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**All Lawyers are Equal, But Some are
More Equal Than Others:
Incivility Towards Female Attorneys from
Within the Legal Profession.**

By Amelia Clegg, Esquire



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**All lawyers are equal, but some are more equal than others: incivility towards
female attorneys from within the legal profession.¹**

I. INTRODUCTION

The Illinois Supreme Court Commission on Professionalism released its 2021 survey on civility in the legal profession.² The Commission communicated the survey via email to 20,000 lawyers in the state of Illinois and handled all correspondence with participants.³ The commission's 2021 report outlined a litany of unprofessional conduct including verbal abuse and swearing, unwarranted interruptions of other attorneys, bad faith representations and sexist, racist or ageist comments. The 2021 survey found that Illinois attorneys experienced less incivility than those surveyed in 2014, thus indicating a downward trend in incivility within the Illinois Bar. However, this was not the case for everyone. In particular, the survey found that 12.3% of respondents had been the target of sexist comments. In 2014, that number was only 2.8%. Even though the general trend of incivility was down, sexism was up.

2022 saw sexist remarks levied at Justice Ketanji Brown Jackson, the newest member of the Supreme Court. Justice Jackson was subjected to a particularly unpleasant blend of sexism and racism (commonly referred to as “misogynoir”) when she was nominated by President Biden to ascend to the Supreme Court. Justice Jackson's qualifications are impeccable. She graduated *magna cum laude* from Harvard University, then attended Harvard Law School, where she graduated *cum laude* and was an editor of the *Harvard Law Review*.⁴ She served as a law clerk

¹ The views expressed herein are the author's own.

² The National Center for Principled Leadership & Research Ethics University of Illinois Urbana-Champaign, *Survey on Professionalism: A Study of Illinois Lawyers 2021*, The Illinois Supreme Court Commission on Professionalism, 2021.

³ *Id.*, at p.1

⁴ <https://www.whitehouse.gov/kbj/> (last accessed on June 28, 2022).

for the Supreme Court justice she will replace, Justice Breyer, in addition to clerking for federal judges in the two lower ranks of the federal judiciary.⁵ She has worked as a Vice Chair and Commissioner on the U.S. Sentencing⁶ Commission, as a federal public defender, and as a lawyer in private practice. As a judge, she has served on the United States District Court for the District of Columbia and, more recently, on the U.S. Court of Appeals for the D.C. Circuit.⁷ During her confirmation hearing, Judge Jackson was repeatedly interrupted while answering questions⁸, her judicial record on sentencing offenders convicted of child pornography offenses was mischaracterized⁹, and she herself was subject to sexist descriptions. For example, Senator Sasse referred to her as “incredibly likable and winsome.”¹⁰ Even though this assessment is purportedly positive, it is hard to imagine such a dubious accolade being attributed to a male nominee.

This paper will examine recent studies, case law and anecdotal evidence which collectively establish that the legal profession contains a strong animosity towards women, focusing on the treatment of female attorneys by male attorneys and the judiciary (both male and female). This paper will also examine the connection between the presentation of female lawyers in the media and how this creates fertile soil in which sexism continues to thrive and grow.

II. SEXISM AS INCIVILITY

Sexism has been defined as “individuals’ attitudes, beliefs, and behaviors, and organizational, institutional, and cultural practices that either reflect negative evaluations of

⁵ <https://www.judiciary.senate.gov/judge-ketanji-brown-jackson> (last accessed on June 28, 2022).

⁶ *Id.*

⁷ *Id.*

⁸ Patricia McKnight, *Issues of Race, Gender Cited as Senators Continually Interrupt Jackson*, NEWSWEEK, Mar. 23, 2022.

⁹ *Fact Check: GOP misrepresents Ketanji Brown Jackson’s views*, LOS ANGELES TIMES, Mar. 22, 2022

¹⁰ Peniel E. Joseph, Opinion, *The racist, sexist mudslinging at Ketanji Brown Jackson is disgraceful*, CNN, Mar. 23, 2022, <https://www.cnn.com/2022/03/23/opinions/ketanji-brown-jackson-hearing-racism-joseph/index.html> (last accessed on June 28, 2022).

individuals based on their gender or support unequal status of women and men.”¹¹ Although sexism is traditionally viewed as antipathy towards a defined group based on their sexual characteristics, this discounts the softer, yet equally impactful, indicators of a lack of parity between men and women, which are usually not recognized because they are couched as compliments. For example, a female attorney being asked to organize a cocktail party for her law firm’s partners because “girls are so much better at that sort of thing” sounds like a positive statement, and yet in fact serves to reinforce and perpetuate a stereotypical presentation of women.

This paper examines sexist incivility towards female attorneys from within the legal profession through the lens of ambivalent sexism theory. Ambivalent sexism theory proposes that sexism is a multidimensional construct comprised of antipathy towards women, termed hostile sexism, and simultaneously presents evaluations of women that are subjectively positive, yet encompassing beliefs that women are weak, in need of protection, and crucial to making men complete and fulfilling their desires, termed benevolent sexism.¹² Hostility and benevolence toward women are complementary ideologies, as evidenced in their positive correlation.¹³

i. Hostile sexism

¹¹ Swim, J. K., Hyers, L. L. (2009). Sexism. In Nelson, T. D. (Ed.), *Handbook of prejudice, stereotyping and discrimination* (407–430), at 407.

¹² See generally Glick, P., & Fiske, S. *The Ambivalent Sexism Inventory: Differentiating hostile and benevolent sexism*, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 70(3), 491-512 (1996); see also Glick, P., Fiske, S., Mladinic, A., Saiz, J., Abrams, D., Masser, B., Adetoun, B., Osagie, J., Akande, A., Alao, A., Annetje, B., Willemsen, T., Chipeta, K., Dardenne, B., Dijksterhuis, A., Wigboldus, D., Eckes, T., Six-Materna, I., Expósito, F., Moya, M., Foddy, M., Kim, H., Lameiras, M., Sotelo, M., Mucchi-Faina, A., Romani, M., Sakalli, N., Udegbe, B., Yamamoto, M., Ui, M., Ferreira, M., & López, W. *Beyond prejudice as simple antipathy: Hostile and benevolent sexism across cultures*, JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 79(5), 763-775 (2000).

¹³ Glick, P. & Fiske, S., et al. (2000), at 765.

Hostile sexism aims to preserve men's dominance over women. Women who challenge traditional roles are viewed as a threat under this belief system. Hostile sexism overtly keeps women in a subordinate position and is even a precursor for sexual harassment and violence toward women.¹⁴ Hostile sexists tend to think about gender as a zero-sum game, a "battle of the sexes."¹⁵

i. Benevolent sexism

Benevolent sexism describes "a set of interrelated attitudes toward women that are sexist in terms of viewing women stereotypically and in restricted roles but that are subjectively positive in feeling tone (for the perceiver) and also tend to elicit behaviors typically categorized as prosocial (e.g., helping) or intimacy-seeking (e.g., self-disclosure)".¹⁶ Benevolent sexism is a subjectively positive orientation of protection, idealization, and affection directed toward women that, like hostile sexism, serves to justify women's subordinate status to men.¹⁷ Although the word "benevolent" suggests that such sexism may confer some benefit on women, the opposite is true.

As Glick and Fiske themselves argued:

We do not consider benevolent sexism a good thing, for despite the positive feelings it may indicate for the perceiver, its underpinnings lie in traditional stereotyping and masculine dominance (e.g., the man as the provider and woman as his dependent), and its consequences are often damaging. Benevolent sexism is not necessarily experienced as benevolent by the recipient. For example, a man's comment to a female coworker on how "cute" she looks, however well-intentioned, may undermine her feelings of being taken seriously as a professional.¹⁸

¹⁴ Begany J. J., Milburn M. A., *Psychological predictors of sexual harassment. authoritarianism, hostile sexism, and rape myths*, PSYCHOL. MEN MASCULI. 3 (2000).

¹⁵ Erin C. Cassese, Tiffany D. Barnes and Mirya Holman, How 'hostile sexism' came to shape our politics, THE WASHINGTON POST, Oct. 2, 2018.

¹⁶ Glick, P., & Fiske, S. (1996), *supra*, at p.491.

¹⁷ Glick, P., Fiske, S. et al., (2000), *supra*, at p.763.

¹⁸ Glick, P., & Fiske, S. (1996), *supra*, pp.491-492.

