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BOOK REVIEW

TOWARD GENDER EQUALITY: THE PROMISE OF PARADOXES OF GENDER TO PROMOTE STRUCTURAL CHANGE

PARADOXES OF GENDER, by Judith Lorber,* New Haven and London: Yale University Press, 1994.

*Reviewed by Andrea Giampetro-Meyer**
and Amy Fiordalisi****

One of the joys of reading is that studying the words of thoughtful, knowledgeable writers helps readers rethink the way they look at the world. Those of us who read, reason, and practice in the field of law sometimes need to experience the jolt one can feel by reading literature outside the field of law. Judith Lorber presents ideas in *Paradoxes of Gender*¹ that trigger a significant jolt. In this book, sociologist Lorber urges the reader to see the world in a new way. In particular, she asks the reader to view gender as a social institution. Lorber sees "gender as an institution that establishes patterns of expectations for individuals, orders the social processes of everyday life, is built into the major social organizations of society, such as the economy, ideology, the family, and politics, and is also an entity in and of itself."² She draws from research on the social aspects of gender from a wide range of fields to support her goal of questioning the naturalness and inevitability of gender as an institution. Lorber aims to expose the institution of gender so it can then be dismantled.

The purpose of this article is to consider the promise of social science literature, including books such as *Paradoxes of Gender*, to help women achieve equality. Section I presents a detailed review of *Paradoxes of Gender*. This section is important because it helps the reader see the kinds of information available in fields

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1. JUDITH LORBER, *PARADOXES OF GENDER* (1994).

2. *Id.* at 1.

outside law that could promote change through and within the legal system. Section II shows how social science literature can help us rethink the way we look at legal issues. This section focuses on three legal issues—domestic violence, rape, and comparable worth—and shows how Lorber's book and other social science information can affect our views of these areas of law. The article concludes by pondering the effect of requiring judges and lawyers to read books such as *Paradoxes of Gender*. This article proposes that judges and lawyers can and should learn from the social sciences, but also that most judges and many lawyers would be reluctant to do so.

I. PARADOXES OF GENDER: A CHALLENGE TO OUR MOST BASIC ASSUMPTIONS ABOUT GENDER

Lawyers and judges often are reluctant to look outside the field of law for answers to compelling social questions. If asked how women can achieve equality, most judges and lawyers would look to past cases that focused on gender discrimination issues and to statutes that aim to combat gender discrimination. After a review of cases and statutes, debates by those in the legal field who care about eliminating gender inequality would likely focus on the relative effectiveness of judicial and legislative decision making to promote such change. Footnotes would be extensive and exhaustive, yet would probably not include references to sources other than cases, statutes, and law review articles—which cite cases, statutes, and more law review articles.

What a surprise it is, then, when lawyers look outside their discipline to see the approach other scholars take to answering compelling social questions. In *Paradoxes of Gender*, Judith Lorber challenges our most basic assumptions about gender. Like a legal scholar, she is thorough. Her bibliography is long; her notes are thick. Unlike a legal scholar, however, Lorber challenges our most basic assumptions about gender by "draw[ing] on research on the social aspects of gender from anthropology, history, sociology, social psychology, sociolinguistics, men's studies, and culture studies."³ She attempts to transform these pieces "into a coherent picture of gender as a process of social construction, a system of social stratification, and an institution that structures every aspect of our lives because it is embedded in the family, the workplace, and the state, as well as in sexuality, language,

3. *Id.* at 5.

and culture."⁴ Lorber aims to present a coherent picture of gender as a social institution in order to facilitate its eventual dismantling.⁵

Lorber argues that "the whole point of gendering is to produce structured gender inequality. . . . The subordination of women persists because it produces a group that can be exploited as workers, sexual partners, childbearers, and emotional nurturers in the marketplace and in the household."⁶ She calls into question the gender system's "naturalness and inevitability."⁷ Ultimately, Lorber would like to see "a society without economic inequities, racial distinctions, or sexual exploitation"⁸

Lorber titled her book *Paradoxes of Gender* because she believes that "much of what we take for granted about gender and its causes and effects either does not hold up or can be explained differently."⁹ Lorber asserts, for instance, that gender grouping has become so standard and universal that society tends to believe feminine and masculine traits are due to genetic or physiological differences.¹⁰ She cites a women's ability to bear children as one paradox of gender.¹¹ She explains that men have created the notion that women's birth giving is a reason for their subordination, when in actuality females, because of their child-bearing ability, have an advantage over males. The ability to bring into life another human being is a "potential source of power unmatched in modern times by any physical advantages men have."¹² Lorber maintains that in most civilized cultures when people have physical disadvantages they are given varying degrees of compensation to make up for their disabilities. Lorber adopts the argument that in our culture, however, "men . . . have received compensation in the form of social customs that give

4. *Id.* Many judges and legal scholars have pointed out that discrimination is entrenched in institutions, including American legal institutions. See, e.g., Deborah Ruble Round, *Gender Bias in the Judicial System*, 61 S. CAL. L. REV. 2193 (1988).

