Professional Women and the Professionalization of Motherhood: Marcia Clark's Double Bind

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"[T]he Simpson case has become far more than a murder trial. It is a primer on society, whether the topic be race relations, the justice system or working women."1

Introduction

In the background of the O.J. Simpson trial lurks a mini-drama. This drama will have long-lasting consequences but not for O.J. Simpson. Rather, it will affect the lives of two small boys who are the focus of a custody dispute involving Simpson's chief prosecutor Marcia Clark. Marcia Clark is one of a number2 of professional women who are victims of a "double bind"; their successful careers become a weapon used against them by their ex-husbands in custody disputes.

This battle is taking place at a critical stage in feminist scholarship. Feminist legal theorists are beginning to carve out a niche in the scholarly literature regarding the legal regulation of motherhood.3 Feminist theorists have previously explored several important issues: custody,
including competing standards (maternal presumption, primary caretaker presumption, joint custody); the effects of custody reform for women; and the problems facing certain mothers (drug-addicted mothers, mothers on welfare, lesbian mothers, battered mothers).
Legal commentators have also addressed the work/family conflict of working mothers\(^{10}\) and of professional women.\(^{11}\) Scholars have yet to focus, however, on the custody problems confronting professional women.\(^{12}\) Perhaps, feminist legal theorists' long-standing concern with issues of race and class\(^{13}\) has led them to neglect the legal problems of these individuals not usually thought of as marginalized.\(^{14}\)

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\(^{12}\) Empirical research on divorce and custody tends to examine the plight of mothers generally. See, e.g., Terry Arendell, *Mothers and Divorce: Legal, Economic, and Social Dilemmas* (1986); Eleanor E. MacCoby & Robert H. Mnookin, *Dividing the Child: Social & Legal Dilemmas of Custody* (1992); Lenore J. Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985). If professional women are among the respondents in these research samples, they are not studied separately.

\(^{13}\) See, e.g., the essays on essentialism in *Feminist Legal Theory: Foundations* 335-95 (D. Kelly Weissberg ed., 1993).

\(^{14}\) Of course, it is a popular misconception that professional women do not experience the effects of marginalization. An increasing number of professional women, including lawyers, are women of color. African-American women constitute 4.2% and Hispanic women 5.2% of all physicians; African-American women constitute 3.7% and Hispanic women 3.3% of engineers; African-American women constitute 5% and Hispanic women 2.9% of college and university teachers; and, African-American women constitute 3.3% and Hispanic women 3.1% of lawyers. U.S. Dept. of Labor, Bureau of Labor Statistics, *Employment and Earnings* 176 (Jan. 1995). Professionals who are women of color experience dual discrimination. See, e.g., Nina Burleigh, *Black Women Lawyers: Coping with Dual Discrimination*, 74 A.B.A. J. 64 (1988) (African-American women lawyers are mistaken frequently for defendants or court reporters).
Part I of this article presents the background of the *Marcia Clark v. Gordon Clark* custody battle. Part II examines the available (although, admittedly, limited) data on the scope of the custody problems affecting women legal professionals. Part III explores gender-based assumptions about motherhood that appear to influence custody decision-making which involves professional women. Finally, the Conclusion discusses the implications of these tentative findings.

I. *Marcia Clark v. Gordon Clark*¹⁵

Marcia Clark has been separated for over a year from her computer engineer husband, Gordon Clark. After 13 years of marriage, Marcia told Gordon on Christmas Day in 1993 that "things weren't working out" and requested that they separate. Shortly thereafter, Gordon moved out of the family home.¹⁷ He agreed to a trial separation in exchange for his wife's promise to postpone filing for divorce for six months.¹⁸

Marcia Clark kept her promise. On June 9, 1994, three days before the murders of Nicole Brown Simpson and Ron Goldman, Marcia Clark filed for divorce on the ground of irreconcilable differences.¹⁹ Simultaneously, she petitioned for joint legal custody and joint residential custody of the couple's two sons, ages three and five.²⁰

The children remained in the family home with their mother, spending two evenings each week and alternate weekends with their father.²¹ Marcia Clark relied on a housekeeper, baby-sitters, and preschool

Moreover, since the professions remain sex-segregated, professional women experience problems arising from their being a minority within their chosen occupation. For an early discussion of the many ways in which women professionals are marginalized, see *The Professional Woman* 587-665 (Athena Theodore ed., 1971) (essays examining problems of women academics, clergy, scientists, architects, engineers, lawyers, artists).

¹⁵ The record of the custody dispute was sealed as of June 14, 1995 (and remains sealed at the time of publication). See Bettina Boxall, *The O.J. Simpson Murder Trial; Records Sealed in Marcia Clark's Child Custody Dispute; Court: An Order Granting Her Request Cites the Need to Protect Two Young Sons. The Ruling is Criticized by her Estranged Husband's Attorney*, L.A. TIMES, June 15, 1995, at A32 [hereinafter Boxall, *O.J. Simpson Murder Trial*]. As a result, the facts of this case, presented infra, are derived from media accounts.


¹⁷ Rabin, supra note 16.

¹⁸ Id.


²⁰ Rabin, supra note 16.

²¹ Id.
providers to care for the boys when she was working. Pursuant to a voluntary agreement, Gordon (who earns $54,586 annually compared to Marcia's $96,829) paid child support of approximately $1200 per month. Eventually, when he located permanent living arrangements, he reduced that payment by a half.

Due to escalating costs of living, Marcia Clark requested in December of 1994 that Gordon reinstate the original child support amount. In particular, she cited increasing child care costs. "I have been working a six- or seven-day week for as many as sixteen hours per day," she asserted. She continued, "I now need baby-sitters for the weekends while I work and someone to spend the evenings with my two children." She also pleaded for an increase in support because of trial-related costs:

Because of the notoriety of the trial with press and television coverage, I have purchased five new suits and shoes at a cost of $1,500. I am under constant scrutiny and on public display. It has been necessary for me to have my hair styled as needed and to spend more money on my personal care and grooming. As I am a county employee, none of these expenses are reimbursed.

The issue of Marcia Clark's child care resurfaced at the end of February. When Judge Lance Ito attempted to schedule a late Friday session, the prosecutor requested that the session be cancelled because of her problem arranging child care. The following Monday, she was

22. Boxall, Marcia Clark's Husband, supra note 1.
   One or both of the children also attend preschool. See Adam Pertman, Clark May Have to Do Battle to Keep Children, BOSTON GLOBE, Mar. 3, 1995, at 6 (Clark requested additional funds for children's pickup after school).
23. Rabin, supra note 16.
24. Id.
25. Boxall, Marcia Clark's Husband, supra note 1.
26. Id. (citing Marcia Clark from court documents). Clark requested an increase in support payments to pay for weekend baby-sitters when she worked, at a cost of $200 per month (costs in addition to the salary of her regular housekeeper), and $150 per month for teachers to pick her children up from school. Pertman, supra note 22.
27. Boxall, Marcia Clark's Husband, supra note 1 (citing Marcia Clark from court documents).
   The exchange with Judge Ito follows:
   Marcia Clark: I'm not arguing with the court's authority to do that, but, Your Honor, I just—I can't be here.
   Judge Ito: I had completely forgotten about Miss Clark's child care obligations.
forced to defend herself against charges by defense attorney Johnny L. Cochran, Jr., that she had used the issue of child care as a ruse in order to delay the testimony of Simpson's alibi witness Rosa Lopez. Clark countered that she was "offended as a woman, as a single parent, as a prosecutor and as an officer of the court." 

That same day, Gordon Clark filed a petition seeking temporary primary custody. He alleged that his ex-wife's work schedule was harming the children. He claimed that, at most, she saw the children an hour a day during the week. "[She] is never home and never has any time to spend with them," he asserted. "I have personal knowledge that on most nights she does not arrive home until 10 p.m. and even when she is home, she is working," he also claimed. He continued, "[w]hile I commend [Marcia Clark's] brilliance, her legal ability and her tremendous competence as an attorney, I do not want our children to continue to suffer because she is never home, and never has any time to spend with them." 

In contrast, he said "I work regular hours from 8 to 6," and claimed to arrive home by 6:15 almost every night. He argued that "[t]here's no reason why they [the children] shouldn't be with me instead of constantly being with baby-sitters." 

Following several press interviews by Gordon Clark, Marcia Clark

Newspaper accounts recorded Clark's distress at the encounter. She "trembled and her voice cracked . . . . [S]he faltered only when Judge Lance Ito began talking eight days ago about extending the trial into the evening, when Clark's two young sons would be expecting her home." Custody Case—Careers vs. Parenting, Husband's Suit Puts New Spotlight on Marcia Clark, S.F. CHRON., Mar. 4, 1995, at A8.


30. Cited in Behrens, supra note 28. In a subsequent declaration filed with the court, Gordon Clark stated that his ex-wife deceived the court in claiming that she had child care problems. He maintained that he was supposed to pick up the children for his usual weekend beginning at 6 p.m. Hancock et al., supra note 29.

However, according to a media account, Marcia Clark's friends claim that her difficulty with child care arose because she routinely prefers to drop off the children herself, "[p]artly because Gordon often neglects to pick them up on time; partly because she wants to say goodbye and explain what's happening to the children." Id.

31. Hancock et al., supra note 29.
32. Boxall, Marcia Clark's Husband, supra note 1.
33. Hancock et al., supra note 29.
34. Boxall, Marcia Clark's Husband, supra note 1 (citing Gordon Clark's Superior Court declaration of February 24, 1995).
35. Id.
36. Rabin, supra note 16.
37. Boxall, Marcia Clark's Husband, supra note 1.
38. Rabin, supra note 16. See also Beck, supra note 19.
requested that the court seal the record. On June 14, 1995, Superior Court Commissioner Keith M. Clemens granted Clark's request.\textsuperscript{40} Commissioner Clemens closed the proceedings, barred the parties and their attorneys from publicly discussing the issues and, prohibited the parties from making public statements about the children or about each other's parenting.\textsuperscript{41} A hearing on the custody and visitation issues has not taken place.\textsuperscript{42}

II. Professional Women and Custody: Scope of the Problem\textsuperscript{43}

Marcia Clark's custody dilemma is a by-product of the problems confronting mothers who are professional women. Research has identified several problems encountered by professional women that stem from the work/family conflict.\textsuperscript{44} As one commentator has remarked: "Professional careers are designed not for women with families, but rather for men who are free of family obligations."\textsuperscript{45} Studies emphasize that professional women constantly worry about juggling work and family demands, and must make many accommodations to meet these conflicting demands.\textsuperscript{46}

In mid-June 1995, Gordon Clark publicly stated that since his wife's work schedule had changed, he would be content with joint custody. \textit{Id.}

\textsuperscript{40} Boxall, \textit{O.J. Simpson Murder Trial, supra} note 15.

\textsuperscript{41} \textit{Id.}

\textsuperscript{42} Telephone Interview with Judy R. Forman, Mannatt, Phelps & Phillips, counsel for Marcia Clark (Jan. 3, 1996).

\textsuperscript{43} Because of the absence of empirical data, it may be premature to attempt to delineate the "scope" of this problem. The few cases discussed here do reveal, however, remarkable similarities in terms of judicial bias against professional women, specifically, and working women in general, in terms of custody decision-making. As such, these cases appear to shed light on an emerging socio-legal problem.


