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GENDER AND THE PROFESSION: THE NO-PROBLEM PROBLEM

*Deborah L. Rhode**

I. INTRODUCTION

It is a great honor and pleasure to have this opportunity among so many friends to discuss issues that have become increasingly central to our profession. It is a testament to our partial progress towards gender equality that Conference organizers believed that these issues were sufficiently important to showcase in a keynote address. Such topics rarely received even a walk-on role when I entered the profession. I graduated from law school in the late 1970s without having a single course by or about women. There were no women's law associations, and I saw no women partners when I was interviewing for jobs. What is most striking to me now is how little of it was striking to me then. Most of us did not perceive the absence of women or women's issues as a problem. It was just how law, and life, were.

Today, the legal landscape has been transformed. But we still have a version of what I have called the "no problem' problem."¹ Women's increasing representation and visibility in the profession is taken as evidence that "the woman problem" has been solved. A widespread assumption is that barriers have been coming down, women have been moving up, and it is only a matter of time before full equality becomes an accomplished fact. In a recent survey by the *ABA Journal*, only a quarter of female lawyers and three percent of male lawyers thought that

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1. DEBORAH L. RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* 1-2 (1997).

prospects for advancement were greater for men than for women.² Common assumptions among male attorneys in gender bias surveys are that “time [will] take care of the problem”; if women will just “concentrate on the job and get the chip off their shoulders . . . they should do fine in today’s society”; and “[o]f all the problems we have as lawyers . . . discrimination is low on the list of important ones.”³

It is not only men who share that perception. A recent Sunday *New York Times Magazine* offered variations on the same theme from women at a prominent Wall Street firm. “Postfeminist” “blather” was one female lawyer’s characterization of colleagues with an unearned “chip on their shoulder.”⁴ According to another woman associate, “[t]here’s no discrimination except for the kind we face within ourselves.”⁵

Would that it were true, although much depends on what you define as “discrimination” and whether you are concerned with unconscious bias and policies that are gender neutral in form but not in fact. In any event, the “no-problem” perception is hard to square with the facts. Time alone, and women’s relatively recent admission to the profession, cannot explain the extent of sex-based inequalities. In law, as in life, women are underrepresented at the top and overrepresented at the bottom. Women now account for a majority of law school applicants and almost 30% of the profession, but only about 15% of federal judges and law firm partners, 10% of law school deans and general counsels, and 5% of managing partners of large firms.⁶ Women in legal practice make about

2. See Hope Viner Samborn, *Higher Hurdles for Women*, A.B.A. J., Sept. 2000, at 30, 33; Lynn S. Glasser, *Survey of Female Litigators: Discrimination by Clients Limits Opportunities*, in *THE WOMAN ADVOCATE: EXCELLING IN THE 90s* at 60, 72 (Jean MacLean Snyder & Andrea Barmash Greene, eds. 1995) (58% of women surveyed believed they had equal opportunity at their firms).

3. NINTH CIRCUIT GENDER BIAS TASK FORCE, REPORT: THE EFFECTS OF GENDER IN THE FEDERAL COURTS 60 (Discussion draft, 1992); Diane F. Norwood & Arlette Molling, *Sex Discrimination in the Profession: 1990 Survey Results*, TEX. B.J., June 1992, at 50, 51. For similar comments, see Cynthia Fuchs Epstein et al., *Glass Ceilings and Open Doors: Women’s Advancement in the Legal Profession*, 64 FORDHAM L. REV. 291, 356 (1995) (quoting a male attorney’s belief that women’s advancement is “only a matter of time”); Judith Resnik, *Gender Bias: From Classes to Courts*, 45 STAN. L. REV. 2195, 2207 (1993) (quoting comments that surveys were “a complete waste of time and money,” and “much ado about nothing”).

4. Emily Nussbaum, *Great Expectations*, N.Y. TIMES, Sept. 9, 2001 (Magazine), at 118, 121 (quoting Sarah A.W. Fitts).

5. *Id.* at 118 (quoting Lindsay K. Smith).

6. See ABA COMM’N ON WOMEN IN THE PROFESSION, A SNAPSHOT OF WOMEN IN THE LAW IN THE YEAR 2000 (2000); MINORITY CORPORATE COUNSEL ASSOCIATION 2000 SURVEY (2000); Matt Fleischer, *Women in NLJ 250 Hit a Glass Plateau: Mergers, Lure of Other Work Keeps Numbers at Law Firms Flat*, NAT’L L.J., Dec. 11, 2000, at A1; Lesley Guth, *Women Making Progress, but Not Enough*, RECORDER, June 16, 2000, at 7; Melody Petersen, *Her Partners Can*

\$20,000 a year less than men, and surveys of law firms and corporate counsel salaries have consistently found a significant gender gap even among those with similar positions and experience.⁷ Moreover, male and female attorneys with similar qualifications do not obtain similar positions. Studies involving thousands of lawyers have found that men are at least twice as likely as similarly qualified women to obtain partnership.⁸ What limited data are available also indicate significant disparities in pay and promotion for minority, lesbian, and disabled lawyers.⁹ In short, the pipeline leaks, and if we wait for time to correct the problem, we will be waiting a very long time.

