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CULTURE CLASH IN THE QUALITY OF LIFE IN THE LAW: CHANGES IN THE ECONOMICS, DIVERSIFICATION AND ORGANIZATION OF LAWYERING

Carrie Menkel-Meadow[†]

I. INTRODUCTION: THE CULTURES OF CHANGE IN THE LEGAL PROFESSION

THERE is no question that law practice has changed in recent decades. More lawyers work in larger units¹ or newer forms of practice.² Increasing numbers of lawyers come from previously excluded groups, including both women and minority demographic groups.³ After a period of economic boom⁴ there is general economic anxiety about the continued health and growth of the law "industry."⁵ This occurs as there is a general "speed up" in American work,⁶ the forms of law practice organization⁷ and billing for

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1. RICHARD L. ABEL, *AMERICAN LAWYERS* 9 (1989).

2. See, e.g., Carroll Seron, *Managing Entrepreneurial Legal Services: The Transformation of Small Firm Practice*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES* 63 (Robert L. Nelson et al. eds., 1992).

3. Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987).

4. Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers? Perspectives on a Turbulent Market*, 14 *LAW & SOC. INQUIRY* 431, 434 (1989) (comparing relative sizes of the legal, steel, textile, auto, and publishing industries for the year 1986 and commenting that lawyer billing exceeded dollars produced in the steel and textile industries).

5. Don J. DeBenedictis, *Growing Pains*, A.B.A. J., Mar. 1993, at 52.

6. JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* (1991).

7. See, e.g., MARC GALANTER & THOMAS PALAY, *TOURNAMENT OF LAWYERS: THE TRANSFORMATION OF THE BIG LAW FIRM* (1991); ROBERT E. LITAN & STEVEN C. SALOP,

legal work are being renegotiated, and rates of dissatisfaction with the practice of law increase, especially among younger and newer lawyers.⁸ These are just some of the changes, broadly labeled, by this writer and others, as “transformations” in the legal profession, that have undoubtedly inspired the current effort to understand what the legal profession of the 21st Century will look like. These changes in the structure and organization of lawyering will have a profound effect on the way in which people labor as lawyers.

As one who is generally skeptical about the predictions of “futurists,”⁹ because I do not think we can accurately predict how various “trends” will interact with each other, I find my task, to suggest proposals or resolutions to deal with the “economics and work environment” of legal practice, particularly difficult. Change in the legal profession is clearly afoot—but how the various changes outlined above will interact with each other is difficult to assess.

In this Paper I aim to combine the descriptive with the prescriptive so that the sources of my proposals for change will be clear. In part II, I will briefly review some of the demographic, structural and organizational changes in the legal profession. In part III, I will review some of the recent and proposed innovations in law practice that have come from the diversification of the legal profession, both in social structural and suggested theoretical terms. In part IV, I will identify some of the barriers to innovation and the diffusion of innovation. In part V, I will describe some of the current efforts to structure change by focusing on a few “change masters”¹⁰ in the profession. In part VI, I will offer my own blue-

MORE VALUE FOR THE LEGAL DOLLAR: A NEW LOOK AT ATTORNEY-CLIENT FEES AND RELATIONSHIPS (1992); Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567 (1989) [hereinafter *Coming of Age*]; Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985) [hereinafter *Human Capitalists*].

8. American Bar Association, *The Report Of At The Breaking Point: A National Conference on the Emerging Crisis in the Quality of Lawyers' Health and Lives—Its Impact on Law Firms and Client Services* (1991) [hereinafter *Breaking Point*] (reporting on “National Surveys of Career Satisfaction/Dissatisfaction” conducted by Ronald Hirsh for the Young Lawyer Division of the ABA in 1984 and 1990).

9. For examples of futurism, see JOHN NAISBETT & PATRICIA ABURDENE, *MEGATRENDS 2000* (1990); FAITH POPCORN, *THE POPCORN REPORT: FAITH POPCORN ON THE FUTURE OF YOUR COMPANY, YOUR WORLD, YOUR LIFE* (1991); ALVIN TOFFLER, *FUTURE SHOCK* (1970).

10. See ROSABETH M. KANTER, *THE CHANGE MASTERS: INNOVATION FOR PRODUCTIVITY IN THE AMERICAN CORPORATION* 15 (1983) (defining change masters as “[t]hose people and organizations adept at the art of anticipating the need for, and of leading.

print for change and proposals for improving the quality of life in the legal profession.

My themes and biases here should be stated at the outset. In my view, the quality of life in the legal profession needs improvement, if lawyers are to lead socially useful and productive lives, for their clients, for their colleagues, for their families, and for themselves, as well as for the future of our legal system. There is room for hope in achieving positive changes for the profession with the entrance and contribution of more diverse members of the profession. However, it is also clear that a variety of other factors, such as the economics of law practice, resistant occupational structures, and persistent, but outmoded, ideologies may have countervailing influences on the innovations most likely to improve the quality of life and work environments of lawyers. My theme here is that change in the legal profession will come from a clash of cultures¹¹—demands for more humane and horizontally¹² satisfying work on the one hand and the requirements and exigencies of the economic (and vertical)¹³ bottom line on the other.¹⁴ Thus,

productive change").

11. The theme of culture clash for me here is the clash between demands of the profession as a business and more humane concerns about work and the quality of life. Or, as I have framed it elsewhere, the clash between professional ideology and social structure and other ideologies, such as feminism. Some who have written about professional work have identified other culture clashes. See, e.g., JOSEPH A. RAEIN, *THE CLASH OF CULTURES: MANAGERS AND PROFESSIONALS* (1991) (discussing conflicts between the corporate culture of managers and the professional-autonomy culture of professionals); Robert G. Meadow & Carrie Menkel-Meadow, *Personalized or Bureaucratized Justice in Legal Services: Resolving Sociological Ambivalence in the Delivery of Legal Aid for the Poor*, 9 *LAW & HUM. BEHAV.* 397 (1985) (discussing the "clash" of the professional ideal and the bureaucratic nature of law practice in some settings).

12. See, e.g., ELIZABETH A. ASHBURN, *MOTIVATION, PERSONALITY, AND WORK-RELATED CHARACTERISTICS OF WOMEN IN MALE DOMINATED PROFESSIONS* (National Association for Women Deans, Administrators and Counselors, 1977).

13. I draw the horizontal-vertical distinction here from a number of studies that have reported that women seek horizontal satisfaction in a variety of domains including work, family relationships, and other social affiliations, while men are more likely to assess their life satisfactions from a more hierarchical, in both economic and social prestige measures, and work-focused, basis. See Carrie Menkel-Meadow, *Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers*, in *LAWYERS IN SOCIETY: COMPARATIVE THEORIES* 196, 227 (Richard L. Abel & Phillip S. C. Lewis eds., 1989).

14. If these "cultural clashes" seem to echo a gendered theme in much recent work on the legal profession, see, e.g., RAND JACK & DANA C. JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* (1989); Carrie Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 *LAW & SOC. INQUIRY* 289 (1989) [hereinafter *Research Agenda*]; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 *BERKELEY WOMEN'S L.J.* 39 (1985) [herein-

ultimately, the story of change in the legal profession is a story of how culture and social structural change are negotiated. Like the current effort, official conferences with specific resolutions are one way of trying to put things on the social change agenda. Ultimately, however, the resolutions of social, political and economic negotiations in the legal profession are much more likely to occur in more subtle ways, behind the closed doors of law firms, government agencies and bar associations. Whether particular changes in the professional culture will ultimately be considered to be progressive innovations or deformations and regressions will depend primarily on who makes up the profession and how much clients and the lay public will be involved in the cultural and economic negotiations. Some of the innovations described below come from lawyers themselves; others may be the product of client or public demands for accountability to other than professional needs.

II. A BRIEF HISTORY OF ORGANIZATIONAL, ECONOMIC AND DEMOGRAPHIC CHANGES IN THE LEGAL PROFESSION¹⁵

A. *Demographic Trends in the Growth of the Legal Profession*¹⁶

For the purposes of this Paper, my review of where the legal profession has been will be short and simple. The early years of American legal history set the tone for the ongoing cultural ambivalence about lawyers we feel today. Lawyers in the colonial era were needed, feared, despised, and banned in some colonies, for many reasons, such as their attachment to the State of the mother country. Following the Revolution, many states prohibited "attornies" from their courts and dispute resolution tribunals, for reasons having to do with hatred of the adversary system,¹⁷ class

after *Portia*], then the legal profession provides an interesting case study of how gender relations will be negotiated in important social institutions. Whether "gender culture" is as oppositional in the legal profession as it is in other social domains, such as in the understandings of what it means to "consent" to sexual relations, see PEGGY R. SANDAY, *FRA-TERNITY GANG RAPE: SEX, BROTHERHOOD AND PRIVILEGE ON CAMPUS* (1990), remains to be seen and is what makes the sociology of the professions an interesting terrain in which to examine these larger questions.

15. For a lengthy discussion of this issue, see ABEL, *supra* note 1; JEROLD J. AUERBACH, *UNEQUAL JUSTICE, LAWYERS AND SOCIAL CHANGE* (1976).

16. See generally Robert L. Nelson, *The Futures of American Lawyers: A Demographic Profile of a Changing Profession in a Changing Society*, 44 CASE W. RES. L. REV. 345 (1994).

17. This rationale is attributed to the Quakers of the Pennsylvania colony. See, e.g., LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 95 (1973); DENNIS NOLAN,

hatred, or a desire to conduct legal business without agents. But attorneys were necessary to conduct and rationalize the interstate commerce of the new nation and to create the documents and institutions of the new governments, processes which lawyers, as well as landowners, dominated. A second wave of strong anti-lawyer sentiment accompanied the Jacksonian Populist era which some say lasted until after the Civil War.¹⁸ Early American lawyers were almost all educated by apprenticeship, in England, the colonies, or the states. Apprenticeship did much more than train lawyers (if it did that effectively at all); it served as an efficient instrument of social control, as a device to limit the number of lawyers and assure enough work and a decent to comfortable living for those who made it through. Without a formal aristocracy in the United States, it was still more common for a man with familial means to be able to afford the apprenticeship period than one with the need to earn immediate sums. The legal profession, though subject to the ebbs and flows of the national economy, remained relatively homogeneous in terms of race and class. However, there was some movement over time from a totally upper class-derived profession to a greater representation of middle-class sons of shopkeepers, teachers, small businessmen and some farmers. As de Tocqueville noted, American lawyers sought to fill the vacuum created by having no aristocracy of birth by creating an aristocracy of profession—that of the middleman—the connecting link between the two great classes of society.¹⁹ Yet, as the nineteenth century unfolded, this “aristocratic” class grew from a legal profession of about 20,000 in 1850, to 60,000 by 1880 and increased again to about 115,000 in 1900.²⁰

The story of the development of the legal profession in the United States in the nineteenth century is the oft told tale of limited competition and increased barriers to entrance to the profession, characterized by the movement from apprenticeships to proprietary schools and increasingly to formal requirements for university and law school formal education, state examinations, and licensing and certifications.²¹ Whether seen as an economic project to limit com-

READINGS IN THE HISTORY OF THE AMERICAN LEGAL PROFESSION 93-112 (1980).

18. ABEL, *supra* note 1, at 4.

19. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Vol I. George Lawrence trans. D. P. Mayer, ed. 1975) at 283-90.

20. FRIEDMAN, *supra* note 17, at 633; ABEL, *supra* note 1, at 280-81.

21. This story has been well told by others. *See, e.g.*, ABEL, *supra* note 1; AUERBACH,

petition²² or a social project to keep out immigrant and non-“nativist” men,²³ the tale of the nineteenth century is an exclusionary one. Historians and sociologists of the profession have documented how attempts to “reform” the profession, by adding educational requirements or demanding adherence to ethical standards, all coincided with increasing enrollments of law students and attempts at greater diversification of the profession—first by class, then by ethnic origin, race and gender. Fluctuations in the size and development of the legal profession vary both with these efforts to control the supply of lawyers and the political and economic variations of war and recession. The practicing profession nearly doubled between 1890 and 1930, but dropped during the Depression and the Second World War, with similar cycles in the years of the Korean and Vietnam Wars. As Richard Abel points out, the lawyer to population ratio was about the same in 1950 as it had been in 1900 and the same in 1960 as in 1885.²⁴ Between 1960 and 1980, the legal profession experienced growth; law school enrollment increased three times,²⁵ bar admissions four times, and the lawyer to population ratio halved. The last ten years have seen some leveling off of this expansive growth period. At least one scholar of the legal profession attributes most, if not all, of this recent growth to the entrance of women into the profession.²⁶

Entry barriers to immigrants, blacks and women were both “official” and more subtle. Blacks and women were formally excluded from legal education and from licensure,²⁷ while some im-

supra note 15; FRIEDMAN, *supra* note 17. For the later histories of the entrance of women and blacks to the profession see KAREN B. MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT* (1986); GERALDINE SEGAL, *BLACKS IN THE LAW: PHILADELPHIA AND THE NATION* (1983).

