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WOMAN'S GHETTO WITHIN THE LEGAL PROFESSION

Marilyn J. Berger*

and

Kari A. Robinson**

I. INTRODUCTION

"I am afraid of getting older. I am afraid of getting married. Spare me from cooking three meals a day - spare me from the relentless cage of routine and rote. I want to be free. I want, I think, to be omniscient. I think I would like to call myself 'The girl who wanted to be God.' "

Today, many women share these desires, aspirations, and fears that seventeen-year-old Sylvia Plath wrote about in 1949 — the desire to retain an identity of their own, the freedom to enter the public sphere, and the freedom to utilize their skills and abilities to the fullest within society. Unfortunately, Sylvia Plath chose to take her life rather than submit to the "relentless cage of routine and rote." There is a common struggle that all women face within a patriarchal society — to retain their existence, to participate within society to their greatest potential, and to have real choices for their personal and professional growth and development. In this article we focus on the legal profession as an example of women's continuing struggle to participate fully within society at all levels.

History provides the necessary social context in which to understand women's current status within the legal profession today. Women's image of frailty and domesticity, fostered by literature, has been used throughout history to justify the exclusion of women from full participation within society. Women were largely relegated to the domestic sphere where social and economic power was the lowest and social control was possible. 

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2. Id. at 2193.
the stereotype of woman's timid and delicate nature and role as the nurturing sex. Protectionism shielded women from the harsh realities in the public sphere. Most women accepted their lot. A few rebelled. Beginning in the 1840's women began to demand participation in the public spheres through the right to vote and protective economic legislation. This was the first stage of struggle by women to participate within the public sphere. However, the image of woman as a timid and delicate creature and her role as nurturer and caretaker clung to her like a shadow, entering the work force with her.

Her place in the work force became a mirror image of her caregiver role at home. Women were permitted to infiltrate fields of work that fit women's roles as caretaker and man's helpmate. Men who once populated these fields abandoned them as she moved in, until she dominated the areas of early childhood and primary education, clerical, and servant positions. Professions, such as medicine, dentistry and law, remained closed. Instead, the paraprofessions were invented for her to occupy — nursing, dental hygiene, and paralegal.

Now she worked both inside the home and outside the home as caregiver. Her caretaker status, her image and position in the private domestic arena and the public work force fused together. The historical image of woman as the frail, weaker, nurturing sex was retained. Woman — nurturer at home, caretaker in the work force.

In this article, we explore how the historical, stereotypical images of women as the timid, delicate caretaker shaped and continue to shape women's roles in the work force. As women entered the workplace, they became nurses, not doctors; dental hygienists, not dentists; paralegals, not lawyers; and kindergarten teachers, not university professors. This pattern persists today. We examine the professions to show how women's nurturing caretaker image has resulted in special niches within the professions, positions which perpetuate women in caretaker roles.

Specifically, we examine the legal profession and probe the contemporary barricades erected to channel women into positions that fulfill and comply with the ingrained historical image that women are caregivers and their skills and abilities are best used in positions which demand such abilities. Although women are entering many professions in greater numbers, their pay and status remain below that of the men in the field. The astounding increase of women in the legal profession has not resulted in equality. Women are still relegated to secondary status in position and pay. It was once fashionable to place blame for the unequal status on the relatively low numbers of women in professional fields or that not enough time had elapsed to redress the discriminatory patterns. In part that is true. However, we believe that such rationalizations do not provide a full picture. We believe that the continuing secondary status of women is a

consequence of the historical image women continue to be shrouded in. New patriarchal protectionist devices assure that women remain in the role of the frail, timid, and nurturing sex. Glass ceilings, mommy tracks, and paraprofessions are contemporary tools which serve to foster women's image as the frail and the domestic and perpetuate her role at home and in the workplace. In order to combat woman's ghettoization within the professions, society must recognize and reject the perpetuation of stereotyped images of women as caretakers and the resulting lack of economic power for women.

II. WOMEN'S IMAGE: FRAILTY AND DOMESTICITY

A. Myra Bradwell, Jane Eyre, and Dorothea Brooks: Still Images for Today

An extraordinary example of preventing women from changing their role in society as the delicate sex occurred approximately one hundred and twenty years ago, when the United States Supreme Court ruled against the admission of Myra Bradwell to the Illinois bar. Supreme Court Justice Bradley, in a concurring opinion, expressed without embarrassment or disguise the sentiment about women in society —

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life . . . . [A]s in the nature of things, . . . the domestic sphere . . . properly belongs to the domain and functions of womanhood. Thus, it was unthinkable, according to the United States Supreme Court, that women should be so boorish as to cast themselves in any role other than wife or mother. The public sphere offering power, prestige, and economic freedom was not open to women. This private/public sphere dichotomy perpetuated stereotypes of women as the weaker and inferior sex. Women were barred from entering the work force as a consequence of society's views about their proper role. Women's large numbers within

6. Id. at 141 (Bradley, J., concurring).
7. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband . . . .

. . . . The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.

Id. at 141 (Bradley, J., concurring).
the domestic sphere were explained as natural and inevitable. Looking back at Bradwell, it is tempting to dismiss the language and the views as antiquities we have finally shed in the modern age. Yet, the legal profession’s stereotyped image of women’s role within society was not an isolated historical occurrence.

“[F]railty, thy name is woman” wasn’t an idea or a phrase invented by a Justice of the United States Supreme Court. That women are the gentle sex was the sentiment of Shakespeare and most celebrated playwrights, poets, and novelists through the ages. Mostly male writers and poets inseminated the landscape with their perspective on women — shaping, molding, and reflecting women’s image as the gentle sex. For the most part, historians ignored women, particularly the daily images and roles of ordinary women.

Literature provides one of the only windows into the daily lives of nineteenth-century women. Tracing literature through the ages reveals the pervasive gender stereotyping in which writers participated. They inverted, shaped and reinforced the image of women as frail, inferior creatures best suited for the hearth.

Even women writers created profiles that echoed the refrain that women were the inferior sex, destined for a life of domesticity. Two nineteenth-century novels, Jane Eyre and Middlemarch, illustrate the historical attitude that women define themselves through their relationships with men as wife and mother. Charlotte Brontë’s Jane Eyre, an icon of Victoria

8. "'That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply, and execute the laws, was regarded as an almost axiomatic truth.'" Id. at 132 (quoting the Illinois Supreme Court opinion).


10. Though merely fiction, Virginia Woolf bases her essay, A Room of One’s Own, on the fact that there were no histories clearly devoted to women. VIRGINIA WOOLF, A ROOM OF ONE’S OWN (Harcourt Brace Jovanovich 1957)(1929).

This book arose from perceptions of a similar disparity [disparity between the image of women presented by men and her own experience of women]-the disparity between our own growing knowledge of women and their activities both past and present, and the almost total absence of women from the pages of history books.

11. See generally THE NORTON ANTHOLOGY OF LITERATURE BY WOMEN 167-77 (Sandra M. Gilbert & Susan Gubar eds., 1985); Nineteenth century women’s confinement to the “private” sphere is aptly defined by the old-fashioned king in Alfred Lord Tennyson’s The Princess when he recites, “Man for the field and woman for the hearth; Man for the sword, and for the needle she; Man with the head, and woman with the heart; Man to command, and woman to obey;” ALFRED LORD TENNYSON, THE PRINCES, in THE POEMS AND PLAYS OF ALFRED LORD TENNYSON 273 (Random House 1938)(1847). More than twenty years later, Louisa May Alcott argued in Little Women that although women wish for castles, ultimately, they are satisfied with a little home, a husband, and some dear children. LOUISA MAY ALCOTT, LITTLE WOMEN (Macmillan, 15th prtg. 1979)(1869).
rian woman independence, struggled mightily for her autonomy. Jane obtained an education and was employed as a governess. Soon to be wed to her employer, Mr. Rochester, it is revealed that he is already married and Jane flees from the prospect of becoming his mistress. Jane struggles on her own again; securing a position as teacher and once again evading marriage, this time to her clergyman cousin. An inheritance makes her an independent and rich woman. However, our hopes as modern readers of this Victorian fairy tale are dashed against the rocks in the end when Jane becomes her dear master's wife, "my Jane," "my fairy," "my skylark." The once indigent and orphaned Jane, who had struggled to obtain her independence, returns to Mr. Rochester. His first wife has conveniently perished in a fire, and so Jane can and does become his wife and a mother.

Several commentators of Jane Eyre strongly and convincingly suggest that "Brontë portrays a woman whose identity does not simply collapse into her husband's at the end of the novel." However, other scholars

12. Jane has a passionate, turbulent nature. She is full of anger at injustice and tyranny. When she resists, it is with strong feeling and even violence. Straight away, this is a view of femininity that is radically different from the contemporary view of women as passive, passionless beings. Moreover, Jane is clever, sharp-witted and resourceful . . . . This self-reliance and determination are entirely at odds with the nineteenth-century notion of women's helplessness and dependence. Jane does not need anyone else to take care of her. Most radical of all, Jane is shown to be a sexual being. She is no chaste nun nor pure 'angel in the house'.


13. Charlotte Brontë, Jane Eyre (James Kinsley & Margaret Smith eds., Oxford University Press 1973) (1847);

Yet Jane does not finally claim equality with Rochester; * * * Jane serves in the end 'both for [Rochester's] prop and guide,' which is an interestingly ambiguous situation. It suggests subservience, and so perpetuates their previous relationship; but the subservience is also, of course, a kind of leadership . . . . Her ultimate relation to him is a complex blend of independence (she comes to him on her own terms, financially self-sufficient), submissiveness, and control.


Marriage is the completion of the life of Jane Eyre . . . but for Jane at least it is marriage radically understood for its period, in no sense merely a solution or a goal. It is not patriarchal marriage in the sense of a marriage that stuunts and diminishes the woman; but a continuation of this woman's creation of herself.

Adrienne Rich, Jane Eyre: The Temptations of a Motherless Woman, in Charlotte Brontë Jane Eyre Authoritative Text Backgrounds Criticism 462, 475 (Richard J. Dunn ed., 2d ed. 1987); Sandra M. Gilbert & Susan Gubar, The Madwoman in the Attic: The Woman Writer and the Nineteenth-Century Literary Imagination 336, 368-71(1979) (Gilbert and Gubar describe Jane and Rochester's marriage at Ferndean in egalitarian terms but more sophisticated analysis reveals that Jane and Rochester's isolation from society indicates that this is a rare occurrence within soci-
interpreting Jane and Rochester's marriage as an equal partnership indicate reservations.

Psychologically Jane and Rochester come together as free, equal human beings of independent will. . . .

Ironically, though, their 'perfect' marriage takes place in a remote, isolated spot, out of view of society at large. It may be that Brontë is saying that there is no place within her contemporary society for a marriage of equals, such as is achieved by her heroine and hero.15

Whichever Jane we choose to believe exists, both sets of commentators place her in the same niche that the Supreme Court Justices placed Myra Bradwell; to be domiciled hereafter happy at the hearth.16

Marriage through the ages has been held out as woman's virtuous calling, as the crescendo in her life — provided that the right man is married. George Eliot's spirited heroine in Middlemarch, Dorothea, actually embraces marriage as a refuge from the tedium of bourgeois provincial life. Dorothea believes she will find intellectual stimulation and through her husband be able to engage in benevolent projects for society. Dorothea's reasons for marriage are a welcome change from a woman driven to marriage out of desire for wealth, status, or passion. Eliot might be trying to make us feel good about Dorothea's impending marriage to Casaubon by telling us: "she talked to him with more freedom than she had ever felt before, even pouring out her joy at the thought of devoting

ety, if possible at all). They further state that Charlotte Brontë:

herself was unable clearly to envision viable solutions to the problem of patriarchal oppression . . . [I]n none [of her novels] was she able consciously to define the full meaning of achieved freedom- perhaps because no one of her contemporaries, not even a Wollstonecraft or a Mill, could adequately describe a society so drastically altered that the matured Jane and Rochester could really live in it.

Id. at 369-70.

15. Campbell, supra note 12, at 59; Gilbert & Gubar, supra note 14, at 369 (1979); See also Anita L. Allen, The Jurisprudence of Jane Eyre, 15 Harv. Women's L.J. 173, 184 (1992) (illustrates why literary critics have viewed Jane Eyre both as a novel of women's equality and oppression).

16. It is interesting to note that in Villette, author Charlotte Brontë's last work, she was torn between the advice of her father's wish for a happy ending, "(like the heroes and heroines in fairy-tales) 'marry, and live very happily ever after,'" and her own desire for leaving her heroine an independent professional woman (a teacher). So she hedged the fate of the future husband, Mr. Paul. Writing to her publisher after Villette's publication she stated:

'With regard to that momentous point- M. Paul's fate- in case any one in future should request to be enlightened thereon—they may be told that it was designed that every reader should settle the catastrophe for himself, according to the quality of his disposition, the tender or remorseless impulse of his nature. Drowning and Matrimony are the fearful alternatives.'

herself to him and of learning how she might best share and further all
his great ends.”

However, Dorothea’s marriage is a crude disappointment. It neither
provides happiness, nor intellectual stimulation, nor results in any of Dor-
othea’s philanthropic fantasies. Instead, she finds herself attached to a
cold, crusty, sickly man. Marriage is a bitter manacle shackling her whole
being. To our great relief as readers, Eliot kills off the aged, sickly, cler-
gyman husband, Casaubon, and allows Dorothea to escape her bondage.
But Dorothea, still seeking intellectual fulfillment and wishing “to do
good” plunges again. Giving up her late husband’s estate, her only secur
ity, Dorothea marries his poor cousin Will Ladislaw — This time her mar
riage is for love and intellectual fulfillment. A wasted life? Justice
Bradley wouldn’t say so. However, George Eliot recognized her readers’
possible disappointment and tried to convince us in the epilogue that mar
riage, when entered into with the “right man,” is the correct and only
choice for even strong-willed intellectually gifted women such as
Dorothea.

Images of women in literature can not in themselves fully explain
women’s exclusion from the public sphere. A brief discussion of the his-
torical context of women’s daily lives is essential to an understanding of
women’s present condition within society and women’s self-perceptions.
What Virginia Woolf pointed out over fifty years ago remains partially
true today. Women historically had no money, power, or legal rights sepa
rate from their husbands or fathers. Women were frequently put on a
pedestal with illusory status and power when in reality they had no access
to education or wealth.

[W]omen have burnt like beacons in all the works of all the poets from
the beginning of time - Clytemnestra, Antigone, Cleopatra, Lady Mac
beth, . . . among the prose writers: Millamant, Clarissa, Becky Sharp,
Anna Karenina, Emma Bovary . . . . Indeed, if woman had no existence
save in the fiction written by men, one would imagine her a person of

17. GEORGE ELIOT, MIDDLEMARCH 50 (Penguin Books Canada Limited 1964)
(1872).
18. Still, she never repented that she had given up position and fortune to marry
Will Ladislaw . . . . They were bound to each other by a love stronger than any
impulses which could have marred it. No life would have been possible to Dor
othea which was not filled with emotion . . . . Dorothea could have liked nothing
better, since wrongs existed, than that her husband should be in the thick of a
struggle against them and that she should give him wifely help. Many who knew
her thought it a pity that so substantive and rare a creature should have been
absorbed into the life of another and be only known in a certain circle as a wife
and mother. But no one stated exactly what else that was in her power she ought
rather to have done . . . .

ELIOT, supra note 17, at 809.
19. LERNER, supra note 10, at 3-20. Lerner points out, “The systematic educational
disadvantaging of women has affected women’s self-perceptions, their ability to conceptualize their own situation and their ability to conceive of societal solutions to improve it.” Id. at 10.
the utmost importance . . . heroic and mean; splendid and sordid; infinitely beautiful and hideous in the extreme; as great as a man, some think even greater. But this is woman in fiction. In fact . . . she was locked up, beaten and flung about the room . . . .

