Although some have hypothesized that women are more geographically constrained in the job market than men, by the location of their husbands' jobs or by family ties, neither of these hypotheses explained the disparities found.<sup>106</sup> By 1994, only 16% of tenured law school professors were women.<sup>107</sup>

Minority women fare the worst of all groups in the academic job market. By 1995-1996, minority men represented 7.34% of law faculty members, and minority women represented only 5.23%.<sup>108</sup> As compared with minority men of similar qualifications, minority women enter teaching at significantly lower ranks, obtain jobs at significantly less prestigious schools, and are more likely to teach courses considered low in status within the law school hierarchy.<sup>109</sup> These differences persist even when controlling for a variety of indi-

were women in 1990).

100. Miriam Goldman Cedarbaum, *Women on the Federal Bench*, 73 B.U. L. REV. 39, 42 (1993).

101. *Id.*

102. Ginsburg, *supra* note 29, at 14; Carol Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 745 (1997).

103. Marina Angel, *Women in Legal Education: What It's Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMP. L. REV. 799, 801, 803 (1988).

104. *Id.*

105. See Deborah Jones Merritt & Barbara F. Reskin, *Sex, Race, and Credentials: The Truth About Affirmative Action in Law Faculty Hiring*, 97 COLUM. L. REV. 199, 258-73 (1997) (explaining that being a woman significantly decreases the likelihood that you will teach constitutional law, one of the most favored teaching assignments, but increases the likelihood that you will teach the least favored subjects, such as skills courses, trusts and estates, and family law).

106. See Deborah J. Merritt, Barbara F. Reskin & Michelle Fondell, *Family, Place, and Career: The Gender Paradox in Law School Hiring*, 1993 WIS. L. REV. 395, 397 (1993) (stating that employers are too ready to blame these factors for the failure of women to advance).

107. ABA COMM'N ON WOMEN IN THE LEGAL PROFESSION, *ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION* 23 (1996) [hereinafter *ELUSIVE EQUALITY*].

108. Hope Viner Samborn, *Women of Color Ascend the Ivory Tower*, ABA COMM'N ON WOMEN IN THE PROFESSION: PERSPECTIVES FOR AND ABOUT WOMEN LAWYERS, Summer 1996, at 10.

109. See Deborah J. Merritt & Barbara F. Reskin, *The Double Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299, 2301 (1992) (noting that these results show how law schools treat minority women less favorably than men).

cia of merit, such as academic credentials and federal court clerkships.<sup>110</sup>

### *B. Reports of Gender Bias*

The 1980s and early 1990s produced another form of literature regarding women and the legal profession, one that was not derived from academic studies or legal journalism, but instead was created by women attorneys themselves. At the instigation of women judges and practitioners, in October 1982, the New Jersey Supreme Court announced the establishment of a task force to study gender bias within the state court system.<sup>111</sup> The New York Court of Appeals set up a similar task force in 1984;<sup>112</sup> and the gender bias task force movement began. Before long, it had spread to more than half the states.<sup>113</sup>

The gender bias task force in each state was typically composed of legal practitioners, judges and academics, who undertook to design their own methods to investigate gender bias in their state court system.<sup>114</sup> Each studied various areas of the law, including domestic relations, domestic violence, and criminal law; but all included a substantial investigation of gender-biased conduct in the courtroom.<sup>115</sup> Some commissioned scientifically designed surveys of practitioners and sent questionnaires to both men and women lawyers about what they had experienced or seen in court.<sup>116</sup> All of the task forces, however, placed a central emphasis upon hearing from the people involved first-hand, by holding public hearings, focus groups and roundtables throughout the states.<sup>117</sup> At about the same time, the ABA Commission on Women in the Profession, chaired by Hillary Rodham Clinton, carried out a similar study, holding public hearings throughout the nation.<sup>118</sup>

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110. *See id.* at 2323-24 (noting how the minor differences in credentials failed to explain the differences between minority male and female career outcomes).

111. *See* Jeannette F. Swent, *Gender Bias at the Heart of Justice: An Empirical Study of State Task Forces*, 6 S. CAL. REV. L. & WOMEN'S STUD. 1, 12 (1996) (discussing how the New Jersey task force intended to gather data about the New Jersey courts to see if gender bias existed).

112. *See id.* (noting how Lynn Hecht Schafran, a New York attorney, pushed for a task force in her state of New York).

113. *See id.* (noting that it took three to four years before these other states established task forces).