22. For an economic-rationalist approach combining both Weberian and Marxist principles, see ABEL, *supra* note 1; MAGALI S. LARSON, *THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS* (1977).

23. AUERBACH, *supra* note 15.

24. ABEL, *supra* note 1, at 108.

25. In the period between 1960 and 1980 almost fifty new law schools opened. See AALS Newsletter, Feb. 1993, Curtis Berger.

26. See ABEL, *supra* note 1, at 110; see also Richard L. Abel, *United States: The Contradictions of Professionalism*, in 1 *LAWYERS IN SOCIETY—THE COMMON LAW WORLD* 186, 202 (Richard L. Abel et al. eds., 1987) (stating that since the early 1970s, the increase in law school enrollment is entirely attributable to the increase in the number of women applicants). Several schools have recently reported a slight decrease in the number of women enrolled in law school.

27. See, e.g., *Sweatt v. Painter*, 339 U.S. 629, 636 (1950) (holding that denial of admission to a state-sponsored law school based solely on race violated the Equal Protection

migrant groups persevered through night schools and the development of their own law firms to service their own constituencies. Particularly successful were Catholics and Jews, who began with separatism in their own law firms, but eventually gave way to an assimilationist strategy.²⁸

By the late 1960s, women began entering the profession in greater numbers. They currently represent about 40% of the student body and just under 20% of the profession. On the other hand, entrance into the profession has been less successful for minorities—putting Blacks, Hispanic-Americans, Asian-Pacific Islanders and American Indians together, all minorities constitute just about 10% of the total enrollment in law schools and much less than 10% of total bar membership. A recent article in the *American Bar Association Journal* points out that only 3% of all partners in our largest firms are minorities²⁹ (compared to about 8-9% for women).

More important than the total numbers are the indications of an occupationally segregated profession. As the practice of law has changed in structure and organization, women and minorities find themselves disproportionately located in particular segments of the profession.³⁰ As I have noted with respect to women lawyers throughout the world, when one aggregates all of the tasks that women lawyers do, one finds that women can do it all. However, when one asks what a particular legal culture values, women will be seen to be doing that which is not valued³¹—the same can be

Clause of the Fourteenth Amendment); *Bradwell v. Illinois*, 83 U.S. 130, 138-39 (1873) (holding that the State's refusal to grant a woman a license to practice law did not violate the Constitution). Blacks, like women, eventually became lawyers through separate institutions, though this strategy was less successful for women seeking to become lawyers. See Menkel-Meadow, *Research Agenda*, *supra* note 14.

28. See JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982) (chronicling the story of the role of ethnicity in the stratification of the bar, based on service to different clienteles).

29. Steven Keava, *Unequal Partners: It's Tough at the Top for Minority Lawyers*, A.B.A. J., Feb. 1993, at 50, 50.

30. See generally ABEL, *supra* note 1; BARBARA A. CURRAN ET AL., *THE LAWYER STATISTICAL REPORT—A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980s* (1985 & Supps. 1985, 1988); NATALIE J. SOKOLOFF, *BLACK WOMEN AND WHITE WOMEN IN THE PROFESSIONS: OCCUPATIONAL SEGREGATION BY RACE AND GENDER, 1960-1980* (1992). Occupational segregation, as well as discrimination, occur in the legal profession as well. See Deborah J. Merritt & Barbara F. Reskin, *The Double-Minority: Empirical Evidence of a Double Standard in Law School Hiring of Minority Women*, 65 S. CAL. L. REV. 2299 (1992).

31. See Menkel-Meadow, *supra* note 13.

said of many minority lawyers. As the percentage of lawyers working in large private firms has increased over time, women and minorities are still more likely to be working in the public sector, in small firms and in solo practice, and if in large firms, they are disproportionately associates.³² It is also important to note, that as a result of the recent and rapid expansion of the legal profession, the profession has become younger—over half of the membership of the ABA is under 38.³³ The mean age for all lawyers has begun to increase again as the larger number of new admittees are older—though women lawyers as a group are younger than men (mean age for men is 42; for women it is 34).³⁴

B. Trends in the Economics and Organization of Law Practice

Of the almost 800,000 lawyers in the United States in 1990, most still work in small units of solo practice or small law firms.³⁵ However, the percentage of lawyers working in large units has increased steadily since the founding of the first big law firms to handle the business of industrialization and railroad building in the nineteenth century. The number of law firms of more than 100 lawyers has almost tripled since 1980.³⁶ In general, the number of associates has greatly increased in recent years. While there is some variation in the pyramid structures of firms, in general, the ratio of associates to partners is greater in larger firms.³⁷ In addition to the proportional increase of lawyers in big firms, more lawyers today work in large units of law practice, in governmental settings, and in-house for corporations.³⁸ Young lawyers are much

32. See, e.g., CARROLL SERON, MIDDLE CLASS LAWYERS: THE WORLD OF SOLO AND SMALL-FIRM PRACTICE (1992 unpublished manuscript on file with the author). Women are twice as likely to work in the public sector as are men, and blacks are twice as likely to work in the public sector as whites. ABEL, *supra* note 1, at 95, 104. Until the 1970s, most black attorneys were government lawyers or in solo practice. *Id.* at 105. Discrimination against women and minorities in private practice is curvilinearly related to size—women and minorities are mostly likely to be found in the smallest and largest practice units. In small units they practice alone or team up with their “own”; in larger organizations they hope for more neutral and meritocratic principles to apply. The fear and reality of the “old boy network” is greatest in the mid-sized firm.

33. See *Breaking Point*, *supra* note 8.

34. BARBARA A. CURRAN & CLARA N. CARSON, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT, THE U.S. LEGAL PROFESSION IN 1988, at 19 (1991).

35. The percentage of lawyers working as sole practitioners has dropped dramatically in recent decades, but still over 60% of lawyers practice alone or with a partner. ABEL, *supra* note 1, at 179.

36. CURRAN & CARSON, *supra* note 34, at 12.

37. *Id.* at 13.

38. Lawyers in private practice constitute about two thirds of the profession—the rest

more likely to work in private law settings than in public or private industry settings.³⁹

In considering the changes in the economic organization of law practice, it is easy to concentrate on the development of the big firm. Several important and influential studies in recent years have attempted to understand the phenomenon of the growth, "transformation," and economic structure of the big firm.⁴⁰ It is equally important, however, to recognize that some of the important economic and other innovations (such as the use of technology to deliver large volumes of service) of law practice have also been developed in the sites of small or solo practice.⁴¹ Finally, some non-economic transformations of the profession, particularly relevant to a consideration of the quality of work life, may occur when critical masses of innovative or "different" lawyers work together (such as in certain segments of governmental or public interest work) or where certain "trend-setters"⁴² push the envelope of what is acceptable in legal practice (advertising) or possible (technological innovation). I will briefly review some of the changes wrought in each of these segments.

1. The Big Firm

The big firm began in the late nineteenth century with the need for accumulation of capital to finance industrialization, the building and management of railroads, and the support structures necessary to support large scale organizations. Specialization began in its earlier forms in the nineteenth century and has grown exponentially since then. Reasons offered for the increasing percentage of larger and larger firms vary from economies of scale, to risk sharing, to diversification of expertise to meet diversification of client needs, to an "inherent dynamic of growth"⁴³ as a result of increasing competition and segmentation of legal work. In the early

are in government, the judiciary, legal aid, the professoriat or other forms of practice.

39. CURRAN & CARSON, *supra* note 34, at 5.

40. See generally GALANTER AND PALAY, *supra* note 7; ROBERT L. NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (1988); Marc S. Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747 (1990); Gilson & Mnookin, *Coming of Age*, *supra* note 7; Gilson & Mnookin, *Human Capitalists*, *supra* note 7.

41. See Seron, *supra* note 32 (discussing the use of advertising and computer technology in the transformation of small firm and legal clinic practice).

42. See *id.*

43. GALANTER & PALAY, *supra* note 7, at 3.

1960s only about forty law firms had more than fifty lawyers and most of these were in New York. By 1990 over 600 firms had more than 60 lawyers; several law firms had more than 1000 lawyers dispersed over a wide range of American and foreign cities and capitals. Today the *American Lawyer* and the *National Law Journal* publish accounts of per partner profit, partner to associate ratios,⁴⁴ and chronicle the constant mobility of lawyers from one firm to another—developments which were all unthinkable just two decades ago.

Yet after the expansion of the 1980s, we are currently in a period of “downsizing” and doom and gloom forecasts for the large firms.⁴⁵ Profits are down and many firms have chosen to retain partner profits by reducing associate “overhead,”⁴⁶ just as higher and higher rates of job dissatisfaction are reported by younger lawyers.⁴⁷ What began as a “women’s issue”—how inhospitable the large law firm was—has grown into an issue that affects all who work in law firms—associates, partners, women, men, minorities and whites—as well as the clients served. Several structural aspects of the large firm deserve mention here. Although there is a continued increase in the number of large law firms, it is also true that greater numbers of law firms have dissolved in recent years, beginning with the national “scandal” of Finley, Kumble. Large numbers of lawyers and interstate and multi-state clients increase the number of possible conflicts of interests. As firms specialize, different firms may do some of the work for the same clients (common are splits between securities work and litigation or bankruptcy and labor). Most firms report fierce competition in the ac-

44. Associate to partner ratios vary by region with New York at a high of 2.55 and law firms outside of New York at a much lower rate of 1.66. Gilson & Mnookin, *Coming of Age*, *supra* note 7, at 585. Gilson & Mnookin report that this associate partner “leverage” rate is directly related to partner profit. *Id.*

45. DeBenedictis, *supra* note 5. *But see* Galanter & Palay, *Growth of Large Law Firms*, *supra* note 40, at 755 (suggesting that law firms have grown from the “inherent dynamic of growth” of increasing associates to sustain partner profits).

46. In one sense the laying off of associates seems contradictory to the “pyramid scheme” analysis of some big firm analysts who suggest that associate income must be tiered into ever higher ratios of associate to partner in order to sustain partner profits. This model of course assumes a world in which clients continue to pay by what one commentator has called the “de Sade billing” method (billing a client till he screams). *See* Jeffrey Tolman, *Learning From How Others Bill in Beyond the Billable Hour: An Anthology of Alternative Billing Methods*, 1989 A.B.A. SEC. ECON. OF L. PRAC.

47. *See* data collected by Ronald Hirsh in 1984 and 1990 lawyer dissatisfaction studies, American Bar Association, *Breaking Point*, *supra* note 8.

quisition and retention of clients. What solo attorneys have previously been disciplined for in client solicitation, large firms now do through "client workshops and seminars." Law firms now compete with their own clients as in-house counsel begin to "retake" the litigation work that was previously farmed out.⁴⁸ The need for constant new and old business has, by all internal and external reports, led to changing measures of partner profit and associate evaluation. The measures of "eat what you kill" and overvaluation of "finders" as compared to "minders and grinders" have placed economic contribution to the firm at the centerpiece of attorney compensation and valuation. Many commentators decry this "commercialization" of the practice, claiming that the practice of a profession has become a "business."⁴⁹

As I report more fully below, the turn to business as the operative metaphor of legal practice is incomplete. The focus on the dollar or bottom line is often what is meant by the "businessization" of law practice and the "ruthlessness" by which attorneys are hired and fired in law firms. On the other hand, as the legal business consultants to law firms have discovered, law firms actually use very few good business or management techniques, especially when it comes to the cultivation of long-term human capital.⁵⁰ Some of this may be changing. In seeking to understand why associates would commit to longer and longer periods of employment with law firms as the promise of partnership looms ever more distant, Gilson and Mnookin analyzed how firms maintain loyalty with promises of "outplacement," deferred compensation, and the promise that with the "up or out system," it is in the firm's interest to make a good lawyer a partner.⁵¹ This

48. Galanter & Palay, *Growth of Large Law Firms*, *supra* note 40, at 750.

49. Historians such as Lawrence Friedman have chronicled similar claims throughout the history of the legal profession. Whatever new innovation or practice characterized a changing profession, the group that gets left behind claims it is the more professional as opposed to the renegade "business people." Austin Sarat, *Ideologies of Professionalism: Conflict and Change Among Small Town Lawyers* (Sept. 1988) (unpublished paper presented at the American Bar Foundation's Conference on Professionalism, Ethics and Economic Change, on file with author).

