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LAWSYERS' LIVES, CLIENTS' LIVES: CAN WOMEN LIBERATE THE PROFESSION?*

LYNN HECHT SCHAFFRAN†

I. THE LAWYER-PARENT: UNFIT PER SE?

ABOUT ten years ago, two custody cases decided in close succession caught my attention. In each case the court made it clear that the parent denied custody was fit and loving, and in each case the court's decision rested on a ground that I had never before encountered. What was the failing of these loving parents? They were . . . lawyers.

In the first case, an Iowa trial court denied custody to a law student on the ground that studies in law school were very time consuming. ¹ Although the mother urged that she could be both a law student and a custodial parent, the judge thought otherwise. "Anyone who has attained a legal education," he wrote, "can well appreciate the time that studies consume. . . . [O]ther than time in class during the day, there will be study periods during the day in the library necessary, as well as in the evening . . . . The weekends are [also] usually occupied by study periods . . . ."²

In the second case, a New York appellate court affirmed the trial court's award of custody to a child's mother.³ The court explicitly rejected the lower court's apparent reliance on "outdated principles of 'maternal superiority,'" and instead rested its own decision on the father's professional responsibilities in the law.⁴ The appellate court determined that although the mother's career was also demanding, she would be more likely to give time to the child during the week because the father was a partner in a prominent New York City law firm. "From necessity, he must spend

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† Director, National Judicial Education Program to Promote Equality for Women and Men in the Courts, a project of the NOW Legal Defense and Education Fund in cooperation with the National Association of Women Judges; B.A. 1962, Smith College; M.A. 1965, J.D. 1974, Columbia University.
¹ In re Marriage of Tresnak, 297 N.W.2d 109, 111 (Iowa 1980).
² Id.
⁴ Id. at 546, 425 N.Y.S.2d at 120-21.

(1105)
many and irregular hours in pursuit of his profession."

These two cases prompted me to write an article suggesting that we had seen the dawn of a new doctrine of family law: the lawyer-parent as unfit \textit{per se}.\textsuperscript{6} It seemed to me that if law students and law partners were unfit to be custodial parents because their work was too demanding, then judges' law clerks, associates on their way up, counsel in regulatory agencies and corporations, public interest lawyers with heavy caseloads and most categories of lawyers other than judges on senior status must likewise be deemed unfit for custodial purposes.

What vistas of legal theorizing were opened to me by the doctrine of the lawyer-parent as unfit \textit{per se}! How to decide a custody dispute between a paranoid schizophrenic and a lawyer? Worse, what if both parents were lawyers? Must the child be put up for adoption?

I considered the edifying spectacle of attorneys who had yet to see their own children in daylight arguing that the parents opposing their clients for custody were unfit solely because of their status as lawyers. I wondered whether children would sue their lawyer-parents for wrongful birth. Could a claim be fashioned that lawyer-parents' absenteeism from their children's lives is imimical to a healthy childhood, and that as lawyers these parents knew or should have known that they were unfit even to conceive?

Lastly, I wondered whether my new doctrine would impact the practice of law. Would law firms with sweat shop hours and a high divorce rate among their partners reduce the work load to protect partners' potential interests in becoming custodial parents? Would judges adjourn court early so that both they and counsel could get home for Little League? Would \textit{everything} slow down if our ubiquitous profession slowed its pace?

II. THE WORK/FAMILY CONFLICT: NOT FOR WOMEN ONLY

The Iowa law student's case was reversed on appeal,\textsuperscript{7} and I know of no subsequent case in which being a lawyer was grounds for being denied custody. However, I thought of these two cases when, in October 1987, I was appointed to the new American Bar Association (ABA) Commission on Women in the Profession (the "Commission"). The Commission's investigations, which in-

\textsuperscript{5} Id. at 546, 425 N.Y.S.2d at 121.


\textsuperscript{7} \textit{In re Marriage of Tresnak}, 297 N.W.2d 109, 114 (Iowa 1980).

cluded two days of public hearings with more than sixty witnesses, revealed that the balancing of work and family is a critical issue for lawyers of both sexes. These investigations also revealed that many people view the discussion about work and family engendered by women’s entry into the law as the chance for the profession to liberate itself from a *modus vivendi* that is destroying everyone.

