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Faulty Framework: Consequences of the Difference Model for Women in the Law

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FAULTY FRAMEWORK: CONSEQUENCES OF THE DIFFERENCE MODEL FOR WOMEN IN THE LAW*

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I. INTRODUCTION

It is impossible to consider the place of women in the lawyering workplace without addressing the larger issue of categorical thinking about gender in the society. Both in theory and practice, gender distinctions form the underpinning of symbolic[1] and physical segregation in the workplace as they do in other parts of social life.[2] The paradigm of *difference* that specifies a set of essential differences between the sexes is central to the discussion.[3]

Age-old, and integrated into all aspects of daily life and discourse, the belief that men and women have emotional and intellectual attributes that are sex-linked is relevant to the role of women in law as practitioners, victims, clients, and citizens, as it is relevant to their participation in all other social institutions.[4] The difference paradigm is located in common myths, in received knowledge, in political ideology, and in public policy.[5]

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1. For a detailed discussion of the concept of symbolic segregation, see C. EPSTEIN, DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER 215-31 (1988).

2. *See* C. EPSTEIN, WOMEN IN LAW (1983). The labeling of social roles as appropriately performed by either men or women creates difficulties for those who enter a profession traditionally associated with the other sex. *Id.* at 276. Higher moral standards are attributed to women who are considered too "good" to be tough-minded negotiators and are encouraged to perform "good works" which are low in prestige and career potential. *Id.* at 268-69. Women are channeled into "female specialties" such as matrimonial and family law, legal aid work, custody cases, and estate work. *Id.* at 110. Women are expected to hold an inferior position to men, and those who show ambition puzzle their male associates. *Id.* at 274. *See infra* pp. 327-34.

3. *See generally* C. EPSTEIN, *supra* note 1.

4. For a discussion in depth, see Epstein, *Strong Arms and Velvet Gloves: The Gender Difference Model and the Law*, MELLON COLLOQUIUM: THE INVISIBLE MAJORITY 5 (Spring 1990).

5. *See* C. EPSTEIN, *supra* note 1, at 102-31. Prevailing ideas of proper masculine or feminine behavior influence the social choices available to the individual. Thus, a man will be father-husband-steelworker-veteran, while a woman is wife-mother-teacher-volunteer worker. *Id.* at 102-04. Some social scientists theorize a universe where men and women have equivalent power, but only in their separate spheres. *Id.* at 111. *See also* Jacquette, *Political Science*, 2 SIGNS 147 (1976).

It is also lodged in the domain of the sciences where claims to objectivity are assumed.[6] This belief structures, orders, socializes, and controls behavior with consequences to the individual and to the society. Because of it, men and women have different access to opportunity, resources, power, and justice in the spheres of employment, political life, family, and education.

The conceptual boundaries that define "male" and "female" in the difference paradigm are only casually linked to biological factors. Extending far beyond sexuality and reproduction,[7] its assumptions associate personality and intellectual traits, such as sentimentality or assertiveness, with one or the other sex in spite of the fact that almost no traits are exclusively held by only one sex and, indeed, that men and women do not differ at all with regard to the possession of most traits. Of course, men and women may demonstrate patterned behavior consistent with the difference paradigm, but we now have considerable evidence that indicates the behavior is not irrevocably determined by physiology or early socialization.[8]

I propose that most differences between women and men in the professions and other spheres of society come not from the organic qualities of the human body or the deeply rooted attributes of psyches distinct for each sex, but from the strong arm of the law, from social force or its threat, and from the mechanisms that provide the subtle restraints and persuasions of social life. This keeps men and women in line with social definitions and expectations. Many differences are merely assumed, and either do not actually exist or are so superficial that they change as opportunities and views change. To more directly address the common view based on ideological commitments, the findings of outdated research or biased observations, males and females no longer differ in many characteristics long regarded as basic, such as verbal ability, math ability, and spatial relations.[9] Yet many claims for difference continue to

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6. Scientific studies report more differences than similarities between the sexes because they are oriented to look for differences. For a report on differences between the sexes, see E. MACCOBY & C. JACKLIN, THE PSYCHOLOGY OF SEX DIFFERENCES (1974).

7. A number of socio-biologists and psychoanalysts do make claims for distinctions based on physiology or deeply rooted sex-based associations. *See generally* C. EPSTEIN, *supra* note 1, at 17-98.

8. Rather, it is an outcome of constant persuasion and coercion and is amenable to alteration with changing social conditions and social controls. *See id.* at 99-135.

9. *See* Hyde & Linn, *Gender Differences in Verbal Ability: A Meta-Analysis*, 104 PSYCHOLOGICAL BULL. 53, 62, 64 (1988) (study of gender differences in verbal and mathematical ability). Men and women probably do not vary much in emotional qualities either; differences in emotions are assumed rather than tested, and where tested, these differences are often poorly conceived and executed. *See* C. EPSTEIN, *supra* note 1, at 72-98.

be made and are widely subscribed to, and overall, they are embedded in both feminist and traditional psychoanalytic thought.[10]

This Article will draw on examples from the past and the present to indicate the consequences that the difference model has had in the legal sphere. There has been considerable change in the way the difference model is used and there are many who now contest it. Although the formal social arrangements that guaranteed segregation of the sexes have diminished, many informal practices still are employed to enforce difference. These are executed by powerful gatekeepers of ideas[11] and by the dominated themselves. This is evidenced by the viewpoint of a number of feminist women who are compliant in perpetuating the difference model, although their thinking on the matter turns around the previously inferred presumption of inferiority.[12] Although in the past many argued that women's presumed different nature indicated their deficiencies, today many who presume differences argue their advantage.[13] Nevertheless, the difference model is a social construction that I believe inevitably leads to social inequality.

Furthermore, this Article will explore law as a site to demonstrate how women as practitioners, clients, victims, and citizens are affected by the ideology and practice of difference. Although this Article will concentrate on women as legal practitioners, law is only one example of a more general phenomenon. I am particularly concerned about the reversal of the orientation toward equality and the renewal of the prejudices of the past underscoring differences between women and men. Current material culture embodies a nostalgia for its nineteenth century past, and there has been a revival of Victorian culture in the characterization of women.[14] The notion of the "good woman," whose high-mindedness puts her above the vulgarity and profit maximization of ordinary life and who is the upholder of the moral order,[15] has found its

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10. Specifically, these claims are rooted in the theory that women and men have different orientations and therefore different perspectives on nurturance, morality, and justice. C. EPSTEIN, *supra* note 1, at 76-77. *See infra* note 55 and accompanying text.

11. "Intellectuals are gatekeepers of ideas and fountainheads of ideology . . . ." L. COSER, MEN OF IDEAS: A SOCIOLOGIST'S VIEW, at x (1965). *See also* C. EPSTEIN, *supra* note 1, at 10 (using Coser's term to define those, who through their control over intellectual discourse, create distinctions between men and women and give value to these distinctions, thereby pressuring people to behave according to others' expectations).

12. C. EPSTEIN, *supra* note 1, at 19-21.

13. *Id.* at 52-54.

14. *See, e.g.*, W. KAMINER, A FEARFUL FREEDOM: WOMEN'S FLIGHT FROM EQUALITY (1990). The growth of a conservative ideology resistent to change and support by recent Supreme Court decisions restricting rights to abortion and equal employment may force feminists either to rationalize domesticity or to focus exclusively on the drive for reproductive choice. *Id.* at 213.

15. *See* C. EPSTEIN, *supra* note 2, at 268-76 (views about women as "good persons"

way back, not only to the common discourse and the discourse of influential feminist scholars and critical legal theorists, but also back into the debates in the courts and legislatures.

II. DECEPTIVE DISTINCTIONS

Not limiting the use of categories such as "masculine" and "feminine" (interchangeably with "male" and "female") to matters linked to biological reproduction and sexuality creates distinctions. These concepts become reified, and the conceptual boundaries, as a result of social decisions, are not only generally regarded as real, but worse, as inevitable.

