Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts

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I. Introduction

For almost a decade, judges and lawyers have been studying gender bias in state courts. Study commissions have issued reports in more than a third of the states, and additional studies are underway. More recently, federal courts have begun studies into gender bias. The Ninth Circuit issued a report in 1992, and the D.C. Circuit has begun its study. The reports share a single message for those involved with family law: family law judges, practitioners, policymakers, and theorists must confront the problem of gender bias or it will persist well into the next century.

As of September 1991, nineteen states and the District of Columbia were in the process of organizing gender bias studies, collecting data,

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1. See Appendix, infra, at 275.
and writing reports, or implementing recommendations. In this article, I cite from more than ten reports, both for the purpose of illustrating a point and to provide statistical grounding for a point. The reliability of the statistical data may be an issue of concern, since most of the studies were undertaken by lawyers and judges rather than by scholarly researchers. To give readers information needed to assess the reliability of the statistics, I provide an appendix at the end of this article summarizing the survey research methodologies employed by ten task forces whose statistical materials I cite.

Statistical data can never be sufficient to provide a complete picture: the qualitative information of people who have experienced judicial proceedings is also crucial. As a result, I rely on both sources of information for this article. Also, even small amounts of both qualitative and quantitative data can identify issues that might well remain unrecognized otherwise.

I also recognize that, no matter how reliable the statistics presented here, some readers will be unconvincled. For example, when I presented a talk based on this article, a number of the comments fell into two categories: I don't believe you because your numbers are inconsistent with my experience, or I don't believe you because your experience is inconsistent with what I think the numbers are. While it is perfectly natural for people to disagree with much of what I say, I fear that both of these responses indicate an unwillingness on the part of many lawyers and judges to try to learn about issues facing women in the judicial system. If I am right, then these problems will be even more difficult to remedy than I suggest in this article.

The state reports document substantive gender bias problems in areas such as custody, alimony, child support, abuse and neglect proceedings,


6. As Professor Carrie Menkel-Meadow has said,

The common thread of these examples is that "truth" may be found with the statistical "outliers," that the margin may be the core, the periphery may be the center, and the excluded may be the included. At the very least, the truth as we know it may be much more multifaceted than the "included" are willing to acknowledge. Previously excluded voices, by providing innovation and change, can counteract the stagnation and bankruptcy of the status quo. As sociologist Digby Baltzell has written, the strength of the "Protestant Establishment" is in its willingness to accept and adapt to innovation from new immigrant groups. Thus, we, the "immigrants" of exclusion, can offer new ways of knowing. [Footnote omitted.]

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and domestic violence actions. The reports also document gender bias problems in the process of litigation, that is, the ways that judges and male lawyers treat women lawyers and litigants. My focus is the synergy between these two sets of findings. The disturbing reality is that we cannot eliminate gender bias against women litigants unless we also eliminate the biased treatment addressed to the women lawyers who so frequently represent them. I call this the negative synergy of law and lawyering.

The "laboratory" I have chosen is domestic violence in family law disputes. Studies of gender bias in the courts document how courts too often disbelieve credible evidence of domestic violence and discount its seriousness. Too often, judges ignore the substantive law along with the evidence. Too often, their orders hurt women and children who come to court in family law cases.

Why does this happen? Two culprits are usually cited: judicial miseducation about the phenomenon of domestic violence and legal standards which fail to provide adequate protection for battered women. No doubt, judges must be educated about domestic violence, and, no doubt, many laws must be changed. In my view, however, these reforms will be insufficient, if gender discrimination remains in the litigation process.

Both judges and lawyers unfairly discriminate on gender grounds. The gender bias reports document that judges too often fail to listen to or believe women lawyers. They show that male lawyers too often are overly


9. Synergy, or synergism, is the "combined action of two or more agents (as drugs) that is greater than the sum of the action of one of the agents used alone." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2320 (1963).
aggressive against or demeaning of opposing female lawyers, both in and out of the courtroom. The result is predictable: to the extent the judge has the option, a client of a woman lawyer can be at a disadvantage.  

What concerns me is the negative synergy of law and lawyering, that is, the interrelationship of legal standards which permit judges to enter biased judgments against women with the lawyering process which permits men lawyers to exercise a gender advantage, either in court or out. The process is synergistic because the combination is greater than the sum of its parts. In other words, woman litigants face the risk of bad outcomes because they may be subject not only to biased judging but also to a biased lawyering process. The biased lawyering process makes the risk of a bad outcome much greater than the litigant would face without that risk, because the judge and/or the opposing counsel may disfavor the woman litigant because of bias against her attorney.

From the perspective of women clients, two types of solutions seem possible. First, retain male attorneys. Second, eliminate the bias against women lawyers and litigants. At a practical level, the first recommendation is not only an unwarranted insult, it is also implausible. Many battered women cannot afford any representation: they must take whatever is offered, if any.  

10. The fact that judges bring attitudes from outside the courtroom into their judging is, of course, nothing new, although how, why and to what extent continues to be a subject of scholarly interest. See, e.g., Symposium, Contemporary Challenges to Judging: History, Politics, Values, 49 WASH. & LEE L. REV. 323 (1992). I am not arguing here, however, that all judicial decisions are the product solely of one's personal beliefs or attitudes, since it cannot be disputed that judges function in a legal system that provides its own constraints. See Catharine Wells, Situated Decisionmaking, 63 S. CAL. L. REV. 1728, 1737-45 (1990). What I am arguing is that one cannot deny the impact of the norms or values that judges bring to judging and lawyers to lawyering, and among those norms and values are attitudes about the proper place and functioning of women in society and in families. In addition, since men and women are, to some degree, physically different and since we live in a culture in which men and women are treated differently from one another from birth and, in many ways, throughout life, male judges may be disabled from seeing women's experiences empathically. See, e.g., Robin L. West, The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 WIS. WOMEN'S L.J. 81, 85 (1987) [hereinafter Women's Hedonic Lives]; CAROL GILLIGAN, IN A DIFFERENT VOICE (1982).

11. See, e.g., Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System, 8 GA. ST. L. REV. 539, 586 (1992) [hereinafter Georgia Report] ("Many clerks' offices do not have TPO forms [temporary protection order from domestic violence], so a victim is forced to get an attorney. Most domestic violence victims do not have money to hire an attorney; thus, without the forms, there is no access to this remedy."); id. at 687 (inadequacy of child support enforcement services); Florida Report, supra note 7, at 805 ("Some courts also routinely decline to order a more financially secure husband to pay the wife's temporary and final fees and costs, as provided by current law. This deprives the woman of economic resources needed to retain competent legal representation. Without a good attorney, the woman is critically disadvantaged. She may be unable to
attorneys represent battered women; it has been a women’s specialty. At a theoretical level, the first recommendation is an offense to our legal system. Obviously, we cannot defend discrimination, so the only solution is to get rid of it. Before we can do that, however, we must understand more about how discriminatory judging and lawyering have a synergistically negative impact on battered women in court.

II. Battered Women and Family Law

In this society, a woman in an intimate relationship or in a marriage faces a high risk of being hurt by her partner. More than 4,000 women are killed by their partners each year. In 1984, 63,000 incidents of domestic abuse were reported to the police in Minnesota alone. Ninety percent of the victims were women. Researchers disagree on the exact incidence of wife abuse, but the most conservative estimate is that 12 percent of wives are abused by their husbands during the marriage. Estimates go as high as 50 percent or 60 percent of wives. A study conducted at Yale
University found that women reported to emergency rooms a total of 5.6 million serious assaults by someone they knew well over the period 1979 to 1987, for an average of 626,000 incidents a year. Spouses were reported to be responsible for 512,000 incidents, ex-spouses for 1,945,300 incidents, and boyfriends for 1,789,200 incidents.\textsuperscript{14}

Violence against a partner is relevant to family law actions involving divorce on a fault-based ground, custody and visitation, neglect and abuse, and even, in some states, alimony and marital property. When victims of domestic violence come to court, however, there is no guarantee they will get the relief their evidence entitles them to. A witness testifying before the committee studying gender bias in Maryland described it best when she related the reasons a judge gave for denying her petition for a protection order after her husband had threatened her life with a gun:

[The judge] took a few minutes to decide on the matter and he looked at me and he said, "I don’t believe anything that you’re saying.” He said,

The reason I don’t believe it is because I don’t believe that anything like this could happen to me. If I was you and someone had threatened me with a gun, there is no way that I would continue to stay with them. There is no way that I could take that kind of abuse from them. Therefore, since I would not let that happen to me, I can’t believe that it happened to you.