Benevolent sexism remains a current issue. A recent survey of 7,210 men working in 13 countries conducted by the Harvard Business Review, which asked when and how men at all levels are likely to interrupt a sexist comment in the workplace, found that between 29% and 74% of all men, depending on country, indicated they would likely respond with one or more of the four benevolently sexist options (out of 23 total options) — such as, for example, “I would ask my colleague to be more protective of women,” or “I would comment that women are easier to deal with than men.”¹⁹ These comments masquerade as compliments but in reality serve to reinforce negative stereotypes about women – or, in the words of Helena Kennedy QC, “Patriarchy while expressing admiration for femininity actually holds it in contempt”.²⁰

ii. Sexism as a form of incivility

This dichotomy of competing sexist attitudes was encapsulated in Deborah Rhode’s 2001 report *The Unfinished Agenda: Women and the Legal Profession*.²¹ Rhode, director of the Center on the Legal Profession at Stanford Law School, stated that female attorneys face a “double standard and a double bind”.²² They risk criticism for being too “soft” or too “strident,” too “aggressive” or “not aggressive enough”.²³ As noted in a recent article for the American Bar Association, civility is not the same as simply having good manners.²⁴ Civility is a social norm and a standard “of behavior... based on widely shared beliefs [about] how individual group

¹⁹ Negin Sattari, Sarah H. DiMuccio, Joy Ohm, Jose M. Romero, *Dismantling “Benevolent” Sexism*, HARV. BUS. REV., Jun. 8, 2022, available at <https://hbr.org/2022/06/dismantling-benevolent-sexism> (last accessed on June 28, 2022).

²⁰ Helena Kennedy QC, *Eve Was Shamed*, Penguin Random House (2018).

²¹ Deborah L. Rhode, *The Unfinished Agenda: Women and the Legal Profession*, AM. BAR ASS’N, 2001, available at <http://womenlaw.law.stanford.edu/pdf/aba.unfinished.agenda.pdf> (last accessed on June 28, 2022).

²² *Id.*, at 6.

²³ *Id.*

²⁴ Jayne R. Reardon, *Civility as the Core of Professionalism*, AM. BAR ASS’N, 2018.

members ought to behave in a given situation”.²⁵ Civility “specif[ies] what people approve and disapprove within the culture and motivate[s] action by promising social sanctions for normative or counternormative conduct”.²⁶ The Model Rules of Professional Conduct state general notions that attorneys should be fair to opposing counsel, refrain from engaging in prejudicial conduct toward the administration of justice, and maintain the decorum of the tribunal.²⁷ Model Rule 3.4 states that an attorney should act with fairness and courtesy to opposing parties and counsel by not unlawfully obstructing access to evidence, not falsifying evidence, not knowingly disobeying obligations under the rules of the court, and not making frivolous discovery requests.²⁸ In addition, some states and local bar associations have adopted their own standards for civility that are more specific or detailed than the Model Rules. The New York State Standards of Civility for the legal profession sets out some “guidelines intended to encourage lawyers, judges and court personnel to observe principles of civility and decorum, and to confirm the legal profession’s rightful status as an honorable and respected profession where courtesy and civility are observed as a matter of course”.²⁹ In 2016, the American Bar Association (“ABA”) passed a Resolution 109, which made it a violation of professional responsibility to discriminate or harass in conduct related to the practice of law.³⁰ The resolution was sponsored by the ABA’s Standing Committee on Ethics and Professional Responsibility, the Section of Civil Rights and Social Justice, the Commission on

²⁵ Fehr, E., and Fischbacher, U. 2004. *Social norms and human cooperation* TRENDS IN COGNITIVE SCIENCES, 8(4): 185–190, 185.

²⁶ Reno, R., Cialdini, R., and Kallgren, C. 1993. The transsituational influence of social norms. JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY, 64(1): 104–112, 104; *See generally*, Jamieson, K.H., Volinsky, A., Weitz, I., and Kenski, K., *The Political Uses and Abuses of Civility and Incivility*, The Oxford Handbook of Political Communication, Jan. 2015.

²⁷ Gary L. Gassman and Elizabeth Olivera, *Defining Civility as an Attorney*, AM. BAR ASS’N, January 21, 2020.

²⁸ Model Rules of Professional Conduct r. 3.4 AM. BAR ASS’N (2016).

²⁹ 22 NYCRR Part 1200, Appendix A

³⁰ Lorelai Laird, *Discrimination and harassment will be legal ethics violations under ABA model rule*, AM. BAR ASS’N JOURNAL, Aug. 8, 2016.

Disability Rights, the Diversity & Inclusion 360 Commission, the Commission on Racial and Ethnic Diversity in the Profession, the Commission on Sexual Orientation and Gender Identity, and the Commission on Women in the Profession.³¹ Despite this robust mandate, instances of sexism against female attorneys remain rife in the courtroom and in the workplace, as will be shown in the analysis below.

III. HOSTILE SEXISM

“Women have very little idea of how much men hate them” – Germaine Greer.

There are many reported instances of hostile sexism directed towards female attorneys in the courtroom that predate the ABA’s Resolution: *Principe v. Assay Partners*³² (where a male attorney was sanctioned for calling female attorney “little lady,” “little mouse,” and “little girl” repeatedly during a deposition); *Matter of Schiffi*³³ (where the court held that an attorney’s sexist epithets toward female opposing counsel’s anatomy and gender were inexcusable, intolerable and violated DR 1–102(A)(7) because they reflected adversely on the attorney’s fitness to practice law); *Mullaney v. Aude*³⁴ (where a male attorney was sanctioned for making a sexist remark to female deponent and also addressing a female attorney as “babe,” during a deposition); *Cruz–Aponte v. Caribbean Petroleum Corp.*³⁵ (where the court found that an attorney’s sexist remark to female opposing counsel during a deposition that “You’re not getting menopause, I hope” violated Rule 4.4).

³¹ *Id.*

³² 586 N.Y.S.2d 182, 184–88, 191 (N.Y. 1992).

³³ 190 A.D.2d 293 (N.Y. App. Div. 1993).

³⁴ 730 A.2d 759 (Md. Ct. Spec. App. 1999).

³⁵ 123 F. Supp. 3d 276 (D.P.R. 2015).

Such nakedly hostile sexism has not dissipated since Resolution 109 was passed, and yet it has proven difficult to prohibit. In *Martinez v. O'Hara*³⁶, an attorney was held to have used language which demonstrated a gender bias towards a female judge by a State Appellate Court but subsequently the State Bar Court found that such language was protected by the First Amendment. The attorney in question, Benjamin Pavone, represented a plaintiff in an employment case.³⁷ Some of the claims eventually went to trial, where the plaintiff was awarded \$8,080.³⁸ Mr. Pavone then filed a motion for attorney's fees which was denied.³⁹ Mr. Pavone appealed that order.⁴⁰ The notice of appeal referred to the ruling of the female judge, from which plaintiff appealed, as "succubistic".⁴¹ For those who are not well versed in their 14th century English insults, "succubus" means a female demon who is fabled to have sexual intercourse with sleeping men.⁴² The sexism is clear within the root meaning of the word (which comes from the late Latin *succubae*, meaning "harlot", and from the Latin verb *succubāre*, meaning "to lie beneath").⁴³ California's Fourth District Court of Appeal affirmed the lower court's decision, denying attorney fees, and found that Mr. Pavone demonstrated gender bias by referring to the ruling as succubistic.⁴⁴ The court found that the use of the word constituted a demonstration "by words or conduct, bias, prejudice, or harassment based upon ... gender"(Cal. Code Jud. Ethics, canon 3B(6)) and thus qualified as reportable misconduct.⁴⁵

³⁶ 32 Cal. App. 5th 853 (2019).

³⁷ *Id.*, at 854-855.

³⁸ *Id.*, at 855.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Succubus, COLLINS DICTIONARY, <https://www.collinsdictionary.com/dictionary/english/succubus> (last visited June 28, 2022).

⁴³ *Id.*

⁴⁴ *Id.*, at 858.

