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AND GOD CREATED WOMAN BUT TO BE A CRIMINAL DEFENSE ATTORNEY?

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I. PROLOGUE

Len: So our task is to come up with an article concerning women criminal defense attorneys in the courtroom. I think an appropriate title would be *And God Created Woman But to Be a Criminal Defense Attorney?* by Leonard Pertnoy & Ellen Podgor.

Ellen: A catchy title, but let's add the words "absolutely yes" to avoid gender bias. You did say by Ellen and Len?

Len: The title merely asks a question. How can that be biased? Further, although it really doesn't matter, I thought I said by Len and Ellen.

Ellen: If it doesn't matter then we can agree to Ellen and Len. OK?

Len: I don't want to say it doesn't matter. I think Len and Ellen is more appropriate.

Ellen: Why is Len and Ellen more appropriate? After all, we both know that I'll do more work on this article than you. Take the footnotes, for example

Len: True, but unique ideas are more important than mere execution, so Len and Ellen is appropriate.

***714** *Ellen*: I find the implication that your ideas are more profound than mine to be a stereotypical belief of gender superiority.

Len and Ellen: It's obvious that we cannot agree, so let's go ahead and write the Article without reference to our names, titles, or gender, and let our reader decide our respective roles.

First Speaker: Now that we've agreed to disagree, why are we writing this Article?

Second Speaker: You mean other than for purposes of tenure and to add to our list of publications?

First Speaker: Yes.

Second Speaker: I believe that real differences exist between male and female criminal defense attorneys¹ and that both male and female attorneys need to be cognizant of these differences when practicing before judges and juries.

First Speaker: I agree. I think it's also important to make criminal lawyers sensitive to these differences and to attempt to understand some of the underlying reasons for these differences, so that hopefully the criminal courtroom will be a place of professional equality.²

Second Speaker: Yes, and also to remove from the courtroom arena gender distinctions that might influence or distort the outcome of a criminal case.³

***715 II. DOES THE FEMALE CRIMINAL DEFENSE ATTORNEY GET THE CASE?**

First Speaker: Now that we've decided why we are writing this Article, I guess we should determine how to approach this massive undertaking.

Second Speaker: Well, perhaps we should start with how the criminal attorney is hired.

First Speaker: Are you saying that there is a difference between the hiring of a male and a female criminal defense attorney?

Second Speaker: Yes. But I'm not referring to the process that law firms use to hire female defense attorneys, but rather the disparity in the number of criminal clients selecting men to represent them, as opposed to women.⁴ Not many criminal clients hire women attorneys to represent them, so I guess there must be some differences in the hiring structure.

First Speaker: If you stop and think about it, the names of many male criminal defense attorneys come to mind; but, there are only a few female criminal defense attorneys of national prominence. Most women attorneys who do enter the criminal arena are in the public sector.

Second Speaker: I think that's because it's a difficult profession for women to enter. For example, the bondsman refers many clients to the criminal defense attorney. You seldom find women bondsmen, and women attorneys are not apt to play the "game" necessary to secure clients from the male bondsmen.⁵

First Speaker: Yes, that's because of the "good ol' boy club."⁶ It has created connections among its members. It's comprised of men who have *716 represented men before and who tell other men of their accomplishments. Thus, the reputation of these men is established and perpetuated in ongoing business relationships.

Second Speaker: So, basically, we're saying that word of mouth, reputation, and connections manifested through the "good ol' boy club" are the basis upon which most people charged with crimes select attorneys, and women have not been a significant part of that process.

First Speaker: So from its inception, there is a stereotypic view which maintains the idea that this is a man's job. That stereotype perpetuates itself in a legal system which is male oriented.⁷ After all, historically speaking, the vast majority of criminal defendants are male.

Second Speaker: Accompanying this view is the belief that a lot of what happens in a criminal case is not just all about how the lawyer handles things in court, but that deals are often made and that connections significantly influence the result. Therefore, those clients who have access to the "good ol' boy club" believe that they are better off having a male attorney than a female attorney, who might not have those avenues available to her. There is a belief that female attorneys don't have access to the system in the same manner and are limited to "in court" or "in office" discussions, as opposed to those discussions that take place at country club bars and racquetball courts.