114. *Id.* at 23-25, 43.

115. *See id.* at 41 (Table 6) (listing the specific areas of law that all of the groups studied).

116. *See* Swent, *supra* note 111, at 43-44 (discussing the different methods that the task forces used in gathering data).

117. *See* Swent, *supra* note 111, at 44 (Table 7) (listing all of the methods used by task forces, categorized by state).

118. ABA COMM'N ON WOMEN IN THE PROFESSION, REPORT TO THE HOUSE OF DELEGATES (1988), *in* 113:2 Rep. of A.B.A. at 235 [hereinafter ABA 1988 REPORT].

Because of their methodology — the taking of evidence through public hearings — the gender bias reports are susceptible to attack as unscientific, anecdotal, and unrepresentative of women lawyers' experience. This is perhaps unsurprising, given that analogous criticisms have been leveled whenever women's conclusions rest upon their own words alone, for example, the traditional distrust of the testimony of rape victims.<sup>119</sup> Similarly, gender bias reports rest their conclusions largely upon the testimony of women who have chosen to speak out.<sup>120</sup> What is remarkable, however, as Lynn Hecht Schafran has pointed out, is that thousands of lawyers in many different states have reported virtually the same things.<sup>121</sup>

As of July 1998, thirty-five states and several federal judicial circuits had issued gender bias reports.<sup>122</sup> The findings presented in these multiple, independently researched reports are remarkably similar. They conclude that subtle forms of discrimination against women by both judges and male lawyers have largely, but not entirely, replaced more overt discrimination against women in litigation — sexist remarks and practices, derogatory treatment and inappropriate forms of address (e.g., first names or "honey"), and gender-based conduct intended to intimidate women attorneys and/or diminish their credibility and professional stature.<sup>123</sup> From state after state came accounts of male attorneys or judges repeatedly interrupting female counsel's presentations, pretending that she was not there, making sexist jokes and innuendos, stating outright that women did not belong in court, and commenting inappropriately upon their physical appearance.<sup>124</sup>

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119. *E.g.*, SUSAN ESTRICH, REAL RAPE 26-79 (1987) (describing history and continuation of distrust of the word of rape victims); Judith Resnick, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2205 (1993) (describing continuing suspicion of women's credibility as witnesses in civil cases as well).

120. *See* Deborah R. Hensler, *Studying Gender Bias in the Courts: Stories and Statistics*, 45 STAN. L. REV. 2187 (1993).

121. *See* Lynn Hecht Schafran, *The Obligation to Intervene: New Direction from the American Bar Association Code of Judicial Conduct*, 4 GEO. J. LEGAL ETHICS 53, 60 (1990) (arguing against skeptics of the data).

122. Statistics obtained in July 1998 from the National Center for State Courts Information Service, National Center for State Courts, P.O. Box 8798, Williamsburg, VA, 23187-8798. Some of the state reports have been published in law reviews as well. *See, e.g.*, *The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts* (1984), 9 WOMEN'S RTS. L. REP. 129, 129 (1986); *Report of the New York Task Force on Women in the Courts* (1986), 15 FORDHAM URB. L.J. 1, 11 (1986-87).

123. *See, e.g.*, THE 1990 REPORT OF THE ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS, at 213-30.

124. For descriptions of some of the gender bias studies, *see, e.g.*, Ann J. Gellis, *Great Expectations: Women in the Legal Profession, A Commentary on State Studies*, 66 IND. L.J. 941, 960-74 (1991) (analyzing the Indiana State Bar Commission on Women in the Profession and comparing it to other state studies); Swent, *supra* note 111; Deborah Ruble Round, Note, *Gender Bias in the Judi-*

Although the state gender bias reports typically did not address behavior toward women attorneys outside the courtroom context, the ABA Commission took testimony about the treatment of women within law firms as well.<sup>125</sup> Women told of their lack of mentoring relationships, exclusion from socializing with clients, assignment to minor cases or to supporting roles in larger cases, and of partners' agreeing to client requests that they would prefer not to be represented by a woman.<sup>126</sup> They spoke of "excessive scrutiny" as well — being presumed incompetent and working harder than men to prove themselves, as well as having to walk a narrow line in relation to an acceptable lawyering style.<sup>127</sup> In short, all of the themes mentioned by the respondents to the 1920 survey published by the Bureau of Vocational Information<sup>128</sup> surfaced at the ABA hearings in the late 1980s. In addition to the double bind presented by the need to appear assertive but not *too* aggressive for a woman (although such lawyering styles were acceptable in a man), the women spoke of facing yet another double bind: whether to suffer silently or to complain when they were discriminated against and risk the interests of their client, either by making the lawyer appear weak or by angering the judge who was to decide the case.<sup>129</sup>

