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Lawyer Professionalism in a Gendered Society

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LAWYER PROFESSIONALISM IN A GENDERED SOCIETY

*Ellen S. Podgor**

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I. INTRODUCTION

The legal profession is historically a male-dominated society that has accepted gender inequality.¹ The inclusion of women into this “club”² has

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1. See generally KAREN B. MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA, 1638 TO THE PRESENT* (1986) (tracing the history of women practicing law in the United States).

2. Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1318 (1987); see also Carrie Menkel-Meadow, *Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law*, 42 U. MIAMI L. REV. 29 (1987) (examining the exclusion of

proceeded slowly,³ with nearly two hundred years passing between the adoption of the U.S. Constitution and the appointment of the first woman to the Supreme Court.⁴ Although women today have become a presence within the legal profession, equality has not been achieved in many respects.⁵

Recent reports on gender bias in the legal system confirm that issues related to gender in the legal profession warrant recognition and change to eliminate existing discrimination.⁶ These reports, authored by several state commissions and a Ninth Circuit Gender Bias Task Force, offer quantitative and illustrative evidence of the pervasiveness of bias both institutionally and by participants within the system.⁷ Corrective implementation devices,

groups from the legal profession).

3. "In 1869 the first woman lawyer was licensed to practice before a state bar." Janette Barnes, *Women and Entrance to the Legal Profession*, 23 J. LEGAL EDUC. 276, 276 (1970).

4. Sandra Day O'Connor was appointed to the United States Supreme Court in 1981.

5. Professor Leslie Bender notes:

What it means to be a woman within any specific culture blurs at the margins, but the core meaning is crystal clear. It means being subordinated to men, having less power, and having to acquire some of their gender attributes to succeed in traditional male-created institutions and professions, like law.

Leslie Bender, *Sex Discrimination or Gender Inequality?*, 57 FORDHAM L. REV. 941, 949 (1989). The subordinate role played by women in the legal profession is emphasized by the fact that until recently women have failed to attain significant levels of leadership in the American Bar Association (ABA). Stephanie B. Goldberg, *Token Women?: The ABA Confronts Its Glass Ceiling*, 77 A.B.A. J. 58, 59 (July 1991).

6. See generally Karen Czapanskiy, *Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1 (1990) (surveying reports on gender bias in state judicial systems); Lynn H. Schafran, *Gender and Justice: Florida and the Nation*, 42 FLA. L. REV. 181 (1990) (providing an analysis of gender bias in Florida and other jurisdictions).

7. See, e.g., CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURT, *ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS: DRAFT REPORT OF THE JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS* (1990); COLORADO SUPREME COURT TASK FORCE ON GENDER BIAS IN THE COURTS, *GENDER AND JUSTICE IN THE COLORADO COURTS* (1990); CONNECTICUT JUDICIAL DEPARTMENT TASK FORCE ON GENDER, JUSTICE, AND THE COURTS, *REPORT TO THE CHIEF JUSTICE* (1991); DISTRICT OF COLUMBIA TASK FORCE ON RACIAL AND ETHNIC BIAS & TASK FORCE ON GENDER BIAS IN THE COURTS *FINAL REPORT*, (1992); *Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System*, 8 GA. ST. U. L. REV. 539 (1992); *Report of the Florida Supreme Court Gender Bias Study Commission*, 42 FLA. L. REV. 803 (1990); *REPORT OF THE ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS* (1990); KENTUCKY TASK FORCE ON GENDER FAIRNESS IN THE COURTS: *EQUAL JUSTICE FOR WOMEN AND MEN* (1992); MARYLAND SPECIAL JOINT COMMITTEE, *GENDER BIAS IN THE COURTS* (1989); *Report of the Massachusetts Supreme Judicial Court Gender Bias Study Committee*, 24 NEW ENG. L. REV. 745 (1990), and in 23 SUFFOLK U. L. REV. 575 (1989); *FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS* (1989); MINNESOTA TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, *FINAL REPORT*, reprinted in 15 WM. MITCHELL L. REV. 825 (1989); MISSOURI TASK FORCE ON GENDER AND JUSTICE, *FINAL REPORT*, reprinted in 58 MO. L. REV. 485 (1993); NEVADA

however, have progressed slowly, and have demonstrated little recognition of the subtle bias that permeates the profession.⁸

Equally voiced in the legal community are claims that professionalism is declining.⁹ Some perceive decreased professionalism as the result of a competitive economic market that has relegated the practice of law to a business in which "lawyers are interested only in making money."¹⁰ Some believe that increased advertising and solicitation by lawyers have led to a decline in "the public's trust in and respect for the legal profession and the judicial system."¹¹ Although some scholars question whether there has been a decline in lawyer professionalism,¹² lawyers clearly have borne the brunt

SUPREME COURT GENDER BIAS TASK FORCE, JUSTICE FOR WOMEN (1989); NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS, REPORT OF THE FIRST YEAR (1984); NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS, SECOND REPORT (1986); NEW YORK TASK FORCE ON WOMEN IN THE COURTS, Report, *reprinted in* 15 FORDHAM URB. L.J. 8 (1986-87); FINAL REPORT OF THE NEW MEXICO STATE BAR TASK FORCE ON WOMEN IN THE COURTS (1990); FINAL REPORT OF THE RHODE ISLAND COMMITTEE ON WOMEN IN THE COURTS (1987); REPORT OF THE UTAH TASK FORCE ON GENDER AND JUSTICE (1990); GENDER AND JUSTICE: REPORT OF THE VERMONT TASK FORCE ON GENDER BIAS IN THE LEGAL PROFESSION (1991); WASHINGTON STATE TASK FORCE ON GENDER AND JUSTICE IN THE COURTS, FINAL REPORT (1989); WISCONSIN EQUAL JUSTICE TASK FORCE FINAL REPORT (1991).

8. An example of corrective measures is found in a recent publication by the Wisconsin Supreme Court. "It is the goal of the Wisconsin Supreme Court Judicial Education Committee and the Supreme Court's Office of Judicial Education that all of our audiences listen and learn in an atmosphere free of subtle messages imputing any tolerance of bias." *Gender-Fair Communication in the Judiciary, Supreme Court of Wisconsin*, Aug. 1992 *reprinted in* 1 PERSP. 98-103 (1993).

9. See ABA COMM'N ON PROFESSIONALISM, " . . . In the Spirit of Public Service:" *A Blueprint for the Rekindling of Lawyer Professionalism* (1986), *reprinted in* 112 F.R.D. 243. The ABA Commission's survey reported: "Only 7% [of the corporate users of legal services surveyed] saw professionalism increasing among lawyers; 68% said it had decreased over time. Similarly, 55% of the state and federal judges questioned in a separate poll said lawyer professionalism was declining." *Id.* at 254. The conclusion of the commission, however, has been disputed by some legal scholars. Professor Ronald D. Rotunda argues that although the profession is changing, the commission fails to prove that the trend is downward. See Ronald D. Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOY. U. CHI. L.J. 1149 (1987).

10. THE FLORIDA BAR COMM'N ON LAWYER PROFESSIONALISM, PROFESSIONALISM: A RECOMMITMENT OF THE BENCH, THE BAR AND THE LAW SCHOOLS OF FLORIDA 10 (May 1989).

11. *Id.* The role of advertising in the decline of professionalism may in fact be more a product of lawyers than consumers. See generally Roy M. Sobelson, *The Ethics of Advertising By Georgia Lawyers: Survey and Analysis*, 6 GA. ST. U. L. REV. 23 (1989) (analyzing the findings of a year-long study of advertising by lawyers in Georgia).

12. See Rotunda, *supra* note 9, at 1156. Professor Rotunda states, "I am no Pollyanna, but I do think that matters are getting better, not worse." *Id.*

of continual public criticism¹³ and have recently served as buffoons in the rhetoric of political entrepreneurs.¹⁴

In 1986 the American Bar Association issued a Report of the Commission on Professionalism with recommendations intended to "inspire [in lawyers] a rebirth of respect and confidence in themselves, in the services they provide and in the legal system itself."¹⁵ The report offers explicit advice¹⁶ as a "blueprint"¹⁷ for enhancing the status of the profession. Some states and localities have responded by launching programs to advance legal professionalism.¹⁸ Although the ABA Report acknowledges increased diversity within the profession,¹⁹ it fails to recommend that a concerted effort be made to eliminate discriminatory conduct within the profession.²⁰

13. [L]awyers as a group are blamed for some serious public problems. Many individuals blame lawyers for the huge increase in medical malpractice litigation, with a concomitant sharp increase in the costs of insurance protection, for example. Many blame lawyers when public playgrounds and sports programs are threatened with a loss of liability insurance and may be forced to discontinue use of facilities for recreational activities.

