

# Nasty Women and the Rule of Law

By ALICE WOOLLEY and ELYSA DARLING\*

“Such a nasty woman.”<sup>1</sup>

“There’s just something about her that feels castrating, overbearing, and scary.”<sup>2</sup>

“She undoubtedly suffered in the trial . . . but she was not likable.”<sup>3</sup>

“Marie Henein is a successful female lawyer at the top of her profession. Total bitch.”<sup>4</sup>

“Not a feminist.”<sup>5</sup>

## Introduction

**N**O ONE ENTERS THE LEGAL PROFESSION expecting social popularity—or, at least, no one should.<sup>6</sup> But recent events create the im-

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1. Daniella Diaz, *Trump calls Clinton ‘a nasty woman’*, CNN (Oct. 20, 2016), <http://www.cnn.com/2016/10/19/politics/donald-trump-hillary-clinton-nasty-woman> [<https://perma.cc/U94K-H8L3>].

2. Yvonne A. Tamayo, *Rhymes with Rich: Power, Law and the Bitch*, 21 ST. THOMAS L. REV. 281, 286 (2009) (quoting Tucker Carlson on Hillary Clinton during her 2007-2008 run for the Democratic presidential nomination).

3. Tim Cornwell, *When Marcia Clark failed to persuade a jury that OJ Simpson was guilty of murder, she fell from grace with a bump – less a legal eagle than a dead parrot. Today’s the day she gets her own back*, THE INDEPENDENT (May 8, 1997), <http://www.independent.co.uk/lifestyle/when-marcia-clark-failed-to-persuade-a-jury-that-oj-simpson-> [<https://perma.cc/75UG-X95Y>].

4. Steve Simon (@the\_stevesimon), TWITTER (Mar. 30, 2016, 7:12 AM), [https://twitter.com/the\\_stevesimon/status/715179945786544128](https://twitter.com/the_stevesimon/status/715179945786544128) [<https://perma.cc/ZKA6-QZ63>] (discussing how Marie Henein successfully defended Canadian radio personality Jian Ghomeshi from accusations of sexual assault).

5. Meghan Murphy, *Marie Henein: Not a feminist, not a surprise*, FEMINIST CURRENT (Apr. 4, 2016), <http://www.feministcurrent.com/2016/04/04/marie-henein-not-a-feminist-not-a-surprise/> [<https://perma.cc/Q9B4-3WNL>].

6. See e.g., Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379, 380 (1987); Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND.

pression that women lawyers face more than the generic suggestions of dishonesty, untrustworthiness, greed, and adversarialism that typify anti-lawyer criticisms.<sup>7</sup> For women lawyers, attacks and criticisms are not only role-related (arising from her occupation in a professional role) but also personal, specific, and gendered. Lawyers in general are labeled as morally troubling; women lawyers risk being specifically and personally identified as morally transgressive, even when performing acts expected of a person in their role.<sup>8</sup> Women who take on law firm leadership, advocate in notorious trials, lead teams in complex corporate transactions, demonstrate political ambitions or political leadership—that is, women who do things that lawyers might normally be expected to do—risk gendered and hostile forms of criticism. They risk being labeled unlikable, unattractive, unfeminine, unpleasant, and immoral—basically, a bitch. Such attacks are not certain to occur. They may be more likely for some women than for others and the form and tone that attacks take almost certainly vary with context. But a woman who chooses to enter the legal profession does not just risk generic unpopularity—she also risks being labeled a “nasty woman.”<sup>9</sup>

That is the premise of this paper. We do not prove that women lawyers risk being attacked in this way, although we note some examples of those who have. We also respond to some objections to this premise and discuss the extent to which gender equality has eluded the legal profession to this day, even in comparison to other professions. Primarily, we focus on why gendered and personal attacks on women might occur. Why did the criticisms of Marcia Clark’s handling of the OJ Simpson Trial have an unpleasant sexist undercur-

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L.J. 911, 911–12 (1996); Thomas W. Overton, *Lawyers, Light Bulbs, and Dead Snakes: The Lawyer Joke as Societal Text*, 42 UCLA L. REV. 1069, 1073–74 (1995); Ronald D. Rotunda, *The Legal Profession and the Public Image of Lawyers*, 23 J. LEGAL PROF. 51, 53 (1999); W. Bradley Wendel, *How I Learned to Stop Worrying and Love Lawyer-Bashing: Some Post-Conference Reflections*, 54 S. C. L. REV. 1027, 1033–36 (2003).

7. Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 634–37 (1994) (identifying the four “clusters” of complaints about lawyers).

8. See Caryn Ganz & Patrick Healy, *Madonna and Hillary: “Witch” and “Nasty Woman” as Sisters in Arms*, N.Y. TIMES (Dec. 11, 2016), <http://www.nytimes.com/2016/12/11/arts/music/madonna-hillary-clinton-renegades.html> (discussing that the criticisms both women have received are troubling, and the connection we make between them is that Madonna suffers misogynist attacks because she is a woman who embraces violations of conventional moral standards; Hillary Clinton suffers misogynist attacks because she is a woman and her role—as lawyer and as politician—requires her to occupy morally problematic space) [<https://perma.cc/7XW7-WM2A>].

9. Diaz, *supra* note 1.

rent?<sup>10</sup> Why do commentators discussing the highly successful Canadian defense lawyer Marie Henein invariably focus on her high heels, clothes, and attractive appearance?<sup>11</sup> Why was Hillary Clinton attacked in vicious and misogynist ways from the very beginning of her time in the public eye and throughout her final, unsuccessful run for the Presidency?<sup>12</sup>

Our thesis is that attacks on women lawyers arise from the intersection between the normative structure of the lawyer's role and sexist stereotypes. The lawyer's function in achieving the social settlement of law, including maintaining the rule of law, requires lawyers to occupy positions of moral ambiguity and power. Lawyers have the privilege and responsibility to pursue the interests of their clients within the bounds of legality, even where doing so inflicts harm or violates valued norms of ordinary morality. That role makes all lawyers unpopular.<sup>13</sup> However, when this is combined with prescriptive gender stereotypes about appropriate conduct for women,<sup>14</sup> it makes women lawyers seem not merely morally dubious, but personally dangerous.<sup>15</sup>

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10. See generally, Rebecca Traister, *Marcia Clark is Redeemed*, N. Y. MAG. (Feb. 17, 2016), <http://nymag.com/thecut/2016/02/marcia-clark-redeemed-c-v-r.html> (discussing the sexist coverage of Marcia Clark) [<https://perma.cc/5GCT-RC4V>]; Sara Boboltz, *Marcia Clark Couldn't Escape Brutal Personal Media Attacks During OJ Simpson Trial*, HUFFINGTON POST (Mar. 9, 2016), [http://www.huffingtonpost.com/entry/marcia-clark-nude-photos-oj-simpson-trial\\_us\\_56e04ebee4b0860f99d75b78](http://www.huffingtonpost.com/entry/marcia-clark-nude-photos-oj-simpson-trial_us_56e04ebee4b0860f99d75b78) [<https://perma.cc/WUD6-5F83>].

11. Anne Kingston, *The Ghomeshi trial's one taboo: Marie Henein's shoes*, MACLEANS (Jan. 9, 2016), <http://www.macleans.ca/culture/the-ghomeshi-trials-one-taboo-marie-henein-shoes/> [<https://perma.cc/8ESH-MXAH>]; Marci McDonald, *The Fixer*, TORONTO LIFE (Oct. 20, 2015), <http://torontolife.com/city/crime/marie-henein-jian-ghomeshi-lawyer/> [<https://perma.cc/Z5D7-AF7C>].

12. Tamayo, *supra* note 2 (discussing examples of earlier sexist discussions of Clinton); Deborah L. Rhode, *Diversity and Gender Equity in Legal Practice*, 82 U. CIN. L. REV. 871, 880–81 (2014) [hereinafter Rhode, *Diversity*]. See Rebecca Solnit, *From Lying to Leering*, 39 LONDON REV OF BOOKS 3, <http://www.lrb.co.uk/v39/n02/rebecca-solnit/from-lying-to-leering> [<https://perma.cc/5AF5-Z7B7>]. We discuss below the objection that attacks on Clinton are not a relevant example for a paper about women lawyers since arising from her power and political role, not from the fact that she is a lawyer. In short, politics and law are closely analogous roles, and attacks on Clinton have at times focused on her status and work as a lawyer, including in the last presidential campaign.

13. Wendel, *supra* note 6, at 1036.

14. Laurie A. Rudman & Julie E. Phelan, *Backlash effects for disconfirming gender stereotypes in organizations*, 28 RES. IN ORGAN. BEHAVIOR 61, 63 (2008) (discussing how descriptive gender stereotypes are stereotypes about how women and men are—their attributes and abilities; and how prescriptive gender stereotypes are stereotypes about how women and men ought to be. Research may suggest that even as descriptive stereotypes evolve, prescriptive stereotypes remain robust today: “the same traits deemed most desirable for women in the 1970s continue to be viewed as most desirable for women today”).

15. See generally, Madeline E. Heilman, *Gender Stereotypes and workplace bias*, 32 RES. IN ORGAN. BEHAVIOR 113, 113–35 (2012) (discussing prescriptive gendered stereotypes about

The perceived danger presented by a woman lawyer connects to an individual woman where *she, specifically*, presents the danger, rather than simply being part of a group or category of dangerous people, and *she* invites the moral outrage.<sup>16</sup> The dissatisfaction and criticism arising from a woman lawyer in her role will not be directed at lawyers, or even at women lawyers; it will be directed just at this one particular “nasty woman.”

This paper sets out this thesis, and considers its ramifications for women, the legal profession, and the rule of law that the lawyer’s role is designed in significant part to achieve. The paper simplifies the analysis insofar as it discusses the problem of attacks on women without separating out additional complexities and issues for women of color or LGBTQ women. It also does not consider the question of whether the issue and analysis here would apply to men of color. In our view, these additional questions merit consideration. Our analysis applies to women generally, but issues of race, gender and sexual orientation mean that the issue is more complex than our analysis reflects.<sup>17</sup> We also suspect that men of color experience similar problems, as suggested by some of the racist attacks on President Obama.<sup>18</sup> This paper starts the conversation, but does not conclude it.<sup>19</sup>

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women in Part II and Part V); Deborah Rhode, *The Subtle Side of Sexism*, 16 COLUM. J. GENDER & L. 613, 621 (2007) [hereinafter Rhode, *Subtle*].

16. See Heilman, *supra* note 15, at 126–27; see also, Rudman & Phelan, *supra* note 14, at 64–65. Researchers have documented the existence of personal backlash against women who violate prescriptive gender stereotypes at work, either by demonstrating agentic qualities (achievement, dominance, autonomy, rationality), or by not demonstrating communal qualities (concern for others, warmth, deference and emotional sensitivity).

17. See e.g., Hilary Sommerlad, *Researching and Theorizing the Processes of Professional Identity Formation* 34 J. L. & SOC’Y 190 (2007); Constance Backhouse, *Gender and Race in the Construction of “Legal Professionalism”: Historical Perspective*, in IN SEARCH OF THE ETHICAL LAWYER: STORIES FROM THE CANADIAN LEGAL PROFESSION I, 126–49 (Adam Dodek & Alice Woolley eds., 2016).

18. Jonathan Kay, *A Role Model Leaves the White House*, THE WALRUS (Jan. 19, 2017), <https://thewalrus.ca/a-role-model-leaves-the-white-house/> [https://perma.cc/WWU2-XEEG]

And yet in the hive mind of right-wing culture warriors—including those here in Canada—this truth is completely reversed: They invented a completely fictional Obama who was an unhinged race activist, a terrorist sympathizer, an anti-Semite, a Kenyan-born Sharia stooge, and a Saul Alinsky acolyte plotting to destroy American capitalism. The myth of this Bizzaro Obama has persisted even as Actual Obama has been playing the role of national father figure and patient turn-the-other-cheek Christian role model.