The other finding in almost every gender bias report, and in surveys from about the same time period, was that women attorneys were repeatedly subjected to sexual harassment — by judges,<sup>130</sup> opposing counsel, and partners and associates within their own firms.<sup>131</sup> A 1993

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*cial System*, 61 S. CAL. L. REV. 2194, 2197-2201 (1988) (describing the Reports of The New Jersey Supreme Court Task Force on Women in the Courts and The New York Task Force on Women in the Courts). For a particularly insightful analysis of the gender bias task force movement from a feminist perspective, see Judith Resnick, *Asking About Gender in Courts*, SIGNS, Summer 1996, at 952-90.

125. See ABA 1988 REPORT, *supra* note 118, at 236 (recognizing the need to study how women are treated within the private arena as well).

126. See ABA COMM'N ON WOMEN IN THE LEGAL PROFESSION, UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR 10-13 (1995) [hereinafter ABA 1995 REPORT] (describing how women with little access to these opportunities were often left out of the partner track); ABA 1988 REPORT, *supra* note 118, at 242-44 (describing how a firm treated women lawyers differently based solely upon their gender).

127. ABA 1988 REPORT, *supra* note 118, at 244.

128. DOERSCHUK, *supra* note 42.

129. See, e.g., THE 1990 REPORT OF THE ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS, *supra* note 123, at 224 (quoting a female attorney who stated that "I firmly believe that if I said anything to this judge, he would be prejudiced against my client").

130. See Marina Angel, *Sexual Harassment by Judges*, 45 U. MIAMI L. REV. 817, 821-33 (1991) (describing numerous studies as well as individual cases in which judges harassed women in the courtroom).

131. See, e.g., ABA 1995 REPORT, *supra* note 126, at 18-19 (providing statistics of sexual harassment by superiors, colleagues and clients); Lisa Pfenninger, *Sexual Harassment in the Legal Profession: Workplace Education and Reform, Civil Remedies, and Professional Discipline*, 22 FLA. ST. U.

survey of 800 law partners and associates revealed that 51% of the women lawyers reported that they had been sexually harassed at some point during their careers and that one in six reported incidents within the previous three years.<sup>132</sup> The descriptions included in these reports make clear that women attorneys are being harassed in the crudest of ways, as well as being subjected to hostile treatment that would qualify in workplace settings as sexual harassment on its own.

Finally, the ABA Commission also addressed the problems that female lawyers have in attempting to combine their work with raising a family in a profession that now may require as many as 2500 billable hours per year.<sup>133</sup> Just as the profession has always accommodated men who leave temporarily for government service or who require reduced work loads to fulfill political or military obligations,<sup>134</sup> the Commission proposed that firms should respond to the family responsibilities that still fall disproportionately upon women and provide maternity leave and flexible work arrangements, including part-time work.<sup>135</sup> Further, it suggested that the law firm culture "developed by men in an era when the workforce was predominantly male and the dual career family was an anomaly" was now an outmoded model for both sexes.<sup>136</sup> While that model persists, however, many worry lest part-time work and the so-called "Mommy track" become simply a new ghetto for women lawyers.<sup>137</sup>

### C. Remedial Strategies

Not surprisingly, the 1990s have begun to see a literature searching for legal remedies for the gender bias revealed by the task forces. Some have begun to sketch the organization of Title VII cases to chal-

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L. REV. 171, 179-81 (1994) (describing instances of men harassing women within law firms).

132. See Mark S. Kende, *Shattering the Glass Ceiling: A Legal Theory for Attacking Discrimination against Women Partners*, 46 HASTINGS L.J. 17, 20 (1994) (quoting a 1993 National Law Journal Study).

133. See ABA 1988 REPORT, *supra* note 118, at 247 (reporting that a demand for 2100-2500 billable hours is not uncommon and in effect impedes outside relationships and personal fulfillment and satisfaction).

134. See ABA 1988 REPORT, *supra* note 118, at 246 (describing how family responsibilities are not viewed as acceptable reasons for professional scheduling adjustments and how women and men given such adjustments come under criticism for receiving special treatment).