Of course, categories and distinctions are necessary for analysis in science as well as in everyday social communication. Distinctions in culture need not lead to invidious comparison, and they often do not when categorizing the inanimate world. But those used in categorizing people inevitably do. This does not happen by chance, or by the laws of nature, but rather because of people defending or pressing their advantages. Steven Lukes has drawn attention to the agenda-setting factor in power, and to the latent third dimension of power that establishes the values, the climate, and the background in which decisions are made.[16] Indeed, as Dale Spender points out, reality is defined and interpreted by those in power.[17] Particular kinds of distinctions, such as those dichotomous models that distinguish between blacks and whites, free people and slaves, men and women, are particularly powerful in creating and maintaining differences.

For example, although they do not discuss gender issues, modern social theorists such as Michel Foucault and Pierre Bourdieu have focused on classification systems and how they structure reality.[18] Bourdieu and his associates, in their work on cultural reproduction, show the ways in which dominated groups contribute to their own subordination because of class-differentiated mental structures.[19] Dichotomous thinking plays an

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often are fixed on the quality of their roles as mothers).

16. *See generally* S. LUKES, POWER: A RADICAL VIEW (1974).

17. D. Spender, Educational Research and the Female Perspective (1978) (paper presented at the British Association Conference on Women, Education, and Research, University of Leicester).

18. For a discussion of Foucault, Bourdieu, and a number of other European writers on the agenda-setting elements in cultural modalities, see Lamont & Wuthnow, *Betwixt and Between: Recent Cultural Sociology in Europe and the United States*, in FRONTIERS OF SOCIAL THEORY: THE NEW SYNTHESES 287 (G. Ritzer ed. 1990).

19. *Id.* at 297. These mental structures, called *habitus*, are a function of class-differentiated dispositions and categories of perception shaped by conditions of existence. *Id. See also* P. BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGEMENT OF TASTE 169-225 (R. Nice trans. 1984). Entrenched in the dominant symbolic system which

important part in the definition of women as "others," as deviants, and in their self-definitions.[20]

Although they were not the first to do so, Foucault, Bourdieu, and other European cultural theorists defined power as the ability to impose a specific definition of reality which is disadvantageous to others,[21] or the capacity to structure the situation of others so as to limit their autonomy and life chances.[22] These writers are concerned with "the power to frame alternatives and contain opportunities, to win and shape consent, so that the granting of legitimacy to the dominant classes appears not only spontaneous but natural and normal."[23] They are also concerned with the structural effects of culture, whether it be cultural signals or ideology, which affect people's positioning in the stratification system.[24] Foucault's writings reconstruct how discourse shapes and structures subjectivity and how classification systems structure reality.[25]

This approach shows how power is ubiquitous in social life, operating at the micro-level in face-to-face relationships and at the macro-level of social reality. This is particularly salient in the case of gender issues, since laws and rules segregate men and women in various institutional spheres, and they also are positioned in the course of ordinary sociability governed

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contribute to its reproduction are binary oppositions, such as rare/common, interested/disinterested, and vulgar/noble, which value the experiences and attributes of the dominant class. Lamont & Wuthnow, *supra* note 18, at 297.

20. *See generally* C. EPSTEIN, WOMAN'S PLACE: OPTIONS AND LIMITS IN PROFESSIONAL CAREERS (1970) (a woman who has proved her capabilities in training faces weighing whether to begin a career that almost inevitably will involve a conflict with traditional images of her place in society and her own images of personal fulfillment, and once past these barriers, she may be forced to repeatedly review her decision as she faces successive conflicts between her personal life and career); C. EPSTEIN, *supra* note 1, at 103, 152-56 (where women are found to constitute a distinct numerical minority in an occupation they are regarded as deviant, not fitting into a sex-typed role viewed as properly female; women are treated differently and are thereby discouraged from escaping their low rank in society and careers); Epstein, *Ideal Roles and Real Roles or the Fallacy of the Misplaced Dichotomy*, in 4 RESEARCH IN SOCIAL STRATIFICATION AND MOBILITY 29 (1985).

21. Bourdieu's "symbolic violence" is an example. Lamont & Wuthnow, *supra* note 18, at 295.

22. Foucault's "regime" is a demonstration of this structuring. *Id.*

23. *Id.* (quoting Hall, *Cultural Studies and the Centre: Some Problematics and Problems*, in CULTURE, MEDIA, LANGUAGE 38 (1984)); C. EPSTEIN, *supra* note 1, at 23, 102, 106-07 (mindless acceptance of popular views, such as employers' beliefs that certain occupations require the characteristics of one sex over another, has permitted sex labels to be learned and perpetuated throughout our socialization creating cultural sex-based biases which keep women in nurturant and service-oriented roles regarded as ancillary to men's).

24. Lamont & Wuthnow, *supra* note 18, at 295.

25. *Id.* at 294-301.

by the latent rules of social interaction.[26] The way in which writers such as Bourdieu, Foucault, and other European cultural theorists define power is not measured by the occurrence of unwilling compliance, and is not limited to affecting others' behavior.[27]

The social inequality that women face, like other kinds of social inequality, has been validated by many people because it is defined as natural.[28] Or, for those less "scientifically-minded," the different positions of men and women in society are based on God's will or the order of nature. Yet, ironically, although believed to be natural, the power structure and the division of labor have been backed and enforced by the law of most lands, the social customs of most peoples, and the rules of most communities. Furthermore, the social pressures exerted by the significant others in intimate associations reinforce traditional social arrangements and hierarchy. Social pressure also assures that men and women demonstrate expressive behavior appropriate for their sex. Thus, the patterned differences we see in the different kinds of work men and women do in the public and private spheres, in their demeanor, and even in their styles of speech, are not a product of inborn differences or even deeply conditioned ones. They are *deceptive distinctions*,[29] because they are socially imposed, regulated, and enforced, and because they are more superficial than is commonly believed.

Yet people not only believe in difference, they insist on it. Thus, this belief is embedded in our discourse and our institutions, including the institutions of science. Scientific thinking, however, has been a double-edged sword in the debates about difference between the sexes. The biases within science have provided legitimacy for policies that have disadvantaged women with regard to access to professional training and research and in the reward system. But the commitment to self-reflection by scientists has also provided the forum for challenging traditional patterns.

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26. *See* C. EPSTEIN, *supra* note 1, at 106-07 (a social stratification system directing men and women into roles, subjected women to obstacles keeping them out of fields socially defined as male, and prevented women from attaining positions of power in a culture where "only men ought to be in charge").

27. Lamont & Wuthnow, *supra* note 18, at 295. Influencing their situation or position in the social structure in a disadvantageous way is conceived as a more pervasive and important way of exercising power. *Id.*

28. In other words, social inequality is rooted in the hormones or the brain.

29. *See generally* C. EPSTEIN, *supra* note 1, at 233-35 (the categories created perpetuate gender inequalities by providing an easy and efficient organization of societal roles, and further, cultural persuasion to accept the role deemed gender appropriate is accompanied by enforcement and perpetuation of gender based roles).

A. *The Nineteenth Century Viewpoint*

The path for a woman to practice law was a difficult one. Although women could exercise a power of attorney during colonial times, state courts refused to admit them as members to the state bar associations during most of the nineteenth century.[30] The courts justified the denials primarily on two grounds.[31] First, courts were reluctant to break with traditional English common law;[32] in nineteenth century England female attorneys were unknown.[33] A woman had as much chance to become an attorney as she had to be elected to a seat in the House of Commons, an apparently unlikely result.[34] The second rationale was that the bar admission requirements set forth by the state legislatures were never intended to include women.[35] By interpreting statutes which explicitly permitted only males to practice law to include women would have been analogous to creating a "judicial revolution," as opposed to proper "judicial construction."[36]

Despite such obstacles, some women prevailed. In 1869, Arabella A. Mansfield applied for and received a license to practice law in the State of Iowa.[37] Mansfield's breakthrough, however, did not immediately open the door for women to practice law in other states. Lavinia Goodell, in her application to the Wisconsin Supreme Court, relied on Mansfield's admittance as a precedent in favor of the admission of women to the practice of law.[38] The Wisconsin Supreme Court, however, was not persuaded. Chief Justice Edward Ryan reasoned that

> [n]ature has tempered women as little for the juridical conflicts of the court room, as for the physical conflicts of the battlefield. Womanhood is moulded for gentler and better things. . . . [O]ur profession . . . has essentially and habitually to do with all that is selfish and malicious, knavish and criminal, coarse and brutal, repulsive and obscene, in human life. It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man's reverence for womanhood and faith in woman, on which

30. A. SACHS & J. WILSON, SEXISM AND THE LAW 94-95 (1978).

31. *Id.* at 95.