In accounting for these persistent and pervasive disparities, a wide array of research reveals common patterns. Women's opportunities are limited in three crucial ways: by traditional gender stereotypes; by

Call Her Ms. Chairman, N.Y. TIMES, Oct. 9, 1999, at C1 (noting that only 5 of 100 of the largest firms have women in the highest leadership position).

7. See Kenneth G. Dau-Schmidt & Kaushik Mukhopadhyaya, *The Fruits of Our Labors: An Empirical Study of the Distribution of Income and Job Satisfaction Across the Legal Profession*, 49 J. LEGAL EDUC. 342, 349 (1999); Wynn R. Huang, *Gender Differences in the Earnings of Lawyers*, 30 COLUM. J.L. & SOC. PROBS. 267 *passim* (1997); Kathleen E. Hull & Robert Nelson, *Divergent Paths: Gender Differences in the Careers of Urban Lawyers*, 10 RESEARCHING LAW 1 (1999); Elizabeth Amon, *Men Far Ahead in Firms' Health Law Pay*, NAT'L L.J., Sept. 20, 1999, at A11; Susan Bianchi-Sand, *The Cost of Pay Inequity*, LEGAL TIMES, Aug. 23, 1999, at 22; Jeff Blumenthal, *Bar Survey Holds Up a Mirror to Changing Face of Philly Lawyers*, LEGAL INTELLIGENCER, June 29, 2000, at 1.

8. See ABA YOUNG LAWYERS DIV., CAREER SATISFACTION 2000, at 6 (2000) [hereinafter YLD, CAREER SATISFACTION], available at http://www.abanet.org/yld/satisfaction_800.doc (last visited Mar. 10, 2002); Cynthia Grant Bowman, *Women and the Legal Profession*, 7 AM. U. J. GENDER SOC. POL'Y & L. 149, 163 (1999) (citing studies); Epstein et al., *supra* note 3, at 359 (noting that in the most recent group studied, men's chances of making partnership were seventeen percent and women's chances were five percent).

9. See ABA COMM'N ON RACIAL AND ETHNIC DIVERSITY IN THE PROFESSION, MILES TO GO: PROGRESS OF MINORITIES IN THE LEGAL PROFESSION *passim* (1999) [hereinafter ABA COMM'N, MILES TO GO]; CAL. BAR ASS'N, REPORT AND RECOMMENDATIONS REGARDING SEXUAL ORIENTATION DISCRIMINATION IN THE CALIFORNIA LEGAL PROFESSION 2 (1996) [hereinafter CAL. BAR, SEXUAL ORIENTATION DISCRIMINATION]; COMM. ON LEGAL PROF'LS WITH DISABILITIES, STATE BAR OF CAL., EMPLOYMENT OF LEGAL PROFESSIONALS WITH DISABILITIES AND CHRONIC MEDICAL CONDITIONS (1996), available at <http://www.calbar.org/2ent/3gps/3clpd2.htm> (last visited Jan. 29, 2002); L.A. COUNTY BAR ASS'N, REPORT ON SEXUAL ORIENTATION BIAS (1994) [hereinafter L.A. COUNTY, SEXUAL ORIENTATION BIAS], reprinted in 4 S. CAL. REV. L. & WOMEN'S STUD. 305 *passim* (1995); SUBCOMM. ON THE EMPLOYMENT OF ATTORNEYS WITH DISABILITIES, STATE BAR OF CAL., SURVEY OF ATTORNEYS AND JUDGES WITH DISABILITIES AND CHRONIC MEDICAL CONDITIONS *passim* (1993) [hereinafter SURVEY OF ATTORNEYS]; David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1677 (1998); David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CAL. L. REV. 493, 570 (1996) [hereinafter Wilkins & Gulati, *Why So Few*].

inadequate access to mentors and informal networks of support; and by inflexible workplace structures. Let me say a few words about each.