Research reveals that, despite recent gains, the most prestigious professions (law, medicine, college and university teachers) continue to be male-dominated. Debra Renee Kaufman, \textit{Professional Women: How Real Are the Recent Gains?, in FEMINIST PHILOSOPHIES} 150 (Janet A. Kourany et al. eds., 1992). On sex segregation in the legal profession, see EPSTEIN, WOMEN IN LAW, \textit{supra} note 11, at 107-11; Rhode, \textit{Gender and Professional Roles, supra} note 11, at 58-59. Moreover, even among female-dominated professions (elementary and high school teaching, social work, nurses, librarians), men occupy higher positions. Kaufman, \textit{supra}, at 151. Kaufman points out that African-American professional women, especially, are affected by this pattern. \textit{Id.}

\textsuperscript{45} Kaufman, \textit{supra} note 44, at 156.

\textsuperscript{46} EPSTEIN, WOMEN IN LAW, \textit{supra} note 11, at 318, 358-66 (noting that women's "big management problem" is how to care for their children; noting also that lawyers adjust
Professional women also experience the work/family conflict upon divorce. Over a decade ago, a journalist called the divorced lawyer-parent an "endangered species." Anecdotal accounts in the media continue to highlight the problems of some divorced women lawyers. Marcia Clark's case is one of four cases involving lawyer-mothers (discussed infra) that have garnered considerable public attention.

Last year, Sharon Prost, chief counsel for the Republicans on the Senate Judiciary Committee, lost custody of her two children to her husband, Kenneth Greene, after a costly and lengthy legal battle. Prost married Greene in 1984. In 1992, she left the family home with the couple's two sons (then ages five and two) and filed for a civil protection order against Greene.

At the time of their separation, Prost was working long hours for Senator Orrin Hatch (R.-Utah), Chairperson of the Senate Judiciary Committee during the confirmation hearings of Supreme Court Justice Clarence Thomas. Her husband, a labor union administrator who had been unemployed for over two years, had recently accepted a job as the Assistant Executive Director of the American Federation of Television and Radio Artists and Screen Actors Guild. Although his salary was only half that of Prost's, his hours were more flexible than hers.

When the marriage dissolved, Prost petitioned for sole custody. Greene petitioned for joint custody. According to District of Columbia procedure, a court may not award joint custody if one party objects (as Prost did). Ultimately, District of Columbia Superior Court Judge

their careers to their families' needs); Chambers, supra note 11, at 257-58 nn. 35 & 36 (despite their difficulties, women professionals report a high degree of satisfaction with their lives); Gellis, supra note 44, at 957 (women lawyers cited repeated concerns about the need to accommodate family and career demands); Project, Gender, Legal Education, supra note 44, at 1227-31, 1257 (women are more likely than men to experience stress associated with work/family conflict and may limit job choices to those offering maternity leave and flexible schedules); Rhode, Perspectives on Professional Women, supra note 11, at 1182-87 (women are forced to compromise either caretaking values or professional success in order to meet demands of work and family).


49. 652 A.2d at 623.


52. Hancock et al., supra note 29. The District of Columbia does not provide, by statute, for joint custody. See D.C. CODE ANN. § 16-914(a)(1995) (general list of factors relevant to custody determination).
Harriet Taylor ruled that, although both parents were fit and had been equally responsible for the children in the early years of the marriage, Greene was the more suitable custodian. The court reasoned that Greene had "prioritized the care and well-being of his children," whereas Prost was "simply more devoted to and absorbed by her work and her career than anything else in her life, including . . . her children and her family." The trial court based its conclusion, in part, on the testimony of the couple’s au pair. The au pair testified that Prost generally arrived home at around seven or eight p.m., the family ate dinner together only four or five times per year, and that it was a "special event" when Prost came home early to cook dinner. According to the au pair, Prost usually ate alone late at night, often "while sitting on the kitchen floor . . . talking on the telephone or writing while she was eating."

The appellate court found that Greene was the more nurturing and involved parent. In support, the court cited Greene’s refusal of two job offers, ostensibly in order to spend more time with the children, his involvement in the children’s school functions, and the choreographing of his son’s birthday party.

While the appellate court rejected Prost’s arguments that the trial court’s “reasoning is infected with gender stereotyping” and that it had overemphasized Greene’s role in raising his two sons, it did rule that the trial court “failed to resolve factual issues concerning the appellant’s claims of physical assault” and thereby remanded the case. In a concurring opinion in Prost, Associate Judge Schwelb suggested that the majority had overlooked a number of factors that cast Greene in a different light: Greene’s deceptive conduct in terms of backdating a document, excising language from a document, falsifying support records to obtain funds from Prost, and possibly perjuring himself regarding his physical assaults on his wife. Judge Schwelb admitted that “[t]he husband is apparently a good deal more relaxed and smoother than the wife is in

54. Id. at 629.
55. Id. at 624.
56. Id.
57. Id.
58. Id.
59. Id. at 630.
60. Id. at 630 n.18.
61. Id. at 630 n.21.
62. Id. at 623.
63. Id. at 629.
64. Id. at 623.
65. Id.
handling the boys. But, especially in this kind of case, in which the future of the children is in the balance, character counts too." Upon remand, the trial court, unpersuaded by the evidence of domestic violence, upheld the earlier decision. The case is now being appealed to the D.C. Court of Appeals.

In another recent case, an appellate court reversed two lower court rulings in determining that Renee B., an attorney for a large multinational corporation in New York City, should lose custody of her eleven-year-old daughter, Rebecca. In 1986, after a five-year marriage to Michael B., Renee filed for divorce and sole custody of Rebecca; the Family Court granted both motions. At that time, Renee retained custody of their daughter. Renee's custody of Rebecca was twice confirmed by a New York Family Court.

Following the divorce, Michael began a pattern of harassment toward his ex-wife that the New York Family Court termed "guerilla warfare." The court recounted:

The father's campaign has involved a chronic pattern of deceit, and harassment of the mother, including, inter alia his collusive interactions with Dr. Gardner [the husband's psychiatric expert who interviewed the child without the mother's consent]; inordinate pressure to undermine the mother's custodial management; pressure directed at the child's school officials; pressure to sabotage the child's psychotherapeutic treatment [by exerting pressure on the child to refuse to see a therapist]; withholding child support; and recurrent motions embroiling the mother in continuous litigation concerning visitation arrangements, etc.

66. Id. at 633-34.
68. Prost v. Greene, No. 95FM450, 98FM492 (D.C. filed July 10, 1995). According to a recent television interview, Prost "is going to try to get the case re-opened, and that will be based on the fact that, after Labor Day, she's going to reduce her work hours to nine to three. She's also going to be taking a 15-percent pay cut. She hopes that may influence the court in her favor." ABC Transcript, supra note 28, at 9.
71. Id. at 2, 121. See also Myrna Felder, The "Rentschler" and "Renee B." Revolution, N.Y. L.J., Oct. 3, 1994, at 3.
73. Id. at 118.
Despite Michael's considerable financial resources of over one million dollars, he consistently failed to pay child support—a failure that the Family Court characterized as "sadistic behavior."74 He was twice held in contempt and was once incarcerated for failing to pay support.75

In 1992, following Renee's discovery that Michael was sleeping in the same bed as Rebecca, Renee petitioned the court to eliminate Michael's right to mid-week overnight visitation and to impose a requirement that Michael's visitation be supervised.76 Michael cross-petitioned for sole custody. The Family Court judge denied Michael's cross-petition and affirmed Renee's right to sole custody.77

In ruling on Michael's cross-petition, Family Court Judge George L. Jurow was not persuaded by either Michael's expert witness or by the court-appointed expert who testified that "the child was 'distressed by her mother's unpredictable moods.'"78 The court determined that the child had been influenced by "excessive paternal pressure"79 to state a preference to reside with her father.

The trial judge characterized the mother as expressive, empathetic, compassionate, "open, direct, and sincere."80 The court pointed out that:

the credible evidence is that the child loves her mother and interacts well with her, and is supported by the mother in numerous social and other activities appropriate for the child's development. In other words, the custodial parenting has enabled the child to thrive.81

The court also disregarded the court-appointed expert's testimony which stated that the husband was a more fit custodian because of Renee's career.82 The judge noted that even Michael's expert witness had characterized one of Renee's greatest assets by saying that, "the time Rebecca spends with her mother is 'high quality time.'"83

In contrast, the court described Michael as "cold, pedantic, and humorless . . . with a pervasive quality of controlled anger."84 According to the court, Michael was socially isolated and had difficulties dealing withĕ
with people. In particular, the court pointed to Michael's interaction with his daughter's school officials that had resulted in Michael being asked to leave the premises, jeopardizing his daughter's continued enrollment in the school, and precipitating a court order excluding him from involvement in the child's school activities.

The court also emphasized the father's intention, should he gain custody, to remove the daughter from her present school, the school that a mental health expert had testified was "the most important arena" of the daughter's life. The trial court concluded that to "transfer the child's custody to the father who, it is clear from the credible evidence, will take actions inimical to the child's future welfare, is clearly erroneous and not in the child's best interests."

Michael appealed the Family Court ruling. In May 1994, the New York Appellate Division awarded Michael sole legal custody with liberal visitation rights to Renee. The appellate court based its reversal on the lower court's lack of deference to the opinion of the court-appointed psychiatric expert, Rebecca's preference to live with her father, Rebecca's distress because of her mother's "spanking, slapping, and locking of the child in her room," and the attempts by Renee to exclude Michael from the child's life.

This custody battle cost Renee approximately $340,000. The stress of the fight also resulted in Renee losing her job. Further proceedings are still pending.

85. Id. at 111.
86. Id. at 39-40.
87. Id. at 40.
88. Id. at 90.
89. Id. at 19.
90. Id. at 117.
92. Id. at 832.
93. Id.
94. Id. The court was also swayed by the court-appointed expert's thoroughness in reaching his opinion—meeting with the child on three occasions as well as with each of the parents in conjunction with the child. It gave little weight to the mother's expert who had interviewed only her and the persons she selected. Id.
96. Id.
97. Subsequent to the appellate court ruling, Michael attempted to hold Renee in contempt for failure to pay child support as ordered by the appellate court in 1994. Having difficulty complying with service of process on Renee, Michael decided to have the process server accompany Rebecca on her visitation to her mother. Upon reading the legal papers, 12-year-old Rebecca became distraught at the threat of imprisonment of her mother. The daughter, on her own initiative, contacted her court-appointed guardian and refused to return to her father. In subsequent sessions with her social worker, the daughter described
Another prominent case that incensed the legal community involved Linda Tresnak, a woman law student. At the time of Linda’s marriage to Jim, Jim worked for his father’s insurance agency; she worked in a nursing home. After Linda gave birth to their two sons (in 1969 and 1971), she became a full-time homemaker. In 1969, the couple sold their house and Jim returned to college. During the course of their fifteen-year marriage, the couple moved twice in order to accommodate Jim’s teaching career.

In the summer of 1975, Jim began work on a master’s degree at Northeast Missouri State University in Kirksville, Missouri. He attended summer courses and worked in nearby Chariton, Missouri, during the school year. During this time, Linda also decided to continue her education; she attended the local junior college. Subsequently, she too enrolled full-time at the University of Kirksville and received a bachelor’s degree in psychology. Because Linda attended classes in a town distant from Jim’s employment, the couple lived apart, and their two sons (then aged nine and seven) resided alternately with each parent. When the boys lived with Jim, Linda returned home every weekend to cook, clean, and help with the children’s schoolwork.

her life with her father as verging on parental abuse. Also, she was prohibited from calling her mother and was required to disclose all correspondence to her father in order to prevent her from sending letters to her mother.