5. LORBER, *supra* note 1, at 10.

6. *Id.* at 292-93. For legal scholars' opinions consistent with Lorber's, see DEBORAH L. RHODE, *JUSTICE AND GENDER* (1989); Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81 (1987).

7. LORBER, *supra* note 1, at 5.

8. *Id.* at 293.

9. *Id.* at 5.

10. *Id.* at 6

11. *Id.*

12. *Id.* (citing Sandra Schwartz Tangri, *A Feminist Perspective on Some Ethical Issues in Population Programs*, 1 SIGNS 895, 896 (1976)).

them power over the able—that is, over women's bodies—and fertility."¹³

Lorber presents a lengthy list of the many "paradoxes of gender" that permeate and envelop our everyday lives.¹⁴ She examines and questions gender norms our world has created.¹⁵ She asks, for instance, why women are expected to be the primary child rearers and parents even when both parents work. She blames this paradox on the effects of gendered parenting, which

13. *Id.* (citing Tangri, *supra* note 12).

14. In the first part of her book, Lorber examines the following paradoxes:

Why does gender simultaneously construct difference and sameness?

Why are the phenomena of bodily experiences gendered?

Why, given the variety of sexual behaviors and relationships, do we speak of only two opposite sexes?

Why don't transvestites, transsexuals, hermaphrodites, and the institutionalized third genders in some societies affect the conceptualization of two genders and two sexes?

Why are most of our cultural images of women the way men see them, not the way women see themselves?

Id. at 7-8.

In part two, Lorber asks:

Why was inequality of women and men the consequence of human's invention of gender when originally the gendered division of labor was a means of cooperatively expanding the food supply and ensuring the survival of children?

Why are all women expected to have children and care for them in modern society? How does this responsibility co-opt women into a system of inequality?

Why is domestic work the wife's responsibility in modern societies even when she earns more than half the family income?

Id. at 8.

In the third and final section of her book, Lorber asks:

Why does gendered segregation of jobs and lower compensation of work done by women persist throughout industrialized economies despite the enormous variety of types of work and work skills?

Why, when women can be found in substantial numbers in many occupations and professions, are there so few women in positions of authority in modern industrialized societies?

Why do societies established for equality (including, in some revolutionary cases, gender equality) still exhibit substantial and systematic gender inequality?

Why, since gender is socially constructed, is it so difficult to eradicate or even minimize?

Id.

15. Lorber focuses on a particular paradox in each chapter. In the first part of her book, Lorber discusses the various components of gender, including socialization, biology, sexuality, and cultural images. In the second part of her book, she examines gender in practice by evaluating the social evolution of gender, gendered parenting, gender and domestic labor, and the division of paid work. Finally, Lorber analyzes the politics of gender and discusses the micropolitics of gender, gender and the state, and gender and equality. *Id.* at vii, viii.

are that females throughout their lives "are psychologically co-opted into wanting to be good mothers, and both the competence and the feelings become a significant part of being a 'good woman.'"¹⁶ Lorber believes, however, that men as well as women could and would be good mothers. She argues that "the phenomenon we call mothering is a learned experience, and the doing of it by anyone develops skills, competence, and emotional relationships."¹⁷

Lorber looks further into the paradoxes of gender in her chapter called "Guarding the Gates: The Micropolitics of Gender."¹⁸ This chapter is one of the best in the book. In this chapter, she examines why in the last decade women numbered between 42.4% and 45.4% of the work force, yet only five women were heads of the largest corporations.¹⁹ The belief that upward mobility and leadership positions would increase among women as they entered the work force "greatly underestimated the social processes that get some people onto the fast track and systematically derail others."²⁰ Through networking, mentoring, sponsorship, and social practices, men have managed to keep the majority of women in middle-management positions. Most women in these positions remain underpaid and are unable to assist their female coworkers progress up the corporate ladder.²¹

In each chapter, Lorber helps us understand why these paradoxes of gender exist and how they have become entrenched in our everyday lives. Her message is that gender is a "human invention, like language, kinship, religion, and technology; like them, gender organizes human social life in culturally patterned ways."²² She believes we have the ability to change society's

16. *Id.* at 169. For a particularly good discussion from the legal community about women as mothers, see West, *supra* note 6. West asserts that "[o]ur reproductive role renders us non-autonomous Emotionally and morally women may benefit from the dependency of the fetus and the infant upon us. But *materially* we are more often burdened than enriched by that dependency." *Id.* at 140.