ABA COMM'N ON PROFESSIONALISM, *supra* note 9, at 253.

14. Former Vice-President Dan Quayle's vocal criticism of the legal profession was met with sharp criticism from ABA President Talbot D'Alemberte. See Don J. DeBenedictis, *ABA Releases Civil Justice Plan*, A.B.A. J., Apr. 1992, at 30; Steven Keeva, *Quayle v. ABA, Round II*, A.B.A. J., Oct. 1992, at 34.

15. ABA COMM'N ON PROFESSIONALISM, *supra* note 9, at 262. Professor Robert F. Drinan, S.J., suggests that:

The bar is struggling to identify itself, sometimes under the rubric of professionalism. It may be that the traditional rules of ethics, inherited from an age when lawyers were few, elitist, and male, do not truly resonate for a bar that in the year 2000 will number one million, will be ethnically diverse, and about 40% female.

Robert F. Drinan, S.J., Foreword, *Legal Ethics From 1983 to 1993: Golden Age or a Decade of Decline?*, 6 GEO. J. LEGAL ETHICS 693, 695 (1993).

16. *But see* Nancy J. Moore, Review Essay, *Professionalism Reconsidered*, 4 AM. B. FOUND. RES. J. 773, 775 (1987) ("Too many of the proposals resemble the vague platitudes and general exhortations once found (and since rejected) in the former Canons of Ethics.").

17. ABA COMM'N ON PROFESSIONALISM, *supra* note 9.

18. Some states now require attorneys to attend Continuing Legal Education in professionalism. For example, attorneys licensed in Georgia are required to attend a one-hour course in professionalism each year. GEORGIA STATE BAR RULES, Rule 8-104(B)(3) (1995).

19. The ABA Report includes statistics that reflect an increase in the number of women and minorities in law school, a rise in the number of women admitted to the bar, and a decrease in the median age of practicing lawyers. The Report states: "Thus, if it ever could have been said that the Bar was composed of persons having the same backgrounds and values, that certainly is no longer the case. We are as diverse as one could imagine." ABA COMM'N ON PROFESSIONALISM, *supra* note 9, at 252.

20. The ABA's recommendations are divided into categories: general recommendations, those directed to law schools, those directed to the practicing bar and bar associations, and those directed to judges. One of the seven general recommendations is that the Bar "[p]reserve and develop within the profession integrity, competence, fairness, independence, courage and a

Similarly, gender bias reports address discriminatory improprieties within the profession but seldom mention the existence of a professionalism crusade.²¹ One does find a reference to a connection between the professionalism and gender bias commissions in a footnote of a report to the House of Delegates issued by the ABA Commission on Women in the Profession.²² Some states have also issued court conduct handbooks.²³ For example, the State Bar of Georgia recently issued a handbook that was authored by the Women and Minorities in the Profession Committee of the State Bar in conjunction with the Chief Justice's Committee on Professionalism.²⁴

The gender bias and professionalism movements have proceeded, for the most part, with distinct commissions reflecting the specific focus of each entity.²⁵ This separatism is clearly warranted with respect to matters unique

devotion to the public interest." There is, however, no explicit recognition of discrimination within the profession, nor of the need to correct existing gender bias in order to heighten professionalism. *See id.* at 263-65.

21. *See supra* note 7.

22. ABA COMM'N ON WOMEN IN THE PROFESSION, REPORT TO THE HOUSE OF DELEGATES 2 (1988). The report advocates a recognition of the existence of gender bias and an adoption of resolutions that "will put the ABA on record as reaffirming the principle that discrimination is incompatible with standards of professionalism." *Id.* The report's footnote to this position states:

The work of the Commission on Women in the Profession has important connections with the work of the ABA Commission on Professionalism, which issued a report in 1986, " . . . In the Spirit of Public Service: A Blueprint for the Rekindling of Lawyer Professionalism." The connection between the concerns addressed by these two Commissions serves to underscore the fact that issues being raised by women are more than just "women's issues," but rather are crucial human and professional issues.

Id. at 2 n.2.

23. The Florida Bar's COURT CONDUCT HANDBOOK: GENDER EQUALITY IN THE COURTS is part of a joint project of the Supreme Court of Florida and the Florida Bar. The Palm Beach County Bar Association issued a pamphlet entitled *Standards of Professional Courtesy*, which notes standards relating to scheduling, discovery, conduct towards other attorneys, the court and participants, candor to the court and opposing counsel, and efficient administration.

24. STATE BAR OF GEORGIA, COURT CONDUCT HANDBOOK, (1994). This handbook was a joint effort of the Professionalism Commission and the Women and Minorities in the Profession Committee of the State Bar rather than being a direct product of the Georgia Commission on Gender Bias in the Judicial System.

25. Some jurisdictions have noted the elimination of discrimination as a goal of professionalism. For example, Georgia includes in its statement on professionalism the general aspirational ideal that, "As a lawyer, I will aspire . . . [t]o avoid all forms of wrongful discrimination in all of my activities including discrimination on the basis of race, religion, sex, age, handicap, veteran status, or national origin. The social goals of equality and fairness will be personal goals for me." CHIEF JUSTICE'S COMM'N ON PROFESSIONALISM, *History, Mandate, Structure*, 13 (1990). A notable incorporation of gender bias into professionalism is also seen in an article commissioned by the Women Lawyer's Association of Michigan. *See* Lorraine H. Weber, *Professionalism and Gender: A Practical Guide*, 69 MICH. BAR J. 898 (1990).

to their particular goals.²⁶ The dual avenues taken, however, fail to provide a concerted force toward the elimination of bias in the legal profession.

This article maintains that professionalism is devoid of a significant qualitative value absent a recognition of our pluralistic society and profession. It is self-defeating to maintain an aspirational paradigm of "public spirit"²⁷ unless ample consideration is devoted to rectifying the inherent bias within the profession. Achieving equality with an understanding of difference needs to be a meaningful component of true professionalism. In this regard, it must be noted that although this article is limited to a discussion of gender bias, it is hoped that the methodology suggested here can also serve as a precedent for correcting other biases within the legal profession.

This article proposes better coordination between professionalism and gender bias reform in order to facilitate the implementation phases emanating from these two efforts. Coalescing the goals of the professionalism and gender bias commissions will provide both efficiency and expanded energy. While combining gender bias and professionalism reform may not prove remarkably transformative, it does serve to fortify the existing mechanisms designed to achieve these symbiotic goals.

This article does not, however, propose to eliminate either the current professionalism or gender bias commissions. These entities present a necessary perspective for addressing existing problems. Rather, coordination in areas of mutual advantage can be accomplished by placing a high priority, within the construct of professionalism, on the goal of eliminating discriminatory conduct. Although "Women and the Law" conferences occur, the incorporation of gender bias issues into professionalism conferences is less apparent. Using the professionalism forum to advocate gender bias reform offers a new avenue for educating the legal community and provides a more comprehensive audience for discussion of these issues.

It is essential to note that this article presupposes the maintenance of an adversarial system, a system that in many respects is antithetical to a feminist approach.²⁸ This article does not propose reconstructing existing bodies of law in order to dissipate inherent bias.²⁹ Sociological studies emphasize the perplexities faced by women as a consequence of the existing norms in our

26. For a discussion of the goals that remain unique to each of these two bodies, see *infra* Part IV.

27. ABA COMM'N ON PROFESSIONALISM, *supra* note 9.

28. See Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 50-55 (1985).

29. Structural changes in both legal education and the law would clearly provide significant resolution towards the elimination of gender bias. See generally Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U. CHI. L. REV. 453 (1992); Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193 (1991).

legal community.³⁰ An ideal resolution would necessitate revamping both the law and the profession, from their historic roots through their resulting documentation, to include pluralistic thought and process.³¹ This article proposes a more practical perspective that admittedly does not eliminate all bias in the law.³² Rather, it offers one positive step within the existing framework of professionalism and gender bias reform to assist in achieving the ultimate goal of gender equality.³³

In recommending a unified approach to the elimination of gender bias in the legal profession, there is to some extent a "mainstreaming"³⁴ of the individual problems faced by the myriad of women within the profession. Clearly, differences premised upon race,³⁵ class, and sexual orientation can effect the methodology being employed.³⁶ As eloquently noted by Carrie Menkel-Meadow, "[i]f feminism is to make its mark on laws and the larger social contexts in which law is experienced, then we must find ways for human conversation and translation to create a joint gendered legal culture that more fully represents the world it seeks to regulate."³⁷

30. RAND JACK & DANA C. JACK, *MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS* (1989).

31. Professor Carrie Menkel-Meadow, in describing the patterns of feminist argument, notes the existence of

claims from a wide variety of legal scholars analogizing (as lawyers have been taught to do) . . . that gender difference (whether based on social construction or more essentialist views of gender) will produce different laws, legal practices and legal methods when women's values are recognized and acknowledged in the legal system.

