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Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law

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Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law

CARRIE MENKEL-MEADOW*

I. INTRODUCTION: THEMES OF EXCLUSION	29
II. EXCLUSIONS FROM LAWMAKING	35
III. THE EPISTEMOLOGY OF EXCLUSION: WHAT WE LEARN FROM BEING OUTSIDE.....	43
IV. APPLICATIONS TO OTHER EXCLUSIONS.....	49
V. THE DANGERS AND HOPES OF THE KNOWLEDGE OF EXCLUSION.....	50

I. INTRODUCTION: THEMES OF EXCLUSION

This article will discuss what the exclusion of particular groups of people from the law has meant for the law. By exclusion I mean exclusion from the making and practice of law—exclusion from the profession. By law I mean the law in all its contexts—the making, explication, interpretation, and practice of law. The story of law in the United States is largely a story about one group of people, middle to upper class white males (I shall call them the “lawmakers”), making law for all others in society. Some have called this the patriarchy of law.¹ The rest of us are “lawreceivers.”

My objective is to explore how some groups have been excluded from the making and practice of law, what meaning that has for how we see our laws, and most importantly, what new things we might learn if the excluded were included. In short, I want to explore the many ways of exclusion, the meaning of exclusion, and the hopes and dilemmas of inclusion.

I will present three questions to consider. First, what are the many ways of exclusion? Let us count the ways—there are many; some are obvious, and others are more invidious because of their subtlety. Second, for those of us who have been excluded, what have we learned from our exclusion? What is the “epistemology of exclu-

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1. Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW* 294 (D. Kairys ed. 1982); Rifkin, *Toward a Theory of Law and Patriarchy*, 3 *HARV. WOMEN'S L.J.* 83 (1980).

sion"? A difficult wrinkle to this question is whether we know what we know *because* of our exclusion—the underclass is forced to know both its own world and the world of the oppressor. We need to be multilingual, speaking white, male, objective tongues, while at the same time speaking in black, brown, yellow, red, female, and subjective ones. Or, do excluded groups offer distinctive ways of knowing that represent epistemologies able to survive inclusion and offer suggestions for broader knowledge of the legal world? Thus, there are the questions of what we know, how we know it, and why we know what we do. Finally, there is the important issue of whether we who have been excluded will assimilate, or will we innovate when we enter the world that has locked us out?

My discussion will focus on the feminist challenges to male knowledge structures in the law because that is my own experience and field of research.² There are now feminist approaches to law as doctrine,³ law as theory,⁴ and law as practice.⁵ Women who previously have been, and presently are being excluded, are constructing legal reality in new ways. The tricky issue, of course, is whether the legal system will include and be transformed by these new constructions or whether these constructions will be transmuted into a form that the lawmakers control.

After reviewing some specific examples of the epistemology of women's exclusion, I will offer a few words about the knowing that

2. See, e.g., Menkel-Meadow, *Women as Law Teachers: Toward the Feminization of Legal Education*, in *ESSAYS ON THE APPLICATION OF A HUMANISTIC PERSPECTIVE TO LAW TEACHING* 16 (1981); Menkel-Meadow, *The Comparative Sociology of Women Lawyers: The Feminization of the Legal Profession*, 24 *OSGOODE HALL L.J.* — (1987) [hereinafter Menkel-Meadow, *The Feminization of the Legal Profession*]; Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies and Legal Education: The "Fem-Crits" Go To Law School*, 38 *J. LEG. ED.* — (1988); Menkel-Meadow, *Portia In A Different Voice: Speculations on a Women's Lawyering Process*, 1 *BERKELEY WOMEN'S L.J.* 39 (1985) [hereinafter Menkel-Meadow, *Portia*]; Menkel-Meadow, *Women in Law?* (Review Essay), 1983 *AM. B. FOUND. RES. J.* 189 (reviewing C. FUCHS EPSTEIN, *WOMEN IN LAW* (1981)).

3. See, e.g., Kay, *Models of Equality*, 1985 *U. ILL. L. REV.* 39; Law, *Rethinking Sex and the Constitution*, 132 *U. PA. L. REV.* 955 (1984); Minow, "Forming Underneath Everything That Grows:" *Toward A History of Family Law*, 1985 *WISC. L. REV.* 819; Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 *TEX. L. REV.* 387 (1984); Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 *OR. L. REV.* 265 (1984); Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 *WOMEN'S RTS. L. REP.* 175 (1982).

4. See, e.g., Littleton, *Reconstructing Sexual Equality*, 75 *CAL. L. REV.* — (1987); MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635 (1983); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 *YALE L.J.* 1373 (1986); F. Olsen, *The Sex of Law* (unpublished manuscript).

5. See Fox, *Good-bye to Gameplaying*, *JURIS DR.*, Jan. 1978, at 37; see generally Menkel-Meadow, *Portia*, *supra* note 2; Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 *N.Y.U. L. REV.* 589 (1986).

comes from other exclusions such as race and class, but will do so cautiously. It has become too easy, I think, for those who have been excluded by the "white male club"⁶ to be lumped together in their exclusions. One bit of knowledge we have gained from feminist knowledge is the contextual particularity of our experiences.⁷ So, I will sketch some teachings from other exclusions, simply as suggestions and speculations for future work to be done on both the similarities and the differences in the various forms of exclusion we experience in the law. We also must consider the new exclusions that we are currently creating in order to think about how those will ultimately challenge our present schemas.

Our work will expose another exclusion—the epistemological exclusions of the fields in which we work. Western knowledge is compartmentalized, organized by specialized knowing and "disciplines." Lawmakers have looked for the meaning of law in doctrine, statutes, and cases. Recently, we have come to understand that to know the meaning of law we must look to other materials and fields: behavior,⁸ literary interpretation,⁹ and experience.¹⁰ I will try to narrow the exclusions of knowledge by drawing on some of the insights of behavioral and social science and by performing one of my favorite functions: translation from one community of knowers to another.

Our inquiry begins with exploring the subject of exclusion, using a method of knowing that emerged from women's exclusion: the telling and sharing of experiences. I will discuss with you what I and others think of exclusion. The following exercise will help us to explore these issues experientially and conceptually.

Think about an experience you have had where you were excluded from something in which you wanted to participate (e.g., a club, an event, an institution) and your exclusion was based on some criterion you had little ability to change (e.g., gender, race, religion, class, ethnicity, age). Now ask yourself the following questions about that experience:

1. What was the basis of your exclusion?
2. In what way were you excluded?

6. Littleton, *supra* note 4.

7. See, e.g., C. GILLIGAN, *IN A DIFFERENT VOICE* (1982).

8. In the works of law and social science, and law and economics, we see some efforts at tracing the effect of law on behavior and the effects of lawmakers' behavior on the making of law. See, e.g., L. FRIEDMAN & S. MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* (1977).

9. See, e.g., Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L.J.* 997 (1985); Minow, *Law Turning Outward*, *TELOS*, Fall 1987.

10. See, e.g., S. ESTRICH, *REAL RAPE* (1987).

3. What did you know about the group/event you were trying to join?
4. What did you know about yourself in that moment of exclusion?
5. What did you learn about that gap or difference between yourself and the group?
6. How did you ultimately come to interpret that experience in terms of its value to you in what you learned about yourself and the other?