19. Further, this paper generally treats women lawyers who work in law, and women lawyers who work in politics, as equivalent for the purposes of the analysis, although we do not consider women politicians other than those who are also lawyers. In our view, the arguments we make here apply to women politicians as much as to women lawyers. The

Part II examines the challenges faced by women in law, and in particular the evidence that women's success in law has been stunted and appears to be slipping in relation to other professions. It notes the explanations generally offered for failures of gender diversity, the extent to which those explanations have not sufficiently accounted for the specific struggles of women in the legal profession, and for the personal attacks and gendered commentary experienced by women lawyers.<sup>20</sup> It discusses some of the particular instances of attacks on women lawyers that underlie the premise of this paper. It also responds to likely objections to it, namely, that the attacks we note occurred because of the flaws or attributes of those particular women subject to them, not because of the role they occupy; or, conversely, that such attacks will be inflicted on any women in power, not just women lawyers, such that the woman's professional role is not especially relevant.<sup>21</sup>

Part III briefly discusses the general problem of lawyer unpopularity, considering both its nature and various explanations offered for it. It notes in particular the connection drawn by several commentators between lawyer unpopularity and the normative structure of the lawyer's role.

Part IV turns to the normative structure of the lawyer's role, arguing that the best accounts of the lawyer's role—those rooted in positivism—necessarily create morally doubtful conduct by lawyers. It argues

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lawyer's function in achieving the social settlement of law flows from politics—it is politics from which laws that settle our moral disagreements are created. Both lawyers and politicians participate in the moral settlement that legality reflects and, as a consequence, both lawyers and politicians must comply with masculine gender stereotypes and subvert feminine gender stereotypes. And just as we argue that doing so is perceived as morally transgressive for women lawyers, so too we would argue it is seen that way for women politicians, which explains the nature of the attacks and criticisms directed at individuals in both groups. We do not analyze women politicians who are not lawyers only because our primary focus is on women lawyers in general, not women in politics.

20. Although there is interesting sociological literature on the significance of masculine narratives in constructing and constraining the experience of women and 'others' in law, Hilary Sommerlad has suggested, that for women to truly succeed in law requires a "total overhaul of the male professional paradigm on which this culture is based, and secondly of the wider social and economic structures on which it is predicated." Hilary Sommerlad, *The myth of feminisation: women and cultural change in the legal profession*, 1 INT'L J. OF THE LEGAL PROF. 31, 48 (1994). See generally Margaret Thornton, *Authority and Corporeality: The Conundrum for Women in Law*, 6 FEMINIST LEGAL STUD. 147 (1998); Richard Collier, *Masculinities, Law, and Personal Life: Towards a New Framework for Understanding Men, Law, and Gender*, 33 HARV. J.L. & GENDER 431 (2010).

21. It addresses also the objection that Hillary Clinton's experiences are not experiences of a women lawyer, even though she is a woman and a lawyer—i.e., that her experiences arise from her position of power and in politics.

that under a modified positivist account, lawyers must take positions contrary to the interests of others and the community as a whole, and will from time to time participate in the infliction of harm. Her conduct will injure communal and other interests. As a consequence, moral ambiguity and morally problematic behavior is a defining feature of the lawyer's role, not a failure in the lawyer to satisfy that role.

Part V elaborates the paper's thesis, that the gendered criticism and commentary that women face, arises from the intersection between prescriptive gender stereotypes and the role that law requires them to occupy. Prescriptive gender stereotypes require women to demonstrate communal values (concern for others, warmth and collaboration, deference, and emotional sensitivity) and to avoid agentic values (achievement-orientation, assertiveness, autonomy, and rationality). Occupying the lawyer's role makes that impossible—a lawyer must demonstrate agentic behavior and is often precluded from demonstrating communal behavior. The hostility directed at women lawyers arises from the combination of their gender and their role, rather than simply reflecting either general social misogyny or the traditional male dominance of the legal profession.

It further considers the implications of this argument, suggesting that it may account in part for issues of gender diversity that the profession has been unable to overcome. It rebuts the proposition that changing the normative structure of the lawyer's role could reduce the problem for women lawyers. The role of a lawyer under those alternative normative structures requires similar—or even more significant—violations of prescriptive gender stereotypes, such that a woman who occupied them would have the same problems that she does now.

This part also argues that because the source of the specific and gendered view of women lawyers arises from the role of being a lawyer itself, none of the strategies women are encouraged to adopt to avoid “negative impressions” due to their gender are likely to be successful.<sup>22</sup> If the criticisms arise by virtue of being a woman and a lawyer, then she risks this kind of criticism simply by virtue of her role and her occupation of it, and no demeanor, style of dress, or placating attitude can eliminate it.

Ultimately, we offer no particular solutions. In our view, absent significant social change, women lawyers will remain susceptible to these kinds of attacks, particularly given the role of social media and

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22. Kourtney L. James, Gillian A. Hobson & Paul W. Hinton, *Life in a Big Firm*, in *THE WOMAN ADVOCATE* 131, 142 (Abbe F. Fletman & Evelyn R. Storch eds., 2010).

the acceptance of vicious personal attacks and negativity in public discourse. This threatens the legal profession's ambition for diversity, and undermines its ability to maintain the rule of law. Not because women have some unique perspective on what legality requires or ought to be, or some unique moral perspective of value. Rather, it undermines the lawyer's ability to maintain the rule of law because the lawyer's role itself ends up undermining equality and respect for human dignity—the core values that the rule of law and lawyers are designed to protect.

We hope that, by pointing out the link between the attack and the role we can make these attacks easier for women to bear and we can try to avoid participating in those attacks—even where we 'don't much like' that woman lawyer. Most of all, we hope that by bringing awareness to how we evaluate women in the law, we can identify the attacks for what they are—a consequence of a socially necessary role a woman has chosen to occupy, rather than as a consequence of the particular woman's aggression, incompetence, immorality, sluttiness, or nastiness.

### **Gender Diversity and Inequality in the Legal Profession**

Women participate and succeed in the legal profession to a remarkable extent, particularly in light of the fact that, during the lifetime of living women lawyers and judges, obtaining admission to the profession “could be a feat of endurance.”<sup>23</sup> Close to 50% of law students are women, and have been for over two decades.<sup>24</sup> Women have achieved the highest levels of success in law and the judiciary, with three women sitting on the Supreme Court of the United States and four women sitting on the nine-member Supreme Court of Canada. Also, it is “well documented that women have made strides in obtaining high-level positions in the public and private sectors” in law.<sup>25</sup>

At the same time, data and trends suggest that gender equality within the profession remains elusive and has slipped in recent years. As a percentage, fewer women enroll in law school today than they did

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23. Cynthia Fuchs Epstein, *Women in the Legal Profession at the Turn of the Twenty-First Century: Assessing Glass Ceilings and Open Doors*, 49 U. KAN. L. REV. 733, 733 (2001).

24. Joyce S. Sterling & Nancy Reichman, *Navigating the Gap: Reflections on 20 Years Researching Gender Disparities in the Legal Profession*, 8 FIU L. REV. 515, 516 (2013).

25. Jason P. Nance & Paul E. Madsen, *An Empirical Analysis of Diversity in the Legal Profession*, 47 CONN. L. REV. 271, 283 (2014). *See also*, Deborah L. Rhode, *Women and the Path to Leadership*, 2012 MICH. ST. L. REV. 1439, 1448 (noting that “96% of Americans feel comfortable with female heads of law firms, 86% feel similarly about a Chief Justice of the Supreme Court and 74% about the presidency”) [hereinafter Rhode, *Path*].

in 1993.<sup>26</sup> Women remain a small minority of equity partners in large law firms—fifteen percent—and that number has not meaningfully changed in many years, despite the fact that half of the associates hired by those firms are women.<sup>27</sup> Women leave firms more often and, even if they stay, are less likely to be made partner, even when “controlling for other factors including law school grades and time out of the work force or part-time schedules.”<sup>28</sup> Women earn less than their male counterparts with the typical female equity partner in a law firm earning 80% of the typical male equity partner.<sup>29</sup> Women are also under-represented as general counsel of Fortune 500 corporations and law school deans.<sup>30</sup> Data from the American Bar Association suggests that the legal profession has less diversity than other prestigious professions, including accounting and medicine.<sup>31</sup> One recent study determined that, after controlling for age and other historically distorting factors, law now performs worse than other prestigious professions in terms of gender equity. The study noted that “women have been well represented in the legal profession until recently, when they appear to have become slightly underrepresented” relative to other prestigious professions.<sup>32</sup>

Women lawyers also appear to be subject to gendered forms of criticism as seen when they appear in public roles, particularly those roles that involve challenging norms or standards, like advocates or politicians, or when they involve seeking power.<sup>33</sup> To illustrate, after shifting the focus of her attention to safer ground as First Lady, Michelle Obama has become a beloved public figure. However, dur-

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26. Sterling & Reichman, *supra* note 24, at 516. In 1993 more than 50% of students enrolled in law schools were women; in 2011 it was 46.8%.

27. Eli Wald, *Glass Ceilings and Dead Ends: Professional Ideologies, Gender Stereotypes, and the Future of Women Lawyers at Large Law Firms*, 78 *FORDHAM L. REV.* 2245, 2251 (2010).

28. Rhode, *Path*, *supra* note 25, at 1448; Wald, *supra* note 27, at 2255–56.

29. Lauren Stiller Riklees, *Women Lawyers Continue to Lag Behind Male Colleagues: Report of the Ninth Annual NAWL National Survey on Retention and Promotion Of Women In Law Firms*, NAT'L ASS'N OF WOMEN LAWYERS (Oct. 27, 2015), <http://www.nawl.org/p/cm/ld/fid=506> [<https://perma.cc/P8YV-33ZS>]; see generally Deborah L. Rhode, *Gender and the Profession: The No-Problem Problem*, 30 *HOFSTRA L. REV.* 1001, 1002–03 (2002) [hereinafter Rhode, *No-Problem Problem*]; Hilary Sommerlad, *Women solicitors in a fractured profession: intersections of gender and professionalism in England and Wales*, 9 *INT'L. J. LEGAL PROF.* 213, 216 (2002).

30. Rhode, *Diversity*, *supra* note 12, at 872.

31. *Id.* at 871.

32. Nance & Madsen, *supra* note 25, at 319. For data on the exclusion of women in prestigious and powerful positions, see Sommerlad, *supra* note 29, at 216–17.