⁴⁵ *Id.*

Due to this behavior, Mr. Pavone was charged with four counts⁴⁶ of failing to maintain due respect for courts and judicial officers, under Business and Professions Code section 6068, subdivision(b).⁴⁷ Despite the Appeal Court’s finding that the use of the word “succubistic” demonstrated bias, the State Bar Court found that Mr. Pavone’s use of the term “succubistic” was protected under the First Amendment.⁴⁸ State Bar Court Judge Cynthia Valenzuela held that “[n]o reasonable reader would surmise that Respondent was claiming that either Judge Luege or her ruling was literally a succubus, which is a mythical creature...As such, distasteful as it is, this comment was made figuratively, representing rhetorical hyperbole, and consequently is protected by the First Amendment.”⁴⁹ Judge Valenzuela did observe that “Respondent’s use of a sexual and gendered term in this manner and context, directed at a female judicial officer, manifests gender bias and that “[t]his gratuitous comment had no reasonable purpose but to convey a gendered insult, disrespecting Judge Luege and the superior court.”⁵⁰ The State Bar Court dismissed with prejudice the disciplinary charge related to the use of the word succubistic.⁵¹

There are myriad other examples of hostile sexism against female attorneys within the courtroom setting. In New York in 2022, a male attorney sent a series of emails to his clients providing legal advice in which he repeatedly insulted other participants in the legal process, including a litigant, opposing counsel, and the presiding court attorney referee, using vulgar and

⁴⁶ Two counts were dismissed with prejudice by the court. Mr. Pavone was sanctioned in relation to the other two counts, which are not relevant to this paper. Mr. Pavone’s Request for Review was referred to the State Bar Court Review Department. *See In the Matter of Benjamin Laurence Pavone*, Case No. SBC-20-O-30496-CV, State Bar Court of California, April 12, 2022. This is correct as of the time of writing.

⁴⁷ *In the Matter of Benjamin Laurence Pavone*, Case No. SBC-20-O-30496-CV, State Bar Court of California, February 10, 2022, at 1.

⁴⁸ *Id.*, at 25.

⁴⁹ *Id.*

⁵⁰ *Id.*, at 24.

⁵¹ *Id.*, at 26.

sexist terms.⁵² Among other things, the petitioner used an extremely crude gender-based slur to describe opposing counsel.⁵³ The court held that “his use of an intensely degrading and ‘vile’ gendered slur to describe a female attorney, as well as petitioner’s demeaning reference to her as “eyelashes,” are especially disturbing.”⁵⁴ What is particularly disturbing is that in addition to being an attorney, the petitioner also held judicial office. The petitioner was a Justice of the Northport Village Court in Suffolk County, a position he had held since 1994. The petitioner sought a review of a determination of the Commission on Judicial Conduct finding that he committed certain acts of misconduct warranting his removal from office. The Court of Appeals held that judge’s behavior constituted egregious conduct warranting sanction removing him from judicial office.

“Calm down, dear” – David Cameron, former UK Prime Minister, to Angela Eagle, then Shadow Treasury Secretary, in the House of Commons, London, April 2011.

The stereotypical caricature of women as overemotional, hysterical microcosms of feelings is not new. Indeed, the United States Supreme Court characterized them as such in its ruling in *Bradwell v. Illinois*, which held women to be “unfit” to practice law because of the “natural and proper timidity and delicacy which belongs to the female sex”.⁵⁵ It is therefore unsurprising that this trope is still alive and kicking within the legal profession. In 2017, attorney Elizabeth Faiella was representing a man who alleged that a doctor had perforated his esophagus during a routine medical procedure.⁵⁶ The matter was slated for a trial, but before the trial started, she was required to attend a hearing with her opposing counsel, David O. Doyle, Jr. Doyle had filed a motion seeking to “preclude emotional displays” – not by a witness, but by Faiella. The judge denied the

⁵² *Matter of Senzer*, 35 N.Y.3d 216, 218 (2020).

⁵³ *Id.*

⁵⁴ *Matter of Senzer*, 35 N.Y.3d 216, 220 (2020), citing *Matter of Assini*, 94 N.Y.2d 26, 29 (1999).

⁵⁵ *Bradwell v. The State*, 83 U.S. 130 (1872).

⁵⁶ Lara Bazelon, *What It Takes to Be a Trial Lawyer If You’re Not a Man*, THE ATLANTIC, Sept. 2018.

motion on the grounds that Doyle had not basis for making it, but the motion had already achieved its desired effect – wrongfooting and humiliating Faiella. Anna Dorn, author of *Bad Lawyer: a Memoir of Law and Disorder* and former criminal defense attorney, reported similar stereotypical treatment in 2021, arguing that female attorneys are still routinely criticized for being too emotional.⁵⁷

Worse than the accusation of being too soft is the crime of being too assertive. Even though one of an advocate’s core ethical duties is to represent her client zealously, it appears that when doing so as a female advocate, you run the risk of censure by your male counterparts. Deborah Rhode has a favorite New Yorker cartoon that shows a king and queen in the throne room.⁵⁸ The queen turns to the king and remarks, “But when a *woman* has someone’s head cut off, she’s a bitch.” The joke works because the premise is so very familiar; when a man displays a show of force, he is assertive. When a woman does it, she is a bitch. In order to conduct research to understand further law firm and in-house lawyers’ experiences of bias in the workplace⁵⁹, in 2018, Joan Williams, a law professor at the University of California at Hastings, completed a survey of almost 3,000 lawyers, as well as a separate study of courtroom closing arguments.⁶⁰ The survey asked male and female lawyers whether they felt free to express anger at work when it was justified, whether they were rarely interrupted at work, and whether they felt penalized for assertive behavior.⁶¹ Their answers differed based on gender, and sometimes based on race.⁶² 56% percent

⁵⁷ Anna Dorn, *Female Lawyers: Lose the Emotion, Bring the Cupcakes*, THE DAILY BEAST, Jul. 23, 2018,

<https://www.thedailybeast.com/female-lawyers-lose-the-emotion-bring-the-cupcakes> (last accessed June 28, 2022).

⁵⁸ Debra Cassens Weiss, *Showing anger can backfire for female lawyers, studies say; law pros suggest “gender judo” response*, AM. BAR ASS’N JOURNAL, Aug. 6 2018.

⁵⁹ American Bar Association and Minority Corporate Counsel Association, *You Can’t Change What You Can’t See: Interrupting Racial & Gender Bias in the Legal Profession*, 2018, AM. BAR ASS’N, 2018, at 2.

⁶⁰ *Id.*, at 5.

⁶¹ *Id.*, at 21-25.

⁶² *Id.*

of white men felt free to express anger, compared to only 40% of women of color and 44% of white women.⁶³ Two-thirds of men said they were rarely interrupted, compared to half of the women.⁶⁴ The results did not differ by race.⁶⁵ 62% of white men said they are not penalized for being assertive, compared to only 46% of women of color and 48% of white women.⁶⁶ Participants provided the following comments⁶⁷:

“I have experienced the most push back from being an assertive and authoritative woman (and minority woman); so there is resentment of my perceived ‘masculinity’ such that people accuse me of wanting to be feared, when men [are] deemed to simply be ‘demanding’ or as having ‘high standards.’”

Black woman, in-house lawyer

“When I am assertive, I am considered a ‘diva’ or ‘bitch.’ I often feel frustrated as it is more difficult, as a woman, to be taken seriously regardless of my qualifications or experience.”

White woman, law firm lawyer

“When women are assertive or ambitious it is seen negatively as opposed to when men are.”

White woman, firm lawyer

In Shakespeare’s *The Taming of the Shrew*, the spirited heroine Katherine responds to an accusation of being “too angry”, she quips, “If I be waspish, beware my sting”. Her male aggressor taunts back: “My remedy is then, to pluck it out”. This is an apt summation of the quandary faced by female attorneys: should they display signs of assertiveness or aggression, they will simply be removed.

⁶³ *Id.*, at 25.

⁶⁴ *Id.*, at 22.

⁶⁵ *Id.*

⁶⁶ *Id.*, at 23.

⁶⁷ *Id.*

*“Hysterical” – Jonnie Cochran describing prosecutor Marcia Clark’s behavior during People v. OJ Simpson*⁶⁸

Maryam Ahranjani, Associate Professor and Don L. & Mabel F. Dickason Professor at the University of New Mexico School of Law found that female attorneys practicing in criminal law face “pervasive sexism”.⁶⁹ Professor Ahranjani’s paper reported in part on the findings of the American Bar Association Criminal Justice Section (“ABA CJS”) Women in Criminal Justice Task Force, launched in January 2019. In January 2019, Professor Ahranjani created—with input from task force co-chairs and members—a survey based on the questions asked in the CLA and LAPIS studies.⁷⁰ The survey questions were designed to prepare women for their “testimony” before the Task Force. The Co-chairs organized an initial pilot listening session in Washington, D.C. during the ABA CJS Fall Institute. Following this, the author coordinated listening sessions across the country with significant assistance from ABA staff, Sila Manahane, Kristen Edwards, and TF members.⁷¹ Listening sessions were closed, invitation-only events whose participants include women and gender non-conforming lawyers with diverse lived and professional experiences who were recognized as leaders in criminal justice.⁷¹ These participants were nominated by Task Force members, Criminal Justice Section leaders, and nominees from local and national lawyers’ associations.⁷² Across a diverse range of participants from different racial, social, ethnic and age groups, the women reported challenges relating to salaries, gendered expectations, lack of respect for and devaluing of women, lack of flexibility, stage-of-life issues, allyship,

⁶⁸ Pandemonium at O.J. Trial, TIME, May 23, 1995.

