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## The Feminist Pervasion: How Gender-Based Scholarship Informs Law and Law Teaching

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# THE FEMINIST PERVASION:

  

## HOW GENDER-BASED SCHOLARSHIP INFORMS LAW AND LAW TEACHING

*An edited panel discussion conducted on Thursday, July 24, 2003, at the annual conference and meeting of the Southeastern Association of Law Schools (SEALS)*

Moderator: JOAN MACLEOD HEMINWAY\*

Panelists: Ann Bartow\*\*

F. Carolyn Graglia\*\*\*

Deseriee Kennedy\*\*\*\*

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\*\* Assistant Professor of Law, University of South Carolina School of Law; LL.M. Temple University School of Law, 1997; J.D. University of Pennsylvania School of Law, 1990; B.S. Cornell University, 1985. In addition to her appointment at the law school, Professor Bartow is an Affiliated Faculty Member of the Women's Studies department at the University of South Carolina, where she teaches courses in Cyberspace Law and Intellectual Property Law. Professor Bartow thanks Professor Heminway for being a wonderful friend and colleague.

\*\*\* LL.B. Columbia University Law School, 1954; B.A. Cornell University, 1951. Mrs. Graglia is a homemaker and self-avowed "nonfeminist." See F. Carolyn Graglia, *A Nonfeminist's Perspectives of Mothers and Homemakers Under Chapter 2 of the ALI Principles of the Law of Family Dissolution*, 2001 BYU L. REV. 993, 993 (2001). She lectures on feminism and its relationship to law. Her book, *DOMESTIC TRANQUILITY: A BRIEF AGAINST FEMINISM* (1998), is a critique of the view that the sexual revolution and its feminist underpinning have positively impacted society and a rebuttal of the attack by contemporary feminists on the worth of women who devote themselves to homemaking and childrearing.

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**PROFESSOR HEMINWAY:** Good morning. I am delighted to welcome you to our moderated panel discussion. The objective of this session is to examine how research and writing on feminism<sup>1</sup> and gender, as defined by our panelists, shape the law and its teaching. The idea for this panel discussion originated in an undergraduate women's studies course that I took at Brown University with the eminent historian Joan Wallach Scott.<sup>2</sup> That course, offered through the Pembroke Center for Teaching and Research on Women at Brown, introduced me to feminist thought and gendered scholarly perspectives and opened for me an exciting new world of inquiry.<sup>3</sup> Thereafter, academic work became a far more interesting, meaningful and enlightening endeavor. That experience occurred over twenty years ago, so my relationship with this topic has been

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Professor Kennedy teaches courses in Civil Procedure, Family Law, Women and the Law, and Family Violence.

1. Finding an adequate definition of "feminism" is a difficult task because of the sweeping variations in feminist thought. The diversity of circumstance, perspective, and experience among women has resulted in a diverse range of feminist approaches to societal power dynamics. According to author Caroline Ramazanoglu,

[w]omen's emancipation, or liberation, has developed numerous meanings over the years, not least because the ideas and political aims of those who have struggled for women have varied. Nineteenth-century European and American movements were split between socialist and liberal movements favouring either working-class or middle-class women. Some struggles were confined to white women, while others fought for rights for blacks or for the working class as well as for women. Organized women's movements had developed by the early twentieth century in most parts of the world. In addition, there have been many spontaneous women's struggles which are now forgotten, or are unknown outside local areas.

CAROLINE RAMAZANOGLU, *FEMINISM AND THE CONTRADICTIONS OF OPPRESSION* 6 (1989). She continues:

[a] unified version of feminism cannot reconcile the conflicting struggles within feminism. Rather than attempting to impose uniformity on diversity, some feminists have simply accepted feminism as a loose term for a variety of conceptions of the relations between men and women in society, their origins and how they might be changed for the better.

*Id.* at 7 (discussing *WHAT IS FEMINISM?* (Juliet Mitchell & Ann Oakley eds., 1986)).

2. Professor Joan Wallach Scott teaches at the School of Social Science of the Institute for Advanced Study in Princeton, New Jersey. She has written extensively on historical topics, including the intersection of history, feminism, and politics. *See, e.g.*, JOAN W. SCOTT, *GENDER AND THE POLITICS OF HISTORY* (rev. ed. 1999); JOAN WALLACH SCOTT, *ONLY PARADOXES TO OFFER: FRENCH FEMINISTS AND THE RIGHTS OF MAN* (1996); JOAN W. SCOTT, *WOMEN, WORK AND FAMILY* (1978); JOAN WALLACH SCOTT, *THE GLASSWORKERS OF CARMAUX* (1974). Professor Scott was the founding director of the Pembroke Center for Teaching and Research on Women at Brown University.

3. Author, professor and cultural critic bell hooks discusses the importance of gender studies in a university setting:

The institutionalization of women's studies helped spread the word about feminism. It offered a legitimate site for conversion by providing a sustained body of open minds. Students who attended women's studies classes were there to learn. They wanted to know more about feminist thinking. And it was in those classes that many of us awakened politically.

BELL HOOKS, *FEMINISM IS FOR EVERYBODY: PASSIONATE POLITICS* 21 (2000).

a long one. I hope that this panel will stimulate some of you to see law or the teaching of law in a different light.<sup>4</sup>

Each of our three panelists has a unique and compelling perspective on how feminism and gender impact law and law teaching. These perspectives have been shaped by research or teaching on feminism or gender issues and their relationship to law. All our panelists have law degrees and were, at one time, practicing attorneys. Two of our panelists are law faculty, and the third is married to a law professor. Collectively, our panelists have written numerous law review articles; one has written a full length book, portions of which examine the influence of feminist perspectives on the law. This group is highly qualified and involved with the subject matter. Their work in this area focuses on what one of our panelists, Deseriee Kennedy, earlier described to me as:

a desire to improve the lives of those I love and know, and those I love but have only seen or read about: mothers who struggle to raise their children alone, women and children who have suffered abuse, individuals who seek to create their own definition of family, and others whose voices are underrepresented in drafting, enforcing, and interpreting law.<sup>5</sup>

Each panelist will now briefly describe her relevant research, writing and, if applicable, teaching experiences. These introductory remarks are intended to provide an overview of the panelists' perspectives on the role of feminism or gender-based research and writing in legal analysis and law teaching. Following these opening remarks, I will ask panel members a series of questions that relate to their work in this area. Audience comments and questions are welcome during this part of the program.

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4. Professor Catharine MacKinnon examines the relationship between feminism and law, noting that

[f]eminism entails a multifaceted approach to society and law as a whole, a methodology of engagement with a diverse reality that includes empirical and analytic dimensions, explanatory as well as descriptive aspirations, practical as well as theoretical ambitions. It lays the whole world open in new ways, offering fresh vistas and angles of vision. Pursuing its leads is a complex adventure—vast, deep, rich, and open—of reexamining existing legal and social reality in light of women's exclusion from, and subordination within, nothing less than life, law, and scholarship.

Catharine A. MacKinnon, *Mainstreaming Feminism in Legal Education*, 53 J. LEGAL EDUC. 199, 200 (2003).

5. E-mail from Deseriee Kennedy, Associate Professor, University of Tennessee College of Law, to Joan Heminway, Associate Professor, University of Tennessee College of Law (July 3, 2003, 17:50:53 EST) (on file with moderator).

Following this dialogue, to the extent that time permits, we will take additional questions from the floor.<sup>6</sup>

**MRS. GRAGLIA:** I am not an academic, and I do not teach. I graduated from law school in 1954, worked in Washington, D.C. in the Department of Justice and as a clerk on the U.S. Court of Appeals for Warren Burger and practiced law with Covington & Burling. However, for the past forty-three years, I have been a homemaker. So why am I here? For the same reasons given by my co-panelist, Deseriee Kennedy, in the words that Joan just read. She wants to improve the lives of those “whose voices are underrepresented in drafting, enforcing and interpreting law.”<sup>7</sup> I am also here to speak for an underrepresented group, homemakers, whose cause I believe has been gravely harmed by the contemporary feminist movement.<sup>8</sup>

From the time in 1964 when I first read Betty Friedan’s *The Feminine Mystique*,<sup>9</sup> I was determined to answer her. I had left the practice of law in 1959 to devote myself to what, at that time, was the socially acceptable and respected vocation of homemaking and childrearing.<sup>10</sup> In the 1960s, the feminist movement began its vicious attack on homemakers, seeking to disadvantage them both socially and economically. Their goal was to drive women into the career-oriented workplace alongside men, thereby enabling

6. Professor Heminway then introduced the court reporter transcribing the discussion, Susan Taylor, indicated that the proceedings later may be published, and requested that each individual with a question state his or her name and affiliation.

7. See Kennedy, *supra* note 5.

8. The “contemporary feminist movement” referenced by Mrs. Graglia is a branch of second-wave feminism that gained popularity in the 1960s from the first wave of feminism in America. The “first feminist revolt” was led by women like Elizabeth Cady Stanton, Lucy Stone, and Susan B. Anthony; their goals included (among others) abolition, suffrage, and improved working conditions. CAROL HYMOWITZ & MICHAEL WEISSMAN, *A HISTORY OF WOMEN IN AMERICA* 88-121 (1978). Second-wave feminists “share a commitment to individual autonomy and choice and insist that these freedoms be afforded to women as well as men” and often work for equality through the legal system. MARTHA CHAMALLAS, *INTRODUCTION TO FEMINIST LEGAL THEORY* 16-17 (2d ed. 2003).

9. BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963).

10. See Joan Williams, *From Difference to Dominance to Domesticity: Care as Work, Gender as Tradition*, 76 CHI.-KENT. L. REV. 1441, 1447-48 (2001). Over the past few years, some of the women who have been pursuing careers have begun to return home to a life they find more fulfilling. See Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES MAG., Oct. 26, 2003; Claudia Wallis, *The Case for Staying Home*, TIME, March 22, 2004, at 51. According to a recent U.S. Census report, in 2002, nearly 10.6 million children were being raised by mothers who stayed home full time, up 13 percent since 1994. See *National Briefing Washington: Rise in Stay-at-Home Parents*, N.Y. TIMES, June 17, 2003, at A21. A new generation of stay-at-home mothers may now emerge as “many women at the nation’s most elite colleges say they have already decided that they will put aside their careers in favor of raising children.” Louise Story, *Many Women at Elite Colleges Set Career Path to Motherhood*, N.Y. TIMES, Sept. 20, 2005, at A1.

women to gain economic and social independence.<sup>11</sup> Our opinion-making cultural elite<sup>12</sup> propagated the feminist message that homemakers are parasites,<sup>13</sup> inferior, dependent children who lack any real function and live without using adult capabilities or intelligence.<sup>14</sup> Homemakers were described as being less than fully human; our lives were described as a waste of the human self.<sup>15</sup> Academic feminists told us that we “must be slightly ill mentally”<sup>16</sup> to be happy in our “parasitism” of traditional marriage,<sup>17</sup> that “[d]omesticity was not a satisfactory story of an intelligent

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11. See JANE J. MANSBRIDGE, *WHY WE LOST THE ERA 100* (1986). Although economic assimilation is not a goal common to all feminist perspectives, it has been widely expressed by a variety of liberal assimilationist feminists. See National Organization for Women, *Statement of Purpose* (1966), in *FEMINISM IN OUR TIME* 95, 95-101 (Miriam Schneir ed., Vintage Books 1994). This liberal branch of feminism has many critics, even within the feminist movement, partly because it “has appealed to bourgeois or middle-class women within national movements, rather than to the millions of working-class, rural, and destitute women who make up the majority of the world’s female population.” RAMAZANOGLU, *supra* note 1, at 16. Professor bell hooks notes that many women were already working out of necessity before the contemporary feminist movement began; in fact, women already made up one-third of the workforce, yet the low wages of these “poor and working-class women” failed to liberate them from male domination. HOOKS, *supra* note 3, at 48.

12. See *DEMOCRACY UPSIDE DOWN: PUBLIC OPINION AND CULTURAL HEGEMONY IN THE UNITED STATES* (Calvin F. Exoo ed., 1987).

13. The characterization of housewives as “parasitic” did not, however, originate with contemporary feminism. As early as the 19<sup>th</sup> century, Charlotte Perkins Gilman leveled the same accusation against homemakers. CHARLOTTE PERKINS GILMAN, *WOMEN AND ECONOMICS: A STUDY OF THE ECONOMIC RELATION BETWEEN MEN AND WOMEN AS A FACTOR IN SOCIAL EVOLUTION* (1898). Career women have also been characterized as parasites by individuals who view male-female power dynamics as a zero-sum game; the success of the woman is perceived as detracting from, and emasculating, her male counterpart. See, e.g., SUSAN J. DOUGLAS, *WHERE THE GIRLS ARE: GROWING UP FEMALE WITH THE MASS MEDIA* 59 (1994). (“[T]here is a finite amount of success allotted to any one male-female [celebrity] couple: the more she gets, the more he loses.”).

14. See Kathy McAfee & Myrna Wood, *Bread and Roses*, in *FEMINISM IN OUR TIME*, *supra* note 11, at 130, 134 (arguing that this stereotype has been leveled at *all* women in order to maintain separation between public and private spheres). Many feminists have recognized intersections between the oppression of white women and people of color. See, e.g., Kathleen Neal Cleaver, *Racism, Civil Rights, and Feminism*, in *CRITICAL RACE FEMINISM* 48 (Adrien Katherine Wing ed., 2003); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, in *CRITICAL RACE FEMINISM* 34 (Adrien Katherine Wing ed., 2003); Beverly Jones, *Toward a Female Liberation Movement*, in *FEMINISM IN OUR TIME*, *supra* note 11, at 108, 108-24.

15. FRIEDAN, *supra* note 9, at 202-04.

16. JESSIE BERNARD, *THE FUTURE OF MARRIAGE* 56 (1972) (“We do not clip wings or bind feet, but we do make girls sick. For to be happy in a relationship which imposes so many impediments on her, as traditional marriage does, a woman must be slightly ill mentally.”).

17. See *id.* at 253, 287. Interestingly, similar derogatory remarks had been made about unhappy homemakers. For example, Betty Friedan points out that, prior to the feminist movement, women had been told that they were mentally ill if they failed to gain satisfaction from their domestic life, and that those unsatisfied with domestic life were considered “freaks” or “neurotics.” FRIEDAN, *supra* note 9, at 5. She dubbed the resulting housewife depression “the problem that has no name.” *Id.* at 20.

woman's life"<sup>18</sup> and that we exist as "female impersonators,"<sup>19</sup> simply fulfilling the needs of others.<sup>20</sup>

This rhetoric had an almost daily impact on my life. I was energized by what I saw as feminism's war against the traditional family, with breadwinning husband and homemaking wife.<sup>21</sup> During the time that I was not domestically engaged, I researched these issues over many years and eventually began writing my book, *Domestic Tranquility: A Brief Against Feminism*.<sup>22</sup> I lecture, give interviews, testify on divorce reform and write on the topic. I view these activities as a form of community service.

The institutionalization of the feminist ideology within our society has significantly contributed to the numerous cultural dysfunctions now afflicting us. Our rates of sexually transmitted diseases,<sup>23</sup> abortion<sup>24</sup> and divorce are the highest in the western world, with one-half of our marriages now ending in divorce.<sup>25</sup> One out of three babies is now born out of

18. ELIZABETH FOX-GENOVESE, "FEMINISM IS NOT THE STORY OF MY LIFE" 111-12 (1996).

19. CAROLYN G. HEILBRUN, WRITING A WOMAN'S LIFE 130 (1988).

20. *Id.* Feminists often have argued that, in order for women to fulfill their human potential, or at the least achieve a more enlightened state of equality with men, women must, to some extent, shed some of their responsibilities in the private sphere; accordingly, domestic concerns of housekeeping and childraising should be divided in a more equitable manner. Herma Hill Kay, for example, encourages couples to recognize the differences between *childbearing*, a task specific to women, and *childraising*, which can and should be done by both parents. Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath*, 56 U. CIN. L. REV. 1, 80-81 (1987).

21. For more of Mrs. Graglia's discussion of this phenomenon, see F. CAROLYN GRAGLIA, DOMESTIC TRANQUILITY: A BRIEF AGAINST FEMINISM 1-30 (1998).

22. *Id.*

23. According to the Centers for Disease Control and Prevention ("CDC"), there were 834,555 reported cases of Chlamydia and 351,852 reported cases of gonorrhea in 2002. CDC, *Sexually Transmitted Disease Surveillance 2002 Supplement*, Atlanta, GA: U.S. Department of Health and Human Services, Centers for Disease Control and Prevention (Oct. 2003), available at <http://www.cdc.gov/std/chlamydia2002/chlamydia2002.pdf> and <http://www.cdc.gov/std/GISP2002/GISP2002.pdf>. In 2000, between 850,000 and 950,000 people were living with HIV. P.L. Fleming et al., *HIV Prevalence in the United States, 2000*, 9<sup>th</sup> Conference on Retroviruses and Opportunistic Infections, Abstract 11 (Seattle, Feb. 24-28, 2002), available at <http://www.retroconference.org/2002/Astract/13996.htm>.

24. See Peter Uhlenberg & David Eggebeen, *The Declining Well-Being of American Adolescents*, in THE PUBLIC INTEREST 32-33 (1986). However, according to the CDC, rates of legal abortion in the United States have been decreasing since 1990. Centers for Disease Control, National Center for Chronic Disease Prevention and Health Promotion, Division of Reproductive Health, *Abortion Surveillance – United States, 2000. Table 2*, (Nov. 28, 2003), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/ss5212a1.htm>. A total of 1,429,247 legal abortions were reported in 1990. *Id.* By 1995, that total number had decreased to 1,210,883. *Id.* In 2000, 857,475 legal abortions were reported. *Id.*

25. See, e.g., Lynn D. Wardle, *Is Marriage Obsolete?*, 10 MICH. J. GENDER & L. 189, 197 (2003) ("The divorce rate in the United States has stabilized at an extremely high level; based on current divorce rates of 4.1 per 1,000 population in 2000, up from 2.5 in 1965; it is estimated that

wedlock.<sup>26</sup> Marriage and birth rates are at historic lows while rates of cohabitation steadily increase.<sup>27</sup> Contrary to all past history, men are refusing to marry the women they impregnate and there is now only a fifty percent chance that a child will reach adulthood with the biological father in the home.<sup>28</sup>

Keenly aware of the dysfunctional culture in which they now live, “[f]emale college students routinely identify ‘finding and keeping a loving partner’ as ‘the greatest obstacle to women today.’”<sup>29</sup> This concern is ranked above job discrimination, sexual harassment and domestic violence.<sup>30</sup> In most college women’s studies departments, however, such confessions are viewed as heresy. These departments applaud professional ambition but ridicule matrimonial motivations as being inconsistent with the feminist equation of domesticity with oppression.<sup>31</sup>

Writer Anne Taylor Fleming illustrates the continuing harm of feminist initiatives in her recent advice to June brides on the Jim Lehrer News Hour.<sup>32</sup> Her essay included a warning to brides that “it’s best to

approximately one-half of all marriages will end in divorce.”). Divorce rates rose from 1964 until they peaked in 1981; rates subsequently declined until 1998. See Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1, 3-5 (2000) (arguing that the rise in divorce rates predated the move to no-fault divorce); Ira Mark Ellman, *The Misguided Movement to Revive Fault Divorce, and Why Reformers Should Look Instead to the American Law Institute*, 11 INT’L J.L., POL’Y & FAM. 216 (1997).

26. See LIONEL TIGER, *THE DECLINE OF MALES* 161 (1999); Wardle, *supra* note 25, at 196 (“By 2000, nearly one-third of all children born in the United States were born out of wedlock, a thirteen-fold increase in the number of nonmarital births in just over fifty years.”).

27. See Eric P. Voigt, *Reconsidering the Mythical Advantages of Cohabitation: Why Marriage is More Efficient than Cohabitation*, 78 IND. L.J. 1069, 1069 (2003); Wardle, *supra* note 25, at 196-97.

28. See TIGER, *supra* note 26, at 49. Cf. Tracy L. McGaugh, *Generation X in Law School: The Dying of the Light or the Dawn of a New Day?*, 9 LEGAL WRITING 119, 129 (2003) (“Because of the rising divorce rate, nearly half of all Xers were raised in single-parent households.”); Lynn D. Wardle, *Relationships Between Family and Government*, 31 CAL. W. INT’L L.J. 1, 13 (2000) (“[M]ore than one-half of all children in America will spend a ‘significant’ part of their childhood (before they turn eighteen) living apart from their fathers.”).