This was an experience of "excluded knowledge." Most of the time when we experience these moments we assume the group we are seeking to enter is the core, and is "where the action is."¹¹ This is what sociologists would call the internalization of the dominant culture, a complex relationship of objective power and the subjective experience of that domination, which results in our perception of the "dominant" culture as legitimate and causes us to denigrate that which is devalued by that dominant culture.¹² For me, the significant aspect of these experiences is their potential for breakthrough, transformation, epiphanies of knowledge, and change and contribution.

Let me share one personal experience that forms the experiential backdrop of my scholarly work. As a trial lawyer for legal services, I worked on many large institutional class actions that had the potential to bring about social change. I did this work in a culture I would honestly describe as a "macho trial" culture. Lawyers were evaluated by "winning" their cases (which they frequently accomplished by moving for summary judgment instead of going to trial). I felt excluded by this culture in several ways. First, it was predominantly male. Second, I found it difficult to be aggressive and confrontational when I frequently saw some of the other side's problems, such as lack of funding. Third, I knew that "paper victories" did not solve the underlying problem, as opposed to the legally constructed problem. My attempts to negotiate and pursue other ways to resolve the issues were regarded as too soft. To survive and to become well respected, I reformed. By apprenticing myself to some hard-hitting lawyers who taught me the tricks of the trade, I am able to report that when I left legal services I was regarded by many as a "tough cookie." I appreciated this opportunity to broaden my repertoire of lawyering skills.

11. Except if we are like Groucho Marx and don't want to belong to any club that would accept us as members. See J. BARTLETT, *FAMILIAR QUOTATIONS* 834 (1980).

12. See C. MACKINNON, *FEMINISM UNMODIFIED—DISCOURSES ON LIFE AND LAW* 32-44 (1987) (application of internalization to women's experience at the hand of the dominant legal culture); see generally Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 *SIGNS* 421 (1987).

But when I began to teach and write I had trouble transmitting this culture. It seemed inefficient, ineffective, and morally uncomfortable, and it ultimately prevented me from being who I wanted to be in the world. Moreover, my students were not becoming what I wanted them to be. So, to make a long story a bit shorter, I began to move from that moment of feeling different and out of place to an exploration of whether there were other ways to be an effective lawyer. I focused particularly on models of legal negotiation, learning a great deal from social psychology, game theory, economics, and other disciplines.¹³ One of the things I learned was that the conventions of the club I was trying to enter were remarkably narrow, short sighted, and could in fact be demonstrated to be economically and mathematically inefficient. Much of my intuition was supported by rigorous scholarship in other disciplines.¹⁴ Interestingly, I learned that other academic lawyers were doing similar work in reaction to the inadequacies of the dominant legal culture,¹⁵ which illustrates one of those wonderful moments in research efforts called convergence. The dominant paradigms were showing their cracks, and those on the outside could see more clearly the possibility of new ones.¹⁶ For me, if there is a moral to this story, it is not just that I gained new substantive knowledge about trials, legal negotiation, adversarial lawyering, integrative solutions, and the dysfunctions of compromise,¹⁷ but rather that one can come to see new ways of knowing through "exclusion" from the core or normative culture.

Let me briefly illustrate with a few other examples of "excluded" knowledge, before moving to the particularities of law. In what has become a basic, though controversial text for feminist scholars, Carol Gilligan illustrates in *In A Different Voice*¹⁸ that much of what we

13. For more detailed accounts, see Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of Theory*, 1983 AM. B. FOUND. RES. J. 905 [hereinafter Menkel-Meadow, *Legal Negotiation*]; Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) [hereinafter Menkel-Meadow, *Toward Another View*].

14. See Menkel-Meadow, *Toward Another View*, *supra* note 13, at 756 n.2; see also H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* (1982); R. LUCE & H. RAIFFA, *GAMES AND DECISIONS* (1957); J. VON NEUMANN & O. MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1947).

15. See *supra* notes 13 & 14; see generally R. FISHER & W. URY, *GETTING TO YES* (1981); G. WILLIAMS, *LEGAL NEGOTIATION AND SETTLEMENT* (1983); Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 U. KAN. L. REV. 69 (1982).

16. See generally T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

17. See Menkel-Meadow, *Toward Another View*, *supra* note 13, at 783-93; see generally AMERICAN SOCIETY OF POLITICAL & LEGAL PHILOSOPHY, *COMPROMISE IN ETHICS, LAW AND POLITICS* (1979); Menkel-Meadow, *Legal Negotiation*, *supra* note 13.

18. C. GILLIGAN, *IN A DIFFERENT VOICE* (1982).

thought we knew about developmental psychology and moral reasoning (in the works of Piaget,¹⁹ Erickson²⁰ and Kohlberg²¹) was based exclusively on male subjects. Thus, although we may know about male development, we have yet to learn much about human development.

Similarly, much of the debate about the work of Margaret Mead²² and Derek Freeman²³ in Samoa has to do with the anthropologist's *pointe de vue*. Freeman claims to have seen the "true" story of violence and sex in Samoa because he studied chiefs and the male power structure. Mead's informants were adolescent girls and women, a particularly relevant portion of the Samoan culture, given the substantive issues of debate, "coming of age," and adolescence.²⁴

In yet another example I recently learned from black feminist Bell Hooks, psychologist Rollo May was confronted with interesting data showing that black children who had been abandoned by their mothers were better adjusted than white children who had been abandoned by their mothers. This finding seemed contrary to the conventional hypotheses.²⁵ The apparent reason for this contradiction was that black children were socialized to expect less and thus had more realistic apprehensions about life in our cruel world, where ultimately we all are "abandoned" by our parents.

The common thread of these examples is that "truth" may be found with the statistical "outliers," that the margin may be the core, the periphery may be the center, and the excluded may be the included. At the very least, the truth as we know it may be much more multifaceted than the "included" are willing to acknowledge. Previously excluded voices, by providing innovation and change, can counteract the stagnation and bankruptcy of the status quo. As sociologist Digby Baltzell has written, the strength of the "Protestant Establishment" is in its willingness to accept and adapt to innovation from new immigrant groups.²⁶ Thus, we, the "immigrants" of exclusion, can offer new ways of knowing.

In many academic disciplines, fields have expanded to include

19. See, e.g., J. PIAGET, *THE CONSTRUCTION OF REALITY IN THE CHILD* (1954).

20. See, e.g., E. ERIKSON, *IDENTITY AND THE LIFE CYCLE* (1959).

21. See, e.g., L. KOHLBERG, *ESSAYS ON MORAL DEVELOPMENT* (1981).

22. M. MEAD, *COMING OF AGE IN SAMOA* (1961).

23. D. FREEMAN, *MARGARET MEAD AND SAMOA* (1983).

24. M. MEAD, *supra* note 22 (crudely stated, a study of the relative importance of nature and nurture effects on culture).

25. Address by Professor Bell Hooks, Tenth Annual Critical Legal Studies Conference, Los Angeles, California (Jan. 7, 1987) (citing R. MAY, *THE COURAGE TO CREATE* 56-63 (1975)).

26. E. BALTZELL, *THE PROTESTANT ESTABLISHMENT* (1964).

women and workers, not just men and kings. This expansion of knowledge, such as new family forms in sociology²⁷ and even new theologies in religion,²⁸ demonstrates that we learn so much more by including new perspectives and new knowers who are beginning to find their voices.