135. See ABA 1995 REPORT, *supra* note 126, at 17-18; ABA 1988 REPORT, *supra* note 118, at 246 (describing how flexible schedules and day care assistance will enable women attorneys to fully participate in the profession, rather than forcing them to make career-sacrificing decisions).

136. ABA 1988 REPORT, *supra* note 118, at 245.

137. See Jennifer A. Kingson, *Women in the Law Say Path is Limited by "Mommy Track,"* N.Y. TIMES, Aug. 8, 1988, at A1 (reporting that when women choose reduced schedules to accommodate child-rearing, they are taken less seriously, creating a barrier to partnership).

lunge a variety of issues, from harassment to discrimination in case assignments to denial of partnership.<sup>138</sup> Because Title VII has been interpreted as not applying to partners themselves, one article explores the remedies possible in the contractual duties inherent in partnership, such as the duty to act in good faith.<sup>139</sup> Others have discussed the remedies potentially available in state and local human rights statutes and a variety of tort actions.<sup>140</sup>

Many scholars believe that the path to follow, instead of litigation, is that of professional self-regulation, by enacting changes in the codes of professional conduct for lawyers and judges.<sup>141</sup> This recommendation was included in a number of task force reports as well.<sup>142</sup> At least partly in response to those reports, the ABA revised the Model Code of Judicial Conduct in 1990 to require that a judge "shall perform judicial duties without bias or prejudice" and "shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice."<sup>143</sup> Almost half the states have adopted these model rules.<sup>144</sup> Model Rule 8.4 of the Code of Professional Responsibility,<sup>145</sup> which governs attorneys, would incorporate duties similar to those prescribed in the Judicial Code.<sup>146</sup> As of February 1994, disciplinary boards of thirteen states and the District of Columbia had adopted rules to expressly prohibit discriminatory conduct by lawyers.<sup>147</sup> The authors of the task force reports and many

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138. See, e.g., Ashley Kissinger, *Civil Rights and Professional Wrongs: A Female Lawyer's Dilemma*, 73 TEX. L. REV. 1419 (1995) (examining whether female lawyers have a cause of action under Title VII, burdens of proof, and problems presented); Pfenninger, *supra* note 131 (examining Title VII and the different elements necessary to make a case of sexual harassment and discrimination).

139. Kende, *supra* note 132, at 45-71.

140. Pfenninger, *supra* note 131, at 203-11.

141. See, e.g., Schafran, *supra* note 121, at 79; Kandis Koustenis, Note, *Sexual Trial Tactics: The Ability of the Model Code and Model Rules to Discipline Discriminatory Conflicts Between Adversaries*, 4 GEO. J. LEGAL ETHICS 153, 159 (1990) (discussing the Model Code and Model Rules and their failure to explicitly mandate professional courtesy, respect, and conduct between adversaries); Kittie D. Warshawsky, Note, *The Judicial Canons: A First Step in Addressing Gender Bias in the Courtroom*, 7 GEO. J. LEGAL ETHICS 1047, 1050 (1994) (examining the ABA's Model Rules of Professional Conduct as a possible tool in combating credibility issues based on gender).

142. See, e.g., *Report of the New York Task Force on Women in the Courts*, *supra* note 122, at 164-65 (recommending passage of rules of professional responsibility specifying the conduct prohibited).

143. Model Code of Judicial Conduct Canons 3B(5), 3B(6) (1990).

144. Warshawsky, *supra* note 141, at 1049.

145. Model Rules of Professional Conduct Rule 8.4 (1992).

146. See Warshawsky, *supra* note 141, at 1050 (commenting that the Model Rules of Professional Conduct have been adopted by several states, and are utilized regularly by judges, attorneys, and litigants).

147. See Kissinger, *supra* note 138, at 1453 (commenting that the rules passed or proposed vary from state to state, but tend to prohibit discrimination (1) in all professional activities; (2)

commentators believe that this is a beneficial development,<sup>148</sup> because such rules will make their way into legal ethics courses in law schools, warn the legal profession that certain types of behavior are unacceptable, and assist women attorneys who want to lodge complaints about discriminatory treatment toward them.<sup>149</sup>