Although women continue to take primary responsibility for child raising and housework, many of the Commission’s informants urged us to make clear that fathers also want to participate in their children’s lives, and that the lack of balance in lawyers’ lives is damaging our ability to serve our clients with appropriate professionalism. In the words of the Chair of the ABA Committee on Professional Discipline, “ma[king] the profession more congenial to the demands that the family imposes on both men and women . . . [is not a] women’s issue[,] [it is an] issue[] of the survival and sanity of our profession.”

Evidence of fathers’ concerns comes from many sources. A partner in Arnold & Porter informed the Commission that in Washington, D.C., many firms are receiving requests for paternity leave. Recently, a male judge who was evaluating a session on stress at the National Judicial College wrote: “Add emphasis on spouse and children. How can we . . . not consider the impact on our children and families? It’s 1989, which means more young judges, more young families and more two working parents.”

Your own Professor Donald Dowd, who sits on the Board of the Defenders Association of Philadelphia, told me that the Association has a paternity leave policy, and that the Board has been surprised by the number of men taking advantage of that policy.

When I met with the ABA Section on Science and Technology, the Chair stated that when his wife, who is an attorney, calls her office to say she will not be attending that day’s non-essential meeting because their child is ill, her excuse is accepted. However, if he were to make the same phone call to the corporation

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9. 2 *Hearings of the ABA Comm’n on Women in the Profession* 461 (Feb. 6-7, 1988) [hereinafter *Hearings*] (testimony of Marna Tucker, Esq.).

10. *Id.* at 392 (testimony of Brooksley Born, Esq.).


12. Professor of Law, Villanova University School of Law; A.B. 1951, J.D. 1954, Harvard University.
where he is counsel, he would be laughed at. I pointed out that his wife and all women pay a price for having that so-called "excuse" accepted, but assured him that the Commission on Women in the Profession is indeed concerned about making his wife's "excuse" as acceptable from a man as it is from a woman.

This not going to be easy, given the paradigm of men's work lives since the Industrial Revolution. As Harvard Business School Professor Rosabeth Moss Kanter described it:

When employees reported to work, they were expected to behave as though they had no responsibilities for a home or family. Occupational life, particularly that of the managerial class, was to be organized around impersonal standards of competence, norms directly opposed to those of the family. So the "organization man" was "freed" to focus on the job, returning each night to his wife and children in the suburbs. Business life was neatly segregated from emotional life.13

Given this history, we should not be surprised that American business is less than eager to encourage men's interest in their families. Congresswoman Patricia Schroeder, sponsor of the Family and Medical Leave Act, which would provide ten-week unpaid leave and job security for either parent when a child is born or adopted or when necessary to care for a seriously ill child or older relative,14 reports that the Bush Administration has indicated it will support the Act only if the coverage for men is dropped.15

III. THE RIGIDITY OF THE MODEL OF THE AMERICAN WORKPLACE

In the model of the American workplace, the employer owns the man. The employer is free to set his hours, move him and his family to any location at any time, and demand that its interests be his highest, if not only, priority. In our profession, this means that the law has become not merely the proverbial "jealous mistress" of yesteryear, but the insatiable god of billable hours. It is


to this model that women have been expected to conform and against which many women are rebelling.

Not every man has been thrilled with this model either, but it has been more difficult for men to object. The hierarchy of our profession makes it clear that the brass ring is in the hands of the partner in a major corporate law firm. Lawyers who insist on seeing their children in daylight may not catch it. Women who choose a different path, who seek more flexible work arrangements or take less demanding jobs, are “excused” (there’s that word again) for their “weakness” because it is perceived that women have to take care of children. Many in the profession treat women’s interest in their children as evidence that women are less serious about the law than men. Men who want something different, however, face not condescension, but incomprehension and intolerance.

A member of the Commission told us about a senior associate in her prominent law firm who was the fair-haired boy in his department, but who decided to quit because he had no family life. When he advised the senior partner in his division that he was leaving, the partner was shocked. “Why are you doing this?” he asked. “You have a wonderful future here.” The associate replied that he appreciated that, but that the hours spent commuting and at work left him no time to spend with his children. He had therefore accepted a corporate counsel position near his home. The partner looked puzzled and said, “What did you want to do that for? I never saw my children when they were growing up and they turned out just fine.”