Let us now explore, more concretely, how previous and present exclusions from the legal profession offer the promise of more varied ways of knowing and of potentially more mellifluous voices of law-making and law practice. We also must explore some of the continuing and new dangers that may result from excluding voices.

II. EXCLUSIONS FROM LAWMAKING

There are many ways to exclude, such as refusing admission to the club, admitting but not listening to the new members, admitting but segregating or marginalizing, and finally, transmuting or translating the words of those excluded into the terms and definitions of the included. All of these strategies have been deployed to exclude women, and others, from the legal profession.

The most obvious exclusion in our history has been simple non-acceptance and nonadmission. History tells us of several early attempts of women to perform lawyering functions—Margaret Brent in seventeenth century colonial Maryland,²⁹ Caroline Norton in early nineteenth century England,³⁰ and black slave Elizabeth Freeman who argued her own cause of emancipation in a Massachusetts court in 1783.³¹ Yet the most familiar of these is the case of exclusion decided by the Supreme Court of the United States in 1873, affirming the decision to deny Myra Bradwell admission to the Illinois Bar.³² Justice Bradley concurred in the judgment with the now infamous words and thoughts of his time:

[T]he civil law, as well as nature *herself*, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded

27. See Epstein, *Women in Sociological Analysis: New Scholarship Versus Old Paradigms*, in *A FEMINIST PERSPECTIVE IN THE ACADEMY* 149 (E. Langland & W. Gove, eds. 1981).

28. See Ruether, *The Feminist Critique in Religious Studies*, in *A FEMINIST PERSPECTIVE IN THE ACADEMY*, *supra* note 27, at 63-66.

29. K. MORELLO, *THE INVISIBLE BAR* 3-8 (1986).

30. M. FORSTER, *SIGNIFICANT SISTERS* 15-52 (1984).

31. K. MORELLO, *supra* note 29, at 8.

32. *Bradwell v. The State*, 83 U.S. (16 Wall.) 130 (1873).

in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state; and, notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent upon this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband's consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.³³

Let us dissect this decision. The actual holding of the case, based on an interpretation of the privileges and immunities clause of the Constitution of the United States, decided that the practice of law, regulated by the states, was not a federally protected privilege.³⁴ In Justice Bradley's concurrence, we can see the conventions of his day that precluded women from practice: the assumptions that they belonged in the home caring for their husbands and children, that husbands could not and should not bear the competition of a wife's separate and independent career, and that the doctrine of coverture prohibited married women from making and enforcing their own contracts, including retainer agreements with clients.³⁵ Justice Bradley alludes to the Married Women's Property Acts,³⁶ which began to alter married women's legal rights and thus gradually erode legal impediments to the practice of law. But it is clear from this opinion that even legalisms should defer to the "nature" of things and the "divine ordinance." Thus, from a strictly legal perspective, only married women should have been barred from the practice of law, even though by 1873 most married women could have been able to perform lawyering duties legally.

33. *Id.* at 141 (emphasis added) (Bradley, J., concurring).

34. *Id.* at 139. See generally Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518 (1986).

35. *Bradwell*, 83 U.S. at 139-42 (Bradley, J., concurring).

36. *Id.* at 142; see Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1384-1423 (1983).

The legal doctrines that excluded women were, of course, made by men. The doctrine of coverture at common law, the interpretation of Illinois state law and the federal Constitution's privileges and immunities clause were all constructed by male legislators, male constitutional founding *fathers*, and male judges and justices. Thus the laws that set forth the rules governing admission to the profession were created by those who sought to keep out the subject of the regulations and legislation, without, of course, this latter group's participation.

Even more important to the underlying structures of the exclusion, however, are the sociological constructs underneath the legal interpretations: Women belong at home, they are too timid and delicate to compete in the man's world, and the family will suffer if women enter the market.³⁷

Let us now contrast this nineteenth century story created by male lawmakers with the real Myra Bradwell. Mrs. Bradwell taught herself law, by reading law with her husband who was a judge in Cook County, Illinois. She took and passed the 1869 Chicago Bar Exam. Prior to taking the bar exam, Mrs. Bradwell began publishing the *Chicago Legal News*, the first law newspaper published in the mid-west. She wrote on issues of social and legal reform, including women's suffrage. When the famous Chicago fire destroyed much of downtown Chicago, the *Chicago Legal News* was still written, published and distributed, all by the hard work of Mrs. Bradwell.

Eventually women in Illinois and elsewhere were admitted to the bar, not by court action, but by active campaigns of legislative lobbying. Bradwell was eventually admitted to the bar in 1890, almost twenty years after legislation was finally passed. By the way, Mrs. Bradwell also raised a son and a daughter, both of whom became lawyers. The next female applicant to the Illinois Bar was single, but she too was denied admission. The court hearing her subsequent challenge concluded that because there had been no women lawyers in England, the Illinois legislature could not have intended to include women in the United States.³⁸

So that you can put the sociological assumptions in perspective, let me tell you briefly about some of the other early women lawyers in the United States. Their amusing, inspiring, and poignant tales were

37. See generally Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

38. See K. MORELLO, *supra* note 29, at 20-21; *From Colonial Times to the New Deal*, in 1 WOMEN IN AMERICAN LAW 215-16 (M. Wortman ed. 1985).

recently told by Karen Berger Morello in *The Invisible Bar*.³⁹ Mary Gissen Leonard, the first woman lawyer in both Oregon and Washington, married a Portland innkeeper whom she later divorced. Her husband was found dead several weeks after he was to have paid her maintenance in accordance with a marital settlement agreement, and Mary was charged with his murder. After almost a year, much of it spent in jail, Mary Leonard was brought to trial and acquitted. She moved to Seattle and apprenticed to a lawyer. She eventually gained admittance to both the Washington and Oregon Bars, where she was known as something of an eccentric. She drank heavily, was known to use physical force and it was said she ran a combination hotel/bordello in Portland. She was arrested at least four times, all while she was practicing law.⁴⁰ Such is the timidity and delicacy of a woman!

In California, Clara Shortridge Foltz sued the Hastings College of Law, seeking admission to the school after the administration refused to permit her to attend classes. Having won that battle, she went on to a criminal defense and legislative lobbying practice, in which she is credited with having created the California parole and public defender systems.⁴¹ Although these fields would seem the least suited to women's "delicacy and timidity," Foltz became interested in them because indigents were not receiving legal aid from the exclusively male bar. Social and legal reform became her *métier*.

Lyda Conley, our nation's first female native American lawyer, learned in 1904 that the United States Department of Interior was planning to destroy her tribal burial ground.⁴² While Ms. Conley studied for the bar exam, she and her sister occupied the burial grounds in Kansas, armed with guns and placards. Her combination of legal and protest tactics did not lead to victory in court, but to a land deal protecting the cemetery, after the public attention garnered by her protest activities caused embarrassment to the federal government.⁴³

I could tell many more such stories, uncovering the lost histories of the women who pioneered entrance to and practice at the bar. Whether by working in quiet law offices, assisting their husbands, or undertaking more audacious social reform practices (many of the

39. K. MORELLO, *THE INVISIBLE BAR* (1986).

40. *Id.* at 27-31.

41. *Id.* at 65. See generally Schwartz, Brandt & Milrod, *The Battles of Clara Shortridge Foltz*, 1985 CAL. DEFENDER 7.