She continued:

I have just never forgotten those words. . . . When I left the courtroom that day, I felt very defeated, very defenseless, and very powerless and very hopeless, because not only had I gone through an experience which I found to be very overwhelming, very trying, an experience which almost cost me my life, but to sit up in court and make myself open up and recount all my feelings and fear and then have it thrown back in my face as being totally untrue just because this big man would not allow anyone to do this to him, placed me in a state of shock which probably hasn’t left me yet.\textsuperscript{15}

\textsuperscript{12} and \textsuperscript{50} percent of women in marriages are abused; more precise statistics are not available, but "using any of these estimates, marriages that include violence against the woman represent a relatively widespread phenomenon in our society.”\textsuperscript{14}

\textsuperscript{14} \textit{Jacqueline A. Horton & Jacobs Institute of Women’s Health, Women’s Health Data Book} (1992).

\textsuperscript{15} \textit{Maryland Report, supra} note 7, at 2–3. \textit{See Women’s Hedonic Lives, supra} note 10, at 94–95:

The danger, the violence, and the fear with which women live and which informs our self-definition are invisible, which is the second reason they are misunderstood. They are not part of men’s world, externally or internally. They are obviously not a part of their internal world: men, unlike women, do not experience the fear of violent sexuality as a part of their self-definition. They will not, because they cannot, understand the kind of defining fear with which women live by reference to shared experience. Furthermore, women’s definitional fear is not a part of their external world: the danger and the threat that causes it are largely—to them—invisible. . . . It is not surprising that the claim that
This metaphorical re-battering is well documented in gender bias reports. For example, many protection order statutes provide that judges may award temporary financial relief, yet judges are reported to routinely deny such relief. Many judges were found to have granted mutual orders of protection, even where the batterer had not sought an order. Every study collected substantial evidence that the credibility accorded women litigants is less than that accorded men litigants.

women's lives are ruled by fear is heard by these men as wildly implausible. They see no evidence in their own lives to support it. This simple fact, more than anything else, I believe, commits women and men to live in two separate realities.

16. **Maryland Report, supra note 7** ("judges were asked whether, '[w]hen granting civil orders of protection, the courts issue support awards for dependents.' Over half of judges (58%) and female lawyers (64%) and nearly half of male lawyers (48%) report that the statement is rarely or never true.'); **Georgia Report, supra note 11**, at 588 ("The victim [of domestic violence] may not know how to stop the violence and obtain the funds to pay rent and buy food. Financial circumstances often make it very difficult, if not impossible, to demand that the batterer leave unless the batterer is ordered to provide support during the separation. Although the Family Violence Act expressly provides for this relief, it is infrequently awarded according to some witnesses.'); **Florida Report, supra note 7**, at 867; **New Jersey Report, supra note 7**, at 150 (According to court statistics, child custody was granted to victims in 82% of the cases where requested, while child support was granted in only 56.3% of the cases where requested. At the same time, visitation was granted in 129.2% of all cases, indicating that judges granted fathers relief they had not even requested on a number of occasions.); **Nevada Supreme Court Gender Bias Task Force, Justice for Women 62 (1988)** [hereinafter Nevada Task Force] ("Although the court has the power to order the respondent [in a temporary protection order proceeding] to pay spousal support, child support, or to make rent/mortgage payments, over 70 percent of the respondents to the judge and attorney survey believed that courts 'never,' 'rarely,' or only 'sometimes' ordered support.'").

17. **See, e.g., Heard v. Heard, 614 A.2d 255 (Pa. Super. 1992)** (error for trial court to sua sponte issue a mutual no abuse order protecting husband when only wife had petitioned court for relief where the statute is clear that a petitioner "must" file a petition and a hearing must be held thereon for the court to have power to issue order); **Georgia Report, supra note 11**, at 586–87 ("Judges too frequently enter mutual orders of protection even where there is no complaint and no evidence of any violent conduct by the victim. In some jurisdictions, the clerk of the court has a form TPO which automatically provides for a mutual order of protection. Thus, even when there is no evidence or even claim of violence by the victim, the TPO restrains the victim equally with the batterer."); **Minnesota Report, supra note 12**, at 878 ("A 1987 Minnesota Court of Appeals decision, Fitzgerald v. Fitzgerald, makes it clear that [mutual orders of protection] are improper. In spite of Fitzgerald, 33% of the male Minnesota judges surveyed by the Task Force and 21% of the female judges report that they sometimes issue mutual OFP's when only one party has petitioned. Male judges in the metropolitan area are much more likely to issue mutual orders (42%) than male judges in other parts of the state (24%)."); **Nevada Task Force, supra note 16**, at 62–63 (use of mutual protection orders increasing, particularly in one county where practice sanctioned by local rule).

18. **See, e.g., Minnesota Report, supra note 12**, at 923 ("In the lawyers' survey, attorneys were asked whether, in their opinion, judges assign more credibility to male or female witnesses. Although a majority of men and women attorneys thought that
The problem seems particularly acute when the issue is a woman’s accusation that a man has been violent toward her. An illumi-
gender played no role in judicial evaluation of witnesses’ testimony, 38% of women attorneys reported that they perceived that judges were more likely to believe men as witnesses. With respect to expert witnesses, 55% of female attorneys and 13% of male attorneys said they believed that judges assign more credibility to male expert witnesses.”); MARYLAND REPORT, supra note 7, at 114 (“the Committee asked judges, lawyers, and court personnel in its surveys whether ‘[j]udges require more evidence for a female litigant to prove her case than for a male litigant.’ Of those with an opinion on the question, more than two-fifths (43%) of female lawyers thought the statement if always, often, or sometimes true, an opinion shared by 22% of female court personnel. Most male lawyers (82%) and male court personnel (81%) believed the statement is never true, but nearly a fifth (17% of male lawyers and 19% of male court personnel) thought it is true sometimes or rarely. All the judges who answered the question denied that the statement is ever true. Judges, lawyers, and court personnel also were asked whether ‘[j]udges appear to give less weight to the testimony of female experts than of male experts.’ Of those expressing an opinion, 43% of female attorneys and 19% of female court personnel agreed that the phenomenon occurs, but with less frequency: 9% of male attorneys and 3% of male court personnel thought the statement sometimes is true. All but 2% of the judges, on the other hand, reported that this never happens.”); Georgia Report, supra note 11, at 706 (“Responses to the Georgia Commission’s questionnaire as well as public hearing testimony revealed the existence of a gender-biased credibility gap in Georgia courts, one that is perceived somewhat differently by judges, attorneys, and court personnel. Judges were more likely to reject the suggestion that there is gender-biased credibility gap in Georgia courts, one that is perceived somewhat differently by judges, attorneys, and court personnel. Judges were more likely to reject the suggestion that there is gender-based inequity in the courtroom. Other court personnel, court clerks and court reporters, while indicating that such bias is not extensive, did report courts in which credibility bias exists. Attorneys, as a group, perceived such bias as widespread and as having a significant impact on court proceedings. There was also a significant difference between how males and females perceived the credibility issue. Females were significantly more likely to perceive such a bias than their male counterparts.”); Achieving Equal Justice for Women and Men in the Courts: Draft Report of the [California] Judicial Council Advisory Committee on Gender Bias in the Courts 30 (1990) (“One of the most profound effects of gender-biased judicial conduct is the effect that it has on the credibility of women.”); New Jersey Report, supra note 7, at 138 (“In the courtroom, ‘credible’ is one of the most important things that a litigant, witness or attorney can be. Survey findings reveal that gender may affect the way credibility is perceived. By an extremely wide margin, more women than men reported that judges sometimes appear to give less credibility to female counsel, witnesses, experts and probation officers than to their male counterparts. With respect to male judges, 41% of women compared to 9% of men reported such situations involving female experts and probation officers; 50% of women compared with 12% of men reported such situations involving female witnesses; 61% of women compared to 15% of men reported such situations involving female counsel. In all categories, the response was divided fairly evenly between ‘rarely’ and ‘sometimes.’ ”); see Obligation to Intervene, supra note 8, at 64–65.

19. See, e.g., Georgia Report, supra note 11, at 706 (“These responses reveal a strong perception by both the bar and the judiciary that, at least in rape and in domestic violence cases, a female comes to court in Georgia bearing a credibility burden, a burden based on a stereotypic view of gender that does not affect males in the same way. The effect of such undue skepticism frequently places female litigants in a position where they must offer more evidence than do male litigants. In cases involving domestic
nating example was provided by a Florida lawyer: 20

I had a temporary hearing asking for an injunction because of past abuse in a domestic matter, and the judge . . . stated that the woman and I were probably overreacting, and that he would not issue such an injunction. Within 24 hours, the man had caught the woman when she was taking out the garbage, tied her up, locked her in a room and threatened to kill her, but fortunately she did not die. He killed himself outside the door.