32. *Id.*

33. *In re* Bradwell, 55 Ill. 535, 539 (1869).

34. A. SACHS & J. WILSON, *supra* note 30, at 95.

35. *Id.*

36. *In re* Goodell, 39 Wis. 232, 242 (1875).

37. A. SACHS & J. WILSON, *supra* note 30, at 95.

38. *Goodell*, 39 Wis. at 238.

> hinge all the better affections and humanities of life, that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice; all the unclean issues, all the collateral questions of sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardy, legitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publications, libel and slander of sex, impotence, [and] divorce . . . .[39]

The *Mansfield* precedent was rejected, among other reasons, because the case could not be found in the Iowa state reports.[40]

During the same time period Myra Bradwell applied for, and was also denied, a license as an attorney at law in the State of Illinois.[41] Although the Illinois Supreme Court admired Bradwell's persistence, and even sympathized with her tremendous undertaking, the court was unwilling to change the exclusively male practice whose origin dated back for centuries.[42] On appeal, the United States Supreme Court affirmed the Illinois decision.[43] Justice Miller held that the right of admission to practice in the state courts was not protected by the privileges and immunities clause of the fourteenth amendment.[44] Justice Bradley concurred in the judgment, leaving no doubt as to the "paramount destiny and mission" of women.[45] He stated that "[m]an is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[46]

It was clear that courts would not grant admittance to women unless the legislative branch explicitly set forth such a proposition. As the Illinois Supreme Court concluded, "if the legislature shall choose to remove the existing barriers and authorize us to issue licenses equally to men and women, we shall cheerfully obey."[47] Shortly after the Supreme Court

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39. *Id.* at 245-46. *See also* A. SACHS & J. WILSON, *supra* note 30, at 96-97.

40. *Goodell*, 39 Wis. at 242.

41. *In re* Bradwell, 55 Ill. 535 (1869).

42. *Id.* at 540-42.

43. Bradwell v. Illinois, 83 U.S. 130 (1872).

44. *Id.* at 139. The Court inferred, however, the possibility of a right for women to practice law in federal courts. *Id.*

45. *Id.* at 141. Justice Bradley's complete thought is: "The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator." *Id.*

46. *Id.*

47. *In re* Bradwell, 55 Ill. 535, 542 (1869).

decided *Bradwell*, state legislatures began to do just that. For example, in 1872 the Illinois Legislature passed an act "giving all persons, regardless of sex, freedom in selecting an occupation."[48] Once legislatures made it clear that women could be licensed to practice law, the state courts made little objection. In fact, courts appeared willing to explicitly overrule their former opinions denying women law licenses.[49] The Wisconsin Supreme Court, in a dramatic reversal from its earlier decision,[50] finally granted Lavinia Goodell a license to practice in Wisconsin courts.[51]

Of course, women were eventually admitted to all the other state bars across the country. But the views about women as unfit for courtroom strife, or at least more suited to "better things," were still prevalent in the 1960s.[52] They were only seriously challenged in the 1970s,[53] and then reappeared in the 1980s, but in a somewhat different form.

B. *A Different Voice*

There is a recent surge in the belief of women's "different voice," the so-called possession of a different moral perspective than that of men.[54] Some would say that women resolve moral conflict differently than men and are more concerned with preserving relationships and satisfying emotional needs than with parceling out rights.[55] The emphasis on

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48. A. SACHS & J. WILSON, *supra* note 30, at 101. Curiously, Myra Bradwell did not reapply for a law license after this legislation was passed. For some reason she waited eighteen more years until she finally applied and was admitted to the Illinois state bar in 1890, only to die four years later. *Id.*

49. *In re* Goodell, 48 Wis. 693 (1879).

50. *See supra* note 37.

51. Not surprisingly, Chief Justice Ryan, who had authored the denial of Lavinia Goodell's motion for admittance to the Wisconsin State bar four years earlier, dissented. What is surprising, however, was that the Chief Justice dissented without opinion. O.M. Conover, the official reporter, went so far as to delay the publication of the *Goodell* decision in expectation of Chief Justice Ryan's dissent. The opinion never came. *See Goodell*, 48 Wis. at 693 n.1.

52. A. SACHS & J. WILSON, *supra* note 30, at 210.

53. *Id.* at 219.

54. C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982). Gilligan's conclusions are based on three studies: (1) a college student study; (2) an abortion decision study; and (3) a rights and responsibilities study based on eight boys and eight girls. *Id.* at 2-3. Her purpose was to "provide, in the field of human development, a clearer representation of women's development. . . . [and to offer women] a representation of their thought that enables them to see better its integrity and validity, to recognize the experiences their thinking reflects, and to understand the line of its development." *Id.* at 3.

55. W. KAMINER, *supra* note 14, at 6. This is Kaminer's characterization of Gilligan's

preserving relationships is believed to account for the disdain for competition held by women, along with the discomfort it causes.[56] This belief also has a normative component. Women who do compete are not regarded as "real women" because competition is not "sisterly" and it is not as selfless as women are supposed to be.[57] Competition requires self-interest, and "women are supposed to be primarily interested in the welfare of others."[58] Indeed, in law today, many writers use the different voice model to argue that women are more interested in mediative techniques of conflict resolution than in the adversary combat of the courtroom.[59]

There are a number of curious ironies in this position because it directly conflicts with several other stereotypes. One stereotype is that women, who have limited access to the sphere of team sports, are usually faulted for not being good team players. Another view has it that women are "Queen Bees," and do not help others. However, women have always competed in society, often in the spheres where men are not competitive. For example, women compete in school, in beauty contests, when promoting their children's interests, and even on the job, yet this competition does not seem to call this stereotype into question.[60]

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thesis. "[Women] tend to cultivate a 'morality of responsibility' instead of a 'morality of rights.'" *Id.* Gilligan points out that women identify themselves through, and are dependent on, relationships because the self is delineated through connection, as opposed to men who are more independent and self-oriented, having the self defined through separation. C. GILLIGAN, *supra* note 54, at 35, 164. A woman will view a moral problem in terms of "care and responsibility in relationships," rather than one of rights and rules. *Id.* at 73.

56. W. KAMINER, *supra* note 14, at 6.

57. *Id.*

58. *Id.* ("[w]omen don't compete; they cooperate . . . ."). Similarly, Gilligan's assertion that a woman's virtue lies in self-sacrifice has "complicated the course of women's development by pitting the moral issues of goodness against the adult questions of responsibilities and choice." C. GILLIGAN, *supra* note 54, at 132. Moreover, this notion of self-sacrifice conflicts with the idea of individual rights which has fueled the women's movement in this past century. *Id.*

59. *See, e.g.*, Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987). Professor Menkel-Meadow reasons that the entrance of women into the legal profession has affected the use and practice of the law. Women approach moral reasoning from a different perspective than men. *Id.* at 44. She proposes that women are more empathic and prefer mediation over the traditional adversarial system, not only because of a stereotypical fear of conflict, but because of a desire to care for others and an ability to see legal problems in a greater social context. *Id.* at 45; *see also* Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of Theory*, 1983 AM. B. FOUND. RES. J. 905; Menkel-Meadow, *Portia in a Different Voice*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 763 n.28 (1984).