29. Jennifer Grossman, *Anarchy in Eros: Where the Men Went*, THE AMERICAN SPECTATOR 57-58 (June/July 2003) (discussing BARBARA DAFOE WHITEHEAD, *WHY THERE ARE NO GOOD MEN LEFT: THE ROMANTIC PLIGHT OF THE NEW SINGLE WOMAN* (2003)); cf. Cheryl Hanna, *Bad Girls and Good Sports: Some Reflections on Violent Female Juvenile Delinquents, Title IX & the Promise of Girl Power*, 27 HASTINGS CONST. L.Q. 667, 706 (2000) (“[W]hat many young women fear most is not career failure or illness or the loss of their female friendships. They fear being forty and single.”) (citing a study in PEGGY ORENSTEIN, *FLUX: WOMEN ON SEX, WORK, LOVE, KIDS, AND LIFE IN A HALF-CHANGED WORLD* 237-58 (2000)).

30. Grossman, *supra* note 29.

31. *Id.* at 58.

32. Interview by Jim Lehrer with Anne Taylor Fleming. *Essayist Anne Taylor Fleming Contemplates June Brides* (PBS television broadcast June 20, 2003), available at [http://www.pbs.org/newshour/essays/jan-june03/fleming\\_06-20.html](http://www.pbs.org/newshour/essays/jan-june03/fleming_06-20.html).



make your own money. Some of us learned that the hard way.”<sup>33</sup> The fact that it is socially and economically perilous for women to become homemakers is a direct result of our no-fault divorce regime,<sup>34</sup> which feminists continue to support in order to force women to abandon homemaking for market production.<sup>35</sup> Despite the evidence that liberalization of divorce laws weakens marriages and leaves many women and children increasingly vulnerable,<sup>36</sup> feminists strenuously resist divorce reform efforts because, if given a choice to be homemakers (and therefore dependent on their husbands), many women would make that choice.<sup>37</sup> Thus, Professor Herma Hill Kay argues for retention of no-fault divorce because, she says, women must “recognize that their unique role in

33. *Id.*

34. Mrs. Graglia argues that:

[a] primary factor contributing to the feminization of poverty has been the change to a system of no-fault divorce under which divorce is easily obtained, even when opposed by one of the parties, and men are often able to terminate marriages without providing adequate alimony or child support.

GRAGLIA, *supra* note 21, at 295. See also JOHANNA BRENNER, *WOMEN AND THE POLITICS OF CLASS* 105-09 (2000) (examining ways that class, race, and gender affect the post-divorce quality of life for men and women); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 338-39 (1985) (demonstrating that the standard of living rises for post-divorce men and declines for post-divorce women). Cf. Kay, *supra* note 20, at 74-84 (ascribing this gendered divergence of post-divorce living standards to injustices in implementation of no-fault divorce laws, though not the no-fault regime itself, as well as women's decisions to conform to traditional gender divisions of labor). Other causes of lower economic status of divorced women include failure to enforce support awards. See DOROTHY MCBRIDE STETSON, *WOMEN'S RIGHTS IN THE U.S.A.: POLICY DEBATES AND GENDER ROLES* 203-05 (2d ed. 1997).

35. For more of Mrs. Graglia's discussion of this issue, see GRAGLIA, *supra* note 21, at 136-37, 264.

36. See PAUL R. AMATO & ALAN BOOTH, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* 81-82, 107-09, 172-74, 181 (1997) (also finding that “low marital quality” between parents causes problems for children); Andrea Brobeil, *Marriage and Divorce*, 5 *GEO. J. GENDER & L.* 529, 540 n.52 (2004) (citing to supportive sources and acknowledging an opposing argument); Aspasia Tsaoussis, *Protecting Homemakers' Marriage-Specific Investments under No-fault Divorce*, 6 *AM. L. & ECON. REV.* 217, 220-22, 229-37 (2004) (examining the impact of the introduction of no-fault divorce on homemakers in long-term, traditional marriages in Greece).

37. See Martha Heller, *Should Breaking-Up Be Harder to Do?: The Ramifications a Return to Fault-Based Divorce Would Have upon Domestic Violence*, 4 *VA. J. SOC. POL'Y & L.* 263, 281 (1996) (rejecting divorce reforms because they “would undermine any such strategy of equalizing parenting roles within the family. If once again given the option of relying on marriage for lifelong support in order to allow the assumption of traditional gender roles, many women undoubtedly will be more likely to choose this option”); Kay, *supra* note 20, at 78-80, 90 (conceding that “many couples still choose to follow the traditional allocation of family functions by sex,” but warning that changes in no-fault divorce laws “may inadvertently perpetuate female dependence by proposing solutions that might encourage future women to continue to select traditional roles”); *Sex, Society and the Female Dilemma: A Dialogue Between Simone de Beauvoir and Betty Friedan*, *SATURDAY REV.*, June 14, 1975, at 14, 18 [hereinafter *Dialogue*] (in which Simone de Beauvoir comments that women should not be given the choice to stay home and raise children “precisely because if there is such a choice, too many women will make that one”).

reproduction ends with childbirth” and that, “like men,” women “should be able to lead productive independent lives outside the family.”<sup>38</sup> To the women who argue that they do not want to leave their children with another woman in order to lead those productive independent lives, feminists reply that these women suffer from “false consciousness”<sup>39</sup> and that their preferences are socially constructed.<sup>40</sup> These women have internalized their own oppression and “may not be the best judges of their own interests or those of the community.”<sup>41</sup> Such is feminist hubris.

A brief personal story illustrates how some women have suffered as a result of following the feminist path. Anne Taylor Fleming was everything the feminist movement encouraged her to be. She was a young sexual revolutionary who became the trophy wife of a man whom she had met when she was in high school; that man divorced the mother of his four young sons in order to marry her.<sup>42</sup> Ms. Fleming concentrated for many years on advancing her career and is now a childless journalist; she describes herself as belonging to the “sisterhood of the infertile.”<sup>43</sup> In her book, *Motherhood Deferred: A Woman’s Journey*, she eloquently describes the experience of having sex with a syringe of sperm and a petri dish in countless failed attempts to “trade a byline for a baby.”<sup>44</sup> She depicts women of her generation as the ones who rejected “motherhood and dishes

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38. Kay, *supra* note 20, at 84-85. Although Professor Kay does not advocate a return to the era of “fault” divorce, she does identify elements of no-fault divorce laws and their implementation that result in post-divorce inequality. *Id.* at 55-77.

39. See Williams, *supra* note 10, at 1470 (criticizing the feminist focus on “false consciousness”).

40. Tracy E. Higgins, *Democracy and Feminism*, 110 HARV. L. REV. 1657, 1690 (1997). In fact, some women who choose to be full-time mothers may believe that they are compelled to make that choice. See Marion G. Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1179 (1991) (“The unavailability and expense of child care leaves many working women no choice but to stay home and care for their children until they reach school age”); Lorraine Schmall, *Introduction*, 19 N. ILL. U. L. REV. 1, 19-20 (1998) (“Many women do not make the choice to stay at home but stay at home because they have too many children, aged family members to care for, an economic disincentive to go to work because of the cost of ‘surrogate parents’ for their children, a lack of interest in or qualification for outside employment, or maybe even cultural demands.”); Pamela Stone & Meg Lovejoy, *Fast-Track Women and the “Choice” to Stay Home*, 596 ANNALS AM. ACAD. POL. & SOC. SCI. 62, 80 (2004) (“Our results undermine the notion that women are freely choosing family over work. Inflexible and highly demanding workplaces are the major barriers to their ability to exercise discretion in any meaningful way.”).

41. Higgins, *supra* note 40, at 1696.

42. ANNE TAYLOR FLEMING, *MOTHERHOOD DEFERRED: A WOMAN’S JOURNEY* 102-03 (1994).

43. *Id.* at 13, 115. Fleming writes of wanting to shout “Hey, hey, Gloria! Germaine! Kate! Tell us, how does it feel to have ended up without babies, children, flesh of your flesh? Did you mean it to happen that way?” *Id.* at 16.

44. *Id.* at 17.

and diapers” of the “traditional wifely role”<sup>45</sup> in order to become “the golden girls of the brave new order.”<sup>46</sup> They instead became, she laments, the “Sacrificial Generation.”<sup>47</sup>

With the words “Sorry. Sorry. Sorry,”<sup>48</sup> Fleming apologizes in her book to the women she calls “the station-wagon moms with their postpartum pounds who felt denigrated in the liberationist heyday by the young, lean, ambitious women like me.”<sup>49</sup> One must wonder if she is apologizing to the wife and mother whom she supplanted so many years ago. That woman became, in Fleming’s description, “one of those heartland moms who ended up in a development of tract houses with four little blond boys”<sup>50</sup>—another homemaker who learned the hard way about the perils of divorce.

How can we say that contemporary feminism has advanced the position of women in our society when it has supported no-fault divorce,<sup>51</sup> the sexual revolution<sup>52</sup> and the glamorizing of market production at the expense of domesticity?<sup>53</sup> All of these have led to broken marriages, wives and mothers who are devalued and abandoned, fatherless children, childless women, unmarried women and young women of either the bimbo or brainy

45. *Id.* at 25.

46. *Id.* at 26.

47. *Id.* at 87.

48. *Id.* at 17.

49. *Id.*

50. *Id.* at 207; see also SYLVIA ANN HEWLETT, *CREATING A LIFE: PROFESSIONAL WOMEN AND THE QUEST FOR CHILDREN* (2002) (analyzing the lives of these women and the choices many of them now regret, noting that more than a third of highly paid professional women over forty are childless).

51. See *supra* notes 34-38 and accompanying text.

52. Some feminists observed parallels between what they contend are the political and sexual oppression of women and encouraged women to explore their own sexuality. See Germaine Greer, *Our Bodies*, in *FEMINISM IN OUR TIME*, *supra* note 11, at 343, 345-50.

53. See The National Organization for Women, *Statement of Purpose*, in *FEMINISM IN OUR TIME*, *supra* note 11, at 95, 95-102. William Ophuls, a former political science professor at Northwestern University and former member of the U.S. Foreign Service, notes the following with respect to the ascendance of women as economic actors in the market:

[t]he usual way of putting it is to say that women have escaped an anomalous and inferior status to take their rightful place in the modern world. But it would probably be more accurate to say that capitalism has finally succeeded in incorporating the last major class to resist the blandishments of the market system. In consequence, as increasing numbers of women (especially elite women) embrace economic values and attempt to live life in imitation of liberal men, positive feminine values are diluted and negative masculine values reinforced, with harmful consequences both to society and to the women themselves. Indeed, the sum of gains to individual women (again, mostly elite women) from increased wealth, status, and power may well be outweighed by the long-run social costs of women’s liberation. . . . The women’s liberation movement therefore epitomizes the tragedy of liberalism in general: individuals get what they want—the satisfaction of private desire—but only by destroying their natural and social environments.

WILLIAM OPHULS, *REQUIEM FOR MODERN POLITICS* 52 (1997).

variety who are regarded as trophies advertising older men's success. This is the legacy of the feminist engine of reform that I seek to derail. Thank you.

**PROFESSOR KENNEDY:** Good morning. I teach a variety of courses relating to women and the law.<sup>54</sup> Much of my perspective on feminism is integrated into the courses that I teach as well as my research. My ideas about feminism are simpler, yet at the same time a bit more complex, than Carolyn's views: I believe that feminism speaks to a more diverse range of individuals and issues than the ones Carolyn expressed in her introduction. Martha Chamallas explains that "[f]eminist legal theory responds to a basic insight about life and law. It proceeds from the assumption that gender is important in our everyday lives . . . whether we are pleased or distressed by the thought of gender difference."<sup>55</sup>

I find the reach and diversity of feminist thought to be intellectually challenging and relevant to my life in significant ways. I am drawn to concepts of feminism and critical legal thought not primarily from theory but primarily from looking at the lives of the women that I knew growing up. As a recent immigrant to the United States, my mother worked. She worked in a toy factory when we were very young. She also worked the late shifts at an orphanage, in the infirmary, caring for children with no homes, while my father worked the day shift. She left for work around 2:30 in the afternoon and returned home in the middle of the night, after my siblings and I had fallen asleep. In my life, feminism meant that you worked and that you were an equal contributor to the family income. In order to have a house with a small yard and enable her children go to school, my mother had to work. She did not have the option to stay home with her children; neither did her mother.<sup>56</sup>

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54. See *supra* note \*\*\*\*.

55. CHAMALLAS, *supra* note 8, at xix.

56. Narratives like the one related here have been and are prevalent and important in feminist scholarship and teaching.

The experiences of those at the bottom are often, but not necessarily, articulated as narratives, in a process of storytelling. Feminist narratives may have aesthetic value, but their purposes are also often political. "They may be a bridge to those who share a similar vision, or a means of inciting change among those who do not." Moreover, the ostensible "neutrality" of the law disguises the extent to which it is premised on the perspectives of the powerful; the narratives of those who occupy a comparatively powerless position are not only evidence of what has been excluded, but testimony to the law's relentless perspectivity. Finally, feminist narratives reflect the feminist epistemological challenge to "the 'scientific rationality' that prevails in our society—and in our legal argumentation—privileges universality, statistical significance, and logical deduction as ways of knowing about the world."

Dana Raigrodski, *Breaking Out of "Custody": A Feminist Voice in Constitutional Criminal Procedure*, 36 AM. CRIM. L. REV. 1301, 1311 (1999) (footnotes omitted); see also Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991); sources cited *infra* note 66. The use of narratives in legal

This scenario is in no way new or unique. Many women have worked throughout history out of necessity, because they had no choice;<sup>57</sup> many women still do not always have choices.<sup>58</sup> For me, feminism is about empowering women to discover a greater diversity of choices and increased opportunities for equality, and it is about women making free choices about their own lives.<sup>59</sup> Yes, it is also about privilege,<sup>60</sup> which I think is the element of feminism that Carolyn is speaking about. I think her comments have a great degree of legitimacy relating to what I call “power” or “liberal” feminism: a narrow perspective that presents valid points about

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scholarship has been subject to thoughtful critique. See Daniel A. Farber & Suzanna Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647 (1994); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993).

57. See STETSON, *supra* note 34, at 219. Since 1900, women never constituted “less than 19 percent of the paid workforce” in the United States. *Id.* at 217. Stetson notes that “more minority women than white women have worked.” *Id.* at 218. bell hooks argues that capitalism, not feminism, is the true reason that women have been pushed into the workforce.

Masses of women feel angry because they were encouraged by feminist thinking to believe they would find liberation in the workforce. Mostly they have found that they work long hours at home and long hours at the job. Even before [the] feminist movement encouraged women to feel positive about working outside the home, the needs of a depressed economy were already sanctioning this shift. If [the] contemporary feminist movement had never taken place masses of women would still have entered the workforce, but it is unlikely that we would have the rights we have, had feminists not challenged gender discrimination. Women are wrong to “blame” feminism for making it so they have to work, which is what many women think. The truth remains that consumer capitalism was the force leading more women into the workforce. Given the depressed economy white middle-class families would be unable to sustain their class status and their lifestyles if women who had once dreamed solely of working as housewives had not chosen to work outside the home.

HOOKS, *supra* note 3, at 49-50.

58. Joel F. Handler, *Institutional Barriers to Women in the Workplace: Women, Families, Work, and Poverty: A Cloudy Future*, 6 UCLA WOMEN'S L.J. 375 (1996) (discussing the plight of women facing part-time work and dead-end jobs).

59. Gloria Steinem, for example, agrees that increasing women's equality and the range of women's choices are important goals of modern feminism because:

[w]hether the struggle is as clear-cut as an individual woman's right to equal pay—and to decide for herself when and whether she will have a child—or as complex as the cross-cultural principles of economic equity and reproductive freedom, the issues still repeat themselves in different ways and in constantly shifting arenas.

Gloria Steinem, *The Way We Were—And Will Be*, in FEMINISM IN OUR TIME, *supra* note 11, at 408, 410. See also ANN CRITTENDEN, THE PRICE OF MOTHERHOOD 233-55 (2001) (examining the realities of women's “choices”). Kingsley Browne, however, argues that women actually have more choices than men.

It is ironic that feminists seize on the lack-of-choice argument, since women have a much broader range of work/family choices than men do. A woman can choose to be a ‘career primary’ worker, a ‘career and family’ worker, a part-time worker, or a full-time housewife; all of these are socially respected choices. Men, on the other hand, have little choice at all. They are expected to be full-time workers who, in most circumstances, are the primary family breadwinners.

KINGSLEY BROWNE, DIVIDED LABOURS: AN EVOLUTIONARY VIEW OF WOMEN AT WORK 55 (1999).

60. See Stephanie M. Wildman, *Making Systems of Privilege Visible*, in PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996).

the interests of middle class white women.<sup>61</sup> However, feminism is also about environmental justice.<sup>62</sup> It is about work, families, race, class and poverty.<sup>63</sup> It is about making clear the public importance of violence and domestic abuse of women and children,<sup>64</sup> and it is about empowering survivors of sexual harassment and rape.<sup>65</sup> It is about putting on the public agenda issues that are of a concern to women and to children.<sup>66</sup> Mothers, in particular, who take up issues of concern to their own children are by

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61. See RAMAZANOGLU, *supra* note 1, at 17-19 (discussing the “gulfs between privileged women who can exercise considerable choice over the course of their lives and women who have to struggle alongside men for their subsistence, let alone for any further rights”). The liberal feminist approach has been challenged for its narrow focus by, among others, critical race feminists. See Harris, *supra* note 14, at 34-41; Cleaver, *supra* note 14, at 48, 52.

62. A variety of ecofeminist perspectives have examined the interrelationship between women and the natural world. For example, some ecofeminists argue that feminism and environmentalism are linked because of the particularly devastating effects of environmental degradation on women. See, e.g., CAROLYN MERCHANT, *EARTHCARE: WOMEN AND THE ENVIRONMENT* 160-65, 189, 194-95 (1996) (examining the ways in which ecological destruction disproportionately impacts women, particularly women of color and women living in poverty). Others argue that feminism and environmentalism are linked because the same masculine, paternalistic values arguably oppress both women and nature. See Deborah Slicer, *Your Daughter or Your Dog? A Feminist Assessment of the Animal Research Issue*, in *ECOLOGICAL FEMINIST PHILOSOPHIES* 97, 101 (Karen J. Warren ed., 1996). Others suggest that ecofeminism naturally flows from women’s close relationship to the cycles of the natural world, a position that is critically examined by Catherine Roach. Catherine Roach, *Loving Your Mother: On the Woman-Nature Relation*, in *ECOLOGICAL FEMINIST PHILOSOPHIES*, *supra*, at 52.

63. See *supra* note 61. See also BRENNER, *supra* note 34, at 101-61 (discussing welfare and the feminization of poverty); HOOKS, *supra* note 3, at 51 (identifying poverty as “a central woman’s issue”).

64. See HOOKS, *supra* note 3, at 61 (noting that the “contemporary feminist movement was the force that dramatically uncovered and exposed the ongoing reality of domestic violence”); Jenny Rivera, *Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials*, 14 B.C. THIRD WORLD L.J. 231 (1994).

65. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* (1975); KATHA POLLITT, *REASONABLE CREATURES* 29-30 (1994) (examining the phenomenon of male violence and advocating increased recognition of the “casual hostility to women such men usually display long before they rape or kill”); Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986). According to the Department of Justice, 670,000 women were victims of rape or sexual assault in the two-year period from 1995 to 1996. BUREAU OF JUSTICE STATISTICS NATIONAL CRIME VICTIMIZATION SURVEY (U.S. Dept. of Justice 1997).

66. Scholars have noted the importance of women’s experiences to feminist scholarship. See Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 20 (1991); Thomas Ross, *Despair and Redemption in the Feminist Nomos*, 69 IND. L.J. 101, 106 (1993); Elizabeth M. Schneider, *Hearing Women Not Being Heard: On Carol Gilligan’s Getting Civilized and the Complexity of Voice*, 63 FORDHAM L. REV. 33, 35 n.11 (1994); Jane M. Spinak, *Reflections on a Case (of Motherhood)*, 95 COLUM. L. REV. 2049 (1995). For example, the Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (2000), grew out of a feminist push for parental leave. Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL’Y 17, 45-46 (2004). Childcare has been another area where feminists have pushed for reform. See STETSON, *supra* note 34, at 275-84.

nature feminists, whether they like the label or not, because they actively bring to the floor issues that women, as mothers, think are important.<sup>67</sup>

Feminism has allowed me to have a complex identification of self. Although Carolyn's introduction focused on women's entry into the workplace as a driving force behind feminism, motherhood and race are my primary focuses in life. Feminist theorist bell hooks, who has influenced me greatly throughout my life, says quite simply that "[f]eminism is for everybody."<sup>68</sup> She states:

[i]magine living in a world where there is no domination, where females and males are not alike or even always equal, but where a vision of mutuality is the ethos shaping our interaction. Imagine living in a world where we can all be who we are, a world of peace and possibility.<sup>69</sup>

She goes on to say:

[f]eminist revolution alone will not create such a world; we need to end racism, class elitism, imperialism. But it will make it possible for us to be fully self-actualized females and males able to create beloved community, to live together, realizing our dreams of freedom and justice, living the truth that we are all "created equal."<sup>70</sup>

I hope that, through this conversation, we can examine different kinds of exploitation and domination and begin to talk about interconnected issues<sup>71</sup> like sexism,<sup>72</sup> racism<sup>73</sup> and heterosexism.<sup>74</sup> We can discuss how

67. For a cross-cultural examination of activist mothers, see *THE POLITICS OF MOTHERHOOD: ACTIVIST VOICES FROM LEFT TO RIGHT* (Alexis Jetter et al. eds., 1997).