II. GENDER STEREOTYPES

Gender stereotypes influence behavior at both conscious and unconscious levels and work against women's advancement in several respects.¹⁰ First, and most fundamentally, characteristics traditionally associated with women are at odds with those traditionally associated with professional success, such as assertiveness, competitiveness, and business judgment. Some lawyers and clients still assume that women lack the aptitude for complex financial transactions or the combativeness for high-stakes litigation.¹¹ Yet professional women also tend to be rated lower when they adopt "masculine," authoritative styles, particularly when the evaluators are men.¹² Female lawyers routinely face some variation of this double standard and double bind. They risk appearing too "soft" or too "strident," too "aggressive" or not "aggressive" enough.¹³ And what is assertive in a man often seems abrasive in a woman.¹⁴

A related obstacle is that women often do not receive the same presumption of competence as men. In large national surveys, between half and three-quarters of female attorneys believe that they are held to higher standards than their male counterparts or have to work harder for the same results.¹⁵ Even in experimental situations where male and

10. See VIRGINIA VALIAN, *WHY SO SLOW?: THE ADVANCEMENT OF WOMEN* 16-17 (1998); Mark R. Poirier, *Gender Stereotypes at Work*, 65 *BROOK. L. REV.* 1073, 1086-90 (1999).

11. See Kathryn Reed Edge, *Gender Bias Goes to Ground in Tennessee*, *JUDGES' J.*, Spring 2000, at 29, 30; Epstein et al., *supra* note 3, at 337; Glasser, *supra* note 2, at 59-61; Elizabeth K. Ziewacz, Comment, *Can the Glass Ceiling Be Shattered?: The Decline of Women Partners in Large Law Firms*, 57 *OHIO ST. L.J.* 971, 977 (1996).

12. See JEANETTE N. CLEVELAND ET AL., *WOMEN AND MEN IN ORGANIZATIONS: SEX AND GENDER ISSUES AT WORK* 106, 307 (1999); Alice H. Eagly et al., *Gender and the Evaluation of Leaders: A Meta-Analysis*, 111 *PSYCHOL. BULL.* 3, 16 (1992).

13. See KATHLEEN HALL JAMIESON, *BEYOND THE DOUBLE BIND: WOMEN AND LEADERSHIP* 129 (1995); ANN M. MORRISON ET AL., *BREAKING THE GLASS CEILING: CAN WOMEN REACH THE TOP OF AMERICA'S LARGEST CORPORATIONS?* 61-62 (1987); Eagly et al., *supra* note 12, at 3; Deborah L. Rhode, *Gender and Professional Roles*, 63 *FORDHAM L. REV.* 39, 67 (1994).

14. See Rhode, *supra* note 13, at 67.

15. See ABA COMM'N ON WOMEN IN THE PROFESSION, *FAIR MEASURE: TOWARD EFFECTIVE ATTORNEY EVALUATIONS* 14 (1997) (indicating that three-quarters of the surveyed female attorneys believe that women are held to higher standards); Glasser, *supra* note 2, at 59; Samborn, *supra* note 2, at 31 (indicating that fifty-seven percent of female attorneys believe women must work harder).

female performance is objectively equal, women are judged more critically and their competence is rated lower.¹⁶

The problem is particularly great when evaluators have little accountability and those evaluated are women of color or other identifiable minorities. These women find that their mistakes are more readily noticed and their achievements are more often attributed to luck or affirmative action.¹⁷ About two-thirds of black lawyers, compared with only about ten percent of white lawyers, believe that minority women are treated less fairly than white women in hiring and promotion.¹⁸ Most disabled and openly lesbian lawyers similarly report adverse effects on employment opportunities.¹⁹

The force of traditional stereotypes is compounded by the subjectivity of performance evaluations and by other biases in decision-making processes. People are more likely to notice and recall information that confirms prior assumptions than information that contradicts them.²⁰ Attorneys who assume that women with children are less committed or that women of color are less qualified will recall their errors more readily than their insights. They will note the times mothers leave early, not the times they stay late. A related problem is that people share what psychologists label a “just world” bias.²¹ They want to believe that, in the absence of special treatment, individuals generally get what they deserve and deserve what they get.²² So if women are underrepresented in positions of greatest prominence, the most

16. See Martha Foschi, *Double Standards in the Evaluation of Men and Women*, 59 SOC. PSYCHOL. Q. 237, 237, 251 (1996); Jacqueline Landau, *The Relationship of Race and Gender to Managers' Ratings of Promotion Potential*, 16 J. ORG. BEHAV. 391, 392 (1995).

17. See ABA COMM'N, MILES TO GO, *supra* note 9, at 3-5; FED. GLASS CEILING COMM'N, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 26-28, 64-72, 93-96, 104-106 (1995) [hereinafter GOOD FOR BUSINESS]; MULTICULTURAL WOMEN ATTORNEYS' NETWORK, ABA, THE BURDENS OF BOTH, THE PRIVILEGES OF NEITHER 9, 23-24 (1994); Foschi, *supra* note 16, at 243.