Carrie Menkel-Meadow, *Mainstreaming Feminist Legal Theory*, 23 PAC. L.J. 1493, 1516 (1992).

32. Although this article offers only one step in the process of achieving gender equality, it should not be considered as surrendering the ultimate goal of redefining law to include women's culture. As noted by Professor Leslie Bender, in order to achieve gender equality we must not limit our focus merely to the elimination of sex discrimination. Bender, *supra* note 5, at 945.

33. As noted by Professor Linda Bell:

Although a feminist ethics begins with a recognition and rejection of injustice and oppression, specifically against and of women, it cannot stop there. Since women are affected by different oppressions according to class, ethnicity, race, and sexual orientation, and, depending on these factors, are even affected differently by gender oppression, any restriction of feminist ethics to concern with gender oppression is impossible. Efforts to insist on such restriction, whether by the culture or by the well-meaning, must be resisted.

LINDA A. BELL, *RETHINKING ETHICS IN THE MIDST OF VIOLENCE: A FEMINIST APPROACH TO FREEDOM* 53 (1993).

34. Menkel-Meadow, *supra* note 31.

35. See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990).

36. See generally ELIZABETH V. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988).

37. Menkel-Meadow, *supra* note 31, at 1541.

II. PROFESSIONALISM

A. Defining Professionalism

Scholars have debated the definition and confines of the term "professionalism" with little resolution. The ABA Report of the Commission on Professionalism accepts an elastic concept that promotes "a rich, long-standing heritage," noting that "any single definition runs the risk of being too confining."³⁸ Chief Justice Harold G. Clarke of the Georgia Supreme Court advises that although it may defy definition, "it is the kind of thing that you may look at, like the Cheshire cat's grin—you see it now, then you don't see it, but when you finally get through it and see it you have an awfully good feeling about it."³⁹

To reflect upon professionalism that "I know it when I see it"⁴⁰ fails to account for the fact that the viewer often does not consider professionalism as applied to all lawyers. For some, professionalism efforts may be limited to issues involving those who have been historically included within the profession. This limited view can result in a definition of professionalism that overlooks issues pertaining to gender equality. Professionalism, therefore, requires definition, whether by attributes,⁴¹ qualities, or expectancies. To analyze this concept without a sufficient definition will promote perpetuation of the historical bias that permeates the legal profession.

The attributes of professionalism reflected here have been elicited by recapitulating and synthesizing an array of legal scholarship. Some of this scholarship, however, defines professionalism in terms of one set of attributes that apply to a variety of different professions.⁴² Thus, existing definitions

38. ABA COMM'N ON PROFESSIONALISM, *supra* note 9, at 261.

39. Interview with Chief Justice Harold G. Clarke, Supreme Court of Georgia, in CHIEF JUSTICE'S COMM'N ON PROFESSIONALISM, *supra* note 25, at 24.

40. This now famous phrase was used by Justice Potter Stewart to describe his own standard for judging whether material was pornographic. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

41. "[P]rofessionalism should properly be regarded as a scale rather than a cluster of attributes, and thus that attributes commonly noted have differing values." WILBERT E. MOORE, *THE PROFESSIONS: ROLES AND RULES* 5 (1970).

42. For example, Professor Jack L. Sammons, Jr., in response to the question, "[W]hat is professionalism?" stated:

The generally accepted concept is that professions provide particular types of services to others and professionalism is doing that in a manner which approaches a professional ideal. The professional ideal must be something other than a benefit to the professional. In other words, we can expect more of a professional than that. The ideal must offer an acceptable justification for the activities of the profession.

JACK L. SAMMONS, *LAWYER PROFESSIONALISM* 3 (1988).

may express the common factors applicable to groups such as lawyers, doctors, teachers, and the clergy.

In contrast, the definition of professionalism provided here is exclusive to the legal occupation. This distinction is premised upon a belief that professionalism may change its complexion depending on the specific nature and requirements of a particular profession. Law especially requires an idiosyncratic definition of professionalism, because lawyers serve not only their clients, but also serve the general public in the drafting, enforcement, and application of laws. Although physicians and teachers may have duties to the general populace, their roles do not directly encompass the maintenance of our basic structure of government.

The distinction between law and other professions is highlighted when the goal of gender equality is considered. While doctors should strive both inside and outside their practice to promote gender equality, their basic function does not encompass a duty toward the achievement of this goal. In contrast, attorneys serve as both models and effectuators in the promotion of equality. Clearly, many attributes related to lawyer professionalism are equally present and significant to other professions.⁴³ Lawyers, however, have the additional function of providing necessary reform to achieve equality in society.

At the outset, it should be noted that professionalism differs from the term "profession."⁴⁴ A profession pertains to the attributes for membership in the occupation, while professionalism applies to the aspirational goals of the profession.⁴⁵ The goals of the legal profession reflect the profession's obligations to clients, the general public, the legal profession, and the legal system.⁴⁶

43. Although Professor Thomas D. Morgan notes that "[p]rofessionalism is not a self-defining term," he lists three attributes seen in traditional professions: "First, professional skills are intellectual in character and result from an extended period of training Second, professional services are, in general, beyond assessment by a typical client Third, professional concerns transcend the problems of particular individuals"

Thomas D. Morgan, *The Fall and Rise of Professionalism*, 19 U. RICH. L. REV. 451 (1985).

44. See, e.g., GA. CODE ANN. § 14-7-2(2) (1994) ("'Profession' means the profession of certified public accountancy, architecture, chiropractic, dentistry, professional engineering, land surveying, law, psychology, medicine and surgery, optometry, osteopathy, podiatry, veterinary medicine, registered professional nursing, or harbor piloting.").

45. See generally Daniel R. Coquillette, *Professionalism: The Deep Theory*, 72 N.C. L. REV. 1271 (1994).

46. Morgan & Rotunda note:

[A]ny Model Code of Professional Responsibility or set of Model Rules is an attempt to accommodate at least five interests. These interests are those of (1) lawyers as individuals, (2) lawyers in their relationships with each other, (3) lawyers' responsibilities to their clients, (4) lawyers' responsibilities to non-clients with whom the lawyer deals, and (5) institutions of the legal system through which the lawyer works.

The self-regulating nature of the profession increases the importance of professionalism goals.⁴⁷ To maintain high standards, it is crucial not only that the profession maintain ethical boundaries, but also that the profession's aspirational goals be integral to those engaged in the practice. The absence of proper enforcement of internal standards strengthens the argument for outside regulation. Relegating the legal practice to a business or industry can be detrimental to maintaining an "altruistic spirit" in the profession.⁴⁸

Timothy P. Terrell and James H. Wildman note that defining professionalism goals as "professional etiquette" or "helping the poor" offers a limited and unsatisfactory approach.⁴⁹ Increasing civility in the profession⁵⁰ and participating in pro bono activities are inherent aspects of professionalism goals.⁵¹ Attempting to concentrate the definition of professionalism into either or both of these categories fails to provide a comprehensive approach to all of the profession's obligations to clients, the general public, the legal profession, and the legal system.⁵²

In discussing the meaning of professionalism, the ABA report refers to the definition of profession provided by Dean Roscoe Pound. A primary element of a profession as defined by Dean Pound is the "[p]ursuit of the learned art in the spirit of a public service."⁵³ This definition is reflected in the title to the ABA Report, ". . . In the Spirit of Public Service: A Blueprint for the

THOMAS MORGAN & RONALD D. ROTUNDA, *PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS* 25 (6th ed. 1995).

47. "The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." MODEL RULES OF PROFESSIONAL CONDUCT, Preamble (1983).