17. LORBER, *supra* note 1, at 168.

18. *Id.* at 225.

19. *Id.* (citing Barbara Marsh, *Women in the Work Force*, WALL ST. J., Oct. 18, 1991, at B3). Most female employees remain in "relatively low-status, low-paying, female-dominated vocations." RHODE, *supra* note 6, at 161.

20. LORBER, *supra* note 1, at 226.

21. *Id.* Women in the legal community have experienced the derailment Lorber describes. Studies in numerous states on gender bias in the courts have noted that women who work in the legal community are often shut out of the network men enjoy. See, e.g., Deborah R. Hensler, *Studying Gender Bias in the Courts: Stories and Statistics*, 45 STAN. L. REV. 2187, 2189 (1993) ("There is a general aura of a 'good old boys' network from which women are excluded") (citing to a letter from a female practitioner).

22. LORBER, *supra* note 1, at 6.

perceptions of gender and, in doing so, to create a more just and fair world in which ability and worth would not be judged by sex or color, and opportunity would be available to all.²³ In discussing the numerous paradoxes of gender, Lorber attempts to contribute to the cause of changing the status quo. She promotes "real change" that would eventually result in a "reordering of the organizing principles of social life ... with awareness of hidden assumptions ... and latent effects"²⁴ She wants her reader to see gender in a new way so that structural change to promote gender equality will take place. Right now, the whole point of gender is to maintain gender inequality. Lorber wants to change our view of gender in the hope of promoting equality.

II. THE CONTRIBUTION OF SOCIAL SCIENCE LITERATURE TO LEGAL ISSUES

This section focuses on three legal issues—domestic violence, rape, and comparable worth—and illustrates how *Paradoxes of Gender* and other works in the social sciences can affect the law. This section shows both the promise and shortcomings of social science literature as a potential contributor to legal issues. The first two legal issues, domestic violence and rape, were chosen because judicial bias has affected these areas of law so clearly. Lorber's work helps us increase our understanding of judicial bias and media reactions to bias. Comparable worth was chosen for a different reason. This legal theory demonstrates the difficulty of trying to promote structural change through an individualistic legal system. By reviewing the comparable worth theory and the legal system's response to it, we can see that judges would be reluctant to take seriously the idea that any institution (including gender as a social institution) can and should be dismantled.

A. *Judicial Bias, Domestic Violence, and Rape*

Lorber's perspectives on domestic violence, or "battered love," and rape shed light on how actors in the legal system respond

23. *See id.*

24. *Id.* at 10.

to these issues.²⁵ She explains her views on domestic violence and rape in a chapter titled "How Many Opposites? Gendered Sexuality." In this chapter, Lorber presents ideas about battered love. She says that men who physically abuse their spouses usually do so because society associates masculinity with norms of dominance.²⁶ Men who do not have the economic status to enforce a dominant stance tend to be psychologically or physically abusive toward their mates.²⁷ Women who stay in abusive relationships are often socialized into believing that they must emotionally support their husbands.²⁸ Because of economic constraints, or fear of what their spouses would do if they tried to leave, abused women often see no way out of abusive relationships.²⁹ Lorber points out correctly that "[w]ife beating was once approved in most communities and is still condoned today where there is an ideology of men's authority over their wives."³⁰ She also draws attention to the lackadaisical response of doctors, nurses, and the police to battering, and suggests this response reflects the idea that domestic violence is just part of life.³¹

In the same chapter, Lorber explores the link between masculinity and rape. She explains that sex crimes against women "are almost mythic metaphors for men's dominance and women's submission."³² She also points out that rape is so common that often "it takes a particularly brutal gang rape to make headlines."³³ In addition, she notes how difficult it is for our society to consider date rape "real" rape³⁴ even though in fifty-two percent of the completed rapes of women and girls, the offender

25. *Id.* at 55; see also RHODE, *supra* note 6, at 241-44 (discussing and explaining battered wife syndrome). See generally Matthew Litsky, Note, *Explaining the Legal System's Inadequate Response to the Abuse of Women: A Lack of Coordination*, 8 N.Y.L. SCH. J. HUM. RTS. 149 (1990) (presenting a thorough discussion of justifications for police non-enforcement in wife abuse cases, and proposing ideas for how the legal system could do a better job of ending spousal abuse).

26. LORBER, *supra* note 1, at 71.

27. *Id.* (citing LENORE E. WALKER, *THE BATTERED WIFE SYNDROME* (1984); Kersti Yllö, *The Status of Women, Marital Equality, and Violence Against Wives*, 5 J. FAM. ISSUES 307-30 (1984)).