## VI. FEMINIST THEORY AND WOMEN IN THE LEGAL PROFESSION

How have feminists analyzed the persistence of discrimination against women in the legal profession?<sup>150</sup> Initially, all efforts were focused upon breaking down the outright barriers to women's participation — the quotas, refusals to hire women, and the like — and upon gaining entry for women on the same terms as men. As we have seen, however, a pure "equal opportunity" approach has not had the effect of affording women equal status and participation in the profession. As Deborah Rhode has pointed out, experience has shown that bias in attitudes and occupational structures have proven highly resistant to change, and the market has not supplied the answer.<sup>151</sup> In her work on women lawyers from a sociological perspective, Professor Cynthia Fuchs Epstein has attempted to explain the persistence of structures and attitudes preventing women from full integration into the profession by the concept of sociological ambivalence.<sup>152</sup> According to this view, the position of women in law results from internal barriers caused by the persistence of sex role stereotypes and norms dictating that women should be subordinate to men in public and in private life.<sup>153</sup> Thus, men feel uncomfortable with women as lawyers, and women themselves feel ambivalence — and the proverbial double bind — when trying to combine their traditional roles with that of being lawyers.<sup>154</sup>

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when representing a client; (3) when in a tribunal; and (4) in employment). For a detailed survey of the state rules, see Andrew E. Taslitz & Sharon Styles-Anderson, *Still Officers of the Court: Why the First Amendment Is No Bar to Challenging Racism, Sexism and Ethnic Bias in the Legal Profession*, 9 GEO. J. LEGAL ETHICS 781, 836-39 (1996).

148. Koustenis, *supra* note 141, at 167; Warshawsky, *supra* note 141, at 1050.

149. See Koustenis, *supra* note 141, at 167 (discussing the anticipated effects of the Model Rules of Professional Conduct).

150. For a more extensive and detailed discussion of the complex interrelationship between feminist legal theory and the legal profession, see Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 FORDHAM L. REV. 249 (1998).

151. See Deborah L. Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39, 60 (1994) (observing that professional employment markets are not perfectly competitive for male and female attorneys).

152. CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 265-302 (2d ed. 1993).

153. *Id.* at 265-66.

154. See *id.* at 268-76 (describing ambivalence about women lawyers on part of both men

Feminists writing later, and especially those influenced by Professor Catharine MacKinnon, openly challenged both the rules under which success in the legal arena is defined and the structures that reinforce men's dominance in law. In her attack upon liberal equality theory, MacKinnon questioned the very origins of our "norms" in the "normality" of the male standard in all fields, but especially in the workplace.<sup>155</sup> Others, like Professor Leslie Bender in her 1989 essay *Sex Discrimination or Gender Inequality?*,<sup>156</sup> pursued this line of questioning in the context of women in law firms. Bender attacked both the liberal assimilationist premise that women should simply take on the characteristics and lifestyles of men in order to succeed as lawyers and the notion that women need special treatment (like the "mommy track") to deal with their differences from men.<sup>157</sup> Rather, Bender argues that the world of the legal profession

has been constructed by men to reinforce and reward their gendered male characteristics. Interpersonal caregiving, which was not part of the male gender culture, was excluded and perceived as inappropriate or interruptive of the important functions of professional work. . . . As a consequence . . . in the world of high-powered law firms, gender inequality predominates. Therefore, our goal must be to reconstruct legal institutions based on gender equality - empowering both genders and eliminating the privilege/power of one gender over another.<sup>158</sup>

In other words, in order to genuinely end discrimination against women lawyers, it is necessary to change the nature and structure of the legal profession in profound ways.

## VII. WILL WOMEN CHANGE THE FACE OF THE LEGAL PROFESSION?

Some feminists have claimed that women will substantially change the legal profession, both by restructuring the legal workplace and by contributing a new, and perhaps uniquely female, perspective to lawyering — a more collaborative, cooperative and contextual approach with a preference for non-adversarial modes of dispute resolution

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and women).

155. Catharine A. MacKinnon, *Difference and Dominance*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 32-45 (1987).

156. Leslie Bender, *Sex Discrimination or Gender Equality?*, 57 FORDHAM L. REV. 941 (1989); see also Carrie Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 L. & SOC. INQUIRY 289, 304-19 (1989) [hereinafter Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession*].

157. See Bender, *supra* note 156, at 949-52 (arguing that it is not gender equality to require women to assume characteristics of the male gender and that addition of "mommy tracks" does not end gender inequality).