⁶⁹ Ahranjani, Maryam, “Toughen Up, Buttercup” versus #TimesUp: Initial Findings of the ABA Women in Criminal Justice Task Force. BERKELEY JOURNAL OF CRIMINAL LAW, Vol. 25, No. 2, 2020, UNM School of Law Research Paper No. 2021-03.

⁷⁰ *Id.*, at 132.

⁷¹ *Id.*, at 133.

⁷² *Id.*

generational challenges, juggling work/life commitments, compassion fatigue/vicarious trauma/burnout, and resilience/survival.⁷³ As Professor Ahranjani observed, “the fact that women from all different backgrounds shared at least some similar experiences indicates the pervasive sexism in criminal law.”⁷⁴ In terms of sexist and uncivil comments, one participant described how she was repeatedly told by male colleagues to “calm down” and to not be too aggressive.⁷⁵ The participants reported the following instances of sexism relating to gendered expectations of women in criminal law⁷⁶:

- “Very often we [judges] see male attorneys treating female attorneys in a way that is disrespectful and unacceptable in the court system and in society.”
- Men try to intimidate you through intimations of incompetence and sometimes blatant overtures of incivility.”
- “I have been called or seen other women called, ‘honey,’ ‘sweetie,’ ‘eye candy,’ ‘cutie.’”
- “I am routinely called by my first name when male attorneys are called ‘Mr. So-and-so.’”
- “There’s a fine line between aggressive and bitch. I was called a chihuahua by a judge once; management said to ‘let it go.’”
- “I get called ‘little lady,’ and people said, ‘people will vote for you [for elected public defender] because you are hot.’”

⁷³ *Id.*, at 135.

⁷⁴ *Id.*

⁷⁵ *Id.*, at 136.

⁷⁶ *Id.*, at 138.

- “I was introduced by my supervisor to a judge as a ‘spicy little Latina.’”
- “I have been told I don’t look or act feminine enough.”

Participants also reported the following generally sexist comments they experienced while working as attorneys⁷⁷:

- “I have been told by more than one judge that I remind him of his daughter.”
- “I’ve had a male judge say to me, ‘Counsel, school your features,’ when I was frowning at him when he ruled against me.”
- “I had a male attorney call a female witness a ‘whore for the government.’ The female judge just said his name. We have thick skins, but that’s not good enough”.

“You don’t know a woman until you’ve met her in court.” — Norman Mailer

In 2020, a statewide survey of New York judges and attorneys showed that women were routinely subject to bias against them in the New York State court system. This survey was undertaken by the New York State Judicial Committee on Women in the Courts for two purposes.⁷⁸ First, to determine whether specific recommendations made in 1986 by the New York Task Force to eliminate the bias against women in the State’s system had succeeded and, if not, what elements of bias remained.⁷⁹ Second, to determine what can and should be done to eliminate any remaining bias against women.⁸⁰ The first Report of the Task Force on Women in the Courts, published in 1986 (100 years after the first woman was admitted to practice law in the State of New York), found that “gender bias against women litigants, attorneys and court employees is a pervasive

⁷⁷ *Id.*, at 138-139.

⁷⁸ New York State Judicial Committee On Women In The Courts, Gender Survey 2020, available at <https://www.nycourts.gov/LegacyPDFS/ip/womeninthecourts/Gender-Survey-2020.pdf> (last accessed June 29, 2022).

⁷⁹ *Id.*, at 69

⁸⁰ *Id.*, at 69.

problem with grave consequences”.⁸¹ The 2020 survey aimed to determine the current status and treatment of women litigants, attorneys, and court employees.⁸² Invitations to participate in the survey were sent on behalf of Chief Judge Janet DiFiore to all 67,862 attorneys during the period November 14, 2018 to December 10, 2018.⁸³ A total of 5,340 responded, much larger than the 1,790 in 1986, enabling the research team to conduct extensive statistical analysis of the survey questions by various demographic variables and by different geographic regions within New York State.⁸⁴ The scope of the survey covered a broad range of experiences encountered in the court system regardless of the survey participant’s particular practice area, such as credibility and court interaction, courthouse environment including sexual harassment, court facilities, and demographics.⁸⁵ Other sections were directed to specific areas of practice and substantive law, and the survey also contained questions regarding the availability and impact of courthouse Children’s Centers where litigants and other court users can safely leave their children while they attend to court matters, baby changing tables in public restrooms, and lactation facilities.⁸⁶ For the purposes of this paper, I have focused on the sections of the report which specifically concern inappropriate conduct, sexual harassment and bias on the basis of sex experienced by female attorneys.

With respect to sexual harassment, the questions focused on inappropriate and demeaning conduct which would create a hostile or offensive work environment existed within court facilities.⁸⁷ The conduct surveyed included “physical” (unwelcome touching, hugging, pinching,

⁸¹ *Id.*, at 7.

⁸² *Id.*

⁸³ *Id.*, at 19.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*, at 8.

up to and including physical violence), “verbal” (jokes and/or inappropriate commentary on age, appearance and/or gender, up to and including requests for sexual favors or making work-related threats), and “non-verbal” (including obscene gestures).⁸⁸ 10% of the female attorneys who responded reported that unwelcome physical contact by other attorneys occurred very often or often, and another 36% reported that it sometimes happened.⁸⁹ This contrasts with the 3% of male respondents who reported that unwelcome physical contact by other attorneys happened very often/often, and another 16% who said it occurred sometimes.⁹⁰

When attorneys were asked whether female attorneys experienced inappropriate or offensive verbal comments, jokes or obscene gestures, the results showed that other attorneys were more often the perpetrators of this verbal harassment.⁹¹ 23% of all female respondents reported such behavior as occurring often or very often, and an additional 44% reported this happening sometimes.⁹² Again, there was a significant difference in the perception of male attorneys; only 5% of male respondents reported it happening very often/often and 27% of male respondents additionally reported that it occurred sometimes.⁹³ With respect to the inappropriate or offensive verbal behavior of nonjudicial personnel, again there appears to be less of a problem than with other attorneys.⁹⁴ The survey found that 12% of female attorneys reported this occurring very often/often, and another 28% reported it occurring sometimes; with male attorneys reporting respectively 3% and 19%.⁹⁵ It is the perception of the female attorneys compared with the male

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*, at p.9.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

attorneys which is particularly interesting. In the Courthouse Environment section of the survey, which invited individual comments, a number of female attorneys described a culture that tolerates behavior such as terms of endearment to subtly intimidate female attorneys.⁹⁶ Inappropriate jokes, putdowns, solicitation for personal information, various types of sexual harassment, and physical touching were also identified in the survey responses.⁹⁷ The data showed that female attorneys under the age of 45 were more likely to often, very often (17%) or sometimes (40%) experience unwanted physical contact by attorneys than those aged 45 or over (4% or 32% respectively).⁹⁸ The younger attorneys also experienced more unwelcome physical contact often, very often (9%) or sometimes (21%) by non-judicial personnel than the older attorneys (2% or 14% respectively).⁹⁹ Only a few female attorneys commented that they did not think that sexual harassment existed, in contrast to a substantial number of male attorneys who indicated they had not witnessed the behaviors above.¹⁰⁰ A few male attorneys said the questions were “silly,” “a witch-hunt,” “more imagined than real,” while others reported they suspected that being male prevented them from recognizing the experiences of their female colleagues.¹⁰¹ Female attorneys identified the continued existence of an “old boys’ network” among male judges, male staff, and male attorneys.¹⁰² The fact that female attorneys perceived that an “old boys’ network” still exists is extremely troubling. When we couple this perception with the result that junior/younger female attorneys were more likely to experience physical sexual harassment, it paints an unpleasantly

⁹⁶ *Id.*, at 24.

⁹⁷ *Id.*

⁹⁸ *Id.*, at 22.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

clear picture of a climate within the court system which would shield perpetrators of sexual harassment and would not encourage younger female attorneys to report such harassment.