The list of bad outcomes and bad judging seems endless. Women are put at risk or left at risk for no good reason. Even their children are put at risk, and not only the children who are themselves subject to assault, whether physical or sexual. Children also are hurt when they live in homes where one parent is violent toward the other. 21 The law in many states provides for evidence of intra-parental violence to influence custody decisions and visitation arrangements. 22 Nonetheless, most of the studies of gender bias in the courts report that judges routinely ignore the issue or dismiss as insubstantial the impact of parental violence on children in the household.

In the Maryland survey, for example, judges and lawyers were asked whether “child custody awards disregard fathers’ violence against mothers.” Of those expressing an opinion, about a third of judges and male lawyers agreed with the statement, as did nearly two-thirds of

violence and rape, female victims must often defend themselves against suggestions and accusations that they themselves provoked the act or are exaggerating the extent of the violence.”); ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS: DRAFT REPORT OF THE [CALIFORNIA] JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS Tab 4, at 92–93 (1990) (“Judges were asked if they believe that allegations, declarations, and testimony about domestic violence are often exaggerated. Roughly 75 percent of female judges disagree or strongly disagree; that is, they reject the view that such testimony and allegations are often exaggerated. The corresponding figure for male judges is 47 percent.”); id. Tab 6, at 5 (“Again and again, this committee heard testimony that police officers, district and city attorneys, court personnel, mediators, and judges—the justice system—treated the victims of domestic violence as though their complaints were trivial, exaggerated, or somehow their own fault. Some court officers were reported to have said as much, and some domestic violence victims and advocates imputed to court officers the deliberate intent to convey these messages. Most testimony, however, revealed that domestic violence victims perceived that they were not taken seriously, that they were not believed, and that their safety was of little concern to the justice system. Witnesses repeatedly testified, in effect, that ‘the judge did not seem to understand.’”); see Obligation to Intervene, supra note 8, at 62 (“Gender bias may also be expressed through totally nonverbal communication. A New York criminal court judge told me recently that although the court personnel in her courtroom are usually quite prosecution-minded, this attitude shifts when a woman testifies in a domestic violence case. Then, court personnel’s body language clearly conveys to the judge and jury an acute skepticism.”).

22. Id. at 1062–71.
female lawyers. When Maryland judges and domestic relations masters were asked to respond to a hypothetical custody problem, only half said their hypothetical custody decision would change if they learned that the father had beaten the mother before their separation. In Minnesota, fewer than half of judges said that they enter orders providing for supervised visitation of children in protection order cases.

Individual case reports confirm the negative survey statistics. In one Maryland case, a judge denied the mother custody of two pre-teen daughters because the father’s sexual abuse of the girls was less significant than the mother’s decision to report him, because her reporting ‘showed [that] her hatred for the father took precedence over the children’s need to hold a high image of their father.’ In another Maryland case, a judge required a battered woman to reveal the location of the shelter for battered women where she had taken refuge so that the father could visit the couple’s children. In Minnesota, a witness reported that the judge threatened to order her

to let her child’s father take the boy for visitation even if the father was ‘crawling up the sidewalk drunk.’ According to this woman, the judge was annoyed with her for objecting to his order, which defined ‘supervised’ as having to contact a third party once a day during visitation. The father in this case had a history of heavy drinking and drug abuse and had threatened the mother’s life more than once.

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24. Maryland Report, supra note 7, at 33. In the District of Columbia survey, nearly half of all respondents said no when asked whether judges “take into account violence by the father against the mother when making custody decisions.” That is, the routine practice is for judges to ignore evidence of intra-parental violence. Little seems to be expected of judges on this issue, however, since the writers of the Report concluded that “Overall the court does not appear to be doing as badly as individual case experiences may indicate, but there is certainly room for improvement.” D.C. Report, supra note 11, at 183.

25. Minnesota Report, supra note 12, at 879 (46% of the men and 42% of the women judges “said that they often order supervised visitation during OFP proceedings.”)


27. Maryland Report, supra note 7, at 39 n.48; see Louisiana Task Force on Women in the Courts, Final Report 70–71 (1992) [hereinafter Louisiana Report] (affiant described her custody case, where both she and her daughter had been physically and emotionally abused by husband, who then took child from mother and hid outside the state for six months until the child was returned to the mother with the assistance of a local prosecutor. When mother sought to deny father visitation, judge denied her request on the ground that the child feared the father only because of the mother’s “vindictive influence.” When the father arrived to pick up the child, who was kicking and screaming, he assaulted the mother verbally and physically, breaking her collar bone and shoulder blade.).

In some of the cases documented in state reports, the fact that the mother had suffered abuse was the core of the judge’s decision to award custody of children to the battering father. In Georgia, for example, it was reported that

A frequent complaint to the Commission was the batterer’s tactic in divorce proceedings of “going on the offensive” and attempting to demonstrate that the victim is unstable, is not self-sufficient, or is unable to care for their children. Judges who do not understand the syndrome often fulfill the batterer’s threat and the victim’s worst nightmare by awarding custody to the father, interpreting the victim’s erratic behavior as neurotic.29

Over a quarter of the survey respondents in the District of Columbia study reported that “women who respond to domestic violence by leaving the home” sometimes or often are viewed as “unstable and less fit to have custody.”30

A study on the implementation of reforms in custody law in Washington State looked at how judges and lawyers worked with section 10, a provision in the law that provided, among other things, for special treatment in cases where a child or a parent had been subjected to violence by the other parent.31 Two findings are most troubling. First, almost a third of the attorneys interviewed for the study stated that they “do not necessarily bring up section 10 with clients,” and, even if they learn that section 10 behaviors have occurred, many attorneys do not bring the behavior to the attention of the court.32 One reason for their conduct was their disbelief of their clients’ assertions about domestic violence, and another was their dismissal of certain kinds of domestic violence as insignificant or unimportant.33 Second, judicial officers

30. D.C. REPORT, supra note 11, at 183 (“Women who respond to domestic violence by leaving the home are rarely/never viewed as unstable and less fit to have custody according to 37.5% of the survey respondents; only 8.7% responded ‘often’; 20% said ‘sometimes’; and no one said ‘always’. (Q.38)); see Learning from New Jersey, supra note 23, at 345; Elizabeth M. Schneider, Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse, 67 N.Y.U. L. REV. 520, 557 (1992) [hereinafter Challenges].
31. Jane W. Ellis, Plans, Protections and Professional Interactions: Innovations in Divorce Custody Reform and the Role of Legal Professionals, 24 U. MICH. J.L. REF. 65, 108 (1989). For the study, Professor Ellis and her students reviewed continuing legal education materials and courses introducing the reforms to the bench and bar; analyzed 306 court files where a parenting plan was filed; conducted structured interviews with 30 attorneys from 2 counties and with 12 family law mediators; and observed ex parte proceedings conducted by commissioners and interviewed the commissioners. Id. at 113.
32. Id. at 152–55.
33. Id. at 155–57. Many attorneys reported to interviewers that they did not consider all domestic violence to be serious. For example, some “expressed the sentiment that ‘some inappropriate behavior’ is pretty typical of people going through a divorce and should not be elevated to an official ground for limitation.” One lawyer wouldn’t raise a section 10 issue where “maybe husband had too many occasions to scream at his wife
failed to inquire about section 10 behaviors in any of the cases observed for the study, even in the relatively few cases in which the attorneys brought section 10 behaviors to the attention of the court and even though the statute unambiguously requires the court to check into the matter. 34

III. Women Lawyers and the Litigation Process

The metaphorical rebattering of battered women and their children confounds and distresses people who examine the issue. In response to the state studies, many state courts and legislatures have undertaken judicial education on domestic violence and have reformed protection order and custody statutes. In my view, however, these changes will not cure the judicial system's hostility toward battered women, because they will not eliminate the discrimination against the lawyers who represent the victims. Where a negative synergy of law and lawyering continues, we can only get negative results.

Although precise statistics are not available, it seems likely that women lawyers represent battered women more frequently than men lawyers. In part, the reasons are historical. Women lawyers and law

and may hit her a couple of times. I don't want child custody determined on that." All attorneys were reported to inquire about corroborating evidence before following up on a section 10 claim. Some attorneys, described as being "cautious" about section 10 claims, reported to the interviewers that they intensely cross-examine clients about their claims and require the client to sign an affidavit of truthfulness to "sift out unsubstantiated claims." Interestingly, all the reports of lawyers disbelieving their clients related to those clients claiming that their partner had been abusive; the article did not relate any incidents where lawyers were skeptical of claims by clients that they had not been abusive.