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

19. See ABA COMM'N, MILES TO GO, *supra* note 9, *passim*; CAL. BAR, SEXUAL ORIENTATION DISCRIMINATION, *supra* note 9, at 2; L.A. COUNTY, SEXUAL ORIENTATION BIAS, *supra* note 9, at 320-29; NAT'L ASS'N FOR LAW PLACEMENT FOUNDATION, KEEPING THE KEEPERS: STRATEGIES FOR ASSOCIATE RETENTION IN TIMES OF ATTRITION 53-57 (1998) [hereinafter NALP, KEEPING THE KEEPERS]; SURVEY OF ATTORNEYS, *supra* note 9, at 53-57.

20. See GOOD FOR BUSINESS, *supra* note 17, at 26-28, 64-72, 93-96, 104-06, 123-25; Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1207-09 (1995).

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

22. See LERNER, *supra* note 21, at vii-viii.

psychologically convenient explanation is that they lack the necessary qualifications or commitment.

These assumptions can then become self-fulfilling prophecies. Expectations affect evaluations, which then affect outcomes that reinforce initial expectations. Senior attorneys are less likely to support women who appear unlikely to succeed. Women who are not supported are more likely to leave. Their disproportionate attrition then perpetuates the assumptions that perpetuate the problem.²³ All of these obstacles are greater for women of color, who have the lowest law firm retention rate of any group, and who are still frequently mistaken for clerical or support personnel.²⁴

The problem is compounded by the disincentives to raise it. Women who express concerns often hear that they are “humorless,” or “overreacting,” or exercising “bad judgment.”²⁵ The tendency in many workplaces is to shoot the messenger,²⁶ which obviously gets in the way of important messages being heard.

III. MENTORING AND SUPPORT NETWORKS

A second, equally persistent and pervasive problem is the lack of access to informal networks of mentoring, contacts, and client development.²⁷ Many men who endorse equal opportunity in principle fall short in practice; they end up supporting those who seem most similar in backgrounds, experiences, and values.²⁸ Some male attorneys

23. See ABA COMM'N, MILES TO GO, *supra* note 9, at 6-7, 14-15; BAR ASS'N OF S.F., GOALS '95 REPORT: GOALS AND TIMETABLES FOR MINORITY HIRING AND ADVANCEMENT 17, 25 (1996); Epstein et al., *supra* note 3, at 298-99; David A. Thomas & Karen L. Proudford, *Making Sense of Race Relations in Organizations*, in ADDRESSING CULTURAL ISSUES IN ORGANIZATIONS 51 (Robert T. Carter, ed. 2000); Wilkins & Gulati, *Why So Few*, *supra* note 9, at 570.

24. See DEBORAH L. RHODE, ABA COMM'N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 21 (2001) [hereinafter RHODE, UNFINISHED AGENDA]; see also NALP, KEEPING THE KEEPERS, *supra* note 19, at 53-57; DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 40 (2000) [hereinafter RHODE, INTERESTS OF JUSTICE]; Nussbaum, *supra* note 4, at 80.

25. *Greener Pastures*, PERSP., Summer 1995, at 3.

26. See NINTH CIRCUIT GENDER BIAS TASK FORCE, FINAL REPORT: THE EFFECTS OF GENDER IN THE FEDERAL COURTS (1993) [hereinafter NINTH CIRCUIT FINAL REPORT], *reprinted in* 67 S. CAL. L. REV. 745, 974 (1994).

27. See IDA O. ABBOTT, THE LAWYER'S GUIDE TO MENTORING 24-25 (2000); SUZANNE NOSSEL & ELIZABETH WESTFALL, PRESUMED EQUAL: WHAT AMERICA'S TOP WOMEN LAWYERS REALLY THINK ABOUT THEIR FIRMS 123, 355 (1998); Epstein et al., *supra* note 3, at 303; Deborah L. Rhode, *Myths of Meritocracy*, 65 FORDHAM L. REV. 585, 589 (1996); Roundtable Forum, *Women Still Struggle to Climb Legal Ladder*, ILL. LEGAL TIMES, May 1996, at 1.

28. See MATS ALVESSON & YVONNE DUE BILLING, UNDERSTANDING GENDER AND ORGANIZATIONS 194 (1997); JUDITH LORBER, PARADOXES OF GENDER 237-38 (1994).

report reluctance to mentor or to be seen alone with female colleagues because of concerns of sexual harassment or “how it might be perceived.”²⁹ Others enjoy the bonding that occurs in all-male events.³⁰ Even women who make real sacrifices to get a foot in the door find that a foot is all they get in. Working mothers short on time, interest, or innate ability have nonetheless learned to play golf, which makes it all the more aggravating when they still aren’t invited to play.