First Speaker: I guess this all goes back to the very roles men and women have in society. For example, women are seldom given the check in a restaurant. It goes to the man in most instances.⁸

Second Speaker: That's because there is an historical presumption both in our social and legal system that places the male in a superior position.⁹ After all, our system of judicial review is founded on John Marshall's interpretation of the Constitution, a document written by men, including *717 the male term throughout, originally used to govern a society completely run by males.¹⁰

III. STEREOTYPES

First Speaker: Now that we've examined the hiring process, or the lack of the hiring process, of the female attorney, let's consider some of the stereotypic traits associated with women defense attorneys.¹¹

Second Speaker: But examinations of stereotypes really are premised upon a male orientation and conjure up the classic false beliefs, such as the "poor little woman" versus the "bitch." They lack reality and perhaps, by approaching the subject in this manner, we perpetuate these false images. I guess, however, that women do need to be cognizant of these false beliefs if they are going to overcome present gender bias.¹²

First Speaker: Okay, but I don't think we should direct this Article to women readers only. Rather, an examination of these false beliefs will be beneficial to men as well as women in gaining an understanding of the inadequacies of the present system.

Second Speaker: Fine, let's discuss the major impressions and beliefs expressed by others when characterizing what the stereotypical female criminal defense attorney's image is.

First Speaker: Let's list the stereotypes often associated with the female defense attorney.¹³

***718** *Second Speaker:* Well, I guess the ones that we've already mentioned are the "poor little woman" versus the "bitch."

First Speaker: Classically, you also hear comments to the effect that female attorneys are less flexible, tend to personalize situations, are supersensitive and more emotional.

Second Speaker: On the bright side, women attorneys are often considered to be more credible than their male counterparts.

First Speaker: I guess that leaves us with six categories of beliefs.¹⁴ Perhaps by examining each of the stereotypes individually we'll be able to form some generalizations regarding their accuracy or inaccuracy and thus provide assistance to female and male criminal defense attorneys by raising their awareness of just how these misconceptions affect the legal process.¹⁵

Second Speaker: The first stereotype associated with a female criminal defense attorney is the "bitch" concept: the belief that the woman attorney is aggressive, unreasonable, emotional, and volatile.

First Speaker: Yet, when characterizing the male criminal defense attorney, one finds that the traits of aggressiveness and volatility are commonplace, acceptable, and even preferable. When a woman employs these same tactics they appear out of character and unprofessional. The effectiveness of these tactics backfires when used by the female criminal defense attorney.

Second Speaker: I think the "bitch" concept needs definitional clarification. Historically, women fitting this term were seen as picky, overbearing, overconcerned, and overnurturing. For example, the image that comes to mind is that of the overbearing mother demanding, in a whining voice, that her teenage son clean his room,¹⁶ do his homework,¹⁷ wear his ***719** galoshes because it might rain and he'll catch a cold,¹⁸ tie his shoelaces or he'll break his neck,¹⁹ and, yes, watch the undertow.²⁰ Despite these seemingly undesirable qualities, the total image was the admirable one of a caring, concerned, and loving individual. Today, however, in the age of the "new woman," society sees this same woman as aggressive, overly

sensitive, argumentative, and definitely carrying a chip on her shoulder. She sees gender bias in every situation. The present image of the female criminal defense attorney as an uncaring, unloving, cold, calculating, and self-motivated female, however, reflects only unadmirable qualities.

First Speaker: Perhaps there is even some truth in these concepts. Maybe a woman operating in a man's world has to be more aggressive in order to be successful.

Second Speaker: Maybe so, but at what cost? Apparently, by making this transition, the modern woman just might be succumbing to the man's world and giving up admirable feminine qualities. Emotion and sensitivity need to be encouraged within our legal system, which has become robotized without considering the effect that the legal process has on people.²¹ Women attorneys innately have these sensitivities and need to be encouraged to foster these qualities in our system.²²

First Speaker: In contrast to the hard-nosed impression some women criminal defense attorneys convey, others portray the "poor little woman" stereotype. This latter image depicts the woman as being subservient, lacking authority and direction, and appearing helpless.²³ The effect of this image is to cause other persons in her company to render assistance by buying into her apparent inadequacies. She seemingly permits judges *720 and opposing counsel to control the course of events in a trial. She appears shy and demure to the jury. Witnesses appear aggressive when compared to her and her gentle demeanor. When employed successfully this stereotype can result in enormous jury empathy and can achieve benefits beyond the intended expectations of the female attorney.

Second Speaker: From what you are saying, it sounds as if this occurs almost automatically, as if the jury inadvertently seeks to render assistance to a supposed "damsel in distress."

First Speaker: Yes, it's uncertain whether this occurs subconsciously or is but a manipulative tactic of choice by the attorney.²⁴ If it is a tactic of choice, the attorney should balance such a tactic. If she leans too far afield, or fails to be advocating from honest and genuine feelings, the jury will perceive it as a fraud.