Similar attitudes about the appropriate impact of domestic violence on custody disputes were uncovered by the Georgia study, where witnesses reported: "While judges may restrict visitation with minor children because of alcoholism, drug use, indiscreet relationships, or other criminal behavior, they are not likely to do so because of repeated spouse battering. Witnesses testified that judges disregard or minimize domestic violence in custody disputes and visitation due to the gender-biased belief that these are just 'family squabbles.'" Georgia Report, supra note 11.

The Minnesota study reported that

A number of attorneys, primarily male, responding to the lawyers' survey suggested that women are crafty schemers who use the OFP proceeding to punish men or gain advantage in a dissolution proceeding. . . . Another attorney commented on the lawyers' survey:

A sitting district court judge once told me in chambers while both sides were trying to reach a stipulation in a final hearing for an OFP that "if my wife slept around I'd kick her butt too." The judge went on to deny the woman's petition.

Minnesota Report, supra note 12, at 876.

34. Id. at 157. Of the 306 cases examined for the study, only 18% referred to section 10 conduct.
professors were the first to construct the issue as a legal problem. In part, women’s involvement is a consequence of politics: the battering of women was identified as an issue affecting women’s liberation early in the second wave of the women’s movement. Feminist women lawyers and legal workers helped to create and even today staff many legal programs dedicated to addressing issues affecting battered women. Domestic violence, to these advocates, is evidence of the continuing patriarchal power that men may assert over women. A third and interconnected reason that more women lawyers are involved is personal: many more women than men are the victims of domestic violence. These experiences are likely to influence one’s selection of a field for advocacy, scholarly or representational work.

Many other women lawyers represent battered women because they work in legal services programs or other pro bono services for poor people, and battered women qualify for the services. More women than men work in legal services programs nationally. While feminist politics motivates some of these lawyers, other political causes motivate others. Another group of women lawyers represent battered women because family law practitioners in some communities are predominantly female. As a result, it appears


36. See Naomi R. Cahn, Defining Feminist Litigation, 14 HARV. WOMEN’S L.J. 1 (1991) [hereinafter Feminist Litigation]; ELIZABETH M. SCHNEIDER, LEGAL REFORM EFFORTS TO ASSIST BATTERED WOMEN: PAST, PRESENT AND FUTURE (1990); Legal Images, supra note 13. One indication of the importance of nonlawyer advocates in the representation of battered women in court is an order entered by the Supreme Court of Minnesota in 1991 permitting domestic abuse advocates to attend court, sit at counsel table, confer with the victim, and address the court in protection order proceedings and the sentencing phase of criminal proceedings. In re Domestic Abuse Advocates, No. C2–87–1089, 1991 Minn. LEXIS 34 (2/5/91).

37. Without Gender, supra note 4, at 1687–88.

38. Numerous studies on this point are cited and critiqued in Challenges, supra note 30, at 540 n.80.


40. Excluded Voices, supra note 6, at 41.

41. In a recent observation study of Maryland courts, for example, male attorneys were observed in 70% of cases in which attorneys were observed, and female attorneys were observed in 30% of the cases. When domestic relations cases are broken out, the attorney percentages do not change significantly: 71% male and 29% female. When these attorneys are broken into age cohorts, however, it appears
that more women than men are represented by women lawyers in family law disputes.\textsuperscript{42}

The gender bias studies investigated the treatment of women lawyers in the courtroom, and each came to a similar conclusion: too many judges too frequently give less credit to arguments made by women lawyers. Lawyers have the job of educating the judge about the law and facts involved in the case at hand, and sometimes about the more general legal or social milieu in which the case arises. When judges refuse to receive such education from a particular group of lawyers, the clients represented by that group suffer. Further, the lawyer has the job of "re-presenting" the client's situation and, at least to some degree, the client's interpretation of that situation to the court. When a judge refuses to hear the lawyer's interpretative account, the client often sees and understands exactly what is happening: the client's version of the case is dishonored.\textsuperscript{43}

\textsuperscript{42} This is not to say that men lawyers do not represent women who experience domestic violence. In fact, given the prevalence of domestic violence, it is likely that most men lawyers as well as most women lawyers do indeed represent battered women. The question is whether they do so knowingly. Women who staff domestic violence legal assistance programs serve only those clients who have already identified domestic violence as a problem, or, typically, the clients would not be eligible for service by the programs. Legal services staff attorneys and private lawyers in non-pro-bono cases do not have the benefit of pre-screening, either by the client or the professional staff of a domestic violence center. Thus, they may not know that a client is having problems with domestic violence and may not, as a result, present evidence on that aspect of her life in court, even where it is relevant and accepted. The client may be in substantial denial about the violence and not assert it as an issue to her lawyer. Further, many judges, lawyers, and clients won't identify the phenomenon as occurring in a particular case because of denial or, perhaps, what Martha Mahoney has called "the fiction of exceptionality," i.e., the notion that battering is such an unusual and extreme phenomenon, it isn't the term to apply to the situation of the particular woman involved here. \textit{Legal Images}, \textit{supra} note 13, at 3; see \textit{Women's Hedonic Lives}, \textit{supra} note 10, at 94-96.

\textsuperscript{43} An unscientific but interesting example of the engagement of women lawyers on domestic violence issues is provided by the \textit{Casey} case. Opponents of the spousal notification provision in the Pennsylvania statute tested in \textit{Planned Parenthood v. Casey}, 112 S. Ct. 2791 (1992), argued that the requirement imposed an undue burden on battered women. The opponents filed three briefs signed by a total of eleven lawyers. All but three of the lawyers were women. Proponents of the provision filed two briefs. Six of the seven signing lawyers were male.
What evidence is there in the gender bias reports that judges refuse to consider the assertions and arguments of women lawyers more frequently than those of men lawyers? Some of the evidence specifically addresses credibility. For example, in the Maryland study, 60 percent of the female litigators who answered the question reported that judges often or sometimes "appear to give less weight to female attorneys' arguments than to those of male attorneys." Eleven percent of male litigators and courtroom personnel agreed. In Louisiana, 36 percent of female attorneys and 12 percent of male attorneys reported that they thought that judges "attributed more merit to the arguments of men as opposed to those of women lawyers." Two-fifths of female attorneys in an Indiana survey believe that their statements are given less weight by judges than are the statements of male attorneys.

Nearly 40 percent of the female attorneys responding to the Ninth Circuit study reported that judges cut off the arguments of women counsel while allowing men more time, a figure echoed with almost precise agreement in the D.C. study. According to the D.C. report,

Through the survey, the Task Force attempted to measure one tangible form of behavior that may indicate lack of respect—how often an attorney is interrupted by the judge during court proceedings. The underlying rationale was that consistent interruptions may affect an attorney's ability to present a cogent argument, may be used to fluster the attorney, and generally denigrate the attorney by indicating lack of ability. Twenty-one percent (21%) of all respondents agreed that "judicial officers interrupt female lawyers more than male lawyers". (Q. 5). Forty-three and one-tenth percent (43.1%) of female respondents and only 5.8% of male respondents agreed.

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44. **Maryland Report**, supra note 7, at 260.

45. **Louisiana Report**, supra note 27, at 116. A female Louisiana attorney described an incident in which a male judge "repeatedly referred to the lawyers as 'gentlemen,' and address[ed] all comments to her associate, in spite of her status as lead counsel." See Id.


47. **Ninth Circuit Task Force**, supra note 3, at 52–53. An attorney in Louisiana provided an illustrative incident about a pre-trial conference involving herself, 5 male lawyers and a male judge: "They were all men and as usual, one side was explaining their version . . . of the case. . . . My turn came, and I was halfway through my theory when the judge interrupted me and said, 'Oh, come on now; shut up. Let's hear what the men have to say.' " See **Louisiana Report**, supra note 27, at 116.

In Georgia, a quarter of white women attorneys and over half of minority women attorneys reported that they perceive judges as treating them less respectfully than they treat male attorneys. A tenth of all women attorneys in the Georgia study reported that they believed the judge had ruled adversely to their client because of the lawyer’s sex. Nearly a third of minority women attorneys reported observing discrimination in the outcome of a case directed against another woman attorney; the same holds true for about 10 percent of the white women respondents.