68. HOOKS, *supra* note 3, at 118.

69. *Id.* at x.

70. *Id.*

71. Because of the interconnected ways that individuals can experience oppression, it is often important to examine "how race, class, and gender intersect in multiple ways to create distinctive forms of discrimination for specific subgroups of women" and how "different forms of discrimination may be mutually reinforcing." CHAMALLAS, *supra* note 8, at 28. See also BRENNER, *supra* note 34, at 293-318 (examining intersectionality from a Marxist perspective).

72. See, e.g., Maryann Ayim & Barbara Houston, *A Conceptual Analysis of Sexism and Sexist Education, THE GENDER QUESTION IN EDUCATION: THEORY, PEDAGOGY, AND POLITICS* 9, 9-23 (Ann Diller et al. eds., 1996) (summarizing and evaluating various definitions of "sexism").

73. See sources cited *supra* note 14.

74. Feminism and feminist legal theory have been characterized as and criticized for being heterosexually biased.

Feminist legal theory will need to expand its horizons and make itself consciously, more consistently, and expressly inclusive. . . . [E]ven though Feminism in the law has challenged androsexist biases, Feminist legal critiques generally have overlooked or underemphasized heterosexist biases in law and society; on the whole, Feminist legal work simply has failed to account for the experiences of sexual minorities, particularly lesbians and bisexual women, in the development of Feminist legal theory. Consequently, Feminist critiques of law have missed nuances that could sharpen, broaden, or texture its insights, and along the way also have missed opportunities for empowerment through coalition.

critical schools of legal thought, feminism included, have opened our minds to important legal, social and cultural issues that affect people's ability to make meaningful real-world choices.<sup>75</sup> Thank you.

**PROFESSOR BARTOW:** I do not come here as a feminist scholar, *per se*; that is not how I define myself. I teach intellectual property, or "IP." I learned the need for caution when using legal acronyms around children the hard way. When I say "IP" out loud, I am referring to intellectual property, but a room full of young children, including my son, will misunderstand the phonetics (I pee) and find hilarious potty humor connotations.

In any event, although my teaching and practice have primarily dealt with intellectual property, I was identified for this panel because of some work I did in law school as a feminist legal scholar—I subsequently had little involvement with gender scholarship until a few years ago, when some colleagues prevailed upon me to participate in a symposium at the University of Kansas revisiting the article *Becoming Gentleman* by Lani Guinier,<sup>76</sup> to which I had contributed.<sup>77</sup> I was initially concerned that my focus on intellectual property law might be incompatible with the subject matter. I felt in some sense that, as someone who writes primarily in the intellectual property law field, I am not really a woman any more, in a scholarly sense. However, one of my co-panelists at the symposium affirmatively—and somewhat sarcastically—welcomed me back to

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Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 3, 373 (1995) (footnotes omitted); see also Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 585 n.105 (1997) (describing and citing to lesbian critiques of feminists and political activists); Frances Olsen, *Politics Without a Movement*, 22 CARDOZO L. REV. 1105, 1108 n.13 (2001) ("There is little reason to believe that the American feminist movement was any further advanced than the rest of society on issues of heterosexism than it was on issues of racism.").

75. See CHAMALLAS, *supra* note 8; Harris, *supra* note 14, at 34; Cleaver, *supra* note 14, at 52.

76. Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994) [hereinafter Guinier, *Women's Experiences*]. That article later evolved into a book: LANI GUINIER ET AL., *BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE* (1997) [hereinafter GUINIER, *BECOMING GENTLEMEN*]. For Professor Bartow's more recent article on this topic, see Ann Bartow, *Still Not Behaving like Gentlemen*, 49 U. KAN. L. REV. 809 (2001).

77. Lani Guinier writes that the research began when Ann Bartow, then a student in her third year at the University of Pennsylvania Law School, asked her to supervise an independent study project dealing with gender stereotypes. Guinier, *Women's Experiences*, *supra* note 76, at 6-9. As part of the research for that project, Ann surveyed her fellow students; the surprisingly gendered results of the survey inspired the resulting literature. *Id.*



feminist legal theory, knowing full well I'd never really left. She said, "One can find gender issues everywhere one looks."

I have found this observation to be true, even in intellectual property law and practice. For example, in copyright law, the invocation of stereotypes is generally an easy way to avoid infringement lawsuits. There is a copyright doctrine called *scenes a faire*, which says, basically, that stereotypes are out there for everybody to use; they can't be individually owned.<sup>78</sup> It is slightly ironic, because you would not necessarily think of copyright laws as enforcing stereotypes; but, in fact, a prudent lawyer would advise a client that using well known stock characters and stereotypes might prevent liability for infringement.<sup>79</sup>

I do not want to push anybody to think too hard this morning, especially the women in the audience with delicate reproductive organs that might be damaged if their brains are overtaxed.<sup>80</sup> However, in addressing briefly some of Carolyn's introductory remarks, when I look around at the world outside the United States, I cannot help but notice that feminism and

78. See *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763 (9th Cir. 2003) (finding the doctrine applicable to photographs of Skyy vodka bottles); Ivan Hoffman, *Scenes a Faire under Copyright Law* (2003), <http://www.ivanhoffman.com/scenes.html> (describing the *Ets-Hokin* case).

79. See *Gaiman v. McFarlane*, 360 F.3d 644, 659 (7th Cir. 2004) (finding that a "stock character is a stock example of the operation of the doctrine" of *scenes a faire* and therefore is not protected); *Atari Games Corp. v. Oman*, 888 F.2d 878, 886 (D.C. Cir. 1989) (stating that "[t]he term *scenes a faire* refers to stereotyped expressions, 'incidents, characters or settings which are as a practical matter indispensable, or at least standard, in the treatment of a given topic.'" (emphasis omitted) (citing *Alexander v. Haley*, 460 F. Supp. 40, 45 (S.D.N.Y. 1978))); *Sinicola v. Warner Bros.*, 948 F. Supp. 1176, 1190 (E.D.N.Y. 1996) ("Copyright . . . does not afford exclusive protection to the various themes, characters, and settings shared to some extent by the works and upon which plaintiff relies . . . . Similarities in the works as to these themes, characters, and settings are too general or trivial or are stereotyped expression amounting to unprotectible *scenes a faire*." (emphasis omitted)).

80. At one time, intellectual and political activity were widely believed to have detrimental effects on a woman's body and reproductive potential. Susan Marshall discusses the antifeminist argument against women's suffrage in the early 20<sup>th</sup> century:

[t]he erosion of separate spheres challenged scientific law, and *The Woman's Protest* published expert testimony that political activity would strain the delicate female nervous system and lead to infertility or defective offspring.

Susan Marshall, *In Defense of Separate Spheres: Class and Status Politics in the Antisuffrage Movement*, 65 SOC. FORCES 327, 334 (1986) (citing Julia D. Henry, *A Plea for Real Progress*, THE WOMAN'S PROTEST [3(2):3] (1913)). See also EDWARD H. CLARKE, *SEX IN EDUCATION: OR, A FAIR CHANCE FOR THE GIRLS* (1873). Echoes of this mindset can be found in modern critiques of women's participation in the public sphere; the idea remains that women must choose between children and work. For example, Mrs. Graglia writes:

[a] woman's ability fully to exercise and enjoy her reproductive capabilities depends on the breadwinner ethic. Without this ethic, she is forced to participate in marketplace activities that require her to curtail and diminish her reproductive accomplishments. To serve the interests of traditional women, therefore, it is necessary to revive the eroded breadwinner ethic.

GRAGLIA, *supra* note 21, at 156-57.

female employment are not always accompanied by the high rates of divorce and abortion that we experience here.<sup>81</sup> I want to quickly focus on abortion as one example. I believe that the high abortion rates in the United States have more to do with the unavailability of birth control or the lack of birth control education than the influence of feminism;<sup>82</sup> many other societies have addressed these issues more effectively than we have.<sup>83</sup> I also do not understand the link that is made between feminism and the

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81. U.S. divorce rates are among the highest in the world. See Marleen O'Connor-Felman, *American Corporate Governance and Children: Investing in Our Future Human Capital During Turbulent Times*, 77 S. CAL. L. REV. 1258, 1320 (2004) (“[T]he United States (1) has taken the most dramatic steps towards flexible labor markets and (2) has among the highest rates of divorce and women’s workforce participation.”). But see Louise Falconer, *The Mother Country and Her Colonial Progeny*, 7 L. TEXT CULTURE 149, 162 (2003) (noting that “Australia had a greater incidence of abortion than either the United States or the United Kingdom”). However, the relationship among the rates of women in the workplace, abortion, and divorce in any country are complex due to the interaction of law, culture, and religion. See, e.g., Margaret F. Brinig, *The Role of Socioeconomics in Teaching Family Law*, 41 SAN DIEGO L. REV. 177, 180-86 (2004) (illuminating the interaction between the divorce rate and various other socioeconomic forces); Jayanth Kumar Krishnan, *Public Interest Litigation in a Comparative Context*, 20 BUFF. PUB. INT. L.J. 19, 36-41 (2001-2002) (noting the complex relationship in Israel among law, culture, and religion in controlling women’s employment, abortions, and divorce); Joel Richard Paul, *Cultural Resistance to Global Governance*, 22 MICH. J. INT’L L. 1, 83 n.373 (2000) (“[G]ains to women in the marketplace often are not matched by legal reforms in the private sphere. For example, . . . Chile has guaranteed equal employment opportunities for women, but has resisted efforts to liberalize women’s reproductive rights and access to divorce.”).

82. See Sylvia A. Law, *Abortion Compromise—Inevitable and Impossible*, 1992 U. ILL. L. REV. 921, 938 (1992) (“expanded sex education and contraceptive availability surely could reduce the need for abortion”); Mary V. Rorty & Joann V. Pinkerton, *Elective Fetal Reduction: The Ultimate Elective Surgery*, 13 J. CONTEMP. HEALTH L. & POL’Y 53, 72 (1996) (“[E]very abortion represents a failure of contraception, education, or social support, and sometimes all three.”); Katherine C. Sheehan, *The Hand That Rocks the Cradle*, 32 U. TOL. L. REV. 229, 242 n.95 (2001) (“Improved education in contraception and reproduction might address some of the conditions that cause teenaged girls to need abortions after the eighth week of pregnancy.”).

83. See Maria Sophia Aguirre & Ann Wolfgram, *United Nations Policy and the Family: Redefining the Ties that Bind: A Study of History, Forces and Trends*, 16 BYU J. PUB. L. 113, 115 n.5 (2002) (“In the late 1990s, several Latin American countries introduced, and in some cases even approved, laws that quoted directly, or followed closely, UN international conferences of the 1990s. Examples of such laws include the sexual and reproductive health education programs in Nicaragua, Honduras, El Salvador, and Argentina.”); Elof D.B. Johansson, *Comparison of the Availability of Contraceptive Methods in Selected European Countries and the United States*, 23 N.Y.U. REV. L. & SOC. CHANGE 471 (1997) (describing then existing differences in the availability of contraceptives in the United States and various European countries); Sheldon Segal, *Introduction*, 23 N.Y.U. REV. L. & SOC. CHANGE 329, 329-30 (1997) (“It is widely recognized that American women have fewer contraceptive choices than European women.”). But see Terri E. Owens, Comment, *The Abortion Question: Germany’s Dilemma Delays Unification*, 53 LA. L. REV. 1315, 1323 (1993) (noting, with respect to the former Soviet Union, that “[t]he enormous scale of abortion is more a result of the unavailability of adequate contraception than any respect for the right of women to control their bodies”).

sexual revolution; I do not think that feminism tries to tell women what kind of sex to have or not have.<sup>84</sup>

I have one final observation, and it relates to women and law teaching. Before I first started teaching at the University of South Carolina, I had taught for two years at a different law school in the Midwest. When I arrived, I found the culture of South Carolina to be quite different. Although the school was ultimately a good fit for me, and I am now very happy to be there, my first semester was a little rocky. Somehow, I didn't seem to have the authority in the classroom that I'd had previously. One student in particular in the first class that I taught at South Carolina behaved arrogantly and disrespectfully and gave me a really hard time all semester. I was therefore quite surprised when he signed up for both of the classes I taught the following spring. Also, ironically enough, he graduated three years ago and still keeps in touch with me. In the first e-mail message that he sent to me, he said, "Professor, I don't know if you remember me." I certainly did.

Through our subsequent communications, I learned that he had been a science major at a small southern school with very few female professors and students. Even at our law school, he managed to get through two full academic years without having taken a class taught by any of the female law professors.<sup>85</sup> I was his first model of a woman teaching law, which

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84. The debate on this subject is as colorful as it is varied. Some feminists argue that women must liberate themselves from repressive sexual double standards (that allow promiscuity in men but not in women) in order to achieve true equality, rhetoric that was influential on many women's sexual decisions:

[i]n 1960, when the federal government approved the use of the birth control pill, the incipient sexual revolution shifted into higher gear. Growing numbers of unmarried women began to stake out their right to enjoy sex for pleasure rather than for procreation. Those who rebelled eagerly embraced their sexual freedom, happy to explore the pleasures of the body, and seduced by the hope that "free love" would lead to a fulfilling life.

RUTH ROSEN, *THE WORLD SPLIT OPEN: HOW THE MODERN WOMEN'S MOVEMENT CHANGED AMERICA* 55 (2000). Others have criticized the notion that equality ever can be found through heterosexual desire, which a lesbian feminist has defined as "eroticized power difference" that imprisons women in a sexual role defined by submission to men. Sheila Jeffreys, *Anticlimax, in WOMEN'S STUDIES: ESSENTIAL READINGS* 243, 243 (Stevi Jackson et al. eds., 1993). She argues that "[t]he demolition of heterosexual desire is a necessary step on the route to women's liberation." *Id.* Others have argued that individuals must be empowered to make their own sexual decisions, whatever those decisions might be. See, e.g., bell hooks, *Ending Female Sexual Oppression, in WOMEN'S STUDIES: ESSENTIAL READINGS, supra*, at 245 (arguing that "feminist activists committed to ending sexual oppression must work to eliminate the oppression of lesbians and gay men as part of an overall movement to enable all women (and men) to freely choose sexual partners").

85. Women then comprised and continue to comprise a minority of the full-time faculty at the University of South Carolina Law School. According to the official Web site of the University of South Carolina Law School, <http://www.law.sc.edu/faculty.shtml>, seven out of the 39 full-time faculty

may help explain our tension during that first semester. I think that I really taught him something during our classes together; not only did I teach him intellectual property law, but I also taught him that I *could* teach him intellectual property law. He went off to work at a large firm, where he interacted with female partners, co-workers and judges. I think that his positive experiences in my classes helped to acclimate him to the idea that women are capable of being competent professionals. Thank you.

**PROFESSOR HEMINWAY:** I thank our panelists for those important reflections, particularly regarding the interconnections between their work and their lives. I will begin the “Question & Answer” portion of the program with a brief discussion of the intersection of gender, law and consumerism. Ann, I want to focus first on trademark law. You submitted a draft paper for the Association of American Law Schools’ June 2003 workshop on *Taking Stock: Women of All Colors in Law School*.<sup>86</sup> In that paper, you suggest that courts adjudicating trademark actions may “perceive female consumers as especially easily confused”<sup>87</sup> and that “trademark holders intentionally or unconsciously exploit this bias when litigating trademark infringement and trademark dilution disputes.”<sup>88</sup> Can you briefly explain the thesis of your paper and its context?

**PROFESSOR BARTOW:** As an introduction, trademark law requires that the plaintiff’s lawyer must convince the fact-finder—a jury, or, more often, a judge—that consumers are likely to confuse two identical or similar products identified with the same or similar trademarks in order to establish an infringement claim.<sup>89</sup> After examining numerous cases, you

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members at the Law School during the 2004-2005 academic year were women. As of the 2005-2006 school year, women comprise twelve out of 44 full-time faculty members.

86. Ann Bartow, *Trademark Law and Gendered Confusion*, <http://www.aals.org/profdev/women/bartow.pdf> [hereinafter Bartow, *Trademark Law*]. A revised version of this paper later was published in the *San Diego Law Review*. See Ann Bartow, *Likelihood of Confusion*, 41 SAN DIEGO L. REV. 721 (2004) [hereinafter Bartow, *Likelihood*].

87. Bartow, *Trademark Law*, *supra* note 86, at 2. Professor Bartow explains that: [w]here the good or service is intuitively linked to women as primary purchasers and consumers, a trademark holder’s burden of convincing the court that another mark is likely to cause confusion (and is therefore infringing, or dilutive, or possibly both) empirically seems to be an easier one to meet in many cases.

*Id.* at 31. See also Bartow, *Likelihood*, *supra* note 86, at 779.

88. Bartow, *Trademark Law*, *supra* note 86, at 2.

89. Professor Bartow summarizes:

[T]rademark infringement occurs when one party adopts a trademark that is the same as or is so similar to an existing mark that, when it is applied to the second user’s goods or services, the purchasing public is likely to be confused, mistaken, or deceived about the source goods or services themselves, or about the relationship between the parties that make the goods or provide the services.

*Id.* at 16 (citing 15 U.S.C. § 1114(1)).

begin to notice disparities in the jurisprudence that can play out in several different ways. For example, wealthy people are considered to be less easily confused than poor people when it comes to their spending. This perception reflects the stereotype that affluent or free-spending individuals pay greater attention to their purchases and are therefore less likely to be susceptible to trademark confusion.<sup>90</sup> While this may be true, I also entertain the contrary possibility that individuals with limited financial resources would have reason to be even more conscious of their spending.

Many products, such as health and beauty aids, are extensively marketed to women, particularly those with children. Trademark holders use the perception of women as rushed and undiscerning to their advantage in trademark litigation. For example, a mark holder might argue that a customer, perhaps distracted by a sick, screaming child, quickly scanning the shelves of a drug store for Tylenol, might not automatically distinguish between Tylenol and the somewhat similarly packaged medication Tempenol.<sup>91</sup> Because courts have shown a tendency to treat female consumers in a paternalistic manner, the fact that this product would be directed towards women and purchased by women, would likely play a role in the court's assessment of the likelihood of confusion.<sup>92</sup>

Interestingly enough, the genesis of this paper was unrelated to gender. It was first inspired by the curiosity of my students during the first semester I taught Trademark Law. We used a wonderful case book by Jane Ginsburg and Jessica Litman<sup>93</sup> that discusses a case that gratuitously made fun of Southerners. Instead of addressing the facts of the case, the opinion digressed into an insulting analysis of whether or not Southerners are capable of possessing a discriminating taste for wine, concluding that the court was taking "judicial notice" of the fact that "it would seem common knowledge that wine was not a widely appreciated beverage in the South in 1959."<sup>94</sup> My students, recognizing that the judge's apparent bias against Southerners affected judicial treatment of the legal issues, asked me what

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90. See Bartow, *Likelihood*, *supra* note 86, at 772.

91. See *McNeil Consumer Brands, Inc. v. U.S. Dentek Corp.*, 116 F. Supp. 2d 604 (E.D. Pa. 2000) (raising these facts); Bartow, *Likelihood*, *supra* note 86, at 787-88.

92. Professor Bartow's case studies indicate that courts consider people who wear finger nail polish, grocery store patrons, handbag carriers, analgesic buyers, mall shoppers, and designer jeans purchasers much more easily confused than people who access Internet pornography, buy luxury cars, work with industrial coatings, follow NASCAR racing, maintain computer networks, eat out at a "House of Brews," or review mailings from trade associations.

Bartow, *Trademark Law*, *supra* note 86, at 42-43.

93. JANE C. GINSBURG ET AL., *TRADEMARK AND UNFAIR COMPETITION LAW* (3d ed. 2001).

94. *E. & J. Gallo Winery v. Consorzio del Gallo Nero*, 782 F. Supp. 457, 465 (N.D. Cal. 1991).

this Southern stereotype had to do with the case. I replied that it had no relevance at all. We began bringing in other cases for closer examination, many involving gender bias. We found a wide range of biases that appeared to be influential in court decisions even though gender overtly had nothing to do with the case facts. We subsequently examined the effects of a range of biases on courts' likelihood of confusion determinations.<sup>95</sup> I ultimately compiled this material into an article.<sup>96</sup>

**PROFESSOR HEMINWAY:** Deseriee Kennedy also has examined the relationships among gender, race and the consumer marketplace, although from a different vantage point. Deseriee, could you elaborate on your scholarship in this area?