28. *Id.*

29. *Id.* at 71-72.

30. *Id.* at 73.

31. *Id.* See Litsky, *supra* note 25 (providing additional information on the lackadaisical attitude of actors in the legal system).

32. LORBER, *supra* note 1, at 75. See RHODE, *supra* note 6, and West, *supra* note 6 for discussions of rape from feminist legal theorists.

33. LORBER, *supra* note 1, at 75.

34. *Id.* (citing SUSAN ESTRICH, *REAL RAPE* (1987)).

was an intimate of the victim.³⁵ In all types of rape, Lorber sees a link between the crime and masculinity. She explains that generally, men who rape feel "that women should be sexually faithful and men should be tough, fearless, and determining what sexualities will have moral hegemony."³⁶

Lorber's views on domestic violence and rape help us see judicial bias and its impact on domestic violence and rape cases from a new perspective. This section will first summarize judicial bias and its impact on domestic violence and rape cases, then it will explain how Lorber's work helps increase our understanding of judicial bias in rape and domestic violence cases. This section incorporates examples from an article titled *America's Most Sexist Judges* from a popular women's magazine.³⁷ The section illustrates that although the most outrageous comments judges make may often trigger emotional responses, these comments are not surprising in a culture in which gender is a social institution that perpetuates inequality.

Many people believe that judges are unbiased and impartial mediators.³⁸ Their decisions affect the lives of many and it is critical that they are able to maintain at least the appearance that their opinions are free from obvious value assumptions. Judges cannot be impartial, however, when they harbor traditional stereotypes and attitudes towards women. These damaging attitudes appear in their courtrooms and in their rulings. Because most judges are male,³⁹ they may hear evidence about women's experiences but fail to understand the experiences.⁴⁰ They may

35. *Id.* (citing CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 7 (1991)).

36. *Id.*; see also West, *supra* note 6, at 809. West writes that "[t]hose in power ignore women's suffering because they don't care about the suffering of the disempowered. Hierarchical power imbalances do that to people—they make the disempowered less than human, and they make the empowered ruthless." *Id.* West describes the radical feminist's strategy to solve this problem: "[W]hat we must do is dismantle the hierarchy." *Id.*

37. Sheila Weller, *America's Most Sexist Judges*, REDBOOK, Feb. 1994, at 83.

38. Numerous cases have asserted the importance of the judge as a neutral ruler. See, e.g., *In re Mussman*, 302 A.2d 822, 824 (N.H. 1973) ("[L]itigants and the public have a right to a court free from the shadow of unfitness. 'It is the right of every citizen to be tried by judges as impartial as the lot of humanity will admit.'" (quoting N.H. CONST. pt. I, art. 35)).

39. When Justice Sandra Day O'Connor was appointed to the Supreme Court, only 5.4% of all federal judges were women and of more than 20,000 judicial positions only 900, or 4.5%, were held by women. ESCHER M. RHODIE, DISCRIMINATION AGAINST WOMEN: A GLOBAL SURVEY OF THE ECONOMIC, EDUCATIONAL, SOCIAL AND POLITICAL STATUS OF WOMEN 288 (1989).

40. Karen Czapsanskiy, *Gender Bias in the Courts: Social Change Strategies*, 4 GEO. J. LEGAL ETHICS 1, 3 (1990).

be unable to see past their own stereotypes about women and men.⁴¹ Male judges also may be unable to accord the same credibility to a woman's testimony as they would to a man's.⁴²

When critics of the legal system point out the lack of gender diversity on the bench, they imply that older, male judges could have difficulty understanding and appreciating a women's point of view.⁴³ The severity of the domestic violence problem in American society demonstrates how these sociological differences can lead to grave consequences.⁴⁴ Many laws pertaining to domestic violence are burdened by traditional constraints and reflect a lack of understanding of economic and social obstacles that women face.⁴⁵ Most of these laws, not coincidentally, were written by legislatures that are dominated by men.

Unfortunately, it is in our courtrooms that women suffer some of the most damaging effects of traditional constraints and prejudices. Judges, like members of the general public, may accept the many myths about domestic violence.⁴⁶ For instance, "many judges believe that battered women are masochists or that they exaggerate the seriousness of the violence they suffer to punish 'philandering husbands or boyfriends.'"⁴⁷ Additionally, many judges respect family privacy to such a great extent that they fail to protect domestic violence victims. In one case, for example, a judge chided a battery victim for washing her "dirty linen in public."⁴⁸

Judges who take their biased attitudes into the courtroom have the power to destroy lives and break up families. For instance, in a custody battle, Judge Jerry Carr Whitehead, age fifty-nine, of the Second District Court in Reno, Nevada, took one woman's son away from her after a court-appointed psychologist met and evaluated only her ex-husband.⁴⁹ In domestic violence cases, judges often let husbands get away with injuring their wives simply because the couple is married. For example,

41. *Id.*

42. *Id.* at 3-4.