In July 1995, Rebecca and her court-appointed guardian motioned for a change in custody to Renee. The trial court issued a preliminary order appointing a new court-appointed expert, ordering Rebecca to remain in her mother’s custody temporarily, and decreeing that the father have supervised visitation. The father refused visitation under these conditions. A formal hearing was scheduled in August 1995. The matter was stayed, subsequently, when the father claimed that the newly-appointed court psychiatrist was biased against him. Custody remains with the mother pending a ruling on the father’s claim. Telephone Interviews with Bernard H. Clair, Attorney, Clair and Danielle, New York, N.Y. (July 7, 1995 & Feb. 14, 1996).

98. The Women Law Students and Staff, University of Iowa College of Law, the National Lawyers Guild, Iowa City Chapter, and the Faculty of the University of Iowa College of Law filed *amici* briefs on Linda Tresnak’s behalf. In re Marriage of Tresnak, 297 N.W.2d 109, 110 (Iowa 1980).

99. *Id.* at 110.

100. *Id.*

101. *Id.*

102. *Id.* In 1970, they moved to Omaha in order for Jim to take a position at a private girls’ college. In 1971, they moved to Chariton, Missouri, where Jim began teaching high school business classes. *Id.*

103. *Id.*

104. *Id.* at 111.

105. *Id.* at 110.

106. *Id.* at 110-11.

107. *Id.* at 111. From January to May 1978, they resided with Jim in Chariton. From Fall 1978 to Spring 1979, they resided with Linda in Kirksville.

108. *Id.* at 113.
At the time of the couple's separation in 1980, Linda had decided to attend law school. She was admitted to the University of Iowa College of Law. When Linda filed for divorce, Jim argued that he should have custody of the boys because long hours of law study would leave Linda little time for their two sons. The trial court agreed, concluding that Linda's pursuit of a professional degree would be detrimental to the children. The court explained that "anyone who has attained a legal education can well appreciate the time that legal studies consume." The court continued: "Although this is commendable insofar as her ambition for a career is concerned . . . it is not in the best interests and welfare of her minor children."

The trial court determined that Jim would be the most suitable custodian because he had a stable occupation and salary. The trial court also reasoned that Jim would be more likely "to engage in various activities with the boys, such as athletic events, fishing, hunting, mechanical training and other activities that boys are interested in."

On appeal, the Iowa Supreme Court reversed. The court determined that the record did not support the concern that Linda's legal education

109. Id. at 111.
110. Id.
111. Id. (citing Jim's argument In re Marriage of Tresnak, No. DM425, slip op. (D. Lucas Cty. Aug. 31, 1979)).
112. Id. (citing In re Marriage of Tresnak, No. DM425, slip op. (D. Lucas Cty. Aug. 31, 1979)).
113. Id. (citing In re Marriage of Tresnak, No. DM425, slip op. (D. Lucas Cty. Aug. 31, 1979)).
114. Tresnak, 297 N.W.2d at 111 (citing In re Marriage of Tresnak, No. DM425, slip op. (D. Lucas Cty. Aug. 31, 1979)).
115. Id. (citing In re Marriage of Tresnak, No. DM425, slip op. (D. Lucas Cty. Aug. 31, 1979)).
116. Id. (citing In re Marriage of Tresnak, No. DM425, slip op. (D. Lucas Cty. Aug. 31, 1979)).
would be harmful to her children.\textsuperscript{117} The court reasoned, based on the record, that Linda was more likely than Jim to engage in recreational activities with the children.\textsuperscript{118} Moreover, the court contrasted Jim's lack of concern with cleanliness with Linda's performance of household duties even during her undergraduate education.\textsuperscript{119} The Iowa Supreme Court criticized the trial court for basing its decision on assumptions about law school\textsuperscript{120} and on unfounded gender stereotypes.\textsuperscript{121}

The above cases represent a small sample in which women lawyers (or law students) have been threatened with a denial of custody because of the demands of their careers. Of course, such custody deprivations are not limited to women lawyers. Cases involve divorced women in other professions,\textsuperscript{122} managerial specialties,\textsuperscript{123} and occupations,\textsuperscript{124} as well as working mothers who leave their children in day care.\textsuperscript{125} Men who are professionals rarely appear to lose custody for this reason.\textsuperscript{126}

\textsuperscript{117.} Id. at 113.
\textsuperscript{118.} Id. at 112. In the past, Linda had taken the boys fishing, whereas Jim had refused to do so. Moreover, the Iowa Supreme Court said that there was no evidence showing that the boys enjoyed hunting or mechanical training. \textit{Id.}
\textsuperscript{119.} Id. at 113.
\textsuperscript{120.} Id. at 112.
\textsuperscript{121.} Id. at 113.
\textsuperscript{122.} \textit{See, e.g.}, Lewis v. Lewis, 219 N.W.2d 910, 911 (Neb. 1974) (award to father upheld because mother-medical student had "little time which could be devoted to the care of the children"); Simmons v. Simmons, 576 P.2d 589 (Kan. 1978) (businesswoman denied custody); Fitzsimmons v. Fitzsimmons, 722 P.2d 671 (N.M. Ct. App. 1986) (architect lost custody at trial level but appellate court reversed).
\textsuperscript{124.} \textit{See} Alice Steinbach, \textit{Career vs. Children: Women Face Difficult Choice, Custody Wars}, BALTIMORE SUN, Mar. 13, 1995, at 1D (citing the case of a Mississippi flight attendant who lost custody because her ex-husband had a more regular work schedule); Elinor J. Brecher, \textit{Working Mothers Losing Custody; Double Standard? Increasingly, Job-Related Complications that Never Cause a Ripple of Trouble for Men in Custody Cases are Swampi ng Women}, POST \& COURIER (Charleston, SC), Mar. 12, 1995, at A6 (citing case of real estate agent who lost custody).
\textsuperscript{125.} In a well-publicized recent case, an unmarried mother (Jennifer Ireland) lost custody of her toddler to the child's father because the mother was a university student who relied on day care. In contrast, the father, who worked part-time and took classes at a local community college, had a mother who was willing to care for the child in her home. The Michigan Court of Appeals subsequently overturned the circuit court order that had granted custody to the father. Ireland v. Smith, No. 177431, 1995 WL 662889 (Mich. App. Nov. 7, 1995). \textit{See} Susan Chira, \textit{Custody Case Stirs Debate on Bias Against Working Women}, N.Y. TIMES, July 31, 1994, at 31; Anna Quindlin, \textit{Done In By Day Care}, N.Y. TIMES, July 30, 1994, at 19. \textit{See also} Burchard v. Garay, 724 P.2d 486 (Cal. 1986) (custody award cannot be based on father's superior financial resources or mother's reliance on day care/baby-sitters while she works and studies).

On bias against working mothers, \textit{see generally} Becker, \textit{supra} note 4, at 177 & nn. 171-72.
\textsuperscript{126.} In February 1980, the New York Appellate Division upheld an award of custody to the mother because the father, a partner in a law firm, "must spend many and irregular
Social forces (namely, the increase in the numbers of professional women, the rising incidence of divorce, the percentage of divorced mothers in the workforce)\textsuperscript{127} and the current social and legal focus on "the bad mother"\textsuperscript{128} make the issue of custody denial to working women especially timely. The next part of this article questions the extent to which such custody deprivations present an issue of gender-based discrimination. It explores the assumptions and stereotypes about motherhood that appear to influence custody decision-making involving professional women.

III. A Feminist Dilemma?: The Importance of Perspective

"This is not about feminism. It's about kids and their par­

ents."\textsuperscript{129}

"To demand that Marcia Clark give up the best job opportunity
she will ever have or risk losing her sons is to put a successful
woman in a desperate bind that would never be imposed on a
successful man."\textsuperscript{130}

The quotations above raise the issue whether the dilemma confronting Marcia Clark and other women lawyers constitutes gender-based discrimi­
nation. On one hand, one might argue that this is not an issue of gender

hours working." \textit{Cited in} Schafran, \textit{supra} note 47, at 15. Of course, it is possible that fathers who are professionals may not request custody because of their career demands. Alternatively, custody denials to these fathers may be based on reasoning that implicitly takes into account their careers.

\textsuperscript{127} See infra notes 272-75 and accompanying text.

\textsuperscript{128} See, e.g., \textsc{Jane Swigart}, \textit{The Myth of the Bad Mother: The Emotional Realities of Mothering} (1991); \textsc{Shari L. Thurer}, \textit{The Myths of Motherhood: How Culture Reinvents the Good Mother} (1994); \textsc{Marie Ashe}, \textit{"Bad Mothers," "Good Lawyers," and "Legal Ethics,"} 81 \textsc{Geo. L.J.} 2533 (1993); \textsc{Marie Ashe, The "Bad Mother" in Law and Literature: A Problem of Representation}, 43 \textsc{Hastings L.J.} 1017 (1992); \textsc{Marie Ashe \\& Naomi R. Cahn}, \textit{Child Abuse: A Problem for Feminist Theory}, 2 \textsc{Texas J. Women \\& L.} 75, 83-93(1993) (discussing the applicability of the "bad mother" idea in popular culture and social science research to the legal treatment of child abuse); \textsc{Bernardine Dohrn, Bad Mothers, Good Mothers and the State: Children on the Margins,} 2 \textsc{U. Chi. L. Sch. Roundtable} 1 (1995).

Another well-publicized illustration of the "bad mother" involves the recent case of Susan Smith, a North Carolina woman who drowned her two young sons. \textit{See} Rick Bragg, \textit{Mother Who Killed: Loss, Betrayal and a Search for a Fairy Tale Life}, \textsc{N.Y. Times}, July 9, 1995, at 16; \textsc{Donna Dixon, Susan Smith, L.A. Times}, Nov. 9, 1994, at B6.

\textsuperscript{129} Mike Littwin, \textit{Clark vs. Clark Means Hard Choices and Tough Luck}, \textsc{Baltimore Sun}, Mar. 6, 1995, at 1D. Interestingly, this viewpoint was expressed also by Sharon Prost's husband. In an interview, he remarked: "I do not view this as a father's rights issue. I do not view this as a mother's right [sic] issue. It's the right of children . . . ." \textit{ABC Transcript, supra} note 28, at 9.

\textsuperscript{130} Beck, \textit{supra} note 19.
inequality; rather, it simply concerns children's best interests. On the other hand, one might argue that such custody decisions constitute discriminatory treatment by imposing a burden upon some women that is not imposed upon similarly situated men. These different points of view highlight feminist legal theory's critique of neutrality.

One of the epistemological contributions of feminist legal theory is the debunking of the myth of neutrality. This myth suggests that we, as observers of the human condition, can be neutral and objective. Feminist legal theorists, however, emphasize the influence of the observer's perspective on what is observed.

Feminist methods constitute part of a larger intellectual movement that rejects such longstanding methodological principles as the positivist empirical tradition in science. The positivist tradition (based on the scientific method utilized in such disciplines as astronomy, biology, chemistry, and physics) utilizes empirical evidence, experimentation, verification and deductive logic. It assumes that through observation and measurement by an objective observer, we can obtain reliable information about reality.