33. Sady Doyle, *America loves women like Hillary Clinton as long as they're not asking for a promotion*, *QUARTZ* (Feb. 25, 2016), <https://qz.com/624346/america-loves-women-like-hillary-clinton-as-long-as-theyre-not-asking-for-a-promotion/> [<https://perma.cc/Q94U-NC2X>].

ing President Obama's 2008 campaign, when she criticized America's history on matters of race she "was labeled by her critics as angry, bitter and militant."<sup>34</sup> Similarly, harsh criticism and media coverage of Marcia Clark during the trial of OJ Simpson has been recently critiqued as reflecting double standards and sexism,<sup>35</sup> an assessment that a review of contemporaneous records makes difficult to refute. A 1997 article in Britain's *The Independent* noted:

In the trial, one never knew which Marcia one was getting. She was by turns silky and flinty, playful and schoolmarmish, but plainly never one to suffer fools gladly. She is fortyish and not especially attractive. Johnnie Cochran, with his instinct for a weak spot, called her "hysterical."<sup>36</sup>

Gloria Allred, a Los Angeles attorney specializing in notorious cases of women who allege mistreatment by famous men, is regularly labeled a "fame-whore."<sup>37</sup> Googling "Gloria Allred bitch" generates an impressive list of blogs and commentaries stating the same.<sup>38</sup> Janet Reno's recent death generated many admiring eulogistic articles, and during her time as Attorney General she enjoyed significant positive press. However, during the fall-out over the disastrous FBI assault on the Branch Davidian compound in Waco, Texas, the media criticized her personal demeanor, seeing her as "abrasive," "cool . . . to the point of iciness," and "testy under questioning."<sup>39</sup>

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34. Kate Dailey, *Michelle Obama: Her four-year evolution*, BBC NEWS (Sept. 4, 2012), <http://www.bbc.com/news/magazine-19431000> [<https://perma.cc/XZ32-TFHC>]. For Michelle Obama, issues of race obviously also factor in to how she is discussed, although in this instance we see gender as a significant component. Other attacks on her have been purely racist. See, e.g., Kristine Guerra, *The nonprofit director who called Michelle Obama an 'ape in heels' has lost her job—for good*, WASH. POST (Dec. 27, 2016), <https://www.washingtonpost.com/news/post-nation/wp/2016/12/27/the-nonprofit-director-who-called-mich> [<https://perma.cc/A7WL-YDEY>].

35. Traister, *supra* note 10.

36. Cornwell, *supra* note 3. There were also issues in relation to how she was treated by the judge. In a 2016 interview, Clark said "He treated me like a second-class citizen, and a jury takes their cue from the judge." Celia Walden, *O.J. Simpson prosecutor: 'His murder trial ruined my life—but 20 years on I'm back'*, THE TELEGRAPH (Mar. 18, 2016, 10:00 AM), <http://www.telegraph.co.uk/women/work/oj-simpson-prosecutor-his-murder-trial-ruined-my-life-but-20-y/> [<https://perma.cc/HPG2-D63Q>].

37. Even in relatively flattering articles: Dodai Stewart, *Attention-Loving Lawyer Gloria Allred is More than Just a Fame-Whore*, JEZEBEL (Oct. 15, 2007, 7:00 PM), <http://jezebel.com/311069/attention-loving-lawyer-gloria-allred-is-more-than-just-a-fame-whore> [<https://perma.cc/92HE-C4MZ>].

38. Top search results, GOOGLE, <https://www.google.com/#q=Gloria+Allred+Bitch&search=Gloria+Allred+bitch;> the first results of the search are "I Fucking Hate Gloria Allred," followed by "Chick fight: Megyn Kelly bitch slaps Gloria Allred" (last visited Feb. 28, 2017) [<https://perma.cc/7UQR-XP45>].

39. Howard Kurtz, *Janet Reno, Hung Out to Dry? How the Media Put Her Through the Spin Cycle*, WASH. POST (Dec. 21, 1993), <https://www.washingtonpost.com/archive/lifestyle/>

The most remarkable criticisms have, however, been reserved for Hillary Clinton. Considering only her career up to 2008, it is not difficult to find comments and criticisms apt for a sexism playbook:

It's not that [Hillary Clinton]'s an accomplished modern woman. It's just that she's grating, abrasive and boastful. There's a certain familiar order of things, and the notion of a coequal couple in the White House is a little offensive to men and women.<sup>40</sup>

[Hillary Clinton] is a bitch . . . [t]hat's the only thing [Newt] ever said about her.<sup>41</sup>

Rush Limbaugh called Clinton the woman with the “testicle lock box” and MSNBC commentator Tucker Carlson stated that “[t]here’s just something about her that feels castrating, overbearing and scary,” and, on another article, he stated that “when she comes on television, I involuntarily cross my legs.” Finally, radio talk show host Don Imus has often referred to Clinton as “that buck tooth witch Satan” and Bill Clinton’s “fat, ugly wife, Satan.”<sup>42</sup>

After her 2007 victory in the New Hampshire primary, when she said “This is very personal for me. It’s not just political. It’s not just public,” Senator Clinton was ridiculed by political commentators who argued that “[s]he pretended to cry, the women felt sorry for her . . . and asked whether Hillary [could] cry her way back to the White House.”<sup>43</sup>

Hillary Clinton has been subject to even more vitriolic descriptions: “power-hungry,” “castrating,” “Hitlerian,” and “feminazi.” During her presidential campaign [in 2008] she coped with sales of a Clinton nutcracker, charges that she reminded men of a scolding mother or first wife, and hecklers with signs demanding “Iron my shirt.”<sup>44</sup>

Those types of criticisms did not abate in the recent campaign. As Rebecca Solnit recently summarized:

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1993/12 /21/janet-reno-hung-out-to-dry-how-the-media-put-her-through-the-spin-cycle/[https://perma.cc/3CSH-LW4Q].

40. Maureen Dowd, *The 1992 Campaign: Candidate's Wife; Hillary Clinton as Aspiring First Lady: Role Model, or a 'Hall Monitor' Type*, N.Y. TIMES (May 18, 1992), <http://www.nytimes.com/1992/05/18/us/1992-campaign-candidate-s-wife-hillary-clinton-aspiring-first-lady-role-model.html> (quoting Roger Stone, a Republican consultant) [https://perma.cc/PG2Y-NVBR].

41. Tamayo, *supra* note 2, at 284 (quoting a 1995 interview with Newt Gingrich’s mother Kathleen).

42. *Id.* at 285–86.

43. *Id.* at 299.

44. Rhode, *Diversity*, *supra* note 12. Full Frontal with Samantha Bee, *Let Hillary be Hillary*, YOUTUBE (Nov. 7, 2016), <https://www.youtube.com/watch?v=B6zf5VkuiEQ> [https://perma.cc/G6S9-YHMW].

Clinton was constantly berated for qualities rarely mentioned in male politicians, including ambition—something, it's safe to assume, she has in common with everyone who ever ran for elected office. It's possible, according to *Psychology Today's* headline, that she is 'pathologically ambitious.' She was criticized for having a voice. While Bernie Sanders railed and Trump screamed and snickered, the Fox commentator Brit Hume complained about Clinton's 'sharp, lecturing tone,' which, he said, was 'not so attractive,' while MSNBC's Lawrence O'Donnell gave her public instructions on how to use a microphone, Bob Woodward bitched that she was 'screaming' and Bob Cusack, the editor of the political newspaper *The Hill*, said: "When Hillary Clinton raises her voice, she loses."<sup>45</sup>

In that campaign President Trump paid particular attention to work Clinton had done when she was in legal practice, bringing the alleged victim of a man she had represented to the second presidential debate:

One of the women, who is a wonderful woman, at 12 years old, was raped at 12. . . . Her client she represented got him off, and she's seen laughing on two separate occasions, laughing at the girl who was raped. Kathy Shelton, that young woman is here with us tonight.<sup>46</sup>

Even women lawyers who receive relatively positive press are often described in highly gendered ways. Hannah Brenner and Renee Newman Knake observe in a media study that women nominees to the Supreme Court tend to have their appearance and family life commented on somewhat more than do male nominees.<sup>47</sup> Well-known celebrity divorce lawyer Laura Wasser is noted for her clothes and appearance and was described in a 2016 *Financial Times* article as having "a ready smile and lustrous brown hair reaching down her back." The *Financial Times* noted TMZ's descriptions of her as "super hot" and "the hottest attorney chick I have ever seen."<sup>48</sup> Coverage of

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45. Solnit, *supra* note 12.

46. Aaron Blake, *Donald Trumps attack on Hillary Clinton for defending an accused child rapist, explained*, WASH. POST (Oct. 9, 2016), [https://www.washingtonpost.com/news/the-fix/wp/2016/10/09/why-donald-trump-just-attacked-hillary-clinton-for-defending-an-accused-child-rapist-explained/?utm\\_term=.0a64c78692b2](https://www.washingtonpost.com/news/the-fix/wp/2016/10/09/why-donald-trump-just-attacked-hillary-clinton-for-defending-an-accused-child-rapist-explained/?utm_term=.0a64c78692b2) [<https://perma.cc/P248-6NQW>].

47. Hannah Brenner & Renee Newman Knake, *Rethinking Gender Equality in the Legal Profession's Pipeline to Power: A Study on Media Coverage of Supreme Court Nominees (Phase I, the Introduction Week)*, 84 TEMP. L. REV. 325, 331–32 (2012) (noting that more data is needed). As a related point, it is worth noting that models of lawyer behavior—whether positive or negative—are articulated in highly masculine form, of male violence or virtue. See Amy Salyzyn, *John Rambo v. Atticus Finch: Gender, Diversity and the Civility Movement*, 16 LEGAL ETHICS 97, 97–118 (2013); see also Jonnette Watson-Hamilton, *Metaphors of Lawyers' Professionalism*, 33 ALTA. L. REV. 833 (1995).

48. Gary Silverman, *Laura Wasser, Hollywood lawyer born to the business*, FIN. TIMES (Sept. 23, 2016), <https://www.ft.com/content/4e4318f2-8113-11e6-8e50-8ec15fb462f4> [<https://perma.cc/6FKK-6AAM>].

whistleblower Jesselyn Radack routinely discusses her family and her appearance—her matching nail polish, her “unruly blonde hair” and her “calf-high leather boots.”<sup>49</sup> Media coverage of well-known Canadian criminal defense lawyer Marie Henein fixates on her clothes and looks, describing how she “sweep[s] past in a stunning black dress and designer jacket,” with a “slash of scarlet lipstick” and “patent stilettos.”<sup>50</sup> Henein, however, has been criticized as “not a feminist” for her successful defense of accused rapists.<sup>51</sup>

Implicit in the discussion of these examples are two claims. First, that these examples reflect sexism and misogyny, as opposed to being justified criticisms of problematic conduct. Second, that these examples relate to the fact that the women are lawyers, rather than simply being sexist attacks directed at women who achieve positions of prominence or power. Both of these claims can be challenged; for every 2016 article suggesting that Hillary Clinton faced sexism in her campaign for president is another article suggesting that her defeat was unrelated to sexism or misogyny.<sup>52</sup> Many of the women we note could be legitimately criticized for aspects of their professional choices. Further, critics could quickly identify women outside of law and politics

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49. A 2004 Mother Jones article discusses Radack’s “tall, handsome husband” and her “two young sons.” It goes on to say in evidencing that she is not “weird, in the clichéd, whistleblower-as-misfit sense,” that her “fingernails and toenails match (deep mauve); her kinky hair (though she often dries it straight) is cinched in a ponytail, her eyebrows lightly plucked.” Laurie Abraham, *Anatomy of a Whistleblower*, MOTHER JONES (Feb. 2004), <http://www.motherjones.com/politics/2004/01/anatomy-whistleblower> [https://perma.cc/243W-BH52]. A 2014 article about her representation of Edward Snowden discussed her “black dress and unruly blonde hair,” noting her “calf-high leather boots” and how she later “trades her boots for a pair of pink New Balance sneakers.” Russell Brandom, *Edward Snowden’s Lawyer Will Keep your Secrets: Jesselyn Radack is a whistleblower’s best defense*, THE VERGE (June 24, 2014, 11:00 AM), <http://www.theverge.com/2014/6/24/5818594/edward-snowdens-lawyer-jesselyn-radack-will-keep-your-secrets> [https://perma.cc/EUQ3-L238].

50. Marci McDonald, *The Fixer*, TORONTO LIFE (Oct. 20, 2015), <http://torontolife.com/city/crime/marie-henein-jian-ghomeshi-lawyer/> [https://perma.cc/8XMY-XRDN]; see also Anne Kingston, *The Ghomeshi trial’s one taboo: Marie Henein’s shoes*, MACLEANS (Jan. 9, 2015), <http://www.macleans.ca/culture/the-ghomeshi-trials-one-taboo-marie-heneins-shoes/> [https://perma.cc/J6KG-M37N].