A friend of mine, who plotted her life carefully from the real estate business to law school to a well-known firm and back into real estate, told me of lunches with male colleagues who remained at her former law firm. At these lunches they confided to her their longing to leave and to own their own lives, but felt that they could not. And it wasn’t the golden handcuffs. These men reported the perception, which I have heard from many other men, that a woman can leave a prestigious firm to start her own practice, pursue another career or stay home with children without being looked down upon. But the man who follows the same path risks public censure.

The influx of women into the profession offers us an opportunity to change our workplace model. However, making genuine change requires that we do it for women and men simultaneously.
Some of you may be aware of the controversy provoked by a recent article in the Harvard Business Review, in which the author proposed that corporations identify women managers at an early age as either “career-primary” (referring to women who put the job above everything and probably won’t have children) or “career-and-family” (referring to women who not only want children but want to see them in daylight). The author suggested that corporations treat career-primary women like men (that is, move them along quickly and allow no time for life outside the office) and train those women who want time for a family for middle management, where there will be lesser demands on them from the workplace and where they will provide top level talent for the company in a mid-level slot.

The proponent of this scheme (a scheme which, by the way, probably violates Title VII of the Civil Rights Act) claims to have proposed it this way because, in her view, corporations are now ready to pay attention to women managers’ needs for family time, and accommodations for women now will pave the way for similar accommodations for men in the future. I think we must ask what the true cost to women of this supposed accommodation is likely to be, and whether it will in fact ultimately benefit men.

This scheme, which has been called the “mommy track,” should remind us of women’s historical experience with protective legislation. In 1908, the United States Supreme Court in Muller v. Oregon upheld an Oregon statute limiting women’s hours of employment on the ground that “as healthy mothers are essential to vigorous offspring, the physical well-being of wom[e]n becomes an object of public interest and care in order to preserve the strength and vigor of the race.” This law was the archetype of legislation that focused on women’s reproductive capacities, gave women “something extra,” but in the long run was turned against us.

Although the brief in this case also included evidence of risks to the health of male workers, and although many supporters of protective labor laws for women viewed this legislation as only the first step toward general, sex-neutral reforms, the practical
result was that the laws "protecting" women from working long hours, late hours, overtime hours, and from lifting objects no heavier than a toddler, were used by employers well into the 1960s and 1970s to "protect" women from managerial jobs and jobs that were non-traditional for women, but paid more than traditional women's work.

Institutionalizing a "mommy track" rather than using this period of change to create a "parent track" is far more likely to reinforce the status quo than to create future flexibility for both sexes. Child raising will continue to be treated as a woman's job, women will continue to be treated as less than serious about their work because they want time for family life, and men will continue to be treated as having no right to family life at all.

In addition to time for one's family being desirable in itself, the Commission learned that persuading lawyers to create balance in their lives is a primary concern of the ABA Commission on Professionalism and the ABA Standing Committee on Professional Discipline. The Chair of the disciplinary committee testified about how the current structure of the profession distorts the lives of lawyers of all ages. She spoke of pressure on young lawyers to bill hours that cannot be sustained, stating:

They start lying about their hours, they pad their bills. We are creating a generation of cheats in our profession. . . . They are losing their physical health, they never see their families. . . . There's no time to develop that moral fiber that made our profession noble . . . when you are billing twenty-five hundred hours. 19

She testified that older lawyers are getting divorced at a prodigious rate, and that they are dysfunctional in their work during divorce because they are going through a crisis. She stated that approximately fifteen percent of lawyers are, in her words, "drunks and druggies." 20 To quote her again: "The profession is falling apart." 21

Summing up all these concerns, the Commission wrote in our 1988 report to the ABA House of Delegates:

Many of the witnesses testifying before the Commission asked to have the issue of women in the profession

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19. *Hearings, supra* note 9, at 459 (testimony of Marna Tucker, Esq.).
20. *Id.* at 462.
21. *Id.*
framed in a larger context; we should examine the direction of the profession itself and ask whether that direction is in the best interests of anyone, the members of the profession or the clients they serve.22