Feminist theory challenges this tradition and its underlying assumptions. Feminist methods reject the idea of a subject-object relationship that is detached and neutral because the law is not an objective, neutral discourse. Rather, feminist legal theorists believe that we are always influenced by our perspective.

Each of the opposing points of view regarding the Clark custody dispute, as expressed at the beginning of this section, rests on certain assumptions. This section attempts to delineate and analyze those assumptions. Specifically, it attempts to explore and challenge the gendered nature of the reasoning behind these conflicting viewpoints. The first view (that the Clarks' dispute does not implicate gender inequality) rests on a belief that time should be a determinative factor in custody decisions, i.e., that children fare better with the parent who has more time to be with them. Upon first glance, this appears to be a gender neutral assumption that emphasizes children's best interests. Yet, as I will

131. Littwin, supra note 129.
explain, this assumption is gendered at its core. The contrary position (that this custody problem of professional women raises an issue of gender inequality) rests on a different foundation. This view is based on the conflicting role expectations that stem from imagery of the hardworking father ("a good provider") versus that of the professional woman/mother ("a bad mother"), as I will also explain.

A. GENDER NEUTRALITY AT WORK? TIME AS A FACTOR IN CUSTODY DECISION-MAKING

In custody determinations, the governing standard is the best interests of the child.135 Although state laws vary, both parent-related and child-related factors are considered relevant in determinations of the best interests of the child.136 Only occasionally is "time" enumerated as a statutory factor.137 More often, consideration of parental availability enters into the determination implicitly, either because of vague statutory language138 or because of the tremendous discretion vested by the best interests standard in decision-makers' determinations of parental fitness.

The argument, as raised by Gordon Clark and the aforementioned ex-husbands of legal professionals, is that a parent's limited availability because of career demands should militate against an award of custody. Several problems arise in utilizing time as a determinative, or even relevant, factor.

First, and most obviously, reliance on this factor emphasizes the quantity, rather than quality, of the parent's interaction with the child. As one commentator cautions:

A standard that awards custody to the parent able to spend more time with the child would ignore qualitative differences in time

spent with the child and thus might not be justifiable from the perspective of what is good for the child. The quantity of time that a parent has available to spend with a child neither dictates the quality of that interaction nor guarantees that the available time will, in fact, be spent with the child. For example, research on mother-child versus father-child relationships reveals that husbands of working wives spend considerably less time than the working mothers in child-care activities. Fathers' interactions differ qualitatively, too. Fathers tend to interact more with their young children in play rather than in the performance of routine caretaking tasks. Research has also suggested that, at the time of divorce, fathers often overestimate the time they say they want to spend with their children. A certified family law specialist told a committee studying gender bias in the legal profession that a father will “quite frequently” suggest that joint physical custody is important to him:

[H]e wants not only quality time, but quantity time with his children . . . . Now, one thing that I’m finding quite often is that dad says that, and dad gets that . . . . All of a sudden he’s on a more traditional, once every other weekend, once a month, maybe on Christmas, all of a sudden the children aren’t hearing from dad at all . . . .

Research that documents visitation patterns over time supports this finding. At the end of the third year after a divorce, there was a declining rate of visitation by fathers in terms of overnight visits, daytime visitation, and regular visitation during the school year.

In addition, a focus on the quantity of time that a child spends with a parent may detract from more important considerations. For example, in

139. Mnookin, supra note 135, at 284.
141. Id. at 65. Research also revealed that working mothers spend considerable time with their children in the early evening period, “using this time to reestablish contact with their babies after having been away for the day.” Id. at 75. Fathers, who were also returning from work, gave more attention to their wives than to the children. Id.
143. Id. at 22.
145. Id. at 172-73.
Renee B., a court-appointed expert determined that the unemployed father would be a better custodian than the mother because of his greater availability. In awarding custody to the father, the appellate court gave little weight to the father’s character, which had been described by the trial judge as, “cold, pedantic, and humorless, and above all, with a pervasive quality of controlled anger.” The judge continued, “[e]ven when directly discussing his daughter, there was little sense of the warmth and empathy for her that the mother displayed.”

In Sharon Prost’s case, by focusing on her availability, the trial court minimized allegations of domestic violence by Prost’s husband (which had been serious enough to merit a civil protection order). Surely, a parent who spends limited “high quality time” with a child is a more appropriate custodian than a parent who has socially undesirable qualities.

Moreover, it is important to note that societal views have evolved concerning children’s need for quantity time. Sociologist Arlie Hochschild writes that in the second half of the nineteenth century, when a woman’s place was in the home, child-care experts agreed that the child needed a mother’s constant care at home. As women’s roles have changed, however, so has our concept of children’s needs: “Nowadays, a child is increasingly imagined to need time with other children, to need ‘independence-training,’ not to need ‘quantity time’ with a parent but only a small amount of ‘quality time.’”

A second problem regarding consideration of time as a factor in custody decision-making is that a reliance on availability “freezes” the status quo. In other words, it measures the present time constraints of one parent against the present availability of the other parent to determine

147. Id. at 108. Further, the trial court cites an expert’s opinion that the father is “indifferent to the human race, does not concern himself with how he offends . . . [is] intrapersonally retarded . . . [and demonstrates] complete indifference to humanity . . . .” Id. at 17-18.
148. Id.
152. Id.
fulfillment of the present time needs of a child. Yet, any, or all, of these factors may change significantly over time.

Consideration of a parent’s current career demands assumes that these constraints are reflective of the career as a whole. In the cases of many of the professional women above, this assumption may not be warranted. For example, although the ordinary demands of a prosecutor may be high, the notoriety of the O.J. Simpson trial makes this trial a singular event. Similarly, for Sharon Prost, the Senate confirmation hearings of Justice Thomas also presented unique time demands. Likewise, Linda Tresnak was at the beginning of her law school career, a time when the demands upon her would, most likely, be highest. Thus, a reliance on present availability fails to recognize that the present situation may be a momentary stage in a lifelong career.

Reliance on time as a factor also freezes the availability of the non-custodial parent. Gordon Clark, for example, asserts that he is home every night by 6:15 p.m. This ignores the possibility that, in time, he might be promoted into a more demanding position, accept a different job, or become involved in a new amorous relationship that would take up more of his time. Similarly, as is the case for two other ex-husbands discussed above, a parent’s availability might be related to temporary unemployment or a current position with flexible hours; both of these work situations are subject to change.

Reliance on present availability also disregards the changing needs of children and fails to recognize that children’s demands on a parent’s time vary as a function of each developmental stage. For example, once

153. In fact, Prost claimed that she regularly left work at 4:30 p.m. when the Senate was not in session (as was frequently the case). Prost v. Greene, 652 A.2d at 629.
154. After completing law school, Tresnak became a psychiatric social worker and subsequently remarried. Hancock et al., supra note 29, at 56.
155. Also, an emphasis on present availability ignores that career demands may vary as a function of seasonality or other factors. In another case in which a mother was denied custody because of her career demands, the mother worked as a city manager for H & R Block, managing 17 offices. “She testified that although she worked forty to fifty hours per week during tax season, she may work from ten to thirty hours per week at other times, depending on the flow of business . . . .” Marilyn Hall Mitchell, Note, Family Law—Child Custody—Mother’s Career May Determine Custody Award to Father, 24 WAYNE L. REV. 1159, 1166 n.47 (1978) (citing Gulyas v. Gulyas, No. 75-083-748 DC (Wayne Co. Cir. Ct., Oct. 20-21, 1975)).
156. Boxall, Marcia Clark’s Husband, supra note 1.
157. Sharon Prost’s husband was unemployed for more than two years. Prost v. Greene, 652 A.2d at 623. Renee B.’s husband had a chronic history of employment problems, and it appeared unlikely that he would return to work. The daughter described his employment as “he works on the papers for the court.” Renee B. v. Michael B., No. V 5272186, slip. op. at 12 (N.Y. Fam. Ct. May 8, 1992).
158. See also MACCOBY & MNOOKIN, supra note 12, at 178 (older children may be less desirous of spending overnights at their fathers). For a study of the effect of developmental changes on visitation patterns, see id. at 178-80.
children reach school age, they are absent from home for a large portion of the parent's work day. Moreover, school children's after-school lives may quickly fill with extracurricular activities and friendships, thus lessening their need and desire to be with a parent.

A third criticism of reliance on availability as a factor in custody decision-making rests on an unspoken assumption that availability is an objective and easily measurable criteria. This assumption is, however, open to challenge. Conscious and unconscious biases by the parties themselves, as well as by decision-makers, may pervade the evaluation of availability. Several other issues also complicate the measurement of availability: What should be measured? Child care only? Or, child care and house work (work performed for the family)? If child care, then what types of tasks? One problem in emphasizing the more visible caretaking activities is that this tends to minimize all the “invisible” work that mothers might perform (such as arranging for baby-sitting or housekeeper services, scheduling doctors’ appointments, scheduling play dates, determining a child’s need for new clothes and haircuts, helping with school work, planning domestic chores and events, making grocery lists, and paying bills).

Sociologist Arlie Hochschild has made visible the extent of the child care and house work that working women perform. Her classic study of

159. For a list of tasks that one court deems relevant to determination of primary caretaker status, see Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981).
160. The term “invisible,” as applied to work, is borrowed from sociological studies of comparable worth that suggest that gender bias pervades the evaluation of occupations by failing to consider the range of tasks that women perform. See Ronnie Steinberg, Social Construction of Skill: Gender, Power, and Comparable Worth, 17 WORK AND OCCUPATIONS 449, 459-63 (1990) (“[T]he prerequisites, tasks, and work context associated with women’s work are invisible.”).
161. Hochschild found that only 18% of the men in her sample of 50 working couples shared half of the work load in housework, parenting, and management of domestic life. HOCHSCHILD, supra note 151, at 282.
162. Marital couples often delegate to the wife the responsibility for organizing child care, whether it be the occasional baby-sitter or a more permanent caretaker. This is true even when both parents have jobs. KATHRYN C. BACKETT, MOTHERS AND FATHERS: A STUDY OF THE DEVELOPMENT AND NEGOTIATION OF PARENTAL BEHAVIOR 191-94 (1982).
163. For example, the court-appointed mental health expert intimated that, because Renee B. was not available after her daughter’s school day, she “farmed out” the girl to friends’ houses. “[H]er work situation does have the effect of reducing Rebecca’s time with her. One of the factors involved in Rebecca’s greater time with other children relates to the baby-sitting element operative in such visits.” Renee B. v. Michael B., No. V 5272186, slip. op. at 92 (N.Y. Fam. Ct. May 8, 1992). Rather than giving credit to the mother for arranging for the child’s social needs, she was faulted for not meeting the child’s needs herself.
fifty working couples in California from 1980 to 1988 reveals that working mothers work “a second shift”; in other words, they work at their job and then come home and perform another shift doing housework and child care. Hochschild estimates that mothers’ second shifts amount to their working an extra month of twenty-four-hour days per year.

Moreover, Hochschild suggests that working mothers may actually do more family work (housework and child care) than non-working mothers. Furthermore, Hochschild points out that those working women who earn more than their husbands tend to participate to a greater extent than other working women in the division of labor. Hochschild attributes this to the women’s subconscious desire to restore power to their husbands.