Regarding judges, only 70% of female responders and 87% of male responders reported that these offensive verbal comments occurred rarely or never from judges.¹⁰³ In addition to these unwelcome statistics, even more troubling was the pattern that emerged from the female respondents which indicated that even when judges did not themselves engage in verbal abuse of female attorneys, they nevertheless looked the other way and allowed such behavior by male attorneys or court officers to go unchecked.¹⁰⁴ Over 60% of the female attorneys reported that in cases of negative or demeaning conduct by others, judges rarely or never intervened.¹⁰⁵ Male attorneys again had a different view, though 29% also reported that judges rarely or never intervened when confronted with negative or demeaning conduct towards women.¹⁰⁶ Respondents were also asked whether female attorneys were addressed by first names or terms of endearment by other attorneys, while male attorneys were addressed by surname or title. Almost one third (32%) of female attorneys reported it occurring very often, and another 37% answered that it did occur sometimes.¹⁰⁷

The survey also examined how sex affected perceptions of credibility with respect to male and female attorneys. Here, as with the results described above, the numbers consistently showed differences in perceptions by male and female attorneys.¹⁰⁸ 51% of female attorneys reported that they agreed with the statement that male judges appear to give more credibility to the

¹⁰³ *Id.*

¹⁰⁴ *Id.*, at 10.

¹⁰⁵ *Id.*, at 11.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*, at 10-11.

¹⁰⁸ *Id.*, at 10.

statements/arguments of male attorneys than female attorneys.¹⁰⁹ Only 13% of male attorneys agreed.¹¹⁰ Further, 29% of female responders agreed that female judges also appeared to give more credibility to male than female attorneys.¹¹¹ This varying standard of credibility was not limited to attorneys. 27% of female attorneys agreed that male judges appeared to give more credibility to male witnesses than female witnesses, whereas the number was only 16% with female judges.¹¹²

There were some areas of improvement. In its 1986 Report, the Task Force noted the public hearing testimony and attorney survey responses asserting that women attorneys were disproportionately denied the most desirable and lucrative assigned counsel positions.¹¹³ As a result, Part 36 of the Rules of the Chief Judge governing fiduciary appointments was promulgated and amended, broadening the eligibility for appointment and establishing procedures to promote accountability and transparency in the attorney selection process.¹¹⁴ Effective October 2019, Parts 26 and 36 of the Rules of the Chief Judge were further amended and a new Fiduciary Case Management System (FCMS) was established to track fees awarded and the number and types of appointments of individual judges.¹¹⁵ A significant majority of those responding to the survey found the issues not applicable to their own situation because they were ineligible to receive appointments.¹¹⁶ For those who were eligible for appointments, slightly more female attorneys were appointed to a fee-generating case within the last three years compared to male attorneys.¹¹⁷ However, of those who had been appointed to a fee-generating case within the past 3 years, 36%

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*, at 15.

¹¹⁴ *Id.*, at 15.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

of female attorneys and 5% of male attorneys agreed that judges appointed male attorneys to more lucrative cases more frequently.¹¹⁸ Furthermore, 24% of female attorneys and only 1% of male attorneys responded that female attorneys are more often awarded lower fees.¹¹⁹ The Report concluded that although the results shows that there has been great improvement in the number of assignments to women since the 1986 report, a substantial number of female attorneys still believe that there is disparity in the monetary value of cases assigned to women.¹²⁰

Incivility in the form of sexism is not confined to the gladiatorial area of the criminal courtrooms. According to a 2019 online article for law.com, female general counsel have experienced subtle and blatant sexism from private practice lawyers.¹²¹ Sarah Feingold, the general counsel of New York-based e-commerce company Vroom, said she has repeatedly received emails and letters from firms soliciting business addressed to “Dear sirs” or “Gentlemen”.¹²² Feingold charitably tries to give firms the benefit of the doubt, assuming that they are using an old template, but observed that “it does sour things from the beginning”. She went on, “Language choices impact inclusivity and impact equality...Although people might say, ‘Hey, come on, you know gentlemen includes you also,’ it doesn’t. I’m not a gentleman.”¹²³ Another female general counsel, who asked to remain anonymous for fear of repercussions at work, reported that she once dealt with an opposing counsel whose junior partner dominated the

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Caroline Spiezio, *The sexism and stereotypes facing female GCs – and how it affects the firms they use*, LAW.COM INTERNATIONAL, Jan. 24, 2019, available at <https://www.law.com/international-edition/2019/01/24/women-gcs-face-sexism-stereotypes-from-firm-lawyers-and-it-impacts-who-they-hire-378-96758/?region=/international-edition/region/uk-legal-week/> (last accessed June 29, 2022).

¹²² *Id.*

¹²³ *Id.*

conversation and either ignored women on her team or treated them with contempt.¹²⁴ In another example, Castlight Health General Counsel Jennifer Chaloeontiarana said that outside counsel had once bypassed her to communicate with her company’s chief financial officer instead. She also experienced outside counsel who dismissed her concerns or ignored her requests, with the result that they offered solutions that did not meet her business’s needs.¹²⁵

IV. BENEVOLENT SEXISM

Although I’ve been a senior figure in client meetings, when all other attendees are men it’s regularly expected that I’m the one to take notes and distribute drinks. – Anonymous respondent, Everyday Sexism Project¹²⁶

“Women are just better at organizing”. “But you always remember to get a birthday card, you’re just so much better at that stuff”. These are examples of benevolent sexism with which many female attorneys will be very familiar. In 2018 the ABA Commission on Women in the Profession (“CWP”), in conjunction with the Minority Corporate Counsel Association (“MCCA”), released a research report entitled *You Can’t Change What You Can’t See: Interrupting Racial & Gender Bias in the Legal Profession*.¹²⁷ The research was conducted by the Center for WorkLife Law at the University of California, Hastings College of Law on behalf of CWP and MCCA, and the resultant report examined implicit gender and racial bias in legal workplaces.¹²⁸ The report concluded that women do more “office housework” than men.¹²⁹ “Office housework” includes literal housework (for example, ordering lunch), administrative work (such as scheduling

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ <https://www.theguardian.com/lifeandstyle/womens-blog/2014/jul/30/10-sexist-scenarios-women-deal-work-ignored-maternity-risk-everyday-sexism>

¹²⁷ American Bar Association and Minority Corporate Counsel Association, *You Can’t Change What You Can’t See: Interrupting Racial & Gender Bias in the Legal Profession*, AM. BAR ASS’N 2018.

¹²⁸ *Id.*, at 2.

¹²⁹ *Id.*, at 25.

meetings), and emotion work (providing emotional support to colleagues).¹³⁰ The report split assignments into two broad categories: “glamour work” (high-profile assignments that are career enhancing) and “office housework” (low-profile assignments that are beneficial to the organization but not the individual’s career).¹³¹ The report found that, regarding glamour work, more than 80% of white male lawyers but only 53% of female lawyers of color and 59% of white female lawyers reported the same access to desirable assignments as their colleagues.¹³² Regarding office housework, nearly 50% of white female lawyers and 43% of female lawyers of color reported that at work they more often play administrative roles such as taking notes for a meeting compared to their colleagues.¹³³ Only 26% of white male lawyers and 20% of male lawyers of color reported the same.¹³⁴ The net effect of this is that this reduces the amount of billable time that they can report, which can hurt their compensation and their career.¹³⁵ U.S. Circuit Judge Margaret McKeown and Roberta D. Liebenberg, a lawyer and former chair of the ABA Commission on Women in the Profession, describe this phenomenon as being “office moms”.¹³⁶ McKeown and Liebenberg list a litany of work which is more often performed by female attorneys, including “helping a colleague with a presentation, leading the mentoring program for junior associates, serving on diversity or hiring committees, coordinating the summer program, planning social gatherings, picking up the cake for a colleague’s birthday, cleaning the communal kitchen, taking notes for the group at a case conference, making sure everyone signs the get-well card and holding

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*, at 95.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ U.S. Circuit Judge Margaret McKeown, Roberta Liebenberg, *The Hazards of Being Office Moms*, <https://www.theredbeegroup.com/wp-content/uploads/2020/02/The-Hazards-Of-Female-Lawyers-Being-Office-Moms.pdf> (last accessed June 29, 2022).