Second Speaker: True, and I think this stereotypical belief gives her the benefit of the doubt in close calls. Once she has lost her credibility, however, I think it is more difficult for the female attorney to rehabilitate herself before the jury since they will feel deceived.

First Speaker: In other words, because women's errors are harder to overcome than those made by men, men can make mistakes more easily than women in jury trials.²⁵

Second Speaker: It's not that the errors are so difficult to overcome. It's that the perception one attaches to the actions of a woman are more firmly implanted in the minds of a jury than those of a man.

First Speaker: Although a woman has a more difficult road once her image is ingrained within the minds of a jury, she does have a higher starting plane than the man in that she is believed to be more credible.²⁶

Second Speaker: That explains why, once the jury perceives the female attorney as less credible, it is generally more difficult for her to rehabilitate herself. The jury simply has a higher expectation level because they expect and presume that a woman criminal defense attorney is more believable than a male defense attorney.

***721** *First Speaker:* What is it that makes a woman appear more honest and credible? Is it something historical or innate within our images of the female gender, or is it simply because women are more honest?

Second Speaker: Perhaps? From an historical standpoint it's interesting to observe that society did not expect women to be achievers, and that women appeared to have less at stake in getting ahead than their male counterparts. Women, therefore, tended to draw clearer distinctions between their accomplishments and the truth. There was less need to exaggerate and accommodate for purposes of acceptance.²⁷

Second Speaker: Perhaps it is also because the mother is the one who tells her child to tell the truth. Or, maybe, it is simply that women are innately more believable because they are less likely to void the trust imparted to them. Women are more cognizant of their feelings than men and as such have had greater exposure to understanding those feelings and emotions that form the basis of truth. Therefore, women are held to a higher accountability.

First Speaker: Yes, which also explains another of the beliefs often associated with the female gender, that women are more emotional than their male counterparts.²⁸

Second Speaker: After all, women definitely are raised to express their feelings. It's acceptable for the little girl to cry. The young male, however, is told to "grin and bear it." The female attorney must be strong, for by becoming a defense attorney she is bucking a system that men have dominated historically.

First Speaker: The criminal justice system takes its toll on all its participants. It's very competitive; it's a battle of the fittest; it's a constant test of survival. I don't think you can exist day to day without losing some of the softness. The stresses of the system harden us all. Women reacting to these stresses start from a more emotional perspective and tend to react with more emotion.

Second Speaker: Is this higher degree of emotion a negative or positive?²⁹

***722** *First Speaker:* Personally, I feel that our legal system lacks sensitivity. We tend to be very callous and make decisions that often do not contemplate the human factor. Perhaps the introduction of emotional considerations benefits all by adding understanding to legal theory. In this regard women have much to offer.

Second Speaker: But because a woman is more emotional doesn't mean that she is opposed to using her emotions as a trial technique. As an experienced advocate she should use all tactics that will be beneficial in persuading the jury of her client's cause.³⁰

First Speaker: Here again, in order to guarantee the effectiveness of emotional appeal, the attorney must insure that the jurors believe that she is acting in her normal mode of conduct.

Second Speaker: Yes, emotion must be genuine to be effective.

First Speaker: Closely connected with the emotional stereotype is the belief that the female criminal attorney is supersensitive. Perhaps this is an outgrowth of the female's tendency to appear emotional in certain circumstances.

Second Speaker: I disagree. I think it's more a question of the female criminal attorney's tendency to personalize the situation.³¹

First Speaker: What do you mean by that?

Second Speaker: For example, when confronted with an accusation in court that the present proceedings are disorganized, the female defense attorney will take that to

mean that she is disorganized when no such inference was intended. This personal interpretation tends to lead to conflict and injects personal animosity between the litigants and counsel.³²

***723** *First Speaker:* You're implying a negative quality in your description. I see personalization as something positive in the courtroom. Too often our legal system is seen as impersonal, a scenario that takes place within the cold stone walls of the courthouse. By injecting a personal quality into the trial, the lawyer assists in creating a more realistic setting. The element of supersensitivity that you describe is partly the result of existing gender bias in the courtroom. A woman constantly must be on guard to compensate against it.³³ An example would be a judge calling female counsel "little woman," while referring to male counsel by use of his formal title, thereby distinguishing the woman in the court setting. These seemingly minor differences place a woman in the constant position of inferiority.³⁴ Thus, what you characterize as supersensitivity isn't supersensitivity at all. Rather, it's a rebuttal to continuing gender bias in the trial.³⁵

Second Speaker: It's obvious to me that a cord has been struck. Your supersensitivity is showing.³⁶ You have cited an obvious example, and I agree that such a remark should be viewed with disfavor. Referring to supersensitivity, however, I believe the appropriate example would be the use of equal titles such as "Sir" and "Ma'am" or substantial equivalents. In this example, no attempt at degradation is intended, and respective counsel are referred to equally. Yet, a supersensitive female attorney will still perceive bias.