48. John G. Corlew, *Preserving the Professional Tradition*, 60 MISS. L.J. 589, 592 (1990).

49. Timothy P. Terrell & James H. Wildman, *Rethinking "Professionalism"*, 41 EMORY L.J. 403, 419 (1992).

50. Professor Amy Mashburn, after detailing "the class-contingent risks inherent in enacting these problematic codes (whether they are enforced or not)" concludes that "civility codes will prove to be unsatisfactory therapy for the misunderstood professionalism crisis, in part, because of the deficits exposed by a more 'class-conscious' examination of professionalism issues." Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 664 (1994).

51. See generally Tigran W. Eldred & Thomas Schoenherr, *The Lawyer's Duty of Public Service: More Than Charity?*, 96 W. VA. L. REV. 367 (1993-94).

52. Terrell & Wildman use six values in discussing the "elements of a professional tradition": (1) An Ethic of Excellence; (2) An Ethic of Integrity: A Responsibility To Say "No;" (3) A Respect for the System and Rule of Law: A Responsibility to Say "Why,;" (4) A Respect for Other Lawyers and Their Work; (5) A Commitment to Accountability; and (6) A Responsibility for Adequate Distribution of Legal Services. Terrell & Wildman, *supra* note 49, at 424-29. See also MORGAN & ROTUNDA, *supra* note 46, at 25.

53. ABA COMM'N ON PROFESSIONALISM, *supra* note 9, at 261.

Rekindling of Lawyer Professionalism.”⁵⁴ This report does not, however, include Karen Berger Morello’s observations that “[t]he giants of the legal profession, men like Harlan Fiske Stone, Roscoe Pound and Clarence Darrow, consistently opposed the entry of women into the law and sought to keep them on the fringes of the profession.”⁵⁵ The ABA’s use of the term “rekindling” in reference to professionalism falls short of offering a progressive approach because it suggests acceptance of historic aspects of the legal profession.

The attributes, qualities, and expectancies that form a definition of professionalism can be placed into four categories: improving the quality of service provided to clients, improving services offered to the public, improving the legal profession, and improving the legal system.⁵⁶ These categories, however, are not distinct entities operating exclusive of each other. The criteria and focus that emerge in these aspirations⁵⁷ may appear in more than one category. Eliminating gender bias, however, is an essential aspect of each of these four goals.

1. Improving the Quality of Service Provided to Clients

The most apparent feature of professionalism for lawyers is encompassed in their daily service to clients.⁵⁸ Improving the quality of this service with enhanced competence⁵⁹ and integrity is a central goal of professionalism.⁶⁰

54. *Id.*

55. MORELLO, *supra* note 1, at IX-X. The ABA Report of the Commission on Professionalism does note that “[t]he rhetoric may be dated, but the Commission believes the spirit of Dean Pound’s definition stands the test of time.” ABA COMM’N ON PROFESSIONALISM, *supra* note 9, at 261.

56. See MORGAN & ROTUNDA, *supra* note 46, at 25. Professor David Luban speaks of Brandeis’ “constellation of six elements as ‘progressive professionalism.’” The six beliefs are: [F]irst, professionalism is better than commercialism; second, lawyers are mediators between public and private interests; third, lawyers therefore have a special responsibility to the common good; fourth, the common good will be realized by blunting class antagonisms within a fundamentally capitalist frame-work; fifth, in an era of high capitalism, class antagonisms must be blunted by promoting the interests of the people against those of the corporations; and, sixth, lawyers are peculiarly suited by training and cast of mind to this task.

David Luban, *The Noblesse Oblige Tradition in the Practice of Law*, 41 VAND. L. REV. 717, 725 (1988).

57. In defining professionalism we need not approach it “descriptive[ly] (what lawyers do)” but rather “normative[ly] (what lawyers ought to do).” Jennifer G. Brown, *Rethinking “The Practice of Law,”* 41 EMORY L.J. 451, 452 (1992).

58. “A working definition of professionalism for lawyers, then, is responsibility in the exercise of power on behalf of clients.” L. Ray Patterson, *The Fundamentals of Professionalism*, 45 S.C. L. REV. 707, 709 (1994).

59. Rule 1.1 of the Model Rules of Professional Conduct requires that “[a] lawyer shall provide competent representation to a client. Competent representation requires the legal

The public's perception of attorneys is formed and modified in part by the treatment that clients receive from their lawyers. An attorney's incompetence defeats the benefit sought by the client.⁶¹ Likewise, conduct that reflects bias or dishonesty by the attorney provides a negative long-term perception that the client will hold of both the attorney and of the profession.

Clients often approach lawyers from a result-oriented perspective. For example, the client may seek the drafting of a will, representation in a criminal matter, or advice on a corporate matter. The client may pursue answers to specific questions or, alternatively, may lack the skill to know what questions need to be asked. Often the client approaches the attorney only after a crisis has developed. Providing the client with an atmosphere of professionalism enhances the perception of the profession and facilitates a continuation of trust in both the lawyer and the profession. Satisfied clients are more apt to return to an attorney for legal advice in the future. Moreover, honesty regarding the inability to achieve specific results desired by the client may help avoid subsequent hostility.⁶² Credibility in the legal profession is achieved, in part, when clients feel comfortable seeking the advice of attorneys.

The attorney-client relationship embraces an element of power because specialized knowledge or expertise places the attorney in a superior position to the client.⁶³ Discriminatory conduct by the attorney may lower the esteem in which the client will hold the attorney. Clients who are victims or observers of an attorney's overt or subtle bias are less likely to find comfort in the attorney-client relationship.⁶⁴ Accordingly, elimination of gender bias in the profession serves to improve that relationship.

knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.1 (1994). Although this rule mandates that lawyers provide competent representation, improving the level of competence is still an important goal of professionalism. Increasing the level of competence among attorneys will provide greater satisfaction to clients.

60. Terrell & Wildman, *supra* note 49, at 424-26 (listing an "ethic of excellence" among the six values of a professional tradition).

61. "Competence, like access to justice, is what everyone wants more of, but no one has a very clear sense of what exactly 'it' is, how best to promote it, or which efforts will be worth the cost." Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274, 288-89 (1986).

62. Terrell & Wildman, *supra* note 49, at 426 ("[T]he 'excellence' of a lawyer's services to a client necessarily entails delivering advice that the client would rather not hear.").

63. Professor L. Ray Patterson notes the following "three basic principles of professionalism: (1) Power is the source of responsibility; (2) rights must be exercised in good faith; and (3) duties must be fulfilled in good faith." Patterson, *supra* note 58, at 709.

64. "Etiquette rules arguably engender the public respect that allows the court system to work. Images of professionalism, competence, dignity and impartiality fortify the impression of truth." Catherine T. Clarke, *Missed Manners in Courtroom Decorum*, 50 MD. L. REV. 945, 962 (1991).

2. *Improving Services Offered to the Public*

Accessibility to legal services is an essential ingredient of professionalism.⁶⁵ A legal system that is secure only to certain classes of society perpetuates a distrust in that system. The present cost-prohibitive nature of the legal system necessitates that lawyers offer alternative methods for securing legal advice.⁶⁶ Whether through government subsidized programs or pro bono activities, the general public should know that the legal system operates in a non-exclusive setting.⁶⁷ The "commercialism" of the profession⁶⁸ needs to be balanced with the provision of legal services to those in society who do not have the means to obtain an attorney.⁶⁹ Improving services to the public also provides internal enhancement for lawyers who participate in rendering public services.⁷⁰

Inherent gender bias in our society detrimentally affects the ability of women to secure legal advice. Women are historically paid less than men.⁷¹ Women exceed men in numbers on the welfare rolls.⁷² The effect of existing gender bias throughout society needs to be considered in the improvement of services offered by the profession to the public.

3. *Improving the Legal Profession*

Lawyers have an obligation to improve the profession. The very nature of maintaining a self-regulating profession mandates that there be satisfactory internal policing.⁷³ Ethical codes and disciplinary commissions serve as the

65. Richard C. Baldwin notes:

The fact that law pervades our institutions is not in itself a justification for expansion of services to all members of society. Law is pervasive in our society because of our cultural commitment to democratic values. Citizen access to and participation in government are hallmarks of a society with democratic aspirations, as is a citizen's ability to resolve important disputes and enforce legal rights. Thus, access to justice for all members of society is the most important substantive value carried by our professional heritage.