It is, of course, not only men who fail to mentor their women colleagues. Even women leaders who are sensitive to gender-related problems are sometimes reluctant to become actively involved in the solution, particularly in workplaces where they risk being perceived as “whiners,” or as biased in favor of other women.³¹ Despite these risks, many senior women do what they can but are too overcommitted to provide adequate mentoring for all the junior colleagues who need assistance.³² And female attorneys at all levels who have substantial family commitments also have difficulty making time for the informal social activities that generate collegial support and client contacts.³³

The result is that many female lawyers remain out of the loop of career development. They are not given enough challenging, high visibility assignments, nor are they included in social events that yield professional opportunities.³⁴ Problems of exclusion are greatest for those who appear “different” on other grounds as well as gender, such as race, ethnicity, disability, or sexual orientation.³⁵ As one anonymous participant in a Los Angeles bar survey described his firm’s attitude toward gay and lesbian attorneys: “Don’t have any, don’t want any.”³⁶

29. Epstein et al., *supra* note 3, at 355-56.

30. *See id.* at 355.

31. *See* ABBOTT, *supra* note 27, at 52-54; DEBORAH GRAHAM, BEST PRACTICES (forthcoming n.d.); NOSSEL & WESTFALL, *supra* note 27, at 50, 60, 176; Amy Saltzman, *Woman Versus Woman: Why Aren't More Female Executives Mentoring Their Junior Counterparts?*, U.S. NEWS & WORLD REP., Mar. 25, 1996, at 50, 51.

32. *See* BOSTON BAR ASS'N TASK FORCE ON PROF'L FULFILLMENT, EXPECTATIONS, REALITIES, AND RECOMMENDATIONS FOR CHANGE 42 (1997), available at <http://www.bostonbar.org/dd/fulfillment.htm> (last visited Jan. 30, 2002); CYNTHIA FUCHS EPSTEIN ET AL., THE PART-TIME PARADOX: TIME NORMS, PROFESSIONAL LIVES, FAMILY, AND GENDER 66-67 (1999); NOSSEL & WESTFALL, *supra* note 27, at 131, 266, 299-300.

33. *See* EPSTEIN ET AL., *supra* note 32, at 68.

34. *See, e.g.*, NOSSEL & WESTFALL, *supra* note 27, at 269.

35. *See* PAUL M. BARRETT, THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA 4-5 (1999) (describing problems of exclusion for minority attorneys); L.A. COUNTY, SEXUAL ORIENTATION BIAS, *supra* note 9, at 298, 299 (describing the limited opportunities for homosexual attorneys).

36. L.A. COUNTY, SEXUAL ORIENTATION BIAS, *supra* note 9, at 312.

IV. WORKPLACE STRUCTURES

A final obstacle involves workplace structures that fail to accommodate personal needs and commitments, particularly family responsibilities. The good news is that the profession has woken up to the fact that this is a problem.³⁷ The bad news is that we are still so far from a solution. Less than a fifth of surveyed lawyers are well satisfied by the balance between their personal and professional lives.³⁸

The most obvious ongoing failure is inhumane hours and a resistance to reduced or flexible schedules—what Justice Scalia’s keynote address characterized as an “ethos of unremitting work.”³⁹ The problem is reinforced by the increasing pace and competition of legal life. Technological innovations have created expectations of instant responsiveness and total availability, while increasing billable hour quotas have pushed working hours to new and often excessive limits.⁴⁰ Lawyers remain perpetually on call—tethered to the workplace through cell phones, emails, faxes, and beepers. “Face time” is taken as a proxy for commitment, ambition, and reliability under pressure.⁴¹ The result is a “rat race equilibrium” in which most lawyers feel that they would be better off with shorter or more flexible schedules, but find themselves within institutional structures that offer no such alternatives.⁴²

Even in workplaces that in theory offer these options, a wide gap persists between formal policies and actual practices. Although over 90% of surveyed law firms report policies permitting part-time schedules, only about 3% of lawyers actually use them.⁴³ Most women surveyed believe, with good reason, that any reduction in hours or availability will carry a permanent price.⁴⁴

37. See NINTH CIRCUIT FINAL REPORT, *supra* note 26, at 835, 836-37.

38. See YLD, CAREER SATISFACTION, *supra* note 8, at 20 tbl.15.

39. Justice Antonin Scalia, Keynote Address at the Hofstra University School of Law 2001 Legal Ethics Conference, Legal Ethics: What Needs Fixing (Sept. 9, 2001).

40. See EPSTEIN ET AL., *supra* note 32, at 5; RHODE, INTERESTS OF JUSTICE, *supra* note 24, at 35; Deborah L. Rhode, *Balanced Lives for Lawyers*, 70 *FORDHAM L. REV.* 2207, 2208, 2210-13 (2002) [hereinafter Rhode, *Lives for Lawyers*].