43. *See id.*

44. "In any given year ... 10 to 20 percent of American women are beaten by a man with whom they are intimately involved About one-third of all female homicide victims are killed by a male friend or family member" RHODE, *supra* note 6, at 237.

45. *See generally* Litsky, *supra* note 25 (delineating the numerous inadequacies of laws that aim to protect women from domestic violence).

46. *Id.* at 169.

47. *Id.* at 169-70.

48. *Id.* at 170.

49. Weller, *supra* note 37, at 84.

Judge William J. O'Neil, age sixty-four, of Carroll County Superior Court in New Hampshire, sentenced Stephen Sarno to a mere twenty-eight days (to be served over consecutive weekends) for beating Susan Sarno, from whom he had been separated for a year. Stephen Sarno stalked his wife on a camping trip and beat her with a flashlight when he found her in bed with another man. Judge O'Neil stated, "I can't conclude that [the attack] was completely unprovoked. I think that would provoke the average man."⁵⁰ The judge did admit the attack went too far. He told the wife, "to have slapped you might have been more normal."⁵¹ The judge's superior later apologized publicly to Susan Sarno for the "insensitivity" she experienced in court.⁵²

Although rape is probably one of the single most devastating crimes a woman could experience, rape victims often are treated with disdain and insensitivity in the courtroom.⁵³ Judges and jury members, like much of American society, hold views biased by stereotypical attitudes and traditional thinking. As Lorber points out in *Paradoxes of Gender*, rape is a crime burdened by traditional and societal beliefs that stress male dominance and female submissiveness.⁵⁴ The attitudes are often expressed in legal proceedings. Victims often must prove that they were forcibly raped and refused to consent. Victims who fail to fight their attackers are encouraged to believe that they have not been really raped, or that they ought to have prevented it. Women who believe that struggling with an assailant is likely to trigger further physical injuries end up facing an unsympathetic legal system, which has laws and attitudes that respect women who fight back.⁵⁵

Rape is an especially sensitive subject. It is a traumatic experience for a woman and is only worsened by society's negative attitudes and bias towards rape victims.⁵⁶ Judges often cannot understand or relate to the victim's pain, or they tend to minimize the seriousness of the crime. For instance, Judge Thomas Bollinger, age fifty-two, of Baltimore County Circuit Court, granted

50. *Id.*

51. *Id.*

52. *Id.*

53. See generally Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986) (providing a thorough discussion of courts' insensitivity to rape victims).

54. See LORBER, *supra* note 1, at 76-77.

55. See RHODE, *supra* note 6, at 247.

56. See generally Estrich, *supra* note 53 (discussing how sexism permeates attitudes about rape).

mere probation to a forty-four year-old man who was found guilty of raping his eighteen year-old employee after she got drunk and passed out on his bed.⁵⁷ At the sentencing last April, Judge Bollinger said the victim had "facilitated" the crime by getting drunk, and he worried that criminalizing intercourse with a sleeping woman might make many husbands rapists in the eyes of the law.⁵⁸ This type of bias is seen in courtrooms all over America.⁵⁹ Many states have already initiated changes to address the damaging attitudes that trigger incidents in which some judges express extreme insensitivity to women.⁶⁰ Many women's groups have picketed courthouses⁶¹ and national and local commentators have written scathing articles about judicial bias in order to promote change.⁶²

Social science literature is promising in terms of its ability to promote change and reform. A review of *Paradoxes of Gender* helps to increase one's understanding of why many judges lack sensitivity in the issues of rape and domestic violence. It is helpful yet distressing to read Lorber's account of how deep-rooted attitudes and beliefs about gender can be. Reading Lorber's book, however, makes it easier to understand why judges sometimes make outrageous and sexist comments and decisions. These judges are not villains. Instead, they are natural products of a culture in which gender is a social institution that perpetuates inequality. The few judges who say outrageous things—and those who harbor the same appalling views but know better than to utter sexist comments—are simply protectors of the status

57. Sheridan Lyons, *Rapist Gets Probation, Judge's Pity*, BALTIMORE SUN, Apr. 23, 1993, at 1R.

58. See Weller, *supra* note 37, at 84.

59. Most states have conducted gender bias studies that outline comments made by judges in specific cases. See Lynn Hecht Schafran, *Gender Bias in the Courts: An Emerging Focus for Judicial Reform*, 21 ARIZ. ST. L.J. 237, 246-51 (1989).