50. Much of my critique of the large law firm is based on its failure to consider and utilize common business practices designed to maximize human capital. Many of those who attended the conference which resulted in *Breaking Point*, *supra* note 8, recognized this as well and reported on a number of successful business practices employed by Fortune 500 companies. Some law firm managers would retort that even large law firms are still much smaller than most Fortune 500 companies and would find such suggestions as in-house employee counselors too expensive.

51. Gilson & Mnookin, *Human Capitalists*, *supra* note 7.

strategy, as reported by Gilson and Mnookin, may be changing as "opportunistic" law firms make fewer and fewer partners at longer and longer intervals, while "opportunistic" associates, who seek to exploit their leverage with particular legal specialties or particular clients, decide to leave and make lateral moves. It also means that some firms are more willing to make permanent associates—a development we will return to below when we examine the gender dimensions of these changes. The permanent associate represents a convenient solution to economic difficulties (the inability to continue to support the pyramiding of partners) tied to the quality of life demands made disproportionately by women lawyers.

With an increased emphasis on "billable hours" as the measure of success within a law firm, there have been several important developments for lawyers on both economic and quality of life grounds. To the extent that the bottom line or billable hours control evaluation (in more polite law firm lingo this is called "productivity"),⁵² more quantitative than qualitative decisions are made about partnerships.⁵³ This increases predictability for associates but often creates some instability for the law firm, by reducing "bonding" by senior partners with particular associates⁵⁴ and creates what some critics have labeled a "time famine."⁵⁵ Billable hours continue to rise to such levels that at least one study documents that over 50% of associates bill more than 2400 hours a year and take less than two weeks of vacation a year.⁵⁶ Associates claim that law firms require total commitment⁵⁷ such that their family and other aspects of their outside lives are almost non-existent,⁵⁸

52. *Id.* at 319.

53. For an interesting review of what differences in qualitative and quantitative measures mean for associates see *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 547 (3d. Cir. 1992) (reversing a finding of sex discrimination in partnership decisions), *rev'g* 751 F. Supp. 1175 (E.D. Pa. 1990). At least one critic has suggested that to avoid discrimination claims, law firms should document their decision process and move to either of two poles—one that is clearly subjective, based on "judgment" or one that is quantitative and "objective." Neil J. Cohen, *Analysis, Bus. Law. Liability Alert*, Feb. 1993, at 1, 1 (editorial written by publisher).

54. In seeking to explain the economics of the "up or out system", Gilson and Mnookin also explain the social structure of the large law firm—partners need to mentor and bond with those younger lawyers they wish to cultivate for the partnership. Gilson & Mnookin, *Human Capitalists*, *supra* note 7, at 315.

55. American Bar Association, *Breaking Point*, *supra* note 8, at 3.

56. *Id.*

57. This is an indication of what sociologists call "greedy institutions." See LEWIS A. COSER, *GREEDY INSTITUTIONS: PATTERNS OF UNDIVIDED COMMITMENT* 6 (1974).

58. See American Bar Association, *Breaking Point*, *supra* note 8, at 4.

as their every minute is clocked and monitored in the law firm.⁵⁹ The emphasis on individual billable hours has also had the effect of decreasing some forms of collective action in the law firm, including both sociability and collegiality, as well as more altruistic, pro bono and public interest activities.⁶⁰

Based on the reports and studies published in the early 1990s which chronicle the events of the 1980s, these general trends of development within the firm may be changing, even as I write this.⁶¹ A quick review of some of the recent work on the economics of the law firm evidences the growth mentality that characterized the 1980s.⁶² "How quickly we fall" was my reaction in re-reading this literature in 1993. How the impact of what is clearly a legal recession will be felt in the large law firm is still evolving. As I review below, however, I am not sanguine that it will reverse some of the trends described above and lead to more humane law practice. Indeed, there is some evidence that legal recession has accelerated some of the most disturbing trends. If anything, the "time famine" becomes worse as fewer and fewer associates must "service" a more constant number of "greedy" partners.

2. The Entrepreneurial Lawyer: New Forms of Law Practice

While most of the attention on the economics of law practice has focused on the large law firm,⁶³ a few scholars have focused their attention on what may be the source of real innovation in the profession—the new forms of entrepreneurial lawyers consisting of solos, small firm practices, or pre-paid legal plans or clinics that

59. See generally Fred S. McChesney, *Team Production, Monitoring and Profit Sharing in the Law Firms: An Alternative Hypothesis*, 11 J. LEGAL STUD. 379 (1982).

60. See Galanter & Palay, *supra* note 40. I do not mean to suggest here that there is no longer any public service, but rather that what does exist is both individualized and often done with a view toward what further business will be produced. Thus, bar association activity may actually be on the increase (in at least some segments of the bar), but it is designed to redound to the financial benefit of the law firm in increased contacts for more work. For some, firm variations in these practices create differentiated firm cultures that allow lawyers and law students to choose employment based on different firm policies and "cultures." See Barbara Buchholtz, *The Melting Pots: Redefining Law Firm Cultures in Changing Times*, A.B.A. J., Mar. 1993, at 62, 63.

61. We have yet to see more than journalistic accounts of the effects of the legal recession of the early 1990s.

62. See, e.g., GALANTER & PALAY, *supra* note 7; Gilson & Mnookin, *Coming of Age*, *supra* note 7.

63. I have noted in other contexts how journalists seem infatuated with the large law firm story, even where it is far removed from the modal lawyer experience. See, e.g., Menkel-Meadow, *Research Agenda*, *supra* note 14, at 310, 317.

attempt to deliver volume legal services. Following the decision of *Bates v. State Bar*,⁶⁴ lawyers began advertising to attract directly volumes of middle and lower income clients who had previously been thought to have inadequate access to the expensive, bar-fixed rates of private lawyers.⁶⁵ This "revolution" in client-getting techniques, accompanied by the Supreme Court's approval of a variety of group and pre-paid legal plans⁶⁶ has resulted in a number of economic and technological innovations in how law is practiced that affects other dimensions of the quality of life choices for lawyers.

Early pioneers in this movement (the "legal clinic" movement)⁶⁷ undertook considerable economic and personal risk to capitalize their practices, engage in advertising and marketing strategies, and purchase the first generations of computers for volume legal work. As noted by sociologist Carroll Seron, this first generation of innovators were "trend-setters" or risk-taking entrepreneurs.⁶⁸ As the legal clinics (such as Hyatt Legal Services, Jacoby & Meyers, etc.), pre-paid plans, and other forms of group legal services have developed, however, they have created two classes of lawyers—a managerial class, which attempts to monitor the productivity of work, and a laboring (dare I say a proletarian?) class of lawyers who "perform" the daily tasks of interviewing, form preparation and court hearings for large volumes of clients. Thus, in one sense, these new forms of practice may be more effective at developing Weberian bureaucratically managed organizations than their "big brothers"—the law firm. Laboring lawyers work on salary, usually for a relatively "normal" and predictable work week, reporting to a clear line of supervisory command, thus distinguishing the "work style" (is this exactly oppositional to "life-style"?) from the greedy institution of the large law firm. Some lawyers report that working in legal clinics or pre-paid plans is, in effect, an extension of work in a legal aid or other direct service govern-

64. 433 U.S. 350, 383 (1977) (holding that advertising by attorneys may not be subjected to blanket suppression).

65. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) (holding that minimum fee schedules for lawyers set by a County Bar Association could be regulated under the Sherman Act).

66. See, e.g., *Brotherhood of R.R. Trainmen v. State Bar of Va. ex rel. Va. State Bar*, 377 U.S. 1 (1964); *NAACP v. Button*, 371 U.S. 415 (1963).

67. See, e.g., CARRIE MENKEL-MEADOW, *THE 59TH STREET LEGAL CLINIC: EVALUATION OF THE EXPERIMENT* (1979).

68. See Seron, *supra* note 2; SERON, *supra* note 32.

ment office.⁶⁹ Yet these lawyers, like a new group of entrepreneurial solo practitioners, report that they work mostly alone on large numbers of direct service cases.⁷⁰ They report somewhat greater feelings of control over their caseload and personal lives, even as they know they are being monitored. In some instances, they can become "partners" through profit sharing plans or even formal partnership.⁷¹

These new forms of practice are also distinguished by their demographic profile—a larger proportion of these lawyers are women and in urban areas greater numbers of minority lawyers will be found in this form of practice. For many women and minorities disenchanted with the ways of the large firm, these new forms of practice provide an alternative that allows them to use their "personal qualities"⁷² to deal directly with clients, master a new form of professional knowledge (the technology of computer delivery of services), and maintain a less totalized personal existence. Yet undoubtedly these lawyers will suffer from a larger economic recession as well.⁷³

3. Innovative "Ruptures" in Law Practice Organization

Every once in a while a creative lawyer or group of lawyers may experiment with law practice organization and these innovations should be of particular interest to those of us who look for change in the legal profession. In one sense, Cravath, Swain & Moore's management of the IBM anti-trust litigation was one of these moments of law practice innovation.⁷⁴ Separating a group of lawyers and paralegals and other professional and staff personnel to handle one large and complex case served to reorganize the prac-

69. Seron, *supra* note 2, at 70-71.

70. In a sense the organizational structure of this paper demonstrates and recapitulates the "two hemispheres" of the bar noted by Heinz and Laumann. What distinguishes the big firm lawyer from the new entrepreneurial lawyer is who the client is—institutional vs. individual clients. Yet, while in a sense reifying this dichotomy, I want to argue that lawyers may select which segment to enter, not just because of client service choices, but for reasons of quality of life.

71. Jacoby and Meyers has begun experimenting with formal partnerships to provide incentives for their lawyers to stay and not set up competing single practices.

72. See SERON, *supra* note 32.

73. Individual legal services such as divorces, wills, home purchases, and consumer lawsuits are postponed when family income is scarce. Some unions have offered their pre-paid legal plans as "give-back" concessions in more troubled labor-management negotiations.

74. See JAMES B. STEWART, *THE PARTNERS: INSIDE AMERICA'S MOST POWERFUL LAW FIRMS* 53-113 (1983).

tice in a number of ways. First, some lawyers were hired specifically to work on one case. This led to the employment of less-elite trained law students, more paralegals, differentiated (and in some cases higher) compensation packages, and an explicit no-partnership track, leading some to pursue permanent associate jobs and others to develop the "contract lawyer" track. Second, for at least some time, these personnel worked directly on site, much as accountants travel to the "field" and in essence, "bonded" more closely with clients than with other members of the firm. With the increase in large scale litigation, particularly mass torts, other innovations, such as new forms of specialized and routinized law practice, may have pre-figured the era of specialized or client-based break-away and boutique law firms.⁷⁵

The 1970s saw the development of "alternative law collectives" of political and ideological commitments in which work was shared, salaries divided evenly among professional and non-professional staff, and cases were taken purely for their law reform potential, rather than for their economic value.⁷⁶ While few of these offices survived the era of greed in the 1980s, they continue to provide evocative visions of how law practice could be alternatively arranged.

In the public sector, different organizational models of less hierarchy and more consensual decision-making, often attributed to women or other "outsider" lawyers, may temporarily alter both the organization and culture of a law practice unit.⁷⁷

In a sense then, the census and other data we have on the forms and organization of law practice do not fully reflect the variations on law practice structures that do and could exist.⁷⁸ More importantly, despite the attempts to use economic theories (particularly of the firm) to explain the structures of law firm prac-

75. Examples include firm specialties in asbestos litigation, medical malpractice, bankruptcy, and entertainment law.

76. See, e.g., CYNTHIA F. EPSTEIN, *WOMEN IN LAW* 130-61 (2d ed. 1993); MARLISE JAMES, *THE PEOPLE'S LAWYERS* 85-255 (1973).