The critical mass of women currently in the legal profession is forcing employers to deal with talented workers who are important to them, but who don’t have a wife in the suburbs taking care of the children and keeping the family’s emotional motor running. Progressive employers are adopting policies providing leave for mothers and fathers of newborn and adopted children, are opening child care centers for full-time or emergency care for the children of lawyers and other workers, and are even allowing part-time lawyers to remain on the partnership track. Responding to women lawyers’ requirements has opened a dialogue about the profession as a whole. How liberating this will be for all of us remains to be seen, but I share the hope of one of the witnesses before the Commission who stated: “I do not believe the legal profession changes women; rather, I believe women have potential for changing the legal profession to the benefit of all lawyers.”23

V. FEMINIST JURISPRUDENCE

This benefit encompasses not just the quality of our lives, but the quality of our skills. Just as women lawyers are providing the opportunity for the profession to liberate itself from a direction which is not in anyone’s best interests, so women lawyers are also providing an opportunity for the profession to liberate itself from an ignorance about the realities of women’s lives that makes us ineffective advocates for our women clients and profoundly diserves the fair administration of justice.

Last year, the Donald A. Giannella Lecture was delivered, as you know, by Harvard Law Professor Derrick Bell.24 When I read his speech, White Superiority in America: Its Legal Legacy, Its Economic Costs,25 I was tempted to take it as the text for my own sermon and entitle mine Male Superiority in America: Its Legal Legacy, Its Economic Costs. The parallels are inescapable, although our profession

22. ABA COMM’N ON WOMEN IN THE PROFESSION, REPORT TO THE HOUSE OF DELEGATES 16 (Aug. 10, 1988).
23. Hearings, supra note 8, at 282 (testimony of Linda DeMetrick, Esq.).
24. Donald A. Giannella Memorial Lecture at the Villanova University School of Law, April 18, 1988.
often fails to see them. In Regents of the University of California v. Bakke, several briefs analogized race discrimination to sex discrimination. In his decision for the majority, Justice Powell wrote, "the Court has never viewed [gender-based] classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis" because "the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share."

Certainly white women did not come to this country in chains, and certainly women born or married to men of wealth have enjoyed the derivative benefits of that status, but all women have been brutalized, degraded and denied equal education, equal pay and equal rights for millennia. Although there has been progress for women in education, pay and rights over the last twenty years, male violence against women continues unabated, and women continue to be significantly poorer than men, with consequences for every aspect of our lives.

Making the realities of women's lives visible and understood is a primary goal of feminist lawyers and law teachers, who have created a burgeoning school of legal theory known as "feminist jurisprudence," sometimes defined as "an examination of the relationship between law and society from the point of view of all women." Feminist jurisprudence involves questioning legal theory and legal teaching, looking for ways to make them contextual and inclusive so that they reflect and respond to the real life situations of women and men of different races, classes, ages, physical abilities, ethnicities and sexual orientation. This new jurisprudence itself has many strands, and it strives to make clear that no one theory of law can account for the vast disparities of social experience. In the words of Harvard Law Professor Martha Minow, feminist jurisprudence "pursues [a] perpetual critique . . . while also searching . . . for practical justice, not just more the-

27. See, e.g., Brief for the United States as Amicus Curiae at 64-65, Bakke (No. 76-811); Brief of the American Civ. Liberties Union, the ACLU of N. Cal., the ACLU of S. Cal. as Amici Curiae at 15-16 & n.22; Brief of Columbia Univ., Harvard Univ., Stanford Univ., and the Univ. of Pennsylvania as Amici Curiae at 29.
ory.\textsuperscript{30} Although feminist jurisprudence initially focused on so-called “women’s issues” such as pregnancy and rape, it is now branching out to ask what all law and legal process would look like if they embodied an inclusive world view, a less abstract, more caring ethic, and a sense of contact and connectedness; and if theory were derived from reality rather than imposed on it.\textsuperscript{31}