51. Murphy, *supra* note 5.

52. See, e.g., Nancy L. Cohen, *Sexism did not cost Hillary Clinton the election*, WASH. POST (Nov. 16, 2016), [https://www.washingtonpost.com/posteverything/wp/2016/11/16/sex-ism-did-not-cost-hillary-clinton-the-election/?utm\\_term=.Aae205047d12](https://www.washingtonpost.com/posteverything/wp/2016/11/16/sex-ism-did-not-cost-hillary-clinton-the-election/?utm_term=.Aae205047d12) [https://perma.cc/JQ67-HJAD]; Rex Murphy, *It wasn’t misogyny that caused Clinton’s downfall, it was all the baggage she dragged around*, NAT’L POST (Nov. 11, 2016), <http://news.nationalpost.com/full-comment/rex-murphy-fear-and-loathing-on-the-campaign-trail-16> [https://perma.cc/9JSA-5K6J].

that have faced similar attacks, such as Megyn Kelly<sup>53</sup> and the women of Gamergate.<sup>54</sup> It is also possible to argue that the attacks on Hillary Clinton do not relate to the fact that she is a lawyer; that she is one is coincidental, not causative.

With respect to the first challenge, our claim is not that sexist criticism and attacks on women never reflect legitimate grounds of moral or political disagreement. Rather, our assertion is that the tone, intensity, certainty, and nature of the criticisms directed at these women go beyond any claimed substantive justification. In essence, if a woman behaved in exactly the same way as a man, any criticism leveled at her in tone and substance sounds very different—our criticisms of that woman can be characterized as sexist, and in some cases, misogynistic. We cannot prove that assertion; it flows from what we see when we consider the examples here and our personal experiences. To us, labeling Michelle Obama angry and bitter because she notes the existence of racism was both sexist and racist. Shifting attacks of Janet Reno from what she did in handling the Waco incident to emphasize her personal abrasiveness and coolness reflects traditional stereotypes employed against women in leadership roles. Critiquing Marcia Clark for her clothes, demeanor, and her “likability” reflects classic negative gender stereotypes. Gloria Allred’s undoubted appreciation of media attention would be labeled differently if she were male—as suggested by comparing commentary about her to the discussion of lawyers such as Jim “The Hammer” Shapiro, one of the more notorious creators of aggressive lawyer advertising, who is criticized but not castigated.<sup>55</sup>

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53. Laura Bates, *Donald Trump’s ‘Spat’ with Megyn Kelly is Sexism, and It’s Abusive*, TIME (Jan. 28, 2016), <http://time.com/4198737/donald-trump-megyn-kelly-sexism/> [https://perma.cc/584P-BFE7].

54. See Jay Hathaway, *What is Gamergate, and Why? An Explainer for Non-Geeks*, GAWKER (Oct. 10, 2014), <http://gawker.com/what-is-gamergate-and-why-an-explainer-for-non-geeks-1642909080> [https://perma.cc/38XM-6T6N].

55. Robyn Pennacchia, *8 crazy lawyer commercials that will haunt your dreams*, DEATHANDTAXESMAG.COM (Apr. 24, 2013), <http://www.deathandtaxesmag.com/197706/8-crazy-lawyer-commercials-that-will-haunt-your-dreams/> [https://perma.cc/K4VQ-NT7M]. Jim “The Hammer” Shapiro creates notorious lawyer advertisements, many of which go viral. Certainly, coverage of those ads are not positive, but it tends to be lighthearted and, when critical, it is directed at lawyers generally rather than at Jim Shapiro personally. Top search results, GOOGLE, [https://www.google.com/?gws\\_rd=SSL#q=Jim™he+ammer+Shapiro+asshole](https://www.google.com/?gws_rd=SSL#q=Jim%20the+ammer+Shapiro+asshole) (the search “Jim the hammer Shapiro asshole” did not generate any notable hits) (last visited Apr. 9, 2017) [https://perma.cc/CD3L-QSAX]; Top search results, GOOGLE, [https://www.google.com/?gws\\_rd=SSL#q=Jim™he+ammer+Shapiro+bastard](https://www.google.com/?gws_rd=SSL#q=Jim%20the+ammer+Shapiro+bastard) (search “Jim the hammer Shapiro bastard” mostly generated links to Shapiro’s book *Sue the Bastards!! Your Guide to Huge Cash*) (last visited Apr. 9, 2017) [https://perma.cc/HA7F-ZCQ3].

The attacks on Hillary Clinton are in our view overtly and indefensibly misogynistic, and have been since she first entered public life. Even positive coverage of women lawyers that focuses on their appearance, clothes, and “hotness” belittles the professional capacity and accomplishments of those women and may set them up for future criticism. The woman who is sophisticated, well-dressed and attractive today, may become a self-promoting harlot if her legal work makes her more susceptible to criticism.<sup>56</sup>

We believe that all women lawyers, whether famous or not, are susceptible to sexist attacks and criticisms of this type—even without the notoriety of the women we have used as examples here.<sup>57</sup> If someone sees something different, we have no argument or tools to persuade him or her that our perception is the correct one. Our argument is, simply, if what we see is what is there, then why does that occur and what does it mean?

In relation to the second challenge, we acknowledge that women outside of law also experience sexist and misogynist attacks and criticism. We do not, however, think that means that the attacks and criticism of women in law are unrelated to their role. Professions other than law can be unpopular, but we still understand the unpopularity of lawyers in light of the work they do. Sexist attacks are inflicted on a range of women, but it is still worth considering why women lawyers experience them.

Importantly, women lawyers suffer such critiques due to the morally ambiguous and problematic nature of the lawyer’s role—the role requires women to challenge or subvert accepted moral and social norms and, consequently, to violate prescriptive gendered stereotypes, making women lawyers susceptible to personal and sexist attacks. When women outside of law are attacked for challenging or subverting accepted moral and social norms, the criticisms support our thesis rather than challenge it—the reason for the attacks is in substance the same as the reason we suggest leads to such attacks on women lawyers. For example, Madonna is not a lawyer, but she has continually challenged conventional moral norms and standards, and exhibited ambition and agency over her own life. The “constant bully-

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56. While she was attacked as an anti-feminist, the criticisms of Marie Henein may have been ameliorated to some extent by what turned out to be the extraordinary weakness of the case against her client. Had the case been stronger, but an acquittal nonetheless obtained, the attacks on her may well have been more vicious, particularly in relation to her personal style and appearance.

57. Both of us have some experience of this.

ing and relentless abuse” inflicted on her as a consequence is, in our view, a different iteration of the phenomenon we describe here.<sup>58</sup>

With respect to Hillary Clinton, we concede that she is an imperfect example of the phenomenon we discuss insofar as she has not been in active legal practice since the early 1990s. However, we believe that she remains relevant for our analysis. Notably, attacks on her have been directly connected to her professional work and status as a lawyer, both when she first came into the public eye<sup>59</sup> and during the last presidential campaign. As noted earlier, her defense of a man accused of sexual assault was explicitly invoked as one of the reasons to view her with suspicion and distrust. Additionally, and more importantly, many of the arguments that we make apply to women in politics because law and politics are closely analogous.

As discussed below, the issues for women lawyers arise in significant part because of the role lawyers play in relation to achieving the social settlement of moral and political disagreements in law. Politicians also work to create that social settlement—indeed, politics is law’s source; law is a product of politics.

To the extent that hostility towards women lawyers arises from their role, women politicians are likely to have similar problems. The attacks leveled at Hillary Clinton arise, therefore, from a position closely analogous to the lawyer’s role and from her status as a lawyer. For that reason, we maintain her relevance to our analysis. Furthermore, considering Hillary Clinton’s experiences is important, because it suggests how bad these sorts of attacks can get. Her experiences demonstrate just how vilified a woman lawyer can be.

Gender inequality in the legal profession is evidenced by generalized data indicating that women have decreased participation in the profession and lower levels of accomplishment than men, and by the common personal and sexist criticisms experienced by successful women lawyers. We are neither the first people to note this inequality nor the first people to consider explanations for it. Generally speaking, scholars observing and explaining gender inequality in the legal

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58. Eli Rosenberg, *‘To Age Is a Sin’: In Blunt Speech, Madonna Confronts Bias in Various Forms*, N.Y. TIMES (Dec. 10, 2016), <http://www.nytimes.com/2016/12/10/arts/music/madonna-billboard-awards-speech-ageism-sexism.html> [<https://perma.cc/MZF6-L5JC>].

59. For example, the criticisms related to her carrying on as a lawyer while Bill Clinton was Governor of Arkansas, and the potential for conflicts of interest, which led to her (in)famous response “I suppose I could have stayed home, baked cookies and had teas.” Denver Nicks, *This Was the Hillary Clinton Comment That Sparked Lena Dunham’s Political Awareness*, TIME (Sept. 29, 2015), <http://time.com/4054623/clinton-dunham-tea-cookies/> [<https://perma.cc/5S3Q-D9U8>].

profession have emphasized the role of negative gender stereotypes and implicit bias,<sup>60</sup> the absence of mentoring and networking opportunities for women,<sup>61</sup> and the structure and function of law firms.<sup>62</sup>

The issue with these general explanations of gender inequality in the legal profession, however, is that they largely tend to assume that law is like any other prestigious and male-dominated profession.<sup>63</sup> Other than noting some issues related to private law firms, they do not identify whether, or why, the legal profession might present unique and more intractable issues for women.<sup>64</sup> An absence of mentoring and networking opportunities for women would be an issue in any male dominated field. Stereotypes related to female incompetence, women's lack of commitment to professional life, and that women "are rated lower when they adopt authoritative, seemingly masculine styles" could inhibit the professional advancement of women accountants, doctors and engineers just as much as they could undermine women lawyers.<sup>65</sup> That is not to say that those explanations are not important or relevant, and some of them will be useful to our analysis, but they do not account for the lag in equality experienced by the legal profession in particular.

In addition, scholars writing about women in the legal profession tend to focus primarily on opportunities for women's advancement in the profession and in legal organizations, rather than considering the

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60. See, e.g., Rhode, *No-Problem Problem*, *supra* note 29, at 1004–05; Rhode, *Subtle*, *supra* note 15; Nicole E. Negowetti, *Implicit Bias and the Legal Profession's 'Diversity Crisis': A Call for Self-Reflection*, 15 NEV. L.J. 930 (2015); Peggy Li, *Physical Attractiveness and Femininity: Helpful or Hurtful for Female Attorneys*, 47 AKRON L. REV. 997 (2015).

61. Rhode, *No-Problem Problem*, *supra* note 29, at 1004–05; Rhode, *Path*, *supra* note 25.

62. *Id.*; see also Ann C. McGinley, *Masculine Law Firms*, 8 FIU L. REV. 423 (2013).

63. This is not true of sociological analysis that considers the intersection between the law, professional identity and ideals or concepts of masculinity and femininity. See, e.g., Sommerlad and Backhouse, *supra* note 17, and comments, *supra* note 20 (specifically, the papers referenced). Our analysis links in concept and outcome to sociological analysis of law and the legal profession, although methodologically distinct in relying on the intersection between philosophical analysis of the lawyer's role and psychological studies and observations of human behavior, rather than considering the construction of norms and behavior through social and cultural forces.

64. In their terrific analysis of trends on diversity in the legal profession, after showing that women have moved to being slightly underrepresented in law in relation to other professions, Nance and Madsen suggest that the difference may arise from the fact that law firms are not "just and inclusive" and that women are not as satisfied as men with their professional lives. However, that answer is relatively unsatisfactory. Large corporate law firms represent a relatively small portion of the legal profession, and the trends that they identify seem to go well beyond the law firm. See Nance & Madsen, *supra* note 25.