77. The Civil Division of the Justice Department during the Carter Administration (headed by Barbara Babcock) is often cited as an example here. Barbara Babcock, *Defending the Government: Justice and the Civil Division*, 23 J. MARSHALL L. REV. 181 (1990); see also GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF LAW PRACTICE* 83-165 (1992) (describing non-profit law practice).

78. In working with the census data on professional and occupational groups I was struck by the limitations of the categories as I am with demographic classifications employed by the census to apply with inapplicability to the great varieties of multi-racial, multi-ethnic individuals that live and intermarry in a city like Los Angeles.

tice, there are no easy predictive models for understanding the relationship of particular economic arrangements to particular forms of law firm organization.

Moving from economic and organizational structural variations, I will next review how a variety of theoretical and cultural approaches, developed by both practicing lawyers and legal theorists, have sought to reinterpret what the life of a lawyer could be, in order to more fully understand the "culture clash" in which the profession is engaged.

III. INNOVATION IN LAW PRACTICE FROM DIVERSITY

A. *Sources of Innovation: Competing Ideologies and Structural Change—Essentialism, Social Construction, Assimilation and the Mighty Dollar*

The dramatic changes in the demographics and social and economic organization of the legal profession have led to change at two levels—actual change (represented in different work policies at the official level and work-style changes at the behavioral level), and more theoretical, proposed changes in the suggestions for innovations that have come from new entrants to the profession, clients and others who seek to adapt to a changing world. At the economic level, law firms respond to the economic needs of their clients, while at the same time trying to shape arrangements that will remain advantageous to them.⁷⁹ This is reflected in such developments as "value billing."⁸⁰ Both clients and law firms now take credit for exploring more "creative" ways to structure billing, beyond the simple billable hour. At the more theoretical level, some have argued that the legal profession needs to adapt to the particular needs of its new entrants and that greater diversification of the profession will be beneficial not just to the new entrants but to

79. Some have gone so far as to suggest that lawyers, particularly as they function in the United States, are deleterious to the larger economy and should be eliminated or at least restricted in their use. See, e.g., STEPHEN P. MAGEE ET AL., BLACK HOLE TARIFFS AND ENDOGENOUS POLICY THEORY: POLITICAL ECONOMY IN GENERAL EQUILIBRIUM 118-21 (1989) (concluding that a higher number of lawyers in any particular country leads to a lower rate of economic growth); Frank B. Cross, *The First Thing We Do, Let's Kill All the Economists: An Empirical Evaluation of the Effect of Lawyers on the United States Economy and Political System*, 70 TEX. L. REV. 645 (1992) (suggesting that economists often simplify and see lawyers as counterproductive, rent-seeking redistributors (litigators), rather than producers or facilitators of wealth (transactional lawyers)); see also Derek C. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983).

80. LITAN & SALOP, *supra* note 7.

the clients served, as well as the profession at large. It is less clear that the profession has been hospitable to these proposed changes.

In exploring the competing ideological sources of suggested innovations in the profession, it is always useful to ask why some ideas take hold and some do not. As the current academic work in feminist epistemology makes clear,⁸¹ our production of ideas and knowledge is clearly dependent on who has the power (economic and political) to control the agenda. This is as true in the development of a profession as in the production of knowledge. In this section, I will review some of the more theoretical or speculative innovations that have been suggested for changes in the organization of work in the profession and then turn to the barriers preventing achievement of some of these goals.

Perhaps the place to begin is with the most controversial claim with which I have been associated—will women or other previously excluded groups (as “outsiders”)⁸² contribute particular perspectives or practices to the legal profession (or the substance of law and doctrine) that can be attributed to their status or qualities as women or minorities?⁸³ First, the sources of these contributions differ themselves from writer to writer. Few adhere to the kind of gender or race essentialism⁸⁴ often attributed to “difference” theo-

81. See, e.g., SANDRA HARDING, *WHOSE SCIENCE? WHOSE KNOWLEDGE? THINKING FROM WOMEN'S LIVES* (1991); SANDRA HARDING, *THE SCIENCE QUESTION IN FEMINISM* (1986) [hereinafter *THE SCIENCE QUESTION*].

82. I alternate here between usages of “outsiders” and “minorities” in part because “outsider” is a broader term including more than ethnic minorities, usually conjured by the phrase “minorities”. Outsiders include gays, the physically challenged, foreign lawyers and other groups who do not conform to the conventionally expected “white middle aged male” social role of the lawyer. See CYNTHIA F. EPSTEIN, *WOMEN'S PLACE: OPTIONS AND LIMITS IN PROFESSIONAL CAREERS* (1970). On the other hand, “outsider” is also overbroad, because many women and minorities desire to or have assimilated to conventional professional role expectations and do not consider themselves to be “outsiders” to the profession.

83. See Menkel-Meadow, *Portia*, *supra* note 14; see also Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493 (1992). But, for recent criticisms of this approach, see Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039, 1040 (1992) (stating that attempting to correlate a female lawyering style with attributes ascribed to women is inaccurate and dangerous); Cynthia F. Epstein, *Faulty Framework: Consequences of the Difference Model for Women in the Law*, 35 N.Y.L. SCH. L. REV. 309 (1990). For views of how “outsider” status creates ambivalence for minorities who become professionals (in their relations with clients as well as with themselves), see Gerald P. Lopez, *Latinos and Latino Lawyers*, 6 CHICANO L. REV. 1 (1983). See also Leo M. Romero et al., *The Legal Education of Chicano Students: A Study in Mutual Accommodation and Cultural Conflict*, 5 N.M. L. REV. 177, 192-93 (1975) (discussing the perception of “the law” in Chicano society as representing “an alien and hurtful” system).

84. For a good discussion of essentialism in feminist legal scholarship see Patricia A.

rists, but it is often unclear whether what women have to offer the profession comes from some understanding of "innate" female or feminine characteristics⁸⁵ on the one hand or socially constructed exclusions and the experience of socialization or subordination on the other, with a variety of arguments in between.⁸⁶ Claims about racial or ethnic minorities' contributions to the profession are more often framed in terms of social construction, or most often, social exclusion and the experience of injustice.⁸⁷

1. Law Practice

Most simply stated, those who have made claims that women will make changes in the legal profession because of their gender argue: (1) that women may be more likely to adopt less confrontational, more mediational approaches to dispute resolution, as well as transaction planning; (2) that women will be more sensitive to client's needs and interests, as well as to the needs and interests of those who are in relation to each other (client's families, employees, etc.); (3) that women employ different moral and ethical sensibilities in the practice of law; (4) that women will employ less hierarchical managerial styles; (5) that women are more likely to have social justice or altruistic motives in practicing law than total devotion to monetary gain; and (6) that women will be more likely to develop greater integration between their work and family lives (seeking what the literature calls, horizontal, as well as vertical

Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 27-29 (1991); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

85. See Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644 (1990) (attempting to reconstruct in a positive way the "feminine" in law).

86. For some exposure to the variety of approaches seeking to explain the sources of difference between male and female perspectives, see CYNTHIA F. EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER AND THE SOCIAL ORDER* (1988); CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); DEBORAH TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1991); CAROL TAVRIS, *THE MISMEASURE OF WOMEN* (1992).

87. SEGAL, *supra* note 21; cf. STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989). A recent study of hiring of minority law professors reveals that women minority professors are hired at lower ranks and salaries, at significantly less prestigious schools and teach more marginal subjects than minority males, demonstrating the double marginalization of minority women, thereby refuting claims made by many that minority women are more likely to get hired to kill two birds with one stone. See Merritt & Reskin, *supra* note 30, at 2301; see also Cynthia F. Epstein, *Positive Effects of the Multiple Negative: Explaining the Success of Black Professional Women*, 78 AM J. SOC. 912 (1973).

satisfaction).⁸⁸

Empirical research seeking to assess these differences is quite mixed and often depends on the frame of reference of the researcher. Thus, sociologist Cynthia Fuchs Epstein, after a full career of studying women lawyers, suggests that those seeking difference will find it, while those who seek to establish women's "equality" to men may be more likely to find more overlap in behavior than difference.⁸⁹ In short there may be more variation among the individuals within a particular gender in their legal behavior, than differences across gender. While some studies support the notion that women may have different motives for studying and practicing law,⁹⁰ other studies report that whatever differences previously were present are diminishing over time, either because the greater number of women entering law study reduces the stark motivational differences or because students in general have become more conservative over time.⁹¹ Still other studies report that there are no gender differences in motivation to study or practice law at all.⁹²

Some studies do report differences in preferences about how to practice law.⁹³ Some of these studies do substantiate the claim that women prefer less confrontational forms of work, such as mediation or deflection from litigation altogether in transactional or other forms of legal work. In addition, demographic work on the location of women lawyers throughout the world, still demonstrates occupational segregation, with women working disproportionately in those fields which are either devalued by men or consistent with

88. For a more comprehensive description of these contributions to the legal profession by women, see generally JACK & JACK, *supra* note 14, at 130-55; Kathryn Abrams, *Feminist Lawyering and Legal Method*, 16 LAW & SOC. INQUIRY 373 (1991); Cahn, *supra* note 83; Menkel-Meadow, *supra* note 13; Ann Shalleck, *The Feminist Transformation of Lawyering: A Response to Naomi Cahn*, 43 HASTINGS L.J. 1071 (1992).

89. See EPSTEIN, *supra* note 87.

90. See, e.g., Suzanne Homer & Lois Schwartz, *Admitted but Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1 (1989-90); Janet Taber et al., *Gender, Legal Education and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209 (1988).

91. See, e.g., David L. Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 LAW & SOC. INQUIRY 251 (1989).

92. Lee E. Teitelbaum et al., *Gender, Legal Education, and Legal Careers*, 41 J. LEGAL EDUC. 443 (1991).

93. See, e.g., JACK & JACK, *supra* note 14, at 130-55. At present virtually no studies report on how people actually do practice law, because no researcher has been able to design an inclusive, both gender, multi-ethnic, observational study of actual lawyering behavior; most studies rely on self-reports or reactions to hypotheticals.

stereotypic notions of what is women's work (such as family law.)⁹⁴ Thus, it may be too early to tell whether there is "push" or "pull" in terms of which directions women or other outsiders in law pursue.⁹⁵

2. The Production of Legal Knowledge

Contributions to the development of law goes beyond some of the process claims about practice alluded to above and suggests areas where women or other excluded groups in the profession have had or will have an impact on the substantive law. Women lawyers have adopted a variety of strategies or patterns of arguments⁹⁶ in advocating legal and doctrinal change. These arguments include: (1) utilizing conventional categories to protect women's interests (such as claims for privacy and equality); (2) recrafting old categories (such as the defense of consent in rape); (3) creating new categories of analysis (sexual harassment and pornography); (4) exposing the male and white bias⁹⁷ or assumption of male experience in defining legal categories⁹⁸ (such as freedom from connection in the liberty context⁹⁹); (5) arguing that woman's dif-

94. See Carrie Menkel-Meadow, *The Comparative Sociology of Women Lawyers: The "Feminization" of the Legal Profession*, 24 OSGOODE HALL L.J. 897 (1986); see also Menkel-Meadow, *supra* note 13, at 208-31. For a general account of how women (both white and black) have fared in the professions see Natalie J. Sokoloff, *Evaluating Gains and Losses by Black and White Women and Men in the Professions, 1960-1980*, 35 SOC. PROBS. 36 (1988).

95. See *Research Agenda*, *supra* note 14; see also Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731 (1991). We do know that the experience of discrimination or perceived injustice does lead to a disproportionate representation of ethnic minorities in civil rights work. See, e.g., SEGAL, *supra* note 21 (discussing surveys conducted in Philadelphia on the participation of blacks in public interest law).

96. See generally Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, *supra* note 83 (describing the variety of these structures and patterns of feminist argument).

97. See, e.g., Peggy McIntosh, *White Privilege and Male Privilege: A Personal Account of Coming to See Correspondences Through Work in Women's Studies*, in RACE, CLASS AND GENDER: AN ANTHOLOGY 70 (Margaret L. Andersen & Patricia Hill Collins, eds., 1992) (discussing a powerful statement of how we take what is "normal" for granted from our places of privilege).

98. This effort parallels the effort to demonstrate that health issues have been defined largely around medical research based on male-only subjects. See Rebecca Dresser, *Wanted Single, White Male for Medical Research*, HASTINGS CENTER REPORT, Jan.-Feb. 1992, at 24.