41. See EPSTEIN ET AL., *supra* note 32, at 55-56; Renee M. Landers et al., *Rat Race Redux: Adverse Selection in the Determination of Work Hours in Law Firms*, 86 *AM. ECON. REV.* 329, 329 (1996).

42. Landers et al., *supra* note 41, at 347.

43. See CATALYST, A NEW APPROACH TO FLEXIBILITY: MANAGING THE WORK TIME EQUATION 16, 25-27 (1997) [hereinafter CATALYST]; EPSTEIN ET AL., *supra* note 32, at 5; ABBIE F. WILLARD, PH.D. & PAULA A. PATTON, M.S., NAT’L ASS’N FOR LAW PLACEMENT, PERCEPTIONS OF PARTNERSHIP: THE ALLURE AND ACCESSIBILITY OF THE BRASS RING 99 (1999).

44. See, e.g., NOSSEL & WESTFALL, *supra* note 27, *passim*; Samborn, *supra* note 2, at 32 (finding that 46.1% of surveyed women believed that taking a leave or part-time status after

The result is yet another double standard and another double bind. Working mothers are held to higher standards than working fathers and are often criticized for being insufficiently committed, either as parents or professionals. Those who seem willing to sacrifice family needs to workplace demands appear lacking as mothers. Those who want extended leaves or reduced schedules appear lacking as lawyers. These mixed messages leave many women with the uncomfortable sense that whatever they are doing, they should be doing something else.⁴⁵ All the coping strategies are problematic. A woman lawyer is hammered in a custody battle for reading briefs during a piano recital; a lawyer who misses recitals is told by her daughter that what she really wanted for Christmas was “more time with mommy”; a senior partner complains that when he needed affidavits for an unexpected motion, mommy was at a recital.⁴⁶ Too many women are in no-win situations. Assumptions about the inadequate commitment of working mothers can influence performance evaluations, promotion decisions, and opportunities for the mentoring relationships and challenging assignments that are prerequisites for advancement.⁴⁷

The problem is compounded by the sweatshop schedules that are increasingly common, particularly in major law firms. Hourly requirements have increased dramatically over the last two decades, and

becoming a parent would be very likely to have an adverse effect on advancement and another 35.2% thought it was somewhat likely). In a recent study of part-time lawyers, only 1.3% had become partners. See EPSTEIN ET AL., *supra* note 32, at 56; see also Michael D. Goldhaber, “Part Time Never Works.” *Discuss*, NAT’L L.J. Dec. 4, 2000, at A31 (finding over 40% of associates believed that part time is underutilized because it never works); see also EMPLOYMENT ISSUES COMM., WOMEN’S BAR ASS’N OF MASS., MORE THAN PART-TIME: THE EFFECT OF REDUCED-HOURS ARRANGEMENTS ON THE RETENTION, RECRUITMENT, AND SUCCESS OF WOMEN ATTORNEYS IN LAW FIRMS 21 (2000) [hereinafter MORE THAN PART-TIME].

45. See WILLARD & PATTON, *supra* note 43, at 99; Epstein et al., *supra* note 3, at 390-98; Rhode, *supra* note 27, at 592-93; Cameron Stracher, *All Aboard The Mommy Track*, AM. LAW., Mar. 1999, at 126; Meredith K. Wadman, *Family & Work: The Delicate Balance*, WASH. LAW., Nov.-Dec. 1998, at 28, 33.

46. For examples, see generally DEBORAH L. RHODE, ABA COMM’N ON WOMEN IN THE PROFESSION, BALANCED LIVES: CHANGING THE CULTURE OF LEGAL PRACTICE 14-21 (2001) [hereinafter RHODE, BALANCED LIVES]; Lisa Brennan, *Women Having It All: They’re Mothers and Partners in New York—You Got a Problem With That?*, NAT’L L.J., Aug. 17, 1998, at A1.