60. See Ruble Round, *supra* note 4, at 2197-2201.

61. In Baltimore, local women's groups picketed Judge Bollinger's courtroom until he was required to take a rape sensitivity course. Larry Carson, *Rape Sentence Protest*, BALTIMORE SUN, May 1, 1993, at 1B; *Protesters Express Outrage at Judge, Refusal to Take Rape Sensitivity Course is Cited*, BALTIMORE SUN, Aug. 6, 1993, at 3B.

62. See, e.g., Bruce L. Bortz, *The Bollinger Affair*, BALTIMORE SUN, May 20, 1993, at 19A (suggesting that Baltimore County courts' reputation for hostility toward women is well deserved); Ellen Goodman, *Ms-Ogynists Have Their Day: The Envelopes, Please*, BALTIMORE SUN, Aug. 24, 1993, at 11A (awarding Judge Bollinger the "Blind Justice Award" for helping to set back the progress of women); Michael Olesker, *Sexual Predators Aided, Abetted by Wink and Leer*, BALTIMORE SUN, Apr. 27, 1993, at 1B (wondering whether Judge Bollinger would have reached the same decision had the rape victim been his own daughter).

quo. Their behavior is one small symptom of a much larger structural problem.

The structural nature of the problem should affect our responses to judges' outrageous, ignorant comments. Persuading a judge to read and appreciate *Paradoxes of Gender* seems more fruitful than organizing women's rights groups to picket the courthouse in which a particular judge practices his version of justice. Picketing is an incremental solution to a structural problem that requires more serious, long-term solutions. Reading Lorber's book also encourages one to question the value of gathering outrageous comments in articles with titles like *America's Most Sexist Judges*. The problem is simply much larger than the comments made by the few judges such articles highlight. In addition to writing and reading such articles, people who care about equality should read more social science literature. Interdisciplinary reading yields new, more productive ideas about how to change societal institutions.

B. Comparable Worth

One of Lorber's strengths is her ability to get to the essence of an issue quickly and to write a pithy section on an issue that is complete and insightful. Her section on comparable worth⁶³ is a particularly strong one. This section is part of one of the most important chapters in the book, titled "Separate and Not Equal: The Gendered Division of Paid Work."⁶⁴

In the pay equity or comparable worth section of the chapter, Lorber defines comparable worth, gives good examples of pay equity lawsuits that illustrate the theory, and provides important evaluative comments about how various groups have implemented comparable worth theory.⁶⁵ She points out, for instance, that under comparable worth evaluation systems, consultants have had difficulty recognizing and rewarding human relations

63. LORBER, *supra* note 1, at 219-22.

64. *Id.* at 194-222. Comparable worth theory compares jobs held predominantly by women with those held predominantly by men. The theory posits that employees should be compensated equally for jobs that are equally complex, or that require similar skills or responsibilities. Under this theory, evaluators assign points for different components of a job—such as knowledge and skills, mental demands, and working conditions—and then compare the total points of predominantly men's and predominantly women's jobs. Jobs with equal total points should pay equal salaries. *See id.* at 219.

65. *Id.* at 219-22.

skills.⁶⁶ As a result, employees who possess such skills, many of whom are female, have their skills labeled "basic."⁶⁷ Lorber explains, furthermore, that "[d]angerous or dirty working conditions tend to be rewarded with extra points, but boredom from routinized and heavily supervised work is not usually considered an adverse working condition."⁶⁸ As a result, assembly line and data processing workers receive fewer points than construction workers.⁶⁹

Lorber points out the limited effectiveness of comparable worth theory, which is rare for someone who is an advocate for increased equality for women.⁷⁰ She writes, "[d]espite its purported radical implications, the comparable worth strategy does not restructure the economy, eliminate workplace hierarchies, flatten out major wage differentials, or remove other forms of gender inequities."⁷¹ She points out that it is unlikely that comparable worth will eliminate occupational gender segregation and stratification.⁷² Additionally, the theory "will not address hiring discrimination based on the gender or race of the worker or inequities in discretionary raises and promotion; these are affirmative action issues."⁷³ Finally, she points out that comparable worth theory also fails to provide an unbiased assessment of job demands and commensurate financial compensation.⁷⁴ Lorber writes that "[o]rganizational politics and the power of some groups ... determine who benefits from comparable worth."⁷⁵ She states that "comparable worth is hardly radical."⁷⁶

Lorber supports her indictment of comparable worth with social science studies and calls for action that is *more* radical

66. *Id.* at 220 (citing JOAN ACKER, *DOING COMPARABLE WORTH: GENDER, CLASS, AND PAY EQUITY* (1989)).

67. *Id.*

68. *Id.* at 219.