In addition to evidence that judges overtly impugn the credibility of female counsel, the reports document the many indirect ways that judges accomplish the same task. For example, judges use demeaning or overly informal forms of address with women lawyers, too frequently behave as if they are ignoring the arguments of women lawyers, too frequently comment on their attire, or their marital, parental, or pregnant status. Such conduct

distracts those who are its targets from the task at hand and undercuts their professionalism and credibility. As female attorneys who have experienced these behaviors wrote to the task forces: “It appears obvious that whatever the outcome of the case, such trivializing discriminatory remarks pose an additional burden upon a woman attorney, requiring her to overcome needless obstacles and irritants not encountered by the men.” “It disrupts the

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49. State Bar of Georgia Special Committee on the Involvement of Women and Minorities in the Profession, The Effect of Gender and Race on the Practice of Law in Georgia 110–11 (1991) [hereinafter Effect of Gender]:

[A] quarter of white women and over half of minority women perceive judges as treating them less respectfully than they treat male attorneys:

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<thead>
<tr>
<th>JUDGES</th>
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<th>MINORITY WOMEN</th>
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<td>1.45</td>
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50. See, e.g., Kansas Bar Association, Report of the Kansas Bar Association Task Force on the Status of Women in the Profession 41 (1992) [hereinafter Kansas Report] (“In response to the telephone questionnaire, the most commonly experienced behavior was that of a judge treating a female attorney in a condescending manner in court or in chambers. The survey data shows more than one in four female attorneys, 26%, and one in eight male attorneys, 12%, experienced or observed judges treating female attorneys in a condescending manner. The data shows 14% of all attorneys who took part in the survey had experienced or observed judges treating female attorneys in a condescending manner.”); Louisiana Report, supra note 27, at 121 (28% of women and 8% of men lawyers interviewed reported that they had observed judges using terms of endearment when addressing women lawyers).
attorney’s trial strategy by requiring the attorney to try her gender rather than the case.”

Reports that judges too often accord female attorneys less credibility than their male counterparts should not surprise people knowledgeable in social psychology. Studies repeatedly demonstrate that, in any given setting, women are accorded less credibility than are men.

Given our social conditioning, then, judges must affirmatively train themselves to accord equal credibility to male and female attorneys. The first step is for judges to acknowledge that bias exists and infects their ability to fairly judge arguments presented by female counsel. Unfortunately, most judges deny this possibility. In the Maryland study, for example, 98 percent of judges said that judges “never” “appear to give less weight to female attorneys’ arguments than to those of male attorneys.” This question was answered affirmatively by 60 percent

51. Obligation to Intervene, supra note 8, at 66.
52. 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, 2357 & n. 175 (1992) (“More than two decades of research on gender bias may hold the key to this conundrum [why female minority law professors do less well than male minority law professors]. Social psychologists have repeatedly shown that, when faced with identical resumes from male and female applicants, employers will rate the male applicant more favorably than the female one. Other studies demonstrate that readers evaluate written work more highly when it is authored by a man than when the same words are penned by a woman. Still other experiments illustrate that audiences judge male speakers as more powerful and effective than women who use the same words and mannerisms; that listeners remember more of what a man says than what a woman speaks; and that discussion groups are more likely to accept proposals proffered by men than identical suggestions made by women. . . . Law schools, of course, may perceive minority women as more passive or less articulate than minority men. Scores of studies have shown that subjects respond differently to men and women—even when the two sexes engage in identical behavior. . . . See, e.g., Robert A. Altemeyer & Keith Jones, Sexual Identity, Physical Attractiveness and Seating Position as Determinants of Influence in Discussion Groups, 6 CAN. J. BEHAV. SCI. 357 (1974) (finding that a man was more likely than a woman to get a group to accept a proposal, even when the woman presented the same proposal in identical terms); Dore Butler & Florence L. Geis, Nonverbal Affect Responses to Male and Female Leaders: Implications for Leadership Evaluations, 58 J. PERSONALITY & SOC. PSYCHOL. 48 (1990) (finding that female leaders of a group discussion received more negative and fewer positive responses than male leaders making identical suggestions and arguments); Kenneth J. Gruber & Jacquelyn Gaebelien, Sex Differences in Listening Comprehension, 5 SEX ROLES 299 (1979) (finding that listeners recalled more of a man’s speech than a woman’s speech, even when the man and woman presented the same material in an identical manner); Ellyn Kaschak, Another Look at Sex Bias in Students’ Evaluations of Professors: Do Winners Get the Recognition that They Have Been Given?, 5 PSYCHOL. WOMEN Q. 767 (1981) (finding that when given identical descriptions of award-winning professors, students described the male professors as powerful and effective while labeling the women as concerned and likable.”).
53. MARYLAND REPORT, supra note 7, at 260.
of female litigators, however, so the reality cannot be as clear as the judges indicated.

Even when it comes to observable courtroom conduct, judges perceive no issue where lawyers and courtroom personnel perceive an issue. For example, in Maryland, 29 percent of all lawyers (male and female) who answered the question said that "sexist remarks or jokes are [always, often or sometimes] made [by judges] in court or in chambers." Only 6 percent of judges agreed. 54

Not only trial judges deny the influence of gender bias; so do appellate judges, at least based on who cites the reports. Gender bias studies began appearing in 1983, and from the start, they have included information about legal issues of interest to appellate courts, particularly in the area of family law. In most states, the studies were conducted by task forces appointed by the chief judge or closely associated with the court system. Most reports were distributed to every judge and the findings discussed at bench conferences. Unlike most studies on the workings of courts, then, these studies were publicized within the judiciary.

I recently ran a Lexis search of state and federal cases citing the reports. Since 1983, gender bias studies have been cited in appellate decisions only twenty-four times. Twenty-three judges authored these opinions. Of these, nine, or 39 percent, are female. Only fourteen are male. Only about 10 percent of state court judges are female, so the judges paying attention at all are disproportionately female. I did not do a count of how many cases involved issues on which gender bias reports collected data in the states in which reports have appeared, but the number must be in the hundreds.

While judges exempt themselves from worrying about the impact of gender bias, so do many other law creators, including legal scholars. Another recent Lexis and Westlaw search disclosed only sixty-four articles in which one or more of the reports was cited. Fifty of the sixty-four articles, or 78 percent, were by female authors; only fourteen (22 percent) were by male authors. Many, but not all, of the articles are about subjects studied by gender bias committees: domestic violence, sexual offenses, child custody, divorce reform, child support, marital property, alimony, judicial selection, judicial treatment of women law-

54. The question is not whether judges can recognize the behavior, however; it is only that judges cannot recognize the behavior in themselves. This becomes clear when one considers the responses by judges to the question of whether lawyers make sexist remarks or jokes in court or in chambers. Twenty-three percent of judges with an opinion reported that lawyers often or sometimes do. MARYLAND REPORT, supra note 7, at 255.
yers, and gender problems in the legal profession. Obviously, hundreds of articles on these subjects have appeared since 1983.

The negative synergy of law and lawyering turns on the nature of lawyer-to-lawyer interactions as well as the nature of judge-to-lawyer interactions. Unfortunately, but nearly uniformly, evidence collected by gender studies about women counsel report that interactions with male counsel are even more negative than their interactions with judges.\textsuperscript{55} In the Ninth Circuit study, for example, 67 percent of female

\textsuperscript{55} See, e.g., Kansas Report, supra note 50, at 42 ("The statistics for judges' condescending behavior are almost mirrored by male attorneys' condescending behavior toward female attorneys. One in four female attorneys, 25%, experienced or observed male attorneys treating female attorneys in a condescending manner in court or in chambers. Nearly one in eight male attorneys, 11%, reported experiencing or observing such behavior, and 13% of all respondents reported observing or experiencing such behavior. . . . The numbers drop slightly when considering the respect with which male attorneys treat female attorneys in court or in chambers. One in five female attorneys, 20%, observed or experienced female attorneys being treated with less respect than male attorneys. Almost one in ten attorneys responding to the survey, 9%, and a little more than one in twenty male attorneys, 7%, reported experiencing or observing such behavior.'"); Louisiana Task Force on Women in the Courts, Final Report 121 n.208 (1992) (46% of women attorneys and 19% of men attorneys reported that they observed attorneys using terms of endearment when addressing female attorneys when same language was not used when addressing male attorneys); Minnesota Report, supra note 12, at 928 ("Male attorneys were thought, by all observers, to be more likely than other courtroom participants to use inappropriate terms of address toward female colleagues. Fifty-nine percent of female attorneys and 43% of female judges said that counsel sometimes, often or always address female attorneys inappropriately. . . . The surveys also asked if comments were made about the physical appearance or apparel of women attorneys when no such comments were made about men. Forty-two percent of female attorneys and only 14% of male attorneys said that judges make such comments at least sometimes. Fifty-nine percent of female attorneys and 25% of male attorneys said that other attorneys make comments about physical appearance that often. . . . The lawyers' survey asked if remarks or jokes demeaning to women are made in court or in chambers. Forty-seven percent of women and 13% of men said that such comments are made sometimes or often by judges. Sixty-three percent of female attorneys and 19% of male attorneys reported that such comments are made often or sometimes by attorneys. Twenty-nine percent of female judges and 13% of male judges thought that attorneys make demeaning comments and jokes sometimes or often in courtroom and chambers.").