47. See MORE THAN PART-TIME, *supra* note 44, at 29-38; Epstein et al., *supra* note 3, at 298; Rhode, *supra* note 27, at 588; Rhode, *Lives for Lawyers*, *supra* note 40, at 2213. In the NALP survey, half of the women believed that female attorneys were considered less committed than their male colleagues. See CATALYST, FLEXIBLE WORK ARRANGEMENTS III: A TEN YEAR RETROSPECTIVE OF PART-TIME ARRANGEMENTS FOR MANAGEMENT AND PROFESSIONALS 46-47 (2000); WILLARD & PATTON, *supra* note 43, at 37.

what has not changed is the number of hours in the day.⁴⁸ Few supervisors are as blunt as the partner who informed one junior colleague that “law is ‘no place for a woman with a child.’”⁴⁹ But that same message is sent by resistance to “special” treatment for working mothers. Moreover, women who do not have partners or children often have difficulty finding time for relationships that might lead to them. Particularly in large firms, unmarried associates report finding it “difficult to have a cat, much less a family.”⁵⁰ As one lawyer responded to a bar survey on quality of life: “This is not a life.”⁵¹

Although the absence of family-friendly policies is not just a “women’s issue,” the price is paid disproportionately by women. Despite a significant increase in men’s assumption of domestic work over the last two decades, women in two-career couples continue to shoulder the major burden.⁵² Part of the reason is that workplaces that only grudgingly accommodate mothers are even less receptive to fathers. Only about ten to fifteen percent of surveyed law firms and Fortune 1000 companies offer the same paid parental leave to men and women.⁵³ Only about ten percent of male professionals take significant leaves, and few feel free to ask for more than a few weeks.⁵⁴ As a male lawyer explained to the Boston Bar Association work/family task force, it may

48. See JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 1-5, 79-82 (1993).

49. Marilyn Tucker, *Will Women Lawyers Ever Be Happy?*, *LAW PRAC. MGMT.*, Jan.-Feb. 1998, at 45, 47; see also EPSTEIN ET AL., *supra* note 32, at 34-35 (quoting advice: “If you want to be a lawyer, be a lawyer. If you want to be a mother, be a mother.”).

50. NOSSEL & WESTFALL, *supra* note 27, at 295.

51. Epstein et al., *supra* note 3, at 385.

52. The extent of the inequality is estimated differently by researchers using different methodologies. Compare studies cited in JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 71 (2000) (citing studies suggesting that seventy percent of women work shorter hours after having children), RHODE, *supra* note 1, at 149 (citing studies suggesting that employed women spend about twice as much time on family matters as employed men), and Deborah L. Rhode, *Balanced Lives*, 102 *COLUM. L. REV.* 834, 841-42 (2002), with Tamar Lewin, *Men Assuming Bigger Share At Home, New Survey Shows*, *N.Y. TIMES*, Apr. 15, 1998, at A18 (citing JAMES T. BOND ET AL., *FAMILIES & WORK INST., 1997 NATIONAL STUDY OF THE CHANGING WORKFORCE* (1997)) (discussing Families and Work Institute study finding that men reported performing 0.7 less hours than mothers doing household chores on the average workday and on the average day off, but nonetheless still noting that men are catching up in the time spent on household chores).

53. See generally *FAMILIES AND WORK INST., BUSINESS WORK-LIFE STUDY* (1998); John Turrettini, *Mommie Dearest*, *AM. LAW.*, Apr. 2000, at 19; Jill Schachner Chanen, *Daddy’s Home: Paternity Leave is Becoming a Viable Option For New Fathers*, *A.B.A. J.*, Nov. 2000, at 90, 90.

54. See RHODE, *UNFINISHED AGENDA*, *supra* note 24, at 19; RHODE, *BALANCED LIVES*, *supra* note 46, at 18 & nn.85-86; GENDER FAIRNESS TASK FORCE, *FINAL REPORT & RECOMMENDATIONS OF THE EIGHTH CIRCUIT GENDER FAIRNESS TASK FORCE*, reprinted in 31 *CREIGHTON L. REV.* 9, 55 (1997).

be “okay [for men] to say that [they] would like to spend more time with the kids, but it’s not okay to do it, except once in a while.”⁵⁵ In short, men cannot readily get on the “mommy track.” Women cannot readily get off it.

We can and must do better. And those of us in law schools are in good positions to promote the necessary reform efforts. It would be useful to spend some time on strategies to move us forward. So let me close with a few ideas.

Most obviously, those of us who teach and write about the legal profession need to make the unfinished agenda of equal opportunity part of *our* agenda. Many students are surprisingly clueless about the extent of gender inequality and the factors that perpetuate it. A large number of women and even larger number of men have not yet bumped up against significant bias, or would not know it when they see it. Nor do students without substantial family obligations generally have a realistic sense of how they will mesh with the demands of practice. Many individuals launch their careers with little understanding of what lawyers actually do or the toll that it can take on personal lives. Much of students’ information comes from film and television portrayals, which take considerable dramatic license.⁵⁶ Law in prime time offers wealth, challenge, and opportunity. Law in real time may be something else, and the brief glimpses offered in summer programs or part-time work do not necessarily provide representative portraits. Candidates being recruited for permanent positions are more likely to be wined and dined than worked to death. And law schools that also want to attract the best and brightest and maximize their employment opportunities have limited interests in raining on the parade by discussing the downside of legal practice.