First Speaker: Having constantly to fend oneself against the barrage of gender bias remarks may result in what you term supersensitivity.³⁷ I think, however, that a woman is justified in feeling the need to examine ***724** statements in every context because so many statements are integrated with gender bias.³⁸

Second Speaker: Unfortunately, what you suggest leads to distortion. Many remarks and statements that are not intended to be derogatory to women are unfortunately interpreted as being such.³⁹ It is to this process that I attach my meaning of supersensitivity.

First Speaker: I guess if there really is no justification for a particular reaction, it is supersensitive. But the realities of the courtroom show that in many instances genuine gender bias provokes the reaction elicited by these women.⁴⁰

Second Speaker: A small concession, but probably accurate.⁴¹ Perhaps, if you would consider being a little bit more flexible, and if we had the opportunity to write a more lengthy article, we could reach an accord.

First Speaker: Are you saying that I'm being inflexible on this issue?

Second Speaker: See, a living example of supersensitivity. I'm dealing with the issue and you're taking it personally.

First Speaker: Or, maybe, I'm dealing with the issue and you're being supersensitive.

Second Speaker: Then let's examine the stereotype that female criminal defense attorneys are less flexible in their role. Perhaps this will provide the answer to our dilemma.

First Speaker: Especially in criminal law, there is the belief that women tend to avoid conflict and thereby take fewer risks, which often ***725** fails to maximize their

client's position. This gives the appearance of a more rigid and conservative approach.

Second Speaker: I'm not sure if I disagree with what you are saying. Women are clearly not as risk-prone as men. For example, if you compare the betting of men with that of women on the television show *Jeopardy*, you'll note that when a man has a daily double he is more likely to bet a greater sum of money than a woman in a similar situation. But whether this applies to the criminal defense world, I'm not certain. Women criminal defense attorneys are individuals who took risks by entering into the male-dominated realm of law practice. Their choice of this avenue, by its very nature, evidences at least some propensity to take risks.

First Speaker: Well then, applying your analogy to the practice of criminal law, it seems that a woman criminal defense attorney is more likely to stay within standard, acceptable, known, and proven theories and tactics. Once committed to a particular strategy or approach, she is unlikely to deviate from it. In contrast, the male is, as you say, likely to "bet it all."

Second Speaker: But does this apply to the female criminal defense attorney who entered a profession that was male dominated?

First Speaker: One does not automatically become a risk-taker merely by entering the profession. Further, I see a distinction between the female prosecutor and the female defense attorney. I view the female defense attorney as being more innovative, often more aggressive, and, by necessity, more willing to take chances. I think the nature of criminal defense work, which often leaves one with little to work with, dictates the need for ingenuity.

Second Speaker: I see the female gender as being more creative, an attribute that lends itself well to criminal defense work. Girls draw and play with coloring books, while boys are outside playing baseball.

First Speaker: Have you ever tried to understand the rules of baseball? If you are familiar with the game then you know how complex and creative it is. Coloring, on the other hand, merely requires that you stay within the lines. Even the colors are dictated by what box of crayons a girl's parents bought her.

Second Speaker: Your inflexibility is showing.

First Speaker: And your supersensitivity is showing.

Second Speaker: Well, I guess we've shed some light on our dilemma.

***726 IV. APPLICATION TO THE CRIMINAL TRIAL**

First Speaker: Having examined these stereotypes, let's see what role they play in the trial.⁴² Do these stereotypes affect how the judge, the jury, or the government perceives a woman criminal defense attorney? And, if they do have a bearing on the trial, should they? How can they be overcome, and how should women and men approach these perceptions to create a gender-neutral courtroom?⁴³

Second Speaker: Do these stereotypes determine how the woman has to act in the courtroom? Do they affect the strategy that she employs on behalf of a criminal defendant? And do they influence the manner in which she tries the criminal case?⁴⁴

First Speaker: Perhaps it would be interesting to review these stereotypes to determine whether they are negative or positive attributes of the female criminal defense attorney. What do you think?