The Maryland surveys of judges and lawyers included a group of four questions about occasions when disrespectful or demeaning things might be said about women lawyers but not said about men lawyers. Each question asked the respondent to identify if the comment was made by a judge or by a lawyer. In each situation, a much higher percentage of respondents reported that counsel were the source of offensive comments. For example, while 25% of all attorneys expressing an opinion affirmed that judges comment on the personal appearance of women attorneys, 41% said that counsel did so. Similarly, 19% of all attorneys expressing an opinion affirmed that judges address women attorneys by first names or terms of endearment; 34% reported such conduct by counsel.

The perceptions of women litigators highlight the problems. Fifty-four percent of women litigators said judges commented on the appearance of women attorneys; 72% said counsel did so. Forty-five percent said judges addressed women attorneys infor-
judges and 77 percent of female attorneys reported that male counsel cut off or ignored the argument of female counsel. Thirty percent of male judges and 42 percent of male attorneys observed the same phenomenon. In Rhode Island, trained observers watched lawyers and judges interact in courtrooms for fifty-eight hours. They found ninety-six incidents of gender bias, of which 45 percent were attributable to attorneys, and only 31 percent to judges.

It also appears that the problems may be exacerbated by racism. In Georgia, it was found that 37 percent of white women attorneys and 68 percent of minority women attorneys believe that they receive less respect from opposing counsel than do male attorneys. It does not appear that men are blind to the problems: in Georgia, for example, only 76 percent of men attorneys perceive treatment by opposing counsel or attorneys of both sexes to be equal.

Discrimination by male lawyers also infects out-of-court behavior. Both male and female respondents to the Minnesota survey agreed that gender bias is more often encountered outside the courtroom than inside. A woman attorney reported that a male attorney called her a "whore" during a deposition and told her client to hire a "real attorney." The D.C. study found that more than 10 percent of respondents believed that women lawyers received less favorable offers of settlement than men lawyers.

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Mally; 74% said counsel did so. MARYLAND REPORT, supra note 7, at 251, 253; see EFFECT OF GENDER, supra note 49, at 141; New Jersey Report, supra note 7, at 137; Great Expectations, supra note 46 at 970 n.66.

56. NINTH CIRCUIT TASK FORCE, supra note 3, at 54. See Florida Report, supra note 7, at 921 ("Over a third of all attorneys responding to the Florida Bar Survey of Attorneys indicated that male attorneys interrupted the presentation of female attorneys more often than the presentation of male attorneys.").

57. FINAL REPORT OF THE RHODE ISLAND COMMITTEE ON WOMEN IN THE COURTS 12-13 (1987). The evidence collected in gender bias reports on the negative treatment accorded female attorneys by their male counterparts is collected in Great Expectations, supra note 46, at 969-72.

58. EFFECT OF GENDER, supra note 49.

59. Id.

60. Minnesota Report, supra note 12, at 931. The Kansas task force asked attorneys whether they thought "my status or prestige with other attorneys who work elsewhere is high." Only 36% of female attorneys strongly agreed with the statement, while 60% of the male attorneys strongly agreed with it. Nine percent of female attorneys moderately or strongly disagreed with the statement, while 4% of the male attorneys moderately or strongly disagreed with it. KANSAS REPORT, supra note 50, at Appendix A, Attorneys Table 26.

61. D.C. REPORT, supra note 11. An example was detailed in the Kansas study:

A district attorney told me over the phone he would not provide me with exculpatory information on any of my clients, including the aggravated battery case we were specifically discussing. I filed a Motion to Compel and in court, the D.A. denied making the previous statement and said he was following his office policy of open
About a fifth of female lawyers and court personnel reported this perception, and about 5 percent of male lawyers.\textsuperscript{62}

It would be comforting to think that the male attorneys who behave nonprofessionally toward female attorneys are those whose professional lives began when there were few women in legal practice. If that were the case, these problems would be ending soon as a matter of simple demographics. The Ninth Circuit study, however, found that lawyers under forty mirror the views on gender of the lawyers over forty.\textsuperscript{63}

\textit{Kansas Report, supra} note 50, at 29. \textit{See Massachusetts Report, supra} note 7; \textit{Minnesota Report, supra} note 12, at 931.

\textit{Id.} The problems seems to be similar to those in the courtroom: some male lawyers behave more aggressively than appropriate professional standards would suggest. As attorneys in a focus group told the D.C. committee,

Women face attempted intimidation by opposing counsel because opposing counsel often assume that a woman will be more susceptible to such tactics. While the group noted that the decline of civility in litigation is a national phenomenon that cuts across gender lines, there is a perception that women still have to “prove” themselves continually while male lawyers are accepted more easily.

\textit{D.C. Report, supra} note 11, at 95.

Unfortunately, coming up with an appropriate response for the female attorney is not simple either, because women attorneys often are criticized for acting too aggressively, even when they believe they are only responding in kind. \textit{Rand Jack & Dana Crowley Jack, Women Lawyers: Archetype and Alternatives, 57 Fordham L. Rev. 933, 937 (1989)} [hereinafter \textit{Women Lawyers}], for more discussion of the double-bind stereotyping. Some women attorneys, however, garner praise for “appropriate” aggressiveness, such as the attorney who was described by a judge responding to the Maryland study:

During a court deposition a local male attorney referred to (female attorney) as, “‘Honey, why don’t you go shopping while we (men) take care of this.’” (Female attorney), who is by the way an excellent attorney spent the next six months making life miserable for the male attorney by making him respond to numerous pleadings and by extremely aggressive (but appropriate) tactics. In other words, (female attorney) does her own fighting and is well able to take care of herself and is highly respected for it as well as for her competence.

\textit{Maryland Report, supra} note 7, at 244. After reading and rereading this quotation, I continue to be struck by how this judge seems to have been somewhat astonished by this “aggressive” woman. Indeed, he or she may well have thought that his example is the exception that proves the rule that women generally aren’t appropriately aggressive or particularly competent.

\textit{Ninth Circuit Task Force, supra} note 3, at 66–67; \textit{see Learning from New Jersey, supra} note 23, at 333. In an observation survey undertaken in Maryland in 1992, representational patterns of male and female attorneys in the younger cohorts reflect quite closely the representational patterns of male and female attorneys in older cohorts: a much lower percentage of women than men in every age group appeared
IV. The Synergy of Law and Lawyering

The two strands of the gender bias reports, domestic violence and the treatment of female attorneys by judges and male attorneys, start to come together when one thinks about what happens to a battered woman when she goes to court. Two recent Maryland cases illuminate how the negative synergy of law and lawyering can produce indefensible outcomes.

Mr. and Ms. Hanke were divorced in 1990, when their daughter was about three years old. 64 Ms. Hanke was awarded custody and Mr. Hanke was awarded unsupervised visitation for four hours on alternate Sunday afternoons. During one of the Sunday afternoon visits, according to the child, Mr. Hanke was touching her inappropriately. Ms. Hanke reported the matter to the Department of Social Services, which had the child examined. The examination was inconclusive, but abuse could not be excluded. A court-appointed doctor evaluated Mr. Hanke and recommended the child was at risk when visiting her father unsupervised, a recommendation seconded by the attorney for the Department of Social Services and the attorney for the child. The trial court, however, found more credible evidence that Ms. Hanke was overreacting to the situation and that Mr. Hanke posed no danger to the child. The court ordered overnight visitation, supervised only in that one of four persons close to Mr. Hanke would have to be present. 65

Up to this point, the case seems unremarkable. There is a conflict in cases involving personal injury and contract claims, while a higher percentage of women than men in the younger two age groups appeared in domestic relations cases. Only in criminal prosecution were women and men represented in percentages proportional to their representation in the age cohort. WBA COURTWATCH REP. (1993) (copy on file with author). What this suggests, of course, is that employment patterns are not changing rapidly as more and more women enter the profession. If employment patterns do not change, neither will other significant factors affecting women in the legal profession.

65. At about the time the order was entered, the mother moved with the child to Kentucky, and no visitation occurred thereafter. Apparently to punish the mother for moving and not complying with the order for unsupervised visitation, the trial court transferred custody from the mother to the father. Id. According to the appellate court, the trial court erred because:

Where the evidence is such that a parent is justified in believing that the other parent is sexually abusing the child, it is inconceivable that the parent will surrender the child to the abusing parent without stringent safeguards. The fact that the judge does not agree with the parent’s fear is immaterial. This is not a case in which there is no basis for the mother’s belief. Past behavior is the best predictor of future behavior, and Ms. Hanke, while perhaps incorrect, is not unjustified in her belief that there may be some unresolved problems.

Id.
in the evidence about whether the child was abused; the trial court is in the best position to evaluate the conflicting testimony; and the trial court decided that the child's best interests would be served by having overnight visitation with her father.