Making women’s real life experiences visible and understood as they relate to the law means, for example, informing the profession about the actual rates of sexual and domestic assault against women and the fear of this pervasive violence with which women live every day. A University of Kentucky law professor\textsuperscript{32} begins the rape section of her criminal law course by asking each male student to tell the class what he does on a daily basis to protect himself from sexual assault. The response is a puzzled silence. Then she asks the female students, each of whom has something to say: “I don’t go to a certain mall because its parking lot is badly lit”; “Before I get into my car I look to see if anyone is in the back seat”; “I don’t come to campus at times when there won’t be many people around”; “I sleep with my windows locked no matter what the weather.” The first time this professor tried this teaching technique, one woman said, “I don’t worry about anything anymore—I carry a loaded gun,” and opened her handbag to take out a pistol. The men in the class are amazed to learn that the fear of sexual assault is a daily reality for their female colleagues and in many ways conditions their lives. A man I know recently published an anthology of writings by American naturalists. He had wanted to include women writers and was puzzled about why he could find so few, until his wife pointed out that women do not have the same freedom as men to wander alone in the wilderness.

Why does it matter if lawyers know nothing of women’s real world experiences? It makes for bad teaching, bad advocacy and, as I have already noted, bad judging.

A few years ago, I learned that the law and psychiatry professor at a New York law school was telling his class that it was a good thing if police did not arrest the batterer when they were

\textsuperscript{30} Minow, Feminist Reason: Getting It and Losing It, 38 J. LEGAL EDUC. 47, 48 (1988).


\textsuperscript{32} Carolyn S. Bratt, Jr; Professor of Law, University of Kentucky; B.A. 1965, SUNY at Albany; J.D. 1974, Syracuse University.
called to a wife-beating case. I wrote to inform him of a study conducted by the Police Foundation\textsuperscript{33} demonstrating that arrest, rather than telling the batterer to walk around the block, is the most effective means to reduce recidivism. The professor who, I should note, is a lawyer, not a psychiatrist, called me to say that he was not just saying that the police ought not to arrest. He was saying that they ought to take the batterer to Bellevue for a shot of thorazine. When I told him that domestic violence is not a few men having psychotic episodes, but rather an epidemic of violence that crosses all economic, racial, religious and ethnic lines and is minimally estimated to affect two million women every year,\textsuperscript{34} he was shocked.

Nor is he the only law professor unaware of these realities. Recently a feminist scholar was considered for tenure at a prominent law school. The chairman of the appointments committee told me that after reading her work, one or two of his colleagues challenged her statistics. Her data about rape, child sexual abuse, domestic violence and sexual harassment were so far out of line with their perception of reality, that they felt these data bore negatively on her scholarship. The committee chairman reviewed all her footnote sources. He reported that she had quoted her sources accurately, and that reputable researchers of both sexes in the social sciences and government had determined, for example, that in 1986 a woman was the victim of a rape or attempted rape every three and one-half minutes; that in 1984, 51.3\% of completed, reported rapes were committed by nonstrangers, including dates and husbands;\textsuperscript{35} that in a study of 930 randomly chosen San Francisco women, 38\% had been sexually abused before the age of eighteen, 16\% incestuously;\textsuperscript{36} that one-half the incidents of domestic violence classified as "simple assaults" actu-

\begin{itemize}
\item \textsuperscript{33} Sherman & Berk, \textit{The Minneapolis Domestic Violence Experiment}, POLICE FOUND. REPS., Apr. 1984, at 1.
\item \textsuperscript{34} Women, Violence, and the Law: Hearings Before the Senate Comm. on Children, Youth, and Families, House of Representatives, 100th Cong., 1st Sess. 3 (Sept. 16, 1987) (information provided by Women, Violence, and the Law—A Fact Sheet, which was based partially upon statistics compiled by the United States Department of Justice Bureau of Justice Statistics (1986-87)).
\item \textsuperscript{35} \textit{Id.} The majority of rapes, particularly those committed by non-strangers, are not reported. For example, a study funded by the National Center for the Prevention and Control of Rape of 7000 students on 35 campuses revealed that one in eight women was the victim of rape, according to the legal definition of the term. But less than 10\% reported the rape to the police. Sweet, \textit{Date Rape: The Story of an Epidemic and Those Who Deny It}, Ms., Oct. 1985, at 56, 58.
\item \textsuperscript{36} D. Russell, \textit{Sexual Exploitation: Rape, Child Sexual Abuse, and Workplace Harassment} 183 (1984).
\end{itemize}
ally involved bodily injury as or more serious than 90% of all rapes, robberies and aggravated assaults;\textsuperscript{37} and that over 40% of the women in the federal workforce have experienced sexual harassment on the job.\textsuperscript{38} The skeptics then asked, “What kind of a society are we living in?” How does the failure to understand the kind of a society we live in affect our roles as advocates?