Second Speaker: I think that these stereotypical behaviors and the respective thoughts associated with those qualities break down along the lines of positive behavior and negative behavior. Certainly a woman does not want to be categorized as a “bitch.”

First Speaker: Whether we consider these qualities negative or positive may depend on the method in which they are used. For example, a supersensitive or overly emotional woman could conceivably turn off a jury with these traits and the result could have a negative impact on her client. On the other hand, a woman so perceived could benefit her position, within the trial, if those qualities are favorably received by a jury. For example, if a woman were arguing to save the life of her client in the death penalty phase of a capital case, her emotional appeal would become an asset.

**727 Second Speaker:* Irrespective of gender, a trial attorney must have an awareness and understanding of the emotions of the case and how the jury will perceive those emotions.⁴⁵ The trial attorney, as an advocate, must know how to use those emotions to the advantage of his client.

First Speaker: You do mean his or her client?

V. CONCLUSION

Second Speaker: I guess the bottom line is that a top-notch criminal defense attorney, male or female, is cognizant of all forces that affect the final verdict, whether related to gender or not.

First Speaker: Therefore, it's important for the woman criminal defense attorney to be aware of the stereotypes associated with her position. In addition, she must appraise how these beliefs will affect the trial and adjust her strategy to use them to her client's best advantage.⁴⁶

Second Speaker: Not only does the female attorney have to appraise herself of how these beliefs affect the jury, judge, and overall trial, but, likewise, the male attorney also needs to concern himself with how to respond to these gender-related issues.

First Speaker: So, what we're saying is that a quality trial attorney must consider gender issues, be they stereotype, false or real, when planning his or her case.⁴⁷ The important factor is that one always remember to be oneself.

Second Speaker: After all, genuineness, honesty, and truth are without gender.

Footnotes

[a](#)

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[1](#)

The focus of this Article is to discuss how different stereotypes affect the court presentation by a male and female defense attorney. The authors believe actual differences predicated upon a feminist methodology or approach are gender

neutral. An awareness by an individual of what has been termed “feminist” controls actual methodology. For a more comprehensive discussion of feminist legal method or methodology, see generally Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); C. MACKINNIN, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

2

Differences are not a basis for gender bias. Differences in approach within a legal setting do not justify or warrant a court's blatant, offensive, or nonverbal bias. See generally Note, *Preventing Gender Bias in the Courts: A Question of Judicial Ethics*, 1 GEO. WASH. J. LEGAL ETHICS 775 (1988) (discussion of types of gender bias within court and methodology for curtailing this bias); see also Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988) (assertions of neutrality often use the male norm).

3

The authors have limited their discussion to the effect of female defense counsel on the trial. Equally important, yet not covered in this Article, is the effect of gender on jury deliberations. See generally Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593 (1987) (jurors need to be educated about gender dynamics in the deliberation process to overcome the empirical studies which show that women have a lower participation rate than men during deliberations); see also Nagel & Weitzman, *Women As Litigants*, 23 HASTINGS L.J. 171, 192-97 (1971) (discussing five hypotheses that concern the effect of the juror's gender on male-female treatment in criminal and personal injury cases).

4

Women attorneys today make up only 20% of the legal profession, yet this figure is more than four times the percentage of women in the legal profession two decades ago. See Kaye, *Women and the Law: Creating Profound Social Change*, TRIAL, Feb. 1990, at 50; see also K. MORELLO, THE INVISIBLE BAR (1986) (story of women lawyers from 1638 to the present).

5

The authors are alluding to the fact that gratuities are often a factor in maintaining a continuing relationship between the bondsman and the attorney.

First Speaker: Women are more honest and do not employ this tactic.

Second Speaker: I don't think it's a question of honesty. Rather it's a question of being less experienced. The woman is a new player to this game. The other players don't know what she will do and, therefore, do not trust her. The bondsmen are not convinced that they will receive their gratuities.

First Speaker: The very term “bondsmen” is interesting.

Second Speaker: Perhaps in the future we will have bondswomen or bondspersons.

6

Robert M. Spire, a Nebraska attorney general, criticized the legal profession as being an “old boy club.” Calling for the greater introduction of minority and women attorneys into the trial realm, he stated:

Aside from the moral issue here, minorities and women improve the quality of legal services. For example, minority members who have had to overcome discrimination themselves are sensitive to minorities in a way that lawyers from the dominant

white society may never fully understand. Through this sensitivity, minority members make the profession responsive to all people.