Sharon Prost’s case illustrates the possibility of bias in the measurement of “invisible” caretaking tasks. The appellate court determined that Prost was so devoted to her career that she neglected her “health, her children and her family.” To the contrary, Prost remarked:

I think they [the children] view me as the parent who takes care of really their most basic needs. I did their laundry, I cut their nails every work [sic], I’d give them haircuts. From the little details of the day to the broader aspects of, you know, going to camp or whatever, I was just [there] . . .

Prost maintains that she read the children bedtime stories and tucked them into bed. She adds, “[m]ost of our best times are just spent hanging out.”

Much of the work Prost performed by tending to the children’s “basic needs” was “invisible” to the judge who focused on the father because he was the principal cook for the family. The judge ignored several other aspects of Prost’s availability—for example, her proximity to her son’s day

164. HOCHSCHILD, supra note 151.
165. Id. at 4.
166. See HOCHSCHILD, supra note 151, at 220-26; See also Cynthia Fuchs Epstein, Toward a Family Policy: Changes in Mothers’ Lives, in THE CHANGING AMERICAN FAMILY AND PUBLIC POLICY 157, 171 (Andrew J. Cherlin ed., 1988) [hereinafter Epstein, Toward a Family Policy] (husbands of working women still perform “only a modest amount more of child care and housework than do husbands of wives who are not in the labor force”).
167. HOCHSCHILD, supra note 151, at 222.
168. Id. Furthermore, Hochschild states, “Sensing when their husbands got ‘touchy,’ sensing the fragility of their husbands’ ‘male ego,’ not wanting them to get discouraged or depressed, such women restored their men’s lost power by waiting on them at home.” Id.
170. ABC Transcript, supra note 28, at 8.
171. Id.
172. Id. at 8.
care.¹⁷³ Instead, the judge faulted her for allowing her husband to take
the child home from day care when she worked late¹⁷⁴ and for placing
Prost's mother's name (rather than the child's father's name) on the parent
notification card as an alternate emergency contact.¹⁷⁵

In addition, the judge ignored the fifteen months before trial during
which Prost was the children's primary caretaker.¹⁷⁶ Also, both the trial
court judge and the appellate judge discounted the work Prost performed
during their son's infancy (such as nursing and tending to him at night).
Summarizing the trial court's opinion, the appellate court stated:

The trial judge made detailed findings of fact attempting to resolve
the conflicting evidence. The judge found . . . [s]pecifically, except during the first several months of Matthew's life, [that]
Prost and Greene were “full and equal caretakers of Matthew from
his birth [in 1987] through at least February 1989.”¹⁷⁷

Research on gender bias in the courts reveals that this de-emphasis on a
mother's primary caretaking may be part of a pattern:

[I]t appears that as soon as physical custody is contested, any
weight given to a history of primary caretaking disappears.
Mothers who have been primary caretakers throughout their child's
life are subjected to differential and stricter scrutiny, and may lose
custody if the role of primary caretaker has been assumed,
h owever briefly and for whatever reason, by someone else.¹⁷⁸

Measurement of availability is complicated by other subtle factors.
Mothers and fathers may attach different meanings to the attentiveness
required by child care.¹⁷⁹ Or, mothers and fathers may have different

¹⁷³. The court, noting the record, states that: “[The couple] placed Matthew in a daycare
[sic] facility across the street from Prost’s office and commuted to and from work together,
dropping him off and picking him up on the way.”
Prost v. Greene, 652 A.2d at 624.
¹⁷⁴. Id.
¹⁷⁵. Id. at 625 n.6. The judge's attitude may reflect an unawareness of the extent to
which working women rely on female relatives. Hochschild reveals the frequency with
which working women (when they do not rely on nannies or housekeepers) tend to call on
their mothers, mothers-in-law, or other female relatives for child care—even when these
women themselves worked. HOCHSCHILD, supra note 151, at 198.
¹⁷⁶. Prost v. Greene, 652 A.2d at 624. Similarly, the appellate court in Renee B., 611
N.Y.S.2d 831, ignored the period from 1986 until 1994, when Renee was primary
custodian.
¹⁷⁷. Prost v. Greene, 652 A.2d at 624 (emphasis added). Perhaps, the above evaluation
ignores Prost's contribution because women are expected to perform such tasks, given that
they have the physical ability to breast-feed.
¹⁷⁸. REPORT OF GENDER BIAS STUDY, supra note 149, at 72.
¹⁷⁹. Arlie Hochschild illustrates this point by citing the example of a father who claims
to “share” housework and child care, but his idea of performing child care is expressed by
standards regarding child care or housework which may affect their availability to their children. For example, one parent may care more about how the house looks or how clean the children are, and thereby perform more child care or household tasks accordingly. 180

Further, it becomes important to notice how certain tasks are weighted in the measurement of availability. An evaluation of availability in some of the cases above appears to rest on gender-based assumptions about the traditional roles of mother and father. Thus, the appellate court judge faults Sharon Prost for not making dinner for her family and for not eating with them. 181 He gives her husband credit for food preparation. 182 This judge obviously presupposes a very traditional family model with traditional gender roles.

Similarly, the court-appointed mental health expert in Renee B. faults Renee for not being available to the daughter after school. 183 It matters little that she wakes the daughter and gives her breakfast. 184 Gordon Clark faults his ex-wife, similarly, for coming home at 10 p.m. 185 Yet, we do not know if she, like Renee, spends time with the children in the morning.

These opinions reveal underlying gender-based assumptions about the expected roles of mother and father that may be out of place in contemporary family life. The families of professional women may function differently. They may, for instance, alter their children's schedule in order to spend more time with them. 186

Further, subjective bias often emerges in the weight given to the amount and type of work that fathers, as compared to mothers, perform. Commentators have pointed out a judicial tendency to overrate fathers' contributions to caretaking:

the statement that "[t]he children do fine while I'm working on the house; they muck about by themselves." HOCHSCHILD, supra note 151, at 222.
180. Hochschild identifies a male strategy of "needs reduction." She cites the example of one husband who explained that he didn't perform certain tasks (laundry, shopping) because he didn't "need" things. "Through his reduction of needs, this man created a great void into which his wife stepped with her 'greater need' to see him wear an ironed shirt, to furnish their apartment, take his suits to the cleaners, buy his books, and cook his dinner." HOCHSCHILD, supra note 151, at 202.
182. Id.
184. Id. at 91.
185. Boxall, Marcia Clark's Husband, supra note 1, at A1 (citing Gordon Clark's Superior Court declaration of February 24, 1995).
186. As Hochschild describes, based on her empirical study, "[s]upermoms put in long hours at the office but kept their children up very late at night to get time with them." HOCHSCHILD, supra note 151, at 195. See also EPSTEIN, WOMEN IN LAW, supra note 11, at 368.
Case analysis reveals a tendency to overrate small paternal contributions to parenting because they are still so noticeable, and to concomitantly over-emphasize lack of total maternal parenting. In other words, the emphasis in evaluating mothers is on what they do not do, because they are expected to do everything. By this standard, men will always look good for doing more than nothing and women will always look bad for doing less than everything. 187

The court in Prost, for example, pointed to the father’s “regular involvement in school functions” 188 while disregarding the mother’s “own equal involvement in [the son’s] schooling.”189 While Prost’s husband was unemployed for almost two years, the couple still hired a live-in baby-sitter to care for the children. He took over from the baby-sitter at 5:00 or 5:30. 190 As Prost commented:

If he was unemployed, at home all day, the question—the lens wasn’t, ‘Well, why wasn’t he taking the children during the day?’ It was, ‘Isn’t he wonderful? . . . So what he did was wonderful, but everything I did was from a lens of how little I did. 191

Similarly, in Renee B., the court-appointed expert testified that the unemployed father was more available. His gender bias against working mothers is apparent in his written report:

Ms. RB is an attorney and has a full-time job. She is available to dress Rebecca in the morning and to give her breakfast. In contrast, Mr. MB [father] is much more available to spend time with Rebecca after school [and] at times of sickness, accidents, and


As Lynn Gold Beacon, of the American Bar Association’s Family Law Section commented:

Men are presumed to spend a couple of hours with the kids and when they spend more than a couple of hours, we think they’re superdads. So when you compare a less-than perfect mom to a superdad, I think it’s difficult to—for the women to win under those circumstances.

ABC Transcript, supra note 28, at 10.


189. Id. See also Hancock et al., supra note 29, at 56 (“Judge Taylor praised the father for assisting in his child’s kindergarten, but made no mention that the same teacher testified that Prost was the class’s ‘surrogate mom’.”).

190. ABC Transcript, supra note 28, at 10.

191. Id.
other possible emergencies . . . Although MB’s greater availability is, in part, a manifestation of a long history of occupational difficulties, from Rebecca’s point of view her father is much more available than her mother and this puts Mr. MB at an advantage . . . 192

Subsequently, the mental health expert charged that Renee, “is not herself available each day after school . . . [H]er work situation does have the effect of reducing Rebecca’s time with her . . . .” 193 The expert’s testimony reflects the traditional role expectation that mothers are to be home when their children return after school. 194

Because of stereotypical gender role expectations, custody decision-makers may not expect fathers to be involved in child care. As a result, fathers’ time commitments in housework and child care are accorded considerable weight. 195

A final criticism of reliance on time as a relevant factor in custody decision-making is the subjectivity of the assessment by the parties themselves. Their measurement may be not unbiased, especially given the likelihood of intra-parental conflict and hostility upon divorce. As one commentator points out, “[i]n all events, because the [time] test would require a prediction of the amount of time each parent would spend with the child, it would be very difficult to apply and would invite exaggeration and dishonesty in litigation.” 196 This commentator presupposes that parents consciously might misrepresent the time they spend on caretaking.

Hochschild’s findings suggest, however, that unconscious motivations may also play a role in a parent’s measurement of child care contributions. That is, Hochschild suggests that some families participate in “family myths,” delusions that serve some unconscious function. 197 One such myth is that the marriage is egalitarian and that the husband’s workload (in terms of housework and child care) is equal to that of the wife. Specifical-

193. Id.
194. See also REPORT OF GENDER BIAS STUDY, supra note 149, at 63 (half of family court judges expressed their belief that mothers should be at home when the children return from school).
195. In a recent South Carolina case, a real estate agent lost custody of her son. The mother was described as an “aggressive, competitive individual” who was “not particularly family-oriented” (even though she took a year off after her son’s birth and was involved in his daily care, religious and secular education, music lessons and other activities). The court gave considerable weight to the father’s domestic activities, which included “making the morning coffee, often cooking weekend meals, attending the boy’s swim meets and sometimes taking him to the doctor.” Brecher, supra note 124.
197. HOCHSCHILD, supra note 151, at 44.
ly, Hochschild identifies relationships in which (despite an observable gender-based inequality in the division of labor), both the husband and wife refer to the division of labor as “equal . . . because equality was so important to [the wife].”

In sum, parental availability is a problematic criterion by which to measure the suitability of a custodial parent. A reliance on time places undue emphasis on quantity rather than quality. Reliance on this factor inappropriately freezes the status quo in a way that may not be in the child's best interests. Also, the evaluation process reveals subjective bias, such as gender bias and stereotyped role expectations, on the part of the decision-makers and the parties.

B. THE FEMINIST DOUBLE BIND

Another perspective on the experience of Marcia Clark (and those of the professional women herein) is that it exemplifies gender bias in custody decision-making. Divorced professional mothers are being treated differently than similarly situated men. These working women are expected to be perfect mothers. If they cannot excel in both their work-life and family-life, they are penalized and made to choose between them. Fathers are confronted neither with the expectation of parental perfectibility nor the demand that they make a choice.