Richard C. Baldwin, "Rethinking Professionalism"—*And Then Living It!*, 41 EMORY L.J. 433, 437 (1992).

66. See Michael Davis, Comment, *Professionalism Means Putting Your Profession First*, 2 GEO. J. LEGAL ETHICS 341, 344-46 (1988).

67. See generally Mary Coombs, *Your Money or Your Life: A Modest Proposal for Mandatory Pro Bono Services*, 3 B.U. PUB. INT. L.J. 215 (1993) (proposing a mandatory pro bono program in which attorneys provide 20 hours of service a year or its monetary equivalent).

68. See generally *Conference on the Commercialization of the Legal Profession*, 45 S.C. L. REV. 883 (1994).

69. See Harry L. Carrico, *The New Professionalism*, N.Y. ST. BAR J., Jan. 1990, at 11-13.

70. Brown, *supra* note 57, at 461.

71. WOMEN'S ACTION COALITION, WAC STATS, THE FACTS ABOUT WOMEN 59 (1993).

72. *It May Prove Costlier to Get People off Dole*, VIRGINIAN-PILOT, Aug. 22, 1993, at A10.

73. The Preamble of the Model Rules of Professional Conduct notes:

focus for sanctioning improper conduct. More, however, is needed to enhance the profession and to offer satisfaction to attorneys.⁷⁴ Having a goal of improving the legal profession offers internal and external benefits to the profession.⁷⁵

As previously noted, the profession is historically male-based.⁷⁶ Despite the admission of women into the legal community, gender bias is prevalent.⁷⁷ This bias handicaps women who operate in the legal system⁷⁸ and presents them with hindrances that are unique as a result of their gender.⁷⁹ Rectifying the uncomfortable occurrences experienced by women would not only serve women, but would benefit the entire profession.⁸⁰

The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement.

MODEL RULES OF PROFESSIONAL CONDUCT, Preamble (1983).

74. Lawyers have expressed an enormous dissatisfaction with their choice of profession. A 1984 A.B.A. poll showed that "41% would choose another profession if they had it to do over again." Paul Ciotti, *Unhappy Lawyers*, Josephson Institute of Ethics 54 (1993).

75. See generally Thomas L. Shaffer, *Inaugural Howard Lichtenstein Lecture in Legal Ethics: Lawyer Professionalism as a Moral Argument*, 26 GON. L. REV. 393 (1990/91) (urging lawyers to be both "professional" and "in and of a profession").

76. See *supra* notes 2-4.

77. See *infra* notes 119-35 and accompanying text.

78. Professor Deborah Rhode notes that "[u]nconscious gender prejudices affect not only the evaluation of individual performance, they also affect the performance itself." Deborah L. Rhode, *Perspectives on Professional Women*, 40 STAN. L. REV. 1163, 1189 (1988). She further states that

[m]ore overt, although often unintentional, forms of gender-bias have comparable consequences. Women in male-dominated occupations face continuing problems of "fitting in" and forming the client and collegial relationships necessary for advancement. Female professionals often lack access to the informal networks of advice, collaboration and contacts on which successful careers depend.

Id. at 1190.

79. *Id.*

80. The very nature of the legal profession is what suits it for initiating an effective battle against discrimination: Lawyers are advocates of justice; when they become judges they administer justice. A logical corollary to this view of the profession is that lawyers and judges should ensure that the laws under which they advocate and which they administer are just. Further, to avoid being hypocritical, lawyers should devote themselves to fostering a just society. Consequently, the legal profession should not tolerate any unjust behavior. Specifically, it should not tolerate laws, behavior, or attitudes that indicate that any member of society is being treated unfairly because he or she belongs to a particular segment of society.

Suzannah B. Wilson, *Eliminating Sex Discrimination in the Legal Profession: The Key to Widespread Social Reform*, 67 IND. L.J. 817, 840 (1992).

4. *Improving the Legal System*

Our laws and our legal system have historically been constructed by lawyers. For example, "33 of the 55 participating members of the Constitutional Convention were lawyers."⁸¹ Lawyers, because of their educational and practical experience in the law, bring a unique insight to the preparation and modification of our laws.⁸² Timothy P. Terrell and James H. Wildman note that "[l]awyers are remarkably important in our culture, . . . because they are the 'gatekeepers' to this vital form of social cohesion."⁸³

Because of the unique role⁸⁴ lawyers play in society, they can assist in providing a fairer, more equitable, and honest system of government. Rectifying inequities in the law can be accomplished more effectively by those with knowledge of the system's structure.

Gender bias in our laws and in our legal system⁸⁵ is duly noted in the array of studies that have examined states and the federal legal system.⁸⁶ This bias undercuts the respect needed for our system in order to instill public acceptance and abidance in established rules and regulations. Eliminating bias in our laws and in the legal system will provide a superior legal process, as well as heightened public respect for the system.

B. *Professionalism and Ethics*

As noted by Chief Justice Clarke of the Georgia Supreme Court, professionalism needs to be distinguished from legal ethics.⁸⁷ "[E]thics is a minimum standard required of lawyers while professionalism is a higher standard expected of all lawyers."⁸⁸ The former carries disciplinary sanctions for violation, while the latter is aspirational in nature.

Incorporating professionalism into ethics may appear at first blush to be an attempt to correct existing bias by providing disciplinary sanctions for improper conduct.⁸⁹ Removing the elimination of gender bias in the legal

81. ABA COMM'N ON PROFESSIONALISM, *supra* note 9, at 251.

82. "[T]he legal profession's traditional ideal viewed the lawyer as the protector of life, liberty, and property through due process." Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L. J. 1239, 1266 (1991).

83. Terrell & Wildman, *supra* note 49, at 423.

84. "Lawyering is a distinctive occupation with unique moral requirements because lawyers have established a special relationship to a fundamental aspect of our culture." *Id.* at 422.

85. "There is no doubt that women are experiencing and have experienced discrimination on the grounds of sex in the legal profession." Barnes, *supra* note 3, at 297.

86. *See supra* note 7.

87. CHIEF JUSTICE'S COMM'N ON PROFESSIONALISM, *supra* note 25, at 24.

88. *Id.*

89. *See generally* Susan D. Gilbert & Michael P. Allen, *Overcoming Discrimination in the*

profession from the rubric of professionalism and place its enforcement in ethical codes or regulation is, however, an alternative that provides limited benefit for the achievement of a true professionalism. It suffices only to correct self-evident egregious conduct that is often covered by existing legislation.⁹⁰

The inclusion of disciplinary sanctions for discriminatory conduct is demonstrated in the ethical standards of several jurisdictions.⁹¹ While some jurisdictions have initiated ethics rules for acts related to employment discrimination⁹² and harassment,⁹³ most states have not taken the initiative to formalize anti-discrimination provisions within their ethical codes.⁹⁴ While the Code of Judicial Conduct has added policies prohibiting judges from personally engaging in biased conduct⁹⁵ and likewise mandating judges to restrain those under their auspices from engaging in discriminatory practices,⁹⁶ the force of these rules remains to be seen.⁹⁷ The recent addition of

Legal Profession: Should the Model Rules be Changed?, 6 GEO. J. LEGAL ETHICS 933 (1993).

90. See, e.g., 42 U.S.C. § 2000e (1990) (covering discrimination in employment).

91. Gilbert & Allen, *supra* note 89, at 934-42; see Joanne Pelton Pitulla, *The Persistence of Bias in the Legal Profession*, 1993 Symposium, THE PROF. LAW. 26, 33-36.

92. For example, the District of Columbia Rules of Professional Conduct provide:

A lawyer shall not discriminate against any individual in conditions of employment because of the individual's race, color, religion, national origin, sex, age, marital status, sexual orientation, family responsibility, or physical handicap.

DISTRICT OF COLUMBIA RULES OF PROFESSIONAL CONDUCT Rule 9.1 (1991).

Other states that have implemented anti-discrimination rules that relate to lawyers' acts of employment discrimination include Vermont and New York. Gilbert & Allen, *supra* note 89, at 935-36.

93. For example, Minnesota has adopted an anti-harassment ethical rule that includes the following prohibition:

It is professional misconduct for a lawyer to:

(g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual preference or marital status in connection with a lawyer's professional activities

MINNESOTA RULES OF PROFESSIONAL CONDUCT Rule 8.4 (1985).