42. K. MORELLO, *supra* note 29, at 123-24.

43. Lyda Conley lost her legal case after argument to the Supreme Court of the United States. See *Conley v. Ballinger*, 216 U.S. 84 (1910).

nation's first women lawyers were activists in the movement for suffrage⁴⁴) these women, by their very existence, challenged the dominant knowledge structures.

In sociological terms, women challenged the dominant conception of womanhood in one of two ways: Either they failed to conform to traditional notions about the appropriate role and passivity of women by being activist, ambitious, and strong lawyers, or they challenged the conventions of what it meant to be a lawyer, defined exclusively in male terms. Thus, the "status-set typing"⁴⁵ that equates male qualities with competent lawyering skills simply because males have been the principal occupants of the lawyer's role, fails to permit a broader, and perhaps more effective description of lawyers' tasks. It has failed to include those qualities stereotypically associated with women (e.g., caring for clients, peacemaking) and those qualities that come from exclusion, such as concern for other excludeds (the indigent and underrepresented), and the more demanding tactics (social protest) that, in concert with legal tactics women used to achieve admission to the bar and participate in legal reform.

The common theme emanating from these stories mandates that we confront and change either our stereotypic view of the excluded (women) or the stereotypic conception of what it means to be included (to be a lawyer, and therefore to be a *male* lawyer). The early experiences of exclusion and eventual inclusion taught women to create new legal arguments, new legal tactics, and new forms of legal practice and law reform. Women responded to their exclusion by seeking innovative ways to gain admittance to the profession and change its composition. The act of seeking admission to the legal profession caused women to become effective advocates in both the courts and legislatures.⁴⁶ The entrance of women forced both law practice and legal doctrine to expand into areas and methods that were new and broadening to the profession.⁴⁷

44. See, e.g., *Equality and the Best Form of Protection: The Political Strategy of Suffrage*, in *WOMEN IN AMERICAN LAW*, *supra* note 38, at 148.

45. "'Status-set typing' occurs when a class of persons shares statuses (that is, certain statuses tend to cluster [such as white, male and legal professional]) and when it is considered appropriate that they do so." C. FUCHS EPSTEIN, *WOMAN'S PLACE* 87 (1970).

46. See R. CHESTER, *UNEQUAL ACCESS* (1985). The notion that women had to "innovate" or "create" new modes of practicing professions is not unique to law. In a recent book, historians Penina Glazer and Miriam Slater have documented the strategies of women's entrance to a number of male dominated professions: college teaching, medicine, science, and psychiatric social work. P. GLAZER & M. SLATER, *UNEQUAL COLLEAGUES* 14 (1987) (suggesting that innovation is only one of several choices; the others are super-performance, subordination and separatism).

47. See Menkel-Meadow, *Portia*, *supra* note 2, at 57; Schneider, *supra* note 5, at 601-04.

Lest you think the struggles are over, let us explore some of the more subtle and modern forms of exclusion. Though some claim women have now entered the legal profession in large numbers⁴⁸ such that they constitute about 15% of practicing lawyers and close to 35% of all American law students,⁴⁹ the entrance has been sufficiently recent, and women are still found disproportionately in the lower reaches of the profession. They serve more often as associates than partners, in the public rather than private sector, and in particular fields of specialization. Women, for example, are less likely to be found practicing corporate law.⁵⁰

In research that I have been doing on the comparative sociology of women lawyers—looking at women lawyers in a variety of civil and common law countries—these patterns are sadly repeated. Analysis of international data reveals that women are working in virtually all spheres of legal practice. But in each individual country, women are clustered in particular occupations and particular tasks that are, not surprisingly, the least valued forms of legal practice in that particular culture. There is widespread occupational segregation and segmentation—a slightly more subtle form of exclusion. In Germany, for example, women are found disproportionately in the jurist corps working as judges or judges in training, just as these civil service jobs are becoming more scarce and jobs in the private commercial sphere are becoming more lucrative.⁵¹ In Belgium, by contrast, where there are fewer judges and the judge's role is more prestigious, women are less likely to be found.⁵² One of the most interesting aspects of this research is to study the differential in women's participation as trial lawyers in countries with different values regarding the importance of public litigation. In Norway, where being a trial lawyer is thought to require "aggressive defiance," there are comparatively few women. Yet in western European countries, where private commercial activity is most valued, women will be found as public magistrates and advocates, a task considered more ministerial and bureaucratic.⁵³ In virtually all countries women are more likely to be providing legal

48. See C. FUCHS EPSTEIN, *WOMEN IN LAW* 21 (1981); Curran, *American Lawyers in the 1980's: A Profession in Transition*, 20 *LAW & SOC'Y REV.* 19, 42-49 (1986).

49. C. FUCHS EPSTEIN, *supra* note 48, at 53.

50. B. CURRAN, K. ROSICH, C. CARSON & M. PUCETTI, *THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980's*, at 38-50 (1985); see generally L. VOGT, *CAREER PATHS STUDY* (1987).

51. See Blankenburg & Schultz, *German Advocates*, in *LAWYERS IN SOCIETY* — (P. Lewis & R. Abel eds. 1988); Menkel-Meadow, *The Feminization of the Legal Profession*, *supra* note 2.

52. Huyse, *Legal Experts in Belgium*, in *LAWYERS IN SOCIETY*, *supra* note 51; Menkel-Meadow, *The Feminization of the Legal Profession*, *supra* note 2.

53. Menkel-Meadow, *The Feminization of the Legal Profession*, *supra* note 2.

assistance to the indigent, and as such their salaries are low and their working conditions are poor.⁵⁴

I could go on citing more statistics and describing more patterns, but let me instead identify the themes of exclusion that are raised here. A push-pull effect pushes women into spheres where men will not tread, although some argue that women are pulled into those fields for which they have a "natural affinity": domestic relations, estate work, and criminal defense. The practice of criminal law provides an interesting contradiction, in terms of exclusion. Women do criminal defense work because men do not want to. Yet it is the very work least suited to women's "natural timidity and delicacy," yielding harsh language, bad working conditions in jailhouse interviews, night courts, overcrowded offices, long hours, and arduous court battles. Those who want to exclude for their own purposes give us the very stereotypes that exclude. By analyzing the lines that exclude and by exposing the logical gaps, we see that lines that exclude serve the particular political purposes of the line drawers. Occupational sociology is filled with stories of gender changes in the composition of the work force as the prestige of the task changed. Such is the case with clerical workers, bank tellers, and telephone operators.⁵⁵

The patterns of exclusion also reveal more problematic issues. Are some clusters the product of preference rather than discrimination? A lawsuit filed by the Equal Employment Opportunity Commission against Sears, Roebuck⁵⁶ illustrates this dilemma, which embroiled feminist historians.⁵⁷ Were women discriminatorily excluded from high commission sales work because men needed these jobs to support their families, or did women self-select out of them to avoid having to use more aggressive sales tactics or because they were too busy with home duties to be ambitious at work? Note that these questions are based on the assumption that aggressive sales tactics are what is necessary to sell big ticket items because those are tactics currently used by men in those positions. Notice as well the irony that the "big ticket" items are frequently "women's products," such as refrigerators, washers and dryers, and other house appliances.