The conflicting role expectations for the working mother versus father have roots in nineteenth century gender ideology. On one hand, imagery portrays the hardworking father as a good provider. Mothers, on the other hand, suffer from the effects of the social movement of the professionalization of motherhood.

Reviewing the feminist literature on mothering, Nancy Chodorow and Susan Contratto identify and articulate the theme of maternal perfection:

[This includes] a sense that mothers are totally responsible for the outcomes of their mothering . . . . Belief in the all-powerful mother spawns a recurrent tendency to blame the mother on the

198. Id. at 58.
199. This is the meaning of the “desperate bind” to which Beck is referring. Beck, supra note 19. See also REPORT OF GENDER BIAS, supra note 149, at 64 (discussing a family service officer who criticized a working mother’s schedule and threatened to place her child in foster care if the mother did not quit her second job and a family court judge who told her, “[y]ou need to decide whether you want to be a mother or a working woman.”)
one hand, and a fantasy of maternal perfectibility on the other.  

Chodorow and Contratto label this the “myth of the perfect mother.” This myth results in a paradoxical treatment of mothers: idealization and blame.

Chodorow and Contratto do not delve into the historical source of this treatment. The source, however, is highly relevant to the legal treatment of the professional woman/mother. The idealization of mothers derives from nineteenth beliefs about womanhood. Historian Barbara Welter identifies “the cult of true womanhood” that surfaced after 1820. According to this view, the “true woman” was supposed to possess certain attributes, such as submissiveness and domesticity.

Woman’s place was in the home as wife and mother. She was supposed to busy herself with domesticity, the most prized virtue. Women’s literature regarded housework as uplifting: “[M]any a marriage is jeopardized because the wife has not learned to keep house.” It was woman’s job to make the home a cheerful, comfortable place. This “mystique,” according to Welter, “of what woman was and ought to be persisted . . . .” Other social forces, including industrialization and urbanization, contributed to the idea of the home as a sanctuary from the outside world.

In the late nineteenth century, women who sought careers, such as women physicians, were the object of ridicule and were “a frequent inspiration to cartoonists.” They were regarded as deviant; the popular view was that “any female who did succeed at medicine must be

201. Id. at 192.
202. Id. at 191.
203. Id. at 192-96.
204. They accept the psychological explanation of idealization as an infantile fantasy. Id. at 204.
206. Id. at 152, 158-64. Welter highlights four virtues: piety, purity, submissiveness, and domesticity. Id. at 152.
207. Id. at 162. Welter discusses an award-winning article in 1851 that explained that “an American woman best shows her patriotism by staying at home.” Id. at 172.
208. Id.
209. Id. at 164.
210. Id. at 167.
211. Id. at 163.
212. Id. at 174.
214. EHRENREICH & ENGLISH, supra note 213, at 63.
In the twentieth century, the working woman would confront remnants of this ideology.

By the 1920s and 1930s, the professional woman continued to receive censure. For example, Deborah Rhode quotes the advice of a therapist to women:

Dr. W.B. Wolfe captured the sentiments of many therapists in the late 1920s and early 30s with his queries to the seemingly “successful” professional woman. Would she be content to ‘take her Ph.D. to bed with [her] on cold nights, or [would she] warm [her] bones with gilt-edged stocks?’ Success or no success, ‘there [was] in all the world no substitute for the job of motherhood.’

In the late nineteenth and early twentieth century, a diverse range of “scientific” experts advised women on the virtues of domesticity and motherhood. Motherhood witnessed a professionalization, spurred by the birth of domestic science and a recognition of the growing importance of childhood. In a speech addressed to women, President Theodore Roosevelt illustrated this deification of motherhood:

The good mother, the wise mother . . . is more important to the community than even the ablest man; her career is more worthy of honor and is more useful to the community than the career of any man, no matter how successful, can be . . . But . . . the woman who, whether from cowardice, from selfishness, from having a false and vacuous ideal shirks her duty as wife and mother, earns the right to our contempt, just as does the man who, from any motive, fears to do his duty in battle when the country calls him.

A “mothers’ movement” at the end of the century provided an eager audience for the experts who were transforming child rearing into a science. This mothers’ movement, paradoxically, contained elements of a feminist backlash; leaders of this movement reproached those women who rejected domesticity for a career.

215. Id. at 65.
216. Rhode, Perspectives on Professional Women, supra note 11, at 1170 (citing W. Wolfe, A Woman’s Best Years: The Art of Staying Young 23, 181 (1935)).
217. See Ehrenreich & English, supra note 213, at 141-81.
218. Id. at 183.
219. Id. at 190 (quoting Theodore Roosevelt, Address to the First International Congress in America on the Welfare of the Child, under the auspices of the National Congress of Mothers, Wash., D.C., Mar. 1908).
220. Id. at 191-96.
221. Id. at 194.
In contrast to the elevation of domesticity and motherhood for women, a corresponding nineteenth century transformation associated men with imagery of the good provider. Sociologist Jessie Bernard explains that the structure of our traditional family took shape in the early nineteenth century, beginning in the 1830s. The industrial revolution spurred the development of a specialized male role. Formerly, in a subsistence economy, both the husband and wife contributed significantly to the division of labor. With the transition to a market economy, however, men were expected to provide to the best of their ability for their family.

Gender identity for men was associated with the public sphere of work. The good provider role envisioned "a hardworking man who spent most of his time at his work." Also, the role encompassed the idea that "[h]is work might have been demanding, but he expected it to be . . . "

Bernard identifies the "costs" of the good provider ideology for our conceptualization of husbands:

The most serious cost was perhaps the identification of maleness not only with the work site but especially with success in the role . . . . To be a man one had to be not only a provider but a good provider. Success in the good-provider role came in time to define masculinity itself.

Another "cost" of the good provider role, Bernard explains, was the exclusion of the attribute of "emotional expressivity." The man was not expected to provide emotional comfort, nurturance, or tenderness: "[T]he good provider was often, in a way, a kind of emotional parasite. Implicit in the definition of the role was that he provided goods and material things. Tender loving care was not one of the requirements."

This aspect of the good provider role began to change in the 1970s. Society placed new demands on husbands, including increased expressivity and the sharing of household responsibilities and child

223. Id. at 2.
224. Id.
225. Id. at 4.
226. Id. at 3.
227. Id. at 4.
228. Id. at 3.
229. Id. at 10.
230. Id. at 10-11.
Men’s behavior in the family began to evolve based on these new expectations. The increase of working wives in the labor force in this century signals that women now share the provider role: “[N]ow that she is entering the labor force in large numbers, she can once more resume her ancient role, this time, like her male counterpart the provider, by way of a monetary contribution.” With this transformation in the division of labor, women’s work patterns increasingly resemble men’s; men’s work patterns more closely resemble women’s.

Thus, the good provider role has declined in importance for the husband-father, and new male role expectations in regard to housework and child care have emerged. No correlative decline has occurred, however, in the role expectations for the working wife-mother. Although she now shares with her husband the role of provider for the family, she is still expected to conform to the role of the perfect mother.

Nineteenth century gender ideology regarding the role of women haunts society today in its treatment of women lawyers in the context of custody disputes. Custody decision-makers in several of the cases discussed above were influenced by traditional gender role expectations. The very qualities that contribute to a woman lawyer’s success militate against her in a custody dispute when her mothering role is evaluated. An exploration of several common gender stereotypes is useful in explaining how these stereotypes are used to the detriment of women lawyers.

1. Gender Stereotype: Women are Responsible for Family Maintenance Tasks.

One stereotype is that the woman, even if she works, is expected to perform traditional gender-based tasks, such as food preparation. The trial judge in Prost is appalled that Prost rarely cooks for the family. It was a “special event” when Prost came home early to cook dinner. Also, the trial court was influenced by testimony that Prost often ate dinner alone, late in the evening, while sitting on the kitchen floor, talking on the

231. Id. at 10.
232. In 1981, Bernard notes that the “pace seems intolerably slow.” Id. at 11. A decade later, Hochschild’s research seems to lead to the same conclusion. See Hochschild, supra note 151, at 276 (women report doing 75% of the housework and 80% of the domestic management).
236. Id.
phone.\textsuperscript{237} Even on occasions when Prost cooked dinner, she ate “standing at the stove or elsewhere in the kitchen, rather than at the table with the children.”\textsuperscript{238}

The image conveyed is that Prost is an inadequate wife and mother. She lacks the requisite domestic attributes. Also, she is an uncaring mother by neglecting her children's primary needs. She fails to provide requisite psychological support and foster family cohesion. Furthermore, she is “selfish” (being on the telephone, presumably engaged in personal conversations) for not sacrificing her needs in favor of her children's.

The judge could have arrived at an alternate explanation for Prost's behavior, of course. After a hard day at the office, a working mother needs transition time, both to “decompress” and to perform all the necessary scheduling (family and personal) that she was unable to do during the work day. As a busy professional, eating may have no special significance to her. She may often eat food while she works as a way of making use of precious minutes. Moreover, an attribute which may have contributed to her successful career is that she performs several tasks at the same time: “[I]n a multitasking world, many feel they are wasting time unless they combine eating with another activity.”\textsuperscript{239} Further, food preparation may simply not be one of the many skills that this woman possesses or enjoys.

In contrast to Prost, law student Linda Tresnak succeeds, on appeal, because of her domesticity. She is “a fastidious housekeeper.”\textsuperscript{240} The appellate court, approvingly, notes that even as a full-time student, she returned home each weekend “to clean house, help with the laundry, cook meals, and prepare foods to be served during the following week.”\textsuperscript{241} Ironically, her success may have depended, in part, on her husband's lack of domesticity.\textsuperscript{242}

\textsuperscript{237} Id. In a subsequent interview, she explained that she sat on the floor because it was the nearest place to sit while talking on the phone. ABC Transcript, supra note 28, at 9.
\textsuperscript{238} Prost v. Greene, 652 A.2d at 624.
\textsuperscript{239} Calmeta Y. Coleman, \textit{The Unseemly Secrets of Eating Alone}, \textit{WALL ST. J.}, July 6, 1995, at B1. Although Coleman refers to the eating habits of single adults, I surmise that her observation is applicable to many professionals. However, the habit may conjure up different degrees of blameworthiness if we think of a male professional versus a professional woman eating alone, after work, late at night after the children have gone to bed.
\textsuperscript{240} Tresnak, 297 N.W.2d at 113.
\textsuperscript{241} Id.
\textsuperscript{242} The Iowa Supreme Court stated: “He is not as concerned about household cleanliness as Linda. Nor did he display her concern about the children's meals and clothing . . . .” Id.
2. **Gender Stereotype: The Mother Must Perform Certain Symbolic Child Care Tasks.**

According to this stereotype, the mother must be the parent who performs those child care tasks with special significance. These appear to include: (1) picking up the child from school or preschool; (2) being home when the child returns after school; (3) putting the children to bed; and (4) choreographing special family events.

Sharon Prost is faulted because her husband brings her son home from work when she works late.\(^{243}\) Renee B. is criticized by the court-appointed psychologist for not being available to the daughter after school,\(^ {244}\) for “farming out” her daughter to friends’ houses and relying on them for baby-sitting.\(^ {245}\) Marcia Clark’s husband charges her with returning home at 10 p.m.,\(^ {246}\) implicitly criticizing her failure to put the children to bed.