. . . [S]he was the slave of any boy whose parents forced a ring upon her finger. Some of the most inspired words, some of the most profound thoughts in literature fall from her lips; in real life she could hardly read, could scarcely spell, and was the property of her husband.20

Pervasive attitudes of women's inferiority, lack of access to educational opportunities, and lack of freedom to exist independently from men help explain "why no woman wrote a word of that extraordinary literature when every other man, it seemed, was capable of song or sonnet."21 Gerda Lerner, a foremost scholar of women's history, states "that women of great talent were kept from realizing their talents fully by the constraints patriarchy imposed on them."22 It is clear that the few nineteenth century women writers who did enter the public sphere faced severe discrimination. All three of the Brontë sisters published under male pseudonyms. George Eliot was really Mary Ann Evans Cross publishing under a pseudonym. Charlotte Brontë expressed to one critic:

I wish you did not think me a woman. I wish all reviewers believed 'Currer Bell' to be a man; they would be more just to him. You will, I know, keep measuring me by some standard of what you deem becoming to my sex; where I am not what you consider graceful you will condemn me.23

Women writers also were limited to roles considered appropriate for their sex. For example, the critics, usually male, attempted to confine women's writing to specific areas such as the "gothic romance," "society novel," and the "novel with a purpose."24 Victorian novels reinforced women's prescribed role, to focus on relationships, and do good within society. It is still a familiar refrain.25

It was against this backdrop — this formidable portfolio of parochial views and images about the inherent womanly-type traits and the desirable life for women, that of domesticity and illusory power — that women exerted a Herculean effort to change. War had to be declared against the

20. WOOLF, supra note 10, at 44-6.
21. WOOLF, supra note 10, at 43; LERNER, supra note 10, at 45.
22. LERNER, supra note 10, at 17.
23. CAMPBELL, supra note 12, at 83.
24. Id. at 82.
25. Certainly I was not without coldly practical reasons when I decided to write detective novels as Amanda Cross. There was no question in my mind then, nor is there any now, that had those responsible for my promotion to tenure in the English department of the university where I teach known of the novels, they would have counted them heavily against me; I would probably have been rejected.

images and philosophies of the poets, novelists, and the jurists who echoed their refrains — to vote, to go to school, to be employed outside the home, to join a profession — to be a lawyer. Yet even as women gained these civil rights, most women were unable to shed their womanly image of caretaker and nurturer.

Today, the historical pattern of women's constricting roles, described by Virginia Woolf, repeats as women confront paraprofessions, mommy-tracks, and glass ceilings.

B. Women's Entrance Into the Public Sphere: Retaining Her Image and Role

Many women perceive that they have more choices than Myra Bradwell, than Jane Eyre, than Dorothea Brooks did more than 120 years ago. Indeed women do. However, the same phenomenon of stereotypical images and pigeonholing of women into certain roles persists and is still evident with painful clarity. A marriage or working relationship between equals remains the extraordinary, not the ordinary.

Woman's double role, at home and in the work place, has allowed men the authority, power, and freedom to define and solidify their roles within the public sphere. Women remain burdened "with most of the tedious, day-to-day tasks of economic production."26 The use of woman as an unpaid labor force within the family, and the exploitation of her as cheap labor by society has been essential to the maintenance of male dominance throughout history. But as women entered the work force in greater numbers, woman's deviation from her caretaker role was perceived as a serious threat to the natural order of society.27

In the legal field, as in other areas, new barricades ensured that woman remained in her rightful role. Glass ceilings, mommy tracks, and paraprofessions became contemporary patriarchal devices for maintaining women in their traditional roles and channeling women into stereotyped positions involving little power and prestige. In the paraprofessions, women perform the same onerous tasks at work they historically performed within the domestic sphere while men remain free to take positions of power, leadership, and authority. At the same time as the


27. Barbara Welter, The Cult of True Womanhood, 1820-1860, in MAJOR PROBLEMS IN AMERICAN WOMEN'S HISTORY 122, 125-8 (Mary B. Norton & Thomas G. Paterson eds., 1989); Erik Eckholm, Finding Out What Happens When Mothers Go To Work, N.Y. TIMES, Oct. 6, 1992, at A1. The Murphy Brown controversy, involving ex-vice-president Dan Quayle's disapproval of single motherhood, reflects the hostility towards women who participate within the domestic sphere without making the appropriate sacrifices. Murphy Brown represents an intelligent, highly paid, professional woman who does not compromise her professional status by participating within a "Mommy-Track" and is not staying home exclusively to raise her family. This is a clear example of hostility towards women possessing the power to make their own choices and not conforming within society's role for women.
paraprofessions were growing, women continued to be locked out of the high paying, high status professions even as their numbers increased in the work force.

III. Women and the Professions

In this section, we examine four aspects of gender discrimination within the professions so vividly portrayed by statistical data. First, there is a relative absence of women from professions that are generally considered to be high paying, high status, and that require independence. Women in these types of professions make up a small percentage of the total.28 Second, even when women are part of these professions, they have an inferior role. Women are concentrated into those professions which are more traditionally supportive. They are also relegated to substrates within professions characterized by lower status, lower pay, and little responsibility.29 Third, most women interested in the professions are enticed into female paraprofessions, creating a rigid hierarchy within these professions. This places women on the bottom of that hierarchy in the paraprofessions and men at the top of the hierarchy in the professions. Generally, the paraprofessions have low status, low pay, and little responsibility, in comparison to the professions.30 Lastly, gender discrimination is powerful and enduring defying the numbers argument.31 In the final section, we will show that women in the legal field tend to have positions of lower status, pay and independence, play roles in the legal profession that are more supportive, tend to join the paralegal field rather than becoming lawyers, and finally that this tendency is not changing much over time.

A. Locked Out: A Small Percentage

Discriminatory practices continue to effectively lock women out of the traditional professions — engineering, medicine, law, science, and so forth.

28. See infra Figure 1.
29. See infra Figure 2.
30. See infra Figure 3; See infra Figure 10.
31. See infra Figures 4 & 5.
Figure 1 presents data illustrating the small percentage of women who are engineers, physicians, lawyers, natural scientists, and college and university teachers. Women make up 9% of the engineers, 20% of the physicians, 21% of the lawyers, 27% of the natural scientists, 41% of the college and university teachers. These fields — engineering, medicine, law, science, and university teaching — are seen as closer to men’s traditional roles involving rational, logical, and analytical processes. Fields such as primary and secondary teaching, administrative support, secretarial, and family child care are closer to women’s traditional roles involving interpersonal, emotional, and nurturing processes.

DATA SOURCE: Bureau of Labor Statistics

Figure 1 was constructed from the United States Department of Labor statistics. Bureau of Labor Statistics, U.S. Dep’t of Labor, Employment and Earnings, 22. Employed Civilians by Detailed Occupation, Sex, Race, and Hispanic Origin 195, 195-8 (Jan. 1993) (1992 annual averages). All statistics used in this paper have been rounded up to the nearest tenth. The United States Department of Labor provided the following explanation for their data collection process:

Data based on household interviews are obtained from the Current Population Survey (CPS), a sample survey of the population 16 years of age and over. The Bureau of the Census conducts the survey each month for the Bureau of Labor Statistics and provides comprehensive data on the labor force, the employed, and the unemployed, including such characteristics as age, sex, race, family relationship, marital status, occupation, and industry attachment. The survey also provides data on the characteristics and past work experience of those not in the labor force. Trained interviewers collect the information from a sample of about 60,000 households, representing 729 areas in 1,973 counties and independent cities, with coverage in 50 States and the District of Columbia. The data collected are based on the activity or status reported for the calendar week including the 12th of the month.

Id. at 251 (explanatory notes).
rial positions, and child care, that require care, cooperation and nurturing have a higher percentage of women.  

Women constitute 75% of non-university teachers, 83% of non-managerial administrative support workers, 99% of secretaries, and 99% of family child care providers. These female dominated occupations are also lower in status and pay, and as such they are characteristically considered women's work.

1990 Census data also confirm women's absence from high paying prestige occupations and their concentration within lower status occupations closer to women's stereotyped role as nurturer.

33. See supra Figure 1; It is interesting to note that when women do represent a high percentage of physicians in other countries, such as the former Soviet Union where in 1986 they constituted 69% of all doctors, the pay and status of the profession is low. MICHAEL RYAN, DOCTORS AND THE STATE IN THE SOVIET UNION 41 (1990).

34. See infra Figure 10.

35. Although the 1990 Census data covers slightly different occupational categories than Figure 1 and includes unemployed workers actively seeking employment, it provides conclusive evidence that the trend of women's concentration in low paying low status occupations is not the result of statistical error or sampling size. According to the 1990 Census, women made up a mere 7% of civil engineers, 21% of physicians, 24% of lawyers, 26% of mathematical scientists, and 31% of law teachers. In startling contrast, women constituted 78% of elementary school teachers, 82% of general office clerks, 99% of secretaries, and 99% of family child care providers.

36. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CENSUS EQUAL EMPLOYMENT OPPORTUNITY FILE, 1990 Census EEO Detailed Report- Persons in Civilian Labor Force by Occupation, Sex, and Race/Ethnic Origin, Prepared by Oregon Employment Division, Research & Statistics Section, October 1992. This report was obtained through the State of Washington Employment Security Department, Olympia Washington. It is important to note that census data are not directly comparable to Figure 1 because the census data includes employed as well as unemployed civilians who were looking for work during the last four weeks, were available to accept a job, and had worked at least once since 1985. The Bureau of the Census provided the following explanation of what type of individual was included in the Civilian Labor Force:

Employed- All civilians 16 years old and over who were either (1) "at work"- those who did any work at all during the reference week as paid employees, worked in their own business or profession, worked on their own farm, or worked 15 hours or more as unpaid workers on a family farm or in a family business; or (2) were "with a job but not at work"- those who did not work during the reference week but had jobs or businesses from which they were temporarily absent due to illness, bad weather, industrial dispute, vacation, or other personal reasons. Excluded from the employed are persons whose only activity consisted of work around the house or unpaid volunteer work for religious, charitable, and similar organizations; also excluded are persons on active duty in the United States Armed Forces.

Unemployed- All civilians 16 years old and over are classified as unemployed if they (1) were neither "at work" nor "with a job but not at work" during the reference week, and (2) were looking for work during the last 4 weeks, and (3) were available to accept a job. Also included as unemployed are civilians who did not work at all during the reference week and were waiting to be called back to a job from which they had been laid off.

Civilian Labor Force- Consists of persons classified as employed or unemployed in accordance with the criteria described above.

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B. Subordinate Participation

1. Women's Low Status Within the Professions

Women have been successful breaking into some professions. Though education was a field originally occupied by men, it gradually became acceptable for women to enter. Yet even when women achieve more than token representation within a profession their stereotypical images follow them, creating a stratification within the profession they just entered. Figure 2 shows when women predominate within a profession, such as education, there is rigid stratification based on gender.

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A telephone conversation with John Priebe, Supervisory Statistician of Labor Force Statistics, confirmed that the Census Bureau only included data for industry and occupation for unemployed persons who had worked since 1985. He also confirmed the Civilian Labor force included persons classified as employed or unemployed as described in the technical documentation.


The Census Bureau provided the following explanation of the accuracy of the data:

The data contained in this data product are based on the 1990 census sample. The data are estimates of the actual figures that would have been obtained from a complete count.

Sample Design

Every person and housing unit in the United States was asked certain basic demographic and housing questions (for example, race, age, marital status, housing value, or rent). A sample of these persons and housing units was asked more detailed questions about such items as income, occupation, and housing costs in addition to the basic demographic and housing information. Persons in group quarters were sampled at a 1-in-6 rate.

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The Census sample was compiled from the Long Form Questionnaire given to approximately one in every six households. Bureau of the Census, U.S. Dep't of Commerce, Informational Copy Official 1990 U.S. Census Form 2 (1990).
DATA SOURCE: Bureau of Labor Statistics

The stratification of the educational profession, as indicated by Figure 2, shows that the greatest number of women are at the lowest level, economically and status-wise, in the education profession. Women comprise 99% of kindergarten teachers as compared to 41% of college and university professors. Kindergarten teachers are often part-time, are paid less, and are considered to be lower in status than university teachers. Likewise, kindergarten teachers are closer to women’s traditional role as a mother and caretaker, which makes it apparent that employment involving young children is more readily considered to be women’s work. In contrast, college and university teachers are paid more and accorded more professional status than elementary or secondary teachers. University teaching positions are characterized as requiring more rational, analytical thinking processes associated with men’s traditional role in society. They are even differentiated by title, calling them professors, scholars or academicians, not teachers.

2. Women Constitute a High Percentage of Paraprofessionals

The most striking display of gender bias is manifested in the high percentage of women in paraprofessions: dental hygienists, licensed...
practical nurses, legal assistants, as compared to the parallel professions of: dentists, physicians, and lawyers.

Figure 3

Figure 3 compares the occupational distribution of women within the professions and paraprofessions. The major professions — dentistry, medicine, law, and university teaching — are overwhelmingly dominated by men. In 1992, women constituted only 9% of the dentists, 20% of the physicians, 21% of all lawyers, and 41% of the college teachers. On the other hand, women predominated in the paraprofessions; they comprised 99% of the dental hygienists, 95% of the licensed practical nurses, 77% of the legal assistants, and 92% of the teachers' aides.

DATA SOURCE: Bureau of Labor Statistics

1990 Census data confirm the display of gender bias manifested in the high percentage of women in paraprofessions illustrated in Figure 3. Women's segregation into paraprofessions is a striking example of the continued gender bias women face within the work force. The high concentration of women in the paralegal field is just part of a pattern of sex role stereotyping that is also exhibited in other traditional professions.

C. Gender Discrimination Preserved

A common argument that many lay persons assert is that as women enter and graduate from professional schools, such as medical and law schools, their numbers will increase within the professions. However, statistics have not borne out that assertion. Instead, over the last twenty years, looking at two time periods (1972-76 and 1988-92), gender stratification within the professions has persisted. Information collected by the United States Department of Labor, as shown in Figures 4 and 5, supports the view that even though women are more greatly represented within the labor market and within the professions, they have not made much significant progress in the last twenty years.

**Figure 4**

![Graph showing women concentrated in lower status professions 1972-1976](image)

DATA SOURCE: Bureau of Labor Statistics

42. Although Census data is not directly comparable to Figure 3 because it includes slightly different occupational categories and unemployed individuals actively seeking employment, it nevertheless provides conclusive evidence of women's concentration within female ghettos in the workplace. Census data indicate women constituted 13% of dentists, 21% of physicians, 24% of lawyers, and 39% of post-secondary teachers. In stark contrast, women constituted 98% of dental hygienists, 94% of licensed practical nurses, 76% of legal assistants, and 89% of teachers' aides.

43. **BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, supra note 36.**

44. Figure 4 was constructed from the United States Department of Labor statistics.
Figure 5 presents data for the period 1972-76, showing that women on average accounted for 2% of dentists but 99% of the dental assistants. Women were 12% of the physicians on average but 98% of the registered nurses. Women accounted for an average of 7% of lawyers, but 99% of the

DATA SOURCE: Bureau of Labor Statistics


46. See supra Figure 4.
legal secretaries. Finally, women accounted for 30% of the college and university teachers, and 70% of the secondary, elementary, and kindergarten school teachers, and 90% of the teachers' aides.

Twenty years later, even after women increased by significant numbers within dental schools, medical schools, and law schools there was little significant progress in moving from the paraprofession to the profession. Figure 5 compares the percentage of women in the professions and paraprofessions for 1988-92. The Figure indicates that, there has been insignificant change in the percentage of women in the professions and paraprofessions since 1972. Though women did make some gains in the dental, medical, legal and teaching fields, they still held a majority of the paraprofessional positions. Women still comprise 99% of the dental hygienists, 94% of the registered nurses, 77% of the legal assistants, 75% of the non-college teachers, and 92% of the teachers' aides. The results in Figures 4 and 5 sadly show that women continue to be channeled into lower status, less professional positions.

IV. THE CONTEMPORARY PICTURE IN THE LEGAL PROFESSION

A. Women's General Increase in Numbers in the Legal Profession

Women's role within the legal profession is a paradigm of how women's stereotypical image continues to contribute to discriminatory treatment of women. Indeed, challenging gender discrimination was an arduous struggle for Myra Bradwell. Even though women are no longer legally barred from the profession, the number of women lawyers advances slowly. In 1910, women comprised only 1.1% of lawyers within the legal profession. It took sixty years, 1910-1970, for women to advance from being 1.1% of lawyers to being 4.7% in 1970. In the next ten years, 1970 to 1980, women's representation within the legal profession was so minuscule it went from 4.7% to comprising 12% of the legal profession. And the next twelve years, though described as being monumental progress, resulted in only 21% of lawyers as women.

Although women's numbers within the legal profession have increased, this has not translated into powerful positions as state and federal court judges, law professors, law partners, or corporate counsel. At this juncture, some commentators would optimistically point out that it is just a matter of time for women, and women will increase in significant num-

47. See supra Figure 5.
49. CYNTHIA F. EPSTEIN, WOMEN IN LAW 4 (2d ed. 1993) (information from Table I.1).
bers in the legal profession and begin to ascend to positions of power. At that point, women will no longer be in secondary status. However, two responses are in order.

History does not support the theory that as women's numbers increase within a profession their opportunities, status, and power will increase. Rather, what has been shown is that as women have entered a field or profession in significant numbers, the pay, status, and responsibilities of the profession have diminished. The clerical field provides a startling example of where women's greater numbers within the profession created lower status positions with fewer job responsibilities and less compensation. Prior to the late 1920's, the clerical field was dominated by men. At that time, the clerical field ranked higher in status and compensation than two primary men's blue-collar fields, manufacturing and steam railways. However, as women's numbers increased within this field, there was a dramatic decline in clerical workers' status, job responsibilities, and compensation. From 1939-1985, not only did clerical women earn an average of 64% of clerical men's wages, but clerical women's wages declined markedly in relation to men's blue-collar wages as women's numbers in the field increased. The fields of public school teacher and bank teller followed similar patterns of feminization. As women's numbers increased, prestige and compensation declined.