Women have been excluded in more painful ways, such as their

54. *Id.*

55. See, e.g., *WOMEN AND WORK* (R. Kahn-Hut, A. Daniels & R. Colvard eds. 1982); *WOMEN, WORK & PROTEST* (R. Milkman ed. 1985).

56. *Equal Employment Opportunity Comm'n v. Sears, Roebuck and Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986).

57. Kessler-Harris, *Equal Employment Opportunity Commission v. Sears Roebuck and Company: A Personal Account*, 35 *RADICAL HIST. REV.* 57, 57-65 (1986); Milkman, *Women's History and the Sears Case*, 12 *FEMINIST STUD.* 375, 375 (1986).

work being exploited and used but not fully credited. This is true in the case of reformer Josephine Goldmark, who contributed to the famous "Brandeis brief" by meticulously collecting data and writing, but not arguing in the Supreme Court.⁵⁸ In more recent times, women have been used to defend against sex discrimination suits such as in the *Sears*⁵⁹ case and in the recent case of *California Federal Savings and Loan Association v. Guerra*,⁶⁰ as if their female presence on the defense side would refute the claims that their clients had discriminated against women.

More problematic in everyday exclusions are the ways in which outsiders speak and are not heard or instead are forced to assimilate into the culture of the included in order to succeed. In interviews I have been conducting with women lawyers, I hear of women trying to innovate or at least broaden the values and methods of law practice only to be urged to conform to the norms of their workplaces. Women who dislike the combative nature of litigation⁶¹ more often seek the healing methods of alternative dispute resolution.⁶² Also, there are women who seek to have law firms focus on issues such as quality of work in addition to money and the bottom line.⁶³ In other tales that I have heard, women who succeed in joining the managing committee of their law firm feel compelled to act like "one of the boys" in order to be heard. In the parlance of feminist scholarship and politics, women must learn to speak in many voices⁶⁴—in essence, to be bilingual in order to be heard. Women must also learn to act like men, for example, by not having children, at least until after partnership.⁶⁵ These are some of the ways exclusion occurs. What does such exclusion produce?

58. See B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *SEX DISCRIMINATION AND THE LAW* 29 (1975) [hereinafter B. BABCOCK].

59. See Milkman, *supra* note 57, at 376; Kessler-Harris, *supra* note 57, at 7.

60. 107 S. Ct. 683 (1987).

61. Fox, *supra* note 5, at 38.

62. See, e.g., *Steptoe & Johnson Partner Chooses to Specialize in ADR*, 4 *ALTERNATIVES TO THE HIGH COST OF LITIGATION* 5 (1986); cf. Rifkin, *Mediation From A Feminist Perspective: Promise and Problems*, 2 *LAW & INEQUALITY* 21 (1984).

63. See J. ABRAMSON & B. FRANKLIN, *WHERE THEY ARE NOW, THE STORY OF THE WOMEN OF HARVARD LAW* 1974, at 1-20 (1986).

64. See, e.g., R. LAKOFF, *LANGUAGE AND WOMAN'S PLACE* (1975); cf. *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 *BUFFALO L. REV.* 11, 41-42 (1985) (Carol Gilligan commented that women conform to society by using both male and female types of reasoning.).

65. See J. ABRAMSON & B. FRANKLIN, *supra* note 63, at 165.

III. THE EPISTEMOLOGY OF EXCLUSION: WHAT WE LEARN FROM BEING OUTSIDE

My point is that we, the excluded, should learn from our exclusion that our insights and ways of doing things are valuable and can be transformative. Feminist work in a number of disciplines has challenged the meaning of objectivity and neutrality in all of our epistemologies.⁶⁶ One of the major intellectual themes of the twentieth century is the recognition that the knower or observer is part of the knowledge or observation.⁶⁷ Thus, feminism has asked us to question everything⁶⁸ as we recognize that what we know has largely been imposed on us as "truth" by a particular class of truth creators and interpreters.

Given the feminist challenge to male jurisprudence and practice, it is important to keep two caveats about "women's knowing" in mind before we explore some particular new ways of feminist knowing about law. The first is a point often made by feminist legal scholar Catherine MacKinnon.⁶⁹ Epistemologies based on exclusion may not be our own, in the sense that we may truly possess them.⁷⁰ I argue below that women express concerns about care, connection, relationship, and empathy for the other. We must remember, however, that care, connection, and relationship are what women may need to be connected to the men who provide literal as well as figurative lifelines. Thus the knowing that comes from exclusion is based not on intrinsic characteristics, but rather on perverse oppositional knowledge that may be necessary for survival and adaptation to exclusion. The parallels to exclusions based on race and class should therefore be obvious. My own view on this topic is close to Simone de Beauvoir's who said "patience is one of those feminine qualities which have their origin in our oppression but should be preserved after our liberation."⁷¹ Exclusions may produce particular characteristics that are not truly our own, but if we think of them as worthwhile, we should not totally reject them simply because they were borne of our oppression.

A different problem of creating knowledge from exclusion arises from the difficulties of tokenism. Sociologists have learned, particu-

66. See generally A FEMINIST PERSPECTIVE IN THE ACADEMY, *supra* note 27; S. HARDING, THE SCIENCE QUESTION IN FEMINISM (1986).

67. See, e.g., P. BERGER & T. LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1966).

68. See, e.g., A. RICH, ON LIES, SECRETS, AND SILENCE (1979); Littleton, *supra* note 4.

69. Menkel-Meadow, *Portia*, *supra* note 2, at 42 n.19; *Feminist Discourse*, *supra* note 64, at 20-21 (comments of Catherine MacKinnon).

70. See generally C. MACKINNON, *supra* note 12.

71. S. DE BEAUVOIR, THE SECOND SEX 153 (1974).

larly in the law school context, that excluded groups that are few in number and are very visible achieve less and are more conventional and assimilationist in their work.⁷² The larger the numbers, the greater the likelihood that previously excluded groups will perform well, both in terms of traditional achievement and in their ability to innovate. Thus, achieving a critical mass of previously excluded people may be essential to promoting the sort of transformative practices I will now describe.

Formerly excluded women now working as feminist scholars have challenged the teachings of virtually every discipline—from anthropology to literary criticism, from religion to “hard” science.⁷³ In law, this revolution in what we know is called feminist jurisprudence.⁷⁴ In the space allotted here I cannot review all of the ways that new voices have challenged our knowing about the law; I will review a few with an emphasis on how the entrance of new, previously excluded female lawmakers has affected our use and practice of law.

A recent study by several psychologists argues that women come to know in ways different from men and in different styles, based on their family experiences and life experiences, and formal education.⁷⁵ “Received knowers” depend on authority and listening to others or to subjective selves.⁷⁶ “Procedural knowers” come to understand different methods of knowing, including reason, in addition to the difference in different perspectives. They experience empathy—the ability to know through the eyes of the other.⁷⁷ Finally, “constructed knowers” are able to integrate the knowledge of inside subjective experience with outside paradigms.⁷⁸ Thus, constructed knowers “let the inside out and the outside in”⁷⁹ and know that “all knowledge is constructed and the knower is an intimate part of the known.”⁸⁰ This study of women’s knowing, when read in connection with the work of psychologists and educators Carol Gilligan,⁸¹ Nel Noddings,⁸² and

72. E.g., Spangler, Gordon & Pipkin, *Token Women: An Empirical Test of Kanter's Hypothesis*, 84 AM. J. SOC. 160 (1978) (finding that women law students did not perform as well in law schools where they were found in small token numbers).