**PROFESSOR KENNEDY:** I write about hierarchies of power and privilege and the role of key organizing institutions in U.S. society. I have particularly focused on the commercial marketplace because, in addition to its economic importance, it involves an interesting interchange of cultural influences. While many economic theorists assert a rationality in business that would discourage discrimination based on gender, race, or ethnicity,<sup>97</sup> discrimination continues to be prevalent.<sup>98</sup> In my recent work, I have been looking at ways in which discriminatory behaviors manifest themselves in the marketplace and how effective law and legal institutions have been in responding to discrimination.<sup>99</sup> My work specifically examines ways in which the law influences advertising and how advertising subsequently

95. Professor Bartow explains that such biases can play important roles in the judge's decision because, "[i]n assessing whether confusion is likely, judges are relatively free to base their findings on their purely subjective reactions." Bartow, *Likelihood*, *supra* note 86, at 763.

96. Bartow, *Likelihood*, *supra* note 86.

97. See Jane Friesen, *Alternative Economic Perspectives on the Use of Labor Market Policies to Redress the Gender Gap in Compensation*, 82 GEO. L.J. 31, 34-35 (1993) (briefly summarizing these theorists and their theories); Oscar H. Gandy, Jr., *Legitimate Business Interest: No End in Sight? An Inquiry into the Status of Privacy in Cyberspace*, 1996 U. CHI. LEGAL F. 77, 130 n.211 (1996) ("Neoclassical economists have argued that racial discrimination in the labor market represents an irrational personal preference that would, under optimal conditions, be punished by the marketplace and would therefore be extinguished as an effective social force."); Robert E. Thomas & Bruce Louis Rich, *Under The Radar: The Resistance of Promotion Biases to Market Economic Forces*, 55 SYRACUSE L. REV. 301, 302 n.1 (citing sources supporting this contention).

98. See generally Derek M. Alphan, *Proving Discrimination After Croson and Adarand: "If It Walks Like a Duck,"* 37 U.S.F. L. REV. 887, 891-92 (2003) ("Race and gender discrimination continues to permeate the business and construction markets, and local jurisdictions, as well as the federal government, should not be powerless to act to eradicate it."); Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489 (2005) (describing and analyzing various studies showing racial bias); Michael Selmi and Naomi Cahn, *Caretaking and the Contradictions of Contemporary Policy*, 55 ME. L. REV. 289, 310-12 (2003) (describing continuing labor force discrimination against women).

99. Deseriee A. Kennedy, *Marketing Goods, Marketing Images: The Impact of Advertising on Race*, 32 ARIZ. ST. L.J. 615 (2000).

influences culture. For example, an article that I wrote examines whether marketing images exploit race and gender stereotypes in order to affect the marketplace and influence culture.<sup>100</sup> I have examined this subject from a historical perspective, analyzing the ways that advertisements were used to sell black people during the antebellum period, and how racist stereotypes were later used to sell a variety of products and services, including soap and rice.<sup>101</sup> An evaluation of history has revealed many other egregious forms of racial and gender stereotypes. I found that contemporary use of stereotypical images of people of color and women is often much more subtle, but no less powerful.<sup>102</sup> I also evaluated ways that such manipulative images feed into our basic assumptions about how the world works and how people interact.<sup>103</sup>

Another paper examines the impact of consumer discrimination—the disparate treatment and increased surveillance of people of color—in the consumer marketplace.<sup>104</sup> This issue has recently received attention in the news due to the alleged discriminatory practices at Macy's and Bloomingdale's department stores.<sup>105</sup>

Most recently, I have been researching protests in the Niger Delta against multinational oil companies drilling in the area. A sizable portion of the world's oil comes from Africa, and Nigeria produces large quantities of oil. Many multinational oil companies operate in small rural communities in countries, like the Niger Delta, that have experienced serious political unrest.<sup>106</sup> The local communities subsist under desperately poor conditions and have few political tools at their disposal. The region

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100. *Id.*

101. *Id.*

102. *See id.* at 648-49.

103. *Id.* at 619-23, 649-60.

104. Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275 (2001).

105. *See, e.g.,* Andrea Elliott, *Suit Accuses Macy's of Bias Against Minority Shoppers*, N.Y. TIMES, May 21, 2003, at B3 (noting "more than two dozen . . . people with similar claims of discrimination at Macy's and Bloomingdale's stores"); *Statistical Evidence and Use of Race-Codes Confirms Policy of Racial Discrimination at Macy's Nationwide*, PR NEWSWIRE, June 3, 2003, available at LEXIS, News & Business library, News file.

106. Nigeria won its independence in 1959, but the new government was plagued with corruption and serious political violence and was toppled by a military coup in 1966. ROBERT COLLIS, NIGERIA IN CONFLICT 105, 128, 137, 139-41, 182 (1970). Periods of military rule followed, in which the country was "hobbled by political instability, corruption, inadequate infrastructure" and a serious debt crisis. Central Intelligence Agency, *The World Factbook: Nigeria* (2004), available at <http://www.cia.gov/cia/publications/factbook/geos/ni.html>. In 1999, a new constitution was adopted and "a peaceful transition to civilian government was completed," although the new leadership faces ethnic and religious conflicts as well as economic instability. *Id.*

has witnessed severe environmental degradation and human rights violations.<sup>107</sup> Women of all ages from the community have joined together to protest against ChevronTexaco's conduct in their community. At one event, in a display of active feminism and environmentalism, the women prevented men from coming or going to work by threatening to remove their clothes. This was a traditional way of shaming Nigerian men; a man who saw a woman naked in public would be cursed forever.<sup>108</sup> They were compelled to get involved because the Nigerian police and military were systematically arresting and killing the men who protested. By using their own bodies, these women effectively prevented a multinational corporation from operating locally for about a week.<sup>109</sup>

ChevronTexaco eventually negotiated with these women and granted modest, yet important, concessions, such as jobs for the men in the community, schools and opportunities for people to work and to improve their quality of life. I find this story particularly compelling because these women in this community had so little power and had so few resources at their disposal to combat this serious situation. However, these women were afforded a degree of protection based on their womanhood and femininity and were able to use that advantage to influence the marketplace. This story demonstrates the two-way interaction of women and people of color in the commercial marketplace.

**PROFESSOR HEMINWAY:** This research highlights another of your areas of interest. Could you comment on the intersection of social and economic structural institutions with feminism, gender, or racism?

**PROFESSOR KENNEDY:** A key organizing institution is the workplace, and I am interested in exploring the degree to which feminism, feminist legal theory and other critical legal scholarship should focus on women as workers in order to narrow the wage gap, break the glass ceiling and ease the work-family conflict.<sup>110</sup> For example, to what extent should workplace institutions be reorganized to meet the needs of parents and

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107. According to Amnesty International, "the non-fulfillment of economic, social and cultural rights of Nigerians is found particularly pronounced in the Niger Delta." Amnesty International, *Human Rights & Oil in Nigeria* (2004), available at <http://web.amnesty.org/library/Index/ENGAFR44023004>.

108. See Niger Delta Women for Justice, <http://www.ndwj.com> (last visited Aug. 23, 2005); Sokari Ekine, *Women in the Niger Delta: Violence and Struggle* (1999), available at <http://www.ndwj.kabissa.org/ArticlesResearch/Sok1/sok1.htm#ViolenceStruggle>.

109. See Ekine, *supra* note 108.

110. See ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (1989) (discussing the work-family conflict); HOOKS, *supra* note 3, at 48-54.



female workers?<sup>111</sup> Feminists and workers shouldering the burden of parenthood, or caring for their own parents, raised awareness of the need for increased flexibility of the workplace for employees with family responsibilities.<sup>112</sup> The most public manifestation of this increased awareness has been the Family and Medical Leave Act.<sup>113</sup> Passed under the Clinton administration, this law, although not without limitations, provided additional flexibility for workers with family responsibilities.

**PROFESSOR HEMINWAY:** Mrs. Graglia's perspective on the contemporary American workplace is quite different. I want to ask her to describe her views on what she refers to as the "feminization" and "domestication" of the workplace.

**MRS. GRAGLIA:** I want to make the point that feminists often attempt to make their workplace more like a home, rather than treating it as a professional environment. Far too many women have been pushed into the workplace and are very unhappy with their surroundings. Because they have to leave their families, these women try to recreate something like a home in their workplaces. This phenomenon is well illustrated in an article that Jane Tompkins wrote for *Change* magazine while she was a tenured professor of English at Duke University.<sup>114</sup> She describes her sense of loneliness and alienation in the University setting:

I've just come back from a walk down the corridors outside my university office . . . . I'm looking for someone to talk to. But, with only one exception, there are no professors in the offices I've just walked by. The secretary I usually talk to has left for the day . . . . Another is on leave-of-absence. A third is busy—I can hear her voice in the hall. So I walk back to my office, deflated. A momentary disappointment but the roots go deep. For some time now I've been restless and dissatisfied with my life in the university, hungry for some emotional or spiritual fulfillment that it doesn't seem to afford. I crave a sense of belonging,

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111. See generally Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989); Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79 (1989).

112. Feminists have varying reactions to flexible work arrangements. See Maria O'Brien Hylton, "Parental" Leaves and Poor Women: Paying the Price for Time Off, 52 U. PITT. L. REV. 475, 478 n.14 (1991) (discussing "special treatment" vs. "equal treatment" arguments). Some feminists have argued that flexible work arrangements focusing on women merely perpetuate the stereotypical role of women as caregivers. See *id.*; Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 475 n.21 (1990).

113. 29 U.S.C. §§ 2601-2654 (2000).

114. Jane Tompkins, *The Way We Live Now*, CHANGE, Nov. 1992, at 13. *Change* magazine is published by the American Association of Higher Education.

the feeling that I'm part of an enterprise larger than myself, part of a group that shares some common purpose.<sup>115</sup>

She then goes on to explain that:

[the workplace] is conceived as the opposite of home and what home is good for: love, safety, feeling relaxed and at ease. You gird your loins to go to work, as if you were going to battle. Getting dressed really is dressing to kill—or to defend yourself. I wanted to be treated like a guest in someone's house, when in reality, though I didn't know it, I was joining the army.<sup>116</sup>

She concludes, "In retrospect, it strikes me that behind my lament for lost companionship lies a dream of perfect unity—a workplace *paradiso*, a society of loving friends, caring and being cared for, that never was on land or sea."<sup>117</sup> This woman has apparently devoted her life to her career. She may not have had children and is now looking for love in all the wrong places, distorting the workplace to meet her personal needs. She is suffering, and I feel sorry for her. Her article was very eloquent and well written, but I think that she should have recognized the workplace for what it is before she built a life around it. This article illustrates what I mean by the attempt to "domesticate the workplace."

Ann Bartow wrote a piece called *Still Not Behaving like Gentlemen*.<sup>118</sup> I got a lot out of this article, but I have many questions and disagree with her interpretations and conclusions. In that article, Ann said that in the law firm where she worked, the "party crowd" was largely women.<sup>119</sup> She explained that women got together to celebrate birthdays and anniversaries, exercised together and hung out together.<sup>120</sup> Based on her description of women workers, I concluded that if I were hiring for a law firm, the last thing I would do would be to hire a woman. In a workplace, employees are supposed to be working, not exercising, celebrating birthdays, or hanging out together.<sup>121</sup> She also wrote that these women usually do not become

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115. *Id.* at 13. She would prefer an atmosphere that "anticipated people's needs and met them in advance" and "made people feel important and cared for." *Id.* at 14.

116. *Id.* at 17.

117. *Id.* at 19.

118. Bartow, *supra* note 76.

119. *Id.* at 820.

120. *Id.*

121. In her article, Professor Bartow explains that women were not the only lawyers at the firm participating in the social activities. "Men were often included" in the gatherings and activities, although "the primary group organizers were women; wonderful, strong, interesting women I was (and am) proud to call friends." *Id.*

partner.<sup>122</sup> Many did not even want to become partner because of the time it would take away from their families.<sup>123</sup> I think that her description does a disservice to the women who put in the hours and are able and willing to make partner. Women who want to be in the “party crowd” should look for a different type of job.

**PROFESSOR HEMINWAY:** Ann, would you like to comment briefly on those observations?

**PROFESSOR BARTOW:** Yes. The exercise activities and birthday celebrations I described in my article took place on nights and weekends, not during the workday. I routinely billed between fifty and eighty hours a week, and my evaluations were quite positive. I am confident that I did a very good job for my clients. In addition, many men at that firm were not interested in making partner. Partners do make a lot more money, but they do not necessarily lead enviable lives. Partners at law firms have stunning rates of alcohol and substance abuse, as well as divorce,<sup>124</sup> perhaps because they have to work so many hours to be successful; however, that is another topic.

**PROFESSOR HEMINWAY:** Earlier, we had been talking about structures and consumerism in the marketplace because of Deseriee’s provocative comments. Ann also discussed how her article on consumerism developed from classroom discussions. Deseriee, have you brought any of your scholarship in this area to the classroom, and, if so, how?

**PROFESSOR KENNEDY:** I have given a lot of thought to this issue. While I am teaching, I do not directly bring up my personal research. However, I approach issues from a critical and interdisciplinary perspective, which shows through in my teaching style. I want to introduce my students to both theory and factual material to which they might not otherwise be exposed. I encourage them to think for themselves about how new ideas are interconnected within a broader framework.<sup>125</sup> I believe that

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122. *Id.*

123. *Id.*

124. *See, e.g.,* Stephen Hunt, *Lawyers Helping Lawyers An Option for Help*, SALT LAKE TRIB., Nov. 26, 2004, at B3 (“[W]hile about 10 percent of the general population has substance-abuse problems, 18 percent of lawyers and judges battle drug and alcohol abuse.”); *Legal Warriors Who Win in Court May Lose in Love, Says Psychologist in a New Book on Lawyer Relationships*, PR NEWSWIRE, Feb. 9, 2004, available at LEXIS, News & Business library, News file (“The divorce rate among male lawyers is among the highest in all professions, and the rate of marriage among women lawyers is among the lowest.”).

125. Professor Kennedy writes that:

Paulo Freire has the right idea in *Pedagogy of the Oppressed*,<sup>126</sup> when he talks about each of us having to be critically engaged in our own education.<sup>127</sup> Accordingly, I feel a responsibility to ensure that my students are critically engaged with the material I bring to class.

Engaged and critical analysis is central to a progressive and practical feminism that acknowledges difference.<sup>128</sup> I believe that feminism involves women thinking for themselves and making their own decisions about how to best order their lives. The stories that Carolyn tells are compelling and real. However, they are about individuals who are free to write about their unhappy lives. Because they do not address the lives of women who work not out of whim but out of economic necessity, lesbians, or women of color, they fail to address women as a group. Such a narrow perspective cannot encompass or define feminism as a whole. Moreover, her perspective fails to examine institutional or structural dimensions of women and work.

Feminist legal theory has had a significant impact on law. Its influence can be witnessed throughout our legal history; it is everywhere.

**MRS. GRAGLIA:** They won. They won.

**PROFESSOR KENNEDY:** I do not think it is a matter of winning or losing. Feminist theory is about empowering women. Consider feminism from a historical perspective. Without the efforts of women, the movement for the abolition of slavery likely would not have progressed as quickly as

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[s]tudents, even those otherwise privileged by education and position, often feel overwhelmed and powerless. Legal education must, at a minimum, empower students and teach them to empower others through legal discourse and precedent, legal process and social action. Legal education can equip students to confront systems of oppression, injustice, and inequity.

Desiree A. Kennedy, *Witnessing the Process: Reflections on Civil Procedure, Power, Pedagogy, and Praxis*, 32 LOY. L.A. L. REV. 753, 755 (1999).

126. PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* (Myra Bergman Ramos trans., 1970).

127. Dr. Freire is critical of the traditional narrative style of education.

The teacher talks about reality as if it were motionless, static, compartmentalized, and predictable. Or else he expounds on a topic completely alien to the existential experience of the students. His task is to “fill” students with the contents of his narration—contents which are detached from reality, disconnected from the totality that engendered them and could give them significance.

*Id.* at 57. “[K]nowledge is a gift bestowed by those who consider themselves knowledgeable upon those whom they consider to know nothing.” *Id.* at 58. Because “[k]nowledge emerges only through invention and re-invention, through the restless, impatient, continuing, hopeful inquiry men pursue in the world, with the world, and with each other,” Dr. Freire argues in favor of increased critical and creative cooperation between teachers and students, to the point that “both are simultaneously teachers and students.” *Id.* at 58-59.

128. See, e.g., CHAMALLAS, *supra* note 8; Harris, *supra* note 14, at 34.

it did.<sup>129</sup> Women fought very hard for suffrage in the early 20<sup>th</sup> century; the issue was highly contentious at that time, and frontline feminists faced serious acrimony and hostility.<sup>130</sup> Typically middle-class and white, these women marched in the streets and were dragged to jail, where they were force fed and locked away with rats.<sup>131</sup>

Feminist voices have been influential in other social issues as well. Much of the protective legislation related to employment is a result of the work of gender and race advocates.<sup>132</sup> We would not have the forty-hour work week<sup>133</sup> or other labor benefits like parental leave<sup>134</sup> without feminist efforts to protect women in the workplace. Feminist thought and action have had long and distinguished histories that reach far beyond the concerns of some individual women who are unhappy in the workplace. I think that the plight of these women says more about the workplace than feminism because many men are also unhappy there.<sup>135</sup> One of the first

129. Although abolitionist women were somewhat limited by their lack of political power, "scores of women, many of them relatives of male abolitionists, organized female antislavery societies throughout the Northeast" to challenge the injustices of slavery. HYMOWITZ & WEISSMAN, *supra* note 8, at 79-80. Women like Sarah and Angelina Grimke were "[d]riven by moral necessity to testify against slavery" and joined with other radical abolitionists to work for emancipation; it was estimated that the sisters' "sincerity won 25,000 converts to the abolitionist crusade in a single year." *Id.* at 80-82. Harriet Tubman, an escaped slave herself, was a powerful force in the underground railroad, freeing at least three hundred slaves during her nineteen trips between the South and the North. *Id.* at 58.

130. See REBECCA J. MEAD, *HOW THE VOTE WAS WON, WOMAN SUFFRAGE IN THE WESTERN UNITED STATES, 1868-1914* (2004). Although suffragists faced substantial barriers, those women worked tirelessly to overcome them. See DORIS STEVENS, *JAILED FOR FREEDOM* (1920) (a firsthand account of the suffragists' struggles, setbacks, and ultimate victory in their fight for the vote).

131. See STEVENS, *supra* note 130, at 96-142 (describing the suffragists' picketing campaigns, their arrest, and the conditions at the Occoquan workhouse). Doris Stevens writes that many imprisoned suffragists faced "the miserable and petty tyranny of the government workhouse at Occoquan," where, "at the end of the first week of detention[,] they became so weak from the shockingly bad food that they began to wonder if they could endure such a system." *Id.* at 141-42.

132. See STETSON, *supra* note 34, at 221-22 (discussing women's rights and protective employment laws).

133. By 1900, five million women were earning wages in the workforce; many were employed in the nation's emerging factories where they faced terrible working conditions and unequal wages. HYMOWITZ & WEISSMAN, *supra* note 8, at 234-43. Women and children often worked ten to twelve hours a day in uncomfortable and dangerous conditions. *Id.* at 239. In response to workplace injustice, many women looked to the left wing of the labor movement and joined industrial unions. *Id.* at 245. Women workers took to the picket lines to demand important changes, such as an end to child labor, an eight-hour work day, and improved working conditions. See generally MARTHA JANE SOLTOW & MARY K. WERY, *AMERICAN WOMEN AND THE LABOR MOVEMENT, 1825-1974: AN ANNOTATED BIBLIOGRAPHY* (2d ed. 1976).

134. See *supra* note 112 and accompanying text.

135. See Trevor S. Blake, *You Get What You Pay For: A New Feminist Proposal for Allocating Marital Property upon Divorce*, 4 GEO. J. GENDER & L. 889, 909 (2003) (referencing the work of Professor Barbara Stark and noting that it "suggests that both men and women are unhappy with

cases under the Family and Medical Leave Act<sup>136</sup> was brought by a man who wanted to fight for the right to take time off to spend with his child.<sup>137</sup> His boss informed him that a man could not take child leave unless his wife was dead or hospitalized. The message was clear: the home is no place for a man. On the contrary, I think that the home is a perfect place for many men.

**PROFESSOR HEMINWAY:** I want to move into the area of individual rights and family law, subjects that are inevitably linked with gender. This discussion actually may consume the majority of our remaining time. Carolyn, is feminism not about structuring our laws and society to better ensure that women have the rights and abilities to live their lives as they choose? Is it not all about having individual choices?