We are beginning to see this pattern within the legal profession; as the numbers of women within the legal profession has increased, the status and compensation of the legal profession has begun to decline. Even with greater numbers of women entering the legal field, women are systematically excluded from top levels possessing the highest prestige, power, and compensation. Feminization of the legal profession has begun. As women begin to crack the glass ceilings, less prestigious and new tracks are forming for women: the public judge, the legal writing and clinical law professor, and the mommy track lawyer.

B. State Court Judges

In 1990, women constituted only an estimated 8.7% of state court

52. Id. at 293.
53. Id. at 287, 291, 293-4.
55. See id. at 81-2.
56. Surveys indicate that the legal profession is beginning to feel the effects of feminization. New lawyer starting salaries were low in 1988. New Lawyer Starting Salaries Slow, 29 L. Off. Econ. & Mgmt. 247 (Summer 1988). The New York Law Journal reported in 1990 that firms were seen holding the starting pay of new associates. Edward A. Adams, Firms Seen Holding Level of Starting Pay, N.Y.L.J., Sept. 10, 1990, at 1. In addition attacks on lawyer's status within the profession have reached an all time high with ex-vice-president Quayle's Council on Competitiveness.
judges according to information collected by the National Center for State Courts. The National Center for State Courts indicates that this figure is speculative and there has been no comprehensive study on the number of women state court judges since 1985. The 1985 Fund for Modern Courts study indicated that women made up 7.2% (873/12,093) of the total state court judges. The first woman was appointed to a state court in 1870. It took another hundred and ten years before women made up

57. Memorandum from Phillip A. Lattimore III, Staff Attorney, National Center for State Courts 1 (July 16, 1990) (on file with authors). Phillip A. Lattimore is no longer employed with the National Center for State Courts and there is no documentation on how this 1990 estimate of women state court judges was calculated. In response to a recent request for information on the number of women state court judges, the National Center for State Courts responded:

Although the National Center has information about the number of women justices serving on state courts of last resort and intermediate appellate courts, no current statistical information exists that accurately estimates the number of women who sit on general and limited jurisdiction courts. The latest comprehensive statistical data about women judges was collected in 1985 by the Fund for Modern Courts, which revealed at that time that 23 women served on state courts of last resort, 46 women served on intermediate appellate courts, and 704 women served as judges of general and limited jurisdiction courts (704 is inaccurately reported in the fax from the National Center for State Courts, the actual number was 804).

The following chart was compiled from information provided by the National Center for State Courts and phone conversations with the Fund for Modern Courts.

### Number of Women State Court Judges 1985

<table>
<thead>
<tr>
<th>Courts</th>
<th>Number of Judges</th>
<th>Number of Women</th>
<th>Percentage of Women</th>
</tr>
</thead>
<tbody>
<tr>
<td>Courts of Last Resort</td>
<td>338</td>
<td>23</td>
<td>6.8%</td>
</tr>
<tr>
<td>Intermediate Appellate Courts</td>
<td>704</td>
<td>46</td>
<td>6.5%</td>
</tr>
<tr>
<td>General and Limited Jurisdiction Courts</td>
<td>11,051</td>
<td>804</td>
<td>7.2%</td>
</tr>
<tr>
<td>Total State Courts</td>
<td>12,093</td>
<td>873</td>
<td>7.2%</td>
</tr>
</tbody>
</table>

Telephone interview by Kari Robinson with the *Fund for Modern Courts* (June 4, 1993); Fax Memorandum from Information Service of the National Center for State Courts (June 3, 1993) (on file with authors); Memorandum from Phillip A. Lattimore III, Staff Attorney, National Center for State Courts 1 (July 16, 1990) (on file with authors). (The 1985 report on women state court judges can be obtained from the Fund for Modern Courts. The report is titled *Success of Women and Minorities in Achieving Judicial Office: The Judicial Process*.)

58. Telephone interview by Kari Robinson with the *Fund for Modern Courts* (June 4, 1993).

59. Esther McQuigg Morris was justice of the peace in a Wyoming frontier mining
2.1% of state court judges in 1980. Not until 1979 did each state within the United States have at least one woman serving in some judicial capacity. Presently only 27 state supreme courts have a woman sitting on their highest court. And although some courts have more than one woman (Oklahoma has two, Minnesota four), many state courts have none.

While the number of women becoming state court judges increases, another phenomenon that has been seen in other professions is beginning to occur: men leaving the profession as women's numbers increase and compensation and status decline. A number of experienced and highly qualified male judges have left the bench in favor of private judging. Private judging has taken hold in a number of jurisdictions. The private judging system, Judicial Arbitration & Mediation Services (JAMS), is considered more desirable. Private judges have smaller workloads and earn three times as much compensation as public sector judges. Currently women constitute 7% of private judges within JAMS. Although it is too soon to tell, this phenomenon may lead to a "two-track system" where women are concentrated within the lower status public judgeship positions, while men populate the more lucrative private judgeships.

C. Federal Court Judges

The under-representation of women in federal judgeship positions, 13%, shows a similar pattern of gender bias in two aspects. First, in the number of women appointed. There was a surge of women appointed to the federal bench during the Carter Presidency (1977-80): 15.5% of judges appointed were women. However, in the next twelve years, while women's numbers within the legal profession almost doubled, women's
federal judicial appointments fell by an average of 6% during the Reagan and Bush Presidencies.69

Second, the most significant manifestation of gender discrimination can be seen when examining the type of federal judgeships held by women. The largest percentage of women judges occupied positions as United States Magistrates. Following an insidious trend throughout the legal profession, women are now concentrated in this least prestigious and least powerful of all federal judgeship positions. The Federal Magistrate’s Act was passed with the congressional purpose “that the magistrates would relieve district judges of certain ministerial or subordinate duties, freeing them for more productive case management and trial work.”70 Full-time United States Magistrates are appointed by federal district judges for a limited tenure of eight years.71 In contrast, Article III judges possess life-time positions. Magistrates cannot conduct civil trials without the express consent of the parties.72 Congress has expanded magistrates’ functions since the initial passage of the Act, but they still cannot hear and determine a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.73

It is not surprising that women make up 18% of full-time United States Magistrates.74 Likewise, women’s numbers substantially diminish as they move up the federal court hierarchy to positions of greater power and prestige. Women make up a mere 12% of District Court Judges, 15% of Circuit Court Judges, and 14% of Bankruptcy Judges.75 Until recently, only one Supreme Court Justice out of nine was a woman, 11%. It took over two hundred years to appoint the first woman to the United States Supreme Court and another twelve to have two women on the court.

Why there are so few women judges, and why they hold inferior status state and federal court judge positions, is the subject of many theories. Many assumptions echo the jurisprudential philosophy expressed in Bradwell and find companionship in the happiness of Jane Eyre and

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75. Id.
WOMAN'S GHETTO

Dorothea at the hearth. Highly suspect theories have suggested that women prefer to be home with their families, the work is too demanding, and women don't want employment that requires immense responsibility. Even the argument that restroom facilities are lacking has been employed.

Notwithstanding the logic of these fictional constructs, scrutiny of the Minnesota State Supreme Court experience negates many of these explanations. The Minnesota Supreme Court now has a majority of women — four out of seven. Appointed in 1977, 1982, 1990, and 1991, the women come from varying backgrounds: public defender, law professor, law partner in a large law firm, trial judge and administrator. They elude age and marital stereotyping: age 66, divorced and mother of five; age 64, never married; age 59, married many years; age 43, recently married and youngest member on the court. And the phenomenal composition of the Minnesota Supreme Court occurs in a state where only 15% of lawyers are women — proving that there does not have to be an overwhelming number of women in the profession to find qualified women. And imagine; such progress occurred even though there wasn't a woman's restroom for Minnesota Supreme Court Justices until after 1977.

D. Law Professors

If the paucity of women judges are not convincing that gender discrimination still exists in the legal profession, let's examine law school teaching. An incontrovertible picture of gender bias continues to unfold when examining where women are actually employed within the legal ivory towers. The ranks of academia resemble a rigid caste system — designated as tenure-track and non-tenure track positions. Generally, the term tenure-track faculty refers to professors who are employed full time, receive higher salaries than non-tenure track, vote in faculty meetings on law school matters, and qualify for travel grants and summer research awards. Non-tenure track faculty refers to all other faculty — adjunct professors, clinical teachers, and legal writing instructors. These professors generally teach part or full time, are paid less, and as a rule do not have full participation in the governance of the schools.

76. Faludi, supra note 4, at 85-95.
77. Margolick, supra note 62.
78. Id.
79. Id.; Anna Quindlen, A (Rest) Room of One's Own, N.Y. TIMES, Nov. 11, 1992, at A16.
80. Historically, as was the case generally, it was a slow battle for women to gain entry into law schools and then to penetrate the teaching ranks. Ada A. Kepley, in 1870, was the first woman in America to obtain a degree from an accredited law school, the Union College of Law (presently called Northwestern). It took another eighty years before some of the most prestigious universities opened their doors to women. For example, Harvard did not admit women until 1950. The exclusion of women continued as late as 1972 when Washington and Lee opened its doors to women. Epstein, supra note 49, at 50.
Historically, women have been denied access to tenure-track positions within law schools. Harvard Law School did not appoint a tenure-track woman faculty member until 1962.\textsuperscript{81} Columbia Law School held the line against the entry of women professors until 1972.\textsuperscript{82} In 1967, women constituted an almost non-existent 1.7\% of all full time tenure-track law school faculty.\textsuperscript{83} By 1980-81, women constituted 5.8\% of full time tenured law school faculty members. In 1986-87, their numbers grew to 11\% of full time tenured law school faculty.\textsuperscript{84}

Today, according to statistics released by the American Bar Association for Fall 1992, women still constitute 27\% of full time law school faculty at 176 ABA approved law schools.\textsuperscript{85} This statistic includes non-tenure track professors. A statistical breakdown of the 27\% of women full time law school faculty by tenure status is currently unavailable. However, the doubling of women's numbers as full time law school faculty within the last twelve years\textsuperscript{86} does not tell the whole story. That women are falling through the cracks on their way to tenured law school positions is evident by the startling growth of women within contract and legal writing positions. And not surprisingly in 1986-87, women comprised 40\% of non-tenured clinical law teachers and 68\% of the contract legal writing instructors.\textsuperscript{87} Contract positions are for set terms of employment, specifying a set number of years. There is no commitment for lifetime employment as provided for in tenure track positions. Additionally, the voting status in law school governance may be limited.\textsuperscript{88} In 1988, it was reported that law school legal writing professors was a "growth" area. A survey of 149 law schools found that between the years of 1980-81 and 1986-87 legal writing positions grew by 114\%. In contrast, during the same time period, women as tenured and tenure-track faculty grew by 8\%.\textsuperscript{89}

The reason is clear for allowing women to populate the ranks of non-tenure clinical law teaching. This type of teaching is the least respected discipline in law schools. Clinical professors are generally responsible for the \textit{practical} training courses for law students. Law school traditionalists (mostly male), have barely tolerated practical clinical teaching. Though

\textsuperscript{81.} Epstein, \textit{supra} note 49, at 227.
\textsuperscript{82.} Id. at 228.
\textsuperscript{83.} Id. at 219.
\textsuperscript{86.} From 1980-81 women comprised only 13.7\% of full time law school faculty. Chused, \textit{supra} note 84, at 538, 557.
\textsuperscript{87.} Id. at 557.
\textsuperscript{88.} Marina Angel, \textit{Women in Legal Education: What It's Like to be Part of a Perpetual First Wave or the Case of the Disappearing Women}, 61 Temp. L. Rev. 799, 804 (1988).
\textsuperscript{89.} Chused, \textit{supra} note 84, at 542, 552-3, 557.
clinical faculty are supposed to be treated in essence similarly to tenure track faculty, this is almost uniformly not the present condition. Clinical professors teach more hours, are paid less, and have less say, if any, in governance of a law school.90

Historically, even when women gained access to the tenure-track, they were channeled into specific areas deemed appropriate for their sex: family law, trusts and estates, and librarian positions. One New York law professor in the 1960's, with both a LL.B. and J.D. degree, stated her faculty position "started in a glorified secretarial job."91 Secretarial work is seen as closer to women's appropriate behind-the-scenes role as caretaker performing routinized functions. This seemingly incredible example of gender discrimination faced by women law professors continues today. And as we will shortly examine, women are channeled into positions as paralegals constituting glorified legal secretary positions.

It is equally no surprise that women fare worse in the very top position in law schools — as the deans of law schools. In 1992, within the 177 accredited law schools, a mere 13 women served as Deans, 7%.92 These figures are astounding considering women have made up on average 40% of law school graduates for the past ten years.93 Women, in Fall 1992, made up 42.6% of J.D. students at 176 American Bar Association approved law schools.94

<table>
<thead>
<tr>
<th></th>
<th>Tenured and Tenure Track Classroom Faculty</th>
<th>Contract Legal Writing Faculty</th>
</tr>
</thead>
<tbody>
<tr>
<td>1980-81</td>
<td>3857</td>
<td>102</td>
</tr>
<tr>
<td>1986-87</td>
<td>4171</td>
<td>218</td>
</tr>
</tbody>
</table>

(This table represents the increase in the total number of full time faculty positions.)

90. Angel, supra note 88, at 804.
Though a few women are making it to the top as law school deans, reporters still label the event as a "revolutionary" breakthrough. The New York Times, reporting that Professor Herma Hill Kay was appointed as dean at the University of California at Berkeley's School of Law (Boalt Hall), heralded her as a "Feminist Pioneer" and her efforts were labeled as "Reaching the top after 32 years of making trouble."95

Women striving to make it to top levels of the legal profession must be careful to work within the system or be excluded completely. Professor Kay stated she had to "make trouble without being a troublemaker."96 In contrast, Catharine MacKinnon, well respected for her scholarship in the area of sex discrimination and harassment, and who has directly attacked the patriarchal system, was unable to secure a tenured position for ten years.97 The New York Times article described Professor Kay's "reputation combining clear-eyed logic and flawless legal research with impeccable manners." The word usage — "impeccable manners" — reinforces the idea that, for women to reach top levels of the legal profession, they must conform to appropriate behavior for law school professors while maintaining feminine decorum. Appropriate behavior is defined and enforced by white male standards.

The small number of women on law school faculties, the minuscule number of women who are law school deans, and the hierarchical system within teaching is not a phenomenon unique to the legal profession. In 1992, there were 1056 employees at the University of Washington with professorial status of whom 122 were women, constituting 12%.98 The University of Michigan's hiring of women faculty follows similar patterns where women make up three quarters of the university staff but only one-

95. Bishop, supra note 92.
96. Id.
98. University of Washington, University of Washington Workforce Display October, 1992 Payroll, 1 F5 (Date Prepared: Dec. 8, 1992)(on file with the University of Washington Equal Employment Affirmative Action Office). As an example, in one University of Washington department, Physiology and Biophysics, there were 18 full time tenure-track faculty members, and not one was a woman. A tenure-track woman faculty member has recently been hired to bring that number to one in 1994. Personal interview by Marilyn J. Berger with Dr. Wayne Crill, Chair, Department of Physiology and Biophysics, School of Medicine, University of Washington (July 12, 1992). Even in the lower academic ranks, women constituted only 26% (73/284) of the total associate professors without tenure, and 32% of assistant professors without tenure (81/251). Their numbers grew substantially at the bottom of the academic hierarchy where women made up 50% of visiting lecturers (9/18), and 54% of part-time lecturers (128/235). University of Washington, University of Washington Workforce Display October, 1992 Payroll, 1 F5 (Date Prepared: Dec. 8, 1992)(on file with the University of Washington Equal Employment Affirmative Action Office).
fifth of the total faculty positions. Women constitute only 18% of tenured faculty staff and 13% of department chairs. 

Parallels exist in other professional type academic disciplines, such as science teaching. A few examples will suffice to present some analogous points. In 1987, there were no female chemists in tenure track positions in twelve well-known universities — Utah, South Carolina, Oregon State, Virginia Polytechnic Institute, Wisconsin-Madison, San Diego State, Georgia Tech, Northwestern, Virginia, Georgia, Arizona State, and Notre Dame. Now, five years later, only seven of these universities have women. In 1991, women filled 36% of non-tenure track neuroscience positions, up from 26% five years earlier; however, they held a mere 18% of the tenure track positions.

E. Law Firms

The picture of gender bias is a continuing saga in law firms. A 1991 survey of the largest law firms in the United States revealed women make up a scant 11% of partners. This lack of women at the top might be a consequence that only recently women are members of law firms and it is a seven year elevation process. However, a 1990 study concerning gender discrimination in law firms, conducted by a professor of economics, demonstrated that during the years 1969-1973 and 1980, women were about half as likely as men to be promoted to partnership. The study confirmed that standards for achieving promotion to partnership within law firms are higher for women than for men, making it a more arduous climb for women than for men.