60. My first study of women lawyers, and subsequent interviews over the next decade,

But challenges to the many assertions about women's and men's natures have been questioned. Many social scientists have examined the evidence to find out which assertions had some basis in truth, and which ones were the products of fantasy or social politics. One aspect of the investigation was to locate the ideological and methodological biases inherent in the scientific community which revealed the impact of the difference model on the social sciences. In science, like the rest of the world, people with power can define the categories and evaluate them as well. This is because of the latent agenda-setting factor in power that establishes the values, the climate, and the background in which decisions are subsequently made.[61] The obviously powerful are those with money, position, or arms. The less obviously powerful are those who hold the resources to ideas. In this category stand scholars, humanists, and scientists. Sometimes power, even in the academy, is obvious, but it may be so institutionalized and lodged in cultural discourse that people accept it without question. Of course, sometimes the bias may be lodged in the research method.[62]

Today, for example, there is the danger of overgenderizing everything. The sex variable is computed on most issues often leading to an assumption of causality that may only reflect a coincident association of the sex variable with other factors. Invariably, of course, although men and women from the same background and the same education substantially agree about most matters, the few percentage points of difference which may turn up are regarded as all important. Sometimes the small differences are important for certain purposes. For example, they could make the difference in an election. But the few percentage points difference do not inform us about basic differences between the sexes. Furthermore, many scientists tend to generalize results of particular studies to the entire population. They report the very small differences found between the men and women in survey studies and even small

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tapped many of the assumptions of the "good woman" thesis expressed by the women attorneys about themselves (many offered that women were less combative than men), although this opinion was often not shared by role partners of particular women attorneys. My own observations revealed that women lawyers, like other human beings, varied in personality, character, and style. *See generally* C. EPSTEIN, *supra* note 2; C. Epstein, Women and Professional Careers: The Case of the Woman Lawyer (1968) (unpublished Ph.D. dissertation) [hereinafter C. Epstein, Ph.D. dissertation].

61. *See supra* text accompanying note 16.

62. Carol Gilligan, who comes from Harvard and who expresses views that are consonant with traditional values, is an example of a powerful promulgator of ideas. Of course she is only one of a long line of scientists who have been affected by bias. Ironically, she attempted to counter the bias of her mentor Lawrence Kohlberg, whose assumptions about moral development were skewed because he confined himself to a sample of males.

laboratory experiments as if they were true of men and women universally.[63]

Another problem comes from a study that depends on people to report on their own attitudes or behavior.[64] Not only are observers biased, but the subjects of their observations are biased as well. People stereotype themselves. They think of themselves as conforming to popular notions of how they should be or act. Thus, women and men tend to characterize themselves according to stereotypes of femininity and masculinity. In my study of women lawyers and my observations of women in public activities such as professional meetings, there are numerous contradictions between many women's assessments of themselves and those of outside observers.[65] To give a striking example, one lawyer I interviewed described herself as especially caring, not an uncommon view; but a male lawyer who worked with her described her as a "barracuda," also not an uncommon view of women lawyers in the old days.

It is irresponsible to overgeneralize on the basis of slight average differences in samples of males and females, and it is probably also irresponsible to characterize particular people in a unitary manner. Current wisdom in social psychology shows people to be more complex beings than many psychological models indicate. Girls and boys, women and men, may change their views and behavior in different social settings and during the course of their lives. One may be caring toward a client in the office, but ruthless against an opposing attorney in the courtroom. A person may be a daring player on the athletic field, but a cautious advisor in planning an estate. A woman may be an aggressive tiger in defending her child, yet reticent as a returning law student. A person may drive by a person stuck by the side of a road with a flat tire if alone, but stop if there is someone with him. These examples show that attempts to characterize a person as aggressive or passive, caring or selfish, are

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63. Gilligan's projections suffered from this same misperception. Her overarching prognosis about the moral character of men and women was based on only three studies. C. GILLIGAN, *supra* note 54, at 2-3. One was of eight boys and eight girls who were asked to interpret a story describing a man who committed a robbery to obtain a drug he couldn't afford for his dying wife. *Id.* at 25-26. Another asked 29 pregnant women about their possible decision to have an abortion. *Id.* at 3. A third study administered tests concerning moral conflict to 25 Harvard psychology students. *Id.* at 2. A methodological critique of these studies is the appropriateness of the sample to study the question being asked. There was considerable variation in response among both sexes, which brings into question whether the subjects can be regarded as representative of men and women. *See id.* And, if one looked at the protocols, observers could easily disagree on which choices were fair and just, as opposed to caring and relational. Each study was based on subjective criteria and quite susceptible to observer bias.

64. *Id.*

65. *See generally* C. EPSTEIN, *supra* note 2.

simplistic and do not account for the multiple components of character or situational factors affecting behavior. Characterizations of personality, as well as characterizations of gender, tend to be dichotomous and static. They also tend to confuse the normative with the actual.

A number of legal writers have fallen into this trap as they ask for the "woman's voice"[66] to be integrated into the legal profession.[67] From a value point of view, that would be acceptable if the quality of humanism were not regarded as "women's work." When humanism is identified as feminine, then gender ideology compels men not to exhibit this behavior for fear of being wimps. As for women who express humanistic concerns, they are regarded as sentimental and impractical or their requests are labeled as "special interests," as the 1988 presidential election conceptualized them.[68]

This is not the forum in which to give a full account of methodological and theoretical biases on the gender issue in the social science literature, or to fully debate the merits of the scholarship cited above.[69] But it is important to note the caution that ought to be exercised in assessing research and its applications that pose male and female, masculine and feminine, as polar extremes. These conceptions lead to and reinforce social constructions of gender as dichotomous categories and mask the ideological and agenda setting components. They assume difference as a given, rather than as a result of a process with considerable rooting in law.

Law is an important sphere to consider because it provides definitions and parameters for gender distinctions and social ordering, as well as the means for holding the distinctions in place. Most, if not all, cultures hold that men and women are suited to distinctive social roles, and that these are extensions of the laws of Nature or of some Divine Will. Yet all

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66. That is, the expression of caring and sensitivity to people's relationships identified by Gilligan. *See supra* notes 54-58 and accompanying text.

67. *See, e.g.*, Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) (law is experiencing a reshaping in women's terms); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988) (patriarchal jurisprudence delimits women creating need to transform masculine jurisprudence into human jurisprudence); Whitman, *Law and Sex*, 86 MICH. L. REV. 1388 (1988) (reviewing C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSE ON LIFE AND LAW (1987)).

68. In the 1988 elections, there were 10 million more women of voting age than men, demonstrating that women are not just a special-interest group out on the fringe. *George and the Gender Gap*, Christian Sci. Monitor, July 26, 1988, at 15, col. 1; *see also* Pear, *King's Dream: How Civil Rights Came to Be a Special Interest*, N.Y. Times, Jan. 17, 1988, § 4, at 1, col. 2.

69. For an in-depth discussion of the sociology of the scientific analysis of sex and gender, see C. EPSTEIN, *supra* note 1, at 17-45.

societies take great care to establish laws, or rules where no formal body of law exists, to ensure that individuals' real roles come close to the culture's ideal roles.[70]

Public policy and laws specify how and when the sexes may and may not mingle. This includes the conditions of many of men's and women's most intimate interactions which set the stage for women's access to professional life and their treatment within it. The laws may not always be enforced, and there may be infringements of them, but the knowledge that punishments are on the books for those who deviate impels people to conform.

Law has also been an instrument for breaking down barriers and removing distinctions, as we have witnessed in the past two or three decades. But no society leaves women and men entirely free to choose the social roles they prefer, or fails to punish them for deviation, although societies differ in their interest in particular infractions and in the harshness of punishment. Most societies and subgroups within them reinforce men's dominant roles by urging women to subordinate their interests and relinquish their power to men.[71] And instruments of culture such as films and television, rules of etiquette, and the division of physical and symbolic labor, such as assigning caring and nurturing roles to women and deflecting and preventing men from assuming such roles, are some of the mechanisms that produce the ranking system in which women are subordinated to men.[72]

The ideological character and content of laws and their promulgation of a particular type of social order has been emphasized by a group of legal theorists and sociologists of law in recent years.[73] These critical scholars claim that powerful groups use law to achieve their own goals, while insisting that the law serves most people and is an outgrowth of natural phenomena.[74]

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70. For ways in which societies construct and reinforce gender distinctions, see *id.* at 118-35.

71. *Id.* at 137. Some societies go as far as performing acts of violence upon women in their efforts to keep them within their traditional roles. *Id.* at 134. In modern western society the traditional gender distinctions are maintained often through more subtle methods, such as defining certain work as "women's work," physically segregating male and female workers in a factory, or assigning males a job title for which females doing the same work are assigned another title. *Id.* at 136.