Conversely, Sharon Prost’s husband is given credit for hosting a son's birthday party in their home while his wife was working.\(^ {247}\) The appellate court in Tresnak, reversing the trial court's denial of custody, commends Linda Tresnak for her participation in vacation and recreation activities; she “fishes, reads, bakes cookies, bicycles and swims”\(^ {248}\) with her sons.\(^ {249}\)

These images harken back to the "myth of the perfect mother."\(^ {250}\) They idealize the mother and a mother’s loving care. Her presence is regarded as essential to the child’s development. If the mother does not perform these child care tasks, she is blamed for this shortcoming. Moreover, her absence at these important times is a symbol of her psychopathology, *per se* evidence of her unfitness as a custodian. Her psychopathology is also manifest in other ways, discussed below.

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245. Id.
246. Boxall, *Marcia Clark’s Husband*, supra note 1 (citing Gordon Clark’s Superior Court declaration of February 24, 1995). For another example in which a mother is faulted for not being present at symbolic times during the day, see Steinbach, *supra* note 124 (citing the case of a Mississippi flight attendant who lost custody because her ex-husband had a more regular work schedule).
248. Tresnak, 297 N.W.2d at 112.
249. In many of these cases (i.e. Clark, Tresnak, Prost) the couple’s children are boys. One may speculate that gender bias is present in judicial preference for a male custodian. Although this is explicit in the trial court award in *Tresnak*, 297 N.W.2d at 112, it may be an implicit factor in other custody denials to mothers.
250. CHODOROW & CONTRATTO, *supra* note 201.
3. Gender Stereotype: A Woman’s Zealous Commitment to Work is a Form of Psychopathology.

In many of the above cases, the woman’s devotion to her career is viewed as an additional element of unfitness. The trial judge characterizes Prost as “driven to succeed” and “intensely dedicated to achievement.”  

The judge criticizes her for returning to work “immediately” after her son was born despite a difficult pregnancy. In awarding custody to the father, the court notes that Prost is “simply more devoted to and absorbed by her work and career than anything else . . . .”

Similarly, Renee B. is characterized as psychologically unstable. In denying her custody, the appellate court based its decision on the opinion of a court-appointed expert who said that Renee’s “general superior intellectual capacities [eclipsed] the more subtle manifestations of psychopathology.” He characterized Renee as “paranoid” and “delusional.”

Yet, as the trial record reveals, when the expert is cross-examined, he agrees that all of Renee’s concerns have a factual basis. Her husband admitted that he slept in the same bed with the daughter and that he taped all of the telephone conversations between the daughter and Renee. These examples reveal vestiges of the nineteenth century view of working women. The fact that a woman works, and is committed to her work, signifies that there must be something wrong with her.

4. Gender Stereotype: Mother Must Be the Constant Loving Nurturer. She Must Be Flexible and Accommodating to Family Members.

The above-mentioned cases further reveal the expectation that the mother be a constant warm, loving source of affection for family members. She must be flexible and accommodating to their needs and desires. The professional women described above do not fit these stereotypes. For example, a court-appointed psychologist criticizes Renee B. for her

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251. Prost v. Greene, 652 A.2d at 625 n. 4.
252. Id.
253. Id. at 629.
255. Id.
256. Id.
257. Id. at 16, 20. One may wonder why the appellate judge does not credit Renee with being appropriately concerned about her daughter’s welfare.
258. Id. at 36.
attempts at humor when describing her daughter's temper tantrums. To the psychologist, Renee is revealing herself as an uncaring mother. Sharon Prost is criticized for her "rigidity" and "inflexibility" in terms of her unwillingness to adjust her ex-husband's visitation; she became irritated that her husband " barged in" on her scheduled weekend with the children. Similarly, Marcia Clark's ex-husband criticizes her for being furious when he unexpectedly kept the children overnight on short notice.

Renee B. is charged with being "temperamental" and "attempt[ing] to exclude [her ex-husband] from the child's life," as the result of an incident where school personnel threw the ex-husband off school premises and asked him never to return. Likewise, Prost is criticized for "demonstrat[ing] insensitivity" to her husband's periods of unemployment and resultant depression. The traits and actions of these two women do not accord with the stereotypes of a submissive, nurturing wife and mother.

Yet, several of these actions are understandable in light of the requisite attributes and career demands of a professional woman. The professional woman is required to be well-organized and to adhere to a schedule. Impromptu, last-minute changes could upset a carefully-crafted accommodation of child care arrangements and work. Also, being temperamental, rigid, and inflexible might be positive attributes for a litigator or corporate attorney who needs to zealously represent clients. Actions which might not be characterized as parental shortcomings for a male professional take on a different significance for women:

For the professional man, frequent absences from home, tardiness for dinner, and "overtime" work are not only expected but also accepted as evidence that he is . . . a good parent and spouse. Such is not the case for the professional woman.

259. Id. at 49. As a two-year-old, the daughter was on a New York City street corner having a screaming fit. When a passer-by confronted the mother, she flippantly responded, "I beat her on an hourly basis. Now let me pass." Commenting on the opinion of the court-appointed expert, the mother's expert commented, "he has no sense of humor."


261. Id.

262. Id. at 628 n. 15.


265. Id.


268. Kaufman, supra note 44, at 156.
Another common expectation is that the woman should adjust to her husband's career. For example, during the Tresnak marriage, the Tresnaks moved twice in order to accommodate Jim's teaching career. 269 Yet, paradoxically, the trial court objected to Linda attending law school, in part, because she would have to move the children to a different state for three years, 270 and then, possibly, move them again to start her career. 271

In short, these cases reveal that decision-makers have expectations of mothers that they do not have of fathers. Gender ideology of the perfect mother leads us to blame these working women when they fail to meet these expectations. This blame sometimes results in the harshest of penalties, custody deprivation.

IV. Conclusion

This article has highlighted a small number of cases in which women have been denied custody because of their demanding careers. Admittedly, the number of divorced women affected by this problem is unknown. Cases in which custody or visitation is contested make up only a small percentage of custody cases. 272 To date, empirical research does not reveal the extent to which career demands serve as the grounds for the contest. This study underscores the need to conduct such research.

This article, however, accurately identifies an issue confronting at least some divorced women. This issue may well assume greater proportions in the future. More women are entering the professions; 273 more women are entering the legal profession, in particular. 274 Many women are

269. Tresnak, 297 N.W. 2d at 110.
270. Id. at 111.
271. Id.
272. Approximately 10%-25% of all custody cases are contested. See MACCOBY & MNOOKIN, supra note 12, at 134, 272; Robert W. Hansen, The Role and Rights of Children in Divorce Actions, 6 J. FAM. L. 1, 2 (1966).
273. Currently, professional and managerial women comprise more than one out of every four employed women. U.S. DEPT. OF LABOR, 42 EMPLOYMENT AND EARNINGS 174 (Jan. 1995). (Table 10: "Employed Persons by Occupation, Race and Sex") (women constitute 28.7% of the total in managerial and professional specialties for 1994). For slightly earlier data, see Kaufman, supra note 44, at 149 (women constitute approximately 20% of total in managerial and professional specialties).
274. The number of women professionals, especially legal professionals, has escalated dramatically in the past two decades. In a speech to the American Association of University Women in March 1995, Senator Moseley-Braun pointed out that women architects comprised 3% of the profession in 1972 versus 19% in 1993; women physicians constituted 10% of the profession in 1972 versus 22% in 1993; women lawyers comprised 4% of the bar in 1972 versus 23% in 1993. Basil Talbott, Moseley-Braun Points to Gains for Women, CHICAGO SUN TIMES, Mar. 24, 1995, at 20. For earlier data, see GERSON, supra note 234, at 238-39 (1985).
likely to be divorced mothers, and a high percentage of divorced mothers work.

This article will now suggest several tentative implications of this research, bearing in mind the methodological caveat regarding the unknown magnitude of the problem. First, this piece lends support to the recognition of gender bias in the legal treatment of working mothers. Commentators have theorized that such bias may be operative. This research augments the number of cases reflecting such bias.

Survey data also substantiate the existence of gender bias. In particular, empirical research reveals that judicial decisions reflect traditional attitudes toward working mothers. One study reports that half of the judges surveyed expressed such stereotypical beliefs as, "Mothers should be home when their school-age children get home from school." Almost half also agreed that, "A preschool child is likely to suffer if his/her mother works." Noting that parenting by mothers

This number will continue to rise; and women now comprise approximately 40% of graduating law students annually. Chambers, supra note 11, at 256. See also Rhode, Gender & Professional Roles, supra note 11, at 39, 58 (placing the percentage of new entrants at 45%).

In 1993, 5,687,000 children under 18 were living with a divorced mother; 950,000 were living with a divorced father. Of those children, 237,000 have mothers with graduate or professional degrees; 3,989,000 children have divorced mothers who are employed. BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, MARITAL STATUS AND LIVING ARRANGEMENTS, March 1993, Table 6, at 36.

Approximately 80% of divorced mothers work. Kingsley Davis, Wives and Work: A Theory of the Sex-Role Revolution and Its Consequences, in FEMINISM, CHILDREN, AND THE NEW FAMILIES 67, 81 (Sanford M. Dornbusch & Myra H. Strober eds., 1988) (in 1985, 83.4% of divorced women with children aged 6-17 years old were in the labor force).

Becker, supra note 4, at 171; Polikoff, Gender and Child Custody, supra note 187, at 188-89; Polikoff, Why Are Mothers Losing, supra note 5, at 239-41.


For cases of custody denials to a working mother that were reversed on appeal, see Burchard v. Garay, 724 P.2d 486 (Cal. 1986) (nurse); Fitzsimmons v. Fitzsimmons, 722 P.2d 671 (N.M. Ct. App. 1986) (architect); Gibson v. Gibson, 304 S.E.2d 336 (W. Va. 1983) (nature of employment unspecified).
is scrutinized more closely than that by fathers when custody is contested, these researchers concluded: "Double standards are particularly a problem in the areas of work outside the home, temporary relinquishment of custody, and dating and cohabitation."284

Gender bias may stem from decision-makers' own beliefs about traditional roles for mothers and fathers. Alternatively, gender bias may result from decision-makers' personal experiences with marriage and divorce.285 Another possible explanation is that it may derive from an anti-feminist backlash:286

[M]any people feel threatened by the vitality and productivity of the people who accomplish the demands of multiple roles. In a society in which until very recently people believed that the typical American woman was incapable of balancing a checkbook or driving a van, women's new competence as bank officers and truck drivers may encounter resistance.287

This sentiment may be directed especially toward women in high-level careers.288 People may feel that it is quite "inappropriate"289 that women are employed in these prestigious positions, and they resent the status and money that these women earn.

A possible remedy to combat gender bias in the family courts is "consciousness raising" for legal and social service personnel. The Massachusetts Gender Bias Committee recommended the development of such programs, which would be made mandatory for "probate [family] judges, family service officers, and court clinic staff."290 The Committee also recommended Continuing Legal Education courses on gender bias for attorneys generally.291 Although it is not easy to change deep-rooted beliefs, such programs certainly would constitute a step in the right direction.