It is clear that, at least for some law firms, women have to fit the

99. Committee Urges University to Open Doors for Women, N.Y. TIMES, April 12, 1992, at 51.
100. Id. at 51-2.
103. Marcia Barinaga, Profile of a Field: Neuroscience The Pipeline is Leaking, 255 SCIENCE 1366, 1366 (1992). It is unclear from the article whether these statistics on tenure and non-tenure track neuroscience positions are from 1990 or 1991.
106. Stephen J. Spurr, Sex Discrimination in the Legal Profession: A Study of Promotion, 43 INDUS. & LAB. REL. REV. 406, 413, 415 (1990). Professor Spurr's study concluded that even when male and female lawyers are of equal ability (work production and academic honors), women are required to meet a higher standard to receive promotion to partnership levels.
image that men set for them. In *Price Waterhouse*, a woman was denied partnership because some of the male partners had reacted negatively to her personality. Ms. Hopkins was criticized for using foul language because she was a "lady." She was advised that to increase her chances for partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." The rationalization as to why few women are partners is based on similar reasons to those rationalizing why there are few women judges, few women law professors, few women science professors, and so on. They don't want to devote long hours to work; they are more interested in being home raising their children than having a professional career. In many professions, such as in the sciences, these reasons are quickly seized upon to eliminate even considering a woman for a position. The view that women have inherently different styles, attitudes, and approaches within the science fields and work force continues to create obstacles to women's advancement.

The domestic sphere remains under the exclusive domain of women, *the nurturing and delicate creatures*. Most women's identities are still defined through marriage and by their reproductive and care taking role. Women are still perceived as naturally destined to be wives, mothers, and helpmates. It is a well known fact that when women work outside the home, they continue to take primary responsibility for the household and child care. Law firms grappled with *their woman problem* — the perceived special need to maintain women in their dual roles as mothers and workers, and gave birth to "The Mommy Track." The Mommy Track is a separate, slower path that women with children can follow that accommodates women wanting to work in a law firm, but desirous of life *outside the office*. Typically, large law firms expect over 2,000 billable hours a year, that potential partners be on call twenty-four hours a day,


108. "One of the male attitudes that plagues . . . women in all fields of science--is that the decision to marry and have children is taken as a token of a weak commitment to work." One woman assistant professor stated, "Ludicrously, I was accused of not being serious about graduate school because I was having a family." In fact she states her efforts to combine a professional career and family life indicated an unusually strong commitment to being a chemist. Ivan Amato, *Profile of a Field: Chemistry, Women Have Extra Hoops to Jump Through*, 255 SCIENCE 1372, 1373 (1992); "Women who choose to put in fewer hours and spend more time with their families say they are considered less than serious by male colleagues." Jennifer A. Kingson, *Women in the Law Say Path is Limited By 'Mommy Track'* , N.Y. TIMES, Aug. 8, 1988, at A1.

109. *Gender and the Culture of Science Women in Science* 1993, 260 SCIENCE 275 (1993) (This is a follow-up issue to the first issue published on women in science on March 13, 1992 and cited fully in footnote 101.)

110. See infra Figure 9.

seven days a week, and cast off family loyalties or concern for anything other than the deal, the case, or the office. Women have to prove themselves able to meet male defined standards. Such devotion is seen as a badge of honor. The Mommy Track allows women with children to elect to work part-time, (9-5, 5 days a week) at 55-70% of a full-time associate’s pay. Women are told they are doing a good job fulfilling their roles as mothers and wives, while providing a lucrative source of labor for law firms.

Advocates of the Mommy Track, including some women, say it accommodates women’s special needs. Echoing Justice Bradley’s values, the Mommy Track preserves the timid and delicate nature of women, allowing them to fulfill their “noble and benign offices of wife and mother.” Women electing the Mommy Track are protected from taking protracted or difficult assignments, working long hours, and traveling to distant places away from home. Women, acting in their maternal and work role, invariably equate goodness with self-sacrifice. Taught throughout childhood how to love and care, women react in a stereotypic fashion by exhibiting a selfless face. 1988 statistics on inactive women lawyers indicate they outnumbered inactive male lawyers by almost two to one during the ages of 30-39, primary child bearing years for professional women.

The Mommy Track is a way to ensure that women will not reach partnership level within law firms. It is a calculated measure to preserve the influential and top economic positions for men. Women will be channeled into the Mommy Track, thereby not working the required hours, taking on protracted difficult assignments, or traveling. Since most law firms condition partnership on a set of established benchmark requirements, including billable hours and the appearance of sacrifice of personal time for office time, anything less results in loss of status within the law office and dooms one to failure.

Achieving the requisite billable hours is not the only prerequisite for partnership. A formidable barrier to achieving partnership is generating new business. Networking is critical to women’s advancement within the top levels of the legal profession. This is difficult for many women, who are still excluded from informal male networks — the club, the secret society, the golf course, and the country club. Gender discrimination

112. Kingson, supra note 108.
116. Holtzman, supra note 115; see also Claudia Center, “Boys Keep Out!” Historical and Legal Perspectives on the Contributions of All-Female Organizations to Sex
occurs by shutting women out of the real centers of power: management committees in law firms, top positions in professional organizations, and the inner circles that organize meetings. Mommy tracks preserve women’s role as primary caretakers by offering women alternative tracks that never lead to the real centers of power. Because women are never at the top, the legal profession evolved and continues to develop in ways antithetical to women.

Anecdotal evidence supports the assertion that the Mommy Track actually discourages women from becoming partners in law firms. Women lawyers, at hearings held by the American Bar Association’s Commission on Women in the Profession, shared their experiences as working mothers within law firms. Barbara P. Billauer, president of the Women’s Trial Board related: “Every single woman that I have spoken to without exception, partner or associate, has experienced rampant hostility and prejudice upon her return. There is a sentiment that pregnancy and motherhood has softened her, that she is not going to work as hard.”

The professional costs of the Mommy Track are reflected in how men react to gender neutral parental leave policies. Fathers of newborns do not take paternity leave because they fear the “Daddy Track.” They fear not being taken seriously about their jobs, not being seen as tough and masculine, and not being promoted within the workplace.

Unfortunately, the Mommy Track does not offer a real choice for women. By reinforcing women’s secondary status within society and primary responsibility for home and child-care, it diffuses women’s ability and desire to challenge the system that sets up standards for advancement such as partnership in private law firms. The Mommy Track exacts a high cost for many women, including professional sacrifice and loss of personal well-being. The way to remedy the situation in law firms is to lower the inhuman hour requirements and to encourage contributions to public service and family life.

F. Corporate Counsel

Women fare little better in Corporate America. They constitute only a handful of America’s general corporate counsel. The lack of women corporate counsel is particularly disturbing since the position of corporate counsel


117. Cf. Marcia Barinaga, Profile of a Field: Neuroscience the Pipeline is Leaking, 255 Science 1366, 1367 (1992). (women are excluded from foundation boards and university committees).

118. Kingson, supra note 108.


120. Id.

counsel is often a stepping stone into corporate board rooms. Not surprisingly, women constituted a mere 5.7% of corporate board directors within Fortune 500 and Service 500 companies in 1992. Corporate America parallels the discrimination faced by women in the legal profession. Locking women out of corporate counsel jobs has a serious impact on women's access to economic and political power in the business community. Despite articles heralding that women are breaking through the glass ceiling, Catalyst, a non-profit organization developed to effect change for women in business, reports that “[t]he significant increase in the numbers of women in the pipelines for senior leadership positions over the last decade leads us to expect a larger representation of women on boards. However, the fact remains that nothing much has changed at the top.”

The lack of women as corporate counsel and board members illustrates just part of how corporate America views women. In 1979, women made up 1% of managers at the nation’s largest 1,000 companies and in eleven years women had grown to a still almost nonexistent 3% of women managers. Currently, there is only one woman CEO of a Fortune 500 company, and not coincidentally she owns Warnaco Group, Inc., a manufacturer of clothing and intimate apparel. It is not surprising that the only woman CEO of a Fortune 500 company would manage a clothing and intimate apparel company, since this field relates to women’s stereotyped obsession with beauty and fashion. Clothing and intimate apparel is seen as a less serious business enterprise than technology, utilities, or financial corporations. Statistics from March 1992 confirm that women have greater opportunities to become board directors in service companies rather than industrial and manufacturing companies. Women constitute 6% of directors at Service 500 companies as compared to 5.3% of directors

122. In 1980, 16% of top corporate officers came from legal backgrounds. Epstein, supra note 49, at 7 n.*.

123. Catalyst, Catalyst Finds Number of Female Board Directors Still Small, 1 (Jan. 11, 1993)(News Release on file with authors).


125. Catalyst, supra note 123 (quoting a Catalyst Representative). Catalyst was founded by Felice N. Schwartz who states the non-profit organization was formed, “to bring to our country’s needs the unused abilities of educated women who want to combine work and family.” Catalyst, The Catalyst Award Annual Awards Dinner and Tribute to the Founder and President of Catalyst, Felice N. Schwartz 14 (1993) (quoting Felice N. Schwartz).

126. Statistical Record of Women Worldwide 27 (Linda Schmittroth ed., 1991) referring to original sources: Ten Years Later, the Glass Ceiling Gleams, Newsweek, Sept. 3, 1990, at 52; Korn/Ferry International and UCLA Anderson Graduate School of Management. “Based on a survey of 698 top executives at the 1,000 biggest companies.”

127. Memorandum from Cybele at Catalyst, Internal Memorandum to All Staff: Regarding Women CEO’s 1 (May 21, 1993) (on file with authors); Maggie Mahar, The Measure of Success; Linda Wachner of Warnaco Group Inc. America’s Top Women Business Owners, Working Woman, May 1992, at 70; Susan Caminiti, America’s Most Successful Businesswoman, Fortune, June 15, 1992, at 102.
within Fortune 500 companies. In 1993, there were only two women CEO's of Service 500 companies. That brings the number of women CEO's within Fortune 1000 companies to three.

The "glass ceiling" women face within Corporate America accounts for one of the major reasons women leave Fortune 500 companies after five or more years of employment. A 1990 study of women within Corporate America indicated that women left big corporations because they saw "their opportunities to advance as limited." Corporate America provides another illustration that women entering the public sphere are excluded from the executive track by associating themselves with the domestic sphere. In 1989, 52% of female executives remained single, indicating the high toll primary responsibility for the household and children takes on professional women's career advancement. A recent 1992 article reported that it was common practice for married women in the MBA program at the University of Pennsylvania's Wharton School of Business to remove their wedding rings before job interviews. In contrast, some men borrow wedding rings for their interviews because a wife, who is the primary caregiver and responsible for family matters, is seen as strengthening their commitment to the company.

V. DEVELOPMENT OF THE PARALEGAL FIELD: A FEMALE GHETTO

Even in light of these disturbing observations in the legal profession, many commentators optimistically believe that gender discrimination will vanish with time. Such optimists play the numbers game. They argue that the increase of women participating in the work force, and in particular the legal profession, will enable women to break down remaining barriers, reach through the "glass ceiling," and become equal partners in the workplace. An identical argument was voiced when the Nineteenth Amendment to the Constitution giving women the right to vote was passed.

129. Memorandum from Cybele at Catalyst, Internal Memorandum to All Staff: Regarding Women CEO's 1 (May 21, 1993)(on file with authors).
133. Id.
134. Handbook of American Women's History 615 (Angela H. Zophy & Frances M. Kavenik eds., 1990); However, a few militant feminists, Alice Paul, Anne Henrietta Martin and Burnita Shelton Matthews rejected the view that the Nineteenth Amendment would solve women's exclusion from society. They formed the National Woman's Party (NWP). Joan Hoff, Law, Gender, & Injustice A Legal History of U.S. Women 206-7 (1991).
Yet, seventy-three years later, gender discrimination still exists. It was also a familiar position after the 1964 Civil Rights Bill was enacted.

Women’s presence within the work force for the last twenty years has not eliminated pervasive sex discrimination. Close examination reveals a gender discrimination pattern that impugns an optimistic view in the professions of medicine, dentistry, and law. In all three fields, women are channeled into positions that emulate the traditional roles they always play — the assistant, the helper, the nurse, the housekeeper. Due to women’s primary responsibility for the domestic sphere and stereotyped role within society, women remain clustered in jobs that have traditionally been viewed as less demanding, offer flexible schedules, lower status and less pay. In the legal profession, that position is the paralegal. This is an extremely invidious form of gender discrimination because it follows the contours of history. As the cliché states, “History repeats itself.”

The concentration of women in the paralegal field is a powerful and overlooked form of gender discrimination. The paralegal field places women in traditional supportive roles that are behind the scenes, giving women only trivial power and fictitious status. Characterized by routinized and subservient work, low pay, and few opportunities for advancement, the paralegal field is the legal profession’s female ghetto. In 1979, women constituted 69% of all legal assistants. Ten years later in 1989, women’s numbers had grown to 76% of all legal assistants. According to the Bureau of Labor Statistics women currently constitute 77% of legal assistants. Even higher numbers of women paralegals are reported by the legal assistant organizations themselves. The National Federation of Paralegal Associations reported in 1991 that the typical paralegal was female—women made up 94% of the field. The National Association of Legal Assistants also reported in 1991 that the average paralegal was a “37 year-old female.”

135. See the MIDDLEMARCH passage quoted supra note 18.
136. This article makes no distinction between paralegals and legal assistants since the two terms are used interchangeably throughout the articles written on this field.
137. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, Vol. 2 SUBJECT REPORTS, EARNINGS BY OCCUPATION AND EDUCATION 1980 CENSUS OF POPULATION, Table 1. Earnings and Detailed Occupation of Persons 18 Years Old and Over in the Recent Experienced Civilian Labor Force With Earnings in 1979, by Age, Sex, and Years of School Completed: 1980, 77 (1984); Approximately 80% of the forty thousand paralegals employed during the 1980’s were women. HANDBOOK OF AMERICAN WOMEN’S HISTORY 323 (Angela H. Zophy & Frances M. Kavenik eds., 1990).
141. Elaine Burkhardt, Today’s Paralegal, 10 THE BAR BULL.-SEATTLE KING
Just how the paralegal field became to be dominated by women parallels historical developments in the late 1960s and early 1970s. Primarily, that was the growth of the women's movement and the demand by women for greater equality within the work force. Women desired to be professionals and not office workers or secretaries. The legal profession, never at a loss for ingenuity, responded to the potential influx of women in the labor market. Paralegals fit perfectly into the legal profession's framework. With the rise of technology and lawyers' desire to avoid routine work, paralegals could do the tedious tasks. They also were a cheap labor source. In short, the paralegals became the male lawyer's bonanza. Women were channeled into a lesser avenue of the legal field. Touting the paralegal field as a profession, women who were already working as legal office workers, secretaries, and new hires to the legal field were recruited to become "paralegals."

It would be understandable and even arguably acceptable to route inexperienced women into the lowest rung of the legal profession if the job of paralegal is a stepping stone into the top level of the legal profession. But it is not. It is a dead-end job. However, governmental agencies, educational institutions, and professional associations nevertheless spread the professional myth. And sadly, the number of women in the paralegal field is a stable and growing phenomenon. Though the paralegal field has only been in existence for the past twenty years, according to claims by the Department of Labor, it is one of the fastest growing occupations.

A. A Secretarial Clone: Same Chair, Similar Hat, Equivalent Tool

There is substantial evidence that paralegal duties are merely the computer age equivalent of the duties traditionally performed by legal secretaries. The similarity in secretary and paralegal skills, duties, and responsibility point to the paraprofession as using the same chair, merely switching hats and exchanging typewriter for word processor.

First, the listing of occupational categories by the United States Bureau of Labor Statistics provides strong support, not only for the idea that the legal assistant field is very new, but also that it replaced the role of the legal secretary within the law office. The Current Population Survey by the United States Department of Labor, covering the years from 1983-1987, deleted the category of legal secretaries in its table on employed civilians by occupation and added the new occupational category of legal


The word “paralegal” wasn’t even officially part of the English language until 1972, according to the *Oxford English Dictionary*. Second, the skills and training of both paralegal and secretary are strikingly similar. Organizational skill is considered a mainstay of secretarial skills. Paralegals, when asked about what they do, emphasized that their foremost skill is organization. A paralegal at The Bank of America stressed her organizational skills in her specialty, complex litigation. “In complex litigation it is my experience that good organization is crucial to effective trial preparation. Management of discovery information lets you know early in the game whether or not a motion for summary judgment or settlement overture should be considered.” It is constantly stated that a paralegal’s role is to help in organization as a custodian of trial preparation. A paralegal provides “[a]n able hand itemizing and indexing the exhibits.” Paralegals arrange simple chronological filing systems and indexes of pleadings, motions and orders, making facts easily accessible at trial and freeing up the attorney’s time.