69. *Id.*

70. *Id.* at 220-21; see also Brigitte Berger, *Comparable Worth at Odds with American Realities*, in 2 *COMPARABLE WORTH: ISSUE FOR THE 80's* 26 (U.S. Comm'n on Civil Rights ed., June 6-7, 1984) (arguing that comparable worth ignores the priority American women place on taking care of their families and asserting that the criteria used to assess the "worth" of jobs ensures that comparable worth will end up helping the women who least need the help).

71. LORBER, *supra* note 1, at 220.

72. *Id.* at 221.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 222 (citing Johanna Brenner, *Feminist Political Discourses: Radical Versus Liberal Approaches to the Feminization of Poverty and Comparable Worth*, 4 *GENDER & SOC'Y* 447-65 (1987)).

than the disappointing implementation of comparable worth. Lorber hopes for a world in which "all workers [are given] the opportunity to do intrinsically and materially rewarding work"⁷⁷ This opportunity "would radically alter gender, class, and race stratification in paid work."⁷⁸

Lorber's section on pay equity or comparable worth focuses on how this theory has not successfully altered gender, class, and race stratification in paid work. Lorber places much of the blame on those who implement comparable worth.⁷⁹ This analysis is important and is overlooked by most groups, except for conservative economists, who are relieved that comparable worth has failed to achieve radical effects.⁸⁰ *Paradoxes of Gender*, however, ignores the role courts have played in minimizing the effectiveness of comparable worth.⁸¹ Judges have rejected comparable worth because it violates an institution most judges take for granted—the market.⁸² Judges who have ruled in comparable worth cases have demonstrated a desire to maintain institutions (in this case the market), even if they are presented with evidence that the institution often works in a discriminatory manner.⁸³

Judges rarely see their role as one that allows them to consider, evaluate, and/or dismantle institutions. Their focus on precedent encourages cautious, incremental reform.⁸⁴ This fact triggers important questions about how judges and lawyers who read *Par-*

77. *Id.*

78. *Id.*

79. *Id.* at 221. Comparable worth decisions often are "shot through with subjectivity, arbitrariness, and interest-group politics." *Id.* (citing William P. Bridges & Robert L. Nelson, *Organizational and Market Influences on Gender Inequality in a State Pay System*, 95 AM. J. SOC. 616-58 (1989)); see also Peter F. Orazem & J. Peter Mattila, *The Implementation Process of Comparable Worth: Winners and Losers*, 98 J. POL. ECON. 134 (1990); Robert S. Smith, *Comparable Worth: Limited Coverage and the Exacerbation of Inequality*, 41 INDUS. & LAB. REL. REV. 227 (1988).

80. For an evaluation of comparable worth from a conservative perspective, see STEVEN E. RHOADS, *INCOMPARABLE WORTH: PAY EQUITY MEETS THE MARKET* (1993).

81. See generally Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207 (tracing the role courts have played in minimizing the effectiveness of comparable worth).

82. See M. Neil Browne & Andrea Giampetro-Meyer, *The Overriding Importance of Market Characteristics for the Selection of Pay Equity Strategies: The Relative Efficacy of Collective Bargaining and Litigation in the Nursing Industry*, 11 INDUS. REL. L.J. 414 (1989) (analyzing market defense in comparable worth cases).

83. *Id.* at 428-32.

84. See, e.g., OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 35-36 (1881) ("The official theory [of the development of law] is that each new decision follows syllogistically from existing precedents. ... [I]t will be found that, when ancient rules maintain themselves ... new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form ...").

adoxes of Gender would react to the book. For professionals whose careers focus on the narrow, individualistic task of looking at the case at hand and comparing it to past similar cases, the idea of looking at legal issues from a world view that promotes structural rather than incremental change is foreign. Lawyers and judges who blindly follow the strict application of *stare decisis* would be likely to view Lorber's book as irrelevant; Lorber does not even mention cases or statutes.

A close examination of the book would alarm some lawyers and judges. More than once, Lorber mentions Marxist ideas.⁸⁵ She also supports changes that would have radical effects.⁸⁶ Her thesis—that gender is a social institution that should be dismantled—is itself radical, and many would exaggerate and call it subversive. Also, readers who fail to consider the whole book and instead merely zero in on Lorber's view of utopia would have difficulty taking her seriously. One reviewer (not from the legal field) has called her view of utopia “nightmarish.”⁸⁷ Lorber's utopia is the following:

In a world of scrupulous gender equality, equal numbers of girls and boys would be educated and trained for the liberal arts and for the sciences, for clerical and manual labor, and for all the professions. Among those with equal credentials, women and men would be hired . . . to do women's types of jobs and only women would be hired to do men's types of jobs until half of every workforce was made up of men and half, women.⁸⁸

This statement alone could trigger scores of law review articles by opponents of even the most modest affirmative action programs.⁸⁹ Perhaps viewed alone Lorber's utopia looks unrealistic (nightmarish seems strong) but in the context of a strong, comprehensive book this statement makes sense. Of course, this kind of utopia threatens those who benefit most from the status quo—those who already enjoy positions of power, wealth, and influence—many of whom are lawyers and judges. Which legal profes-

85. LORBER, *supra* note 1, at 266, 284-85.

86. *See id.* at 293 (“A truly radical goal for feminism would be not just gender equality but . . . a society without gender.”).