In 1988, the theme of the Washington, D.C., Judicial Conference was “Racism, Sexism and Gender Orientation in the Law, the Legal Process and the Legal Profession.” The presentation on sexism addressed torts and damages. The judge organizing this panel contacted several lawyers, hoping to find female plaintiffs to be speakers. One lawyer responded with a lengthy letter about a client in a sexual harassment case whom he had hoped would be willing to speak, and about how his own ignorance almost prevented him from taking her case. I am going to read you a long excerpt because this letter provides a singular evocation of what our profession has yet to learn about women’s lives, and how that ignorance affects our advocacy:

I had especially hoped to obtain the assistance of one particular former client, whose case was most enlightening to me, as an attorney. This lady called several times, nearly hysterical . . . . I tried to avoid talking to her, because she seemed crazy. Finally, our receptionist persuaded me to meet with this lady. Our initial conference started off strangely, as the prospective client asked if I could give her several large manilla envelopes. I did, and she placed them strategically on the leather of the chair, before sitting. She explained that she was so upset by the events, that she would sweat profusely whenever she thought about her case.

When she came to my office, she was chief telephone operator for her private employer. She claimed that the distinguished man who headed the division in which she was employed, had harassed her repeatedly, and in most outrageous ways. For instance, as she was xeroking papers, he came up from behind and pressed

\textsuperscript{37} P. \textsc{Langan} \& \textsc{C. Innes}, \textit{Bureau of Justice Statistics Special Report, Preventing Domestic Violence Against Women} 1 (1986).

himself against her buttocks. On one occasion, he called, said it was his birthday, and asked why she had not brought him a card. During lunch, she bought a card and brought it over to his office. He closed the door, grabbed her, kissed her and brought a hand up under her blouse to touch her breasts. He would call her up, promising "to light such a fire on her tail" that she would never want any other man afterwards.

This lady rebuffed and resisted these advances, which occurred in private, without suffering any consequences. But, when on one occasion he tried to touch her while he was in the company of several of his male assistants, she slapped his hand away. Then, all hell broke loose. Everything she did on the job was wrong, and he devoted himself to breaking her spirit and making her an outcast.

As crazy as all of this sounded, I told this lady I would not represent her until I had spoken with her psychiatrist and psychologist. The client agreed and got up to leave, but first threw away the manilla envelopes, which were indeed soaked through.

I spoke to her psychiatrist. He told me that there was no evidence of fabrication, and he believed her story. Her psychologist concurred, so we plunged ahead.

The case was assigned to Judge X and full discovery was held. Still, as of a few days before Pretrial, there was no independent corroboration, and my only strength was the believability of my client. Then, an unrelated woman employed in a different area at the same institution called and asked for an appointment. She came in, and told her tale. It turned out that she had been harassed by the same man, in many of the same ways. She was quite willing to be a witness, and also directed me to a third person, in yet another department, with similar experiences at this man's hands.

Amazingly, my client and the other two ladies had all brought their complaints to their employer's internal EEO office. When request was made to add these two witnesses at pretrial, and Judge X discovered that defendants had known of these other complaints, the case settled rather quickly...
Now, the reason I have burdened you with such a long letter, is because of my feeling that [the] objective at this judicial conference is extremely important. I do not think I am any less sensitive than most lawyers, but in this case, I was about to reject a meritorious case, because it seemed to be too awful to believe. And, I was mistaking the client's desperate cries for justice, with hysteria.