**MRS. GRAGLIA:** Absolutely not. The last thing that contemporary feminism, which began in the 1960s, is about is giving choices to all women.<sup>138</sup> This new brand of feminism does not want to give women the choice to be homemakers. It is not appropriate to talk about the feminists who worked for abolition as feminists in the contemporary context. These women were social feminists and cultural feminists,<sup>139</sup> completely distinct from the career-oriented feminism that dominates the contemporary women's movement.<sup>140</sup> Social feminists accomplished a great thing by helping to abolish slavery.<sup>141</sup> The women who fought for the right to vote were feminists of a similar type.<sup>142</sup> The great suffragists, like Elizabeth

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society's imposition of gendered norms in the home and market"); Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479, 1499 (2001) ("Traditional working fathers complain about missing out on the 'new fatherhood.' Fathers who try to participate more in childcare complain that they are discriminated against at the workplace as well as at the playground." (footnotes omitted)).

136. 29 U.S.C. §§ 2601-2654 (2000).

137. *Knussman v. Maryland*, 935 F. Supp. 659 (D. Md. 1996). See also Martin H. Malin, *Fathers and Parental Leave*, 72 TEX. L. REV. 1048-55 (1994).

138. See Steinem, *supra* note 59, and accompanying text.

139. Cultural feminists embrace the idea of gender difference (although they often disagree on whether the differences are inherent or learned) and believe that traditional "feminine" values of nurturing and cooperation are beneficial and necessary to families, government, and society. Jan Jindy Pettman, *Gender Issues*, in *THE GLOBALIZATION OF WORLD POLITICS* 582, 586-87 (John Baylis & Steve Smith eds., 2d ed. 2001).

140. Modern examples of cultural feminism certainly do exist; educational psychologist Carol Gilligan, for example, examines differences in the ways that males and females approach problem-solving and concludes that women make moral decisions by different standards than men. CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982). But see POLLITT, *supra* note 65, at 49 (critiquing the cultural feminist perspective).

141. See *supra* note 129 and accompanying text.

142. At that time, the women's movement was split by issues of race and slavery, as well as class. However, some female abolitionists were concurrently drawn to the cause of women's emancipation.

Cady Stanton, opposed abortion and were saddened by working women;<sup>143</sup> they are markedly distinct from modern feminists.<sup>144</sup>

I am talking about what feminists began saying in the 1960s. You say that feminism is all about choice. Well, the intellectual touchstone of contemporary feminism is the work of Simone de Beauvoir, who argued that women should not be authorized to stay at home to raise their children. Feminists do not want to offer women that choice precisely because if there is such a choice too many women will make that one.<sup>145</sup> That tenet underlies the contemporary feminist efforts to implement no-fault divorce in all fifty states, which makes the position of the homemaker so economically and socially perilous that some women feel forced to enter the workplace.<sup>146</sup> The connection is undeniable.<sup>147</sup>

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For example, much to the chagrin of abolitionist men, the Grimke sisters drew relevant parallels between the enslavement of blacks and the oppression of women and incorporated freedom for all human beings, including women, into their antislavery rhetoric. HYMOWITZ & WEISSMAN, *supra* note 8, at 82.

143. It was the social feminists of the New Deal, led by President Franklin Roosevelt's Secretary of Labor, Frances Perkins, and Mary Anderson of the Women's Bureau, who fought so successfully for securing a "family wage" for male heads of household. Their goal was a family wage adequate enough to spare mothers from working and children from the day care that social feminists rejected "as a general custom," believing it to be acceptable only as a temporary solution in emergencies. GRAGLIA, *supra* note 21, at 104-05.

144. There has never been a unified feminist perspective at any point, although the conflicts and issues facing first-wave feminists are remarkably similar to those addressed by more modern feminists, and the antifeminist presence has been constant. Ann Crittenden, for example, identifies a longstanding and continuing disagreement faced by feminists from all generations:

[A]t the turn of the twentieth century, the women's movement contained two contradictory strands: one that denigrated women's role within the family, and one that demanded recognition and remuneration for it. The first argued that only one road could lead to female emancipation, and it pointed straight out of the house toward the world of paid work. The second sought equality for women within the family as well and challenged the idea that a wife and mother was inevitably an economic "dependent" of her husband. For the rest of the twentieth century, the women's movement followed the first path, and it led to innumerable great victories. But in choosing that path, many women's advocates accepted the continued devaluation of motherhood, thereby guaranteeing that feminism would not resonate with millions of wives and mothers.

CRITTENDEN, *supra* note 59, at 63.

145. See *Dialogue*, *supra* note 37, at 18 (paraphrase of quote from de Beauvoir).

146. See *supra* notes 34-38 and accompanying text.

147. DANIELLE CRITTENDEN, *WHAT OUR MOTHERS DIDN'T TELL US* 133 (1997) (discussing the fact that many mothers feel they must work because of the "greater prospect of divorce"). Many individuals have critically examined this purported connection. See Kay, *supra* note 20, at 78; HOOKS, *supra* note 3, at 49-50 (explaining that consumer capitalism, not feminism, has made it necessary for families to have two wage earners). Although economic necessity requires some women to work, in particular single and divorced women, the vast influx of women into the workplace is not solely the result of economic necessity. See GRAGLIA, *supra* note 143, at 71-79; ELIZABETH WARREN & AMELIA WARREN TYAGI, *THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS AND FATHERS ARE GOING BROKE* (2003) (concluding that although the average two-income family today earns far more than the

When I testify in support of divorce reform, feminist lawyers come to testify against it. When I describe the realities of women who are suffering, these lawyers, as well as academic feminists, say that it is not in a woman's interest to become financially dependent on her husband; she should be in the workplace. They say that protecting the position of housewives is merely a disservice to them because women do not really want—or in feminists' view should not want—to be home with their kids all day.<sup>148</sup> This is the core of the feminist message.

Feminists will show their commitment to real choices for women when family law feminists begin testifying for divorce reform and working to protect women who choose to stay home. As of now, feminists are on the other side. Professor Herma Hill Kay staunchly defends the California no-fault divorce laws. Although she concedes that “many couples still choose to follow the traditional allocation of family functions by sex,” Professor Kay rejects their choice because she believes that women should “recognize that their unique role in reproduction ends with childbirth” and that they should “lead productive, independent lives outside the family.”<sup>149</sup> She argues for retention of no-fault divorce laws because they support this goal.

In the long run . . . I do not believe that we should encourage future couples entering marriage to make choices that will be economically disabling for women, thereby perpetuating their traditional financial dependence upon men and contributing to their inequality with men at divorce.<sup>150</sup>

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single breadwinner family of a generation ago, once they have paid all the bills, today's dual-income family has less discretionary income and less to save). *But see* sources cited *infra* note 193.

148. *See, e.g., supra* notes 42-50 and accompanying text (quoting Anne Taylor Fleming on this issue).

149. Kay, *supra* note 20, at 78, 84-85. Professor Kay elaborates her view that all childrearing responsibilities should be shared equally.

Episodic analysis offers such a strategy by permitting mothers to recognize that their unique role in reproduction ends with childbirth. It allows fathers to see themselves as essential to the child's nurturance and development. With the help of this insight, men, like women, should be able to draw an important aspect of their self-esteem and identity from their parental roles. Women, like men, should be able to lead productive, independent lives outside the family. Female dependency should no longer be the necessary result of motherhood.

*Id.* at 84-85 (footnote omitted).

150. *Id.* at 80. Professor Kay encourages shared parenting, “emphasizing the bright line that separates the unique female tasks of pregnancy and childbirth from the common male and female responsibility” of childrearing. *Id.* at 81. *See generally*, NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* 205-09, 216-19 (1978) (arguing that children, particularly boys, would reap important benefits from a more involved male role model).



How can anyone argue that this perspective supports choice? Maybe individual feminists personally do, but the leaders of the movement clearly do not.

**PROFESSOR HEMINWAY:** I believe that the other two panelists perceive feminism a bit differently. Can either of you comment on Carolyn's perspective on feminism?

**PROFESSOR BARTOW:** I want to take a quick poll. How many people in the audience know women who stay at home with their children for at least a few years? Anyone at all? How many feminists came and harassed those women to go back to work? I am simply flabbergasted that anyone would suggest this regularly occurs.

Can anyone name any state legislature that had a feminist majority when these divorce reforms were being enacted? We live in at least a marginally democratic society; if the majority of people are interested in divorce reform, for whatever reason, they have every right to express their opinions and work to change divorce laws. If the majority of people want them changed, I presume they will be.

**MS. HEMINWAY:** I know that Deseriee teaches family law and has her own views on no-fault divorce. I would be interested in hearing her views on this issue.

**MS. KENNEDY:** Well, I have a couple of comments. Carolyn very nicely hit upon the point I want to make when she identified distinctions between schools of feminism like cultural and social feminism. By acknowledging these distinctions, she helps to define feminism as a broad and diverse movement that historically has taken on a number of important fights.<sup>151</sup>

In the context of divorce, custody and support, studies do not necessarily show that no-fault divorce is the *cause* of the high divorce rate.<sup>152</sup> After no-fault divorce became the law of the land in the United States, we did witness a dramatic increase in the number of divorces.<sup>153</sup> Those rates, however, have decreased and leveled out in the years since then, which may indicate that the problem does not necessarily lie with the increased flexibility of divorce laws; these laws may have simply helped to

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151. See RAMAZANOGLU, *supra* note 1.

152. See Ellman, *The Misguided Movement to Revive Fault Divorce*, *supra* note 25.

153. *Id.*

facilitate the separation of many couples who should not have gotten married in the first place.<sup>154</sup>

A primary problem with divorce law involves the way property is held in the United States, because the economic disparities result in a highly unequal distribution of power. Divorced women are in dire straits not because they are divorced, but because divorce plunges them into poverty, a phenomenon that has many cultural causes.<sup>155</sup> Women continue to face inequity in the workplace; we have a system in which women still make seventy-six cents to every dollar that men make,<sup>156</sup> a reality that reflects the lower wages that women receive as well as the fact that women often assume more family responsibilities than men and therefore may work less.<sup>157</sup>

Also, to a large extent, much of the work that women do both in the workplace and in the home is devalued.<sup>158</sup> For example, many of us could not afford to hire someone to perform the services of a homemaker. All of the work that Carolyn is doing at home is incredibly valuable to our society, but she receives no wages for it.

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154. *Id.* See also sources cited *supra* note 25. Paul Amato and Alan Booth explain that a weakening of the “barriers to divorce” (“more tolerant community attitudes, the introduction of no-fault divorce laws in all fifty states, and the growing economic independence of women”) has made it easier for individuals “to leave unhappy marriages.” AMATO & BOOTH, *supra* note 36, at 11.

155. Ann Crittenden examines the effects of property division, alimony, and child support upon divorced spouses. CRITTENDEN, *supra* note 59, at 149-85. Johanna Brenner notes that [t]he feminization-of-poverty literature often assumes that women of all races and classes have a common destiny as poor single heads of families following divorce or widowhood. It is true that generally women’s standard of living declines after divorce, while their ex-husbands’ standard of living rises. But relative deprivation is not impoverishment. Some women—for example, those with more affluent ex-husbands, those employed during marriage, and those with marketable job skills—are less likely to end up poor or near-poor. BRENNER, *supra* note 34, at 106 (footnotes omitted). Professor Herma Hill Kay attributes much of the post-divorce gendered inequality to traditional divisions of labor, see *supra* notes 152 & 153 and accompanying text, and accordingly proposes a gender-neutral approach to workplace and household labor as an important part of a solution to this situation. Kay, *supra* note 20, at 89-90.

156. Institute for Women’s Policy Research, *Fact Sheet #C353: The Gender Wage Gap: Progress of the 1980s Fails to Carry Through* (2003), available at <http://www.iwpr.org/pdf/C353.pdf>.

157. RANDY ALBELDA & CHRIS TILLY, GLASS CEILINGS AND BOTTOMLESS PITS: WOMEN’S WORK, WOMEN’S POVERTY 4-5 (1997); HOCHSCHILD, *supra* note 110, at 3-4, 8-10 (estimating that married working mothers, compared to their husbands, spend an average of an extra month of work each year when daily household responsibilities and child maintenance are taken into account). Ann Crittenden argues that studies estimating that women earn seventy cents to men’s dollar do not fully demonstrate the extent of the wage gap because they often only examine the salaries of full-time workers; when she takes into account all male and female workers, she finds that women only make fifty-nine percent of men’s earnings. See CRITTENDEN, *supra* note 59, at 93.

158. See Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 5-6 (1996).

**MRS. GRAGLIA:** I would argue that I do get paid; my husband hands over his salary. I am not complaining about that.

**MS. KENNEDY:** I know you are not complaining, but the issue is the devaluing of the work that women do every day—like childcare, laundry and cooking—that is critical to the operation of our society.<sup>159</sup> Reform of our system of child support and alimony appears much more critical to protecting women and children than divorce reform.<sup>160</sup> It is difficult for an outsider to fully understand the dynamics of a marriage or to accurately determine who is subjected to family violence and who is not. Individuals should be able to choose for themselves whether they want to move their separate ways; however, they should not be able to choose whether to support their children or to equitably share property with their spouse at the termination of the marriage.<sup>161</sup>

**MRS. GRAGLIA:** Several things that were just said need to be corrected. So many studies have shown that no-fault divorce laws did result in “a substantial number of divorces that would not have occurred otherwise.”<sup>162</sup> The states enacted their no-fault divorce laws over a period of years. Some analyses show that when the later states enacted their laws, it made no significant difference in the divorce rate.<sup>163</sup> In twenty-five of the thirty-two states that enacted no-fault laws between 1965 and 1974, however, the laws did result in an increase in the number of divorces. It is likely that the later enactment in the fifteen states after 1974 had little impact on divorce rates in those states because of “the easy availability of no-fault divorces in neighboring states” and because of “a legal system that had already implemented no-fault divorce de facto.”<sup>164</sup>

I want to go back to Ann's comments for a moment. She says feminists are not beating homemakers over the head. Such direct

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159. “[In 1981] women composed one-half of the world's population and performed two-thirds of the world's work hours, yet were everywhere poorer in resources and poorly represented in elite positions of decision-making power.” V. SPIKE PETERSON & ANNE SISSON RUNYAN, *GLOBAL GENDER ISSUES* 5 (2d ed. 1999); see Silbaugh, *supra* note 158, at 35-38.

160. See Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 *GEO. L.J.* 2227 (1994).

161. See Silbaugh, *supra* note 158, at 55-59; see also CRITTENDEN, *supra* note 59, at 157-58 (examining so-called “equitable” divisions of marital assets in the “best and worst states for divorced mothers”).

162. Joseph Lee Rodgers et al., *Did No-Fault Divorce Legislation Matter? Definitely Yes and Sometimes No*, 61 *J. OF MARRIAGE & FAM.* 803, 804 (1999); WEITZMAN, *supra* note 34, at 338.

163. See sources cited *supra* note 25.

164. See JAMES Q. WILSON, *THE MARRIAGE PROBLEM* 175-76 (2002); Rodgers et al., *supra* note 162, at 803-09.

harassment is not necessary. All fifty states enacted no-fault divorce laws, and many working women will admit that they only sought employment for one reason: divorce insurance. Some of these women who may stay home for a few years eventually return to work in order to protect themselves. Many of us did not want to follow that path. We were willing to take over all household responsibilities and leave economic ambition to our husbands. We wanted no part of the workplace.

After we do that for twenty-five or thirty years, under no-fault divorce laws, our husbands can go into court, unilaterally divorce us and be free from paying us long-term alimony.<sup>165</sup> Marital property will be divided, but the husband may be at the peak of his career, earning a six-figure income while the wife is earning little or nothing,<sup>166</sup> left with kids in a tract house, as Anne Taylor Fleming puts it,<sup>167</sup> or left alone if the children have grown up and left home. We are too old to remarry.<sup>168</sup> We have had no experience in the workplace for the past thirty years. It is scarcely conceivable that one group of women would do this to another group of women, yet that is exactly what happened. Yes, feminists did work in cooperation with male legislators, and no-fault divorce was enacted in fifty states where the majority of the legislators were men. It is not surprising that some men are willing to enact laws to absolve themselves from the responsibility for paying alimony to older wives when they unilaterally divorce them and acquire younger wives. Some men are dishonorable and do that kind of thing. I do blame the women who cooperated with them.

**PROFESSOR HEMINWAY:** Are there any final comments on this issue before we move on?

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165. Katha Pollitt summarizes similar concerns about the state of modern marriage.

A woman marrying today has a dead even chance of finding herself in divorce court, where, as study after study has documented, the system tends to shortchange wives. Although both the domestic demands of marriage and its implied promise of lifelong security encourage a woman to put her career on hold, only 15 percent of divorcing women are awarded alimony or rehabilitative (interesting word) maintenance. The average allotment in New York State is \$4,000 a year. Nationally, the average court-awarded child-support payment is \$34 a week—a ludicrous sum, but only half of ex-husbands bother to pay it in full. Perhaps most alarming, although women are overwhelmingly their children's primary caregivers, a man who pursues a custody suit has an even chance of winning. The fact that he works proves he is a stable citizen and a good father, while a mother is caught in a double bind: If she works, she's neglectful; if she doesn't, she's a parasite.

POLLITT, *supra* note 65, at 6-7.

166. See CRITTENDEN, *supra* note 59, at 131-61.

167. See FLEMING, *supra* note 42, at 207; see also GRAGLIA, *supra* note 21, at 293-97.

168. See Peter Uhlenberg et al., *Divorce for Women After Midlife*, 45 J. GERONTOLOGY S3, S5 (1990) (“[T]he probability of remarriage after divorce declines steeply with age and is quite low after age 45.”).

**PROFESSOR BARTOW:** Yes, I would like to personalize this issue. My grandmother was thirteen years old and her sister was eleven years old when their father died. Circumstances were dire. Their family lived on a farm in upstate New York and her mother had absolutely no prospects for supporting the two girls. My great-grandmother had never been allowed to drive the one family car, so nobody in the family was able to drive; that car remained in the barn until my grandmother was sixteen and could get a license. My grandmother grew up, educated herself, got married and had two daughters and two sons; she made educating the girls the top priority. She told my grandfather, "We are educating the girls. If we can, we will also educate the boys, but first we need to make sure that no matter what happens, the girls never wind up in the situation I was in. They need to be able to feed themselves and to provide for their future children in case their husbands die, or in case they get divorced."

My grandmother's younger sister educated herself and became a teacher. She worked at a time when she could not earn the same salary as men because the men who wrote the laws saw no problem with paying women less money for the same degree of work.<sup>169</sup> I am really happy that these circumstances are improving. I am grateful that I have the well-recognized right to own property, to vote and to live my life as I choose. That is what feminism has meant for my family.

**PROFESSOR HEMINWAY:** Each of these topics we are covering could constitute an entire lecture for each of these three panelists. However, we must now move on.

We have talked about statutory law generally and no-fault divorce law in particular, but there is another source of law that our discussion should address. I want to present an interesting and provocative quote to spark commentary on the relationship between judicial sources of American law and feminism and gender. In 1993, Phyllis Schlafly wrote:

[Ruth Bader] Ginsburg's writings betray her as a radical, doctrinaire feminist, far outside the mainstream. She shares the chip-on-the-shoulder, radical feminist view that American women have endured centuries of oppression and mistreatment from men.<sup>170</sup>

Schlafly also says that "America will be watching to see if and how Justice Ruth Bader Ginsburg tries to write her feminist legal and social theories

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169. Discrepancies in pay, however, still exist. See *supra* note 156 and accompanying text.

170. Phyllis Schlafly, *Ruth Bader Ginsburg's Feminist Worldview*, in *FEMINIST FANTASIES* 136, 137 (2003).

into the United States Constitution.”<sup>171</sup> My question to our panelists is this: how has the Supreme Court, and specifically Ruth Bader Ginsburg, incorporated a feminist vision into our decisional law in the past nine years? Let us start with Carolyn.

**MRS. GRAGLIA:** Justice Ginsburg has been very effective in her efforts to integrate feminist theory into issues that reach the Supreme Court. One failure was the decision declaring key parts of the Violence Against Women Act unconstitutional.<sup>172</sup> Feminists had supported the act and, although I would not have voted for it as a legislator, I find it difficult to distinguish this act from the many congressional enactments which have been upheld as coming within the scope of congressional Commerce Clause power. In most cases, however, Justice Ginsburg and feminists espousing modern feminist theory have been highly successful in getting what they asked for. Before Justice Ginsburg was appointed to the Supreme Court, she worked for the American Civil Liberties Union Women’s Rights Project.<sup>173</sup> Her goals were to challenge the constitutionality of as many laws based on sexual distinctions as possible<sup>174</sup> and, through litigation, to demonstrate that the Equal Protection Clause applied to cases involving sex discrimination.<sup>175</sup> Many of the laws making

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171. Phyllis Schlafly, *How the Feminists Want to Change Our Laws*, 5 STAN. L. & POL’Y REV. 65, 72 (1994).