72. *See id.* at 107-08. Women's roles are defined by expressive, nurturant, and service-oriented characteristics, ancillary to men's; whereas men's roles are typically instrumental, dominant, and goal-oriented. Women are prevented from attaining power reserved for men by having roles classified by gender, thus constricting their range of behavior.

73. For a discussion of a few of these works, see *id.* at 120-31.

74. *Id.* at 120.

Women have been kept "in their place" by laws that restrict their rights to control their person and property and to participate in government.[75] Of course, law does not cover every kind of activity. Custom and tradition are important too, either in supporting law or in undermining it. But law is an important legitimator of social practice and it contributes to the establishment of norms because it defines what is permitted and what is deviant. For most of legal history, women were restricted by the law from obtaining both material and human capital resources, such as credit and access to many educational institutions and thus, were prevented from participating in the law as attorneys, judges, and legislators.[76]

In law, even where a status which is not specifically geared to characterization by gender, and in which gender-free terms have been used, attempts have been made to genderize roles for the purpose of including or excluding men or women from particular domains. For example, in Britain around the turn of the century, male public officials and leaders justified women's exclusion from the public sphere by linguistic casuistry about whether women were included in the word "persons"[77] because only "persons" had the right to a public office and to vote.[78]

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75. *Id.* at 121.

76. *Id.*

77. *See generally* A. SACHS & J. WILSON, *supra* note 30, at 4-66. In Nairn v. University of St. Andrews, Sess. Cas. 147 (1909), five women graduates from Edinburgh University attempted to exercise their right to vote for members of Parliament representing the universities. The provision stipulated that "every person" whose name was on the register was entitled to vote. A. SACHS & J. WILSON, *supra* note 30, at 29. The Lord Chancellor ruled that the disability of women was supported by judicial precedents, and that where it had been held that a woman could vote, it was "dicta derived from an ancient manuscript of no weight." *Id.* at 30. The other opinions concurred, stating that although the word "person" was ambiguous, the uninterrupted usage of centuries left little doubt of it meaning "male person." *Id.*

78. *See generally* A. SACHS & J. WILSON, *supra* note 30, at 4-66. Specifically, The Parliamentary Elections Act, 1868, used the word "person" throughout. 31 & 32 Vict. 877, ch. 125. One year before, Parliament had passed a voter registration statute using the word "man." The Representation of the People Act, 1867, 30 & 31 Vict. 297, ch. 102, Part I, §§ 3-6. Other parts of this act, however, used the word "person." *Id.* at §§ 10, 13-15, 30. This statute was interpreted to exclude women. Chorlton v. Lings, L.R. 4 C.P. 374 (1868). Although the statutory mandate was to interpret all statutes written in the male gender to include females, An Act for shortening the Language used in Acts of Parliament, 1850, 13 & 14 Vict. 35, ch. 21, § 4 (known as Lord Brougham's Act), the *Chorlton* court declared that while in many statutes the word "man" may include women, "in others it would be ridiculous to suppose that the word was used in any other sense than as designating the male sex." L.R. 4 C.P. at 386. The Act of 1867 specifically provided men, as distinguished from women, with the franchise. *Id.* Also, because women were under a legal incapacity to vote, the court limited the Act's application to men. *Id.* at 387.

As evinced from the words of the nineteenth century courts, who characterized women as too delicate, pure, and refined to undertake public functions, and classified them legally alongside the insane and insolvent,[79] women's nature was legislated from the bench as well as from nature. Such reasoning, even after the "person" issue was resolved, restricted women in the legal profession,[80] in medicine,[81] and in academic teaching,[82] as well as in the mines or in police and fire departments. In the United States, the Civil Rights Act of 1964 made such restrictions illegal. Title VII[83] of the Civil Rights Act, along with Title IX[84] of the Education Amendments of 1972, made it possible to change many entrenched practices in the legal sphere at both the practice and training level for women attorneys.[85] Among them, quotas limiting

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79. *See supra* pp. 314-17 & nn. 77-78.

80. For a general overview of discriminatory practices in law schools and law firms, see C. EPSTEIN, *supra* note 20; C. EPSTEIN, *supra* note 2; Fossum, *Law Professors: A Profile of the Teaching Branch of the Legal Profession*, 1980 AM. B. FOUND. RES. J. 501 (in 1975-1976 the general profile of law teachers was 96% white, 93% male, and 66% between the ages of 30 and 50, thus reflecting the race, sex, and age discrimination inherent in the legal profession); Weisberg, *Barred from the Bar: Women and Legal Education in the United States 1870-1890*, 28 J. LEGAL EDUC. 485 (1977) (exclusion of women from state bars was based upon statutory interpretation of the word "persons" to mean "men only," as well as upon traditional common law disability); Weisberg, *Women in Law School Teaching: Problems and Progress*, 30 J. LEGAL EDUC. 226 (1979) (1975-1976 ABA statistical data showed women comprised only 7.9% of all law school faculty members, even with this figure skewed by a small number of law schools with high women-to-men ratio of faculty members); C. Epstein, Ph.D. dissertation, *supra* note 60.

81. *See, e.g.*, J. LORBER, WOMEN PHYSICIANS: CAREERS, STATUS AND POWER (1984); M. WALSH, DOCTORS WANTED—NO WOMEN NEED APPLY: SEXUAL BARRIERS IN THE MEDICAL PROFESSION (1977); Lorber, *Women and Medical Sociology: Invisible Professionals and Ubiquitous Patients*, in ANOTHER VOICE 75 (1975); Lorber, *The Limits of Sponsorship of Women Physicians*, 36 J. AM. MED. WOMEN'S A. 11 (1981).

82. *See, e.g.*, Tyack & Strober, *Jobs and Gender: A History of the Structuring of Educational Employment by Sex*, in EDUCATIONAL POLICY AND MANAGEMENT: SEX DIFFERENTIALS 131 (1981).

83. Civil Rights Act, Pub. L. No. 88-352, § 703, 78 Stat. 255 (1964) (codified as amended at 42 U.S.C. § 2000e-2(a) (1988)).

84. Education Amendments, Pub. L. No. 92-318, § 901, 86 Stat. 373 (1972) (codified as amended at 20 U.S.C. § 1681(a)(1) (1988)).

85. Title VII of the Civil Rights Act states:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, *sex*, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status

women's admission to law schools were eliminated, and there was a movement to eradicate sexist references in textbooks.[86]

The changes in attitudes toward women in the courts did not come until the 1970s when the United States Supreme Court reviewed some of the practices that created false distinctions. A number of important cases were decided which forbade discriminatory conduct.[87] All rested on the

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as an employee, because of such individual's race, color, religion, *sex*, or national origin.

42 U.S.C. § 2000e-2(a) (1988) (emphasis added).

Title IX of the Education Amendments states:

No person in the United States shall, on the basis of *sex*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance, except that . . . in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, *professional education*, and *graduate higher education*, and to public institutions of undergraduate higher education . . . .

20 U.S.C. § 1681(a)(1) (1988) (emphasis added).

86. Judge Ruth Bader Ginsburg has told me of an old property casebook which said that "land, like women, was meant to be possessed." Sexist examples still remain in the casebooks. *See, e.g.*, Coombs, *Crime in the Stacks, or A Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988); Frug, *Re-reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065 (1985). For a review of other projects investigating sex bias in textbooks, see Schneider, *Task Force Reports on Women in the Courts: The Challenge for Legal Education*, 38 J. LEGAL EDUC. 87 (1988).