I am not saying that I have learned how to do this without making mistakes, but all of us, lawyers and judges, need to remember that unspeakable acts are sometimes committed even by respected people and that the most severely injured of their victims may be the hardest to believe. 39

This is a very moving letter, and I am grateful to the lawyer who wrote it, whom I do not know, for his willingness to expose his own ignorance in furtherance of reform. The crux of his letter is the phrase "[a]s crazy as all of this sounded" (emphasis added) after the description of the harassment this woman endured. While I certainly believe in verifying the accuracy of any client's allegations, why did he perceive this woman's story as "crazy"? It certainly doesn't sound crazy to me. University of Maryland Law Professor Robin West 40 has written about the phenomenon of the often strikingly different reactions of women and men to the statistics and specifics about violence and harassment against women. "Why is my reaction so different [than men's]?" 41 she asks. She replies:

I attribute it to this: my reality—both internal and external—includes that violence, the pain it causes, and the fear it engenders. Not only have I lived it (and they haven't), but I talk to women (and they don't), and women talk to me (and not them). Like all women I know, I hear narratives of violence which are not heard by any man

39. Letter to a Judge of the Superior Court of the District of Columbia concerning the 1988 Washington, D.C., Judicial Conference on Racism, Sexism and Gender Orientations in the Law (Apr. 26, 1988) (for confidentiality reasons the names of the lawyer and judge have been omitted).


with the sometimes exception of male therapists. My male colleagues think my neighborhood is safe; they weren’t told (I was) the details of a recent rape. I hear about the date rapes of students . . . ; my male colleagues do not. . . . I hear (men don’t) about marital violence. . . . I hear women’s memories of early sexual abuse. . . . I draw this simple inference: Women and men have wildly different “ignorant” intuitions about the amount of danger, violence and fear in women’s lives because women live it and men don’t and women tell other women and not men.42

Our profession must be liberated from its ignorance about women’s lives, or we will continue to fail in our obligations as advocates. We will fail to accept a meritorious case because we mistake a woman’s cry for justice for “hysteria” (a word classically applied only to women). We will fail to obtain permanent alimony for the fifty-year-old homemaker who invested thirty years of human capital in making her husband a star because we think this is the age of women’s liberation, where any woman can get a good job, no matter what her age or background. We will fail to make appropriate claims for damages for the value of women’s unpaid work as homemakers and child rearers because this is invisible work. We will not think to fashion appropriate claims and defenses for our women clients because little or nothing in our casebooks encourages us to think about the realities of women’s lives in the way that casebooks urge creativity on behalf of men.

Understanding the realities of our female clients’ lives and communicating them to the court can make a difference.

State v. Wanrow43 was a case in which a five-foot, four-inch woman with her leg in a cast shot and killed a six-foot, two-inch intoxicated man whom she believed was again about to molest her children. A jury convicted her of murder.44 The feminist litigators who argued the appeal demonstrated to the Washington Supreme Court why a jury instruction applying the equal force standard and directing the jury not to consider Wanrow’s perspective in evaluating her claim of self-defense denied her equal protection.45 As Professor Elizabeth Schneider,46 one of the law-

42. Id. (emphasis in original).
43. 88 Wash. 2d 221, 559 P.2d 548 (1977).
44. Id. at 224, 559 P.2d at 550.
45. Id. at 240-41, 559 P.2d at 558-59.
46. Professor of Law, Brooklyn Law School; B.A. 1968, Bryn Mawr College;
yers on the appeal, described it: "We developed the legal argument for women's 'equal right to trial,' which challenged sex-bias in the law of self-defense, based upon our knowledge of the particular problems women who killed men faced in the criminal justice system . . . ." 47 Schneider's list of problems included—and here's that word again—"myths and misconceptions in the criminal justice system concerning women who kill as 'crazy.'" 48

I have seen in my own work in judicial education the benefit of making the realities of women's lives visible. In 1981, the National Judicial Education Program's pilot course at the California Center for Judicial Education and Research invited Dr. Lenore Weitzman to present the findings from her study of 1500 California divorce cases, which has since been published in her well-known book, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America. 49 The judges were startled by her documentation of the acute financial hardships that women face after divorce as a result of insufficient and unenforced alimony and child support. One judge wrote on his evaluation form:

I was quite shocked at the information we received indicating the disparity between males and females and the treatment of them in the courts, especially the statistics concerning how women fare after divorce, after a few years. Many of the myths that are taken as fact by judges were shattered by your presentation and the correct situation was revealed. It was the impact of knowledge on ignorance. 50

When I have presented information about the economic consequences of divorce, more than one judge has told me, "When I listened to you explain the difficulty that a lifetime homemaker faces in trying to join the paid workforce in middle age and without a resume, I realized that I did not give sufficient alimony to a woman who came before me last week." I have even had judges


48. Id. (emphasis added).


send me opinions reflecting this new awareness. 51

At a program on race and gender bias in the courts presented by the Oregon Supreme Court in 1983, I distributed excerpts from an article about rape by Columbia Law Professor Vivian Berger. 52 This article included extensive citations to FBI data about the incidence of rape, the small percentage of rapes that are reported, the great difficulty of having a rape case proceed to trial and the very small percentage of guilty verdicts. 53 Subsequently, I received an opinion and note of thanks from the Oregon Supreme Court, which used this data to expose the fallacy of the Lord Hale jury instruction that rape is a crime easy to charge and difficult to defend, so the female complainant must be examined with extra caution. 54 This was the standard jury charge in rape cases throughout the country well into this decade. 55

51. For example, at a 1988 National College of Juvenile and Family Law Judges’ program for appellate judges I spoke on the feminization of poverty and distributed an article by Professor Joan M. Krauskopf, Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony, 21 FAMILY L.Q. 573 (1988). A Florida appellate judge who attended this program subsequently sent me a per curiam opinion affirming the award of permanent alimony to a long-term homemaker. The judge had written a concurrence in which he quoted Professor Krauskopf’s article extensively. Quinn v. Quinn, No. 88-0709, slip op. at 3 (Fla. Dist. Ct. App. Jan. 11, 1989) (unpublished opinion).

The National Judicial Education Program’s seminars for judges about gender bias in the courts were the catalyst for the creation of the New Jersey Supreme Court Task Force on Women in the Courts, whose findings inspired a gender-biased task force movement nationwide. To date, there are more than 25 task forces established by state chief justices to investigate gender bias in their own court systems and make recommendations for reforms. See Schafran, Documenting Gender Bias in the Courts: The Task Force Approach, 70 JUDICATURE 280 (1987); Schafran, Gender Bias in the Courts: An Emerging Focus for Judicial Reform, 21 ARIZ. ST. L.J. 237 (1989). In 1988 the supreme court justice who chairs the Nevada Supreme Court Gender Bias Task Force, and who has become deeply sensitized to the plight of the older homemaker in dissolution cases as a result of his task force’s investigation, sent me an opinion in which his court not only reversed and remanded a $500 per month alimony award to a 57-year-old homemaker whose husband earned $67,000 per year on the grounds that it was totally inadequate and unjust, but stated that “we believe that the award should not necessarily be limited to the $1,500 per month prayed for by [the wife].” Heim v. Heim, No. 18240, slip op. at 11-12 (Nev. Oct. 28, 1988) (unpublished opinion).


VI. CONCLUSION

There is a consciousness-raising exercise called “The Circle” which is usually done on a blackboard, but which we can all do in our heads.56 Draw a circle in your mind. This represents all the people in the world. Divide the circle in half. Mark one-half “women” and one-half “men.” Within the half marked “men” draw a line that marks out one-third of the segment. This one-third is all the white men in the world. Now shade a tiny sliver of this one-third. This sliver is all the educated and privileged white men in the western world. This sliver is, for most of us, what we know about the world. It is our history books, our literature, our art and our law.

Until now, this sliver of men made all the rules: the rules about how laws should be written, interpreted, applied and enforced; the rules about how lawyers should live and work. Women in the profession are questioning the rightness of all of this. Let us all join the “perpetual critique,” and strive to achieve more “practical justice” for our clients and ourselves.

56. University of Texas Law Professor Patricia Cain described this exercise in Teaching Feminist Legal Theory at Texas: Listening to Difference and Exploring Connections, 38 J. LEGAL EDUC. 165, 168 (1988). Professor Cain credited the exercise to Joyce McConnell, Assistant Professor of Law at CUNY Law School at Queens; J.D. 1982, Antioch University.