172. *United States v. Morrison*, 529 U.S. 598 (2000).

173. Justice Ginsburg was not only an active attorney on this project, which was established in 1971, she was also a founding Co-Director. Melanie K. Morris, *Crafting a Constitutional Rationale: Ruth Bader Ginsburg and Gender-Based Equality 25* (Aug. 2001) (unpublished Ph.D. dissertation, The University of Tennessee, Knoxville) (on file with Hodges Library, The University of Tennessee, Knoxville).

174. Justice Ginsburg explains that the goal of the project was to raise awareness of sex stereotyping, which just “ends up hurting both sexes.” LYNN GILBERT & GAYLEN MOORE, *PARTICULAR PASSIONS: TALKS WITH WOMEN WHO HAVE SHAPED OUR TIMES* 153 (1981). She employed a strategy of incrementalism, where she worked to “find the right cases, bring them before the most sympathetic tribunals, and help develop Constitutional law in the gender classification area step by step.” *Id.* at 153-54; *see also* Morris, *supra* note 173. It is interesting to note that Justice Ginsburg’s perspectives on law and gender were shaped by her own experiences with gender discrimination. *See* Morris, *supra* note 173, at 19-26. She came to realize the full implication of these parallels as she was conducting research on gender-discrimination for the ACLU and teaching at Rutgers Law School. *See* GILBERT & MOORE, *supra*, at 153.

175. Prior to Justice Ginsburg’s litigation in this area, gender discrimination cases often did not invoke the Equal Protection Clause. Melanie Morris explains that:

[p]rior to the 1970s, challenges to the constitutionality of gender-based distinctions typically invoked the Due Process or Privileges or Immunities provisions of the Fourteenth Amendment. Gender discrimination challenges invoking equal protection were not unknown during this period. However, there was no systematic effort to challenge gender distinctions under the equal protection guarantee. Ginsburg diverged from this pattern, bringing gender discrimination claims under the Equal Protection Clause as part of a broader, incremental litigation strategy.

sexual distinctions that Justice Ginsburg challenged were actually designed to provide important benefits for and protection of women; advocating gender-neutrality, she brought cases on behalf of the men who, she argued, were harmed by this preferential treatment of women.<sup>176</sup> She won many cases, and we now have a great deal of jurisprudence that has institutionalized the feminist perspective, pushing us farther toward an androgynous society.<sup>177</sup>

Before Justice Ginsburg was appointed to the Supreme Court,<sup>178</sup> Justice Sandra Day O'Connor wrote the majority opinion in *Mississippi University for Women v. Hogan*, which forced a woman's nursing school to admit men.<sup>179</sup> After Justice Ginsburg was appointed to the Court, it heard the *Virginia Military Institute* ("VMI") case and forced the all-male VMI to admit women.<sup>180</sup> Cases like these undermine traditionalism, which is one

Morris, *supra* note 173, at 25-26. Justice Ginsburg has advocated for an Equal Rights Amendment that would pave the way for increased judicial gender-neutrality. *Id.* at 29-30; Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451 (1978).

176. Because Justice Ginsburg's vision of equality involved a gender-neutral approach to law and policy, she was particularly concerned with laws that granted special protection to women. She believed that laws of this kind were grounded in paternalistic stereotypes of women as weak, vulnerable (and, therefore, in need of special protection), or even morally superior; she perceived these stereotypes as damaging to both genders. Ruth Bader Ginsburg, *Sex and Unequal Protection: Men and Women as Victims*, 11 J. OF FAM. L. 347 (1971); Morris, *supra* note 173, at 39-40. For example, Justice Ginsburg challenged an Oklahoma law allowing eighteen-year-old women to purchase alcohol but not eighteen-year-old men; the law was based on the stereotype that eighteen-year-old women were more responsible with alcohol than men of the same age. *Craig v. Boren*, 429 U.S. 190 (1976). She also challenged laws that showed preferences for men. See *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971). Phyllis Schlafly perceives Justice Ginsburg's gender-neutral approach to equality as somewhat hypocritical.

Ginsburg was vehement in her desire to abolish any legal preference or protection that women might have. She advocated getting rid of laws against statutory rape as "discriminatory on their face" and the Mann Act because it was "meant to protect weak women from bad men." At the same time, she demanded gender-based preferences for women, even in the military. Such is the feminist notion of equality.

Schlafly, *supra* note 170, at 139.

177. Divisions in feminist thought arise because women often define equality and choice differently. A central disagreement involves the issue of gender difference: are women and men the same, or are they different? Many feminists do argue that gender-neutrality is the path to true equality between the sexes; such a position often relies on an assumption that perceived gender differences are a product of socialization into sexist institutions. See Monique Wittig, *One is Not Born a Woman*, in *THE STRAIGHT MIND AND OTHER ESSAYS* 9, 9-20 (1992). But see Luce Irigaray, *Women: Equal or Different*, in *THE IRIGARAY READER* 30, 32-33 (Margaret Whitford ed., 1991) (disapproving of so-called "equal" treatment of men and women and suggesting that gender-neutrality would be impractical and damaging to women, men, and society because a realistic vision of equality would necessarily incorporate a recognition and appreciation of the differences between women and men).

178. Justice Ginsburg was appointed to the Supreme Court by President Clinton in 1993.

179. 458 U.S. 718 (1982).

180. *United States v. Virginia*, 518 U.S. 515 (1996).

of my primary concerns; they undermine traditionalism because they ignore differences between the sexes and reject choices based on those differences, thereby disrupting the balance between the public and private spheres. Men appreciate and function optimally in an all-male military environment.<sup>181</sup> I believe that the decision in the *VMI* case has fostered the decline of males, which I perceive as the most serious problem we face today. As we have witnessed an increase in confidence and power on the part of women, we have seen a corresponding decrease in confidence and power on the part of men.<sup>182</sup> This reality does not hurt those women who are competing against men in the workplace, but it will naturally hurt those women who hope to find a bread-winning husband.

The combined effect of these cases that I have discussed is to push us towards a more androgynous, gender-neutral society, which has always been the goal of contemporary feminists.<sup>183</sup> We are emasculating men by feminizing them, as we have done over many decades in our increasingly

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181. See Kingsley Browne, *Women at War: An Evolutionary Perspective*, 49 *BUFF. L. REV.* 51 (2001). Dr. Lionel Tiger argues that “[t]he traditional draconian immersion of young men in Marine culture is less successful for women. They do not prosper under it, enjoy it, or become effective contributors.” TIGER, *supra* note 26, at 215.

182. See TIGER, *supra* note 26, at 2. Dr. Lionel Tiger writes that:

[i]nequities founded in the arrangements of the past, now ebbing away, have led to legal, policy, and social initiatives by male and female officials to bolster the jobs and lives of women, even seemingly to the direct disadvantage of men. How have men responded? To judge from their behavior—as mates, as voters, as fathers—repeated denigration of their moral worth has generated among men resentment, irritation, demoralization, and confusion.

TIGER, *supra* note 26, at 60.

183. See GRAGLIA, *supra* note 21, at 54-61.

Individuals who advocate gender-neutrality generally believe that gender differences are products of social conditioning, rather than biology; accordingly, they desire to correct the inequality of traditional gender roles by radically transforming the way society is structured. For example, Israeli kibbutz experiments attempted to combat the perceived injustice of maternal domesticity by creating an environment of sexual egalitarianism. The communal lifestyle of the kibbutz provided community childcare and teaching in order to free women from the burdens of childrearing. Women and men enjoyed equal access to the public sphere, and individuals of both genders could freely choose their occupation. However, by the 1950s men were doing farming, the highest-status occupation in the kibbutz, and women were acting as nurses and teacher. Laundry and cooking were still done by women, whose jobs were in the service sector. Whereas their grandmothers sought to minimize sexual dimorphism, the granddaughters found a new interest in fashion and jewellery [sic]. Parents, especially mothers, grew increasingly dissatisfied with the practice of collective sleeping for the children. The emotional centrality of family increased for women . . . as an important source of fulfillment.

BROWNE, *supra* note 59, at 40 (discussing MELFORD E. SPIRO, *GENDER AND CULTURE: KIBBUTZ WOMEN REVISITED* (1979) and LIONEL TIGER & JOSEPH SHEPHER, *WOMEN IN THE KIBBUTZ* (1975)). Professor Browne explains that while members of the kibbutz continued to value sexual equality, they moved away from policies of “sexual sameness” that did not appreciate and incorporate the inherent differences between men and women. KINGSLEY BROWNE, *BIOLOGY AT WORK: RETHINKING SEXUAL EQUALITY* 107 (2002) [hereinafter BROWNE, *BIOLOGY*].



feminized schools.<sup>184</sup> I should add that feminists in fact achieved their greatest victory in the Supreme Court two decades before Justice Ginsburg's appointment to the Court. It was crucial to contemporary feminists that abortion be legal and socially acceptable so that women could lead the kind of lives they chose and be able to compete equally with men and childless women in the workplace.<sup>185</sup> The Supreme Court gave feminists what they wanted in 1973 with the decision in *Roe v. Wade*,<sup>186</sup> followed by *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>187</sup> and *Stenberg v. Carhart*.<sup>188</sup> These cases all clearly demonstrate the institutionalization of the feminist perspective.

**PROFESSOR HEMINWAY:** Comments, Ann? Deseriee?

**PROFESSOR BARTOW:** I am confused about the link that Carolyn just made. The vast majority of the judiciary is male, so I do not understand how Justice Ginsburg could have managed to orchestrate a feminist judicial takeover. I know she is an intelligent, strong woman with a lot of energy, but I do not perceive her as having sufficient power and influence to single-handedly transform society. If this is true, I would like her to become my mentor.

**MRS. GRAGLIA:** I am saying that the feminist perspective has been institutionalized in our society through Supreme Court decisions. Of course Justice Ginsburg did not accomplish this goal alone. Even Chief Justice Rehnquist, in a recent decision, allowed the state to be sued in federal court for money damages as an employer under the Family and Medical Leave Act.<sup>189</sup> Chief Justice Rehnquist's opinion reflected great sympathy for the feminist position, noting that:

[s]tereotypes about women's domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men.

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184. See CHRISTINA HOFF SOMMERS, *THE WAR AGAINST BOYS* 153-57, 169-78 (2000).

185. See FOX-GENOVESE, *supra* note 18, at 72-73; GRAGLIA, *supra* note 21, at 176-78, 186-89; PATRICIA CAYO SEXTON, *THE FEMINIZED MALE: CLASSROOMS, WHITE COLLARS, AND THE DECLINE OF MANLINESS* (1969). In *Roe v. Wade*, Justice Blackmun wrote that "[t]he detriment that the State would impose upon the pregnant woman by denying this [reproductive] choice altogether is apparent . . . . Maternity, or additional offspring, may force upon the women a distressful life and future." 410 U.S. 113, 153 (1973). Evidencing his agreement with feminist goals, Justice Blackmun has asserted that the decisions legalizing abortion "[w]ill stand as landmarks on the road toward the full emancipation of women." Cynthia Gorney, Op-Ed, *Justice Blackmun, Off the Record*, N.Y. TIMES, Mar. 7, 1999, at 15.

186. 410 U.S. 113 (1973).

187. 505 U.S. 833 (1992).

188. 530 U.S. 914 (2000) (holding the Nebraska law banning "partial birth abortion" unconstitutional).

189. *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

Because employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees.<sup>190</sup>

The refusal in this case to recognize the state's sovereign immunity from suits by private citizens in federal court stands in sharp contrast to the Court's recent decisions that appeared to give new vigor to the sovereign immunity defense, in all of which Chief Justice Rehnquist joined, and some of which he authored.<sup>191</sup> I am not claiming that Justice Ginsburg accomplished everything alone, but she has certainly been a persuasive force on the Supreme Court.

**PROFESSOR HEMINWAY:** Deseriee, as a law professor who teaches Family Law, how do you perceive the relationship between feminism and judicial decisions?

**PROFESSOR KENNEDY:** First I want to comment on Carolyn's reference to men and women as if there is some universality of power among men, which there is not. We are a class-based society in which privilege and power is dispersed unequally among people; this disparity can be found along race lines, along immigrant lines and along ethnicity lines.<sup>192</sup> Therefore, it is not fair to say that women are stealing all the existing power from men, because that is not the reality.

The reality for many families—for immigrant families, for Latino families and for black families—is that in order to exist, or even to subsist, women need to work.<sup>193</sup> It is not a matter of women playing at work in to

190. *Id.* at 736.

191. *See* Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); Alden v. Maine, 527 U.S. 706 (1999).

192. *See* DARLENE CLARK HINE & KATHLEEN THOMPSON, A SHINING THREAD OF HOPE: THE HISTORY OF BLACK WOMEN IN AMERICA 299-300 (1998); *see also* Harris, *supra* note 14, at 34-41 (critiquing the assumption that all individuals of the same race, gender, class, and sexual orientation share the same experiences); Cleaver, *supra* note 14, at 53 (encouraging white feminists to examine the interconnections between gender and race oppression, and "to include gender and race within the same critique instead of polarizing them" because "[i]f these constructs are extracted separately from the cultural matrix that defines them both, each category loses layers of its coherence").

193. *See* Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 383 (2001) ("[T]oday, most women must work in order to support their families."); Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1908 (2000) ("The overwhelming majority of women need—and want—to have jobs and children at the same time."); Mylinh Uy, Note and Comment, *Tax and*

order emasculate men; it is a matter of families struggling to survive in an economy and a culture that is often very hostile to families and to poor people.<sup>194</sup> Women do not work to steal jobs from men or to escape from their families. Women work to survive, to contribute to society and to fulfill their own needs. Work can also be empowering.<sup>195</sup> Women provide much of the care in our society that we could not live without.<sup>196</sup> Where would our society be if women decided they did not want to be teachers, social workers, nurses, or librarians? Women also work in sweatshops, produce our clothes and do much of the work that keeps us together. These women make significant contributions to the availability of low-cost food for very little pay and, quite often, often under very poor conditions.

Women have probably served much of the food that we are enjoying here at the hotel. Right now, women are upstairs cleaning the bedrooms that we slept in. They are up there washing out our tubs and cleaning our toilets. They are not doing it because they love dirty toilets; they are doing it so that their kids can eat, have clothes and go to school. I talk to the women who clean our offices at night; one of these women told me that she has three jobs. She is not playing around at life; these are serious issues. When we think about feminism and women's issues as an academic issue

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*Race: The Impact on Asian Americans*, 11 ASIAN L.J. 117, 138 (2004) (“[M]ore Asian American women than white women must work, because the males in their family earn such low wages.”). By way of summary, Professor Marleen O'Connor-Felman writes:

[i]n single-parent families, mostly headed by women, the parent must work to support the family. In addition, even in two-parent families, as job tenure and real wages fell for men, wives and mothers took jobs to keep family income constant. Specifically, “despite the rapid influx of mothers into the workforce over the past twenty years, household income for employed families with children has not changed during that period.” Thus, for many dual-earner families, the mother's income is vital to support the family.

O'Connor-Felman, *supra* note 81, at 1290 (footnote omitted).

194. See sources cited *supra* note 63. In addition, bell hooks argues that:

[w]hite supremacist capitalist patriarchal attempts to dismantle the welfare system in our society will deprive poor and indigent women of access to even the most basic necessities of life: shelter and food. Indeed a return to [a] patriarchal male-dominated household where men are providers is the solution offered women by conservative politicians who ignore the reality of mass unemployment for both women and men, and the fact that jobs simply are not there and that many men do not want to provide economically for women and children even if they have wages.

HOOKS, *supra* note 3, at 51.

195. See, e.g., Schultz, *supra* note 193, at 1883-84. Professor Schultz argues that:

a robust conception of equality can be best achieved *through* paid work, rather than *despite* it. Work is a site of deep self-formation that offers rich opportunities for human flourishing (or devastation). To a large extent, it is through our work—how it is defined, distributed, characterized, and controlled—that we develop into the “men” and “women” we see ourselves and others see us as being.

*Id.* at 1883; HOOKS, *supra* note 3, at 50 (noting that women, particularly single women, gain benefits—through “increased self-esteem and positive participation in community”—from their workplaces, particularly as compared to housewives).

196. See *supra* note 159 and accompanying text.

with theoretical disagreements, as if it is merely something that middle-class white women are playing at, we ignore the reality that for the majority of women and their families this is a matter of life and death. Having an opportunity to work, to have fair opportunities for advancement in the workplace and to have some equity and parity of salaries is not an abstract academic issue for these women.

**PROFESSOR HEMINWAY:** Carolyn, could you conclude this topic?

**MRS. GRAGLIA:** I am concerned that my remarks have been misunderstood. I have never said that women should not work. I am not attempting to try and convince anyone that they should feel the same way about my role as I do.<sup>197</sup> I am criticizing the institutionalization of feminist strategies that hurt men.<sup>198</sup> I believe women should compete equally with men for employment and that they should not ask for special preferences in the workplace.<sup>199</sup> There are currently many preferences for women. For example, consider rulings of our Equal Employment Opportunity Commission (as Kingsley Browne is sitting there, I should mention that he writes about this topic and has a wonderful book on it).<sup>200</sup> Evidence of a lower percentage of females in a particular employment area is automatically accepted as proof of discrimination, when, in fact, there are other, more logical, explanations for existing disparities between the sexes. As Professor Browne notes, the assumption in these cases is that “absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the . . . composition of the population in the community from which employees are hired.”<sup>201</sup> It is this phenomenon that I am objecting to, and it is essential to understand that the feminist perspective that is controlling these decisions operates on the assumption that women should not be able

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197. Despite arguments that women are naturally inclined to be nurturing caregivers and maternal figures, clearly not all women are drawn to a life of motherhood, and many mothers are out-of-sync with this idyllic notion of maternal harmony and bliss. See generally POLLITT, *supra* note 65; see also ANN OAKLEY, *TAKING IT LIKE A WOMAN* 66-70 (1984) (discussing the pain of postpartum depression).

198. See, e.g., SOMMERS, *supra* note 184, at 100-37 (examining ways in which the “girl crisis” movement in education, inspired by CAROL GILLIGAN, *supra* note 140, is ignoring, and worsening, the plight of boys and young men); see generally TIGER, *supra* note 26.

199. However, feminists often argue that these “special privileges” are, in fact, necessary for true equality because of woman’s unique capacity to bear children. See *supra* note 177.

200. BROWNE, *BIOLOGY*, *supra* note 183, at 44, 152-56.

201. *Id.* at 154 (quoting from *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977)).

to choose whether or not they should enter the workforce. As Professor Lionel Tiger has observed:

The cold stigma of the 'old maid' that females have had to endure has in a curious way returned. But now the stigma flows from a *job* they don't have, not a husband. It appears to have become more controversial, or at least more questionable, to be unemployed than unmarried.<sup>202</sup>

I have no objection to women competing on a level playing field with men for employment opportunities. If women can get their jobs without receiving special preferences, then they deserve those jobs.

**PROFESSOR HEMINWAY:** Let us move on to the relationship between procedural aspects of law and issues of feminism and gender. In our preconference comments, Deseriee raised the interesting point that in her Civil Procedure class, "discussion will often turn to the impact gender, race and class have on attaining fair and just outcomes"<sup>203</sup> in civil litigation. Has anyone on the panel had those kinds of concerns raised in their own classrooms, either as law teachers or as law students?

Ann, can you start by describing your experiences, either as a student or as an educator?

**PROFESSOR BARTOW:** This may come as a shock to some of you, but as a law student, I was somewhat mouthy and I spoke up a lot in my law school classes. As a result, I believe that I got a better legal education. As an educator, I have wonderful students of both genders who I love teaching, mentoring and communicating with. I am troubled when I encounter a female student who seems very nervous about speaking in the classroom.<sup>204</sup> Some females preface their remarks with self-deprecating comments such as "I may have misunderstood, but . . ." or "Sorry to bother you with this, but . . ." Sometimes female students talk in quiet, little mouse voices, as if they were only saying "peep, peep, peep."<sup>205</sup> When I

202. TIGER, *supra* note 26, at 4.

203. Kennedy, *supra* note 5.

204. See Lisa A. Wilson & David H. Taylor, *Surveying Gender Bias at One Midwestern Law School*, 9 AM. U. J. GENDER SOC. POL'Y & L. 251, 256-58 (2001) (highlighting then existing scholarly literature that notes this and related phenomena).