99. See generally Kenneth L. Karst, *Woman's Constitution*, 1984 DUKE L.J. 447; Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989); Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441 (1992).

ference will produce different legal theories and constructions thereof¹⁰⁰ (like recognizing other compensable wrongs in the tort arena); (6) recognizing how law disadvantages women, even when framed in neutral terms; and (7) arguing from a women's perspective transforms the legal emphasis from one of rights to needs.¹⁰¹ Like critical race theorists, feminists argue that their position as outsiders¹⁰² and as the "acted upon" in law¹⁰³ allows them to see other possibilities of legal regulation and definition. Recently, women theorists and lawyers have moved from the "core" women's issues to expressing their analyses of more conventional legal doctrinal areas, moving into analyses of how corporations,¹⁰⁴ labor unions,¹⁰⁵ organizations¹⁰⁶ and bankruptcy proceedings¹⁰⁷ might be reconfigured with women actors included.

These claims that women might begin to think of legal categories in different ways does not, in my mind, require adherence to an essentialist position about women's natures. If only a few women think of legal categories in different ways or shift the perspectives with which we analyze legal problems, then women will have contributed to a broadening of our thinking about law. Just as "two heads are better than one", it is my view that two genders and many races and ethnicities in one profession cannot but help increase the number and quality of ideas in circulation for solving legal problems and revising conventional taken-for-granted catego-

100. See, e.g., Leslie Bender, *From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law*, 15 VT. L. REV. 1, 46 (1990); see also Robin L. West, *The Difference in Women's Hedonic Lives: a Phenomenological Critique of Feminist Legal Theory*, 3 WISC. W.L. J. 81, 82 (1987).

101. This claim has been raised in many areas, but particularly in social welfare law. See Johanna Brenner, *Towards a Feminist Perspective on Welfare Reform*, 2 YALE J.L. & FEMINISM 99, 125 (1989).

102. Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 8 (1988).

103. For several moving accounts of how being an object of legal regulation gives one a particular perspective on its simultaneously oppressive and insufficient operation on subordinated people, see PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

104. Sarah W. Lahey & Kathleen A. Salter, *Corporate Law in Legal Theory and Scholarship: From Classicism to Feminism*, 23 OSGOODE HALL L. J. 543, 544 (1985).

105. Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1156 (1991).

106. Joanne Conaghan, *The Invisibility of Women in Labour Law: Gender Neutrality in Model-Building*, 14 INT'L J. SOC. L. 377, 379 (1986).

107. Karen Gross, *Revision of the Bankruptcy System: New Images of Individual Debtors*, 88 MICH. L. REV. 1506, 1510 (1990).

ries. In my view, this analysis applies as well to the inclusion of other excluded groups in the law (visible and invisible minorities, the physically challenged, gays, racial and ethnic minorities, etc.). Any disruption of conventional and dominant group thinking must improve the quality of legal decision-making.

B. Benefits to the Legal Profession in Diversification

Most discussions of women or other excluded groups in the law focus on the benefits to the previously excluded individuals of full participation in the profession.¹⁰⁸ Obviously, for women and minorities previously excluded, working as a legal professional is an expression of individual achievement, fulfillment and self-determination, as well as the pleasure of doing things for others, being self-supporting and contributing to the growth and development of one of our major human institutions. These are things which white male professionals have always valued and women and minorities have come to claim in their demands for equality in the ability to express those values in the legal workplace. It is less obvious, however, how the legal profession as a whole will benefit from the entrance of women and other excluded groups and I will focus briefly here on that issue.¹⁰⁹

From an epistemological perspective, there is the controversial claim that women and minorities "know" things differently¹¹⁰ from white men and thus will change the way in which we produce legal knowledge. Whether this special knowledge comes from the double vision of an excluded/subordinated status that requires women and minorities to master the master's vocabulary, as well as their own (a theory of knowledge based on social position) or on more essentialist or role based knowledge (such as the knowing of "mothers"¹¹¹) many, but certainly not all feminists have argued

108. For comprehensive treatments of how and why women entered the profession and suffered the vicissitudes of working where they were not always wanted, see MORELLO, *supra* note 21; Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163 (1988).

109. I have written extensively about this issue in other contexts. See *supra* notes 3, 11, 13, 83.

110. See generally MARY FIELD BELENKY ET AL., *WOMEN'S WAYS OF KNOWING: THE DEVELOPMENT OF SELF, VOICE AND MIND* (1986); HARDING, *THE SCIENCE QUESTION*, *supra* note 81.

111. For the conflicting and competing claims of the value of mothering in creating knowledge, see SARA RUDDICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* 12 (1989); Marie Ashe, *The Bad Mother in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017, 1018 (1992); Ruth H. Bloch, *American Feminine Ideals in*

that adding women to the development of legal doctrine and law practice will expand, broaden and transform the way we produce and use legal knowledge.¹¹²

The inclusion of women and others in the profession has also the obvious benefit of providing lawyers who can serve the previously under or unrepresented or representing better those interests served by more conventional lawyers. I do not mean to suggest that women lawyers should serve only women clients or native group lawyers should serve only natives, but that in some cases, comfort with a same-group representative may facilitate the expression of legal needs and desires that might be repressed with more conventional, dominant group representation.

One of the most telling findings of many of the Gender Bias Task Force Reports is that disparate treatment of some groups is perceived by the general public and the legitimacy of the entire system is compromised thereby.¹¹³ When the public observes court proceedings, such as through jury service, and through being a witness or observer (and these days through non-fictional television programming of actual trials or *People's Court* as well as the fictional accounts on such programs as *LA LAW* or *Law & Order*) adverse treatment of particular individuals because of their social characteristics becomes evident and public in a way in which regular actors in the system may be totally unaware. Thus, public attention to issues of gender and racial differential treatment, through such efforts as Task Force Reports serves to illuminate in a public way what is going on in private and in turn may result in pressures to the profession to "clean up its act" if the profession wishes to improve its already tarnished reputation.

Finally, attention to gender issues and the issues that women are more likely to raise with respect to quality of life issues may cause the profession as a whole to reevaluate the demand of its "greedy institutions" that seem to require so much devotion to

Transition: The Rise of the Moral Mother 1785-1815, 4 FEMINIST STUD. 101 (1978); Joan B. Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 N.Y.U. L. REV. 1559, 1561 (1991).

112. The claim of a gender, as well as a race-based, epistemology is the centerpiece of a hotly debated academic controversy. See HARDING, *THE SCIENCE QUESTION*, *supra* note 81, at 11; Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 867 (1990); Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1749 (1989).

113. See THE PRELIMINARY REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE, Discussion Draft (July 1992), at 171.

work. In some instances, the development of parental or healthcare leaves has occurred because of the activism of some male attorneys who also seek to spend more time with their families and to humanize their commitments to work. I am less sanguine that this will have long-lasting effects, given the current short-term economic realities that seem to require many hours of commitment (especially to clients who do demand constant availability of their professionals—a demand all of us who need doctors can understand). Yet the demands for an improved quality of life, coupled with the now charged political agenda of “family values” has produced strange sources of innovation and change. In my own research into law firm policies I have uncovered instances of middle-aged men who have become innovators on issues of leave, either because their daughters have become lawyers and they now understand more fully the impediments of the “glass ceiling” as it affects mothers¹¹⁴ or because of their own needs to spend time with families, often second families they have begun in their more mellow middle years. For some, the aggravating wear and tear of adversarial legal practice leads to mid-life evaluation and changes in what is desirable in legal practice. The key to understanding this phenomenon is to realize that innovation may get sparked by women raising issues or making demands, but the effects of those innovations may come from surprising sources not expected to be so responsive. It also indicates that innovation may come from self-interest as opposed to a commitment to the underlying values of the common good of changing the profession.

IV. ECONOMIC AND SOCIAL BARRIERS TO INNOVATION

A. *Economic Realities*

Barriers to the recognition, never mind achievement, of some of these innovations come from a variety of sources, including economic, ideological and social structural factors, that in turn interact with each other. Whether coincidental or not, it is true that the legal recession has hit at a time when women were just beginning to make some headway with respect to quality of life innova-

114. Interestingly, one unpublished report taken from an analysis of American census data demonstrated that divorced women with children worked the greatest number of hours (perhaps due to the need for income). See Halliday, Aschaffenberg & Granfors, *Gender, Time and Structure in the American Legal Profession, Data from the 1980 Census* (July 1987) (presented to Conference on Women in the Legal Profession, Madison, Wis.).

tions.¹¹⁵ Though some would argue that law firm resistance to part-time or flexible work is, in effect, intentional discrimination to avoid certain kinds of workers, it is also clear that economic hard times have coincided with women's and other dispossessed groups greater access to the profession.¹¹⁶ If times were flush and there were a greater need for lawyers, I have no doubt the laws of supply and demand would result in greater flexibility in determining working conditions. With the demand for lawyers being dependent on the gross national product,¹¹⁷ the need for lawyers is currently reduced which in turn has reduced the bargaining leverage of the available supply of lawyers. Indeed, rather than reducing expenses by hiring more part-time lawyers (with fewer fringe benefits), law firms seem to be requiring more hours of fewer and fewer associates.¹¹⁸ Pressures to work long hours and take more clients may be even greater in the solo to small firm practice locations where the decreased economic value of the dollar requires lawyers to work harder for even less. In addition to the economic and quality of life issues addressed here, there is the question of the quality of the work produced under these economic conditions.

Thus, economic pressures to use fewer lawyers to bill for greater numbers of hours prevents the growth and development of workplace innovations addressing the issues presented by work and family responsibilities.¹¹⁹ As I and others have argued repeatedly,

115. Not surprisingly, not all groups are affected similarly by economic downturns. Some empirical work demonstrates that mobility from one firm to another or from one sector to another is more difficult for women than for men. See John Hagan et al., *Cultural Capital, Gender and the Structural Transformation of Legal Practice*, 25 L. & SOC'Y REV. 239, 253 (1991); see also John Hagan, *The Gender Stratification of Income Inequality Among Lawyers*, 68 SOC. FORCES 835, 849 (1990).

116. I am not intending to lay all the blame for resistance to change on the economic recession. Even before the recent legal recession, I argued that some forms of social organization within the law firm were likely to conflict with women's needs and claims for change, even if extreme economic conditions did not prevail. See Menkel-Meadow, *Research Agenda*, *supra* note 14, at 304.

117. B. Peter Pashigian, *The Market for Lawyers: The Determinants of the Demand for and Supply of Lawyers*, 20 J.L. & ECON. 53, 68 (1977).

118. Nancy D. Holt, *Are Longer Hours Here to Stay? Quality Time Losing Out*, A.B.A. J., Feb. 1993, at 62.

119. As anecdotal evidence, I can report that increasing numbers of my former students are unable to secure more flexible work arrangements after having a child. While some firms have adopted formal policies, in many firms, particularly smaller ones, women lawyers (and fathers if they choose to) must negotiate for individualized "packages" and treatment. There seems to be a growing reluctance to grant part-time requests (part-time in Los Angeles practice often means as much as forty hours a week). Furthermore, although some firms do recognize a more formal maternity or child-rearing leave policy, the infor-

the work cycle of the typical lawyer, particularly the big firm lawyer, is incompatible with the birth-fertility-child-rearing cycles of most women's lives.¹²⁰ This recognition by one business consultant led to the cultural debate, some would say "explosion," about the "mommy track" in which Felice Schwartz suggested formal recognition of two models of work for women.¹²¹ The debate which followed the naming of the "mommy track" demonstrates the deep ambivalence that feminists, policy makers, and all employers and employees feel about the inevitable tensions and conflicts between the allegiances owed to work and family. It is, of course, somewhat ironic that the economic recession would seem to privilege greater commitment to work and the demand for fewer, hard-working employees. On one level, the "official" recognition of a "parent" track might ease some of the economic burdens of lawyer billing by offering opportunities for cheaper part-time workers. Several commentators have suggested that the profession officially acknowledge that all careers are "phased" with layers and variations of productivity throughout the life cycle.¹²² The economics of law practice are in fact far more complex¹²³ and the demand for total commitment to work needs to be understood as a complex of economic and non-economic demands and needs, including client preferences for "on-call" professionals,¹²⁴ the economics of providing fringe and other benefits to workers, and an underlying culture of work that some might label "masculinist." For all the journalistic treatment that legal work receives, as in *The*

mal effects are often to penalize women who are not fully committed to their work in terms of time and effort, either by assignment of "B" class clients and matters or in the allocation of partnerships, be they full equity partnerships or non-equity participation partnerships.