73. See generally A FEMINIST PERSPECTIVE IN THE ACADEMY, *supra* note 27.

74. See *supra* notes 3 & 4.

75. See, e.g., M. BELENKY, B. CLINCHY, N. GOLDBERGER & J. TARULE, *WOMEN'S WAYS OF KNOWING* (1986) [hereinafter M. BELENKY].

76. *Id.* at 35-51.

77. *Id.* at 87-130.

78. *Id.* at 131-54.

79. *Id.* at 135.

80. *Id.* at 137.

81. C. GILLIGAN, *IN A DIFFERENT VOICE* (1982).

82. N. NODDINGS, *CARING* (1984).

Ann Schaeff⁸³ tells us that women may come to apprehend reality in different ways or ask different questions of reality.⁸⁴

I have been a part of a group of legal scholars that has asked how women's knowledge might contribute to different ways of reconfiguring the legal system. In my own work I have explored the possibility of less adversarial modes of dispute resolution, such as problem solving, negotiation,⁸⁵ and mediation,⁸⁶ which flow both from conventional stereotypes such as women's fear of conflict, and from the more affirmative desire to care for the other and to see legal problems within the greater social context.⁸⁷ There is evidence, albeit limited, that suggests that women are seeking justice through healing.⁸⁸ The ethic of care and responsibility described in Carol Gilligan's work⁸⁹ has obvious implications for client relations and empathy, in contrast to the male conceived professional distance taught in legal and medical interviewing courses.⁹⁰ Thus, we may come to challenge the most deeply rooted paradigms of law—the adversary system as we know it and its professional dominance of and distance from the client. I am not suggesting that all women behave in this way or challenge these notions, but rather, that as the excluded find themselves chafing at the knowledge systems created by men, the varied voices of the previously excluded will express more porousness, more questioning, and more ways to do things.

Feminist jurisprudence and an increase in women's voices in the law have challenged legal doctrine as well. I have suggested that the liberty interest in *Lassiter v. Department of Social Services*⁹¹ might have been interpreted differently if women had construed liberty to include the right to be connected to one's child, not just the right to be

83. A. SCHAEFF, *WOMEN'S REALITY* (1981).

84. M. BELENKY, *supra* note 75, at 95-99 (citing M. DALY, *BEYOND GOD THE FATHER* (1973)).

85. *See, e.g.*, Menkel-Meadow, *Legal Negotiation*, *supra* note 13; Menkel-Meadow, *Toward Another View*, *supra* note 13.

86. *See, e.g.* Menkel-Meadow, *Portia*, *supra* note 2; *see also* Weingarten & Douvan, *Male and Female Visions of Mediation*, 1 *NEGOTIATION J.* 349 (1985).

87. *See* C. GILLIGAN, *supra* note 18, at 24-62; *Feminist Discourse*, *supra* note 64, at 49-60 (comments of Carrie Menkel-Meadow).

88. *See generally* Pipkin & Rifkin, *The Social Organization in Alternative Dispute Resolution: Implications for Professionalization of Mediation*, 9 *JUST. SYS. J.* 204 (1984) (finding that mediators were more likely to be women in both private and publicly sponsored mediation programs); Weingarten & Douvan, *supra* note 86.

89. *See* C. GILLIGAN, *supra* note 18, at 62-63.

90. *See* Klass, *Bearing a Child in Medical School*, *N.Y. Times*, Nov. 11, 1984, § 6 (Magazine), at 120; HERS 246-49 (N. Newhouse ed. 1986).

91. 452 U.S. 18 (1981).

“free” from governmental interference.⁹² Men also have interpreted women’s voices. My colleague Ken Karst has proffered suggestions about how women’s voices might “modify”⁹³ interpretations of the Constitution, and Paul Spiegelman suggests that “sharing” jobs might be one way of resolving difficult issues in affirmative action.⁹⁴

The recently decided case of *California Federal Savings and Loan Association v. Guerra*⁹⁵ provides an example where one can hear excluded voices effecting lawmaking. The legal issue in *California Federal* was whether a California statute that required employers to grant unpaid leaves of up to four months to pregnant workers was inconsistent with the the Pregnancy Discrimination Act,⁹⁶ a federal civil rights law that provides, in effect, that pregnancy cannot be treated differently from other disabilities. This was a case in which the feminist legal community divided into several approaches based on jurisprudences of either “neutral equality” for the sexes,⁹⁷ a “special exception for pregnancy” only,⁹⁸ or a broader view of “accommodating and recognizing real differences in the law so that difference[s] won’t have legal or social costs.”⁹⁹ The real political issue boiled down to the fear that if women were treated differently and if they were legally recognized as different, this difference would be used against women, as was perceived to be the case in protective labor legislation.¹⁰⁰

92. Menkel-Meadow, *Portia*, *supra* note 2, at 61-62; *see also* Sherry, *The Gender of Judges*, 4 LAW & INEQUALITY 159, 163-64 (1986).

93. Karst, *Woman’s Constitution*, 1984 DUKE L.J. 447, 449. Note that Karst says “modify” as if to include within the presently constructed system rather than to “transform” and change completely—a noble, but still “male” effort to see women’s contribution to potential legal change.

94. Spiegelman, *Court-Ordered Hiring Quotas After Stotts: A Narrative on the Role of the Moralities of the Web and the Ladder in Employment Discrimination Doctrine*, 20 HARV. C.R.-C.L. L. REV. 339 (1985).

95. 107 S. Ct. 683 (1987).

96. 42 U.S.C. § 2000e(k) (1982). In many states, including California, it may have been possible for the employer to have no disability benefits for employees, thus pregnancy becomes, in the words of the objectors, “privileged” or “specially protected.”

97. *See* Williams, *supra* note 3, at 190-200; *see also* Williams, *Equality’s Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985); Taub, Book Review, 80 COLUM. L. REV. 1686 (1980) (reviewing C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979)).

98. *See e.g.*, Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN’S L.J. 1 (1985); Kay, *supra* note 3; *see also* Law, *supra* note 3, at 1007.

99. Littleton, *supra* note 4; *see also* E. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* (1980); Minow, *Learning to Live With the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157 (1985).

100. The debates and issues about the effects of protective labor legislation are actually

For me, the role that now-included voices played in this legal debate makes it historically different from previous legal episodes. First, the parties and numerous amici developed the legal arguments through information supplied by women lawmakers and writers.¹⁰¹ Second, I joined an argument written by, among others, my colleague Chris Littleton. We suggested that there were many ways to frame the issue. Specifically, the constitutionally recognized right to procreate was available to men who could have children and suffer no loss of employment opportunity, but it was less available to women who, if they had children, might lose their jobs.¹⁰² Thus, it is the interaction of procreation and employment rights (which are necessarily connected in our modern world) that causes the problem, and a simple focus on employment rights alone will not yield a resolution. The notion of "equality" itself needs reconstructing¹⁰³ when conceptualized in terms of the interaction and inevitable interplay of work life and family life, a recurrent theme in feminist jurisprudence.¹⁰⁴ The role that women played in arguing to transform the legal constructs by unpacking them and making their complexities felt in the realities of how *they are experienced by the acted upon* (pregnant workers), illustrates the potential for new voices transforming the legal constructs with which we work. The arguments were derived from the *experience* of pregnant workers having to choose between work and procreation, and thus suggested a transformation of legal categories. The "creative" moment here is in not necessarily assimilating the arguments of already existing categories, such as "disability" or "work *versus* family."