Zoom check-in meetings with colleagues just to see how they are doing”.¹³⁷ They note that this work is often “critical” and yet is “undervalued or not rewarded”.¹³⁸ They cited a 2021 report by McKinsey & Company which found that their male counterparts are less likely to check in on employees’ well-being, provide emotional support, assist employees in navigating work-life challenges, ensure that employees’ workloads were manageable, and help prevent or mitigate burnout.¹³⁹

Sociologist Arlie Hochschild coined the term emotional labor in 1983 and defined it as “being hired and monitored for your capacity to manage and produce a feeling.”¹⁴⁰ Although Hochschild’s concept was gender-neutral, she recognized that women often perform this type of labor more commonly than men, as they work more commonly in service industry jobs.¹⁴¹ The term was then redefined by Gemma Hartley in an article she wrote for Harper’s Bazaar magazine to incorporate the unpaid work that women frequently do in order to keep their households orderly.¹⁴² This term has also been applied to the work that female attorneys do to in order to keep their working environment similarly organized. However, to use the term “emotional labor” to describe this phenomenon is to expand the term way beyond Hochschild’s original concept.¹⁴³ It is more accurate to view this behavior pattern as a form of benevolent sexism. A classic example is

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*, citing McKinsey & Company, *Women in the Workplace Study*, Sept. 2021, at 18.

¹⁴⁰ Julie Beck, *The Concept Creep of “Emotional Labor”*, THE ATLANTIC, November 26, 2018.

¹⁴¹ Sirin Kale, *Does anyone know what emotional labor means any more?*, THE GUARDIAN, Feb. 8, 2021.

¹⁴² Gemma Hartley, *Women Aren’t Nags, We’re Just Fed Up*, HARPER’S BAZAAR, September 17, 2017.

¹⁴³ Beck, *supra*.

describing a female attorney as a “meticulous notetaker” with the result that the same female attorney is thereafter automatically assigned to type up and distribute meeting notes.¹⁴⁴

This particular brand of sexism is not limited to female attorneys. In 2019, Associate Justice Brian Currey of California’s Second District Court of Appeal, with Associate Justices Thomas Willhite Jr. and Audrey Collins concurring, criticized an attorney for referring to now-Associate Justice Vail Ruderman Feuer, who was then a Los Angeles Superior Court judge, as “an attractive, hard-working, brilliant, young, politically well-connected judge on a fast track for the California Supreme Court or Federal Bench” in his brief.¹⁴⁵ The court addressed the merits of the attorney’s brief first and then ended the opinion with a note on civility, stating, “[w]e would be remiss if we did not also comment on a highly inappropriate assessment of certain personal characteristics of the trial judge, including her appearance, in the opening paragraph of Chow’s reply brief. We do so not to punish or embarrass, but to take advantage of a teachable moment.”¹⁴⁶ The Court found that

“calling a woman judge — now an Associate Justice of this court — ‘attractive,’ as Chow does twice at the outset of his reply brief, is inappropriate because it is both irrelevant and sexist. This is true whether intended as a compliment or not. Such comments would not likely have been made about a male judge.”¹⁴⁷

The Court further held that “objectifying or demeaning a member of the profession, especially when based on gender, race, sexual preference, gender identity, or other such characteristics, is uncivil and unacceptable.” While the attorney in question claimed he was attempting to

¹⁴⁴ Sian Beilock, *How to address subtlefriendlysexism at work*, FORBES, Jan. 7, 2020, available at <https://www.forbes.com/sites/sianbeilock/2020/01/07/how-to-address-subtle-friendly-sexism-at-work/?sh=3a00e52350ce> (last accessed on June 29, 2022).

¹⁴⁵ *Briganti v. Chow*, 42 Cal. App. 5th 504 (2019).

¹⁴⁶ *Briganti*, 42 Cal. App. 5th, at 510.

¹⁴⁷ *Id.*, at 915.

compliment the judge, the court concluded that his comments “reflect[ed] gender bias and disrespect for the judicial system”. This is the courtroom equivalent of telling a woman, “You would look much prettier if you smiled” – while intended as a clumsy attempt at a compliment, it serves as an insult. Benevolent sexism is just as harmful as hostile sexism, and even more prevalent because it is camouflaged as supportive behavior, when in fact it serves to undermine.

V. PORTIA OR PATTY HEWES: SEXISM AGAINST FEMALE ATTORNEYS IS ALL AROUND US.

“Miss Jean-Louise, stand up. Your father’s passing.” To Kill A Mockingbird – Harper Lee

Hollywood loves a courtroom drama. Hollywood has also loved portraying female attorneys as early as 1918, with *The Reckoning Day*.¹⁴⁸ In that film, the plucky Jane Whiting foils the plans of a gang of spies and rescues the son of a senator.¹⁴⁹ Later, audiences were delighted by the performances of Katherine Hepburn and Spencer Tracey in *Adam’s Rib*¹⁵⁰, a screwball comedy about a husband and wife who end up as opposing counsel in the same case (the hilarity no doubt increased by the real life sexual tension displayed between Hepburn and Tracey onscreen). Although Hepburn plays a feisty and articulate female attorney, the film reverts back to stereotypical gender roles. When Hepburn’s character triumphs over Tracey’s in the courtroom, and receives acclaim in the press, Tracey’s character moves out of their apartment, unable to reconcile his wife’s professional success with the subservient position she should adopt at home.¹⁵¹ Gradually representations of women as attorneys began to increase in the 1980s and 1990s, but, in a prescient mirroring of what has transpired within the profession today, the prevalence of female

¹⁴⁸ *The Reckoning Day* (Triangle Film Corp., 1918).

¹⁴⁹ David Ray Papke, *Cautionary Tales: The Woman as Lawyer in Contemporary Hollywood Cinema*, 25 U. ARK. LITTLE ROCK L. REV. 485 (2003), at 486.

¹⁵⁰ *Adam’s Rib* (MGM 1949).

¹⁵¹ Papke, *supra*, at 488.

attorneys in film did not equate to parity of treatment. Female lawyers were routinely portrayed as frustrated or lonely people who overstretched themselves by taking on ethically and legal complex cases which they inevitably failed to handle, as in *Jagged Edge*¹⁵², *Suspect*¹⁵³, *The Music Box*¹⁵⁴ and *Class Action*¹⁵⁵.

With the arrival of a new millennium came a new, more palatable female attorney in *Legally Blonde*'s¹⁵⁶ Elle Woods. Elle Woods wears pink, pets animals, is nice to her horribly snobbish classmates until she wins them over and acknowledges her award of a place at Harvard Law School with the coquettishly cute line “What, like it’s hard?”. Predictably, Ms. Woods wins a murder trial and her co-counsel’s heart at the same time, graduating first in her class and in his heart, and proving that female attorneys can be both successful and well-liked. (The fact that Ms. Woods wins a trial despite being a first year law student who is not admitted to practice law in any State is breezily glossed over with vague references to a legal loophole). Despite the appeal of a chipper female attorney, the stereotypical caricatures of the previous century remained. Contrast Elle Woods with the dignified, soberly dressed Diane Lockhart in *The Good Wife*, whose professional success is frequently contrasted with her status as an unmarried and childless woman, or Patty Hewes, the relentlessly ambitious and ruthless attorney in *Damages*, or the mesmerizingly persuasive Annalise Keating in *How To Get Away With Murder*. The rise of the “litigatrix”¹⁵⁷ in

¹⁵² *Jagged Edge* (Columbia Pictures, 1985).

¹⁵³ *Suspect* (TriStar Pictures, 1987)

¹⁵⁴ *The Music Box* (TriStar Pictures, 1989)

¹⁵⁵ *Class Action* (20th Century Studios, 1991). For a more detailed analysis, see Caplow, Stacy, *Still in the Dark: Disappointing Images of Women Lawyers in the Movies*, 20 WOMEN’S RTS. L. REP. 55 (1998-1999), at 57.

¹⁵⁶ *Legally Blonde* (Metro-Goldwyn-Mayer, 20th Century Studios, 2001).

¹⁵⁷ David Lat, *Farewell, Ally McBeal, Enter the Litigatrix*, THE OBSERVER, May 20, 2008, available at <https://observer.com/2008/05/farewell-ally-mcbeal-enter-the-litigatrix/> (last accessed on June 29, 2022).

television and film eschews Elle Woods' iron fist in a velvet glove; she dispenses with the velvet glove in favor of a steel gauntlet.

When we think of famous fictional attorneys, we think of Gregory Peck's dignified and principled Atticus Finch in *To Kill A Mockingbird*, Tom Cruise's gutsy and sometimes naïve Lieutenant Daniel Kaffee in *A Few Good Men*, Denzel Washington's dismantling of both his own prejudices and a homophobic law firm with his portrayal of Joe Miller in *Philadelphia*, or Joe Pesci's performance of the rambunctious yet ultimately triumphant Vinny Gambini in *My Cousin Vinny*; all of them are men. It is telling that the American Bar Association Journal's list of the 25 Greatest Fictional lawyers only contains two women.¹⁵⁸ As Stacey Caplow, Associate Dean of Experiential Education & Professor of Law at Brooklyn Law School, famously noted, we are still waiting for the cinematic portrayal of a female attorney who is as universally beloved and admired as Gregory Peck's Atticus Finch.¹⁵⁹ Female attorneys may be perky and appealing, or they may be calculating shrews. They may not, however, be the reasoned and grounded equivalents of the protagonists of Hollywood's male-led legal dramas.