What makes the case remarkable, however, is the overwhelming nature of the evidence that the court found incredible, particularly in light of the low standard of proof applicable in this type of case, and the suggestions that appear in the appellate court record about why the mother and her lawyer were unable to persuade the court to be convinced by that evidence.

To begin with, Mr. Hanke admitted to sexually abusing Ms. Hanke's older daughter by a previous marriage four years before the divorce, and the evidence of his inflicting excessive punishment on the child was, in the opinion of the appellate court, "overwhelming." Ms. Hanke separated from Mr. Hanke when she learned of the sexual abuse. He pled guilty in a plea bargain in which he agreed to, among other things, supervised visitation with the parties' child, then an infant. He denied that he needed treatment for his conduct toward the older child or for his excessive use of alcohol.

Second, the record contained evidence that Mr. Hanke had physically and sexually abused Ms. Hanke. What the judge made of this evidence is not revealed by the appellate report. What seems quite possible, however, based on the state gender bias studies, is that the judge would have found the evidence incredible and interpreted the mother's willingness to testify about the father's violence toward her as additional proof that the mother was willing to demean the father in every way she could. If the mother was willing to lie to demean the father on one issue, the judge could then conclude, she would be willing to lie on other issues, such as whether the younger child reported being abused.

Third, Ms. Hanke was represented by a female attorney who had displeased the judge, apparently from acting assertively on behalf of her client. According to the appellate court, "It is also clear from

66. Under Maryland law, a judge must deny visitation or provide for a supervised visitation arrangement assuring the safety of the child in any case where the court has "reasonable grounds" to believe that a child has been abused, unless "the court specifically finds that there is no likelihood of further child abuse." Md. Code Ann. Fam. Law § 9–101 (1984, 1991 Repl. Vol.).
67. Hanke v. Hanke, supra note 64.
68. Id. at n.2.
69. In addition, the mother testified that she moved to Kentucky because she had become disabled and could not continue her employment, so being near her family in Kentucky was economically necessary. Id. The trial court, however, apparently disbelieved this testimony and found that the move was undertaken to deprive the father of contact with the daughter. Id.
reading the record that the trial judge had no particular fondness for Ms. Hanke’s attorney. This may be due in part to a Motion to Recuse filed by Ms. Hanke’s attorney prior to the start of the trial, which was denied.”

Again, based on the state and federal gender bias studies, it would not be surprising to find a judge acting antagonistically toward a female attorney who was assertive on behalf of her client. The negative judicial response may well have been intensified by the fact that the female lawyer was representing a battered woman. As a participant in the ABA Wingspread Conference reported:

My area of specialization is domestic violence. . . . Now, one of the things that I encounter is that attorneys are being attacked for representing battered

70. Id. at n.5.
71. For a woman attorney to employ an aggressive litigation strategy may not benefit her client, because aggressive women attorneys are sometimes subject to more of a negative response than a similarly aggressive male would receive. In the Kansas study, for example, three woman attorneys in separate interviews said:

I’ve often felt, all else being equal, that it is an advantage to have a male opponent. I believe judges don’t tolerate behavior that might be at all interpreted as rude or discourteous. On the other hand, it is a fine line between a female being perceived as zealous and aggressive . . . or bitchy.

Cases where my gender has influenced the outcome are legion . . . usually involving a minor advantage gained by my ability to appear “appropriately” feminine. With some judges, I have to avoid appearing strident or aggressive. They reward acceptable demeanor.

I’ve had several divorce cases before a judge who does not treat female litigants or witnesses (even expert witnesses) with the same courtesy or deference he affords men . . . this attitude applies to lawyers, too. If I’m an advocate, he thinks it’s “bitchy.” . . . If I’m firm, he thinks I’m obstinate.

Kansas Report, supra note 50, at 48, 43; see Florida Report, supra note 7. The double-bind phenomenon has been the subject of substantial study. See Women Lawyers, supra note 62, at 937:

Yet for a woman to play the law game as a man does violates sex role norms, a transgression that is negatively judged by others and that can create anxiety in the transgressor. To fit the stereotypical image of an advocate means being argumentative and aggressive, characteristics that are traditionally condemned in a woman. If a woman chooses to reject the usual lawyer image and follow a less combative form of participation, she may be labeled too feminine, and others may doubt her fiber as a tough lawyer. Speaking of the double bind female lawyers face in playing a man’s game while held to standards of feminine behavior, a male attorney testified to the New Jersey Supreme Court Task Force on Women in the Courts:

A woman attorney must walk a fine line between being feminine and being assertive. She is held to a different standard than a man. If she is too feminine she is accused of trying to use it to her advantage and is therefore resented, but if she is equally assertive to her male counterpart, she is accused to being too aggressive. To their credit, most of the women attorneys with whom I have had dealings have been able to walk that fine line, but it is usually with much more pressure than is experienced by a man.
women. The assumption is that I "automatically believe the battering." I know that I am much more critical than just making assumption. 72

What the mother and child experienced at the trial court level, in my view, was the negative synergy of law and lawyering. The trial judge, although subject to a reasonable statute requiring him to take seriously the risk of harm to the child from unsupervised visitation, ignored overwhelming evidence of the father’s potential to commit harm to the child. The trial judge disbelieved the mother and, indeed, accused her of overreacting to information that a second daughter was being abused by the same man. The trial judge was hostile toward the female attorney representing the mother, which may have led the judge to reject arguments made by the mother’s attorney.

In the case of John O. v. Jane O., 73 decided shortly before Hanke, a trial court’s order denying unsupervised overnight visitation with a child was upheld by the appellate court on the basis of evidence quite similar to that in Hanke: a prior episode of admitted sexual abuse by the father involving a different child coupled with a conflicted allegation of sexual abuse by the father against the child of the parties. 74 As would be true of any pair of cases, the difference in result could be explained by differences in the evidence. 75 What must also be noted about the case, however, is that counsel for Jane O. was a male and that Jane O. apparently introduced no evidence indicating that she too had been a victim of abuse by John O. Thus, the negative synergy of law and


I have had a similar experience in a child custody case in which I represented the mother, who had been battered by the father prior to their separation some years earlier. At one hearing, the judge instructed counsel to bring verified financial reports for each party to the next hearing. At the beginning of the next hearing, I mentioned to the court that my client’s statement was ready for submission to the court and started to hand it to the clerk for marking as an exhibit. The male attorney for the father advised the court that he had no recollection of the court’s instruction. The judge’s response was that, in that case, he supposed he hadn’t asked for them. After twenty years of practice, I remain stunned at having been subjected to such a blatant denial of my credibility. Nothing similar has ever occurred in any case where I was not representing a battered woman.


74. Id.

75. When the appellate reports of the evidence are compared, however, the evidence in Hanke and Jane O. seems remarkably similar. For example, while John O. was observed engaging in what was characterized as inappropriate touching of his son, his psychiatrist provided a supportive letter indicating that he was committed to therapy and making progress. What makes the comparison difficult, however, is that the appellate report is by its nature selective.
lawyering which may have influenced the outcome of Hanke was absent from John O., and the outcome was positively related to the evidence. 76

V. Conclusion

A fair reading of the many state and federal studies on gender bias in the courts indicates that women litigants who experience domestic violence suffer again in court because of the negative synergy of law and lawyering. The negative synergy infects other areas of family law as well, such as custody, property disposition, and alimony. Further, although we have some data about minority lawyers from studies such as the one in Georgia, our data is insufficient to fully grasp how the synergy operates when lawyers are of different races.

The implications of the data we do have for the practice of family law are many. Underlying all of them is the question of whether the advantage now held by male attorneys is theirs to keep. The argument is that, in an adversary system, an attorney should represent his or her client zealously. This means that every advantage must be exploited, including those awarded by a social system that favors men over women in leadership roles such as litigator. My reply is that there are some sources of advantage and disadvantage which in fact are not fair game for exploitation, and that sex is one of them. As the Supreme Court recognized in the case of Batson v. Kentucky, 77 our system of justice is perverted when prosecutors select jurors according to race. Similarly, our system of justice is perverted when judges select which argument to accept according to the sex of the advocate or when lawyers decide how professional to be according to the sex of the opposing lawyer.

This symposium was organized to consider three topics: rules v. discretion, extended families, and who should do the work of family law. I think the negative synergy of law and lawyering bears on each topic.

First, caution is essential when we think about entrusting discretionary powers to judges who have been found to discriminate against women litigants, especially when those same judges will not acknowledge the problem. Second, we must question whether judges can learn

76. Maryland is not alone in providing recent exemplar cases. See, e.g., State of New York ex rel. H.K. v. M.S., 592 N.Y.S.2d 708 (1993) (supervised visitation of 3-year-old upheld where allegations of sexual abuse could not be disproved; lead counsel for mother was male and no allegation that mother was abused by father); Coleman v. Coleman, 493 N.W.2d 133 (Minn. 1992) (custodial parent found not to have abducted children under UCCJA where she left state to seek safe haven from emotional and physical abuse of herself and children; counsel for mother was male).