205. The phenomena described in these sentences have been noted elsewhere. See Annalise E. Acorn, *Discrimination in Academia and the Cultural Production of Intellectual Cachet*, 10 UCLA WOMEN'S L.J. 359, 369 (2000) ("[T]he de-centered perspective of many women and minorities often results in tentativeness about one's conclusions and knowledge base rather than bravado."); Charles B. Craver & David W. Barnes, *Gender, Risk Taking, and Negotiation Performance*, 5 MICH. J. GENDER & L. 299, 310 (1999) ("Men usually exert more control over the subjects being discussed; they employ more direct language, while women tend to exhibit tentative and deferential speech patterns."); Leslie G. Espinoza, *Multi-Identity: Community and Culture*, 2 VA. J. SOC. POL'Y & L. 23, 35 (1994) ("Women

encounter this, I want to tell them, “Speak up! You know the material, you are smart, I know that you can do this.” I like to have women participate more, but I do not always do a great job about keeping them involved in the discussion. Sometimes in my classroom certain people dominate,<sup>206</sup> and I have to remind myself to be conscious of this reality and work to make sure that everyone is equally engaged in discussions.

**PROFESSOR HEMINWAY:** Carolyn, could you describe your law school experience, specifically on this issue?

**MRS. GRAGLIA:** We were certainly concerned about fairness, although the whole idea of a problem with what feminists call “gender issues” never occurred to us. Out of 300 students at Columbia Law School, I was one of fourteen women. We never thought of ourselves as being any different from the men, and the word “feminism” was rarely mentioned. We certainly knew that feminists had historically fought for the right to vote,<sup>207</sup> but in terms of our aptitude for legal study, we never saw ourselves as being different in any way because we were women. When I read Lani Guinier’s article<sup>208</sup> and Ann Bartow’s follow-up,<sup>209</sup> I was just amazed because Ann said that thirty-eight percent of her class was female, yet she described a law school experience in which it seems that she felt alienated and that was far less enjoyable than college. Without the Women’s Law group and three female faculty members, she says, she’s not sure that she “would have made it through.” She also described two other law schools where there was no achievement gap between the men and women, and yet the women still felt that law school was “a hostile educational environment,” and they suffered higher rates of anxiety and depression than the men.<sup>210</sup> Lani Guinier said that these women whom they interviewed in law school feel as if they are incompetent; they are afraid to talk, and the hostile environment makes it impossible for them to study properly.<sup>211</sup> I

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are socialized to not answer questions directly. Thus, women law students will usually begin their response with a hedge: ‘I think’ or ‘Perhaps’ or ‘One way of looking at it.’”).

206. See Paula Gaber, “*Just Trying to Be Human in This Place*”: *The Legal Education of Twenty Women*, 10 YALE J.L. & FEMINISM 165, 183 (1998) (“Women in the interviews characterized the classroom experience as dominated by men, both in the sense that male students participate more and in the sense that the environment can be overtly masculine.”); Wilson & Taylor, *supra* note 204, at 265 (“[F]emale students surveyed at other law schools suggested that they lose their voices in the classroom and that male students dominate discussions.”).

207. See *supra* notes 133 & 134 and accompanying text.

208. Guinier, *Women’s Experiences*, *supra* note 76.

209. Bartow, *supra* note 76.

210. *Id.* at 810-11, 815, 819.

211. Guinier, *Women’s Experiences*, *supra* note 76, at 42-71. Lani Guinier describes the suffering of female students:

experienced none of this.<sup>212</sup> I believe that one major reason for this disparity is that the fourteen women of my class were self-selected. Society, at that time, was not telling us that we had to have some career in order to be respected citizens of the community. Today, only a career confers status; without one, a woman is considered worthless. We did not need a career to have status. We were going to law school not because society told us that it was the only way we would achieve status, but because, for whatever reasons, it appealed to us.

I decided to attend law school when I was in the seventh grade. I had always wanted to be a lawyer. When I sat in class along with almost 300 men, I thought that law school was the neatest, most interesting place I had ever been. The men in our class were friendly and respectful, and the faculty (entirely male) was always supportive. I felt that I was where I belonged and believed myself to be well suited to my choice. It never occurred to me to be intimidated by the men in my class, or to view myself as somehow incompetent; such a thought would have been beyond belief. I would not have been in law school in the first place if I was incompetent. The women in my class did not have these problems, and I believe that our confidence resulted from our passion for going to law school. I loved it. I loved the way we learned to analyze cases. I considered it to be the best training I had received in my life. After graduation, I had the same passion for practicing law, which continued until I developed an even greater passion for my children. As a result, I gave up the practice of law in order to pursue a life as a mother and homemaker.<sup>213</sup> My experience in law

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almost all the women we interviewed described their first-year experience as a radical, painful, or repressive experience . . . Several women reported their voices were "stolen" from them in the first year. . . . [Some] women reported suffering from hissing, public humiliation, and gossip, simply for speaking aloud in class. They expressed profound alienation from the Law School, the educational process, and, most disturbing, themselves, or who they used to be.

*Id.* at 42-43 (footnote omitted).

212. Mrs. Graglia explains:

[m]y own experience differs sharply from the tales feminists tell. I was a practicing lawyer in the 1950s. From the time in junior high school when I decided to become a lawyer until I ceased working in order to raise a family, I always received unstinting encouragement and support.

GRAGLIA, *supra* note 21, at 19-20.

213. *Id.* at 24. Mrs. Graglia writes:

I have been happy in every period of my adult life: attending college and law school, practicing law, staying at home to raise a family, and creating a new life once my family responsibilities had largely ended. Yet those many years I spent as a mother at home from the birth of my first child until the last left for college were the best, the ones I would be least willing to have forgone. Feminists recount endless tales of women's oppression throughout the ages, but one of the greatest injustices to women is feminists' own success in convincing society to treat as a sacrifice what for some women can be the most rewarding occupation of their lives.

school was diametrically opposed to what Lani Guinier and Ann Bartow have written about.

**PROFESSOR HEMINWAY:** Discussions about women and law school inevitably turn to the very provocative work that Lani Guinier and Ann Bartow have done in this area. Before we turn our discussion to this work, are there any questions from the audience?

**PROFESSOR GREGORY VINCENT,** Louisiana State University:<sup>214</sup> I attended a law and education seminar in which we discussed *Becoming Gentlemen*,<sup>215</sup> and I was amazed at the hostility of responses to the ideas presented by the authors. Individuals who were students in the years after 1994, when the book was published, seemed to reject those valid ideas and observations because they were dissimilar to the students' own experiences; accordingly, they could not acknowledge that these problems of gender and education had even existed ten years before. I had not anticipated this reaction; these individuals did not believe that the experiences from 1994 were *real* experiences. How could they feel that way? The fact that they could not even recognize the validity of the issue really startled me.

**PROFESSOR HEMINWAY:** I am not sure that everyone in the room is familiar with the body of work regarding women and the law school experience that you are describing. I would like Ann Bartow to describe this work, in her own way, so that we can build a substantive discussion on it.

**PROFESSOR BARTOW:** During my third year at law school, I took a course with Lani Guinier that dealt with voting rights. She is a wonderful teacher and an incredibly smart person. I began to examine dynamics at my law school that were unrelated to the course work. The third year is when students begin to seek and accept permanent legal employment, and I could not help wondering why most of the clerkships and lucrative, prestigious positions were going to the men in the class. I examined the law review roster and found that it was composed primarily of men.<sup>216</sup>

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*Id.* See also STEVEN E. RHOADS, TAKING SEX DIFFERENCES SERIOUSLY (2004) (criticizing feminism's effect on education as inflicting a terrible injustice on women because of the feminist refusal to recognize crucial differences between the sexes and the very successful feminist effort to steer women into making the same life choices that men make).

214. Professor Vincent currently teaches law at the University of Texas at Austin, where he also serves as a vice provost for institutional equity and diversity.

215. GUINIER, *BECOMING GENTLEMEN*, *supra* note 76.

216. See Guinier, *Women's Experiences*, *supra* note 76, at 28.



Most individuals who graduated with honors were men.<sup>217</sup> Participation on moot court teams was based on grades, and since men generally maintained higher grade point averages, moot court teams were mostly comprised of men.<sup>218</sup>

Women comprised thirty-eight percent of the student body; however, they did not receive anywhere near thirty-eight percent of the grade-based perks and privileges of the law school.<sup>219</sup> The serious disparity that I noticed made me wonder why this phenomenon was still occurring. There are a number of possible explanations,<sup>220</sup> and the article is meant to encourage further inquiry on the topic.<sup>221</sup> I have since learned, from other research, that in almost every educational context women out-perform men.<sup>222</sup> They under-perform men on entrance tests,<sup>223</sup> which also raises some interesting and important questions, but as far as grades go, they out-perform men.<sup>224</sup> Law school is the only professional school where this is

217. *Id.* at 26-28.

218. *Id.* at 30-31.

219. Professor Guinier and her coauthors analyze and discuss this phenomenon. *See id.* at 21-32. The authors explain that the credentials of the male and female students are comparable upon admittance to the law school, but that "women graduate from the Law School with significantly less distinguished professional credentials." *Id.* at 21. By the end of the first year, the men in the class had received "significantly better grades" and "they maintain[ed] this advantage through graduation." *Id.* at 23.

220. Professor Guinier and her coauthors explore three hypothetical explanations for this phenomenon. First, women could be suffering from alienation within the formal structure of the law school. *Id.* at 61-71. Women also could be alienated from informal learning networks, like study groups. *Id.* at 71-80. Finally, women could be inherently different from men in ways that make them ill-equipped for the male-dominated, aggressive environment of law school. *Id.* at 80-84.

221. The article discusses several future avenues of discussion:

[T]he needs of many female law students present an occasion to reexamine traditional assumptions about lawyering. This reexamination is timely in light of the changing character of the legal profession. Such a reassessment presents an opportunity to reconsider the value of the dominant pedagogy and the accompanying emphasis on adversarialism that presently permeates legal education.

*Id.* at 84. More specifically, the authors identify three possible avenues of future inquiry on the subject. First, the authors suggest an exploration of "conventional assumptions that the large Socratic classroom should dominate first-year instruction" in the context of "more pluralistic" approaches that might lessen the alienation of women law school students. *Id.* at 93-94. Next, they recommend an investigation of the "limitations of the adversarial model of problem-solving, at least in this model's role as the universal, exclusive norm for legal education." *Id.* at 95. Third, they encourage development of a program of intervention, to be implemented by the school, that would help structure the "informal learning networks" to more effectively integrate women into the law school community. *Id.* at 97-98.

222. *See generally* SOMMERS, *supra* note 184, at 23-45 (examining and discussing the many ways that "today's girls outshine boys").

223. *Id.* at 31-32.

224. *See* Carol A. Dwyer & Linda M. Johnson, *Grades, Accomplishments, and Correlates*, in *GENDER AND FAIR ASSESSMENT* 127, 127-56 (Warren W. Willingham & Nancy S. Cole eds., 1997).

not true.<sup>225</sup> At that time, I wanted to know why, and I would still like to know why.

**PROFESSOR HEMINWAY:** This topic is, indeed, very interesting. I want to be clear here that Carolyn and Ann are both referencing observational studies that are context-based. One might have a more limited population than another, a reality that we must recognize as they share their viewpoints.

**MRS. GRAGLIA:** Your statistics on that really pertain only to elite law schools.<sup>226</sup> The problem for women who compete with men in the elite law schools, which accept only students with the highest aptitude, is that there are more men at the tails of the bell curve, so that more men are geniuses and more are morons.<sup>227</sup> At an elite law school, a larger body of men will be at the very top of the class, and that is going to make it harder even for an average, intelligent, well-skilled woman to compete for the very top positions.<sup>228</sup> That is particularly going to be the case as more women are encouraged to attend law school. The fourteen women at my school were probably all near the top of the class, otherwise we probably never would have gone to law school; it would not have occurred to us to try. We were used to being the top academic performers. Now that there are so many more women pursuing a legal education in the elite schools, a lot more of them are going to be in the lower range, as opposed to the almost genius-level men at the top. This achievement gap between men and women occurs only in the elite law schools. Professor Dan Subotnik's survey of students at Touro Law School disclosed no achievement gap and no reactions on the part of women students like those described by Ann Bartow and Lani Guinier.<sup>229</sup> However, Touro Law School is not one of the elite schools.

It is accepted that the LSAT score is the best predictor of success in law school, not undergraduate grades.<sup>230</sup> In undergraduate schools,

225. See Sarah Berger et al., *Hey! There's Ladies Here*, 73 N.Y.U. L. REV. 1022, 1044 (1998).

226. Ann Bartow discusses this limitation:

The absence of a cognizable performance gap may give non-elite law schools reason to assume that their female students either cannot complain about the law school environment, or can be ignored or neutralized if they do. Most elite law schools, however, can't even pretend not to have a gender-based achievement differential.

Bartow, *supra* note 76, at 816 (citing and discussing Richard K. Neumann Jr., *Women in Legal Education: What the Statistics Show*, 50 J. LEGAL EDUC. 313, 322 (2000)).

227. BROWNE, BIOLOGY, *supra* note 183, at 27.

228. See *id.*

229. See DAN SUBOTNIK, TOXIC DIVERSITY: RACE, GENDER, AND LAW TALK IN AMERICA (2005).

230. LSAT & LSDAS REGISTRATION & INFORMATION BOOK 121 (2003-2004 ed.); Richard H. Sander, *A Systemic Analysis of Affirmative Action in American Law Schools*, 57 STAN. L. REV. 367, 420

students, for the most part, select their own courses. Undergraduate women may do so well in comparison with their standardized test scores because they choose the courses and professors that they like. They could be choosing to take easier courses; then, when they attend an elite law school, it appears that they are not doing as well as they should.<sup>231</sup> However, their achievement in law school is consistent with their LSAT, which is more predictive than those women's undergraduate grades.<sup>232</sup> It is not a problem; it is merely an observation of what is logically the case.

**PROFESSOR HEMINWAY:** These are important issues. Women, in fact, now comprise more than half of the population in many U.S. law schools and other institutions of higher education.<sup>233</sup>

**MRS. GRAGLIA:** In this country men and women can achieve educational levels equally. This reality is great; I am certainly in favor of education, which helps people to enjoy life more and brings increased

n.146, 421-24 (examining the role of race in law school admissions and noting that, although law schools and other institutions could improve their admissions criteria by developing other measures, "most of the criticisms of the LSAT are greatly overblown"). *But see* LSAT & LSDAS REGISTRATION & INFORMATION BOOK 92 (2005-2006 ed.) (asserting that "studies show that LSAT scores *help* to predict which students will do well in law school" (emphasis added)); David A. Thomas, *Predicting Law School Academic Performance from LSAT Scores and Undergraduate Grade Point Averages: A Comprehensive Study*, 35 ARIZ. ST. L.J. 1007, 1010-11 (2003). After examining the predictive ability of LSAT scores and undergraduate grades at Brigham Young University's J. Reuben Clark Law School, Professor Thomas concluded:

- 1) The predictive power of the LSAT score, undergraduate GPA and a combination of those two measures in an "index" is about the same, both for first-year and for overall academic performance.
- 2) Although the differences may be small or statistically insignificant, the LSAT score is a better predictor than GPA of first-year law school performance, and GPA is a better predictor of overall law school performance. An index with a combination of LSAT score and GPA is substantially better than either LSAT score or GPA alone in predicting both first-year and overall law school performance.
- 3) The predictive power of any of these measures is not strong, and only the most general patterns may be discerned. Entering law students should not feel that their future academic success is either unduly limited or assured by the quality of their academic credentials.

*Id.*

231. BROWNE, BIOLOGY, *supra* note 183, at 30 (noting that "[g]irls' SAT scores slightly underpredict their future academic performance, but much of that effect disappears when difficulty of college coursework is controlled"). Professor Jeffrey Kinsler has examined this possibility in a study at Marquette University Law School, however, and found that "no significant correlation between undergraduate majors and law school performance" exists. Jeffrey S. Kinsler, *The LSAT Myth*, 20 ST. LOUIS U. PUB. L. REV. 393, 394 (2001).

232. *See supra* note 230.

233. *See, e.g.*, Ruth Bader Ginsburg, *Remarks on Women's Progress at the Bar and on the Bench*, 89 CORNELL L. REV. 801, 804 (2004) ("Today, women are more than fifty percent of the entering law school population."); Reynaldo Anaya Valencia & Miguel A. Ortiz, *The Persistent Challenge of Gender and Law: Views From One Law School's Student Body*, 3 SCHOLAR 157, 163 (2001) ("[I]n 2001 for the first time in U.S. history, women comprised over one half of all entering students in the nation's law schools.").

opportunities. Kingsley Browne, who is present in the audience, should introduce himself.<sup>234</sup> His books explain why similar education does not result in the same representation of men and women in power structures: women do not have that representation because many of them do not choose that path.<sup>235</sup> Studies have shown that women do not choose that path at the same rate as men because women find their greatest satisfaction in life from their families while men find the greatest satisfaction in life from their jobs.<sup>236</sup> Women do not want to sacrifice that much family time to achieve in the workplace.

**PROFESSOR HEMINWAY:** Professor Bartow? Professor Kennedy?

**PROFESSOR KENNEDY:** I would disagree that the disparity in achievement for men and women is simply a matter of choice. Framing the issue as one of choice ignores the structural and cultural limitations on making free choices.<sup>237</sup> I think it has a lot more to do with power and privilege than it does with an individual choice. Women are sometimes making choices within a vacuum that limits the range of choices and the range of movement that they can make.<sup>238</sup>

**PROFESSOR BARTOW:** I would like briefly to return to a previous point concerning Dan Subotnik's research. Touro is a wonderful law school, but how many of you folks in the audience graduated from there? How many Supreme Court law clerks graduated from Touro Law Center? These gender dichotomies may be less pervasive at less prestigious law schools, but you generally have to go to an elite law school if you want to clerk for a federal judge or become a law professor.<sup>239</sup> That is why these issues are important, because women face increased barriers in these entranceways to potential success and power. If we really want women to have the choice to achieve, we need to examine these barriers to success to

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234. Kingsley Browne, Professor of Law at Wayne State University Law School, has written several books and articles dealing with gender issues from an evolutionary perspective. *See, e.g.*, BROWNE, *supra* note 59; Browne, *supra* note 181; BROWNE, BIOLOGY, *supra* note 183.

235. BROWNE, *supra* note 59, at 42-48.

236. Professor Browne examines the contemporary feminist movement in an evolutionary context. BROWNE, BIOLOGY, *supra* note 183. Professor Browne argues that the male desire for competition and power in the workplace is part of the evolved male reproductive strategy; males compete among themselves for power and status in order to attract females, both in nature and in the workplace. *Id.* Likewise, Professor Browne argues that the feminine tendency toward cooperation and nurturing is part of the evolved female reproductive strategy. *Id.*

237. CHAMALLAS, *supra* note 8, at 11-13.

238. *Id.*

239. *See supra* notes 226-29 and accompanying text.

see how much of this phenomenon is driven by personal choices in education and how much is actually driven by inequality women face.

**PROFESSOR HEMINWAY:** It seems that you all may be saying the same thing here. We see different results for different law schools and different time periods; we cannot find full clarity from these individual studies and must examine them in their broader context.

**PROFESSOR STEVEN MULROY,** University of Memphis School of Law: Professor Bartow, as I understand it, women out-perform men in terms of grades and graduate level performance in areas other than law, and it is only in the field of law that we find the disparity you describe.<sup>240</sup> However, men out-perform women on the standardized exams, like the GMAT and the LSAT, that are the gateways to law and those other graduate level studies.<sup>241</sup> So, despite Mrs. Graglia's comments, we still need to account for the unique aspects of law that create this difference between women's performance in other areas and the actual grades of female students once they get to law school, correct?

**PROFESSOR BARTOW:** That is absolutely right. The LSAT is a really lousy predictor of a student's performance in law school.<sup>242</sup> Anyone who has served on an admissions committee recognizes that. It really is hard to judge how students will perform once they get to law school because they are coming from different colleges and different fields of study. It is extremely difficult to compare and contrast different schools and different majors, so we fall back to LSAT scores as the best predictors we have to work with. However, the best that the LSAT ever has been asserted to predict is about sixteen percent, and usually it is under ten percent, for first-year grades.<sup>243</sup> In examining whether the LSAT is capable of predicting who will be a good lawyer, we first must agree on a definition of what a good lawyer actually is, which is a rather contentious issue.

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240. See *supra* notes 222-25 and accompanying text.

241. See Catherine A. Lugg, *Attacking Affirmative Action*, in *MEASURED LIES: THE BELL CURVE EXAMINED* 374 (Joe L. Kincheloe et al. eds., 1997). See also *infra* note 261 and accompanying text.