The above cultural influences provide a useful backdrop against which to view the current treatment of female attorneys within the legal profession. It is no wonder, when we are faced with portrayals of female attorneys as the glamorous and polished Elle Woods or the intimidating and non-nonsense Patty Hewes, that stereotypical assumptions about what female attorneys "should" look and act like leak into reality. Marcia Clark had been a prosecutor for 13 years before the Simpson trial. She was experienced and successful, winning 19 of her 20 murder trials.¹⁶⁰ Despite

¹⁵⁸ <https://www.abajournal.com/gallery/25characters/> (last accessed June 29, 2022).

¹⁵⁹ Caplow, *supra*, at p. 71.

¹⁶⁰ Kira Cochrane, Interview, *Marcia Clark: life after the OJ Simpson trial*, THE GUARDIAN, May 23, 2011.

this, during the Simpson trial, the media focused on everything but her legal qualifications and credentials. Her performance as a mother was called into question by a March 2, 1995 article in the Los Angeles Times which was emblazoned with the title, “Marcia Clark’s Husband Cites Trial in Custody Fight: Family: He asks to be named primary parent, saying she hardly sees sons. Case shows problems of working mothers.”¹⁶¹ Her appearance, from her clothes to her hairstyles, was routinely mocked and critiqued.¹⁶² Her sex life was splattered across the press when a topless photograph that she had taken while on holiday with her ex-husband was leaked.¹⁶³ The same media who had chastised her for daring to take such a photograph simultaneously sexualized her – a 1995 Washington Post article described her thus: “...men call her a hopeless flirt, a screeching wife, a bad mom, a shrill litigator. But she eludes them all, vividly contradictory -- so sexy, so uptight, so serene, so snappish, so tired, so busy.”¹⁶⁴ It is therefore unsurprising that Johnnie Cochrane felt confident enough to remark on Clark’s “childcare crisis” in open court¹⁶⁵, and even less surprising that Judge Lance Ito failed to censure him for it. Judge Ito’s bias prompted Tammy Bruce, the president of the Los Angeles chapter of the National Organization for Women, to draft a series of complaints about Ito’s treatment of Clark and other women during the trial and presented it to the judge.¹⁶⁶

¹⁶¹ Bettina Boxall, *Marcia Clark’s Husband Cites Trial in Custody Fight: Family: He asks to be named primary parent, saying she hardly sees sons. Case shows problems of working mothers*, THE LOS ANGELES TIMES, March 2, 1995.

¹⁶² Gina Tron, *The Unbelievable Sexism Prosecutor Marcia Clark Faced During The OJ Simpson Trial*, OXYGEN, December 29, 2017, available at <https://www.oxygen.com/oj-simpson-the-crimes-and-punishment/crime-time/the-unbelievable-sexism-prosecutor-marcia-clark> (last accessed June 29, 2022).

¹⁶³ *National Enquirer Runs Photo of Topless Simpson Prosecutor*, ASSOCIATED PRESS, Feb. 6, 1995.

¹⁶⁴ Lorraine Adams, *The Fight Of Her Life*, THE WASHINGTON POST, Aug. 20, 2008.

¹⁶⁵ Lindsey Ellefson, “*The People v. O.J. Simpson: American Crime Story*” *Recap: Marcia Clark Cries on Chris Darden’s Shoulder After Nude Pics Leak*, US WEEKLY, Mar. 9, 2016.

¹⁶⁶ Rebecca Traister, *Marcia Clark Is Redeemed*, NEW YORK MAGAZINE: THE CUT, Feb. 2016.

Anyone who was remotely connected to a news outlet in 2022 will not be surprised by the treatment endured by Marcia Clark; nothing much has changed. In May 2022, the defamation lawsuit brought by Hollywood actor Johnny Depp against his ex-wife and actress Amber Heard consumed the public imagination. Sexism against the female attorneys involved in the trial ran rampant across the front pages of the press and across websites to the extent that the coverage of the two most prominent female attorneys was almost as salacious as the details that emerged during the trial itself. Camille Vasquez, Depp’s attorney who undertook the cross-examination of Heard, was linked romantically to Depp (despite the fact that she has a partner).¹⁶⁷ Vasquez was frequently compared to the lead attorney for Heard, Elaine Bredehoft, with the latter being dismissed as less effective. The language used to describe Bredehoft was littered with sexist stereotypes – for example, one commentator described her as sounding “like that aunt who has just picked up a few new swear words and is trying to pass them off as her own. Elaine, it seems like you need to calm down.”¹⁶⁸ Despite the fact that Bredehoft has been recognized in The Best Lawyers in America every year since 1997 for Employment Law, and is a Fellow of the American College of Trial Lawyers, an honor reserved for only the top 1% of attorneys in each state¹⁶⁹, reporters consistently portrayed her as emotional and unstable.¹⁷⁰

¹⁶⁷ Andrew Court, *Why Johnny Depp’s “flirt” vibe with lawyer is “deliberate”*: body language expert, THE NEW YORK POST, May 19, 2022; Jake Massey, *Johnny Depp’s Lawyer Camille Vasquez Dismisses Romance Rumours As “Sexist”*, unilad.co.uk, June 10, 2022, available at <https://www.unilad.co.uk/news/johnny-depp-lawyer-camille-vasquez-romance-rumours-sexist-20220610> (last accessed June 29, 2022).

¹⁶⁸ Michael Kurt, *Elaine Bredehoft, Amber Heard’s lawyer, is the “Best Lawyer Johnny Depp Has on His Team,” according to courtroom insider jokes [exclusive]*, TECHNO TRENZ, May 16, 2022, available at <https://technotrenz.com/entertainment/elaine-bredehoft-amber-heards-lawyer-is-the-best-lawyer-johnny-depp-has-on-his-team-according-to-courtroom-insider-jokes-exclusive-1896696.html> (last accessed on June 29, 2022).

¹⁶⁹ Gregory Sirico, *Johnny Depp and Amber Heard: The Best Lawyers Honorees Behind the Litigation*, BESTLAWYERS.COM, May 27, 2022, available at <https://www.bestlawyers.com/article/lawyers-johnny-depp-amber-heard-trial/4530> (last accessed on June 29, 2022).

¹⁷⁰ Ryan Smith, *Bystander Claims Amber Heard Lawyer Elaine Bredehoft Left Trial Crying*, NEWSWEEK, May 31, 2022.

Portrayals of female attorneys in popular media are an important part of any analysis of sexism in the legal profession because these are the images that govern how people expect female attorneys to look, speak and behave. English barrister Helena Kennedy QC observed that the portrayals of female lawyers in film and courtroom dramas frequently show them as overidentifying with their clients.¹⁷¹ She writes, “Women face this accusation much more frequently than men because explanations have to be given for why they fought so hard to win”.¹⁷² Depictions of fictional female attorneys as simultaneous sex symbols, bad mothers, and emotionally unsteady harridans who are measured as much by their desirability as they are by their success in the courtroom merely continue to fertilize latent seeds of sexism which then bear fruit in reality.

VI. CONSEQUENCES

“Does it occur to you, that the girl has some feelings?” Colonel Pickering to Professor Higgins
Pygmalion, George Bernard Shaw

In 2019, the American Bar Association published its report on the exodus of female attorneys from private practice, entitled *Walking out the Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice*. The report noted that although entering associate classes had been comprised of approximately 45% women for several decades, in the average private practice firm, women constituted only 30% of non-equity partners and 20% of equity partners, that the number of lawyers named as new equity partners at big firms had declined by nearly 30% over the past several years, and that firms increasingly relied on the hiring of lateral

¹⁷¹ Helena Kennedy QC, *Eve Was Framed*, Vintage Books (2005).