Third, there was, and is, a woman on the Supreme Court. I don't want to make too much of this, as Professor Suzanna Sherry has in arguing that Sandra Day O'Connor has demonstrated a particular "feminine jurisprudence."¹⁰⁵ One token woman will not necessarily transform the Supreme Court but it does add another voice that may

quite complicated when put in their historical context. *See, e.g.,* B. BABCOCK, *supra* note 58, *passim*; DuBois, *supra* note 6; Olsen, *supra* note 34, at 1540; K. Sklar, *Florence Kelley and the Female World of Progressive Reform* (unpublished manuscript).

101. Brief for Amicus Curiae, California Fed. Sav. and Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987) (No. 85-494) (briefs filed by, inter alia, Coalition for Reproductive Equality in the Workplace (CREW), American Civil Liberties Union (ACLU), Women's Law Project, and Women's Legal Defense Fund).

102. Brief for Amicus Curiae, California Fed. Sav. and Loan Ass'n v. Guerra, 107 S. Ct. 683 (1987) (No. 85-495) (brief filed on behalf of Coalition for Reproductive Equality in the Workplace (CREW)).

103. *See* Littleton, *supra* note 4.

104. *See e.g.,* S. EVANS, *PERSONAL POLITICS* (1979); Olsen, *supra* note 37.

105. Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543, 543-44 (1986).

be heard. Male jurists may become more sensitive to what they do and may bestow upon women's legal groups the attention of someone who must listen to them.

In addition, and perhaps most important to me, the debates about the dangers of "special treatment" occur in a different historic and political context than the earlier debates about protective labor legislation.¹⁰⁶ Throughout the *California Federal* litigation women's legal strategy groups discussed which legal arguments would be appropriate. Even in the heat of their disagreements, they continued to meet.¹⁰⁷ With women lawyers appearing on all sides of the case and with a greater participation of women in the debate,¹⁰⁸ whatever the dangers of a "difference" approach, more women as lawmakers will now participate in the ongoing process of lawmaking and remaking (though clearly, still not enough).

Finally, the substantive issue itself, the relation of family to work, is one of the crucial issues placed on the legal agenda by feminist lawyers, whether through litigation or pleas to transform parental leave policies in law firms.¹⁰⁹ Congresswoman Patricia Schroeder has introduced legislation to provide parental and dependency leave for all workers¹¹⁰ (to bring us to conformity with most other western industrial nations¹¹¹), and following *California Federal*, there is talk of legislation to extend leaves to all workers who need to care for children or other dependents. Thus, the *California Federal* story is rich with legal transformations effected by the concerns of voices previously excluded from the legal system. It is a story not yet complete, but in my feminist optimism I think it is one that signals the potential of excluded voices transforming law.¹¹²

106. See *supra* note 101.

107. E.g., Meeting of the Feminist Legal Strategies Project, Washington, D.C. (Oct. 17-18, 1986); see also Schneider, *supra* note 5.

108. This intensified participation is due to 42 U.S.C. §§ 2000e—2000e-17 (1982) (Title VII of the Civil Rights Act of 1964), a federal civil rights law that now prohibits sex discrimination in employment.

109. See, e.g., Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381 (1984-85); Address by Lisa Fenning, 14th Annual National Association for Law Placement Conference, San Francisco, California (April 22, 1985) (report on Maternity Benefits Survey); see also J. ABRAMSON & B. FRANKLIN, *supra* note 63, at 164-99.

110. See H.R. 2020, 99th Cong., 1st Sess., 131 CONG. REC. H 1941-42 (daily ed. April 4, 1985); see also Taub, *supra* note 110, at 402 n.98 (The Congressional Caucus for Women's Issues, of which Congresswoman Schroeder is a member, considered the "Family Employment Security Act" which includes disability and parental leave.).

111. The majority of European nations provide long-term leaves for women only. Sweden, Denmark and France provide long-term leaves for both parents. See Taub, *supra* note 110, at 397 & n.80.

112. Many other stories could be told here of transformative legal efforts by feminist lawyers. In the area of pornography, see *American Booksellers v. Hudnut*, 771 F.2d 323 (7th

IV. APPLICATIONS TO OTHER EXCLUSIONS

Let me turn now, briefly, to some speculations on how other excluded voices might transform the legal theories and practices that once pervaded the legal profession.

Imagine, if you will, what our constitution would have provided for if black slaves had participated in its drafting¹¹³—for example, the abolition of slavery, and the counting of each person as a whole person rather than as some fraction of a person.

Imagine as well, the question so eloquently posed by one of our symposium participants, Patricia Williams:¹¹⁴ What would be the legal meaning of family if the true families of mixed color that were produced by our country's founders¹¹⁵ on the nation's plantations, really had been taken into account? Taken one step further, think how contemporary legal definitions of family might be broadened to include the more nurturing extended family that is currently not fully recognized by our legal system.¹¹⁶

By focusing on the often excluded "lower classes," we can learn more about the meaning of law through studying its penetration into small claims courts and into disputes with employers and merchants, and by analyzing the impact of obfuscating legal language.¹¹⁷ How is

Cir. 1985), *aff'd*, 106 S. Ct. 1172 (1986) (reviewing an Indianapolis ordinance, passed through the lobbying efforts of antipornography feminists, that granted civil rights remedies for the pornographic depiction of women in sexually subordinate roles); MacKinnon, *Not A Moral Issue*, 2 YALE L. & POL'Y REV. 321 & n.1 (1984) (exposing pornography as the "graphic sexually explicit subordination of women"). Feminist efforts, such as those of the Reproductive Rights Project of the American Civil Liberties Union, helped secure a woman's right to determine whether or not to bear a child. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973). For a discussion of feminist efforts in the area of family law, see L. WEITZMAN, *THE DIVORCE REVOLUTION* (1985) (portraying the current status of the law of domestic relations as a mixed story of success and failure); Marcus, *Reflections on the Significance of the Sex/Gender System: Divorce Law Reform in New York*, 42 U. MIAMI L. REV. 55 (1987); Menkel-Meadow, *Portia*, *supra* note 2, at 56-57 (discussing marital property law reform). These are all examples of women lawyers working on women's legal issues in such a way that the rules, doctrines and practices have had to be reconceptualized in order to provide the needed results. For a more detailed discussion of some of these issues, see Schneider, *supra* note 5.

113. See Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985).

114. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructing Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987).

115. F. BRODIE, *THOMAS JEFFERSON* 287-300 (1973).

116. See particularly the definitions of family used for eligibility in Aid to Families with Dependent Children, Food Stamps, and Medicaid programs. Each program has different requirements for eligibility, and each agency recognizes different extended family forms. See also C. STACK, *ALL OUR KIN* 30-31 (1974).

117. This has been evident in law and society studies of lower, rather than appellate courts. See, e.g., M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979); see also Bumiller, *supra* note

the law actually experienced by those who can't afford to mobilize it and who more often experience it as a constraint and enforcement mechanism rather than as an opportunity for crafting lucrative transactions?