158. Bender, *supra* note 156, at 949.



over binary, rights-based justice. One of the earliest and most influential articles on this subject was *Portia In a Different Voice* by Professor Carrie Menkel-Meadow.<sup>159</sup> In her article, Menkel-Meadow first described the “different voice” theory of Carol Gilligan, which posits that women’s moral reasoning is different from that of men and, specifically, that women are motivated by an ethic of care rather than a more abstract rights-based approach.<sup>160</sup> Menkel-Meadow then suggested that care-oriented women will display a substantially different lawyering style than men.<sup>161</sup> Among other things, she opined that women lawyers may reject the win/lose approach of the adversarial system in favor of dispute resolution methods that take account of the interests of all parties and seek to preserve relationships among them.<sup>162</sup> Mediation is such an alternative.

Rand Jack and Dana Crowley Jack pursued this line of inquiry in their study of thirty-six lawyers,<sup>163</sup> concluding that gender was associated with different moral orientations and responses to ethical dilemmas, but only when the legal norm or professional standard was unclear.<sup>164</sup> Recounting the stories of several individual lawyers, the Jacks described different ways in which care-oriented women lawyers adjust to practicing law: (1) by emulating the “male” rights-oriented model and denying the “relational” self, subjugating personal concerns to demands of the professional role;<sup>165</sup> (2) by “splitting the self” into a detached lawyer at work and the caring self at home;<sup>166</sup> and (3) by attempting to reshape their role as lawyers to conform with their personal morality.<sup>167</sup>

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159. Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman’s Lawyering Process*, 1 BERKELEY WOMEN’S L.J. 39 (1985) [hereinafter Menkel-Meadow, *Portia in a Different Voice*].

160. *Id.* at 43; see generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982).

161. See Menkel-Meadow, *Portia in a Different Voice*, *supra* note 159, at 49-63 (arguing that men may favor an adversarial mode and women favor a more cooperative mode).

162. Menkel-Meadow, *Portia in a Different Voice*, *supra* note 159, at 52-53; see Carrie Menkel-Meadow, *The Comparative Sociology of Women Lawyers: The “Feminization” of the Legal Profession*, 24 OSGOODE HALL L.J. 897, 914-15 (1986) [hereinafter Menkel-Meadow, *The Comparative Sociology of Women Lawyers*] (discussing women’s perceived aversion to the adversarial process).

163. See RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS (1989) (examining how lawyers think about themselves, their relationships with other attorneys, and their moral choices with regard to their work). The study consisted of matching eighteen male attorneys with eighteen female attorneys who had a similar type of practice for about the past six years. *Id.*

164. *Id.* at 54-55, 75.

165. *Id.* at 132-44.

166. *Id.* at 144-49.

167. *Id.* at 149-55.

The Gilligan (often called the cultural feminist or difference feminist)<sup>168</sup> approach has also been applied to the judiciary, most prominently by Professor Suzanna Sherry.<sup>169</sup> Sherry has attempted to demonstrate, by examining the opinions of Justice Sandra Day O'Connor, that women judges display a greater concern for context and community, and less concern for abstract rules, than do their male counterparts.<sup>170</sup> In another article, Sherry called for the appointment of more women to the bench, anticipating their more sympathetic treatment of gender-related issues.<sup>171</sup>

Additionally, Menkel-Meadow and others have suggested new and humane ways in which women might organize the legal workplace if they were charged with writing the rules, envisaging, among other things, shorter hours, structures that allow for care of children and family members, and more egalitarian relationships in the workplace.<sup>172</sup>

Feminists may disagree as to the wisdom of emphasizing women's differences from men in the legal world, for a number of reasons. First, the notion of a prototypical woman lawyer, motivated by an ethic of care, is an essentialist one, ignoring differences among individual women and giving scant consideration to women who in fact may want to succeed in the legal workplace as it is now structured. Second, the empirical evidence in support of the differences posited between men and women lawyers is far from overwhelming. Studies of mediation, for example, do not reveal differences between men's and women's styles, although women lawyers are in fact overrepresented in the mediation field.<sup>173</sup> One study points out, however, that

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168. MARY BECKER, CYNTHIA GRANT BOWMAN & MORRISON TORREY, *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 95 (1994).

169. Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

170. *Id.*

171. See Suzanna Sherry, *The Gender of Judges*, 4 LAW & INEQ. J. 159, 161 (1986) (arguing that Justice O'Connor has traditionally been more sympathetic to gender-related issues). Others have challenged the notion that women judges display any different tendencies in their jurisprudence than do men, and several empirical studies show only slight differences in the voting behavior of judges based upon gender. See Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND. L.J. 891, 898-99 (1995) (and sources therein).