65. Rhode, *Diversity*, *supra* note 12, at 879.

hostility or criticism that women lawyers may face.<sup>66</sup> Although this difference is not noted, these scholars tend to focus on descriptive stereotypes about women's capabilities, not prescriptive stereotypes about appropriate behavior for women. The criticism faced by women lawyers relates to issues of lawyer advancement, as we will note below, but it is a distinct question, and it requires consideration of prescriptive and descriptive gender stereotypes. If gender stereotyping accounts for the attacks directed at women, it seems likely to be because women have violated stereotypes about how they *ought* to behave, rather than because they have defied stereotypes about how they *will* behave.

Eli Wald addresses some of these gaps in his compelling assessment of the reasons for the failure of women to advance in large law firms. Wald argues that modern law firms have adopted a "hypercompetitive ideology" in which law firms emphasize total commitment to clients and client service, and the elite status of the firms depend on portraying "lawyers as near-heroic servants, zealous service providers who pursue the interests of their clients around the clock."<sup>67</sup> Wald argues that the combination of hypercompetitive ideology with negative descriptive stereotypes about women as insufficiently committed to their professional lives, has made large law firms incompatible with the retention and success of women attorneys.<sup>68</sup>

Wald's argument is compelling. While it relies on many of the insights of other scholars about the nature and significance of gender stereotyping, it illuminates the particular issues for women in large law firms. Women in large firms do not have problems simply because they are women in a male-dominated profession; they have problems because they are women working in a hypercompetitive law firm, where gender stereotypes about women create unique barriers to advancement.<sup>69</sup> Wald focuses on descriptive gender stereotypes, but his explanation highlights the issues arising for women specific to an aspect of legal practice.<sup>70</sup>

Further, Wald's thesis indicates the type of explanation likely to be useful to address the challenges faced generally by women in law, and the personal and sexist attacks that women lawyers may face. In

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66. Although, this question is clearly considered by some. See, e.g., Tamoyo, *supra* note 2; Kathleen Bergin, *Sexualized Advocacy: The Ascendant Backlash Against Female Lawyers*, 18 YALE J.L. & FEMINISM 191 (2006).

67. Wald, *supra* note 27, at 2271.

68. *Id.* at 2279–86.

69. *Id.*

70. See generally *id.*

his analysis of descriptive gender stereotypes about the nature of women's abilities and capacities, Wald demonstrates that the gendered issues for women in law firms arise at the intersection between the firm's norms and negative gender stereotypes.<sup>71</sup> Assuming that issues for women in law arise in a manner similar to the issues Wald identifies for women in large law firms, their source is likely to be the intersection between norms and values of legal practice and negative gender stereotypes. Our analysis of the relevant gender stereotypes will include prescriptive gender stereotypes about what women *ought* to do or be, rather than descriptive gender stereotypes about what women are capable of doing or being.<sup>72</sup> Wald's example takes us to the key question: How might the intersection of the norms underlying the practice of law with negative gender stereotypes give rise to personal, hostile, and sexist attacks on women lawyers?

### The Unpopularity of Lawyers

To answer that question it is worth briefly considering the general issue of lawyer unpopularity. The question of why and in what way society dislikes lawyers may have some relevance for the question of why critics direct gendered and hostile criticism at particular women lawyers. Lawyer unpopularity can seem hostile; even when framed as a "joke." Lawyers are characterized as devious, money obsessed, contemptible, incomprehensible, useless, and self-satisfied.<sup>73</sup>

Academics who have considered this issue generally identify one of two causes. Some see the unpopularity of lawyers as reflecting genuine grievances with the unethical and immoral conduct of lawyers: "a significant segment of the bar routinely and patently pads bills and defrauds clients" while the rest maintain "silence in the face of open and endemic fraud."<sup>74</sup>

The problem with this explanation, however, is that it does not account for the form that lawyer unpopularity takes. Lawyers are unpopular, but not uniformly or simplistically so. Even though lawyers, as a class of professionals, are often the butt of jokes, the work they do is also seen as valuable. The general public criticizes lawyers for doing work for clients at the public expense, but also values putting client interests first and protecting people's rights.<sup>75</sup> Further, people who

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71. *Id.* at 2279–86.

72. Rudman & Phelan, *supra* note 14.

73. *See, e.g.*, Overton, *supra* note 6.

74. *See* Bogus, *supra* note 6, at 914; *see also* Overton, *supra* note 6.

75. Rotunda, *supra* note 6, at 61.

retain lawyers tend to report high levels of satisfaction with the work those lawyers do on their behalf.<sup>76</sup> This belies the idea that lawyer unpopularity arises from lawyer misconduct; if it did, one would expect lawyers to be unpopular specifically—because of their own bad acts—rather than generically. One would also not expect the criticism and praise of lawyers to look much the same. Yet as Robert Post has noted:

[L]awyers are applauded for following their clients' wishes and bending the rules to satisfy those wishes; and they are at the very same time condemned for using the legal system to satisfy their clients' desires by bringing lawsuits at their clients' behest and using the legal system to get what their clients want, rather than to uphold the right and denounce the wrong.<sup>77</sup>

As Brad Wendel puts it, people view lawyers positively when they evaluate them from the perspective of a client or potential client, but when they evaluate lawyers from the perspective of “an affected member of the public,” their views are more negative.<sup>78</sup>

Wendel and others attribute this complex view to the nature of the lawyer's role as understood from a positivist perspective—we see lawyers as dangerous and valuable because lawyers work at the center of law as a response to the problem of pluralism.<sup>79</sup> By working to the point where we have settled our moral disagreements and created a social order despite those disagreements, lawyers both enforce consensus views on moral outcomes and allow individuals to achieve results that some find morally objectionable.<sup>80</sup> As explained by Robert Post:

Lawyers, in other words, bstride the following cultural contradiction: we both want and in some respects have a universal, common culture, and we simultaneously want that culture to be malleable and responsive to the particular and often incompatible interests of individual groups and citizens. We expect lawyers to fulfill both desires, and so they are a constant irritating reminder that we are neither a peaceable kingdom of harmony and order, nor a land of undiluted individual autonomy, but somewhere disorientingly in between. Lawyers, in the very exercise of their profession, are the necessary bearers of that bleak winter's tale, and we hate them for it.<sup>81</sup>

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76. Wendel, *supra* note 6, at 1034.

77. Post, *supra* note 6, at 380.

78. Wendel, *supra* note 6, at 1034.

79. *Id.* at 1041.

80. *Id.* at 1034.

81. Post, *supra* note 6, at 386.

This account of lawyer unpopularity has two notable features from the perspective of our analysis. First, it tends to assume that all lawyers will be liked or disliked in more or less the same way. The problem is one for lawyers as a whole, not one experienced to a greater or lesser extent by different groups of lawyers or individual lawyers. Second, it posits that individual lawyers will have a better reputation than do lawyers as a group. The distrust and dislike of lawyers is because of the general work that lawyers do, more than it is the work of any individual lawyer, but that is not entirely the case. Lawyers who take on controversial cases will, when assessed from the perspective of an affected member of the public, plausibly become a focal point for discontent with the legal profession.<sup>82</sup> But the problem of lawyer unpopularity is generally understood to be a collective problem more than an individual one.

The discussion from the prior section calls that assumption into question. It suggests that while lawyers in general may be unpopular and subject to criticism, women lawyers experience criticism directed at them that is more frequent as well as being personal, hostile and gendered. This means that we have to consider something beyond the standard analysis of lawyer unpopularity. Instead, we need to identify why women lawyers are both more unpopular and more unpopular in a personal, hostile and gendered way.

Based on Wald's observation about women in large law firms, the most plausible explanation is likely to be that the different sort of unpopularity experienced by women lawyers arises from the intersection between the norms of the lawyer's role with negative gender stereotypes, and prescriptive gender stereotypes about appropriate conduct by women. That is, the norms of the lawyer's role create general yet complex unpopularity for lawyers as a group; however, the intersection of that role with prescriptive gender stereotypes creates a specific and gendered hostility for particular women lawyers.

Considering whether that is the case, however, requires deeper consideration of the normative basis for the lawyer's role. What does being a lawyer require, and how might those requirements conflict with gendered expectations for appropriate female behavior? The next section considers the first of those questions: What is the normative foundation of the lawyer's role?

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82. Which in turn makes it likely that some groups of lawyers, like criminal defense lawyers, may be more unpopular than lawyers on average.

## The Lawyer's Role and the Rule of Law

### Introduction

Scholars contest the normative foundations of the lawyer's role.<sup>83</sup> This section considers one of those explanations, which connect the lawyer's role to the nature and function of legality, understood in a modified positivist sense.<sup>84</sup> It does so because one of us has written extensively in support of that perspective,<sup>85</sup> and more importantly, because the modified positivist theory connects closely to popular understandings of the lawyer's role and to conventional professional practices. The modified positivist theory does not uncritically endorse or adopt the practices of common law lawyers, but, as described below, it does generally endorse the standard conception of the lawyer's role.<sup>86</sup> That is, the lawyer as a person who advises clients on their legal rights and entitlements, and advocates for client interests within the boundaries of legality, and in both cases without assessing or accounting for the extra-legal morality of the client's ends.

In order to link to lawyer unpopularity in general, or the unpopularity of women lawyers in particular, the normative justification needs to explain what lawyers actually do in practice. Lawyers, either in general or women lawyers specifically, are unlikely to be socially unpopular or criticized because of normatively justified practices none of them actually do. Thus, it is worth considering the availability of a normative justification for those practices, and how it might intersect with negative gender stereotypes to cause the type of specific gendered criticisms women experience.

The paper will later consider alternative normative justifications for the lawyer's role to consider whether shifting current lawyer practices to be more consistent with those accounts would improve the circumstances of women lawyers. It will consider whether, for example, women lawyers would fare better if lawyers did not allow professional norms to dominate personal moral obligation. The starting point, though, is the lawyer whose practices can be normatively justi-

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83. See generally, Alice Woolley, *The Problem of Disagreement*, 26 CAN. J. OF L. & JURIS. 181, 181 (2013).

84. The theory adopted here reflects positivist perspectives on the legitimacy of law as a democratic compromise to the problem of deep social disagreement, but following Waldron, it incorporates Fuller's perspective on law as also having a moral structure arising from its form and process. That is, it claims that the legitimacy of law, and the lawyer's role, arise both from the law's positivist function and from its moral structure.

85. See Alice Woolley, *The Lawyer as Fiduciary: Defining Private Law Duties in Public Law Relations*, 65 U. OF TORONTO L. J. 285 (2015).

86. See explanation, *supra* note 84.

fied while also connecting to the current practices of common law lawyers.

### Rule by Law

A modified positivist theory of the lawyer's role justifies that role in light of the nature and function of legality; lawyers must act as zealous advocates for client interests within the bounds of legality because accomplishing rule by law requires that they do so.<sup>87</sup>

Rule by law is a particular form of social governance. As positivist legal ethicists emphasize, law allows us to accomplish social coordination and settlement without violence. We can pursue shared moral values, and settle moral differences through democratic processes we recognize as legitimate, and which incorporate respect for the dignity and equality of the governed.<sup>88</sup> The resulting social compromises, while potentially divergent from the moral values of some—or even the majority—can claim authority and legitimacy as the product of the adequately fair procedures of democratically created and constituted political institutions.<sup>89</sup> As described by Brad Wendel:

All citizens have an interest in living together and working on common projects, and doing so on the basis of rights that others will accept as legitimate. This means that citizens have an obligation to one another to act in a way that is respectful of moral pluralism, which means acknowledging that others may disagree in good faith about what rights people should have. Citizens comply with this obligation by acting on legal norms, which have been established by institutions and procedures entrusted with the responsibility of settling on a position, in the name of the community as a whole, regarding what should be done in a particular situation.<sup>90</sup>

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87. Kate Kruse has described this as the “jurisprudential turn” in legal ethics. See Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 493 (2011).