77. 476 U.S. 9 (1986).
enough about the parties to properly exercise discretion when they discriminate in favor of attending to male lawyers and against attending to female lawyers. Third, predictable rule-based regimes, such as child support guidelines, can reduce the opportunities male lawyers and litigants have to negotiate unfairly from a position of unwarranted strength.

Eliminating discretion totally will not eliminate gender-based discrimination, however, because statutes cannot be written that control or pre-determine every credibility issue or interpretive possibility. Further, we may go too far toward standardization and be unable to give due weight to the context in which particular parties operate. Thus, even though a more rule-based regime will reduce the onerous impact of gender bias, it may not solve every problem and it may create some new ones. What we need to do, I think, is to be highly skeptical of any proposal to increase discretion while at the same time insisting that judges start confronting the biased ways in which they work.

The negative synergy of law and lawyering also impacts the extended family questions. For example, when a noncustodial father remarries and seeks a change in custody to his newly created two-parent home, or when a custodial mother remarries and seeks to move with the children to be with her new spouse, we need to watch carefully how their gendered circumstances influence the outcome. It seems fair as well to watch whether the presence of a female or male attorney makes a difference.

On the subject of who should do the work of lawyering, I think some of the answers are clear, as are some of the questions. First, and most obvious, women lawyers are not about to leave the area of family law, so judges and male lawyers must learn not to discriminate. We need better mechanisms for naming and sanctioning discriminatory conduct as well as more emphasis on gender issues in continuing education for lawyers and judges. In California, for example, continuing legal education on gender issues is mandatory.

Second, we need to use extreme caution when we consider taking family law issues outside the realm of courts and into private dispute resolution systems. Given our general social conditioning, the professionals who staff such systems are likely to be just as biased as judges. Because they do not operate in the open, however, holding them accountable is much more difficult.

Third and finally, we need to be aware that poor people have little access to family law professionals and that most of those poor people

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are women. As the gender bias reports document, courts contribute to the problem by failing to award attorney fees in a timely manner or in a sufficient amount. Further, overly aggressive lawyering contributes to the problem because it adds to costs and discourages pro bono attorneys from accepting family law cases. The expense problem could tempt us to conclude that family law disputes don’t belong in the hands of lawyers. Before we succumb, I want us to evaluate the impact of discriminatory courts and lawyers in perpetuating the problem and seek ways of eliminating discrimination.

Difficult problems like discrimination are difficult to discuss. We all would prefer to look the other way. To do so, however, guarantees that the next century will look altogether too much like this one.
Methodological Appendix


Along with its other data collection methodologies, the Task Force contracted with Applied Survey Research to design and implement a survey of judges. The judge survey was sent to a representative sample of 434 judges and an oversampling of sole judges, family law judges, and women judges, but only responses from the representative sample were used in the report, except where indicated. Only statistically significant results were reported, with significance defined as a 95% confidence level. The judge response rate was 73.9%.


The Task Force conducted a census survey of judges and commissioners (n = 101), of court personnel (n = 151), and a combination of a random survey with an oversampling of lawyers practicing in D.C. courts (n = c.1100). Approximately 1,300 surveys were mailed. The response rate for judges and commissioners was 29/101, for court personnel 52/151, and for lawyers 210/1,100. One-third of the judicial respondents were female, and two-thirds male. A slightly higher percentage of female than male lawyers responded to the survey. The Task Force did not determine the representativeness of the respondents.


Three survey instruments were used, one on race, one on gender, and one on the combined effect of race and gender. The instruments are reproduced in the report. All attorneys of color received one of the survey instruments. Minority men (African-American, Hispanic, or Asian) (n = 355) received the race survey. Minority women (n = 219) received the combined survey. A random sample of approximately 35% of white women attorneys (n = 1,000) and 10% of white male attorneys (n = 1,324) were randomly selected to receive one of the survey instruments: half of each group were sent the gender survey and half the race survey. The response rate for all respondent subgroups was approximately 40%, with roughly equal response rates by men (47.9%) and women (52.1%). Approximately two-thirds of the respondents of each sex were white and the remainder minorities. According to the Survey Research Center of the University of Georgia, which analyzed the responses, "A test of significance was conducted for the cross-tabulation analyses. Results were reported as statistically significant when the probability level was 0.05 or less. In most cases, probability levels reached a level of significance much greater than the 0.05 level established for the study."

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Surveys were sent to all trial court judges, court employees, and a sampling of 1,000 attorneys. A total of 753 responses were received. No information was provided in the report about the response rates with respect to each group of respondents or the representativeness of the respondents.


Task Force retained a professional survey research company to conduct an anonymous telephone survey of a randomly selected group of attorneys. The response rate was 198/275 male attorneys, 203/275 female attorneys; when compared with the population of the Kansas bar, the representativeness of the respondents is strong. According to the study, """"[t]he significance of the survey data when extrapolated from the 7,500 Kansas attorneys is accurate within +/- 4% - 5%.'"


Task Force commissioned professional survey researchers to conduct a telephone survey of randomly selected attorneys who had appeared in Louisiana state courts or in chambers within the prior two years. A total of 404 attorneys were questioned. According to the report by Dr. Susan E. Howell of the Survey Research Center of the University of New Orleans (copy on file with author), half of the attorneys were male and half female. They were drawn from all age cohorts, from across the range of years in practice, and engaged in all types of practice. No information was provided on the representativeness of the respondents as compared to all lawyers practicing in the state.

7. **Gender Bias in the Courts: Report of the Maryland Special Joint Committee on Gender Bias in the Courts** 174 (1989).

The Committee retained the Survey Research Center of the University of Maryland at College Park to assist it in designing, implementing and analyzing its surveys. Census surveys were conducted of judges and court personnel, while random samples of male (n = 750) and female (n = 750) attorneys licensed to practice in the state were surveyed. The results have been statistically weighted to reflect the accurate proportions of male/female attorneys in the state at the time: 86%/14%. 80% of judges responded, 49% of court personnel, 54% of male attorneys (n = 292), and 49% of female attorneys (n = 236). The responding judges were representative of all judges with respect to sex, race, and court. The responding lawyers are roughly representative of their groups with respect to age, race and geographic distributions.


Attorney survey was sent to all the registered attorneys in the state. A group of 4,288 of the attorneys
were randomly selected to form a representative sample, stratified by gender and geographic location. . . . Non-metro females were sampled at four times the rate of metro males; metro females and non-metro males were sampled at twice the rate of metro males. Wherever strata are combined in the analysis in this report, responses were weighted to reflect their appropriate proportions in the population as a whole. . . . The sampling error for the total is approximately +/-2% at the 95% level of confidence. . . . The overall response rate for the lawyers' survey was 83.5%. The response rates for the four strata ranged from 82% to 86% with the two non-metro strata having slightly higher rates than the two metro categories. This response rate is very high for mailed questionnaires and the evenness of the response rate across strata is very encouraging. . . . Any bias introduced by non-responses as well as any problems with the validity or reliability of survey items produces error in addition to sampling error. This additional error, unlike sampling error, cannot be estimated.

The judges' survey was sent to all judges and judicial officers, and the response rate was 93%.


Attorneys were surveyed by means of a questionnaire published in a state legal newspaper. Of the 886 questionnaires returned, 867 were usable. Two-thirds of respondents were male, one-third female. At the time, 13% of practicing attorneys in the state were female, so females were overrepresented in the responding population. In addition, approximately 200 attorneys attending regional meetings hosted by women's bar associations responded to a standardized set of questions about the treatment of female attorneys; courtroom treatment of female litigants, witnesses and jurors; and problems in a variety of substantive law areas.


In addition to other data collection methodologies, the Task Force conducted a census survey of all judges and a survey of a probability sample of lawyers who practice in Ninth Circuit federal courts. The judicial response rate was 82% (n=232), above average for a mail survey, and male and female judges were equally likely to respond. The lawyer response rate was 52% (n=3,531), an about average response rate. Male and female lawyers in the Offices of the Federal Public Defenders and U.S. Attorneys were equally likely to respond, but gender differences appeared in response rates among attorneys in private practice, with females significantly more likely to respond, and the survey data were adjusted to account for the differences. "Because the Task Force used a probability sampling approach, administered the survey to relatively large samples, and obtained relatively high response rates, we have good reason to believe that the results are not subject to very large sampling errors." Other measures of reliability also were satisfied.