Spire, *Women and the Law: Breaking Up the Old Boy Network*, TRIAL, Feb. 1990, at 57, 58.

7

As stated by Professor Leslie Bender:

Men have constructed an adversary system, with its competitive, sparring style for the resolution of legal problems. In many ways it is an intellectualized substitute for duelling or medieval jousting. Much of legal practice is a win-lose performance, full of one-upmanship and bravado. If it were to turn out that competitive sparring is not the way a majority of women function most effectively, then within patriarchy's terms it could be concluded that women are not well suited for legal practice. But rather than regarding legal practice as fixed, we can question whether a competitive, win-lose approach is necessary and examine how it has been modelled by men in their own image.

Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 7 (1988).

8

See generally Rhode, *The Woman's Point of View*, 38 J. LEGAL EDUC. 39 (1988) (discussing the "male society" in which law has arisen and the implications of a woman's view for legal, social, and feminist theory).

9

After all, most of the shootings in movies do not occur in beauty parlors but in Italian restaurants.

10

The "founding fathers" source of jurisprudence was male-dominated. See generally Brown, Parmet & Baumann, *The Failure of Gender Equality: An Essay in Constitutional Dissonance*, 36 BUFFALO L. REV. 573, 619 (1987).

11

See generally Schafran, *Women in the Courts Today: How Much Has Changed*, 6 LAW & INEQUALITY 27 (1988) (gender bias includes "stereotyped thinking about the nature and roles of women and men").

12

The reader should not interpret awareness as an acceptance of these stereotypes. Both authors believe that stereotyping promotes gender bias and that equality within the judicial system should be the foremost goal.

13

In listing stereotypes, the authors concede that even if these stereotypes were truisms, any listing of real differences encourages set classifications that fail to permit growth dependent on the personal circumstances of the case. As stated by Professor Ann C. Scales:

When we try to arrive at a definitive list of differences, even in sophisticated ways, we only encourage the law's tendency to act upon a frozen slice of reality. In so doing, we participate in the underlying problem—the objectification of women. Through our conscientious listing, we help to define real gender issues out of existence. Our aim must be to affirm differences as emergent and infinite. We must

seek a legal system that works and, at the same time, makes differences a cause for celebration, not classification.

Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1376 (1986).

14

The authors believe that there are many subcategories to these stereotypes. For clarification the authors denominated these groups as the most prevalent categories. For examples of other stereotypes or subcategories that result in gender bias, see generally Eich, *Gender Bias in the Courtroom: Some Participants are More Equal than Others*, 69 JUDICATURE 339 (1986).

15

The authors feel that to truly battle gender discrimination, more than a general awareness is necessitated. There must be reform in substantive law and legal education in order to truly correct existing problems. See generally Schrafran, *Gender Bias in the Courts: Time is Not the Cure*, 22 CREIGHTON L. REV. 413 (1989); Angel, *Women in Legal Education: What It's Like To Be Part of a Perpetual First Wave or the Case of the Disappearing Women*, 61 TEMPLE L. REV. 799 (1988) (excellent study of lack of and disappearing number of women in legal education); see also Cain, *Teaching Feminist Legal Theory at Texas: Listening to Difference and Exploring Connections*, 38 J. LEGAL EDUC. 165 (1988) (description of teaching feminist theory); Schneider, *Task Force Reports on Women in the Courts: The Challenge for Legal Education*, 38 J. LEGAL EDUC. 87 (1988) (New York and New Jersey Gender Bias Reports call for rethinking and reconstructing legal education).

16

Second Speaker: It should be noted that it was never clean enough.

17

Second Speaker: It should be noted that the son never seemed to get it done.

18

Second Speaker: A search of the medical journals reveals no causal connection between wearing galoshes and catching a cold.

19

The authors report that a search of accident reports fails to show that any broken necks occurred as a result of a failure to tie shoelaces.

20

See J. IRVING, THE WORLD ACCORDING TO GARP 474-75 (1st Ballantine Books ed., 1990).

21

According to Professor Suzanna Sherry, women judges differ from male members of the judiciary:

This essay suggests that women judges are identifiably distinct from their male cohorts in three ways. Women judges make a unique contribution to the legal by their presence, their participation, and their perspective. The first two of these aspects of the feminization of the judiciary may decrease in significance as discrimination wanes, but the influence of a feminine perspective is independent of the existence of gender discrimination.

Sherry, *The Gender of Judges*, 4 LAW & INEQUALITY 159 (1986).