88. See generally, TIM DARE, *THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER'S ROLE* (Ashgate Publishing Co. ed., 2009); W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* 91 (Princeton Univ. Press ed., 2010) [hereinafter *LAWYERS AND FIDELITY TO LAW*]; W. Bradley Wendel, *Professionalism as Interpretation*, 99 NW. U. L. REV. 1167, 1201 (2005) (discussing a lawyer's role in objectively interpreting the law and settling moral differences arising from client conduct); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L. J. 1060, 1060–61 (1976) (discussing the “traditional conception of the lawyer's role and the ideal of moral purity”); Monroe Freedman, *Personal Responsibility in a Professional System*, 27 CATHOLIC U. L. REV. 191 (1977–78); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, AM. B. FOUND. RES. J. 613 (1986).

89. *LAWYERS AND FIDELITY TO LAW*, *supra* note 88, at 91; Dare, *supra* note 88, at 61.

90. *LAWYERS AND FIDELITY TO LAW*, *supra* note 88, at 107.

Legality fairly establishes the terms of our interaction and engagement with each other, and in doing so it “has moral value.”<sup>91</sup>

In addition, as emphasized by Lon Fuller and Nigel Simmonds, and as more recently linked to positivism by Jeremy Waldron, the form and process of rule by law allows respect for the dignity and autonomy of the person.<sup>92</sup> The form of law, and the process through which it is applied, ensures respect for the people subject to it. Law’s form and procedures rest on the premise that people can understand the world, can control and monitor themselves and their behaviours, and within the law’s structural constraints, ought to be able to engage with and shape its meaning and application.<sup>93</sup> The law treats “ordinary citizens with respect as active centers of intelligence”<sup>94</sup> and not as objects to be acted upon.<sup>95</sup>

Specifically, the law assumes voluntary compliance and structures itself—through clear and consistent rules, capable of being complied with and which match official action—to permit voluntary compliance.<sup>96</sup> Law does not function because officials *make* people comply with it; officials have that power but rarely exercise it.<sup>97</sup> Rather, the law functions because of the voluntary and willing compliance of the citizenry, and it embodies respect for the citizenry by assuming they will do so.

Further, the law assumes the freedom of individuals to act as they see fit within the constraints of the law’s rules. In contrast to rule by fiat or force, the law respects the freedom of each person to choose

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91. *Id.* at 123.

92. NIGEL SIMMONDS, *LAW AS A MORAL IDEA* 104 (Oxford Univ. Press ed., 2007); *see also* LON FULLER, *THE MORALITY OF LAW* 200-24 (Yale Univ. Press ed., 1964) (Fuller conceives of law-making as being a bilateral relationship between the governed and governing, rejecting the idea that law can be understood as a “one-way projection of authority” rather than as interactional); DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 99-130 (2007) (the author provides an excellent explanation of this aspect of Fuller’s theory).

93. Jeremy Waldron, *The Concept and the Rule of Law*, 43 *GA. L. REV.* 1, 30 (2008) [hereinafter Waldron, *Concept*].

94. Jeremy Waldron, *The Rule of Law and the Importance of Procedure* 20 (NYU Sch. Of Law, Public Law Research Paper No. 10-73, 2010), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1688491](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1688491) [<https://perma.cc/2WGY-UKAP>].

95. Waldron, *Concept*, *supra* note 93, at 26.

96. FULLER, *supra* note 92, at 33-94 (sets out the “desiderata” of law); *see also* Luban, *supra* note 92, at 116 (“The burden of understanding and complying with rules falls on those whom the rules govern; the reciprocal relationship between governors and the governed places a corresponding burden on the governor to make the rules understood and capable of being complied with.”); *see also id.* (dividing Fuller’s desiderata into requirements going to clarity, requirements going to ability to comply and requirements which go to both).

97. Waldron, *Concept*, *supra* note 93, at 28.

how to construct her life within its constraints. Indeed, as suggested by Nigel Simmonds, it is only rule by law that can ensure that sort of freedom:

Law represents the only possible set of conditions within which one can live in community with others while enjoying some domain of entitlement that is secure from the power of others. When a government pursues its objectives through the rule of law it governs consistently with those conditions . . . Such a system of reliably enforced rules represents the only conditions within which one can live in a political community and nevertheless enjoy a degree of freedom (independence).<sup>98</sup>

Further, and importantly, the procedures of law allow citizens to engage with and even shift the law's meaning. The procedures of law ensure participatory rights, that the law considers the perspective and personhood of those to whom it applies.<sup>99</sup> Further, the law has "systematicity."<sup>100</sup> The law is not a series of precepts that can be applied to any given situation; rather, it creates and applies norms and rules through a structure of argument and interpretation. The meaning of those norms and rules evolve over time, and can even be "discovered." Provided a specific norm can be identified or justified within the system as a whole, that norm can be said to be part of the system. The law structurally permits people to take a position on what the law ought to be given how law works in general, and other relevant criteria.<sup>101</sup> The law does not exist as a set of rules superimposed on the citizenry. Rather, it "pays respect to the persons who live under it, conceiving them now as bearers of individual reason and intelligence"<sup>102</sup> who can be expected to think about and engage with the legal system that applies to them:

[The law] also respects the dignity of reasoning and even argumentativeness. The individuals whose lives law governs are thinkers who can grasp and grapple with the rationale of that governance and relate it in complex but intelligible ways to their own view of the relation between their actions and purposes and the actions and purposes of the state.<sup>103</sup>

Rule by law in a democratic society thus creates a legitimate and authoritative form of resolution for our moral differences. It does so in a way that respects the autonomy and dignity of those subject to it, allowing them freedom of action within its boundaries, and the ability

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98. Simmonds, *supra* note 92, at 142–43.

99. Waldron, *Concept*, *supra* note 93, at 23–24.

100. *Id.* at 32.

101. Waldron, *Concept*, *supra* note 93, at 36.

102. *Id.*

103. *Id.*

to engage with and shape the law as it applies to them. What follows from that for understanding the lawyer's role in the legal system?

### Rule by Law and the Lawyer's Role

In this modified positivist framework, the law has moral authority as the means for ensuring legitimate and peaceful coordination and settlement of our disagreements. The law is also a form and process of governance which respects the autonomy and dignity of those to whom it applies. Accomplishing legality in this sense requires the availability of legal service providers—or lawyers.<sup>104</sup> It requires people who have the knowledge and skills to advise people what the law means and requires and to facilitate voluntary compliance with the law. It requires people who can advocate within the law's processes of dispute resolution, and work with the law's systematicity and complexity. In general it requires people who allow the citizenry to have access to the social settlement that the law creates and to exercise the freedom of choice within the law's constraints that rule by law permits.

This is the work that lawyers do. They advise and advocate within the boundaries of legality, but without accountability for what morality would otherwise require. They serve their clients and the law, without exercising personal moral judgment or accountability for the ends their clients pursue within those legal boundaries. Indeed, the lawyer's role *necessarily* precludes the lawyer's pursuit of her personal moral values, at least at the point where she provides legal services to a client.<sup>105</sup> A lawyer who imposes her own moral values on a client subjects that client to rule by lawyer not rule by law, undermining both the law's function as a form of social settlement and the domain of freedom that rule by law creates. Further, she would preclude the ability of the citizen to engage with, contest, and even shift the law's meaning.

The modified positivist theory makes the lawyer a conduit for the relationship of respect between the governed and the governing that

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104. Although not necessarily lawyers; persons with the training necessary to fulfill this role do not necessarily need the training and licensure we associated with lawyers. See Alice Woolley & Trevor Farrow, *Addressing Access to Justice Through New Legal Service Providers: Opportunities and Challenges*, 3 TEX. A & M L. REV. 549, 550-1 (2016).

105. As Tim Dare argues, lawyers remain morally accountable, and may seek other means for redressing what they perceive as moral wrongdoing within their professional role, and in particular to reduce tension between the norms of morality and legality. See Dare, *supra* note 88, at 151–52. See Alice Woolley, *Context, Meaning and Morality in the Life of the Lawyer*, 17 LEGAL ETHICS 1, 1 (2014) (discussing the ethical challenges this can create for lawyers in establishing a meaningful life).

rule by law contemplates and creates. To achieve this function the lawyer must necessarily defer to the client and to the law, rather than to moral norms, or her own values and judgments.<sup>106</sup> The normative foundations of the lawyer's role do not simply justify a morally neutral or problematic aspect to that role, they require it. A lawyer cannot *be* a lawyer while simultaneously restricting her representation of a client based on extra-legal considerations, even ones of morality or virtue.

Further, because of the highly contested nature of many questions in a modern pluralistic society, a lawyer who advances a client's interests within the framework of legality will always run contrary to the deeply held values of someone, moral or otherwise. Legal norms resolve disputed questions—our economic, social, political, familial, and moral relations—and a lawyer advising or advocating for a client necessarily takes a stand on those questions. No matter who she represents and how tight her respect for legality, she works at the point where our values conflict and advances some values over others as chosen by her client.

In addition, a lawyer will take a contrary or even adversarial position to the interests of others or the community as a whole, and may participate in the infliction of harm on others. Her concern for others stops with her client and the law, rather than being directed at the community as a whole. In doing so she does not act without ethical justification, provided that her conduct remains within the boundaries of legality. Indeed, she can claim ethical justification for her conduct, but that conduct is nonetheless injurious to communal and other interests.

## **The Problem with Women Lawyers**

### **The Woman Problem**

As discussed in Part III, the normative structure of the lawyer's role links to the complex attitude society has towards lawyers and the work that they do. People recognize the importance of the peaceful settlement of our disagreements, and the freedom of people to pursue their own conception of the good within that social settlement, and even recognize the importance of having lawyers to help enforce that settlement and the space for personal autonomy. Yet, at the same

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106. Except when the law gives the lawyer genuine discretion, or—for example, the permission given to a lawyer to reveal confidential information “to prevent reasonably certain death or substantial bodily harm.” MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(1) (AM. BAR ASS'N 1983).

time, people see the costs that work imposes, and its preference for legality—for “technicalities”—over substantive moral values of importance. The importance of the work that lawyers do creates, rather than disrupts, the uncomfortable social position that they occupy.

Why, though, does that unpopularity and uncomfortable social position look different for women? Why do women struggle to achieve equality in the profession? Why do they risk personal gendered commentary and criticism that male lawyers generally do not? In our view, the most plausible explanation arises from the intersection between the requirements of the lawyer’s role and prescriptive gendered stereotypes about how women ought to act. By virtue of her role—pursuing client interests within the bounds of legality—a lawyer is required to be competent, authoritative, and rational. She acts in the interests of her client, not in the interests of others, and will not be deferential, generally concerned with the interests of others or act with emotional sensitivity, except insofar as doing any of those things advances her client’s interests within the bounds of legality. But by acting in this way, she not only violates our expectations of what women *can* do, she also violates our standards about what women *ought* to do.

Robust psychological literature demonstrates the existence of gender stereotypes, both descriptive—what we believe men and women can do and be—and prescriptive—what we believe men and women ought to do and be. In general, we believe that men ought to reflect agentic qualities, to be focused on achievement, to have an “inclination to take charge” and to be autonomous and rational.<sup>107</sup> Simultaneously we believe that women ought to reflect communal qualities, to be concerned about others, to seek affiliation, and to be deferential and emotionally sensitive.<sup>108</sup> These qualities can be articulated in more detail, and have been identified consistently over time<sup>109</sup> and across cultures:<sup>110</sup>

Feminine characteristics are: affectionate, cheerful, childlike, compassionate, does not use harsh language, eager to soothe hurt feelings, feminine, flatterable, gentle, gullible, loves children, loyal, sensitive to the needs of others, shy, soft-spoken, sympathetic, tender, understanding, warm, and yielding. Masculine characteris-

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107. Heilman, *supra* note 15, at 115, 123.