87. *See, e.g.* Califano v. Westcott, 443 U.S. 76 (1979) (provision of Social Security Act granting aid to dependent children if father but not mother is primary wage earner violated due process clause of fifth amendment); Davis v. Passman, 442 U.S. 228 (1979) (claim of sex discrimination was cause of action under the equal protection component of the due process clause of the fifth amendment); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (city agency requirement that women employees make larger contributions to its pension fund than male employees violated Title VII of the Civil Rights Act of 1964); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (employer's policy of denying employees returning from pregnancy leave their accumulated seniority violated Title VII of the Civil Rights Act of 1964); Dothard v. Rawlinson, 433 U.S. 321 (1977) (Alabama statutory height and weight standards for employment in state correctional facilities discriminated against women and violated Title VII of the Civil Rights Act of 1964); Califano v. Goldfarb, 430 U.S. 199 (1977) (provision of Social Security Act allowing lower benefits for widowers over widows was a gender-based distinction discriminating against female wage earners and violated the due process clause of the fifth amendment); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (provision of Social Security Act granting survivor's benefits to widows but not widowers violated the right to equal protection secured by the due process clause of the fifth amendment because it unjustifiably discriminated against female wage earners); Taylor v. Louisiana, 419 U.S. 522 (1975) (Louisiana constitutional and statutory requirements that a woman should not be selected for jury service unless she previously consented to such service in writing violated the sixth amendment); Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (company impermissibly paid male employees who performed nightshift inspections at a higher rate

fundamental premise that the law's differential treatment of men and women, typically rationalized as reflecting "natural" differences, historically had tended to contribute to women's subordination.[88] The

than female inspectors who worked the dayshift); Cleveland Bd. of Educ. v. La Fleur, 414 U.S. 632 (1974) (mandatory maternity leaves imposed on pregnant teachers violated due process clause of fourteenth amendment); Frontiero v. Richardson, 411 U.S. 677 (1973) (statute requiring a female but not a male member of the armed forces seeking to obtain benefits for her spouse to prove his dependency violated the due process clause of the fifth amendment); Reed v. Reed, 404 U.S. 71 (1971) (Idaho probate code preferring men over women as estate administrators violated equal protection clause of fourteenth amendment); Phillips v. Martin-Marietta Corp., 400 U.S. 542 (1971) (employer who refused to accept job applications from women but not men with pre-school-age children violated Title VII of the Civil Rights Act).

Cf. Orr v. Orr, 440 U.S. 268 (1979) (Alabama statutory scheme of imposing alimony obligations on husbands but not wives violated the equal protection clause of the fourteenth amendment); Caban v. Mohammed, 441 U.S. 380 (1978) (sex-based distinction in New York Domestic Relations Law § 111 allowing unwed mothers but not fathers to block adoption of illegitimate children violated equal protection clause of fourteenth amendment); Trimble v. Gordon, 430 U.S. 762 (1977) (Illinois Probate Act allowing illegitimate children to inherit by intestate succession only from their mothers violated the equal protection clause of the fourteenth amendment); Craig v. Boren, 429 U.S. 190 (1976) (Oklahoma statute prohibiting the sale of 3.2% beer to males under the age of 21 and females under the age of 18 violated equal protection clause of the fourteenth amendment because the relationship between gender and traffic safety was far too tenuous to be substantially related to achieving the state's objective); Stanton v. Stanton, 421 U.S. 7 (1975) (Utah statute establishing majority at age 21 for males but at age 18 for females violated equal protection clause of the fourteenth amendment).

But see Parham v. Hughes, 441 U.S. 347 (1979) (gender-based distinction in Georgia statute permitting the mother but not the father of an illegitimate child an action in wrongful death of the child not violative of the due process clause because it substantially relates to state's objective); Califano v. Webster, 430 U.S. 313 (1977) (provision of Social Security Act allowing different computation of benefits in favor of women over men not violative of equal protection component of the due process clause of the fifth amendment because statute specifically enacted to redress society's disparate treatment of women); General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) (employer's disability benefit plan excluding pregnancy-related disabilities not violative of Title VII of the Civil Rights Act of 1964); Schlesinger v. Ballard, 419 U.S. 498 (1975) (statute requiring mandatory discharge for want of promotion of a male naval officer after nine years of commissioned service versus thirteen years for a female naval officer not violative of the due process clause because of combat and sea duty restrictions imposed on female officers); Geduldig v. Aiello, 417 U.S. 484 (1974) (California disability insurance system denying coverage for certain disabilities attributable to pregnancy not an invidious discrimination and not violative of the equal protection clause of the fourteenth amendment); Kahn v. Shevin, 416 U.S. 351 (1974) (Florida statute permitting widows but not widowers a property tax exemption not unconstitutional because distinction has a fair and substantial relationship to the objective of the legislation); Pittsburgh Press Co. v. Pittsburgh Comm'n Human Relations, 413 U.S. 376 (1973) (city ordinance enjoining newspapers from publishing employment advertisements under headings designating job preference by sex did not violate first amendment rights).

88. Frontiero v. Richardson, 411 U.S. 677 (1973).

Court has declared that

> [t]here can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. . . . [O]ur statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes . . . .[89]

Thus, overt discrimination based on sexual distinctions would go the way of *Plessy v. Ferguson.*[90] But the subtle distinctions of symbolic segregation are still to be addressed in the 1990s.

C. *The Consequences of the Difference Model for Women in the Professional World*

The process by which women have been excluded from the public sphere and from positions of decision making has been well-expressed in the legal profession. This exclusion has prevented them from exercising the agency that would give them the power to define and exercise their interests and competence as attorneys. The legal sphere also has provided an arena in which contests between many women and professional gatekeepers[91] have been played out since the mid-1970s.[92] The blatant modes of discrimination women faced have been well-documented, as well as the subtle and informal mechanisms used by male gatekeepers to remind women attorneys, along with the rest of the world, that the legal profession was the domain of men and that they would protect their turf by whatever means they could muster.[93]

When I first started studying women lawyers in the mid-1960s, there

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89. *Id.* at 684-85. In *Frontiero,* the Supreme Court held that a statute subjecting uniformed servicewomen to stricter requirements than their male counterparts in order to qualify for benefits was a violation of the due process clause of the fifth amendment. The Court concluded that "classifications based upon sex, like classifications based upon race, alienage, or national origins, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." *Id.*

90. 163 U.S. 537 (1896) (upholding statute requiring separate but equal railway accomodations based upon racial classification).

91. *See supra* note 11.

92. *See* C. EPSTEIN, *supra* note 2, at 13-22.

93. *Id.*

were not many of them to study.[94] I could cover certain specialties and spheres of the law fairly well by interviewing the one or two women who had graduated in the 1950s and somehow had managed to slip through the obstacle course women law school graduates had to navigate before they could hope to get a job. Those were the years when women, graduating from the very top law schools in the country such as Stanford, Harvard, and Columbia, could not get the jobs that men in their class, with records far inferior to theirs, could easily obtain.[95] Most of the offers received by these outstanding graduates and other women top performers were for jobs as a legal secretary.[96]

My study of women attorneys revealed that both the lack of participation and the type of participation in the field were indicative of the problems inherent in the profession.[97] For example, I interviewed the first and only woman district attorney in Manhattan, two or three of the handful of women judges, the only woman law professor in the city of New York, several of the forty women who had jobs in large firms, and one-third of the women (that is to say, *one* of the three women) who were partners in the large Wall Street firms. I also interviewed a good number of the women attorneys who either chose or had to settle for jobs in family firms, in government work,[98] in small practices where they concentrated in what was then called domestic relations work, in real estate, or in trusts and estates work. These were the specialties where most women attorneys clustered. Women attorneys, virtually closed out of courtroom participation, did find a place as volunteers for the poor in the criminal courts and were among the most outspoken advocates of a permanent place for women in courts designed to work for the betterment and protection of women and children.[99] Having found this niche for themselves, it is not surprising that the first women to ascend to the bench were chosen to serve as judges either in the women's juvenile courts or in the family

94. There were 7543 women lawyers in the United States in 1960, and 13,000 in 1970, mostly clustered in a few cities, such as New York, Washington, and Chicago. *Id.* at 4, 100. Interviewing in and around the New York area did not substantially limit me in developing a fairly representative sample.

95. *Id.* at 79.

96. *Id.* at 84. For example, in 1952 the major west coast law firms' only offer to Justice Sandra Day O'Connor was for the position of legal secretary. Magnuson, *The Brethren's First Sister: A Supreme Court Nominee—And a Triumph for Common Sense,* TIME, July 20, 1981, at 8, 12. Judge Cecelia H. Goetz of the Bankruptcy Court of the Eastern District of New York was not even asked to any interviews, let alone not being offered the common $5.00 a week clerkship. C. EPSTEIN, *supra* note 2, at 84.