120. See, e.g., Nancy E. Dowd, *Work and Family: The Gender Paradox and the Limitations of Discrimination Analysis in Restructuring the Workplace*, 24 HARV. C.R.-C.L. L. REV. 79, 103 n.82, 126 n.158 (1989).

121. Tamar Lewin, 'Mommy Career Track' Sets Off a Furor, N.Y. TIMES, Mar. 8, 1989, at A18 (referring to Felice N. Schwartz, *Executives and Organizations: Management Women and the New Facts of Life*, HARV. BUS. REV., Jan.-Feb. 1989, at 65).

122. Abbie W. Thorne, *Gender and the Profession: The Search for Equal Access*, 4 GEO. J. LEGAL ETHICS 81, 107 (1990) (citing Lynn M. Dannheisser & Steven R. Reininger, *Grape Jelly Fingerprints on Your Career: The Challenges Facing the Lawyer-Parent*, 58 FLA. B.J. 609, 610 (1984)).

123. For one attempt to unpack the economic structure of the large American law firm, see GALANTER & PALAY, *supra* note 7.

124. For a discussion of the medical profession's efforts to limit work hours of physicians on public health theory—that it is damaging to the public health to have physicians making decisions when overworked and overstressed—see *infra* note 171.

National Law Journal, *The Legal Times*, and *The American Lawyer*, there is still a need for a more systematic analysis of both the cultural and economic structures (and their interaction) of legal work, both in the large law firm and elsewhere.¹²⁵

While in some circles, the North American obsession with work is decried as having paid insufficient attention to women's family roles, it is also true that women have made greater headway in professional work achievement in North America than in many countries with more enlightened family policies (with the exception of some Scandinavian countries, and for some occupations in the former Communist bloc countries).¹²⁶ It appears as if women cannot have their cakes and eat them too (though men seem to be able to manage work and family, even multiple families!). Public policy initiatives seem sensitive either to improving the conditions of women's maternal or work role, but it is rare to find regimes in which both work and family roles are equally supported.¹²⁷ Thus, another set of cultural oppositions affects the way in which we perceive women professionals—whenever we see a working woman we wonder what she is doing about her family in ways we simply don't think of male professionals.¹²⁸ The work-family conundrum is located in women, not in the human family.¹²⁹

125. Such work is hard to do, given the general reluctance of lawyers to be studied and especially to expose their proprietary management practices.

126. For a comparison of how the United States fails to provide adequate child rearing leaves when compared to other western industrial countries, see SYLVIA A. HEWLETT, *A LESSER LIFE: THE MYTH OF WOMEN'S LIBERATION IN AMERICA* (1986). Hewlett lays much of the blame on American feminists who made equality at work their primary goal in the 1970s and 1980s, rather than the European feminist commitment to obtaining greater social welfare benefits and supports for women in their maternal roles.

127. Some of this can be seen in the difficulty of passing, over President Bush's veto, the Family and Medical Leave Act, which guaranteed twelve weeks of *unpaid leave* to a family member who cares for someone else (a rather modest proposal when compared to the regimes of most industrialized nations). The bill finally passed and was signed by President Clinton in January, 1993, after eight years of Congressional and Presidential political action. See generally 5 U.S.C. §§ 6381-6387 (1994).

128. It is important to note here, however, that most empirical studies of high achieving women, particularly in the legal profession, still report a disproportionately high rate of single marital status or childlessness. See THE PRELIMINARY REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE, *supra* note 113.

129. To wit the rhetoric and debate in the recent American presidential campaign about the respective roles of the lawyer wives of the candidates—Hillary Rodham Clinton and Marilyn Quayle.

B. *Social and Cultural Barriers: Continuing Discrimination*

In the United States, over thirty states and now two federal jurisdictions have commissioned Gender Bias Task Forces to study the possible sources of bias and discrimination in the practice of law.¹³⁰ Several states, affected by the leadership of the ABA in developing a Commission on Minorities in the Profession,¹³¹ have established similar task forces designed to uncover problems encountered by minority lawyers.¹³² Initially conceived as a more limited look at how women lawyers, witnesses, jurors, judges and employees were treated in the court system, most Gender Bias Task Force studies have been expanded to consider the gender biases that exist in the relevant substantive law as well. Thus, for example, the California Gender Bias Task Force issued a report which called for substantive changes in the law of divorce and spousal and child support, certain crimes and torts related to violence against women, as well as procedural changes in court rules and practices.¹³³

One of the most significant findings of the Task Force Reports is the existence of two (almost separate perceptual or cultural) worlds. Women actors in the legal system continue to report discrimination and the perception of being treated differently from men (could this be the source of women's behaving differently as lawyers?) in the legal system, while men report either lack of consciousness or awareness of discriminatory practices or a belief that the system does operate fairly and neutrally.¹³⁴

The recent reversal of a trial court finding of sex discrimination in law firm partnership decisions, on the basis that the trial

130. See Karen Czapanskiy, *Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1 (1990); Lynn H. Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 ARIZ. ST. L.J. 237, 237 (1989).

131. This commission was appointed soon after and modeled on the ABA Commission on the Status of Women in the Profession. The ABA has subsequently engaged in several follow-up projects, including a demonstration project, the ABA Minority Counsel Demonstration Project and a conference of Minority Partners in Majority/Corporate Law Firms dedicated to integrating minority lawyers into the profession.

132. Statewide and local bar associations, such as the Association of the Bar of the City of New York's Committee to Enhance Professional Opportunities for Minorities and the Chicago Committee on Minorities in Large Firms, have also developed committees to first document discriminatory practices and then to facilitate minority lawyer integration in the profession. Keeva, *supra* note 29, at 52-53.

133. See THE PRELIMINARY REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE, *supra* note 113.

134. *Id.* This observation appears to be true for both judges and lawyers.

court substituted its judgment "erroneously" for that of the law firm partnership,¹³⁵ reinscribes the masculinist supremacy of subjective and discriminatory employment decisions in high status, high paying professional jobs.¹³⁶ That many lawyers claim not to "know it when they see it" (job discrimination or sexual harassment on the job as an example) suggests just how pervasive and subtle the second generation of discrimination is.¹³⁷ As long as courts continue to sustain exclusive and homogeneous groups that make important decisions with respect to the working conditions of lawyers, the status quo is hardly likely to be changed from within.

V. WHAT HAS BEEN AND CAN BE DONE TO CHANGE THE LEGAL PROFESSION: CHANGE AGENTS

In much of my earlier work I have argued that the increasing numbers of women in the legal profession has the promise of "transforming" the legal profession, but I have often skirted the issue of how to get there from here. In recent years there have been some very important efforts both to study and to structure change in the legal profession from a variety of formal institutional bodies.

Perhaps most significant have been the Gender Bias Task Force studies in the states and now federal jurisdictions, usually commissioned by a judicial body, or in some cases by relevant bar associations. These Gender Bias Task Force studies have fully documented the widespread discrimination experienced by women in the legal system in arenas ranging from professional courtesy and niceties to substantive doctrinal treatment in the law. As one commentator has noted, the observations of Gender Bias studies reveal at least three levels of analysis.¹³⁸ First, at the most obvious level, is the disparate (meaning different) treatment of women in the courts.¹³⁹ At another level are evidentiary issues having to

135. *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509 (3d Cir. 1992), *rev'g* 751 F. Supp. 1175 (E.D. Pa. 1990). For a discussion of the ramifications of *Ezold*, see *Women Partners and Title VII: When Does a Denial of Partnership Equal Gender Bias?*, CAL. LAWYER, Mar. 1993, at 35.

136. See Elizabeth Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 945, 955-56 (1982).

137. For an eloquent analysis of how more subtle discrimination is in its second generation of "non-intentional" excluding practices, see Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

138. See Czapanskiy, *supra* note 130, at 2.

139. *Id.* at 2-3. Different treatment can be very subtle. Often, it might appear as if

do with how credible women claimants (clients, witnesses and lawyers) are considered to be by fact-finders and judges and what is considered valid evidence in particular proceedings. At a third level, there is the problem of legal interpretation or the way in which facts and law are put together. In my view, this consists of at least two levels of process which may be "infected" with masculinist bias. At the first instance, some judges and fact-finders may be unable to understand women's experiences¹⁴⁰ and thus will find facts adversely to women. Secondly, the "neutral and objective" place from which judges interpret laws which they apply to those facts may in actuality be filtered through gendered understandings.¹⁴¹ Given these different "patterns" of bias, different correctives may be required. Professor Czapanskiy suggests at least two different routes, each fraught with new problems and difficulties—judicial and lawyer education and legal rule changes.¹⁴²

Some states, including my own, California, have begun a second round of work in establishing committees of judges, lawyers and other legal administrators to implement the proposals suggested in those reports. In California, for example, specific committees have been delegated with the function of reforming particular areas of the law or drafting new court rules that will explicitly deal with some of the objectionable conduct.¹⁴³

One of the major efforts in the United States to track the

some women are being treated "better", i.e. more gently or "sweeter" in the courtroom, yet women may experience this "kinder, but gentler" treatment as patronizing and condescending, thus discriminatory and denigrating.

140. *Id.* at 3-4. This is the continuing issue with respect to the adjudication and treatment of rape, sexual harassment, and domestic violence cases in our still mostly male judicial system.

141. See Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 13 (1987).

142. See Czapanskiy, *supra* note 130, at 6. While Professor Czapanskiy focuses on judicial education, the more difficult issue will be both attorney education and more difficult still, public education, especially for those who serve on juries. In her view, rule change is difficult, and as issues about the extent of judicial discretion and feminist attention to context may be considered differently—depending on who is doing the fact-finding and judicial interpretation. *Id.* at 6-11. Thus, I would add that the judicial selection process, as well as a more representative judiciary and legal profession, is an essential element of the social change necessary to correct gender and racial bias.

143. This includes, for example, revisions of both lawyer's professional responsibility codes and judicial codes of conduct to prohibit discriminatory conduct both in employment and in the courtroom. For an example of such a code of conduct, see D.C. RULES OF PROFESSIONAL CONDUCT Rule 9.1 (1992); see also Lynn H. Schafran, *The Obligation to Intervene: New Directions From the American Bar Association Code of Judicial Conduct*, 4 GEO. J. LEGAL ETHICS 53 (1990).

progress of women's participation in the legal profession has been the American Bar Association's Commission on Women in the Profession¹⁴⁴. In its earliest years, the ABA Commission held hearings throughout the country so that women could tell their stories about their experiences of practicing as a minority in the profession and the testimony so collected¹⁴⁵ served to focus efforts on specific reforms. To date, the ABA Commission has been engaged in a number of activities that have both symbolic and real value in improving the lot of women in the profession. The ABA Commission drafted, moved and passed through the ABA House of Delegates several resolutions having to do with women's roles and rights in the legal profession. One resolution required the ABA to use gender neutral language in its policy documents,¹⁴⁶ to formally recognize the barriers to women in the profession,¹⁴⁷ to recognize the pervasive problem of sexual harassment in the profession, and to develop educational programs for legal institutions to prevent behavior that is harmful to women.¹⁴⁸ In addition, the ABA Commission on the Status of Women has developed a policy guide for implementing parental leave, alternative work schedules and sexual harassment policies for lawyers designed to improve the quality of life for all lawyers.¹⁴⁹ The ABA Commission has also been effective in monitoring the position of women in leadership positions in both the ABA itself and in local and state bar associations.¹⁵⁰ Bar association activity is important for monitoring such issues as judicial selection as well. Researchers have demonstrated that women are more likely to achieve judicial appointments through different routes than men, through academic performance

144. Which was initially chaired for a number of years by Hillary Rodham Clinton.

145. This testimony is available from the Commission's office in Chicago.

146. Resolution of Section of Tort and Insurance Practice and the Commission on the Status of Women, Adopted by ABA House of Delegates, Feb. 6, 1989.

147. A recommendation of the Commission adopted on August 10, 1988.

148. Report of the Commission on the Status of Women to the ABA House of Delegates, Feb. 2, 1992.

149. *Lawyers and Balanced Lives: A Guide to Drafting and Implementing Workplace Policies for Lawyers* (ABA Commission on Women in the Profession 1990, revised ed. 1992).