108. *Id.*

109. Deborah A. Prentice & Erica Carranza, *What Women and Men Should Be, Shouldn't Be, Are Allowed to Be, and Don't Have to Be: The Contents of Prescriptive Gender Stereotypes*, 26 *PSYCHOL. OF WOMEN Q.* 269, 270 (2002); Elizabeth L. Haines, Kay Deux & Nicole Lofaro, *The Times They Are a-Changing . . . or Are They Not? A Comparison of Gender Stereotypes, 1983-2014*, 40 *PSYCHOL. OF WOMEN Q.* 353, 359 (2016); Rudman & Phelan, *supra* note 14.

110. Heilman, *supra* note 15, at 115.

tics are: acts as a leader, aggressive, ambitious, analytical, assertive, athletic, competitive, defends own beliefs, dominant, forceful, has leadership abilities, independent, individualistic, makes decisions easily, masculine, self-reliant, self-sufficient, strong personality, willing to take a stand, and willing to take risks.<sup>111</sup>

Prescriptive gender stereotypes are “oppositional”; women ought not to exhibit traditional male qualities, and men ought not to exhibit traditional female qualities.<sup>112</sup> Women “are prohibited from demonstrating the self-assertion, dominance, and achievement orientation so celebrated in men,” and are expected to be “communal, demonstrating socially sensitive and nurturing attributes reflecting their concern for others.”<sup>113</sup>

The literature also demonstrates that women who violate prescriptive gender stereotypes will experience “social censure and personally directed negativity,”<sup>114</sup> will be viewed as “less socially appealing,” and will be “less liked and more personally derogated” in relation to men with similar qualities.<sup>115</sup> Further, women will experience greater negative reactions for violations of expectations about appropriate female behavior. An absence of communal behavior may result in a woman being “characterized as the antithesis of the female nurturer—as the quintessential ‘bitch’ who is concerned not at all about others but only about herself.”<sup>116</sup> Women may also be especially subject to backlash or hostility when they demonstrate negative but masculine qualities, for example, being arrogant or aggressive as opposed to competent and assertive.<sup>117</sup> As generally summarized by Rudman and Phelan:

In fact, evidence now abounds that female agency can result in backlash effects, defined as social and economic repercussions for disconfirming prescriptive stereotypes. Although women must pre-

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111. Prentice & Carranza, *supra* note 109, at 169.

112. Heilman, *supra* note 15, at 115.

113. *Id.* at 123.

114. Madeline E. Heilman, Aaron S. Wallen, Daniella Fuchs & Melinda Tamkins, *Penalties for success: Reactions to women who succeed at male gender-typed tasks*, 89 J. OF APPLIED PSYCHOL. 416, 417 (2004).

115. *Id.* at 426; *see also* Laurie A. Rudman & Peter Glick, *Prescriptive gender stereotypes and backlash toward agentic women*, 57 J. OF SOC. ISSUES 743, 758; Rudman & Phelan, *supra* note 14; Laurie A. Rudman, Corinne A. Moss-Racusin, Julie E. Phelan & Sanne Nauts, *Status Incongruity and backlash effects: Defending the gender hierarchy motivates prejudice against female leaders*, 48 J. OF EXPERIMENTAL SOC. PSYCHOL. 165, 165 (2012); Andrea C. Vial, James L. Napier & Victoria L. Brescoll, *A bed of thorns: Female leaders and the self-reinforcing cycle of illegitimacy*, 27 THE LEADERSHIP Q. 400–14 (2016).

116. Madeline E. Heilman & Tyler G. Okimoto, *Why are women penalized for success at male tasks?: The implied communality deficit*, 92 J. OF APPLIED PSYCHOL. 81, 82 (2007).

117. Prentice & Carranza, *supra* note 109, at 280.

sent themselves as self-confident, assertive, and competitive to be viewed as qualified for leadership roles, when they do so, they risk social and economic reprisals. Specifically, agentic women are rated as highly competent and capable of leadership, but they are also viewed as socially deficient and unlikable by both male and female perceivers. For example, successful female managers are perceived to be more hostile, selfish, devious and quarrelsome, compared with male counterparts. This type of bias is evident in the epithets often applied to powerful women, such as “dragon lady,” “battleaxe” and “iron maiden.”<sup>118</sup>

The evidence suggests that a woman in leadership may be able to alleviate some of these challenges if she adopts “participatory styles of leadership,”<sup>119</sup> or if she can exhibit communal qualities, either directly through her work or by virtue of her status as, for example, a mother.<sup>120</sup> However, doing so may prevent a woman from being perceived as qualified to occupy a leadership position in the first place, since that position requires her to demonstrate that she possesses masculine qualities. Success without backlash requires the capacity and opportunity to combine the ideal masculine capacities, without demonstrating an absence of ideal female capacities: “[I]t is not easy to be competent and effective without offending anyone’s sensibilities, nor to be warm and creative without taking one’s eye off the instrumental goal.”<sup>121</sup>

The combination of these prescriptive gender stereotypes with the requirements of the lawyer’s role explains the experience of women lawyers. It explains why women are more likely to be viewed as not up to the job. It explains why traditional narratives around lawyer conduct tend to evoke models of masculinity—whether Rambo or Atticus Finch.<sup>122</sup> It explains the tendency to focus on women’s feminine accomplishments—their looks, their clothes, their families, and their children. And it explains the harsh, derogatory, and sexist backlash that women lawyers sometimes experience.

Being a lawyer requires the prescribed masculine qualities, and much of the time it precludes the prescribed feminine ones. A lawyer representing the interests of a client within the bounds of legality has to focus on accomplishment of the client’s goals. She has to be “asser-

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118. Rudman & Phelan, *supra* note 14, at 64 (citations omitted).

119. Rudman et al, *supra* note 115, at 176.

120. Heilman & Okimoto, *supra* note 116, at 91.

121. Prentice & Carranza, *supra* note 109, at 280.

122. See generally Salyzyn, *supra* note 47; see also Watson-Hamilton, *supra* note 47; see, e.g., Sommerlad and Backhouse, *supra* note 17 and Sommerlad, Thornton, and Collier, *supra* note 20 (also confirming the sociological analysis of gender in law and legal practice).

tive, dominant [and] forceful." She must be "independent, self-reliant, decisive . . . analytical, logical [and] objective."<sup>123</sup> Further, she cannot consistently be "kind, caring, considerate . . . warm, friendly, collaborative . . . obedient, respectful, self-effacing . . . perceptive, intuitive, understanding."<sup>124</sup> Those qualities may be helpful from time to time, particularly in advising a client or in negotiation, but they are simply inconsistent with much of the work that lawyers do, particularly when acting as zealous advocates in an adversarial trial. No lawyer cross-examining a hostile witness can realistically expect to be perceived as kind, caring, or considerate.

Given descriptive gender stereotypes, women can expect to be seen as less likely to be able to do the work that lawyers do. Further, women who receive favorable attention or media coverage can expect that coverage to focus on their counter-acting feminine qualities, particularly their beauty, compliance with norms of feminine dress and attire, or their commitment to their families and children. Coverage will not focus exclusively on their work, because if the coverage focused on their lawyerly conduct or abilities it would, in terms of prescriptive gender stereotyping, not *be* positive coverage. No feminine virtues can arise from doing the job itself. Finally, women risk being targets of gendered hostility, because being a good lawyer means being a bad woman. It means abandoning or acting contrary to the communal behavior women ought to exhibit, in favor of the agentic values men ought to exhibit. This is particularly so if the woman is an aggressive lawyer, exhibiting the kind of zeal and occasional incivility that the profession frowns upon, since doing so could be considered a violation of a "gender-intensified proscription."<sup>125</sup>

The issues for women do not, however, arise simply because of the occasionally adversarial nature of lawyer's work. They rather arise because of the lawyer's role as understood through a modified positivist perspective. The woman lawyer in that role will act to assert individual interests against communal values, whether of morality or—insofar as her client contests its meaning or application—of the law itself. The moral ambiguity of the lawyer's role that scholars identify as the source of lawyer unpopularity will hit women particularly hard because it is necessarily non-communal. The woman asserts her client's interests and needs even where it hurts others, even where doing so requires challenging current legal norms, and doing so violates ac-

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123. Heilman, *supra* note 15, at 115.

124. *Id.*

125. Prentice & Carranza, *supra* note 109, at 280.

cepted moral norms. She asserts rather than appeases, and she resists rather than conforms, even outside an adversarial trial. By doing so, she violates prescriptive gender stereotypes.

It also means that women lawyers cannot adopt the ameliorating strategies sometimes available to women in leadership, at least within the confines of traditional legal practice. The job itself does not permit the consistent exhibition of communal values, at least not where the lawyer pursues the interests of a client. Pursuing client interests necessarily conflicts with acting in an affiliative or deferential way in relation to others. A woman may be able to assert her compliance with gendered norms in other ways, through her dress or demeanor, but those factors are unlikely to counter-act the violation of gender prescriptions that the lawyer's role requires. They may simply become another basis for criticism, suggesting that the woman is hypocritical or sexually transgressive if she succeeds in communicating femininity, or as additional evidence of her lack of feminine virtue if she fails to do so.

Further, while the literature on the consequences for women who violate prescriptive gender stereotypes focuses on women who advance in their careers or occupy leadership roles, a woman lawyer may experience the consequences of violating prescriptive gender stereotypes at any point in her career. Since the issues arise by virtue of the role, a woman merely needs to occupy the role to violate gender norms; she does not need to have a leadership role or professional success. Although, women who do so have compounded risks of personal attacks, since they may be perceived as having further violated prescriptive gender stereotypes.

Some professional roles may cause less difficulty for women than others—a woman who advises behind the scenes will have greater opportunities for apparently communal behavior than a woman who goes to court. Ultimately, however, even the lawyer as advisor risks backlash. Her advice to her client may be contrary to the interests of others; it may assist the client to do things that the law permits but morality condemns. To the extent her participation in that conduct is known, she risks being perceived as violating prescriptive gender stereotypes.

Further, certain roles that women lawyers pursue or occupy, especially in politics, heighten the difficulties that the role creates. Holding political office arguably creates more opportunities for the expression of communal virtues, to be warm, sensitive, and to pursue communal interests and values. At the same time, however, politics is

the point where the social settlement of law arises; politics exists to permit peaceful resolution of our disagreements. That means, therefore, that a woman lawyer in politics in a sense occupies ground zero of the problem of the lawyer's role. She participates in choosing some moral values over others, and by doing so again must necessarily demonstrate agentic virtues rather than communal ones. She may have greater opportunities to ameliorate the issue through also demonstrating communal virtues than are, say, available to a criminal defense lawyer, but she also has greater risks by virtue of her direct participation in the creation of the social settlement of law.

Further, a woman who seeks political office must necessarily have and demonstrate ambition. By definition you cannot seek something without actually *seeking* it, and doing so violates prescriptive norms about how women ought to behave. Indeed, insofar as it is conduct we find unappealing in men as well, women who engage in it may experience heightened risks of backlash, since it is women who demonstrate non-preferred masculine behavior or an absence of preferred feminine behavior who are most vulnerable.

### **Overstating the Case?**

The argument is, then, that by virtue of the lawyer's role, a woman who occupies that role necessarily violates gender stereotypes, and faces challenges as a result. She may be identified as less suitable for the role. She may find that people care about her demonstration of communal values—or she may find it necessary to find ways to demonstrate her commitment to communal values in order to be perceived as likeable or appropriate despite her work as a lawyer. Or she may find herself subject to personal attacks and criticisms, labeled unlikable or unpleasant because of her professional work.