What might we learn about cooperation and caring from the physically challenged and elderly that would focus us on the joys of helping and interdependence and not on the individualistic achievement promoted by our laws and social structures?

And what are we already learning from the gay members of our society about the infinite human variations in relationships that demonstrate the impossibility of keeping to our neat legal categories?¹¹⁸ More urgently in recent times, what are we learning about the inevitability of our interdependence as a result of the the modern plague AIDS, which ultimately will affect us all?

At the risk of appearing to have lumped many excluded groups together, when in fact they display enormous variations and diversity, these exclusions tell us that our common exclusions may enable us to see that there is a vision of equality that does not require sameness, that there is glory in diversity and difference, and that there are ways for the law to include, accommodate, and rejoice in the social and cultural differences that both enrich our society as well as threaten to divide it.

V. THE DANGERS AND HOPES OF THE KNOWLEDGE OF EXCLUSION

Let me conclude by offering some sobering and hopeful thoughts about what the knowledge of exclusion offers us.

First, there is the danger of the reification of differences. I have spoken of participation in the legal profession as one way that previously excluded peoples can transform the law. But what of the dangers of insularity and reinforcement of stereotypically conceived differences? In terms of legal practice, what do we make of the proliferation of self-interested bar associations? Women's, black, Latin, Japanese, Filipino, and Korean bar associations all exist in Los Angeles. I suspect there are comparable organizations in other cities. This dispersion of differences occurs at a time when the elite bar

12, at 431-37 (discussing various reasons why many "excluded voices" do not utilize the legal remedies that are available to them).

118. *But see* *Bowers v. Hardwick*, 106 S. Ct. 2841 (1986) (This case unfortunately represents a failure to recognize this variation in human relationships and may limit, at least for awhile, the law's ability to hear from that particular "excluded voice.").

associations, so influential in law and rulemaking, remain predominantly controlled by the white males of the elite, large law firms.

There is the danger of an inability to communicate across knowledge systems. Can the excluded talk to each other and to the included or will we hear an impossible cacophony of voices? Will we find enough commonality to agree on basic principles for our laws? Collective strategies of the excluded will be necessary to open the doors ever wider. Can women talk to men, blacks to whites, Asians to Latins? Where I come from, these are very real issues in which the law is inevitably used in symbolic as well as real terms—to wit, the California referendum to make English the official state language.¹¹⁹ If the demographics of Miami are anything like Los Angeles we may be witnesses to the exploitation of one underclass by another, creating tensions as new excluded groups enter our society and displace or create new lines of exclusion.¹²⁰

What is to be our model of inclusion? Should the romanticized American “melting pot” be contrasted to the Canadian “mosaic”¹²¹ imagery?

Is assimilation a desirable goal? In my study of women lawyers I have been looking at a model of the incorporation of European immigrants into elite law firms.¹²² The models are varied. First Catholics, then Jews, were admitted to elite law firms, but the most comprehensive study to date of the sociology of lawyers, Heinz & Laumann’s *Chicago Lawyers*,¹²³ demonstrates that the ethnic separation of lawyers begins in the tracking of law school and continues through legal specializations and bar association memberships. Unlike the Jews and Catholics, however, women and other excluded groups may not be able to draw on wealthy same-group client bases to help create their own law firms with enough success to rival and “merge” with more restrictive forms of law practice. We have melted together to the

119. *Official State Language Initiative Constitutional Amendment for the November 4, 1986 General Election*, in CALIFORNIA BALLOT PAMPHLET FOR THE NOVEMBER 4, 1986 GENERAL ELECTION (proposed by Senator S.I. Hayakawa, Mr. William J. Orozco, and Mr. Stanley Diamond).

120. In Los Angeles, there are stories of Korean shop owners locking their doors to black consumers; whites who seek “English only” rules to stop Chinese and Hispanic businesses from posting signs in other languages; and a general displacement of “older” minorities (blacks and Hispanics) by “newer” groups who will work for less (Filipinos and Vietnamese) than minimum wage in the workforce. See e.g., Hernandez, *Tale of 2 Cultures*, L.A. Times, May 18, 1986, § 2, at 1, col. 1; Dart, *Korean Immigrants, Blacks Use Churches as Bridge to Ease Tensions*, L.A. Times, Nov. 9, 1985, at 4, col. 1; Banks, *Korean Merchants, Black Customers—Tensions Grow*, L.A. Times, Apr. 15, 1985, § 2, at 1, col. 1.

121. A. MALCOLM, *THE CANADIANS* 66 (1985).

122. See generally J. AUERBACH, *UNEQUAL JUSTICE* (1976).

123. J. HEINZ & E. LAUMANN, *CHICAGO LAWYERS* (1983).

extent that we all eat bagels, sushi, tacos, pizza, and dim sum, but we live in a nation that probably still would not elect a Geraldine Ferraro, a Mario Cuomo, or a Jesse Jackson (integrated food, not power!).

Let me also suggest that I fear total assimilation. The integration that produces androgyny or marble cake without enough chocolate is a potentially bland world that includes by blotting out differences and by abstracting away the particularities.

As I have used feminism as my principal example of exclusion, let me return to my opening theme, the epistemology of exclusion. For those of us who have learned to rethink the world from a woman's point of view—taking our own experiences seriously enough to challenge the conventional order of things—these have been heady and exciting times of “passionate learning.”¹²⁴ What keeps me going as a teacher and a lawyer is the realization that our knowledge structures are changing constantly and that law is a dynamic process. A wise teacher taught me years ago that each time we learn something new, we realize not that we know more but that we know less because we recognize how much more there is to know. Such is the lesson of the knowledge of exclusion—that each time we let in a new excluded group, that each time we listen to a new way of knowing, we learn more about the limits of our current way of seeing. Rather than being threatened by new entrants into the legal profession and the law, we should be grateful for the opportunity to learn that perhaps there are new and other ways to do things. Most European countries have better social legislation than we do.¹²⁵ Most Asian countries have less litigation than we do.¹²⁶ There is much we can learn.

In my view, the future of our society lies with the challenge of whether we can learn to use the voices of the excluded to create innovative adaptations to these troubling times, and to learn that those outside have much to tell us about ourselves and about the ways we draw our lines. The inclusion of new voices in the legal profession is

124. M. BELENKY, *supra* note 75, at 141.

125. See S. HEWLETT, *A LESSER LIFE* 95-99, 127-29, 354-60, 420 n.73 (1986).

126. I say this at the risk of oversimplifying three issues that have been the subject of intense scholarly debate. First, whether there is too much litigation in the United States. See, e.g., Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 *UCLA L. REV.* 4 (1984). Second, what are the reasons for the lower litigation rates in Japan. See, e.g., Haley, *The Myth of the Reluctant Litigant*, 4 *J. JAPANESE STUD.* 359 (1978); Haley, *The Politics of Informal Justice: The Japanese Experience, 1922-1942*, in 2 *THE POLITICS OF INFORMAL JUSTICE* 125 (R. Abel ed. 1982); Ramseyer, *The Myth of the Reluctant Litigant Redux*, 14 *J. JAPANESE STUD.* — (1988). Finally, is the current state of affairs in both American and Japanese litigation rates positive?

one concrete way to make new voices in the law. For those of us who are still excluded, the question is: Will you on the inside hear and, more importantly, will you really *listen* to what we have to give?