150. The ABA Commission on the Status of Women publishes an annual report card which reports on the participation of women in bar leadership and committee positions. Not surprisingly, women are disproportionately underrepresented in leadership positions in the bar. There is an active debate among women lawyers about whether participation in women's bar associations facilitates advancement in the more establishment bar associations or whether it leads to a "separate track" of participation.

and rapid and unusual advancement in firms, rather than through the more usual political channels.¹⁵¹ Similar efforts are now underway for minority lawyers, including mandating diversity workshops, training programs and official mentoring programs in law firms.¹⁵²

In addition to these institutional efforts, other developments have increased the visibility of women's participation in the legal profession and other professions, such as the growing number of very visible lawsuits against law firms for partnership denials,¹⁵³ which challenge the sex stereotypic ways in which decisions are made. In addition, growing numbers of women and minorities are being appointed to the bench. Minnesota, for example, is the first state with a majority of women on the Supreme Court.¹⁵⁴ Thus, the good news is that there is a great deal of attention being paid to the issues of women's participation in the legal profession and slowly the number of women is growing and accreting.

Yet the bad news is that partnership rates for women and minorities are still lower than their participation and length of time in the profession would predict and women and minorities remain highly segregated in different parts of the profession.¹⁵⁵ And, the new threat of the formally recognized "Mommy Track" might serve to encrust this dangerous division of women permanently, when it is more likely that women will opt for more flexible, time de-limited roles.

151. See Marion Z. Goldberg, *Carter Appointed Judges: Perspectives on Gender*, TRIAL, April 1990, at 108 (1990); Sheldon Goldman, *A Profile of Carter's Judicial Nominees*, 62 JUDICATURE 246 (1978); Elaine Martin, *Men and Women on the Bench: Viva La Difference?*, 73 JUDICATURE 204 (1990); Elaine Martin, *Gender and Judicial Selection: a Comparison of the Reagan and Carter Administrations*, 71 JUDICATURE 136, 139 (1987); Patricia Wald, *Women in Law: Despite Progress, Much Still Needs to Be Done*, TRIAL, Nov. 1988, at 75.

152. See generally Keeva, *supra* note 29.

153. See, e.g., *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 751 F. Supp. 1175 (E.D. Pa. 1990) *rev'd and remanded*, 983 F.2d 509 (3d Cir. 1992); *Hopkins v. Price Waterhouse*, 490 U.S. 228 (1989); *Hishon v. King & Spaulding*, 467 U.S. 69 (1984).

154. See *The First in Minnesota: Women a Majority on Supreme Court*, PERSPECTIVES-A NEWSLETTER FOR AND ABOUT WOMEN LAWYERS (Commission on Women in the Profession, A.B.A.), Fall 1991, at 1, 7. Chief Justice Rosalie Wahl suggests that the most important aspect of this significant achievement is not that there will necessarily be a "new age of feminist jurisprudence" in Minnesota, but that the participation of women in the highest judicial office will have great symbolic value for women practitioners.

155. Women are still more likely to work in the public sector and in large and small, rather than middle size firms. These occupational segregation patterns appear in virtually every country in which women are beginning to make inroads in the profession. Menkel-Meadow, *supra* note 13, at 213-14.

Yet women also demonstrate a remarkable resilience and role virtuosity, like one women lawyer I interviewed who described her transformation on her bus ride home as her transition from "very tough civil rights lawyer" to a warm nurturing mother. Because women have had to play so many roles in our society and because those choices are expanding with each day, a greater number of women have been able to achieve and push the envelope of more constrained role expectations of both professionals and family members. Minority lawyers often demonstrate similar "role virtuosity" or "bi-lingualism" by mastering the multiple languages and practices of the dominant legal culture as well as continuing to be responsive to their home communities.¹⁵⁶ Data from recent satisfaction studies demonstrate that women like challenge and diversity and seem to respond well to the conflicts of many roles.¹⁵⁷

Perhaps what is needed for the legal profession as a whole is what Professor Pat Cain suggested was necessary for the professoriat—remedial feminist jurisprudence—an explication of feminist theory and jurisprudence accessible to non-specialists in feminist issues.¹⁵⁸ Efforts at judicial education have attempted to explain to judges what women's and racial and ethnic minorities' experiences are and how they should come to understand them before they judge them.¹⁵⁹ Similar efforts at educating lawyers

156. See generally WILLIAMS, *supra* note 103; John D. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing An Authentic Intellectual Life in A Multicultural World*, 65 S. CAL. L. REV. 2129 (1992); Cardiss Collins, *The Role of the Black Attorney in the 1980's: A Challenge to Become Specialists, Associates and Renovators*, 7 BLACK L.J. 54 (1982); Charles R. Lawrence, *The Word and the River: Pedagogy As Scholarship as Struggle*, 65 S. CAL. L. REV. 2231 (1992); David Wilkins, *Two Paths to the Mountaintop? The Role of Legal Education in Shaping the Values of Black Corporate Lawyers*, 45 STAN. L. REV. 1981 (1993). For the particular multi-lingualism and multi-practices facing women of color attorneys, see SOKOLOFF, *supra* note 30, at 129; Nina Burleigh, *Women in Law: Black Women Lawyers Coping With Dual Discrimination*, A.B.A. J., June 1, 1988, at 64.

157. Indeed recent satisfaction studies demonstrate that some women with children (and thus the greatest role strains) are often the happiest and most fulfilled. Chambers, *supra* note 91, at 252, 257. However, other satisfaction studies continue to report that women lawyers have higher dissatisfaction rates than do men. See American Bar Association, *Breaking Point*, *supra* note 8.

158. Cain, *supra* note 84, at 38.

159. Susan Gaspell's wonderful short story, *A Jury of Her Peers*, has been widely used in judicial education to demonstrate both women's experience of abuse and also how women draw inferences from different sorts of data than the official authorities. Perhaps similar training programs, with the use of literature, film, and actual stories, is necessary for the bar as a whole, as well as for the general public. The depiction of women's legal issues in the popular culture thus becomes extremely important as an issue of advocacy.

and the public will be essential before gender, racial and ethnic bias can be eliminated. The difficult part of effecting social change in the legal profession is the interlocking webs of client expectations and law firm and judicial system structures, in which the status quo is sadly and constantly reinforced. Efforts at innovation and change should be rewarded and made public¹⁶⁰ so that self-perpetuating cycles can be broken. Most important to me is the notion that if there are separate cultures of gender and race and ethnicity within the profession, we must develop places, institutions and structures where the diverse members of our profession meet, confer, and work together on tasks that will enable them to develop mutual recognition and to understand the experiences of the other in a way which is real.¹⁶¹ This does not mean substituting feminist values for masculinist values. It simply means that a profession which should be committed to equality should permit a full hearing for all of its participants. Only then, when there is real equality of voice, will we be able to measure if there are particularly gendered contributions to be made by women and contributions from other "outsider" groups who have been previously excluded and have particular contributions to make in the way in which we do our work.

At least one commentator has suggested that women should not be the repositories of all arguments for change in the way the legal profession is structured,¹⁶² just as others now assert that minority lawyers should not carry the burden of urging us all to do more pro bono and civil rights work. There is growing evidence that clients will assert greater control over the profession by making demands that fees be restructured¹⁶³ and even that the "time famine" be reduced.¹⁶⁴ As clients themselves become more diver-

160. As the ABA Commission on Women honors outstanding women lawyers who have innovated in the fields of practice, judging, community service and education each year.

161. For my views on the importance of empathetic understanding in lawyering, see Carrie Menkel-Meadow, *Is Altruism Possible in Lawyering?*, 8 GA. ST. U. L. REV. 385 (1992).

162. See Epstein, *supra* note 76, at 385-86.

163. The Aetna Insurance Company is widely touted as having demanded a "blended" value-billing structure from its lawyers. This structure involves a tri-partite billing procedure of hourly rate for start-up file familiarization, a contingent fee with reverse bonus for low settlement rates in defense work, and a fixed fee for particular tasks, such as document preparation, some discovery and even some trial work. See LITAN & SALOP, *supra* note 7.

164. A colleague of mine once asked why smaller boutique firms promising higher quality work for attorneys who worked fewer hours wouldn't attract a greater market

sified, they may demand greater representativeness in their lawyers. And as clients, in the corporate context, we have evidence that lawyers are affecting change not only in billing but in such areas as dispute resolution—demanding greater use of alternative dispute resolution devices.¹⁶⁵ The profession clearly will respond to these and other cultural clashes in ways we cannot even imagine at the present time. Yet, it might be useful to suggest some particular ways to direct the negotiations that will necessarily ensue among different constituencies of the profession.

VI. LOOKING TO THE FUTURE: BLUEPRINT FOR A BETTER QUALITY OF LIFE IN THE LEGAL PROFESSION

Change then can come from many sources. Here are my proposals and recommendations for resolutions to encourage better quality of life in the practice of law. Some are self-explanatory and simple, if controversial. Others will require a bit of elaboration.

1. The American Bar Association should include a non-discrimination provision in the Model Rules of Professional Conduct to serve as a model for state regulation and law firm policies.¹⁶⁶ In my view, discrimination should be prohibited on the basis of race, ethnic origin, gender, sexual orientation and physical disability. Client preference should be no defense.¹⁶⁷ Methods of disciplinary enforcement and sanction are likely to be complex and controversial.

2. Units of law practice should be encouraged (required? by whom?) to develop "managing diversity" workshops and related educational programs to facilitate working groups of multi-cultural, and both gender groups of lawyers to reduce stereotypic conceptions of "otherness" in work groups. Some units might actually

share from clients than the overworked, multi-layered, overly expensive work of big firm practice. William Klein may have been prescient. He was laughed at in 1983, but his words seem to be predicting some of the future.

165. The Center for Public Resources began with a pledge to use ADR by the in-house counsel of the Fortune 500 companies. In 1990 this organization initiated a similar pledge for the leading law firms in the nation. The effectiveness and actual understanding of ADR processes must still be evaluated, but at the level of rhetoric and some law firm culture, "quality management"—a buzz word of business management in the 1990s—has translated into ADR in some legal work management.

166. In fact, many states and local bar associations have already taken the lead here. See, e.g., D.C. RULES OF PROFESSIONAL CONDUCT Rule 9.1 (1992).

167. This is to anticipate a "bona fide occupational qualification"-like defense, as in Title VII.

require lawyers to allocate work in such ways as to maximize the diversity of the working group.

3. Mentoring of lawyers should be developed to include both senior lawyers who are "like" a newer lawyer (demographically speaking) for support and "different" to ensure cross-group interaction and understanding. I have long opposed the notion of single mentors. People learn best from multiple role-models (consider the family with mother and father) to encourage multiple role identifications and role virtuosity. It may also be imperative to have multiple forms of law firm interaction (for both mentor and mentee) if disputes about partnerships or work assignments develop.

4. Specialization should be reduced. While some suggest that associates improve their lateral mobility with increased specialization that they can sell to other units of law practice,¹⁶⁸ narrow specialization may lead to a winnowing of scope and judgment in lawyering, as well as disappointment if vertical promotion does not occur. With greater generalization lawyers should be better able to learn new fields and adapt to changes in the law.¹⁶⁹

5. Lawyers should be required to attend mandatory continuing education in fields outside their own, especially those with general applicability to changes in the way law is practiced, like alternative dispute resolution.¹⁷⁰ An enriched life is a better life for both lawyer and client.

168. See Gilson & Mnookin, *Coming of Age*, *supra* note 7, at 592.

169. I would also require lawyers to read novels, take sabbatical for public service, and travel on the theory that the more lawyers know about other people, the better the lawyers will be. Increased specialization narrows the substantive and human sphere of knowledge for most lawyers. "To be a good lawyer, one has to understand the context within which the law acts and people live and work. You have to have knowledge about society. That knowledge comes from education, from association with other individuals in a variety of contexts, from reading." American Bar Association, *Breaking Point*, *supra* note 8, at 3.

170. In addition, lawyers might be required to attend particular skills workshops outside of any particular area of specialization. Examples of such skills are empathy training (for both client relations and jury work), active listening, question-framing, and problem-solving. See ABA Task Force, *Legal Education and Professional Development—An Educational Continuum*, A.B.A. Section Legal Education & Admissions to the Bar (1992) (the "MacCrate Report"); Carrie Menkel-Meadow, *Narrowing the Gap by Narrowing the Field: What's Missing from the MacCrate Report—Of Skills, Legal Science and Being a Human Being*, 69 WASH. L. REV. (forthcoming summer 1994).