94. Only nine states and the District of Columbia have adopted or proposed anti-discrimination ethics rules. Gilbert & Allen, *supra* note 89, at 934.

95. See Kittie D. Warshawsky, *The Judicial Canons: A First Step in Addressing Gender Bias in the Courtroom*, 7 GEO. J. LEGAL ETHICS 1047 (1994); Marina Angel, *Sexual Harassment By Judges*, 45 U. MIAMI L. REV. 817 (1991). Canon 3 of the revised Model Code of Judicial Conduct states:

A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

MODEL CODE OF JUDICIAL CONDUCT 3B(5) (1990).

96. Canon 3 of the revised Model Code of Judicial Conduct states:

these provisions to the Code of Judicial Conduct is without doubt an advancement that should serve as a model for amending the Model Rules of Professional Conduct to include anti-discrimination language.⁹⁸

Regulation outside professionalism boundaries, however, rarely offers solutions with respect to gender bias,⁹⁹ providing few instances where a cause of action arises as a result of discriminatory conduct.¹⁰⁰ Increasing regulatory power over a profession¹⁰¹ can also prove to be counterproductive to other meaningful aspects of professionalism.¹⁰² While the addition of an anti-

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, or other similar factors, are issues in the proceeding.

MODEL CODE OF JUDICIAL CONDUCT 3B(6) (1990).

97. The Director of the National Judicial Education Program to Promote Equality for Women and Men in Courts notes that "[b]efore intervention to stop gender-biased behavior can become a reality, judges must become aware of what constitutes such behavior, and how even apparently trivial incidents can have important ramifications for credibility and case outcome." Lynn H. Schafraan, *The Obligation to Intervene: New Direction From the American Bar Association Code of Judicial Conduct*, 4 GEO. J. LEGAL ETHICS 53, 55 (1990).

98. Gilbert & Allen, *supra* note 89, at 934.

99. Blatant gender bias is the easiest to observe and thus eliminate. More problematic is subtle bias that is difficult to detect and often is not reflected in the court record. Jennifer A. Levine, Note, *Preventing Gender Bias in the Courts: A Question of Judicial Ethics*, 1 GEO. J. LEGAL ETHICS 775, 777-80 (1988).

100. As noted by Gilbert and Allen, the adoption of an anti-discrimination rule in the Model Rules of Professional Conduct could "better the public's perception of the legal profession," exist when needed, "increase the bar's sensitivity to discrimination," "aid the diversification of the legal profession," and "create a model for other jurisdictions to adopt." Gilbert & Allen, *supra* note 89, at 943-46.

101. Increased regulation of the profession may be inevitable. As noted by Professor Hazard: "Legalized" regulation will undoubtedly continue to dominate the normative structure of the legal profession, through court-promulgated rules, increasingly intrusive common law, and public statutes and regulations. As a consequence, the dominant normative institution for the legal profession will no longer be "the bar," meaning the profession as a substantially inclusive fraternal group. The bar has become too large, diverse, and balkanized in its practice specialties for the old informal system to be effective as an institution of governance. In the emergent "legalized" era, increasingly dominant power reposes in government regulatory authorities, including courts, legislatures, and disciplinary agencies.

Hazard, *supra* note 82, at 1279.

102. The preamble of the Model Rules of Professional Conduct includes the following: "Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice." MODEL RULES OF PROFESSIONAL CONDUCT, Preamble (1983). See also Ellen S. Podgor, *Form 8300: The Demise of Law as a Profession*, 5

discrimination ethical rule would not impair the aspirational nature of professionalism, it is still insufficient to combat the subtle or unconscious bias that permeates the profession.¹⁰³ This requires education, so that members of the profession learn to recognize existing bias and work for its correction. This is best accomplished by placing the goal of eliminating discriminatory conduct high within the definition of professionalism.

C. Realigning Existing Structures

Professionalism has an air of elitism¹⁰⁴ and exclusion that some may consider to be anti-feminist by its very nature. Why, then, should women seek admission to this male-dominated country club?¹⁰⁵ Would a better institutional objective be deconstruction of the profession to eliminate all the privileges and exceptions that accompany this club? Would "[e]xpanding participation without redistributing power . . . simply legitimate existing structures?"¹⁰⁶

Completely redesigning our legal process could, idealistically, provide a neutral setting for increasing professionalism. Reality, however, requires that we proceed within existing mechanisms and structures. Realignment, as opposed to reconstruction, offers a practical perspective that can be influential in correcting inequities within our system and society. Thus, although our legal roots are male-dominated, and rekindling professionalism to some extent perpetuates these antiquated norms, inclusion of feminist thought and spirit in professionalism can offer a positive approach that will enhance existing bodies and also provide some reform in eliminating gender bias.

Concepts of professionalism, as previously noted, are not antithetical to gender bias reform.¹⁰⁷ In fact, improving the quality of services provided to

GEO. J. LEGAL ETHICS 485 (1992) (discussing the adverse effect on lawyer professionalism of the government's requirement that attorneys file a tax form for their receipt of cash in excess of ten thousand dollars).

103. See generally Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing the unconscious nature of most racially discriminatory beliefs).

104. Professor Sammons aptly notes:

The word "professionalism" has bad connotations for many people. For some it means getting paid for not getting upset when you should. For others it means wearing a three-piece suit to do the grocery shopping, or using an interior decorator to select your oversized mahogany desk. If the word only carries connotations like those for you, I ask that you give it a second chance.

SAMMONS, *supra* note 42, at 4.

105. De Tocqueville described the legal profession as the American aristocracy. Luban, *supra* note 57, at 718.

106. Deborah L. Rhode, *The Rhetoric of Professional Reform*, 45 MD. L. REV. 274, 282 (1986).

107. See *supra* notes 58-86 and accompanying text.

clients, improving services offered to the public, improving the legal profession, and improving the legal system all reflect gender neutral concepts. The inclusion of women in the profession and the eradication of gender bias are inherent within these goals. Employing a definition of professionalism that includes gender bias reform as one of its goals will serve to foster professionalism concepts.

Refusing to accept professionalism goals because of the male "club" mentality they have historically suggested, does nothing to enhance the quest for the elimination of gender bias. Rejection of the concept of professionalism because of the historical discrimination in the profession can only offer a voice against historical bias, and not a voice for progress towards eliminating existing discrimination. The use of new words in place of "professionalism," new concepts for professionalism goals, or a new forum for its distribution, will not offer the existing strength and recognition provided by the professionalism literature and commissions. In contrast, using existing professionalism structures will provide a significant audience as a new avenue for combating gender bias in our system. Thus, despite the elitist connotation that may surround the term "professionalism," it is beneficial to maintain and accept the existing mechanism, but realign it to serve as a new avenue for gender bias reform.

III. GENDER BIAS

A. Gender Bias in the Profession

Bias is demeaning to the ideal of professionalism. As noted by Lynn Hecht Schafran, "differences in treatment matter. They go far beyond personal irritation and insult to issues of equal opportunity, professional credibility, and whether one's clients receive the full due process of law."¹⁰⁸ The historical exclusion of women from the legal profession resulted in a deprivation of the female culture in key aspects of our laws and legal system.¹⁰⁹ Male lawyers have been the architects of our constitutional history and its interpretations, while women have been relegated to experiencing the effects of this process.¹¹⁰

Women, historically, have been excluded from professions. In *Bradwell v. Illinois*¹¹¹ the United States Supreme Court affirmed the Illinois Supreme

108. Lynn H. Schafran, *Practicing Law in a Sexist Society*, in WOMEN, THE COURTS AND EQUALITY 191 (Laura L. Crites & Winifred L. Hepperle, eds., 1987).

109. See generally Judith Resnick, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682 (1991).

110. See generally Becker, *supra* note 29 (arguing that the Bill of Rights has served the interests of men better than the interests of women).

111. 83 U.S. 130 (1872).

Court's decision refusing Myra Bradwell admittance to practice law in Illinois. Justice Miller, writing for the majority, found that "the right to admission to practice in the courts of a state" was not encompassed within the privileges and immunities clause of the Fourteenth Amendment.¹¹² A concurring opinion by Justice Bradley noted: "[T]he paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother. This is the law of the creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based on exceptional cases."¹¹³

Women were, of course, eventually admitted to the practice of law.¹¹⁴ In the case of Alta M. Hulett, her admission to practice in Illinois was "accompanied by a scolding from one of the justices who admitted her: 'If you were my daughter, I would disinherit you.'"¹¹⁵ Although women today do not suffer the admission barriers of the past,¹¹⁶ equality within the profession has not been achieved.