But a little drizzle might make for more informed choices. Part of the responsibility of professional responsibility courses should be to include discussion of the structures of practice and the dynamics of discrimination. The point is not only to enable students to think more deeply about their own career priorities. It is also to educate these future leaders of the bar about lawyers’ need for more balanced lives and equal

55. BOSTON BAR ASS’N TASK FORCE ON PROF’L CHALLENGES AND FAMILY NEEDS, REPORT: FACING THE GRAIL: CONFRONTING THE COST OF WORK-FAMILY IMBALANCE 16 (1999) [hereinafter FACING THE GRAIL], available at <http://www.bostonbar.org/workfamilychallenges.htm> (last visited Jan. 30, 2002); see also CATALYST, *supra* note 43, at 25-26.

56. See Ray Carter, *Improving Impressions*, J. REC. (Okla. City), Jan. 21, 2002 (discussing the effect television dramas portraying the legal profession have on the public, and finding the media responsible for the public’s unrealistic impression of attorneys), available at 2002 WL 4933540.

opportunity initiatives, and about the cost effectiveness of promoting them. A wide array of research indicates that making initiatives like alternative or reduced work schedules available in practice not just in principle can help increase productivity and reduce attrition, recruitment, and stress-related costs.⁵⁷ Bleary, burned out lawyers are not providing efficient services.⁵⁸ Other research makes equally plain that lawyers, like most other individuals, tend to overvalue income as a source of satisfaction.⁵⁹ Most people believe that twenty-five percent more income would significantly improve their lives.⁶⁰ But particularly at lawyers' salary levels, it rarely does so. It just ratchets expectations and desires up to a new level.⁶¹ Balanced lives offering time for family, friends, and pro bono commitment are far more likely to yield fulfillment than the additional financial benefits available from sweatshop hours.⁶² Yet this is not always apparent to entering attorneys, who after years of genteel poverty, find spiraling salaries overwhelmingly appealing. Studies of workplace satisfaction could be a sobering reminder of the hidden price of current priorities.

Similarly, those of us with expertise on the profession could add to those studies, and make the conditions of practice more central to our own research agenda. Here again, the situation has improved considerably since I went to law school, when our field was scarcely a field and data on gender or racial bias was noticeable for its absence. But our progress is only partial and on many key issues our knowledge base is strikingly thin.⁶³ Much more could, and should be done, to learn about what works in the world. What strategies are most effective helping to institutionalize values of equal opportunity and balanced lives and what stands in the way?

Finally, we can do more to prod our profession to act on the research available. Promising proposals are not in short supply. More

57. See RHODE, *BALANCED LIVES*, *supra* note 46, at 20-21; CATALYST, *supra* note 43, at 16; *FACING THE GRAIL*, *supra* note 55, at 22-23; RHODE, *UNFINISHED AGENDA*, *supra* note 24, at 19.

58. See RHODE, *BALANCED LIVES*, *supra* note 46, at 19 & n.107.

59. See *id.* at 20.

60. See RHODE, *INTERESTS OF JUSTICE*, *supra* note 24, at 31.

61. See *id.*

62. See *id.* at 26; see also RHODE, *BALANCED LIVES*, *supra* note 46, at 21 (reviewing evidence indicating that family-friendly policies and greater responsiveness to family needs increases employees' satisfaction as well as the employers' reputations). For other evidence documenting the cost-effectiveness of family-friendly policies see Rhode, *supra* note 40, at 2217-18, and Rhode, *supra* note 52, at 847.

63. See Deborah L. Rhode, *The Professional Responsibilities of Professors*, 51 J. LEGAL EDUC. 158, 158, 166 (2001); David B. Wilkins, *The Professional Responsibility of Professional Schools to Study and Teach About the Profession*, 49 J. LEGAL EDUC. 76, 78-80 (1999).

bridges between the bench, bar, and the academy could help keep these issues central to bar reform agendas. I was reminded of that need by the experience of one of my students interviewing for a law firm job last year. Her resume listed my course in gender, law, and public policy, which raised eyebrows at a Wall Street firm she had thoughts of joining. When a senior partner expressed some doubts about the relevance of the class, she described her research project involving workplace barriers for Asian-American women. He was unimpressed. With all the cutting edge courses Stanford offered in financial institutions and the structure of capital markets, why was she “wasting time” on something so “impractical”? The thought that a better grip on issues of cultural identity and structural bias might be extremely practical to a woman of Asian-American descent evidently escaped his attention.

There is, in short, some progress yet to be made in convincing many lawyers that the “woman problem” remains a problem, and that the agenda of equal opportunity remains unfinished. I am grateful for this opportunity to remind us of the distance still to be traveled.