97. For a detail of the methodology used, see C. EPSTEIN, *supra* note 2, at 387-99.

98. These jobs were mostly obtained by outscoring males in competitive examinations.

99. C. EPSTEIN, *supra* note 2, at 120-29.

courts.[100]

Employers' assumptions regarding the special personality traits of women led to their assignment to specialties which were usually less prestigious, dead-end, less lucrative, and often less interesting than those of men.[101] Assumptions that women had less motivation and commitment as lawyers than men made their prospects for promotion to partner poor. Women often found themselves in "no-win" situations. They were either regarded as not tough enough to handle business law and the stress of the courtroom, or too tough to be regarded as easy collaborators and partners.[102] They were also regarded as too pure to make deals and too caring to be tough-minded, or too stiff and unyielding to be able to make the kinds of deals and settlements that male lawyers depended upon for the easy, informal professional relationships that were characteristic of the male professional life.[103]

Women who were tough-minded faced the disapproval of both men and women colleagues, and even of feminist attorneys who faulted them for assuming a "male model" of behavior, such as wearing clothing regarded as "masculine" in style or otherwise deviating from sex-role appropriate attitudes.[104] Women lawyers have also been faulted for deviating from demeanor and emotional norms attached to gender roles when they act "straight" and business-like in professional settings.[105] Male colleagues find them stiff and evaluate them as interpersonally incompetent. Women colleagues often agree.[106]

Stereotypes are also held of women judges. Like those applied to women lawyers, the views are often inconsistent. One stereotype holds that women judges are harsher than male judges; another stereotype, closer to the "caring" model, maintains that women judges are apt to be more lenient and empathetic than their male counterparts.[107] Overall, the studies are contradictory, but many show no difference on average in their decisions, even those having to do with rape.[108]

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100. *Id.* at 237-46; Cook, *Women Judges: The End of Tokenism*, in WOMEN IN THE COURTS 84-105 (1978).

101. *See* C. EPSTEIN, *supra* note 2, at 107-10. Many employers believed that women preferred less stressful areas of law than litigation. In large firms, women were relegated to "feminine" specialties such as family law and probate practice. Women who were allowed to practice corporate law were not allowed to meet with clients.

102. *Id.* at 279.

103. *Id.* at 279, 280-81.

104. *Id.* at 269-71, 272.

105. *Id.* at 281-82.

106. *Id.* at 280, 287-88.

107. *Id.* at 244-45.

108. *See* Gruhl, Spohn & Welch, *Women as Policymakers: The Case of Trial Judges*,

In 1989 the issue of sexual stereotypes affecting women's professional career advancement was reviewed by the Supreme Court in Price Waterhouse v. Hopkins.[109] Ann B. Hopkins was a successful senior manager in the accounting firm of Price Waterhouse who had secured a $25 million contract with the Department of State.[110] Although her work performance was exemplary, she was denied a partnership in the firm. She brought a title VII suit against Price Waterhouse in 1985 alleging that the denial was discriminatory because it was based on sexual stereotyping.[111] During the application process, Hopkins was advised by a head partner to "walk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[112] Previously, other women candidates for partnerships were rejected because the "partners believed that they were curt, brusque and abrasive, acted like 'Ma Barker' or tried to be 'one of the boys.'"[113] Judge Gerhard A. Gesell held that Hopkins had proved that sex discrimination did play a role in this employment decision, and that the burden had shifted to Price Waterhouse to prove by clear and convincing evidence that the decision would have been the same without the discrimination, a burden that the defendant did not sustain.[114] On appeal, the District of Columbia Circuit Court not only affirmed the district court's decision but allowed an even greater recovery.[115]

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25 AM. J. POL. SCI. 308 (1981) (study of 30,000 felony cases found few significant differences in the conviction rates of male and female judges); Kritzer & Uhlman, *Sisterhood in the Courtroom: Sex of Judges and Defendant in Criminal Case Dispositions*, 14 SOC. SCI. J. 77 (1977) (no difference between male and female judges); *but cf.* Cain, *Good and Bad Bias: . . . A Comment on Feminist Theory and Judging*, 61 S. CAL. L. REV. 1945 (1988) (commenting on a method of dichotomous judicial decision making); Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1878 (1988) (advocating a feminist approach to judicial decisions); Walker & Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POLITICS 596 (1985) (women judges exhibit greater tendency to defer to the government's position than male judges). The jury is still out on Judge Kimba M. Wood's ten-year sentence of Michael R. Milken. *See* Eichenwald, *Judge Who Gave Milken 10 Years Wants Him Eligible for Parole in 3*, N.Y. Times, Feb. 20, 1991, at A1, col. 1; Eichenwald, *The Milken Sentence: Milken Gets 10 Years for Wall St. Crimes*, N.Y. Times, Nov. 22, 1990, at A1, col. 6.

109. 490 U.S. 228 (1989).

110. *Id.* at 231, 233.

111. Hopkins v. Price Waterhouse, 618 F. Supp. 1109, 1113-14 (D.D.C. 1985), *aff'd in part, rev'd in part*, 825 F.2d 458 (D.C. Cir. 1987), *rev'd*, 490 U.S. 228 (1989).

112. *Id.* at 1117.

113. *Id.*

114. *Id.* at 1120.

115. Hopkins v. Price Waterhouse, 825 F.2d 458, 473 (D.C. Cir. 1987), *rev'd*, 490 U.S. 228 (1989).

The Court, in a 6-3 decision,[116] found that the discrimination was obvious and substantial, declaring that

> [i]t takes no special training to discern sex-stereotyping in a description of an aggressive female employee as requiring "a course at charm school." Nor . . . does it require expertise in psychology to know that, if an employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.[117]

The Court, however, reversed the court of appeal's judgment and remanded the case, disagreeing with the clear and convincing standard imposed by the lower courts. The Court declared that the "defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff's gender into account."[118] This reversal is significant because now, after *Hopkins*, professional firms that discriminate against women applicants have an easier burden to sustain in order to avoid liability.

Appraisals of feminine characteristics remain a problem for women lawyers and those in a position to assess their performance. Yet, there has been a revolution in the lawyering workplace. Women are, indeed, a formidable presence because a larger number are obtaining degrees and entering the profession and, at entry levels at least, women have been welcomed. Ironically, this opportunity has caused distress for young women who worry how they will manage to reconcile childcare and career.[119] In the past, few women could find employment in these firms, and the few who did had little prospect of advancement, no matter how hard they worked.[120] Now that there is greater possibility of promotion for commitment and effort, they must make the hard choices, choices that

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116. Price Waterhouse v. Hopkins, 490 U.S. 228, 231 (1989). The plurality decision was written by Justice Brennan, and joined by Justices Marshall, Blackmun, and Stevens; Justices White and O'Connor wrote separate concurrences; and Justice Kennedy, joined by Chief Justice Rehnquist and Justice Scalia, dissented. *Id.*

117. *Id.* at 256.

118. *Id.* at 258.

119. *See* C. EPSTEIN, *supra* note 2, at 358-79. The problem of balancing workplace demands has forced many couples to either postpone having children or to decide not to have them at all.

120. *See id.* at 175-218. Only a tiny number of women attorneys worked in large New York law firms prior to 1940, and those that did were intentionally provided only backroom assignments, keeping them out of the courtroom.

were not possible in the past.[121]

The opportunity to work the amount of hours required by firms to become a partner may be of small comfort to the young women attorneys who have entered or will be entering the profession. Today, women attorneys must face the daily problems of coordination of home and family responsibilities. The time management of family and career still burdens the woman attorney, although there has been some slight movement on the part of large firms to provide such services as emergency childcare and part-time work, which in few firms will lead to partnership.