Gender bias is not exclusive to the female gender. In the gender bias report issued by the Michigan Supreme Court task force, gender bias was defined as "the tendency to think about and behave toward others primarily on the basis of their sex. It is reflected in attitudes and behavior toward women and men which are based on stereotypical beliefs about the 'true nature,' 'proper role,' and other 'attributes' of the gender."¹¹⁷ Although by definition the term "gender bias" appears neutral, the effects of gender bias in the legal system have been predominantly experienced by females.¹¹⁸

Gender bias within the legal system is exhibited not only in our laws and their application, but also in the courtroom environment.¹¹⁹ Female attorneys have been called, "lawyerette," "missy," "honey,"¹²⁰ or "sweetheart."¹²¹

112. *Id.* at 138-39.

113. *Id.* at 141-42 (Bradley, J., concurring).

114. "Indeed, in 1872, one year prior to the U.S. Supreme Court's *Bradwell* decision, the Illinois legislature had passed a law providing that '[n]o person shall be precluded or debarred from any occupation, profession, or employment (except military) on account of sex.'" Jane M. Friedman, *Myra Bradwell: On Defying the Creator and Becoming a Lawyer*, 28 VAL. U. L. REV. 1287, 1301 (1994).

115. *Id.* (quoting 5 CHI. LEGAL NEWS 453 (Apr. 19, 1873)).

116. "Between 1960 and 1990, women's representation in law school classes grew from 3 to 40%, and their representation among practicing lawyers grew from 3 to 14%." GEOFFREY C. HAZARD, JR. & DEBORAH L. RHODE, *THE LEGAL PROFESSION, RESPONSIBILITY AND REGULATION* 55 (1994).

117. FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS 3 (1989).

118. "Majority female attorneys and all minority attorneys observed substantially more instances of unfair or insensitive behavior directed towards themselves, their female and minority colleagues and litigants, witnesses and jurors than did majority males." *Id.* at 13.

119. See generally Abbie W. Thorner, *Gender and the Profession: The Search for Equal Access*, 4 GEO. J. LEGAL ETHICS 81, 108-11 (1990).

120. See *Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the*

Bias reports commonly cite instances of judges addressing women attorneys by their first names and male attorneys by their last.¹²² Comments from judges regarding the physical appearance¹²³ or dress of female attorneys are also noted.¹²⁴ Reports show that women attorneys are asked more often than their male counterparts if they are, in fact, attorneys.¹²⁵ Women attorneys repeatedly report being mistaken for secretaries, court reporters, and social workers.¹²⁶ Women attorneys are continually subjected to jokes¹²⁷ and, on occasion, sexual advances.¹²⁸ Perhaps most noticeable is the lack of credibility afforded to women attorneys.¹²⁹ As noted in the Georgia Report on Gender and Justice in the Courts, “[w]hen judges and attorneys deny a person credibility based on gender, professionalism is breached and substantive rights can be undermined.”¹³⁰

Many of the gender bias reports reflect the fact that men and women perceive the existence and nature of gender bias differently.¹³¹ For example, the Michigan Supreme Court task force report states that “male attorneys observed far fewer instances of unfair or insensitive courtroom treatment of female attorneys and litigants than did women attorneys.”¹³² In Colorado the

Commission on Gender Bias in the Judicial System, 8 GA. ST. U. L. REV. 539, 714 (1992); FINAL REPORT OF THE RHODE ISLAND COMMITTEE ON WOMEN IN THE COURTS 16 (1987); MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, FINAL REPORT, reprinted in 15 WM. MITCHELL L. REV. 825, 925-27 (1989).

121. MARYLAND SPECIAL JOINT COMMITTEE, GENDER BIAS IN THE COURTS 123 (1989).

122. See FINAL REPORT OF THE RHODE ISLAND COMMITTEE ON WOMEN IN THE COURTS 12 (1987); MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, FINAL REPORT, reprinted in 15 WM. MITCHELL L. REV. 825, 927 (1989).

123. WISCONSIN EQUAL JUSTICE TASK FORCE, FINAL REPORT 240 (1991).

124. See, e.g., MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, FINAL REPORT, reprinted in 15 WM. MITCHELL L. REV. 825, 928 (1989).

125. See *id.* at 929; MARYLAND SPECIAL JOINT COMMITTEE, GENDER BIAS IN THE COURTS 122 (1989).

126. See WISCONSIN EQUAL JUSTICE TASK FORCE, FINAL REPORT 249 (1991); GENDER AND JUSTICE: REPORT OF THE VERMONT TASK FORCE ON GENDER BIAS IN THE LEGAL PROFESSION 40 (1991).

127. See KENTUCKY TASK FORCE ON GENDER FAIRNESS IN THE COURTS: EQUAL JUSTICE FOR WOMEN AND MEN 16 (1992); COLORADO SUPREME COURT TASK FORCE ON GENDER BIAS IN THE COURTS, GENDER AND JUSTICE IN THE COLORADO COURTS 115 (1990).

128. See *Gender and Justice*, *supra* note 120, at 715; MARYLAND SPECIAL JOINT COMMITTEE, GENDER BIAS IN THE COURTS 125 (1989).

129. See *Gender and Justice*, *supra* note 120, at 703-08; COLORADO SUPREME COURT TASK FORCE ON GENDER BIAS IN THE COURT, GENDER AND JUSTICE IN THE COLORADO COURTS 114 (1990).

130. *Gender and Justice*, *supra* note 120, at 715.

131. See REPORT OF THE UTAH TASK FORCE ON GENDER AND JUSTICE 93-96 (1990).

132. FINAL REPORT OF THE MICHIGAN SUPREME COURT TASK FORCE ON GENDER ISSUES IN THE COURTS 13 (1989).

task force reported that “[f]orty-three percent of the women in the attorney survey compared with only seven percent of men, thought bias was widespread though subtle.”¹³³ In Minnesota the Task Force for Gender Fairness in the Court noted that 63% of the female attorneys and only 19% of the male attorneys responded “yes” when asked whether demeaning jokes or remarks were being made often or sometimes in court or in chambers towards women.¹³⁴ Maryland reports that 57% of female attorneys and only 12% of male attorneys thought that judges appeared to give less weight to female attorneys arguments than male attorneys.¹³⁵

Despite the existence of gender bias, women attorneys are often reluctant to take corrective action. “Reasons cited for this inaction included the fear that it might compromise their client’s case or that it would make an adversary of the offender, who is often someone they must deal with on a regular basis.”¹³⁶ A woman “runs the risk, in confronting a judge about stereotypical attitudes or behaviors, of jeopardizing herself, her case and her client.”¹³⁷

B. Addressing Bias in the Professionalism Forum

Gender bias reports reflect pervasive bias in our laws, legal system, and the personnel operating within this system. These reports often offer recommendations to combat existing bias.¹³⁸ These reports, however, fail for the most part to incorporate the professionalism crusade as a forum for correcting existing bias.

Professionalism seminars offer a new and expanding forum for eradicating existing gender bias. Informing attorneys and judges of both the explicit and subtle bias that is reported in gender bias reports will allow for recognition of existing problems and assist in correcting the disparity in perception about the extent of gender bias. Professionalism commissions and conferences offer a recognized forum for educating individuals in an effort to eliminate gender bias, providing a neutral setting that can offer correction without jeopardizing the client or attorney’s position.

133. COLORADO SUPREME COURT TASK FORCE ON GENDER BIAS IN THE COURTS, GENDER AND JUSTICE IN THE COLORADO COURTS 9-11 (1990).

134. MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, FINAL REPORT, *reprinted in* 15 WM. MITCHELL L. REV. 825, 930 (1989). In Vermont it was shown that 54.1% of the women and only 16.2% of the men responded that remarks or jokes demeaning to women were made at least “some of the time.” GENDER AND JUSTICE: REPORT OF THE VERMONT TASK FORCE ON GENDER BIAS IN THE LEGAL PROFESSION 30 (1991).

135. MARYLAND SPECIAL JOINT COMMITTEE, GENDER BIAS IN THE COURTS 122 (1989).

136. FINAL REPORT OF THE RHODE ISLAND COMMITTEE ON WOMEN IN THE COURTS 17 (1987).

137. MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, FINAL REPORT, *reprinted in* 15 WM. MITCHELL L. REV. 825, 926-27 (1989).