[22](#)

See Kean, *Equality in the Judicial System*, CT. REV., Fall 1989, at 4 (“Women judges bring a perspective to the bench that cannot help but make for better justice.”).

[23](#)

The dismantlement of this image is seen in cases such as [Stanton v. Stanton, 421 U.S. 7 \(1975\)](#), and [Orr v. Orr, 440 U.S. 268 \(1979\)](#). See Buker, *How Does the Constitution Constitute Women Citizens?*, 24 GONZ. L. REV. 107, 116 (1988-89).

[24](#)

Oftentimes this stereotype arises as a result of judicial disparity in treatment of male and female counsel. Gender bias studies reflect numerous examples of paternalism by the judiciary. See Schafran, *Eve, Mary, Superwoman: How Stereotypes About Women Influence Judges*, JUDGES J., Winter 1985, at 12, 13 [hereinafter *Superwoman*]; see also Arredondo, *Combatting Stereotypes*, CT. REV., Fall 1989, at 14 (discussion of sexism and racism in the courts).

[25](#)

“[W]omen must prove their competence, men must prove their incompetence.” Mayden, *Warning People at Work*, VAND. LAW., Winter 1990, at 5.

[26](#)

The Florida Gender Study Bias Report indicates that many men believe that they are more credible than women. See *Report of the Florida Supreme Court Gender Bias Study Commission 197-99 (1990)* [hereinafter *Florida*].

[27](#)

Pinocchio was a male.

[28](#)

It is interesting to note that Aristotle in his work RHETORIC finds emotion to be one of the three divisions of persuasion. He describes the three branches as the ethos (the speaker's power of evincing a personal character), the logos (his power of proving a truth, or an apparent truth, by means of persuasive arguments), and the pathos (the power of stirring the emotions of his hearers). RHETORIC AND POETICS OF ARISTOTLE, RHETORIC, Book 1, Ch. 2, 24-25 (F. Solmsen ed. 1954).

[29](#)

Louise LaMothe, a litigation partner with a Los Angeles firm, is quoted as stating: If a woman lawyer begins to argue with another lawyer, it may seem to the judge that the woman is becoming too emotional or agitated. I have also at times seen a woman lawyer's attempts to use drama in the courtroom backfire because the judge thinks it is histrionics and too emotional On the other hand, trying to avoid the sexual stereotype of being an emotional woman is itself a dangerous tactic. If a woman tries to be unemotional, she may be accused of being hard or unfeminine. This label will make her presentation less attractive and perhaps less persuasive. Blodgett, *I Don't Think That Ladies Should Be Lawyers*, A.B.A. J., Dec. 1, 1986, at 48, 49-50.

[30](#)

Of course, one needs to stay within the bounds of the disciplinary rules. See MODEL RULES OF PROFESSIONAL CONDUCT Rules 1.1, 1.2, 8.4 (1983).

[31](#)

Oddly enough, a female attorney criticized other female attorneys for taking comments personally. Suzanne Saunders, a Jackson, Mississippi lawyer, was quoted as saying: "Women lawyers take themselves too seriously. When someone says something sexist, they take it personally. It's not the judges' problem. It's their problem. These remarks should roll off their back like water off a duck!" Blodgett, *supra* note 29, at 53. Saunders stated that "Judges bend over backwards to show me respect." She argued that it is counterproductive to respond to improper comments. "Men think women are too emotional and responding this way only perpetuates that feeling." *Id.*

32

Even concerning their dress, women tend to look upon clothing "as an extension of their personalities, and to let someone else mandate what they will wear is considered by them to be surrender of part of themselves." J. MOLLOY, DRESS FOR SUCCESS 344 (1988).

33

See generally Angel, *Sexual Harassment by Judges: New ABA Code of Judicial Conduct Commentary Provides Specific Prohibition*, 45 U. MIAMI. L. REV. ---- (1991) (provides examples of judges who have solicited sexual favors from lawyers) [hereinafter Angel].

34

A compliment that a woman would welcome in private takes on a different meaning in the courtroom. The expert female attorney is there to carry out a professional obligation. By commenting on her looks when she takes the witness stand or presents her opening statement to the jury, the judge takes her out of that professional context and focuses attention on her as a woman, to be appraised for her appearance rather than her ability.

Superwoman, *supra* note 24, at 15.

35

The Florida Gender Bias Study notes: "Although the legal profession now admits women, it has not fully accepted them. Bias against women lawyers—sometimes subtle, sometimes flagrant—is evident everywhere." *Florida*, *supra* note 26, at 196.