87. Alan Wolfe, *The Gender Question: Women and Men in the Mirror of Feminist Theory*, NEW REPUBLIC, June 6, 1994, at 32.

88. LORBER, *supra* note 1, at 298.

89. For an excellent refutation of arguments against affirmative action, see DAN MCGUIRE, *A NEW AMERICAN JUSTICE* (1980).

sionals, then, might see Lorber's book as one that provides valuable evidence toward promoting structural change? More than one category of lawyers would appreciate Lorber's efforts.

First, those legal scholars who embrace the critical legal studies movement would appreciate Lorber's work.⁹⁰ Like Lorber, critical legal studies scholars aim to dismantle discriminatory social institutions. They want to examine and deconstruct the legal system and the way lawyers are trained in much the same way that Lorber wants to deconstruct gender as a social institution. Critical legal studies scholars, like Lorber, first want to expose the structural problems inherent in some institutions.⁹¹

Second, feminist critical theorists would be interested in the information Lorber presents in *Paradoxes of Gender*.⁹² Feminist critical theorists, sometimes referred to as "fem-crits," believe that we will not be able to achieve gender equality under existing ideological and institutional structures.⁹³ Like critical legal studies theorists, fem-crits challenge existing distributions of power. Unlike critical legal studies theorists, fem-crits emphasize that "important aspects of mainstream legal doctrine and theory were 'developed with men's experience and interests in mind [and] are incapable of adequately recognizing women's needs or incorporating women's experiences.'" ⁹⁴ These theorists believe that "significant changes are needed in the law in order to promote greater equality between the sexes."⁹⁵

These views sound much like Lorber's, although the fem-crits aim to deconstruct a different institution. Fem-crits want to deconstruct the legal system and change ways law schools train students; Lorber wants to deconstruct gender itself as a social institution. Although the ultimate goal is different, it is with the fem-crits that Lorber would enjoy the most acceptance and appreciation within the legal system, given their shared perspective that gender matters in a foundational way.

90. For thoughtful overviews of the critical legal studies movement, see Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61 (1988); Comment, *The Schism Between Minorities and the Critical Legal Studies Movement: Requiem for a Heavyweight?*, 11 B.C. THIRD WORLD L.J. 137 (1991).

91. See Menkel-Meadow, *supra* note 90, at 66-71.

92. For excellent overviews of feminist critical legal theory, see Gregory Bassham, *Feminist Legal Theory: A Liberal Response*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 293 (1992); Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990).

93. See Rhode, *supra* note 92.

94. Bassham, *supra* note 92, at 294 (citing WILL KYMLICKA, *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 238 (1990)).

95. *Id.*

Finally, legal scholars who promote gender equality, but who do not necessarily follow the critical legal studies movement or appreciate feminist jurisprudence, might find Lorber's ideas enlightening.⁹⁶ Some scholars who push for equality for women may be frightened by Lorber's insistence that change must be structural rather than incremental. Most lawyers, regardless of their political tendencies, are taught to prefer incremental change. Lorber's book provides information that supports such incremental change. For instance, an increased understanding of how various groups have failed to successfully implement comparable worth might help future consultants and lawyers to one day implement comparable worth, even if they ignore Lorber's more "radical" ideas.

III. CONCLUSION

Paradoxes of Gender reminds lawyers and judges of the importance of looking beyond the field of law for insight into social issues that are played out in the legal arena. Issues rooted in the fields of anthropology, history, sociology, social psychology, sociolinguistics, men's studies, and culture studies often evoke intense dramas in courtrooms, lawyers' offices, and judges' chambers. Lorber's work is important. Although the book does not provide "the answers" to questions about gender equality, it does what a good book must do—presents valuable information that could trigger new ways of looking at the world.

96. For examples of authors who favor increased equality for women, but are moderate in their approach, see Mary A. Mason, *Beyond Equal Opportunity: A New Vision for Women Workers*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 393 (1992); Charlotte Rutherford, *African American Women and "Typically Female," Low-Wage Jobs: Is Litigation the Answer?*, 17 YALE J. INT'L L. 211 (1992).