Many jurisdictions now require MCLE. Many of these jurisdictions include particular requirements in certain subjects like ethics and law office management. There may be other subjects, such as ADR, that have meta-applicability to all lawyering. Transactional lawyers still need to know about litigation so that they can advise clients and litigators need to know how particular industries or technologies have changed.

6. In whatever way it can be accomplished,¹⁷¹ work hours should be limited. Clearly, exceptions could be built in for "continuity of service" or particular kinds of matters or work (like trial work).¹⁷²
7. Where possible, lawyering should be structured in teams so that lawyers can substitute for each other.¹⁷³
8. Lawyers should be treated as the investments in long-term (not short-term) human capital that they are. With all of the focus on

171. I am "punting" here on the legal hook by which hours can be regulated for lawyers. Efforts to restrict the number of hours that medical house staff can work (whether consecutively or in total) have been based on public health justifications. The claims are that medical decision-making is impaired when a physician has been on duty for too long (is the same true of lawyers, diplomats, any work-a-holic?), though there appears to be little empirical support for this claim. After many attempts to legislate limited hours in the medical profession, hours are now limited by guidelines issued by Residency Accrediting bodies, the Residency Review Committees of each sub-specialty, or by hospital departments or by university rule-making. Sample hour limitations are no more than 84 hours/week; 12 hours in the emergency room; only every third night on call. Some bodies require a certain amount of rest within particular work periods and also regulate the provision of appropriate resting facilities (some of this is responsive to requests by women doctors to have separate sleeping facilities to avoid harassment). Most regulatory schemes allow exceptions to include continuity of care in particular cases. Ironically, surgeons have been most resistant to these developments, arguing that it prevents continuity of care—strange when surgeons are least likely to provide continuity of care! Information provided by Dr. Neil Parker, Associate Dean, Graduate Medical Education, UCLA School of Medicine. Report on Resident's Working Hours and Working Conditions, Ad Hoc Committee on Housestaff Issues, University of California, 1988. The medical profession has studied the problem of too many work hours through a special committee, the Bell Commission.

Lawyers are "exempt" workers under federal labor standards requirements and thus, limitations of work hours are unregulated. But in the era of "freedom of contract," all workers' hours were unregulated. Do professionals need to organize to achieve the same protections as organized labor and other regulated workers?

172. One of the key difficulties in comparing the legal profession to the medical profession is that lawyers bill by the hour and medical house staff generally do not. Also, medical hourly work limitations do not apply to private practitioners, but mostly to house staff in hospitals who are still in training. Reduced hour requirements must be linked to billing reform measures.

173. When women demand flexible work time or alternative work structures, they are often told that legal work cannot be organized to meet part-time requirements. Yet, in many instances, when lawyers are traveling, on trial, at bar association meetings, or in the military, arrangements are made for "coverage" by other lawyers. This would seem to be good management for the handling of any legal case since lawyers may become ill, die, or become absent from work for any number of reasons. Empirical evidence seems to suggest that part-time lawyers actually are often more efficient and more accessible to clients than other lawyers because they are more organized about their time management. See COMMISSION ON WOMEN IN THE PROFESSION, ABA LAWYERS AND BALANCED LIVES: A GUIDE TO DRAFTING AND IMPLEMENTING WORKPLACE POLICIES FOR LAWYERS (PART II) (1990). This is one of the ways that law is not structured as a business—it fails to use a wide variety of standard business management techniques.

the "bottom line," law firms actually engage in very few business management practices that are designed to retain happy and healthy employees. Law firms often assume that the combination of professional training and some loyalty to the law firm will keep lawyers working productively. Many Fortune 500 companies actually provide more human resource services and benefits to employees, ranging from psychological support services, rotating assignments, mentors, training, flexibility to personal needs, long range planning (both for employees and for clients), broader participation in management decisions (not single partner management or a very small management elite committee), etc.¹⁷⁴

9. Lawyers should be given opportunities for sabbatical, renewal leaves for rest, pro bono work, education and training in an old or new field, time with family or relatives, and family care-giving. Leisure is necessary not only to rest but to renew life and energy and to deepen and broaden our understanding of each other and how the world operates. To the extent that leaves are available to everyone, there will be less stigma attached to those who choose to use them for the important functions of family caregiving. Such policies would make official and clear that many lawyers leave their firms for a variety of reasons, including government service, bar association office, etc., and that all such reasons are ultimately important both for the individuals and for the development of the law practice. If work and family life is to be arranged so that it is truly shared among members and does not disproportionately affect only part of the workforce,¹⁷⁵ leaves of various sorts must be available to all workers in a non-stigmatized manner.

10. Legal work units should experiment with different ways of organizing work. In some recent work on labor union organization, labor scholars have identified different patterns of work and union organizing, that in some cases, support the "difference" notions that women and men might organize work differently. Women workers share and participate more equally in the assignment of work tasks (and combine work and social life) and seem to have less need of hierarchical organization.¹⁷⁶ Whether these alternative forms of

174. For some more detailed suggestions for what sounder long-term management of law firm work would look like, see American Bar Association, *Breaking Point*, *supra* note 8, at 14-27.

175. Many recent studies demonstrate that women still bear an overwhelmingly disproportionate amount of homecare. See ARLIE HOCHSCHILD, *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* 271 (1989); SCHOR, *supra* note 6, at 83-105.

176. For studies on union organization drives among women workers, see Marion Crain,

work organization can be adapted to legal practice remains to be seen¹⁷⁷ but if dissatisfaction rates remains high or productivity decreases, this is one form of innovation that may help.

11. Alternative forms of billing must be experimented with, not only because increasingly clients demand it, but because a variety of billing alternatives may facilitate a greater variety of working arrangements. Alternatives to the hour as billing unit include: (1) volume discounts for repeat business of particular case types or utilization of the same unit of lawyers; (2) flat rates for particular documents or tasks; (3) blended rates that apply one hourly rate for all lawyers and paralegals working on a matter (based on some computation of the "average" value of workers with disparate seniority or expertise); (4) caps on total hours billed (usually with a billing partner managing total cost of a project); (5) tiered contingency fees with the percentage return linked to the size of the award (this is innovative for defense practices); and (6) mixed fee structures that combine a variety of these billing formats.¹⁷⁸ Billing may also vary for the service performed. If for example, some members of a law firm form a specialty unit for a dispute resolution, settlement, or mediation practice,¹⁷⁹ billing may be managed separately on an hourly, matter or result basis. Billable hours are not the only time-honored form of billing. Lawyers began to keep track of hours thirty to forty years ago as a management device to see if some clients should be given a "value break" for work done. It became clear that lawyers who kept track of their time were making more money and most of the profession turned to this

Feminism, Labor and Power, 65 S. CAL. L. REV. 1819, 1849 (1992); Marion Crain, *Images of Power in Labor Law: A Feminist Deconstruction*, 33 B.C. L. REV. 481, 482 (1992); Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155, 1156 (1991) (arguing that unions and labor laws may need to adapt to women's needs in the workplace, both for differences in organizing drives that affect later work culture in the workplace, for actual work practices); see also KAREN BRODKIN SACKS, *CARING BY THE HOUR: WOMEN, WORK, AND ORGANIZING AT DUKE MEDICAL CENTER* (1988); Gillian Lester, *Toward The Feminization of Collective Bargaining Law*, 36 MCGILL L.J. 1181, 1183 (1991).

177. There is, however, some evidence it has worked in legal work dominated by women. See Menkel-Meadow, *Portia*, *supra* note 14, at 56 (discussing a letter from Grace Blumberg to Carrie Menkel-Meadow).

178. See *Beyond the Billable Hour: An Anthology of Alternative Billing Methods*, 1989 A.B.A. SEC. ECON. L. PRAC.; Emily Couric, *Firms Offer Alternatives to the Billable Hour*, 10 ALTERNATIVES TO THE HIGH COSTS OF LITIGATION 95, 95-96 (1992); American Bar Association, *Breaking Point*, *supra* note 8, at 15-18.

179. See Roger Fisher, *What About Negotiation As a Specialty?*, 69 A.B.A. J. 1221 (1983).

manner of billing, with disregard for client needs within relatively expansionary economic times. With the advent of the current recession and with increased business management of legal fees by aggressive in-house counsel, clients have begun to demand other forms of billing, not only for decreased costs but because of the greater need to predict legal costs and share the economic risk of some legal matters that may be highly dependent on lawyer performance. Flexible billing not only meets client needs, it allows for more flexible and efficient work organization. For example, partners are less likely to hoard work at high hourly rates and to delegate more work to junior personnel. Furthermore, attorneys may structure their work for particular projects (such as independent contractor lawyers are increasingly doing) so that junior lawyers may have more control over how much they will work and on what they will work.

12. Related to value-billing, law practice units might utilize more varied work relationships. Should the partnership, as we know it, be eliminated? Many firms now distinguish between "equity partners" and "income partners." Many more lawyers are now willing, and in fact are desirous, to work as contract lawyers, senior counsel, or "of counsel"—appellations all applied to more senior lawyers who wish to stay affiliated with a law firm that will not make them partner.¹⁸⁰ Some firms have been organized as "mixed-compensation" firms where some lawyers are compensated by non-pecuniary means such as working at home, pro bono work, committee work rather than legal work, etc.¹⁸¹ In this era of mergers and dissolutions of law firms, many are experimenting with more varied and looser forms of affiliation and work sharing.¹⁸² An alternative model could lead to the separation of ownership and control over work with smaller numbers of larger units of practice, such as the move from the "Big Eight" in accounting to the "Big Six" with larger corporate firms providing legal services. Given the special requirements of lawyers' conflict of interests rules, I am fairly certain that such centralization and corporate bureaucratiza-

180. There are some issues of gender and minority discrimination here as these jobs are becoming disproportionately feminized. However, there is little data to help us unravel whether women or others are more likely to seek out these jobs or to get pushed into them—another push-pull problem.

181. See Galanter & Palay, *Growth of Large Law Firms*, *supra* note 40, at 809.

182. *Id.* Of course, these more complex forms of affiliation may lead to special conflicts of interests problems. Some of this is currently being negotiated in the "ancillary practice" rules proposed by the ABA and various jurisdictions.

tion of legal services is less likely to happen, but it is conceivable that such work organizations might lead to different distributions of work over greater numbers of "managed" lawyers, working fewer hours, with fewer lawyers working long hours. It is more difficult to apply some of these suggestions to the public interest sector of the bar (or, for that matter, to any salaried lawyer). Incentives to work hard are structured by other needs and priorities.¹⁸³ Not all lawyers will seek to improve the quality of their lives by working fewer hours as not all lawyers value the same things about work or about their lives.¹⁸⁴

13. In short, there should be greater experimentation and flexibility in work organization arrangements, with such work policies as suggested above made available to all members of a working unit for universal applicability and possible evaluation. For those who believe in the market, economic forces will weed out those forms which are less financially viable, but greater variations will give different models a chance to be tested.

14. Legal education should be encouraged (I will not say required) to teach more about the policy and practical issues implicated in being a professional (including law firm management, billing practices, diversity, work organization and the relation of work roles to other life roles).¹⁸⁵ In my view, education and professional development must occur at both the professional educational and continuing education level. Learning must start in law school and continue throughout a professional's life to deal with substantive, personal and ethical issues implicated in being a lawyer.

The key to negotiating the culture clash described in this Paper is to recognize that the legal profession consists of people performing services for other people, whether individually, or "bundled" together in firm or corporate units. Ultimately, the productivity of the profession and satisfaction of its clients will depend not only on economic concerns, though these may seem dominant when particu-

183. As I have written elsewhere, the board game *Careers* captures the choices that lawyers have to work for hearts (love), stars (fame) or dollars (money). All of these incentives can lead to long working hours and lawyers have differential satisfaction rates depending on what they value in work (and in their out of work interests).

184. For a poignant example of how older and younger lawyers may value different things in their work, see George Cooper, *The Avoidance Dynamic: A Tale of Tax Planning, Tax Ethics, and Tax Reform*, 80 COLUM. L. REV. 1553, 1557 (1980).

185. For recent suggestions along these lines, see Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34-35 (1992).

lar forms of legal work are analyzed (such as the large law firm), but on the human satisfaction, creativity and fulfillment that professionals like to think distinguishes their work from other work. Whether the legal profession will continue to be able to offer work satisfaction, service goals and professional pride beyond the earning of high salaries and the peculiar "high" status that lawyers have in this society will depend on its willingness to change some of its entrenched belief systems and perhaps outmoded forms of practice.