Paralegals themselves recommend that to get a job in a law firm, a paralegal should have secretarial skills. One legal assistant stated in a recent article, “A marketable paralegal should know everything a good legal secretary knows, have a basic understanding of how lawyers think, good writing skills, organizational skills, and the assertiveness of a good salesman.” It is suggested that a double degree of receptionist-paralegal would increase an individual’s marketability with law firms dramatically.

Third, the duties that legal secretaries provide and the services for lawyers performed by paralegals are amazingly similar; indeed, it is diffi-

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147. Supreme Court Justice Sandra Day O’Connor revealed in a lecture on the history of women lawyers at New York University Law School:

> I myself, after graduating near the top of my class at Stanford Law School, was unable to obtain a position at any national law firm, except as a legal secretary. Yet I have since had the privilege of serving as a state senator, a state judge, and a Supreme Court Justice.


cult to draw clear lines between the tasks traditionally performed by secretaries and the tasks performed today by paralegals. The duties of a legal secretary include scheduling meetings, creating and maintaining files, drafting simple routine correspondence, and making travel arrangements. Legal secretaries also provide services that are definitely paraprofessional. For example, secretaries may conduct interviews, do legal research, and file pleadings. Recent articles also share the view that many of the administrative functions of the legal secretary are now performed by paralegals.

A recent study by the National Association of Legal Assistants (NALA) confirms that legal assistants are spending a large part of their time performing functions closest to secretarial work. The NALA 1991 report indicates that legal assistants spend the most time reviewing and summarizing documents; drafting pleadings and documents; maintaining general client contact; and performing general office work. Legal Assistants rarely conduct legal research for memos and briefs; prepare for or attend depositions; prepare or attend closings; or spend time on hearings and conferences.

Fourth, the level of education required for paralegals and legal secretaries is very similar. Prior to 1968, most paralegals were trained on the job and did not receive formal legal education. And even after paralegal training programs were offered, for eleven years, until 1979, women with only four years of high school made up the largest proportion of legal assistants. This is the same level of education most secretaries had. Whether they were called secretaries or eventually became known as paralegals, this is compelling evidence to suggest that women learned on the job and performed the same duties.

B. Paralegals are Dependent

Jane Eyre could have been a role model for paralegals. In Charlotte Brontë's *Jane Eyre*, Jane tells her husband-to-be, the blind Mr. Rochester,
‘I will be your neighbour, your nurse, your housekeeper. I find you lonely: I will be your companion—to read to you, to walk with you, to sit with you, to wait on you . . . . Cease to look so melancholy, my dear Master; you shall not be left desolate, so long as I live.’

Traditionally, a wife’s legal rights and duties were defined through her husband. She could not own property, make contracts, or even obtain custody of her children. She was her husband’s helper. The Supreme Court, in Bradwell v. Illinois, affirmed woman’s inferiority and incapacity to act independently from her husband, declaring that woman’s benign role as “wife and mother . . . . is the law of the Creator.” Like Eve created out of Adam’s rib, a woman was a mere appendage of her husband. “So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband.”

Similarly, secretaries and paralegals are only defined in relation to “their lawyer,” assisting the lawyer in performing his or her work. Secretaries and paralegals lack any power to act on their own. The little responsibility they do possess is defined exclusively through their attachment to a particular person, their attorney. Like the secretary performing time-consuming and routine chores who has been characterized as an office wife, the paralegal is essentially an office wife and helper performing time-consuming and routine tasks.

Even paralegals stress that their duty is to serve their attorney. In a magazine written specifically for and by paralegals, the articles highlight this point — “what attorneys expect from paralegals;” “understanding of attorney behavior;” “knowing how to win an attorney over;” and “building ‘personal leverage’ and marketing yourself.” Finally, one lead article deals with the problem of when an “attorney won’t let you handle responsibilities beyond drafting documents - and even worse, often treats you like a creative typist.” Paralegals play a subordinate supportive role, much like the traditional supportive role carved out for women as wives.

Attempts by paralegals to act on their own have been met with stiff opposition. Through the doctrine of respondeat superior, the attorney is ultimately liable for the work product of the paralegal; they have fought

156. Brontë, Jane Eyre, supra note 13, at 440.
159. Genesis 2:22-3 (King James); see also Genesis 3:16: “thy desire shall be to thy husband, and he shall rule over thee.”
162. Advertisement for Legal Assistant Today, (September/October 1990) Supplement to Trial.
valiantly to retain control over paralegals.\textsuperscript{163} Masked beneath the objective of protecting the public from inadequate representation is the lawyer's self-interest in prohibiting paralegals from gaining independent status and taking away legal fees.

Nevertheless, the myth is perpetuated that paralegals are professionals and can exercise independent responsibility for their work. Needless to say, this is illusory. Even when paralegals are given more responsibility, it is in areas traditionally considered by the profession to be low in status and intellectually unchallenging, such as family law. Largely considered a less worthy intellectual enterprise, coupled with its emotional volatility, family practice is a primary area in which paralegals are given a significant amount of responsibility and client contact. Generally the paralegal has the role of go between — listening to and defusing the client's emotions and anxiety.\textsuperscript{164} This part of lawyering is highly distasteful to many attorneys and a field of law traditionally avoided by male lawyers.

Bar associations guard the door to protect their monopoly over legal services by enforcing unauthorized practice of law statutes against paralegals.\textsuperscript{165} The American Bar Association has denied paralegals any independent authority to act on their own. The Model Code of Professional Responsibility makes it clear that a paralegal's work is only appropriate when "the lawyer maintains a direct relationship with . . . client, supervises the delegated work, and has complete professional responsibility for the work product" of the paralegal.\textsuperscript{166} Other examples of the legal profession's control over the paralegal field abound. Paralegals' attendance at the closing of a real estate transaction is permissible in Nassau County, New York, only if the lawyer strictly supervises the paralegal, the paralegal's duties are merely ministerial, and the lawyer maintains a direct relationship with the client.\textsuperscript{167}

The courts have sided with Bar Associations by defining the unauthorized practice of law very broadly, including services rendered outside of court requiring the use of a legal skill or knowledge.\textsuperscript{168} Several cases have held that paralegals cannot exercise independent professional judgment or give legal advice.\textsuperscript{169} Kentucky, the first state to adopt a paralegal

\begin{thebibliography}{99}
\bibitem{164} Patricia L. Grove & Mary K. Binter, \textit{The Use of Paralegal Assistants in Divorce Practice}, 4 Am. J. Fam. L. 41, 41 (Spring 1990).
\bibitem{166} \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 3-6} (1981).
\bibitem{168} Davies v. Unauthorized Practice Committee, 431 S.W.2d 590, 593 (Tex. 1968).

code in 1980, specifically prohibits paralegals to do anything but strictly supervised matters. Kentucky Supreme Court Rule 3.700 states: "A lawyer shall ensure that a paralegal . . . does not engage in the unauthorized practice of law. . . . The lawyer supervises the paralegal. . . . The lawyer remains fully responsible for such representation. . . ."  

C. Computers and Paralegals

The paralegal field has been made to look professional because much of paralegal work is dependent upon computer usage. However, computer usage has increased within all levels of society. Pre-kindergarten and kindergarten children increased their computer use more than twofold from 1984-1989, and 52% of all elementary children used computers in 1989. The myth that merely using a computer makes a job professional is one shared by paralegals themselves. Spokespeople within the paralegal field assert that growth of computer automation has made paralegal work more professional. A paralegal coordinator from Santa Monica described her first paralegal position ten years ago as a glorified file clerk. With increased technology she asserts, "That's not true anymore. A person uses their intelligence now . . . You're not just pushing paper - you're pushed to think."  

While it is true that lawyers are demanding that workers perform computer functions, the tasks performed — document retrieval and organization — are commonplace tasks traditionally performed by legal secretaries before computers were in common usage. The fact that these tasks can be performed more quickly on the computer does not change their nature. New computer technology is merely a mask for the same type of chores legal secretaries have been performing for years. Merely labeling a job as being one for professionals is an old trick. This was done at first with legal secretaries who once were portrayed as professionals. They were told that they had to learn a new language, stenography, and
master the use of modern tools — At first it was dictation pads and carbon paper, then manual typewriters, followed by electric typewriters, then memory typewriters. Now, secretarial tools consist of computer disks, scanners, and programs for management of files. Being computer literate does not change the nature of their work.

The paralegal also has been told she is a professional because she is an information manager, her logical tool, a computer. Paralegals are trained in the latest technology of computer applications such as computer-assisted research, database management, and on-line communications.176 Though computer automation is an important factor in the continued growth of the paralegal field, it doesn’t make the field any more professional than being a high-tech office worker or secretary. With the increase in technology in law firms, there is a need for individuals to perform computerized research searches and generate generic legal documents. Once an individual has mastered this new technology, it becomes standardized and formulaic. Lawyers still control and identify what legal issues are researched, what arguments are made, and ultimately the entire research process. Computer automation does not change the fact that paralegal work is standardized and routine.

VI. PARALEGALS: A MYTHICAL PROFESSION

A. Illusion of Professional Status, Affluence, and Abundant Jobs: Two Paralegal Training Programs

1. Paralegal Programs Target Women

The paralegal programs are highly successful in capitalizing on women’s interest in the law and perpetuating the myth that legal assistance work is a profession. This is the case even though for eleven years, most paralegals did not have any greater education than legal secretaries. The paralegal field champions itself as a profession by fostering its own certification program. For example, the National Association of Legal Assistants maintains a voluntary certification program for legal assistants.176 They offer a standardized two-day examination and publish model standards and guidelines for utilization of legal assistants. The first paralegal training programs were offered in 1968, at the same time that women were increasing their enrollment within law schools.177 Since that time

175. Id.
177. From 1963-64 to 1968-69 women’s numbers as first year law students within American Bar Association Approved law schools increased by 99% from 877 to 1,742. During the same time frame total first year numbers of students for both men and women only increased by 14%, from 20,776 to 23,652. AMERICAN BAR ASSOCIATION, A REVIEW OF LEGAL EDUCATION IN THE UNITED STATES FALL, 1991 67 (1992). Women’s interest in legal careers has steadily increased since 1968 and, from 1986-87 to 1990-91, women’s applications to law school rose by 41%, 28,793 to 40,500, keeping pace with men’s appli-
over 500 paralegal programs across the United States have materialized. The American Association for Paralegal Education has 273 member schools. Depending on the type of program, the cost ranges from $650 up to $5000.

The programs are a diverse offering — ranging in time from a certificate which can be earned in a matter of a few months to four-year bachelor degrees in legal assistance. Four-year paralegal programs offering bachelor degrees are on the rise, completing the illusion of professional responsibility. Typical of the various certificate and degree programs are two — The twenty-year-old Philadelphia Institute, referred to as the Harvard of the paralegal profession, which offers a four month certificate, and a two-year degree program at the Edmonds Community College paralegal program, located in Lynnwood, Washington.

Both programs are representative of paralegal program practices: they target their program at women and minorities and portray the paralegal field as a profession. For instance, the Philadelphia Institute recruits by catalogue. The Philadelphia catalogue, similar to other paralegal program catalogues, includes photographs of paralegal students and graduates. This is not an astounding marketing technique in itself. The only remarkable aspect of the catalogue photographs is that 90% of the photographs of students and graduates feature women and/or minorities. The second recruitment aspect is the appeal of lower cost and time investment of paralegal programs in comparison to law schools. This is attractive to women and minorities who statistically have less ability to indulge in long and costly educational programs. In 1990, the Philadelphia Institute

178. Yegge, supra note 153, at 56.
182. Haskell, supra note 163, at 634-6.
stitute's tuition fee for its four-month paralegal program was $4,970. In comparison, three years of law school can cost over $30,000.

Characteristic of all paralegal training programs is their emphasis on the prestigious nature of a demanding career in legal assistance, the necessity for specialized skills and training, and the abundance of employment opportunities. The Edmonds program describes the legal assistance field as a growth area — with "Prestige . . . Challenging Work . . . Independence . . . A Rewarding Career . . . Opportunity." The Philadelphia Institute catalogue promotes the challenging and exciting assignments that paralegals have, potential for greater responsibility and growth, rigorous and fascinating specializations; and reminds students that the Institute offers an alternative to the time and money invested in law school. It cultivates its professionalized image by requiring a bachelors degree, satisfactory academic record and performance on the Institute’s admission test, and a personal interview before admission. However, both the Institute’s claims and admission requirements are farcical when examining the length of the Philadelphia program. It lasts only four months.

Paralegal educational programs exploit the stereotypical image that women belong in supportive nurturing roles. The success of the paralegal field’s marketing efforts can be seen in the high concentration of women in educational programs that lead to paralegal careers as compared to careers as lawyers.

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184. The Philadelphia Institute, Catalog No. 20, 1990-91, at 29.
185. The U.S. Department of Labor contributes to this view by calling paralegals "the second-fastest-growing U.S. occupation (after home health care) and says paralegal jobs will jump 85.2% in the 15 years ending in 2005." Pollock, supra note 179.
188. The Philadelphia Institute, Catalog No. 20, 1990-91, at 28.
Figure 6

Greater Number of Women Obtaining Education in Legal Assisting as Compared to Law School, 1989-90

<table>
<thead>
<tr>
<th>Less than 1-year certificate in law</th>
<th>Associate - 2 year degree in law</th>
<th>Bachelor - 4-5 years legal assisting</th>
<th>LL.B. or J.D. law degree</th>
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<td>81%</td>
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DATA SOURCE: U.S. Department of Education

Figure 6 shows that a higher percentage of women are concentrated in legal assistant programs than men. In contrast, men make up a higher percentage of law school graduates than women. 81% of the certificates taking less than one year to earn were awarded to women. Associate degrees, which generally require two years to earn, also saw a high concentration of women, 87%. Women also accounted for 85% of the total legal assistant four-five year bachelor degrees awarded in 1989-90. During that same time period, 1989-90, women obtained 42% of the total LL.B. or

189. Figure 6 was constructed from the United States Department of Education Statistics. U.S. Dep't of Education, Nat'l Center for Education Statistics, Digest of Education Statistics 1992, Table 232.- Associate Degrees and Other Subbaccalaureate Awards, by Length of Curriculum, Sex of Student, and Field of Study: 1989-90 244; Table 234.- Bachelor's, Master's, and Doctor's Degrees Conferred by Institutions of Higher Education, by Sex of Student and Field of Study: 1989-90 250; Table 244.- First-Professional Degrees Conferred by Institutions of Higher Education in Dentistry, Medicine, and Law, by Sex: 1949-50 to 1989-90 268 (1992); The United States Department of Education provided the following explanation of their data collection process:

The National Center for Education Statistics (NCES) has expanded its post-secondary data collection through the Integrated Postsecondary Education Data System (IPEDS). IPEDS obtains data from each college and university on its enrollment . . . . This annual study provides a comprehensive overview of post-secondary education by instituting a survey system with a consistent set of definitions and survey forms for 2-year, 4-year and other types of postsecondary institutions.

Id. at 163.
J.D. law degrees conferred by law schools. The high concentration of women in these legal assistant programs demonstrates their interest in the law. However, instead of being routed into the legal profession as lawyers, they are routed into a secondary role as legal assistant.

This is a typical pattern, channeling women into secondary, supportive roles. The primary and secondary school education that girls receive further contributes to perpetuating the stereotyping of women as secondary citizens, promoting and channeling women into secondary employment positions. Educational studies confirm this socialization process and will be discussed later in this paper.

2. Education Does Not Improve Paralegal Salaries

Not only is it a hoax to channel women into legal assistance work and call it a profession, women are also told that they need special training. This is ironic. The irony of obtaining special training in legal assistance is that, in reality, specialized paralegal education is neither essential for obtaining paralegal employment nor improving salary opportunities. The education, particularly the certificate and associate degree programs in legal assisting, are in direct contradiction to what employers are really looking for in paralegals: good secretarial skills and general college backgrounds.

Employers have commented that they are not interested in specific legal skills requiring professional training. Instead, they focus on whether an applicant has two essentials.

First, they want their legal assistant to have secretarial skills including writing, spelling, and general office work experience. Second, they look for a college educated applicant—a person with a well-rounded background, maturity, and good writing skills. For example, the chairperson of one legal studies program in Wilmette, Illinois stated, "Our experience shows law firms want kids with four-year degrees. They don't care if it's a degree in music."

A specific marketing ploy used by paralegal programs to entice women into their programs is their claim that a certificate or degree in legal assistance will increase the salary that a paralegal can earn. Studies on educational background and paralegal salaries refute this claim. Unlike lawyers, paralegal salaries are not improved by education.

190. See supra Figure 6.
191. See infra note 243.
193. Id.
Figure 7 presents data that educational level makes little difference in compensation of paralegals. Salaries paid to beginning paralegals who had less than a four year degree were remarkably similar to paralegals with four year bachelor degrees. And the average salary range for paralegals only improved marginally even when they had an advanced degree, such as a masters.