283. Id.
284. Id. (emphasis added).
285. The California gender bias study found 32.5% of judges-respondents "have experienced divorce and bring the memories of that experience with them to the bench." ACHIEVING EQUAL JUSTICE, supra note 142, Tab 5 at 4.
286. For the classic work on this phenomenon, see generally SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN (1991). Faludi discusses the backlash against working women in the 1980s in terms of anti-daycare sentiment, especially the myth that day care poses a high risk of child abuse and developmental problems. Id. at 41-45.
287. Epstein, Toward a Family Policy, supra note 166, at 164.
288. Id. at 165.
289. Id.
290. REPORT OF GENDER BIAS STUDY, supra note 149, at 73.
291. Id.
Another remedy is to encourage the divorcing parties to attempt to work out their differences themselves without litigation. This would take the matter of custody out of the hands of possibly biased decision-makers. Admittedly, although this suggestion might prove workable for some parties, in cases of disputes that are "100 year wars," it is unlikely to be successful.

Using mediation by a neutral third party is yet another suggestion. This idea, however, is similarly no panacea. Mediators, too, may have gender bias. This becomes especially problematic if mediators make recommendations to the court, a practice permitted in some jurisdictions. Mandatory mediation also may constrain the parties to reach a resolution without full consideration of long-range consequences. Further, mediation does not work well in cases when the parties have unequal bargaining power, especially in cases of battering.

Second, this article suggests that custody determinations based on gender-neutral, "objective" criteria may have significant shortcomings. That is, reliance on the factor of time or the related factor of parental availability is a mine-field strewn with problems of subjectivity and speculation. Moreover, gender-based stereotypes regarding the proper roles for men and women may enter into measurement of "neutral" factors. The existence of attitudes deriving from a time when men were the sole breadwinners and women were homemakers/mothers may result in mothers being censured for a failure to conform to an idealized standard, whereas fathers may be accorded considerable approval for their contributions because they have deviated from traditional role expectations.

If parental availability is to enter into custody decision-making, either explicitly or implicitly, then we must exercise considerable caution in our...
evaluation. We need to be especially careful in our evaluation of families with dual career parents. Determinations of primary caretaker are complicated when both parents work. These families may have negotiated a division of labor that is far from traditional; the concept of "primary" caretaker may not be meaningful when applied to these families.

We also need to recognize that "parental availability" may function as strategic behavior in the divorce bargaining process. That is, fathers may demand sole or joint custody, or increased visitation, because they hope to lessen the amount of their child support. It may have been more than coincidental that Gordon Clark's request for primary custody came on the heels of his ex-wife's request for increased support.

Some statutes link child support awards to custody arrangements, either explicitly or implicitly. This linkage results in the allocation of support being based on the number of nights the child sleeps in a parent's home. In a custody contest, then, each parent is motivated by financial factors to emphasize the extent of his/her child-care responsibilities, especially the time he/she spends with the child. Commentators have urged that the statutory linkage of support and custody be modified or

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297. For example, Homer Clark suggests that the determination of the primary caretaker may be easy when the woman is a traditional homemaker, but it becomes more difficult when both parents work. HOMER CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 801-02 (2d ed. 1988).

298. For a discussion of the linkage between money and custody and, also, of "strategic behavior" in the bargaining process, see MACCOBY & MNOOKIN, supra note 12, at 44-48, 154-61.

299. For example, CAL. CIV. CODE §4724 (repealed 1990) formerly permitted the court to reduce the mandatory minimum child support if a parent was awarded 30% or more custodial or visitation time with the child. Also, CAL CIV. CODE §4700(b) (repealed 1990) permitted a custodial parent to recover child care expenses if the noncustodial parent failed to fulfill caretaking responsibilities. A study of gender bias in California courts recommended that the former statute be modified or repealed and that procedures for recovery of expenses be improved. ACHIEVING EQUAL JUSTICE, supra note 142, Tab 5 at 23 (regarding modification/repeal), 24 (regarding recovery of expenses). With the enactment of CAL. FAM. CODE § 4055 (West 1994), new statewide guidelines for determining child support take into account "the approximate percentage of time" that a parent has "primary physical responsibility for the children." CAL. FAM. CODE § 4055(b)(1)(D) (West 1994). This appears to be a modest improvement, at best. Parents still must estimate their time with the child.
repealed\(^{300}\) in order to decrease the likelihood that child support be utilized as a bargaining chip in custody disputes.

Decoupling support and visitation may also be in the children's interests in that it might help the children maintain contact with both parents. For example, a mother would not feel that she needs to limit a child's overnight visitation out of the fear that any increase in visitation with the child's father will lessen her child support.

Third, this study, although limited to the lives of a few professional women, brings into focus the difficulties some professional women experience regarding the work/family conflict and suggests a need for improved workplace accommodations. Women make significant efforts to meet the demands of both their private and professional lives. Their efforts are all the more commendable given that, despite their employment in the public sphere, women still perform the majority of child-rearing and housework in the private sphere.

We need to explore the empirical basis (or lack thereof)\(^{301}\) for the occasional judicial condemnation of working women. Psychological research fails to substantiate that maternal employment has harmful effects on children.\(^{302}\) To the contrary, data reveal the positive consequences for children of a mother's employment. Research indicates that maternal

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300. See, e.g., the committee findings in ACHIEVING EQUAL JUSTICE, supra note 142, Tab 5 at 23. The committee writes:

[T]he interplay between custody and support adversely affects the parent with primary custody, usually the mother, in two ways. First, the initial calculation of the award results in a lower award based on the time that is spent by the other parent with the child even though that may not have any bearing on the actual costs borne by the primary custodian. Second, the underlying custody arrangement upon which the support award is based may be honored more in the breach.

Id. at 21 (citing a family law specialist who observes that fathers often tend not to see their children subsequent to the divorce as much as they projected, whereas mothers tend to have physical custody full time but less support).

301. It is interesting to scrutinize the treatment by the decision-makers' herein of the issue of the children's adjustment to their mother's career demands. For example, despite finding that Sharon Prost's children were "charming, bright and healthy youngsters" (Prost v. Greene, 652 A.2d at 625), the trial court awarded custody to her husband. And, despite testimony that Renee's daughter "continues to thrive" (Renee B. v. Michael B., No. V 5272186, slip op. at 14 (N.Y. Fam Ct. May 8, 1992)), the appellate court awarded custody to the father. Thus, courts denied the mother custody without proof of any evidence of harm to the children stemming from the mother's career.

302. See Harriet Nerlove Mischel & Robert Fuhr, Maternal Employment: Its Psychological Effects on Children and Their Families, in FEMINISM, CHILDREN, AND THE NEW FAMILIES 191 (Sanford M. Dornbusch & Myra H. Strover eds. 1988) (reviewing the literature). See also Glenna Spitze, Women's Employment and Family Relations: A Review, 50 J. MARRIAGE & FAM. 595, 607-09 (1988). In addition, Epstein points out that studies that do find harmful effects are based on faulty methodology by failing to differentiate the type of jobs, the mother's education, economic level or work experience. Epstein, Toward a Family Policy, supra note 166, at 175.
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employment correlates with an increase in children's cognitive and social development;303 more flexibility in their sex-role perceptions;304 expansion of children's stereotypical masculine and feminine personality traits;305 and better personality adjustment.306 Working mothers provide role models for daughters and expanded occupational options for sons.307 Further, studies report that mothers who work full-time are happier and healthier than those who are unemployed or employed part-time,308 which also has a positive effect on children's development.

If, indeed, maternal employment has positive consequences for children, then we need more support for women to deal with the work/family conflict. For example, we need an improved parental and family leave policy on the part of government309 and private sector employers.310 The federal family leave policy has been criticized for many reasons: the allotted amount of time for leave is inadequate;311 it has no provisions for wage replacement312 or the accrual of seniority benefits;313 and it limits benefits to certain parents.314

In addition, more employers need to offer part-time work315 or flexible schedules316 in order to accommodate the childbearing and child-rearing periods when family demands are highest. Better coordination of

303. Mischel & Fuhr, supra note 302, at 192.
304. Id. at 200.
305. Id.
306. Id. at 201.
307. Id. Adult sons of working mothers also had higher educational aspirations. Id.
308. Id. at 203.
309. The Family and Medical Leave Act, 29 U.S.C.A. § 2601-54 (West Supp. 1995) (requiring employers of 50 or more to provide job security and health and retirement benefits to eligible employees), is a step in the right direction; but it has limitations. See infra notes 310-13 and accompanying text.
310. See Project, Law Firms and Lawyers With Children, supra note 11, at 1295-98 (policy recommendations for law firm-employers).
312. Id. at 341-42. See also Donna Lenoff & Claudia Withers, Implementation of the Family and Medical Leave Act: Toward the Family-Friendly Workplace, 3 AM. J. GENDER & L. 39, 53 (1994).
314. Dowd, supra note 311, at 342. Dowd points out that low-income, single, African-American mothers who care for extended family members are penalized. Id.
315. See Abrams, supra note 10, at 1245 (employers should make available option to work part-time for two or three years); Gellis, supra note 44, at 957 (women lawyers complained that the lack of part-time opportunities was an obstacle to success); Rhode, Perspectives on Professional Women, supra note 11, at 1206.
316. Abrams, supra note 10, at 1241; Project, Law Firms and Lawyers with Children, supra note 11, at 1296; Rhode, Perspectives on Professional Women, supra note 11, at 1206.
school schedules, the work day, and holidays is necessary.\textsuperscript{317} Good day care facilities,\textsuperscript{318} especially in-house day care or day care referral,\textsuperscript{319} are essential. The government might encourage employers to accommodate family needs by the provision of tax incentives.\textsuperscript{320}

Sociologist Cynthia Fuchs Epstein urges that the workplace and family "be considered an interactive unit."\textsuperscript{321} "Above all," she writes, "what we need from government is symbolic leadership that helps to legitimize the role of the employed mother, and, in so doing, weaken the contradictory norms that make life for working women . . . more difficult."\textsuperscript{322} She adds, "[t]his is not only a 'woman's problem,' but a social problem."\textsuperscript{323}

\textsuperscript{317} For example, few institutions make provisions for child care during school holidays or administrative "in-service" days when parents may be working. See Epstein, \textit{Women in Law}, \textit{supra} note 11, at 379; Epstein, \textit{Toward a Family Policy}, \textit{supra} note 166, at 185. See also Work Week, \textit{Wall St. J.}, July 18, 1995, at A1 (study of 1,680 parents reveals that 25\% of parents report problems with baby-sitting schedules during August, 20\% of parents face such problems in December, followed by those experiencing problems in June and July).

\textsuperscript{318} Epstein, \textit{Women in Law}, \textit{supra} note 11, at 372 (respondent believes Wall Street ought to have day care centers); Gellis, \textit{supra} note 44, at 957; Project, \textit{Lawyers and Law Firms With Children}, \textit{supra} note 11, at 1298.

\textsuperscript{319} Project, \textit{Lawyers and Law Firms With Children}, \textit{supra} note 11, at 1298.

\textsuperscript{320} Epstein, \textit{Women in Law}, \textit{supra} note 11, at 379; Rhode, \textit{Perspectives on Professional Women}, \textit{supra} note 11, at 1206.

\textsuperscript{321} Epstein, \textit{Toward a Family Policy}, \textit{supra} note 166, at 185.

\textsuperscript{322} Id. at 186.

\textsuperscript{323} Epstein, \textit{Women in Law}, \textit{supra} note 11, at 379.