36

Is the speaker the man or the woman?

37

Female judges tend to approach sexist behavior by litigators in the courtroom in a different manner than their male counterparts. "Women judges in this study, perhaps as a consequence of these personal experiences evidence greater attitudinal feminism than men. Women are also stronger in their support of increased political, judicial and social roles for women than men judges." Martin, *Men and Women on the Bench: Vive La Difference?*, 73 JUDICATURE 204, 208 (1990).

38

The National Jury Project reports that some judges speak to male attorneys in a straightforward voice, then switch to a long-suffering tone to respond to a female attorney, no matter what she is saying, implying that only a fool would raise that objection or make that argument. Other judges speak to women in a consistently angry tone, when no anger is warranted.

Superwoman, *supra* note 24, at 15.

[39](#)

Interpretation of remarks by males and females often differ. *See* D. TANNEN, *YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION* (1990) (linguistic comparison of men and women in their conversations and in their interpretations of conversations).

[40](#)

This bias has been documented not only in specific comments by judges and attorneys, but in nonverbal communication that reflects poor attitudes toward the female attorney. Schafran notes:

There are also judges who express their unease with female attorneys in completely unconscious ways, such as listening intently when a male lawyer speaks but looking at the clock and shuffling papers when female counsel speaks. Body language that reveals discomfort or disinterest when a woman speaks has a tremendous impact on a jury: Communications researchers have found that nonverbal messages carry four times the weight of verbal messages.

Superwoman, *supra* note 24, at 15.

[41](#)

Gender bias reports recently conducted in many states document the prevalent gender bias in the courts. *See generally* Schafran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 *JUDICATURE* 280 (1987); *see also* Karlan, *Towards the Elimination of Gender Bias in the Florida Courts*, 11 *NOVA L. REV.* 1569 (1987).

[42](#)

"After a one-year investigation, the New Jersey Task Force, comprised of thirty-one male and female members, found that even though the written law was usually gender neutral, judicial decisionmaking was often influenced by stereotyped beliefs and biases." Note, *Gender Bias in the Judicial System*, 61 *S. CAL. L. REV.* [2193, 2199-2200 \(1988\)](#).

[43](#)

The authors hope that the infusion of the new Code of Judicial Conduct, which incorporates provisions prohibiting sexual harassment by judges both in and out of the courtroom, will be followed with similar provisions in the Rules of Professional Conduct so that gender bias will be combated and the gender distinctions that promote bias in the courtroom will become extinct. *See generally* Angel, *supra* note 33. Any new implementation, of course, must be followed by appropriate enforcement.

[44](#)

Other factors not discussed in this article but which clearly merit consideration are the effect of the gender of the criminal defendant and the stereotypical attitude a judge or jury may have as a result of the gender of the litigant. *See generally* Nagel & Weitzman, *Women as Litigants*, 23 *HASTINGS L.J.* 171 (1971). The Florida Gender Study Bias Report notes: "Witnesses and litigants suffer the effects of gender bias in the courts of Florida. This occurs not just in the way they are treated or mistreated by the courts, but in the ominous way this treatment affects the outcome of cases." *Florida*, *supra* note 26, at 206.

[45](#)

Even clothing must be taken into consideration by a quality trial attorney. For counsel, clothing should be nothing more than a costume that further serves to form an impression to the jury. *See* J. MOLLOY, *THE WOMAN'S DRESS FOR SUCCESS* 116 (1977). The United States Supreme Court validated the argument that the clothing of a defendant can serve to prejudice that individual with the jury when the clothing worn is jail garb. [Estelle v. Williams, 425 U.S. 501, 512-13 \(1976\)](#) (violation of due process to require defendant to appear before jury in jail clothes).

[46](#)

The reader should not interpret awareness of gender bias as an acceptance of a discriminatory court setting. The authors sincerely hope that through proper education the need to reflect upon a biased court setting will be eliminated. Obviously, eliminating gender bias within the classroom is a step towards that goal. *See* Banks, *Gender Bias in the Classroom*, 38 *J. LEGAL EDUC.* 137 (1988). Banks believes that sexism in the classroom probably has a strong correlation to gender bias in the courts. *Id.* at 137-38.

[47](#)

It is especially important that one not limit his or her views of feminist influence to set categories. As Angela P. Harris points out, one should not rely on “gender essentialism—the notion that a unitary, ‘essential’ women's experience can be isolated and described independently of race, class, sexual orientation and other realities of experience.” Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STAN. L. REV.* 581, 585 (1990).