172. See Menkel-Meadow, *Portia in a Different Voice*, *supra* note 159, at 55-57 (describing the different ways in which women might structure the practice of law); see also Naomi Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039, 1049 (1992) (observing that these changes are in tune with the goals and beliefs of many women).

173. See generally CHRISTINE B. HARRINGTON & JANET RIFKIN, *THE GENDER ORGANIZATION OF MEDIATION: IMPLICATIONS FOR THE FEMINIZATION OF LEGAL PRACTICE* (1989); Lloyd Burton, Larry Farmer, Elizabeth D. Gee, Lorie Johnson & Gerald R. Williams, *Feminist Theory, Professional Ethics, and Gender-Related Distinctions in Attorney Negotiating Styles*, 1991 J. DISP. RESOL. 199; Charles Craver, *The Impact of Gender on Clinical Negotiating Achievement*, 6 OHIO ST. J. ON DISP. RESOL. 1 (1990).

women mediators tend to practice in lower-paying and less prestigious areas, such as family law, and suggests that they may have entered mediation practice in disproportionate numbers because they were shut out of more lucrative practice areas.<sup>174</sup>

Finally, some feminists argue that it is a dangerous strategy to emphasize women lawyers' differences from men and their consequent "special" needs at all, because to do so plays into old stereotypes that harm women.<sup>175</sup> According to this view, the desired changes in the practice of law are less likely to be effected if they are associated with the needs of women than if those interested in change emphasize the universality — and gender neutrality — of the underlying vision.<sup>176</sup> This tactic does not belie the contribution of women lawyers to the construction of that vision, however. As Deborah Rhode has said:

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.<sup>177</sup>

### VIII. CONCLUSION

There is almost universal agreement that the entry of women into the practice of law has had a profound impact upon the legal profession. Women lawyers have begun to challenge the organizational structures within which law is practiced and the assumptions upon which much of legal practice is premised. Yet women continue to be absent in large numbers from the upper reaches of the legal hierarchy, and it seems apparent that still more profound changes in the nature of legal work are necessary for women to be fully integrated into the profession.

Whether the profession will respond with the necessary structural changes remains to be seen. The changes in the nature of legal practice over the last decades — the transformation of law firms into en-

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174. HARRINGTON & RIFKIN, *supra* note 173, at 22, 41 (noting that women may not freely choose mediation, but may be pushed into it because of discrimination in higher status legal jobs).

175. See Cynthia Fuchs Epstein, *Faulty Framework: Consequences of the Difference Model for Women in the Law*, 35 N.Y.L. SCH. L. REV. 309, 335 (1990) (arguing that the difference model reinforces gender stereotyping and inequality); Rhode, *supra* note 151, at 44 (arguing that emphasizing feminine strengths reinforces separate but equal power structures).

176. Rhode, *supra* note 151, at 44.

177. Rhode, *supra* note 151, at 45.

terprises far more closely resembling corporate businesses than a genteel profession, with the concomitant eye for the “bottom line;” the growth of huge, bureaucratized law firms; and the startling increase in the number of hours lawyers are expected to bill on an annual basis<sup>178</sup>— make it unlikely that the desired transformation of the workplace will occur in the near future. Women will still be able to attempt to succeed on the same terms as men, and with the same degree of personal sacrifice if they aim at success in large law firms. Women who are unwilling to pay that price — and women appear from the statistics in fact to be differentially willing to pay that price—will continue, as they have, to seek satisfaction in different work settings. Many of those positions, as the statistics discussed above show, are less well paid and seen as lower in status. They result in women lending their talents to government and private agencies in a variety of settings. Among other things, women lawyers prosecute rape and domestic violence; they defend indigent criminal defendants; and they advocate on behalf of children within the juvenile justice system. They teach in legal clinics and staff neighborhood legal aid offices. As long as women are doing these jobs out of a genuine choice, and not because of the absence of other options, I am reluctant to denounce the resulting “job segregation” as sex discrimination. Instead, we should strive for a reevaluation of such work in terms of salary and respect, and a reevaluation of the criteria of success in the legal profession.

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178. See generally Deborah K. Holmes, *Structural Causes of Dissatisfaction Among Large-Firm Attorneys: A Feminist Perspective*, 12 WOMEN'S RTS. L. REP. 9 (1990) (discussing the dissatisfaction of lawyers in general, and women lawyers in particular, with modern practice of law).