But to move from the individual level to the aggregate is useful in understanding this problem historically and comparatively. We can see which issues relate to individual decisions and which are clearly institutional or time sequence problems. As Mr. Justice Holmes once remarked: "A page of history is worth a volume of logic."[122]

Thus, it is instructive to point out that most of the women lawyers who have ever lived are living today.[123] Furthermore, about eighty percent of the 100,000 women lawyers who are today in practice were admitted to the bar after the 1970s.[124] This means the demographic profile of women lawyers is considerably different from that of male lawyers. Men are distributed over the entire adult life span, while the women are disproportionately young and are thinking about their biological clocks as they approach their mid-thirties and forties. This also means that under the best of circumstances, women have less experience, and only recently have a sizable number of them met the criteria for partnership and other decision-making posts in the profession. This creates problems for women, of course, but it has also created problems for the firms that have been asked to change their policies to be responsive to a sizeable number of women with childbearing and childrearing responsibilities. If women had always been permitted free entry into the legal profession, then they, like men, would be at different stages of the life cycle and firms would not have as many women who need flexibility in hours and time off.[125] Furthermore, there is a focus on women's family responsibilities which highlights "difference," both biological (since women are the ones who give birth) and ideological (because there is a

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121. *Id.*

122. New York Trust Co. v. Eisner, 256 U.S. 345, 348 (1921).

123. C. EPSTEIN, *supra* note 2, at 4-5.

124. *Id.*

125. I am not at this time dealing with the possibility that men also could have shared those responsibilities and thus, also would need the same accommodations from firms that are linked to women and "women's roles." Of course, more men do express the desire to engage in family life to a greater degree than ever before. Also, gender ideology often creates an obstacle in that there is less legitimation for their desire in this regard.

consensus that it is women's main responsibility to assume primary care of infants), as a result of the cohort effects of past discrimination.

The cohort effect has consequences for women in all types of firms. It may make women themselves more self-conscious of their "differences," partly because the problems are considered "women's problems" and not family or social problems, and because most women accept these role designations. Many of them (but, I suspect, not most of them) also accept a gender difference ideology that maintains that they have different orientations toward careers because of their different personalities. What women "want," in terms of kinds of careers, is affected in the aggregate by a combination of possibilities in the opportunity structure of law (i.e., what kinds of jobs they can get given the now subtle but nevertheless pervasive discrimination beyond the entry level), the compatibility they and their employers perceive with other role responsibilities, and the social controls and ideological pressures from their families and peers to make the "right" choices. Of course, these decisions are also affected by their social backgrounds, their race and religion, the quality of the law school they attended, their rank in their class, and their own economic situation. Middle and upper class white women who have had prestigious educations may have more opportunity to have the highest ranking jobs, but they also have the most opportunity to "decide" that the time demands of these kinds of legal work are incompatible with their other duties and interests. Thus, these jobs may not be "worth it" because they are not driven to them by economic motivation.

Of course, too, today there is highlighted attention to problems because greater consciousness has produced it. The consciousness has produced a good deal of the hand-wringing and upset that we are witnessing today. This is true not only for women in law, but for women in other occupations, such as business management. There is also a great deal of media attention devoted to some of the issues which seems to center on the problems women encounter as professionals, offering a kind of doomsday portrait of careers for women. The success stories and satisfactions that women attorneys experience are rarely documented.[126]

One thing is clear, however. The entry of women into the law has been firmly institutionalized. Approximately forty percent of the law students in the country are women and this proportion continues to increase slowly.[127] Certain changes do seem to be firmly in place. There

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126. *See, e.g.*, Shad, *Working Part Time Without Paying the Penalty*, N.Y. Times, Aug. 3, 1990, at B7, col. 3; Bouton, *Linda Fairstein vs. Rape*, N.Y. Times, Feb. 25, 1990, § 6 (Magazine), at 21.

127. Lhamon, *Quality of Life Issues This Recruiting Season*, N.Y.L.J., Aug. 28, 1990, at 2, col. 3. In fact, I suspect that, as the number approaches 50%, we can expect

is opportunity at entry-level jobs, women have greater confidence in their technical abilities, and there has been a change in gender ideology with regard to women's ability to engage in most aspects of the lawyering process.[128] What is not so firmly set, however, is the opportunity for advancement to the very top of the ladder; the acceptance of women in the informal domain of the profession. Stereotypes remain about women's interpersonal qualities and attributes and a continuing belief in innate qualities which are presumed to be salient to the practice of law. Today, even if women do not have to bear the insults of "ladies days" in law school,[129] or the humiliations of going up the back steps of private clubs at which their firms do business,[130] or the discouragement of knowing they would never make partnership in a firm in which they had a major commitment of time and energy,[131] they must still deal with the subtle messages in the profession and in the larger culture that they are "a breed apart."

It is not only men who monitor gender-appropriate norms. Both feminist-identified and non-feminist women also condemn women who do not conform to behavioral and attitudinal femininity norms because they are assertive in the quest for monetary success and insufficiently "caring" or "nurturant" in their interpersonal interactions. Women in firms who want to leave early to be with their children have a hard time, but women who stay late are regarded as heartless by the same men who set the standards.

D. *Professional Opportunities and Gender Stereotyping*

Stereotypes regarding women's priorities and positions as wives and mothers affect their opportunities as professionals. Yet by now there is an accumulating body of data that women who are successful in male-dominated professions disproportionately tend to be married and have children.[132] Although the conventional wisdom is that marriage and children are impediments to a woman's career success, there are good reasons to explain the seeming paradox. First, although these professional

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considerable efforts to limit the free entry of women.

128. Although some maintain that women prefer mediation to courtroom strife, there is clearly a range of preference among women.

129. *See* C. EPSTEIN, *supra* note 2, at 66-67. "Ladies days" were a common practice in the early days of women law students, whereby on certain days only the female students were quizzed and asked to recite intricate legal issues.

130. *Id.* at 283-85.

131. *Id.* at 175-218.

132. Cole & Zuckerman, *Marriage, Motherhood and Research Performance in Science*, SCI. AM., Feb. 1987, at 129.

women may have careers that are deviant from other women's, they are conforming to social expectations regarding a normal woman's life. This may make them more acceptable working partners to men who may regard single career women as too interested in the social opportunities that work provides. Furthermore, since women in professional life disproportionately tend to be married to men in their own fields, their husbands' reputations often reflect on their own, and further, may give them access to networks and business contacts they might not have had independently. In some sense, then, there are not only normative aspects of women's roles that extend into their professional lives, but structural elements as well that smooth their way.

Thus, we see how gender stereotyping and dichotomous thinking leads to inequality. Even well-intentioned dichotomizing, giving honor and respect to the so-called special qualities of women, whether by jurists, lawyers, or social scientists, seems to lead to unintended consequences, which often have negative outcomes for women.

In my own studies of women in law during the past two decades,[133] which focused on the wide range of traits and qualities exhibited by women attorneys and judges, I could see no basis for the expectation that substantial changes could be predicted in the profession merely because of the participation of women, and this has come true in some ways. In concluding that book, it seemed appropriate to note that "no one group ought to be burdened with the expectation of unilateral altruism."[134] They may engage in such behavior, but typically as a component of traditional women's roles, normatively prescribed, and socially enforced through punishments for deviation, or they come to them because of their commitment to political ideals. It is no longer uncommon for women lawyers for the defense and the prosecution to square off on matters of crime, the environment, and the negotiations of trade.

III. CONCLUSION

As we have seen, the assignments of specific role prescriptions too often have the consequence of subjugating women. Moreover, women have been vulnerable to patronizing attitudes, to discrimination, and to other forms of unequal treatment because of stereotypes that link them to these attitudes. This does not mean women should not act in common cause as they do have collective concerns and may respond in patterned ways to differential treatment. But women's position in society as outsiders to the establishment, or in their unique roles as mothers, does

133. *See generally* C. EPSTEIN, *supra* note 2.

134. *Id.* at 385. Evidence does not show that women possess altruistic or caring qualities "naturally."

not necessarily predict a common set of behaviors or attitudes. There are as many differences among women as there are among men and between both men and women.

Many feminist scholars today are either committed to a difference model or leaning toward its acceptance because of their commitment to humanistic values and a desire to change society. Their perspective has certainly alerted social scientists and the legal community to insensitivities regarding the role of women. But all scholars must act with caution to avoid the pitfalls that so characterized the biased analyses of the past. Models are social constructions which may hinder or expand our perception and knowledge. We must differentiate between those that serve our ideological agendas and those that inform us about the nature of reality.