One response to that argument is, bluntly, it overstates the case. As noted in Part II, women have had enormous successes in the legal profession, including at the highest level. If what we described were true, how could that be possible? Many women work as litigators, as corporate counsel, as academics, and as judges, without experiencing the sorts of vicious public attacks that we also described in Part II, or that our argument here would suggest are likely to occur.

We largely concede that objection. Our argument is not that every woman lawyer experiences vicious personal attacks, fails to advance because of doubts in her ability, or spends her legal career engaging in compensating communal behavior to avoid backlash. Rather, our point is that the combination of the lawyer's role with

prescriptive gender stereotypes explains why these things do occur for some women, some of the time. Just like analysis of lawyer unpopularity does not assert that everyone dislikes lawyers all of the time, we are not asserting that all women lawyers experience gender-related attacks and challenges. We claim only that this analysis explains why such attacks and challenges occur.

In addition, however, we would claim that every woman lawyer is at risk of being criticized and attacked in this way, or of having her abilities marginalized relative to male lawyers, and that many women do experience it. We would also claim that women lawyers recognize those risks, will adjust and engage in compensating behaviors to avoid their occurrence, and will suffer significant personal consequences if they end up on the wrong side of a gender backlash. We are, in other words, claiming that this problem is a significant one for all women in the profession, even if not one that is universally experienced, or that presents itself in the same way for every woman lawyer.

### **Changing the Role?**

Part IV of this paper considered the lawyer's role from a modified positivist perspective, in part because that perspective reflects to a significant extent the norms and practices currently governing common law lawyers. The modified positivist perspective is, however, only one way to think about the lawyer's role, and it is one that some scholars view as impoverished and inadequate—as simply reifying existing deficiencies in the morality of legal practice. If another perspective were adopted, and the lawyer's role shifted accordingly, would that improve the circumstances of women lawyers?

Deborah Rhode has directly argued that feminism supports normative arguments against the role morality of lawyers that the modified positivist perspective justifies. In her view, from “most feminists’ perspective, a preferable alternative would break down the boundary between personal and professional ethics. In essence, lawyers should accept direct moral accountability for their professional acts.”<sup>126</sup>

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126. Deborah L. Rhode, *Gender and Professional Roles*, 63 *FORDHAM L. REV.* 39, 49 (1994). Rhode suggests that from “feminists’ standpoint, this conventional justification for the partisanship role is too abstract and acontextual to yield morally satisfying outcomes.” *Id.* at 47. In addition, the traditional perspective improperly “collapses legal and moral entitlements” and fails “to explain why rights of clients should trump those of all other individuals whose interests are inadequately represented.” *Id.* at 48. And finally, “the submersion of self into role carries a price not only for the public in general, but for lawyers in particular.” *Id.* at 48. We do not accept Rhode’s argument that feminism is inconsistent with the modified positivist perspective.

Whether or not resulting from “most feminists’ perspective,”<sup>127</sup> the assertion that role morality ought to be subject to the primacy of ordinary moral accountability is a respected alternative to the modified positivist argument.<sup>128</sup> It asserts that the law can never eliminate moral demands; a lawyer is always a moral agent, such that while there may be a “presumption in favor of professional obligation” that presumption can be rebutted and, ultimately, “when professional and serious moral obligation conflict, moral obligation takes precedent.”<sup>129</sup>

Other normative positions include the perspective that lawyers ought to approach the law within a Dworkinian framework, collapsing the boundaries between law and morality by interpreting the law consistent with its internal moral structure—doing in any given case what justice in that sense requires. A lawyer ought to take those “actions that, considering the relevant circumstances of the particular case, seem likely to promote justice”—that is, which have legal merit.<sup>130</sup> More recently, some scholars have suggested that, even if a lawyer may take a positivist stance in relation to the law when she seeks “merely to describe the law or to predict how others will interpret it,” she should take a natural law approach when she seeks “moral guidance” from the law.<sup>131</sup>

Whatever the merits of these other perspectives, however, if they were adopted, and the role and practices of lawyers shifted to reflect them, it would be unlikely to make any difference to the day-to-day experiences of women lawyers. The lawyer acting in accordance with those perspectives will, one way or another, incorporate morality into her deliberations. She will make decisions that either advance or constrain her representation of client interests to be consistent with ordinary morality, Dworkinian concepts of legal morality, or taking into account moral facts at points when interpreting law from which she or

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127. In our view feminism is quite consistent with modified positivism.

128. Indeed, the modified positivist perspective as explained in the prior section can be largely understood as a response to the arguments made by LUBAN et al., *supra* note 92.

129. *Id.* at 63; see also DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* (1988); Gerald Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

130. WILLIAM SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* 138 (Harv. U. Press, 1998); see also William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); David Tanovich, *Law's Ambition and the Reconstruction of Role Morality in Canada*, 28 DAL. L.J. 267, 284 (2005).

131. Joshua P. Davis, *Legal Dualism, Legal Ethics, and Fidelity to Law*, J. OF THE PROF'L LAWYERS 1, 2 (2016); see Amy Salyzyn, *Positivist Legal Ethics Theory and the Law Governing Lawyers: A Few Puzzles*, 42 HOFSTRA L. REV. 1063 (2014) (raising related but distinct questions).

her client derives moral guidance. In doing so, she will still advance some interests over others and assert those claims—whether moral or not—against the demands of the state or community. There is no particular reason to believe that in the highly contested moral world we currently occupy, pursuing moral values necessarily permits greater adherence to communal values such as deference, connectedness, nurturing, or emotional sensitivity. That woman lawyer may, in fact, have an additional obligation to assert agency and power in relation to her client, denying her client the ability to pursue claims that, descriptively, the law might permit but morality would preclude. In short, the woman lawyer working under one of these alternative conceptions will, by virtue of her satisfaction of that role, violate the same prescriptive gender stereotypes that she violates now, just in a different way. Changing the lawyer's role in response to different normative justifications may or may not be worth doing, but doing so will not meaningfully contribute to improving the experiences of women lawyers.

### **Observations and Consequences**

The point of this paper has been to argue that the troubling experiences of women lawyers arise by virtue of the role those women occupy. If correct, that argument suggests that those problems will not be easily resolved. Despite consequential changes in our attitudes about women, and the opportunities available to them, descriptive and prescriptive gender stereotypes appear robust and resilient, and continue to shape how we see and treat women who act contrary to those stereotypes. The tension between the lawyer's role and descriptive and prescriptive gender stereotypes means that the problems experienced by women lawyers are likely to persist.

That means, in turn, that there may be reason for pessimism about efforts to improve diversity in the profession. Even if women have better mentoring, or opportunities for flexibility and work-life balance, that will not necessarily place them on the same footing as men in relation to professional opportunities or advancement. Women may also have reasons to opt out of the profession beyond those related to the demands and inflexibility of the job. Women may correctly perceive that occupying the professional role has costs for them that do not exist for men, and may choose careers where they face less

risks of backlash. The extreme case of Hillary Clinton creates a disheartening and discouraging example for women lawyers.<sup>132</sup>

It also means, as earlier noted, that there are limits in the ability of women to avoid these risks through their own conduct or behavior, while still satisfying their professional obligations. Women may choose areas or types of practice that reduce the tension with gender stereotypes, but they cannot eliminate the risk entirely. Women may find it useful to have support networks to help them deal with the challenges that they personally experience. They may also look to role models and examples—like Hillary Clinton—of the resilience that is possible in the face of misogyny and sexist attacks. To understand that the sexism they experience is not their fault, but is also something that they can withstand, survive and, one way or another, overcome. Hillary Clinton may have lost the election, but she was not defeated. As Marie Henein noted in a lecture to University of Calgary law students in January 2017, young women lawyers should know that legal practice is hard, but that they can do it, and that they are not alone.<sup>133</sup>

At the same time, however, these observations invite us to be careful and vigilant in checking our criticisms of women lawyers to moderate or eliminate the aspects that flow from violations of gender stereotypes rather than violations of actual moral or ethical norms. To be aware of the fact that all of us absorb gender stereotypes to some extent, and that our discomfort with women like Marcia Clark or Gloria Allred may arise in part from their being women lawyers rather than from them being frumpy, cold or attention-seeking. In expressing legitimate disagreement with Hillary Clinton's policies, it is imperative to acknowledge the sexism that has imbued public conversation about her over the past several decades, and how that sexism shapes our perceptions of who she is and what she has done. It is not a reason to ignore or reduce genuine political disagreement, but any conversation about her that ignores the misogyny that has infected public discussion of her policies and her conduct is uninformed at best and willfully blind at worst.

It can be difficult to distinguish between fair criticism and backlash. It can be hard to know when talking about a woman lawyer's

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132. Marie Henein, *Thank you, Hillary. Now women know retreat is not an option*, THE GLOBE AND MAIL (last updated Nov. 11, 2016, 1:02 PM), <http://www.theglobeandmail.com/opinion/thank-you-hillary-women-now-know-retreat-is-not-an-option/article32803341/> [https://perma.cc/D7CK-C7WC].

133. Marie Henein, Milvain Lecture in Advocacy at the University of Calgary (Jan. 6, 2017).

children and family is humanizing in the way that Sports Illustrated's coverage of athletes is, and when it is pandering to our need to make that woman's advocacy palatable. When we judge the competency and commitment of women lawyers we may struggle to distinguish between legitimate observations and the filtering those observations through our implicit biases about what women can and cannot do. But we need to try. At minimum, we need to see the way in which the intersection between our stereotypes and the lawyer's role creates the risk that we will err in these sorts of ways.

Finally, we need to acknowledge the limitations in our normative accomplishments in relation to the rule of law. We may have achieved a social settlement for our disagreements, and a system designed to respect the dignity and autonomy of those to whom the law applies. We may have created the social role of the lawyer to make those normative ambitions a reality for the people to whom the law applies. In doing so we have, by virtue of our limited imagination and capacities, also created a role which subjects the women who fulfill it to potential assaults on their autonomy and their dignity. Women who work to accomplish the law's respect for dignity risk having their own undermined. In that respect at least, the accomplishment of law falters.

### **Conclusion**

We began to write this paper in the spring of 2016 because of our observations about the way people talk about women lawyers—the way women lawyers are attacked and criticized, and the focus on their appearance, their sexuality, and their families. If we looked more closely, would we confirm our observations or contradict them? If we confirmed them, could we explain them? The paper took on more urgency after the defeat of Hillary Clinton, and our sense that that defeat both validated the misogynist rhetoric to which she had been subjected, and made casting light upon its misogyny more important. We wanted to emphasize unequivocally that misogynist attacks did happen to her, they did matter, they were not fair, and they were not her fault. Whatever fair criticisms could have been offered about her or her campaign, she neither asked for nor deserved the vicious and sexist attacks targeting her. And, finally, we wanted to connect the misogyny of the attacks on her to our observations about the experiences of women lawyers generally—that, in a sense, Hillary Clinton is all of us.

In doing so, in arguing that the intersection of the lawyer's role with gender stereotypes creates challenges for women and in particu-

lar the risk of gendered commentary and criticism, we recognize the accomplishments of women in law. We firmly believe that women have the ability to overcome the challenges that they face. But we also think it important for people to see the gender stereotypes that underlie how we perceive, discuss and criticize women lawyers and to appreciate the costs that stereotypes impose not only upon particular women, but also to women lawyers as a whole. Women lawyers, especially young women lawyers, need to be given support and resources to navigate these challenges, but the profession as a whole needs to be aware of the unique costs to women in occupying the lawyer's role, however central that role is to the accomplishment of the rule of law in a free and democratic society.