242. See sources cited *supra* note 230.

243. See William C. Kidder, *The Rise of the Testocracy: An Essay on the LSAT, Conventional Wisdom, and the Dismantling of Diversity*, 9 *TEX. J. WOMEN & L.* 167, 187 (2000) (noting that "the LSAT accounts for only 16% of the variation in first-year grades among students enrolled in ABA law schools"); Kristan S. Mayer, *Flagging Nonstandard Test Scores in Admissions to Institutions of Higher Education*, 50 *STAN. L. REV.* 469, 480 (1998) (demonstrating the inadequacy of the predictive ability of the LSAT).

**PROFESSOR MULROY:** Is there some basis for believing that the LSAT is a better predictor than its analogs in other fields of post-undergraduate study, or is that not, in fact, the answer? Do we still have a mystery? I have another question as well: why are female geniuses not self-selecting into the elite law schools? If attention has been drawn to the distinction between the prestige and opportunities of elite law schools and law schools like Touro, why are the female geniuses not selecting schools like Harvard at the same rate as male geniuses? The disparity still does not make sense.

**PROFESSOR BARTOW:** Many women certainly do very well in law school. Most of the women in this room who attended law school would fit into that category. But, statistically, women as a group are not achieving the same levels of success as men. In addition, women strive to find a balance between success and family life. For example, Ruth Bader Ginsburg, who I think is fantastic, married and had children while pursuing a successful career. Her daughter, Jane, coauthored the trademark law textbook that I use and really like.<sup>244</sup> She is also a high achiever and a member of the law faculty at Columbia. We can find many examples of women who have achieved in the workplace and built highly successful careers. However, institutional issues still need to be addressed because of these barriers that women, as a group, continue to face.

**PROFESSOR HEMINWAY:** There is a sizable body of developing scholarship dealing with the relationship between the LSAT and classifications such as race and gender, just as similar scholarship exists dealing with respect to other gateway testing devices.<sup>245</sup> If anyone on the panel is familiar with that body of scholarship, it is worth a brief examination.

**PROFESSOR KENNEDY:** Professor Bartow really captured the essence of the problems with the LSAT as a predictor of either lawyerly ability or performance in all three years of law school; it is even an imperfect predictor of first-year performance. A lot of interesting work has also been done about the extent to which the LSAT questions themselves are biased.<sup>246</sup>

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244. See GINSBURG, *supra* note 93.

245. See sources cited *supra* notes 222 & 230 and accompanying text.

246. See, e.g., Leslie G. Espinoza, *The LSAT: Narratives and Bias*, 1 AM. U. J. GENDER & L. 121 (1993). All testing (including law school admissions and IQ testing), however, may be biased, and test changes have resulted in different gender-based results. See *Larry P. v. Riles*, 793 F.2d 969, 976 (9th Cir. 1984); *Sharif v. N.Y. State Educ. Dep't*, 709 F. Supp. 345 (S.D.N.Y. 1989) (prohibiting awarding scholarships based solely on the SAT because it discriminatorily impacts women). See generally

**PROFESSOR HEMINWAY:** We could obviously have a whole other session on it. Mrs. Graglia, do you have closing comments on this issue before we take another audience question?

**MRS. GRAGLIA:** Yes, and I want to emphasize the fact that there are very few female geniuses; males are the geniuses.<sup>247</sup> More important, however, is the fact that you don't need to be a genius to do well in the workplace. Women can have confidence and other attributes, such as the willingness to work very hard, that help them perform better than the male geniuses. Geniuses can be disorganized, unreliable and lacking in everyday competence. However, you would not have enough female geniuses in those elite schools to really compete with the genius men there. These women can be good people, worthy individuals and extremely bright, but not many of them are going to be geniuses.

Steve, you want to know why women have this problem in law school and not in other graduate programs. I believe that one reason is captured in Lani Guinier's work when she says that it is the competitive, aggressive environment that women do not like.<sup>248</sup> Women, in general, do not have the aggression level that men have, and law is a very high aggression-level job. Women who are faced with so many aggressive men must somehow use their academic capabilities and intelligence to make up for their natural lack of aggression. However, many women find that the longer they do it, the bigger a drain it is on them. I had thought that I was happy studying and working in the legal field, but I realized that I was a lot happier once I stopped.<sup>249</sup> So many women in these high aggression-level jobs are on Prozac, which is called the feminist drug because it makes women better able to cope with the stress of competing in high aggression-level jobs.<sup>250</sup>

**PROFESSOR HEMINWAY:** We are running low on time, so let us move on to the next question.

**PROFESSOR LINDA MALONE,** William and Mary School of Law: I just wanted to mention that there really is a substantial body of feminist literature that is directed towards divorce reform, specifically to

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ELAINE MENSCH & HARRY MENSCH, *THE IQ MYTHOLOGY: CLASS, RACE, GENDER, AND INEQUALITY* (1991) (examining the ways that IQ tests and other standardized tests are biased and manipulated).

247. BROWNE, *BIOLOGY*, *supra* note 183, at 27 (“[T]here are approximately 20 percent more males than females among those with an IQ over 140.”).

248. GUINIER, *BECOMING GENTLEMEN*, *supra* note 76, at 2, 9, 13, 28.

249. GRAGLIA, *supra* note 21, at 24.

250. See PETER D. KRAMER, *LISTENING TO PROZAC 270-71* (1993) (noting that Prozac “allows a woman with the traits we now consider ‘overly feminine’” to achieve “a spunkier persona” by “curing” women of traditional, passive feminine traits”).

protect homemakers. I wrote an article nearly twenty years ago, and it is not even my area of expertise.<sup>251</sup> Many other women have written extensively on precisely the inequities that you correctly identified in family law that penalize homemakers and mothers upon divorce. I think many feminists would share your views that the situation is problematic and are trying to change it. Also, as an international human rights lawyer, I have seen that feminism extends far beyond the area of family law. As it has been suggested, feminist efforts have done tremendous things in terms of stopping sexual violence, female genital mutilation, sexual trafficking and other terrible injustices against women that occur on a global scale.<sup>252</sup>

I have a quick question for Mrs. Graglia. How do you reconcile your views with the fact that you took a space in law school and in a law firm from a male breadwinner? I applaud you for that educational experience and your subsequent litigation experience, but I do not understand how you can reconcile your views, because I assume you knew that when you had a family you would abandon that career.

**MRS. GRAGLIA:** During the time I was in the workplace, I assure you that my employers got their full value for the money that they paid me. I do not believe that women who earned a job by competing on an equal basis with men should ever turn the job down because they think there is a less deserving male who could use the job. As long as a woman earns the job without any preferential treatment, I certainly do not begrudge it to her. The male breadwinner is going to have to compete and get another job. As long as I am doing the work, I see no inconsistency in earning the money for that work.

**PROFESSOR MALONE:** But from the employer's perspective, every associate is an investment—hopefully, a long-term investment. So, despite your level of contribution, I still have difficulty reconciling your

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251. Linda Malone, *For Richer or Poorer, 'till Decree Do Us Part: A Spouse's Entitlement to Division of Pension Funds and Professional Degrees as Marital Property*, 1985 ARK. L. NOTES 73.

252. Professors V. Spike Peterson and Anne Sisson Runyon explain that:

Throughout history, women have always participated in all types of struggle; however, they play a particularly central role in nonviolent resistance, which requires mass mobilization to induce the populace to cease cooperation with, and, thereby, delegitimize regimes. Both women's activism in nongovernmental organizations and their traditional roles in sustaining families and communities uniquely position them to mobilize people at the grass-roots level and to devise alternative networks for food, clothing, shelter, and health services. In addition, women have taken great risks to protest governmental crimes and bear witness to human rights violations. These actions have not in themselves toppled governments, but they have been significant factors in bringing about political change.

PETERSON & RUNYAN, *supra* note 159, at 49-50.



perspective, because you knew that you would only be there for a definite period of time (as opposed to being there long-term).

**MRS. GRAGLIA:** I disagree with your characterization of associates as “long-term investments.” I worked at a law firm where perhaps one out of every eight to twelve associates ever had a chance of making partner. All of those other associates would eventually have to leave, so there was not necessarily the long-term relationship that you described. In those days, law firms got the highest possible value out of their young associates. They worked us like dogs and were happy when we chose to leave, because they were trying to weed out all the associates that would never make partner. Actually, I was told that if I stayed, I would make partner. (I only tell you this so you know that I had a good career ahead of me.) But my point is that the firms were happy to have associates leave. It is not true that law firms were investing a lot in associates. In fact, they paid associates very little compared with what they charged the client for the associate’s work.

**PROFESSOR HEMINWAY:** We have another question in the back.

**PROFESSOR KEVIN OUTTERSON,** West Virginia College of Law: Mrs. Graglia, you have mentioned the bell curve and the lack of female geniuses. Do you think that the phenomenon you described is true for both women and for racial minorities, and do you think that the bell curve effect is genetic or social?<sup>253</sup>

**MRS. GRAGLIA:** I know nothing about racial divisions, but I do know about men and women. I think the lack of female geniuses is probably genetic.<sup>254</sup> In my case, it has absolutely nothing to do with society holding me back. My life was like Ann described her grandmother’s. I was raised by a divorced mother, and we often did not know where our next meal would come from. We had to buy all of our food on credit. When my mother got paid at the end of the month, we went and paid the bills and then had to start putting everything on credit again. I learned very young that I had to be a street fighter to survive, and I became a good street fighter. Nobody ever held me back, but I was never a genius. I am not quite as smart as my husband, but I may be more competent. I may work harder at things and make up for it.

**PROFESSOR OUTTERSON:** The panel seems to be divided on whether the phenomenon has genetic or social roots. If the cause is

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253. See SOMMERS, *supra* note 184, at 31-33 (discussing the ranges of people taking tests).

254. *But see* sources cited *supra* note 246.

genetic, there is nothing to be done about it. However, if the cause is social, then it seems that we have an obligation to try to understand it and change it. From my understanding of the genomic literature on this issue, it is far from clear that there is a genetic cause for any sort of racial or gender bell curve distribution.<sup>255</sup> If you make the assumption that the difference lies in genetics, then your positions make some sense. However, if you look more at the relevant research and literature, the rest of the panel's approach makes more sense.

**PROFESSOR LINO GRAGLIA**, University of Texas School of Law: Kingsley Browne here probably knows more about this subject than anyone. For liberals, anything that distinguishes and separates people by any kind of skill or talent has to be denied. The idea that a bias in the LSAT accounts for different performances among blacks and whites and men and women is false, as is shown by the latest studies. No one in the *Grutter* case, in either of the Michigan cases,<sup>256</sup> or the *Bakke* case<sup>257</sup> even claimed that the LSAT was biased, because that claim was defeated definitively 30 years ago.<sup>258</sup> Blacks do not outperform their LSAT scores, they underperform. If LSAT scores were biased, obviously the people it is biased against would do better than the score indicates, and that is not the case. The LSAT certainly is not perfect, and it does not guarantee that a high scoring individual will be a great lawyer. However, it provides the best indication we have as to how an individual is going to perform in law school.<sup>259</sup>

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255. See generally MEASURED LIES: THE BELL CURVE EXAMINED, *supra* note 241.

256. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

257. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

258. Cf. *Grutter v. Bollinger*, 137 F. Supp. 2d 821, 866 (E.D. Mich. 2001) ("The court is unable to find that anything in the content or design of the LSAT biases the test for or against any racial group. If such a bias exists, it was not proved at trial."), *rev'd*, 539 U.S. 306 (2003); Gail L. Heriot & Christopher T. Wonnell, *Standardized Tests Under the Magnifying Glass: A Defense of the LSAT Against Recent Charges of Bias*, 7 TEX. REV. LAW & POL. 467 (2003). But see Espinoza, *supra* note 246, at 127-38 (discussing bias against women and minorities in LSAT questions); William C. Kidder, *Portia Denied: Unmasking Gender Bias on the LSAT and Its Relationship to Racial Diversity in Legal Education*, 12 YALE J.L. & FEMINISM 1, 36-37 (2000). On the gender bias question, one scholar remarks:

[t]he day when women will occupy more than one-half of the seats in ABA law schools is near, and yet, even as that day approaches, for a growing proportion of female applicants the hope of equal access to the legal profession will prove increasingly elusive. The fruit of increased opportunity is, in this case, bittersweet because as a greater and greater proportion of women applicants are people of color, a larger and larger share of the female applicant pool will be denied the chances to become a lawyer because of group differences in LSAT scores.

*Id.* at 36.

259. See sources cited *supra* note 230.

**PROFESSOR BARTOW:** Putting the issue of bias completely aside, the research says unequivocally that the LSAT is a lousy predictor.<sup>260</sup> People routinely get into law schools from the wait list with lousy LSAT scores and become first in their class, and then people with wonderful LSAT scores do not put forth the necessary effort and flunk out.<sup>261</sup>

**PROFESSOR GRAGLIA:** You know that this reality is irrelevant because, of course, the test is not perfect. Nevertheless, the correlation is by far greater than any other indicator we have, including undergraduate grades.<sup>262</sup> Eccentricities will be present in any test; that does not undermine the fact that it is the best we have and that it works pretty well. By and large, the individuals with the highest LSAT scores will float towards the top and vice versa. That is all we can hope from a test like that.

**PROFESSOR HEMINWAY:** I want to hear Kingsley Browne's comments on this issue.

**PROFESSOR KINGSLEY BROWNE,** Wayne State University Law School:<sup>263</sup> I want to make two quick points. On the issue of female geniuses, the literature is relatively clear that there is a biological basis for that.<sup>264</sup> If you look at the distribution of traits, whatever they are, whether it's IQ or anything else, usually the male distribution and the female distribution are relatively normally distributed, but the male distribution is usually more variable—that is, stretched out—which means that there are more men in the very highest level, but there are also more men in the very lowest level.<sup>265</sup> Nobody in this kind of discussion ever shows concern for all those men at the bottom. The end quality for the men at the bottom is not the focus, quite obviously for the good reasons that men are often on top. Even if you have equal male and female means, the male distribution

260. *See id.*

261. *See* Dorothy Brown, *The LSAT Sweepstakes*, 2 J. GENDER RACE & JUST. 59, 61-62 (1998) (describing a student who entered law school, from the wait list, with a low LSAT score and subsequently rose to second in the class, and another student with an LSAT score in the top one percentile who did not enjoy high academic success in law school). For a summary of literature on the poor correlation between standardized test scores and academic and future career success, *see* Richard Delgado, *Official Elitism or Institutional Self Interest? 10 Reasons Why UC-Davis Should Abandon the LSAT (and Why Other Good Schools Should Follow Suit)*, 34 U.C. DAVIS L. REV. 593, 599-601 (2001).

262. *See* sources cited *supra* note 230 and accompanying text.

263. *See* sources cited *supra* notes 234 & 236 and accompanying text.

264. *See* BROWNE, BIOLOGY, *supra* note 183, at 27.

265. *Id.*

will be stretched out to greater extent; therefore you get more male geniuses and male retarded individuals.<sup>266</sup>

My other point concerns the question of why educational statistics and outcomes are not mirrored in the workplace. One reason is that the educational statistics are very gross. They mask the fact that while women have gotten more master's degrees in the United States in every year since 1982, they get their degrees in different subjects than those to which men are drawn. So why do you not get as many women at the top of the corporate heap? Because, for example, not nearly as many women get their master's degree in Business Administration as they do in Education.<sup>267</sup> Getting a master's degree in Education is not going to get anyone a CEO position. Men and women are differentially represented in almost all academic disciplines; men tend to be more represented in more lucrative disciplines,<sup>268</sup> in large part because that is what they care about. They want to structure their lives to make the most money, whereas women are more likely to major in French Literature because that is what interests them.<sup>269</sup> A guy probably would not like French Literature anyway, but even if he did, he is more likely to major in engineering or a similar field because those pursuits will give him the kinds of rewards that he desires.

**PROFESSOR BARTOW:** I may have misheard, but your remarks gave me the sense that you walk into your classroom assuming that the men

266. Commenting on this phenomenon, Dr. Christina Hoff Sommers offers the following, as a summary:

[o]n almost any intelligence or achievement test, male scores are more spread out than female scores at the extremes of ability and disability: there are more male prodigies at the high end and more males of marginal ability at the low end. Or, as the political scientist James Q. Wilson once put it, "There are more male geniuses and more male idiots."

SOMMERS, *supra* note 184, at 32. However, Dr. Sommers does not argue that the greater variation in male test scores is indicative of a greater variation in male intelligence; instead, she points out that, for example, "more girls [than boys] from lower-income homes or with parents who never graduated from high school or never attended college" take the SAT, while, "[o]n the other hand, the exceptional boys who take school seriously show up in disproportionately high numbers" to take standardized tests. *Id.* at 32-33 (citing and discussing EDUCATIONAL TESTING SERVICE, COLLEGE BOUND SENIORS: 1992 PROFILE OF SAT AND ACHIEVEMENT TEST TAKERS iv (1992)).

267. Cf. Cynthia Fuchs Epstein, *Multiple Myths and Outcomes of Sex Segregation*, 14 N.Y.L. SCH. J. HUM. RTS. 185, 194 (1998); Mimi Sharamitaro, Comment: *The Federal Tax System and Treatment of Scholarships for Graduate Students: Should Scholarships Be Taxed?*, 48 ST. LOUIS L.J. 1501, 1507-08 (2004) (summarizing National Center for Education Statistics data from 2002 and 2003). Trends in this area are, however, changing. See William T. Bielby, *Social Science Accounts of the Maternal Wall: Applications in Litigation Contexts*, 26 T. JEFFERSON L. REV. 15, 18 (2003).

268. See BROWNE, BIOLOGY, *supra* note 183, at 76-78.

269. See Martha S. West, *Gender Bias in Academic Robes: The Law's Failure to Protect Women Faculty*, 67 TEMP. L. REV. 68, 152 (1994) ("The percentage of United States PhDs earned by women ranges from a high of 70% in art or French literature to a low of 9% in engineering.").

are smarter than the women. I do feel sorry for your students if I am correctly interpreting your comments.

**PROFESSOR BROWNE:** I do not think that anything that I said would imply that.

**MS. JUDY FELIX:** My husband is a professor at the University of South Carolina School of Law, and he is speaking next door. I am the mother of four and grandmother of ten, and my five female grandchildren will have just as much genius as my male grandchildren. Two of my children, one male and one female, are lawyers. My son is practicing in a small firm in Hilton Head, and my daughter left a practice in a large firm in Washington, D.C. to be a stay-at-home mother of three children. My children had more choices than I had, and my grandchildren will get more choices than their parents had, but, in order to address an important aspect of the problem, we have to look outside of the law school. I taught middle school for twenty years, and I know that part of the problem begins there. I believe deeply in treating children as if they are able to rise to the maximum of their ability.<sup>270</sup> I have taught classrooms of forty, and I have taught classrooms of seventeen. I pushed, I shoved, I kicked, but part of the problem in the classroom is discipline. Discipline of boys and girls at the middle school age involves dealing with two different species, not just two different sexes. Educators treat male and female students very differently.<sup>271</sup> We must revamp our whole educational system before our female geniuses will truly be able to rise to the top, because we are not giving them the attention they need at an early age. They know how to sit

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270. This approach is arguably supported by the "labeling theory" or the "societal-reaction" approach to addressing deviance. See RICHARD T. SCHAEFER & ROBERT P. LAMM, *SOCIOLOGY* 198-99, 290-91 (6th ed. 1998). According to this approach, using negative stereotypes to define a child, or treating a child as if he or she was deviant, can strongly affect the way that child perceives himself or herself; accordingly, placing deviant stereotypes on a child can become a self-fulfilling prophecy because they incorporate that label into their own self-image and sense of identity. *Id.* at 290.

271. There are differing perspectives on the experiences of young boys and girls in school. Carol Gilligan presents an image of the "silenced" girl whose self-esteem is diminished because of the hostile school environment. GILLIGAN, *supra* note 140. Some, however, believe it is male children who have suffered.

How do boys fit into the "tragedy" of America's "shortchanged" girls? Inevitably, boys are resented, being seen as both the unfairly privileged gender and as obstacles on the path to gender justice for girls. There is an understandable dialectic: the more girls are portrayed as diminished, the more boys are regarded as needing to be taken down a notch and reduced in importance. This perspective on boys and girls is promoted in schools of education, and many a teacher now feels that girls need and deserve special indemnifying consideration.

SOMMERS, *supra* note 184, at 23-24.

still, they know how to do their homework and they have bought into the educational system in a way that many thirteen-year-old boys have not.<sup>272</sup>

If you want to get allies for your cause, go to the fathers of adolescent daughters. These men want every dream, every choice and every possibility open for their daughters, and they are the ones who should be writing the laws that affect women in the workplace and women in marital situations, because they are the ones who have the most at stake.

**PROFESSOR HEMINWAY:** Thank you for that closing comment, Judy. I also want to thank our panelists for a very lively discussion this morning.

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272. *Id.* at 24-31.