Figure 7 also diffuses another myth — that paralegal salaries are significantly higher than secretarial salaries. Indeed, this is not the case. Figure 7 compares the educational level and pay of paralegals to that of legal secretaries. Paralegals with less than four-year bachelor degrees earn $26,718. Legal secretaries with the same level of education earned $24,054, a 10% difference in salary. When paralegals and legal secretaries have four-year bachelor degrees, paralegals earn 21% more than legal secretaries. Paralegals earn $30,443; legal secretaries earn $24,046. With a masters degree, the difference for both groups is substantially the same as with a four-year bachelor degree. Paralegals earned $31,824, 18% more.

DATA SOURCE: Abbott, Langer & Associates\(^{194}\)

194. Figure 7 was constructed from the data of Abbott, Langer, & Associates. **Abbott, Langer & Associates, Compensation of Legal & Related Jobs (Non-Law Firms) 12th Edition Volume 3: Legal Administrators, Paralegal Assistants, & Legal Secretaries** 31, 158-9 (1990); Abbott, Langer, and Associates provided the following explanation of their data collection process:

Questionnaires were mailed in May 1990 to the chief legal officers of organizations in business, industry, government, and other non-profit organizations, as well as to past survey participants, purchasers of previous survey reports in this series, and other selected groups. Two hundred and forty-seven organizations provided information which was usable in this report.

*Id.* at i.
than legal secretaries. Thus, regardless of educational level, there is barely any difference in salary between paralegals and secretaries.

3. Illusion of Professionalism

In most professions, skill and experience are key to a person's status, pay, and professionalism. However that does not appear to be the case for paralegals or secretaries.

Figure 8

DATA SOURCE: Abbott, Langer & Associates

Figure 8 presents data on two related points. It shows that on the job experience does not affect the salaries of legal secretaries and paralegals; they remain comparable, suggesting the jobs are essentially the same. Secondly, the relationship between the salaries of paralegals and secretaries and the amount of experience, when compared to the same relationship

195. Figure 8 was constructed from the data of Abbott, Langer, & Associates. Id.; ABBOTT, LANGER & ASSOCIATES, COMPENSATION OF LEGAL AND RELATED JOBS (NON-LAW FIRMS) 12TH EDITION VOLUME 2: NON-SUPERVISORY ATTORNEYS 9 (1990).

196. Although a 1991 study conducted by the National Association of Legal Assistants found that "[y]ears of experience and years with the current employer" had the strongest relationship to paralegal salaries, the average paralegal in their study had eleven years of legal experience while the average paralegal salary was still less than $29,000. This is consistent with the data in Figure 8 which provides a long-term picture of paralegal salary in relation to years of experience. In addition, the National Association of Legal Assistants' survey found a negative correlation between education levels and paralegal salaries consistent with Figure 7. NATIONAL ASSOCIATION OF LEGAL ASSISTANTS, THE NALA UTILIZATION & COMPENSATION SURVEY FOR LEGAL ASSISTANTS 2, 6 (1991)(Summary Brochure).
between salary and experience for attorneys, exposes the illusion of professionalism. In regard to the first point, after fifteen to nineteen years of experience, paralegals earn $31,509 while legal secretaries earn $27,413. The difference in salary between paralegals and legal secretaries ranges from a low of 9% with one to two years of experience to a high of 25% with ten to fourteen years of experience. By fifteen to nineteen years of experience, paralegals earn 13% more than legal secretaries. The insignificant distinction in salaries for the two positions is a strong indication that paralegals and legal secretaries are virtually equivalent positions in the legal field. Of course, salary is only one factor among many others showing the unity in positions.

Second, Figure 8 illustrates a large differential in salaries paid to paralegals and legal secretaries as compared to attorneys. Salary is among several factors that measure status of a profession. In Figure 8, the average starting salary for paralegals with under one year of experience is $25,040. Entry level salaries for legal secretaries are close to those of paralegal salaries. Entry level legal secretaries earn $20,111. However, beginning attorneys with under one year of experience earn more than twice as much as paralegals or legal secretaries earn. Entry level attorney compensation is $46,166.

Figure 8 also shows that experience on the job has little effect on salary growth for secretaries and paralegals while it has an enormous effect on attorney salaries. Paralegals’ and legal secretaries’ salaries level out within five to nine years. The amount of experience on the job and its lack of effect on compensation is further evidence that paralegals and secretaries can be more realistically classified as salaried workers and not professionals. The widening salary differential indicates that paralegals and legal secretaries are accorded little or no professional status in comparison to attorneys.

Although it is reported by some paralegals that they earn $55,000 per year,197 these salaries are not earned by most paralegals. Rather, most paralegals average less than $32,000 per year even after almost nineteen years of employment.198 The National Federation of Paralegal Associations reported in 1991 that the salary of a typical paralegal was $29,607.199 This is consistent with the data in Figure 8. One spokeswoman within the field stated, "[F]or someone to graduate from a seven-month paralegal course and anticipate a job with an annual salary of $22,000 may be misguided."200

198. See National Association of Legal Assistants, Pay and Billing Rates for Legal Assistants, A.B.A. J., March 1992, at 37; See supra Figure 8.
200. Brown, supra note 149.
4. Mythical Jobs

Another myth perpetuated, mainly by paralegal programs, is that there are plentiful employment opportunities within the paralegal field. Although the United States Department of Labor predicts the paralegal field is one of the fastest growing fields, many paralegal programs are not adequately preparing students for the job market. This appears to be another widespread misrepresentation by paralegal programs. Though there are inadequate statistics to validate this point, anecdotal evidence seems to refute the full employment myth. A feature article in one Texas law journal exposed this myth in the Dallas, Texas, market. The article quoted a paralegal placement agent who stated "It's kind of like a puppy mill... [t]hey're just churning these people out of paralegal schools and giving them this rosy-colored picture. And a lot of these people are really discouraged."\(^{201}\) The article also reported another anecdote from a woman who did not learn until the semester before she graduated that her paralegal certificate from a community college in Dallas was not sufficient to find employment in the area. She stated, "Here the school is promoting these law firms, and they (the firms) told us flat out that they wouldn't hire us because we didn't have a four-year degree and two years experience."\(^{202}\) The nationwide legal market has become flooded from the proliferation of the over 500 paralegal programs.\(^{203}\)

In addition to misrepresenting the availability of employment with only a paralegal degree, many programs do not even provide students with the fundamental skills necessary to work within the legal field. After completing a six-month paralegal course in San Diego, the graduates of one school did not even know the very basics of how to file a suit. They hired an attorney to handle their case of misrepresentation against their paralegal school.\(^{204}\)

B. Paralegals: A Cheap Labor Source

Just as paralegal training programs specifically target women with illusions of paraprofessionalism to work as paralegals, law firms also promote the image of professional status and rewarding work for the paralegal. It is in their interest to attract paralegals since they are a source of profitability for law firms. The assumption that women provide cheap, unskilled labor is the story of protective labor legislation in the United States. Protective legislation has depended upon perpetuating the stereotypic image of women as being frail, passive, and dependent. Stressing the role of women as mother and nurturers has effectively banned women

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202. *Id.*
from male-type jobs and perpetuated lower pay rates. The concentration of women as paralegals makes it easy for law firms to take advantage of the paralegals and perpetuate the low rates of pay. Paralegals are billed out for less money than attorneys, cutting costs and generating additional business. By performing routinized tasks, the paralegal frees up the attorney to work in complex areas, allowing the attorney to get a greater number of clients, and thus maximizing the output of the law office.

Historically, law firm partners have built their profits on exploiting their associates. Law firms hire classes of young associates knowing that only a small fraction of them are ever admitted to the throne room to share in the kingdom’s treasury. Billed at $125 per hour, while costing $17-41 per hour, these young associates are an essential cog in the profit making law firm machine. However, as costs soared, so did salaries of associates and partners. In the past ten years, average starting associate salaries in the nation’s largest law firms increased dramatically from $35,000 to $85,000. High salaries, costly benefits, and rapid associate turnover rates marginalized the profit reaped from associates until associates have now become a less profitable commodity.

While new associates have become a less profitable commodity, paralegals remain an abundant supply of cheap labor. In the past ten years, the average starting salary of paralegals rose from $11,000 to $23,000. An article from the New York Times reveals that in 1990 large law firms paid beginning associates $85,000 a year, while those same law firms paid new paralegals $22,000 to $25,000. The large disparity between paralegal and new associate salaries illustrates the connection between profitability and paralegal utilization. In smaller law firms, where salary differentials between associates and paralegals were less than at large law firms, the number of paralegals hired did not grow as it did at large law firms, illustrating the link between profitability and paralegal use within law offices.

Law firms candidly acknowledge that they favor paralegals because it is profitable. When asked to assess the benefits of paralegals in their firms, the majority found that they had an increase in profitability and lawyer-performed routine tasks decreased. Hiring paralegals constituted “low cost and efficient labor.” The large growth of paralegal use within

205. HOFF, supra note 157, at 200.
209. Id.
210. Fowler, supra note 207.
211. Id.
212. Marianne M. Jennings & Patricia Murranka, Attitudes and Functions of Paralegals: Ten-Year Perspective, 29 L. OFF. ECON. & MGMT. 192, 202 (Summer,
law firms illustrates their profitability potential. A 1988 nationwide survey of 200 law firms and 90 corporate law departments found that legal assistants increased by 16% in law firms and 9.8% in corporate law departments for the years of 1987-88. The United States Department of Labor has estimated that from the mid-1980s to 1995 the number of paralegals will nearly double, creating the fastest growing occupation in the United States. The National Law Journal collected data on the nation's ten largest firms and found that from 1979 to 1989 paralegal numbers within the firms increased at least 68% and as much as 691% during the ten year span.

According to a 1989 Washington, D.C. survey, law firms pay paralegals on average the equivalent of $12-14 per hour while billing them at $60-65 per hour. In Los Angeles, the average paralegal with five years of experience is paid $16.50 per hour while billed at $75-78 per hour. The National Association of Legal Assistants, in a 1990-91 survey, reported that the average legal assistant makes approximately $14 per hour and is billed at $53 per hour. Searching for even more profitability, it has been suggested that lawyers can even make a greater profit billing by the job, thus hiding the true labor cost of the work product.

Even the United States Supreme Court recognized the economic value of using paralegals for strictly supervised and routinized tasks. In 1989, the United States Supreme Court in Missouri v. Jenkins held that reasonable attorney fees could include the work of paralegals determined at market rates. The court, citing to Cameo Convalescent Center, reasoned that "market-rate billing of paralegal hours 'encourages cost-effective delivery of legal services.'"

Instead of objecting to using paralegals for profit, members of the paralegal industry enthusiastically embrace the idea. The National Association of Legal Assistants admits that the legal assistant concept developed in the late 1960s when attorneys searched for ways to improve the cost efficient delivery of legal services. Legal assistant organizations

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217. Ruth Lee, Demand for Paralegals Mushrooms; Salaries in Dallas and Houston are Among the Highest in the Nation, TEX. LAW., Jan. 8, 1990, at 6.
221. National Association of Legal Assistants, What is a Legal Assistant? Opportu-
readily acknowledge that cost control by law firms is responsible for the
growth of the legal assistant field. What they fail to recognize is that most
paralegals are women, the job they do is stereotypical, and men are profiting
off the sweat of women. It's not that efficiency and profitability are
unjust, but the methods in which they are achieved perpetuate stereotypi-
cal roles for women.

VII. Conclusion: Why Do Women Predominate in the
Paralegal Profession?

A. Myra Bradwell, Jane Eyre, and Dorothea Brooks: Did They Never
Leave?

The statistical data presents a clear case that the role of paralegals in
the legal profession is a paradigm of the role of women in other profes-
sions. We will continue to examine the legal profession for a window on
why women predominate within paraprofessions. Paraprofessions channel
large numbers of women into supportive subservient positions. Analogous
to being placed on pedestals, these positions offered women the illusion of
professional status while merely reinforcing their role as helpmates. Con-
fining them to routine, behind-the-scenes work that carries limited respon-
sibility and lower pay than men, new barricades erected systematically
exclude women from the top levels of professions and retain women in
their historical image as nurturers.

1. Women's Choice

A 1989 article on the status of the paralegal profession quoted several
women who stated they would rather be paralegals than lawyers. The
reasons they gave were that they "'don't want the responsibility,'" would
"'rather someone else do all the talking,'" liked performing the "'back-
ground stuff' - research, drafting documents, estate work." Indeed,
since the myth that paralegals are highly paid professionals with a rosy
future perpetuates itself, it is not surprising that women volunteered their
partiality for being a paralegal. Of course, no one asked the women if
they would be happy in a dead end job, if they would be satisfied if their
paralegal salary after ten years on the job was roughly 75% of newly
hired law associates, as shown in figure 8, and if they would be content
with the lack of paralegal status in the legal profession. What is sur-
prising are the theories used to argue the correctness of this position for women as opposed to recognizing it as gender discrimination — a job that perpetuates the image of women as caregivers.

2. Biological Determinism/Sociobiology

Women's concentration in lower status professions such as the paralegal profession is, according to some theorists, a natural biological phenomenon. This theory finds its roots in nineteenth century biological determinism, which maintained that men and women are biologically different. Biological determinists asserted that men are intelligent, assertive, and logical thinkers. Women, they contended, are nurturing, compliant, and coy. Scientific evidence for this theory was that the size and weight of the male brain is larger than the female brain. Objective evidence indicates that average weights of male and female brains differed by barely four ounces. Nevertheless, even from this scant difference, some scientists reasoned that men are biologically superior to women. Max Funke, a German writer, took the theory to its most outrageous conclusion, arguing that "woman, with her small brain, must be considered a sort of 'missing link,' halfway between man and the anthropoid ape, and should be labeled 'semi-human.'"

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226. Ruth Bleier, Science & Gender 18-21 (1984). Following Professor Bleier's death in 1988, the Ruth Bleier Science Scholarship was established at the University of Wisconsin-Madison. The scholarship was created to encourage women to pursue careers in the natural sciences, medicine, and engineering. It is available to UW-Madison women first and second year undergraduates. The award provides a cash stipend, hands-on laboratory experience, and a woman scientist mentor. Ruth Bleier Scholarship in the Natural Sciences (pamphlet).


228. Id. at 62. Ashley Montagu, a noted anthropologist, would have us believe in the natural superiority of women. Though his text must be taken "tongue in cheek," he argues the point that, mentally and physically, women are superior to men. He does this by redefining superiority as "the extent to which that trait confers survival benefits upon the person and the group." Id. at 32. Montagu then debunks the myths about woman's innate inferiority and achievements. Taking on physical size, brain size, fetal development, intellect, emotional makeup, health, and creativity. Yet Montagu also fails to shed some lingering stereotypes which become painfully evident when examining his comments about women physicians.

It is not, we may suspect, by chance that when women enter the field of medicine they tend to favor such specialties as pediatrics, psychiatry, obstetrics, and anesthesia, and do best in these fields. [W]omen physicians are happier
The biological notion that women are caring, cooperating and nurturing and that men are genetically engineered to be aggressive and competitive was an accepted theoretical construct in the latter part of the nineteenth and early part of the twentieth centuries. This theory was used to justify women's place in the home. Justice Bradley's Bradwell concurrence and the vehement protests to deny women the right to vote and work in most of the world was based on this theory.

Eventually the main grounding of the theory — cranial size — fell out of favor. Nevertheless, that did not kill the theory that women were biologically inferior. The biological determinists went on to contend that biological factors such as hormonal cycles, infant activity levels, sexual capacities and emotional orientations were the possible sources of why women are the inferior sex. These bases also remained scientifically unproven. Yet, that did not hamper the biodeterminist advocates from justifying their theory that the female sex was inferior to the male sex. Finally the biodeterminists fell out of favor, and their theories seemed to disappear. That is, until 1975.