¹⁷² *Id.*

partners, over 70% of whom are men.¹⁷³ In the report, one set of data was particularly disturbing: the much greater extent to which female attorneys experienced sexual harassment. In the report's survey of over 1200 experienced lawyers, 50% of women versus 6% of men reported that they had received unwanted sexual conduct at work (which amounts to one in every two women), 16% of women versus 1% of men reported that they had lost work opportunities as a result of rebuffing sexual advances, and more than a quarter of all women (28%) avoided reporting sexual harassment due to fear of retaliation as opposed to 1% of men who reported the same avoidance behavior.¹⁷⁴ The report also noted that too many firms have their compensation systems shrouded in mystery, where unwritten rules and relationships determine equity shares, origination credit, salary, and bonuses. These unwritten rules help maintain the status quo, which directly impacts the ability of women to break through into the top levels of compensation.¹⁷⁵ The report found that the lack of a critical mass of women on many firm compensation committees, coupled with a lack of women sponsors in the compensation process, contribute to the continuing and significant gender pay gap for women partners.¹⁷⁶ The report also observed that many firms continue to lack a "team" approach to compensation decisions, which would ensure that credit is shared among all the partners who are playing a significant role on a client matter.¹⁷⁷ These factors led many experienced women lawyers believe that the compensation system is "rigged" against them.¹⁷⁸

¹⁷³ Roberta D. Liebenberg and Stephanie A. Scharf, *Walking Out The Door: The Facts, Figures, and Future of Experienced Women Lawyers in Private Practice*. American Bar Association (2018) at i.

¹⁷⁴ *Id.*, at 8.

¹⁷⁵ *Id.*, at 6.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

The ABA's analysis found that the most common reasons for senior female attorneys leaving private practice were, among others, caretaking commitments, level of stress at work, emphasis on marketing or originating business and work life balance.¹⁷⁹ These top reasons why experienced women leave private practice were largely due balancing caretaking commitments with non-substantive responsibilities at the office that do not reflect the quality of an individual's legal work. Experienced women lawyers are much more likely than experienced men to be solely responsible for multiple dimensions of childcare.¹⁸⁰ 54% of the female attorneys surveyed said that childcare was their full responsibility, as opposed to 1% of male attorneys.¹⁸¹ 32% of female respondents said that leaving work in order to look after children was their sole full responsibility as opposed to 4% of male respondents. The same disparity was apparent across other caretaking responsibility: children's extra curriculums (20% of female attorneys versus 4% of male attorneys), evening childcare (17% of female attorneys versus 4% of male attorneys) and daytime childcare (10% of female attorneys versus 1% of male attorneys).¹⁸² The results clearly illustrate that senior female attorneys bear the larger caretaking burden which is another contributing factor to the lack of retention.

One particularly interesting set of data from the report shows the same discrepancy between perceptions of sexism between male and female attorneys that we have seen before. The report found that managing partners and senior men had far more positive views than their women colleagues about their firm's success in retaining and advancing experienced women lawyers, acknowledging gender diversity as a priority, and promoting experienced women into the highest

¹⁷⁹ *Id.*, at 12.

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.*

levels of the partnership and firm leadership.¹⁸³ The authors of the report posited that this discrepancy may be because managing partners and senior men are unaware of the actual statistics showing a relative lack of advancement for experienced women lawyers and their high rate of attrition, or because men may have different expectations than women for assessing the firm’s “success” in advancing and retaining senior women lawyers.¹⁸⁴ In any event, there is a substantial chasm between male attorneys’ perceptions of how well their respective firms do in attracting, retaining and promoting female attorneys and the perceptions of the same by their female colleagues.

The cost of sexism in the courtroom is not limited to the damage it does to the female attorneys. In a recent case in Florida, an attorney’s use of sexist language towards a female opposing counsel was criticized to such an extent by the court that eventually the case was remanded for a new trial. The attorney repeatedly referred to the opposing counsel as “Ms. Jackson and her drama”¹⁸⁵ in front of the jury. The trial court observed that plaintiffs’ counsel employed sexist language in its strategy of denigrating the defense. The trial judge, who was in “the best position to evaluate improper, unobjected-to errors,” specifically found plaintiffs’ counsel’s remarks offensive, sexist and unacceptable.¹⁸⁶ The Court of Appeal found that “the improper remarks in this case were ‘so highly prejudicial and of such collective impact as to gravely impair a fair consideration and determination of the case by the jury’” (internal citation omitted) and concluded that the trial court abused its discretion in denying the motion for new trial. In that instance, the cost of sexist incivility manifested itself as tangible financial expense,

¹⁸³ *Id.*, at 15.

¹⁸⁴ *Id.*

¹⁸⁵ *Fla. Peninsula Ins. Co. v. Nolasco*, 318 So. 3d 584, 587 (Fla. Dist. Ct. App. 2021).

¹⁸⁶ *Id.*, at 588.

proving that this species of incivility does not just result in the metaphorical cost of talented female attorneys.

VII. CONCLUSION

*“Stereotypes are more likely to emerge when women are scarce than when they are common.” –
Helena Kennedy QC¹⁸⁷*

“Forward out of error / Leave behind the night. / Forward through the darkness, / Forward into light!” These words were emblazoned across the banners of America’s suffragists as they campaigned for women’s right to vote.¹⁸⁸ The words “Forward into light!” are most associated with Inez Milholland, who carried a banner bearing those words while leading the 1911 New York City march for women’s suffrage¹⁸⁹. Milholland is best remembered for her fantastically bold decision to lead the Woman Suffrage Procession in Washington, D.C. in 1913 astride a horse, resplendent in a white cloak.¹⁹⁰ She was also a lawyer, having gained an L.L.B. from New York University Law School¹⁹¹ after she was rejected from Harvard, Yale and Columbia because she was a woman.¹⁹² Milholland’s work as a lawyer reflected her commitment to improving the lives of others: she specialized in criminal, divorce and labor law and advocated for many areas of reform, including women’s suffrage, abolition of the death penalty, and workers’ rights.¹⁹³ She was instrumental in securing a last-minute reprieve for Charles Stielow, a farmer accused of murder and sentenced to be executed in the electric chair.¹⁹⁴ Tragically, Milholland suffered from

¹⁸⁷ Kennedy, *supra*, at p2.

¹⁸⁸ <https://www.nps.gov/articles/000/suffrage-forward-into-light.htm> (last accessed June 28, 2022).

¹⁸⁹ *Id.*

¹⁹⁰ <https://www.nps.gov/people/inez-milholland.htm> (last accessed June 28, 2022).

¹⁹¹ <https://hollisarchives.lib.harvard.edu/repositories/8/resources/4998> (last accessed June 28, 2022).

¹⁹² <https://www.vassar.edu/vcencyclopedia/alumni/inez-milholland.html> (last accessed June 28, 2022).

¹⁹³ <https://hollisarchives.lib.harvard.edu/repositories/8/resources/4998> (last accessed June 28, 2022).

¹⁹⁴ *Id.*

pernicious anemia and died in 1916 while undertaking a speaking tour of the West Coast during which she campaigned for women's suffrage.¹⁹⁵ 100 years on since she received her law degree, Milholland is a reminder of how far female attorneys have come since 1916. However, the data shows that female attorneys still need her energy and spirit as they trudge patiently forward towards the elusive level of parity with their male peers. This paper has set out the myriad forms of sexism that female attorneys experience from within the legal profession, from the benevolent sexism of coaxing them into undertaking the role of housekeeper within their law firms, to open and aggressive hostility. This treatment of female attorneys is intertwined with the presentation of female attorneys in popular media, as Marcia Clark experienced first-hand.

Sexism is a particularly unpleasant and pernicious form of professional incivility which must be uprooted if female attorneys are ever to feel that they truly belong in the legal profession. It is not a coincidence that Justice Warren E. Burger penned the most famous paean to professional civility in his 1975 speech *The Necessity of Civility*, and the Burger Court frequently moved to eradicate gender discrimination. The first opinion to hold that a law which discriminated according to gender was unconstitutional was written by Justice Burger in 1971.¹⁹⁶ While gender would not be made a suspect class, overt sex classification was invalidated in a variety of contexts. The Burger Court struck down a federal statute that required female members of the armed forces (but not male members) to prove that they contributed more than 50% of their dependent husband's support in order to calculate allowances and fringe benefits.¹⁹⁷ In 1976, the Burger Court held that in order to uphold a statute classifying by gender, the law "must serve important governmental

¹⁹⁵ *Id.*

¹⁹⁶ *Reed v. Reed*, 404 U.S. 71 (1971); see also https://www.nixonfoundation.org/2019/06/fiftieth-anniversary-warren-burgers-appointment-chief-justice/#_edn22 (last accessed June 28, 2022).

¹⁹⁷ *Frontiero v. Richardson*, 411 U.S. 677 (1973).

objectives and must be substantially related to those objectives.”¹⁹⁸ Sexism against female attorneys should be viewed as professional misconduct and a breach of professional ethics. It is time that as a profession, we make more robust steps towards moving forward out of error and into light – perhaps then female attorneys will be able to leave behind the night.

¹⁹⁸ *Craig v. Boren*, 429 U.S. 190 (1976).