138. *See supra* note 7.

Civility models for professionalism need to include discussions of how to properly address parties in court. Improper patronizing comments, jokes, and harassment can aptly be explored in a professionalism context. The disparity in perception of whether gender bias exists in the profession can also be highlighted in the gender-neutral setting offered by professionalism conferences. Focusing on how gender bias is present in both our laws and their applications can serve to remedy this deficiency and increase respect for our legal system.

Professionalism education, beginning in law school¹³⁹ and continuing with legal education programs for practitioners, also needs to provide the beneficial qualities¹⁴⁰ offered by a feminist model.¹⁴¹ Attributes of "caring" can assist lawyers in attaining professionalism goals.¹⁴² Because gender bias reform of our legal system needs to be a product of both men and women,¹⁴³ the neutral setting offered by the professionalism forum best accomplishes this goal.

IV. TWO COMMISSIONS WITH DISTINCT ROLES

Gender bias commissions and professionalism commissions need to retain their separate structures because they provide distinct perspectives. For example, a gender bias commission can focus on a particular substantive law, as opposed to focusing on the profession that drafted the law. The elimination of discrimination in the law can best be monitored by a gender bias commission that can provide heightened expertise in examining the context and effect of a particular statute as it relates to gender bias. This is true even though in significant part the bias may be an outgrowth of our legal profession. The

139. The numerical increase in female population in law school does not guarantee equal access and treatment. Sandra Janoff, a clinical psychologist, performed a study on men and women in a first year law class. Reflected in her work is that more often women enter law school with a care-oriented approach, while men have a rights-oriented approach. Her study shows how women moved closer to the male model by the conclusion of the first year of law school. *See* Sandra Janoff, *The Influence of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193 (1991).

140. Professionalism can be viewed as having many care-oriented attributes. Clearly, concern for other parties, lawyers, and the legal system are encompassed within the goals of professionalism. The aspirational nature of professionalism emphasizes its care orientation.

141. "I believe that incorporating an ethic of care into an LTP [Legal Theory and Practice] course is an important means of encouraging students, over the course of their professional lives, to provide effective legal services to people living in poverty." Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L. J. 1175, 1186 (1992); *see also* Ruth Bader Ginsburg, Essay, *The Progression of Women in the Law*, 28 VAL. U. L. REV. 1161 (1994).

142. *See, e.g.*, Jack & Jack, *supra* note 30; Deborah Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39 (1994).

143. Judith L. Miller, *Making Change: Women and Ethics in the Practice of Law*, 2 YALE J. L. & FEMINISM 453, 476 (1990).

professionalism commissions, on the other hand, have as a distinct function the goal of increasing services to the general populace. Although gender issues may be reflected in the existing disparity of services offered by lawyers, professionalism provides a singular forum for implementing the ideal of increased public service via pro bono activities.

To merge these two commissions into one entity would be to accept a general correlation of all legal issues to gender. Although the historic paternalism within the profession permits such a correlation, this unification would provide insignificant progress towards combatting the majority of the goals of each separate commission.

In contrast, the inclusion of gender bias reform in the legal profession as an element of lawyer professionalism demonstrates an overlap that is not merely a replication of all of the goals of these two entities. The linking of these groups in this common area provides a forum for progressive implementation of mutual goals. The principle of "in Union there is strength"¹⁴⁴ should not be limited to acts of criminal conspiracy or labor law, but rather should be used as a benefitting principle for recalibrating the professionalism forum.

A combination of gender bias reform and professionalism offers beneficial attributes beyond the elimination of discriminatory conduct. By admitting the female culture into the existing male club, deficiencies in the existing lawyer professionalism movement may be addressed.¹⁴⁵ The caregiving,¹⁴⁶ unaggressive,¹⁴⁷ and uncompetitive nature offered by feminists¹⁴⁸ can serve to confront directly the concerns reported by the ABA in its 1986 Report of the Commission on Professionalism.¹⁴⁹ Cultural differences offered by feminists present a construct that is diametrically opposed to litigiousness, lack of civility, and adversity.¹⁵⁰ Implementation of mediation and alternative

144. See, e.g., *Eastex, Inc. v. NLRB*, 437 U.S. 556, 578 (1978) (appendix) (bulletin from the union president to local members).

145. See generally Bender, *supra* note 5 (arguing that the increased presence of women in the profession should lead to redefining professionalism with the insights of women taken into account).

146. CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

147. Professor Carrie Menkel-Meadow believes "the growing strength of women's voice in the legal profession may change the adversarial system into a more cooperative, less war-like system of communication between disputants in which solutions are mutually agreed upon rather than dictated by an outsider, won by the victor, and imposed upon the loser." Menkel-Meadow, *supra* note 31, at 54-55.

148. Feminists are not exclusively female. Men, too, can present a feminist perspective.

149. "Women can change the legal profession in at least two interrelated ways. First, by fostering equal opportunity based on sex within the profession, and second, through asking feminist questions, they can question underlying assumptions about legal roles." Naomi R. Cahn, *A Preliminary Feminist Critique of Legal Ethics*, 4 GEO. J. LEGAL ETHICS 23, 24 (1990).

150. Professor Deborah L. Rhode notes that "contemporary feminists can ground their

dispute mechanisms can decrease the cost of legal services to the public, provide increased access, and present a model that will enhance the public image of a lawyer.

Inclusion of gender bias reform into professionalism would offer a new forum for eradicating existing bias. It offers a forum that historically carries the baggage of excluding women. Significantly, this provides a strong male voice for incorporating reform. The professionalism crusade is not at the impetus of a clearly defined group of feminists or women. Rather, it grows from commissions, scholarly works, and public sentiment that is expressed in a gender neutral manner. The professionalism forum, therefore, adds an already accepted credibility to deserving issues such as gender bias reform.¹⁵¹

V. CONCLUSION

Whether one sees lawyer professionalism as being on the rise¹⁵² or fall,¹⁵³ it is obvious that improvement is needed. Concerns about professionalism have warranted establishment of commissions, continuing legal education requirements, significant scholarly debate, and reflection on its definition, goals, and expectancies. Recognition of a problem concerning lawyer professionalism is conceded.

The existence of gender bias in the legal profession is, likewise, prevalent. Elimination of this bias has also reached a level of recognition as an issue deserving study. Although it has fostered no continuing legal

aspirations in values traditionally associated with women under particular social circumstances." Deborah L. Rhode, *Gender and Professional Roles*, 63 FORDHAM L. REV. 39, 72 (1994).

151. The professionalism forum has also been accepted as part of some law school settings. See Richard Boldt & Marc Feldman, *The Faces of Law in Theory and Practice: Doctrine, Rhetoric, and Social Change*, 43 HASTINGS L. J. 1111 (1992).

152. "[T]he legal profession may be moving toward an enhanced sense of professional calling." Morgan, *supra* note 43, at 452.

153. In discussing whether professionalism is "a problem or a perception," the Florida Bar Commission on Lawyer Professionalism noted:

One of the causes for the erosion of the public's respect for lawyers is that lawyers are frequently and conveniently blamed for many of society's ills. Lawyers are blamed for increased medical malpractice insurance premiums, for high jury awards, and for all of the legal system's injustices. Lawyers are often perceived as owning and controlling the legal system, using barracuda "win-at-all-costs" tactics while charging excessive fees.

After hearing testimony from a variety of individuals from within and outside the legal profession, the Commission believes that the Bar membership, even more than the public in general, perceives that there is a dramatic decline in lawyer professionalism.

FLORIDA BAR COMMISSION, *supra* note 10, at 10.

education requirements, the existence of gender bias has warranted commissions and significant scholarly debate.

What these issues of professionalism and elimination of gender bias have failed so far to embrace are their corresponding goals. Although increasing lawyer professionalism and ending gender bias are not concepts that subsume each other, the forces that serve to heighten these issues can be fortified by recognizing those features that are complementary.

The complexities of practicing law today render new and increased demands on the profession.¹⁵⁴ Economic deficiency can breed repression of a class or stereotype. Now more than ever, there is a need to have an impact on increasing lawyer professionalism and diminishing gender bias. Now more than ever, there is a need for a united problem-solving approach.

154. See *Developments in the Law—Lawyers' Responsibilities and Lawyers' Responses*, 107 HARV. L. REV. 1547 (1994).