In the guise of a new science, almost identical biological determinist ideas took root again. Riding on the wave of worldwide Pulitzer Prize acclaim, Edward O. Wilson, professor of biology at Harvard, fathered the field of sociobiology. Sociobiology employs the idea that human behavior — its social characteristics — are biologically, genetically, and evolutionally determined. Originally, Wilson and his fellow sociobiologists worked with insects and laboratory animals. Then, employing the genetic reasoning they developed from the study of insects and animals, sociobiologists made the quantum leap to humans. Expanding the insect theories, Wilson and others set out to explain differing human characteristics. The sociobiologists contended that all human characteristics are programmed by genes. Sociobiologists attribute man's aggressiveness and woman's nurturance to genes. They argue that sex differences and personality traits ascribed to the sexes, as well as sexually differentiated traits such as coyness, fickleness, promiscuity, rapaciousness, and maternalism, are predetermined. Sociobiologists maintain that women are "genetically" predis-
posed to be attached to home and nursery, and men to business and professions.\textsuperscript{235}

It is tempting to dismiss this resurrected biodeterminist theory as the brainchild of a few demented scientists struggling to maintain the status quo of male superiority. Even Wilson, the mastermind behind sociobiology, candidly admits that extension of his theory to human nature is "not a work of science" and "its core is a speculative essay."\textsuperscript{236} He humbly confesses error: "I might easily be wrong - in any particular conclusion . . . . The social sciences are still too young and weak, and evolutionary theory itself still too imperfect, for the propositions reviewed here to be carved in stone."\textsuperscript{237} However, the belief lives on. The sociobiological theory continues to be used to explain and justify women's continued secondary status in the workplace.\textsuperscript{238} Sociobiologists attempt to explain that the reason she is not reaching the top, that she is in a subservient position, that she lacks responsibility, that she is poorer paid, is that women want to be in supportive, nurturing positions — it's a biological command. \textit{It's in the blood of the victim.}

We reject the speculative and unproved biological superiority notions, as do others.\textsuperscript{239} Professor Bleier, medical doctor, professor of neurophysiology, and former chair of the Women's Studies Program at the University of Wisconsin-Madison, in her book \textit{Science and Gender}, convincingly argued that one need not disbelieve the sociobiology theories on mere ideological grounds but can do so because the methodology behind the theories is "shoddy and deceptive."\textsuperscript{240} She asserted there is ample evidence in anthropology, sociology and science to find the theories without merit.

Their basic premises are flawed: the universal behaviors, characteristics, and sex differences of humans that they presume to explain as biological and innate are \textit{not} universal either within or between cultures; the behaviors of animals \textit{cannot} be taken to indicate innate behaviors of humans, "uncontaminated" by culture, since animals learn and have cultures; nor are the animal behaviors they describe \textit{universal}.\textsuperscript{241}

As early as 1974, distinguished anthropologist Sherry Ortner correctly pointed out that biological determinism ignored the powerful force of culture to shape and define sex roles. She stated "not that biological

\textsuperscript{235} \textsc{Wilson, On Human Nature, supra} note 224, at 125-54.
\textsuperscript{236} Edward O. Wilson calmly states in his book: "On Human Nature may be read for information about behavior and sociobiology, which I have been careful to document. But its core is a speculative essay about the profound consequences that will follow as social theory at long last meets that part of the natural sciences most relevant to it." \textsc{Wilson, On Human Nature, supra} note 224, at xii.
\textsuperscript{237} \textit{Id.} at xiii.
\textsuperscript{238} Some commentators reject the notion that it makes any difference whether differences are biologically constituted. Martha A. Fineman, \textit{Feminist Theory in Law: The Difference it Makes}, 2 \textsc{Colum. J. Gender \\& L.} 1, 14 n.25 (1992).
\textsuperscript{239} \textsc{Bleier, supra} note 226.
\textsuperscript{240} \textit{Id.} at 6.
\textsuperscript{241} \textit{Id.}
facts are irrelevant, or that men and women are not different, but that these facts and differences only take on significance of superior/inferior within the framework of culturally defined value systems. Socialization molds women and men's views of themselves and their roles within society. Culture provides the necessary context in which to analyze the secondary status attributed to women and women's concentration within low paying, low status paraprofessions.

3. Cultural Determinism: Fairy Tale Images of Women

We too reject the view that women are gene driven to choose and endure their low paying, subordinate roles as paralegals, dental assistants, nurses, teachers aides, child-care workers, and secretaries. Rather, we suggest the inquiry is: Can women really exercise free choice when bombarded with messages that they are the nurturers, the caregivers, they are not as bright, intelligent, or competent as men in the workplace? Advertisements displaying women as the subordinate sex, the accommodating sex, the pornographic object, the preparer of food, and the dispenser of cough medicine to a sick child are powerful images reinforcing the supportive, nurturing woman image. They belittle women's aspiration, self esteem, and career commitment. Encouraged not to be aggressive, competitive and assertive, women unceasingly swim against the historical tide of images.

A recent study commissioned by the American Association of University Women Educational Foundation, addresses the educational experiences of girls from preschool to high school. Researchers speculated from the studies in the report that sexist curriculums, behavior, textbooks, and treatment of girls in classrooms continue delivering the message that women's lives count for less than men's. Startling statistics have given rise to studies to explain the reasons for employment patterns. For example, gender differences in attitudes towards math and science by young women and men reveal that schools reinforce gender stereotypical patterns. Boys receive more teacher attention, instruction, and positive reinforce-

244. MARY F. BELENKY ET AL., WOMEN’S WAYS OF KNOWING (1986).
245. Occasionally, their destination is to go out with the tide. The main character ends her life by walking into the tide. See KATE CHOPIN, THE AWAKENING (1899). Going against the tide is a lonely battle in a lonely room. The wife and mother gasses herself to death, See DORIS LESSING, TO ROOM NINETEEN (1963), or descends into madness, as the autobiographical character experiences in CHARLOTTE PERKINS GILMAN, THE YELLOW WALLPAPER (1892).
247. Id. at 27-9.
ment than girls. Boys are commended for the intellectual aspect of their work. Girls are commended for neatness and ability to follow rules. Sex discrimination takes a tremendous toll on young women’s aspirations and self-esteem as they “are more likely to be the quiet and invisible classroom members.” A 1990 study by the American Association of University Women, found that girls lose their self-esteem to a significant degree as they enter adolescence. In contrast, boys’ loss of self-esteem is much less than girls’. At the high school level, 46% of the boys stated they were happy with themselves, compared to a dismal 29% of girls. This lack of self-confidence bars many women from even attempting to enter professions such as law, science, and medicine. From the cradle and beyond, women are tutored in the adage that they are to play subordinate sweetheart, wife, and mother roles. Literature and media in all forms — from fairy tales to books to newspapers and magazines to movies — disseminate and reinforce this stereotype. A recent survey of Seventeen, a popular teenage magazine with a circulation of 1.7 million, revealed that in 1961, 1972, and 1985, 60% of the magazine’s articles focused on beauty, fashion, cooking, and decorating. The recent survey concluded that a teenage girl will learn in our society:

250. The sex role stereotyping where boys are allowed and encouraged to express more anger, aggression, and competition contrasts sharply to girls who receive positive reinforcement for being nice to others. JACK, supra note 249, at 92. Years of sex role stereotyping where girls’ contributions to class room discussions are often ignored or played down results in some women silencing their voice and becoming virtually invisible within the law school classroom. The traditional law school Socratic method is not conducive to helping women overcome years of internalized messages that their opinions, ideas, and logic is inferior. The use of intimidation tactics and public humiliation is not an effective tool to creating a positive learning environment for diverse student needs. Angel, supra note 88, at 809-11.
252. Once women enter male dominated professions, lack of self-confidence feeds into the pervasive sexism reflected in one male math professor’s opinion: “I feel bad about it, but I really do feel women are genetically inferior in math.” Paul Selvin, Profile of a Field: Mathematics Heroism is Still the Norm, 255 SCIENCE 1382, 1382 (1992). Overt manifestations of sexism combine with more subtle forms of gender discrimination to produce a no-win situation for many women. As expressed by one neurobiologist, women “must walk a narrow line to be acceptable. . . . A female applicant who seems ‘too feminine’ risks not being taken seriously. . . . On the other hand. . . . successful, confident women are often considered unpleasantly aggressive, while a man with those very same qualities is viewed as a go-getter.” Barinaga, supra note 117, at 1366.
goal in life is to find a man to take care of her financially, and that her place will be home with the kids and the cooking and the housework, while his place will be wherever he wants it to be. . . . She will have been told that biological differences necessitate these gender differences and her lesser status in society.285

Literature and poetry, powerful sources of socialization, reinforce the fairy-tale image that a woman should be concerned with finding a man to take care of her. Cinderella marries the prince. Snow White and Sleeping Beauty wake in the arms of their princes. Jane Eyre finds happiness by marrying a man and performing the traditional caregiver role. Dorothea Brooks (in Middlemarch) marries her true love and finds fulfillment. Elizabeth Barrett Browning, a feminist poet of her time, ends her epic poem, Aurora Leigh, with the heroine being fulfilled, not by work but by finding love.286 The message is clear; the supportive roles of wife and mother, not work, bring women satisfaction.

Some women, literally brainwashed, place themselves in roles that fulfill this preordained prophecy. The young girl growing up does so with Cinderella’s icon. She has to battle the tide to aspire to be a corporate executive. The girl that crows with happiness when reading Snow White being wakened by a kiss from her prince has to engage in hand to hand combat against that kiss image to see herself as a surgeon with a scalpel and a vial of blood, bringing someone back to life. The cheerleader in college, reading Elizabeth Barrett Browning’s Aurora Leigh, isn’t encouraged by Browning to encounter math and strive to succeed. Fairy tales of the contemporary princess living equally with her prince have yet to be written.287

Both women and men live with these images. Boys also expect to find their fairy-tale images intact. Cinderella will be waiting to be fetched away from the dirty kitchen to his palace and made his wife. He expects to kiss Snow White and carry her off from the seven dwarfs.288 But

255. Id.

256. ELIZABETH B. BROWNING, AURORA LEIGH (1856). In Elizabeth Barrett Browning’s last poems, written before her death and published posthumously by her husband, poet Robert Browning, it could be said that she had written her own epitaph; that true happiness was to be loved. My heart and I;

Yet who complains? My heart and I?
In this abundant earth no doubt
Is little room for things worn out:
Disdain them, break them, throw them by,
And if before the days grow rough
We once were loved, used- well enough,
I think, we’ve fared, my heart and I.

Last Poems, (1862.)


258. A few years ago, the Seattle Children’s Theater performed a revisionist version of Snow White. Playwright Greg Palmer substantially changed the role of Snow White.
princesses and princes with ready-made castles are a fairy tale that doesn’t exist. Women expect to and do work to pay the castle rent. Not only do women work outside the home, but they are expected to and do take primary responsibility for the household and child care responsibilities.  

Figure 9

![Figure 9](image)

**Women Still Perform Majority of Work in Household 1992**

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**Do Not Want A Job Now. Current Activity, Keeping House.**

**Want A Job Now. Reason For Not Looking. Home Responsibilities.**

**DATA SOURCE:** Bureau of Labor Statistics

Figure 9, which compares the percentage of men and women who are not in the labor force because of household responsibilities, reveals women still have primary responsibility for the domestic sphere. In 1992, 98% of women who did not want a job did not want one because their current activity was keeping house. In stark contrast, a scant 2% of men from a passive princess who is carried off by the prince to a Snow White who could take control of her own life. In this version of Snow White she does not go away with the handsome prince whom she has never met before to live happily ever. Instead, she returns to the dwarfs. Telephone Interview by Kari Robinson with Greg Palmer (Nov. 12, 1992). Such changes are few and children still grow up with nineteenth century versions of prince and princess. The marriage of the British Prince of Wales to Diana was a modern day version of such a fairy tale. Shattering revelations that the prince and princess are not living “happily ever after” are swiftly swept under the rug, too painful to shatter the fairy tale images that everyone still wants to believe in. *ANDREW MORTON, DIANA: HER TRUE STORY* (1992).

260. Figure 9 was constructed from the United States Department of Labor statistics. *BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, EMPLOYMENT & EARNINGS, 35. Persons Not in the Labor Force by Reason, Sex, and Age 214, 214 (Jan. 1993) (1992 Annual Averages).*
261. Harriet Fraad et al., *For Every Knight in Shining Armor, There’s a Castle*
indicated they did not want a job because they were busy keeping house. Such a small number of men wanted a job but were not looking for employment because of home responsibility that the category did not exist. In comparison, home responsibility was the most frequent reason given by women who wanted a job but were not looking for employment.

In law, this translates to choosing a niche within the legal profession that accommodates a woman’s roles as wife, mother and professional. It means mom will be a paralegal professional. Or even if mom becomes a lawyer, her primary obligation will be her family; she will forego the aggressive, competitive tracks in the legal profession. The Mommy Track, now termed parental leave, is a reflection of this point of view. The Mummy Track is a more accurate description of how it literally restricts and binds women from using their full talents within the legal profession. Hardly any men take advantage of parental leave, fearful that they may be prey to being classified as a Male Mommy.

In a practical sense, both women and men view women as primary caregivers. When asked to describe the primary problems facing women litigators, a woman judge, Ann C. Williams, responded, “the task of juggling the often competing demands of their professional and family lives.. Being a good mother and a good litigator simultaneously is often a very hard goal to accomplish.” Few women would disagree with Judge Williams. Battling the tide requires active duty.

The view of women as primary caregivers within society has devastating consequences on women’s earning potential. Figure 10 makes the striking point that the higher the pay in the professions, the fewer women are employed within those professions. Women account for less than 35%
of the field in the higher paid professions of natural scientists, physicians, lawyers, mathematical and computer scientists, and engineers. In professions which are lower paid, women account for more than 79% of the field. These lower paid professions of kindergarten teachers, licensed practical nurses, legal assistants, secretaries, and child care workers are linked closer to women's stereotyped caregiver role, which clearly reflects women's secondary position within society.

Figure 10

![Lower Salaries in Women Dominated Occupations 1992](image)

DATA SOURCE: Bureau of Labor Statistics²⁶⁷

4. Cultural Determinism: Professional Images of Women in the *ABA Journal* and *Forbes* Magazine

The *ABA Journal* and *Forbes* magazine are graphic illustrations of society's discriminatory attitudes toward professional women. The media, in this case the *ABA Journal* and *Forbes* magazine, sustain the attitude towards women that they do not belong in the same employment spheres as men. The messages conveyed by the *ABA Journal* are that women attorneys are generally involved with women's issues — rape, sexual harassment, and so forth, and that when they are successful, it is only when they are litigating purely women's issues. *Forbes* magazine offers stories and photographs of business women as helpmates — women defined in relation to the men in their lives. Men are portrayed as independent actors — as the business leaders and conductors. Combined with the fairy tale images of women, women's day-to-day socialization, and women's primary responsibility for the household, these magazines do a top-notch job in portraying, communicating, and perpetuating the secondary status of professional women.

A survey of three *American Bar Association Journals* (December 1991, January 1992, February 1992), revealed entrenched gender bias. The three issues contained a total of ninety-one feature articles. Only nine articles focused on women in the law, while there was no shortage of articles on successful male attorneys in many different specialties. Not one article focused exclusively on the individual success of a women lawyer. A dominant and recurring theme in the nine articles on women

268. The organized bar professes that it deplores gender discrimination and is actively fighting such bias. Yet the most influential and prestigious association of attorneys, the American Bar Association (ABA), nevertheless reflects the polar opposite. The American Bar Association is an extremely influential organization with 360,000 members and an annual budget of fifty million dollars. *Encyclopedia of Associations* 1993 27TH EDITION VOL. 1 NATIONAL ORGANIZATIONS OF THE U.S., 542 (Deborah M. Burek ed., 1992). Upon observing its organizational structure and monthly publication, it is clear that gender bias is ingrained also in the ABA. Eighty-five percent of the American Bar Association 1991-92 Board of Governors are men. Women are nonexistent among top officers of the American Bar Association including President, President-Elect, Immediate Past President, Chair House of Delegates, Secretary, Treasurer, and Executive Director. The few numbers of women as ABA officers and board of directors arguably could be dismissed if gender bias wasn't so conspicuously displayed in the principal ABA publication, the *ABA Journal*. Although it can not be denied that women are making inroads into male dominated professions, it does not mean that women have real choices within the work force. Not until the cultural frameworks that stereotype women are dismantled will women achieve equality and have real choices within the work force.

269. Specialties included real estate ventures, corporate matters, trial practice, and general leadership roles. In contrast, women were only shown as successful when litigating purely women's issues — rape, sexual harassment, and sex discrimination.

attorneys was the insurmountable obstacles women still face within the legal field and work force.271

Even when a woman lawyer is portrayed as successful within the ABA Journal, the adjectives used to describe her are not complimentary. In one article, Ms. Peterson, a lawyer working on a sexual harassment case, was referred to as “zealous and earthy.”272 Although earthy can mean practical, it also carries the meaning of being unrefined, common, or unsophisticated.273 Earthy implies a connection with the earth, nature and the domestic role of women.274 No description was given of her opposing male defense attorney, but “earthy” is not a term commonly used to describe successful attorneys.

A more recent survey of three 1993 ABA Journals from February to April revealed identical patterns of gender bias. There were few articles focusing on women in the law. In the three 1993 issues of the ABA Journal, a mere sixteen articles focused on women in the law out of a total one hundred and ten feature articles—15%.275 The sixteen articles focused

271. Of the nine feature articles concerning women within the legal field, seven articles focused on women’s problems within the legal profession. Only two of the nine articles focused on women performing as lawyers. One article featured the female prosecutor in the celebrated William Smith rape trial. The author was highly critical of the female prosecutor’s loss of the case. The prosecutor was presented as an antagonistic, pugnacious, bungling attorney. In the same article, defense counsel, a male, was congratulated for his success in keeping out damaging evidence. Mark Hansen, Experts Expected Smith Verdict, Even a Perfect Prosecutor Can Lose Date Rape Cases, Pundits Say, A.B.A. J., Feb. 1992, at 18.


274. See Ortner, supra note 242, at 73-4.

almost exclusively on the barriers women still face within the legal profession, volunteer work, domestic violence, abortion, sex discrimination, and working within the public sector.

Wondering if women are portrayed in the business sector in the same light as in law, we did a similar random survey of articles about women in a business magazine, Forbes. Forbes, considered to be a noteworthy business publication, presents feature articles on distinguished business leaders and entrepreneurs. In our survey of three Forbes magazines, from December 1991 to January 1992, there were one hundred and seventy-three feature articles including many profiles of corporate leaders. Only two articles out of the one hundred and seventy-three articles even peripherally focused on women in business. In both of these articles, women existed only in relation to their husbands. The women were referred to as the “wife of the husband-and-wife management team,” and as “his wife and fellow codirector.” Not one article in the three issues of Forbes focused on a woman achieving success on her own. Moreover, not one of the one hundred and seventy-three feature articles portrayed men’s success in relation to their wives.

A more recent survey of Forbes proved just as dismal with regard to the representation of women within business. There were only two articles focusing on women in business out of the one hundred and fifty articles from the three March 1993 Forbes issues. In the March 1, 1993 issue of Forbes there were no feature articles on women in business.


A third small article talked about the success of a husband and wife team of analysts. Norfolk Southern’s Albatross, Forbes, Mar. 15, 1993, at 166.
However, there was an interesting article on a millionaire who had a spectacular Halloween-night bash for his nightclub featuring "a naked woman lying on a table with a pool of chocolate on her belly. Guests were invited to dip strawberries in the chocolate. . . ." Mr. Kramer was described as very decadent but with a business side, as if that justified his treatment of women or the fact that this was one of the few representations of women provided in the magazine's forty-nine feature articles. The two articles on successful women in business were equally disturbing. The first article titled "I Didn't Know I Was Oppressed" states "[i]nstead of whining about the lack of opportunities for women in the brokerage business, Judy Resnick did something about it. She started her own firm." Ms. Resnick advises young women that being a woman and lacking an M.B.A. degree are not real hurdles for someone who wants to succeed in investment banking. Women should not make barriers for themselves where there aren't any. This article attempts to convince women and men that, if a single mother of two, almost broke, with no work experience or advanced education can succeed in the brokerage business, then when a woman fails it is her own fault, not the result of sex discrimination. The second article, Beverly Hillbilly, asserts that as long as you "play to win" you will succeed as a woman in business.

Paralleling women's lack of presence within Forbes, the New York Times ran an ad in May 1992 for the New York Stock Exchange. It pictured sixteen successful businesses with their almost exclusively white male founders. Ironically, the caption in the ad stated, "America has been called the land of opportunity for one simple reason: anyone with a dream has been free to pursue it." Unfortunately, this advertisement sorely contradicts itself. Women have not been free to pursue their dreams in business and law. Sex discrimination has remained a formidable barrier to women's success within non-traditional professions, and this is well illustrated by the genders of those photographed.

The ABA Journal and Forbes magazine are not isolated examples of gender bias within the media. Studies of national and local newspapers

279. Phyllis Berman, Miami Beach's South Beach Has Become the New Mecca of Eurotrash: Meet Thomas Kramer, FORBES, Mar. 1, 1993, at 58.
282. Only one woman business founder, Jenny Craig, was pictured with her co-founder husband. N.Y. TIMES, May, 27, 1992, at C3.
283. California Lawyer, an award winning magazine of the California Bar Association, also portrays women having difficulty within the law field and trivializes women's success within the profession. Of twenty feature articles listed in the May 1992 table of contents, only three focused on women lawyers. The first article, titled High Noon for Judge Karlin, described the complete lack of support she received from the legal community and other judges after a controversial courtroom decision. The article stressed her youthful appearance and small size. Not surprisingly, this focus on appearance is not as common in articles about successful male lawyers. The second article focused on women "pressing up against the glass ceiling." It stressed that a few women have broken through
illustrate that photos of men consistently outnumber photos of women. Women are portrayed predominately in the spouse role in contrast to men who are found predominately in professional and sports photos. Women constituted 17% of photos representing professionals but made up 78% of all spouse photos. Other studies confirm that women are identified in relation to their husband. Women tend to be identified by personal information in contrast to men who tend to be identified by occupation and experience, and finally women are seen predominately in "domestic, subordinate, and sex-object roles."

5. A Theory of Difference and Its Critics

Women unconsciously perpetuate their confinement to nurturing roles by taking subordinate positions. Professor Carol Gilligan's study of women's moral development, published in the book In A Different Voice, has provided a vehicle for perpetuating the image of woman as nurturer and supporter. Although the study is an important foundation for an
examination of women’s psychological development, it has become the 
odestone for women defining themselves through others “in a context of 
relationship and judged by a standard of responsibility and care.”
This work reveals that women’s psychological development, experience, and 
behavior has been evaluated according to male standards. Until Gilligan, 
women’s deviation from male norms was interpreted as a sign of their 
own inferiority and deficiency. Consistent with women’s socialization 
within society, Gilligan’s study of women’s moral development presents 
recurring themes of responsibility and care.

In contrast to women’s identity defined through “relationships of in-
timacy and care,” men’s identity is defined through separation. Gilligan 
reports that men describe themselves with adjectives of separation.
Men, according to Gilligan’s study, make up the majority of engineers, 
lawyers, judges, and natural scientists in society. These fields are seen as 
closer to men’s traditional roles involving rational, logical, and analytical 
thinking processes. These differing identities described by men and 
women reflect the socially appropriate characteristics and roles each is 
prescribed to take.

Critics of Gilligan’s work assert that one of the greatest risks of Gilli-
gan’s theory is oversimplification. Linda Kerber, professor of history at 
the University of Iowa, is troubled by Gilligan’s theory. Although she 
agrees with Gilligan that our culture has historically undervalued nur-
turance, she asserts that “Gilligan permits her readers to conclude that 
women’s alleged affinity for ‘relationships of care’ is both biologically nat-
ural and a good thing.” Kerber asserts that most of the sex differences 
attributed to women and men can be explained by the different socializa-
tion process women receive. Women receive this different socialization due 
to the strict division of labor in our society which rigidly differentiates 
between the appropriate roles for women and men, as was evident in Fig-
ure 9. According to Kerber, “Gilligan describes how women make lemon-
ade out of the lemons they have inherited. She does not tell how to trans-
form the lemons into chocolate.”

THE CROSSROADS (1992). Carol Gilligan’s work has provided a major contribution to the 
understanding of women’s psychological development.

291. Id. at 160.
292. Id. at 1-2. For example, women used the words “giving to,” “helping out,” 
“being kind,” and “not hurting” in the process of describing themselves. Id. at 159.
293. Id. at 160-4. Robin West adopts this thesis for her theory that law is a pa-
trarchally-based system because men and women are biologically distinct. Women’s inter-
ests stem from her biological difference as mother. Robin West, Feminism, Critical Social 
294. For example, men used the words “‘intelligent,’ ‘logical,’ ‘imaginative,’ ‘honest,’ 
sometimes even ‘arrogant,’ and ‘cocky’” to describe themselves. GILLIGAN, supra note 
290, at 161.
295. Linda K. Kerber, Some Cautionary Words for Historians, 11 SIGNS 304, 309 
(1986).
296. Id. at 310.
Likewise, Zella Luria, professor of psychology at Tufts University, is concerned that sex difference theories like Gilligan's have been used to "shunt people into the 'appropriate' job."\footnote{297} Like Professor Kerber, she criticizes Gilligan's study and warns of the danger of generalizing these findings to characterize all women.\footnote{298} Professor Luria asserts, "Surely Gilligan and I want one voice that allows both men and women a variety of differentiated responses. Anything else is a step backward."\footnote{299}

Embracing the idea that women are different is a concept that has disturbing results. Historically, the difference theory has been used to perpetuate gender discrimination. It was ostensibly the basis for protecting women from harsh working conditions and long hours in the workplace.\footnote{300} Others at the time believed it was a way for organized labor to protect their jobs from being filled by lower wage earners — women.\footnote{301}

In recent history, 1988, Gilligan's theory that women's different "value system" leads them to make different choices than men was the basis for the defense mounted by the Sears department store. Women employees at Sears claimed that they were denied high paying commission sales positions within departments such as auto parts, plumbing, heating,
and fencing. Sears asserted that its practice was not sex discrimination, but a matter of women having different interests than men. Sears asserted that women preferred salesclerk jobs in departments that they could relate to — clothing and household goods. These other departments — auto parts, plumbing, home improvements — were furthest from women’s traditional interests as wife and mother. The key witness for Sears, a woman, testified that the small number of women in the higher paying commission sales jobs was “the natural effect of women’s special ‘differences.’” Sears argued that women’s different voice makes them choose occupations more closely related to their nurturing and care-taking role in society, instead of occupations which promote individual achievement and self-autonomy. The Court agreed, finding that the scant number of women in high paying commission jobs was not the result of a systematic pattern of gender discrimination by Sears but merely a reflection of the natural choices of women.

Not surprisingly, the male-female difference descriptions overwhelmingly can be used to explain why a greater number of men are lawyers and a greater number of women predominate as paralegals. Paralegals are defined exclusively through their attachment to a particular person, their attorney. They possess little responsibility and no power to act independently. Lawyers act independently and decisively, taking responsibility.

B. A New Image, A New History

Almost universally, women are still viewed as caregivers within society. “[W]oman’s maternal role leads to a universal opposition between ‘domestic’ and ‘public’ roles that is necessarily asymmetrical; women, confined to the domestic sphere . . . [did] not have access to the sorts of authority, prestige, and cultural value that are the prerogatives of men.” Women’s identity defined through “relationships of intimacy and care,” and men’s identity as defined through separation, created a divergent history.

A new history needs creating. Women and men must see themselves as “intelligent,” “logical,” and “imaginative,” as well as “nurturing,” “caring,” and “supportive” when describing themselves.
Carol Gilligan’s most recent book, Meeting at the Crossroads, provides a starting point for creating a new history — a true women’s voice. Gilligan and co-author Brown clarify that simplistic categorization defining women through relationship and defining men through separation, is extremely misleading. “[T]o say that men wanted domination and power while women wanted love and relationship seemed to us to ignore the depths of men’s desires for relationship and the anger women feel about not having power within the world.”

Gilligan and Brown, in studying women’s psychology and girl’s development through adolescence, incorporate societal and cultural frameworks into their research methodology. This methodology reveals more than “a different voice” for women. It painfully documents women’s loss of voice and dissociation “from their feelings and thoughts” to “look more like some ideal image of what a woman or what a person should be.”

The girls in this study define the ideal girl as being perfectly nice, kind, polite, and patient — a modern day Cinderella or Snow White. As girls moved through adolescence they lost “knowing one’s feelings and thoughts, clarity, courage, openness, and free-flowing connections with others.” Gilligan concludes that this “loss of voice” is a “kind of psychological foot-binding” that defuses women’s political power and ability to use their strengths.

If women are to be liberated from subordinate status in the workplace and at home, they and society must shed the images of Cinderella, Sleeping Beauty, Dorothea from Middlemarch, and Jane Eyre. A different structure is needed: one that would transform our values, responsibilities, and images. When we talk about child care, we should be talking not about mothering, but parenting. Neutral paternity leave policies do not address the real problem — the inferior status society places on women’s maternal role and their place within the domestic sphere. The Family and Medical Leave Act of 1993, allowing “leave to eligible em-

309. Lyn M. Brown & Carol Gilligan, Meeting at the Crossroads 5 (1992). This four-year study, 1986-1990, involved approximately 100 girls between the ages of seven and eighteen who were attending the Laurel School for Girls in Cleveland Ohio.

310. Id. at 11.

311. Id. at 217-8.

312. Id. at 45.

313. Id. at 6.

314. Id. at 218.

315. Beauty and the Beast, a Walt Disney movie, begins to do this. See Karen S. Peterson, Disney’s New 'Beauty' Isn't Just a Pretty Face, USA Today, Nov. 20, 1991, at 6D.

316. A recent series of four articles in the New York Times, concerning work and children was aptly entitled The Good Mother. The entire focus of the series was on the mother. The third article, Learning if Infants are Hurt When Mothers Go to Work, did not mention even once the father and his child. Erik Eckholm, Learning if Infants are Hurt When Mothers Go to Work, N.Y. Times, Oct. 6, 1992, at A1, A21. Felicity Barringer, In Family-Leave Debate, A Profound Ambivalence, N.Y. Times, Oct. 7, 1992, at A1, A22.
ployees for their own serious illnesses, to care for newborn or newly adopted children, or to care for seriously ill, close family members,” is a step towards that goal.317 When we talk about population control, we should place equal responsibility on the biological couple — man and woman — not just the *unwed mother*. By valuing a partnership in parenting, more women would be placed on an equal plane.318 A marriage of equals remains the extraordinary, not the ordinary. One noted feminist, Professor Carolyn Heilbrun, observed that the difficulty lies in our culture which has “failed to evolve, a narrative of marriage that will make possible their development, as individuals and as a couple.”319 Women are bombarded with the images and messages that fulfillment lies in their relation to men.

Professor Catharine MacKinnon, at the University of Michigan Law School, asserts the structure of society needs to change before women can claim an equal and true voice. MacKinnon does not want to assimilate women’s different voice into society by creating separate spheres for women; she wants to change the very structures of society that prevent women from having real choices. MacKinnon states, “construing gender as a difference, termed simply the gender difference, obscures and legitimates the way gender is imposed by force.”320 Gender differences are derived from an inequality of power between women and men, according to MacKinnon.321 Although she acknowledges that difference doctrine allows women to be valued and taken seriously for the functions society has allowed them to perform, MacKinnon exposes revaluing difference in our society is equivalent to maintaining women’s powerlessness.322 Women’s concentration within low paying, low status paraprofessional positions illustrates that creating women’s separate spheres is not the answer to improving women’s status within society.

There is little doubt that women will increase in greater numbers in the professions — as professors, doctors, dentists, and lawyers. Even men might enter the paraprofessions as other employment opportunities diminish or collapse. However, history demonstrates that equality will not come as the number of women increases in the professions.323 The cycle of his-

321. Id. at 8.
322. Id. at 32-9.
tory will repeat itself: as women increase in the professions, the pay will decline and the status of the profession will plummet. Men, as they have done in the past, will vault to their next enterprise, pulling up the drawbridge as they enter the close. Women, again relegated to positions low in status and pay, will be left to swim against the tide.

While some feminists have stressed difference either as an attempt to assimilate women’s voice into society or to merely laud difference as a treasure, these positions only serve to perpetuate an old voice. Gilligan’s most recent work clearly stresses the debilitating effects that “loss of voice” has for women by denying women genuine relationships and an opportunity to develop a true voice. The poet Sylvia Plath chose to take her life rather than submit to the constricting roles for women within society. The balancing of public and private spheres and the shifting roles of work and caregiver have made women more vulnerable to depression in the nineteenth century, and continue to do so today. MacKinnon’s goal, and one first spoken by Virginia Woolf, is to create a society where women develop their own new voice, and where men accept and embrace women’s own new voice. New fairy tales need to be written. The answer does not lie in Cinderella, Snow White, and Jane Eyre merely occupying more places in the work force. With a new image, creating new history, women will be poised at the drawbridge as it opens, beating the tide.

Earnings, by Selected Characteristics: 1983 to 1991, 412 (1992). In 1987, women earned 65% of men’s full-time yearly earnings. This pay differential persists across broad occupations even when men and women have completed the same educational level. In 1987, women earned 70% of men’s full-time weekly earnings. Researchers controlling for factors such as formal education, work history, and labor force attachment have found that sex discrimination accounts for as much as half or more of the female-male pay gap. Francine D. Blau & Anne E. Winkler, Women in the Labor Force: An Overview, in WOMEN: A FEMINIST PERSPECTIVE 265, 277-9 (Jo Freeman ed., 4th ed. 1989). Similarly, in other countries the mere increase in women’s numbers has not eliminated sex discrimination. In Japan, growth in the female labor force resulted in a drop in average women’s earnings. In 1978, the average woman in Japan earned 56% of the average male worker’s salary. However, in 1988 when Japanese women’s labor force participation increased they earned only 51% of the average male worker’s salary. Pat Murdo, Women in Japan’s Work World See Slow Change from Labor Shortage, Equal Employment Law, in JAPAN ECONOMIC INSTITUTE REPORT, NO. 33A, Aug. 30, 1991, at 7. This illustrates that greater numbers of women in the labor market will not itself promote greater equality for women. 324. JACK, supra note 249, at 110, 226 n.4.
325. MACKINNON, supra note 320, at 45.