

Edited by  
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The Handbook of *Women,*  
*Psychology,*  
and the Law



**CSPP**

CALIFORNIA SCHOOL OF PROFESSIONAL PSYCHOLOGY

Andrea Barnes

*Editor*

— **The Handbook of  
Women, Psychology,  
and the Law**



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**The Handbook of Women,  
Psychology, and the Law**

*To those teachers who, through their kindness  
and their example, showed me the importance  
of understanding women's lives. Thanks to Steve  
Schiavo, Laurel Furumoto, Elizabeth Douvan,  
Leslie Espinoza, and Martha Minow.*

## Introduction

When a baby is born, there is one thing we want to know: Girl or boy? It is good manners to ask about the health of the baby first, and of course we want to know how mother and child fared during the birth. But once we are assured of their health and safety, we want to know: Girl or boy? We have to know, because without that piece of information, our imaginations are stuck. We want to be able to think about how this new member will fit into the rest of the family. We want to think about how we will interact with the new child. Will she follow in the footsteps of the family business tycoons, or artists, or teachers? Will we identify with him? Will we make a point of giving him career advice so that he can avoid the mistakes we made? Will we want to give her beauty advice? Will he be the shortstop or quarterback we can brag about? Will she be the devoted child who makes up for those times when we did not feel loved? Will he carry on the family name? How will she fit in our models for how families work? Is this a child who will help cook the Thanksgiving turkey? Is this the child who will clean up afterward—or the child who will sit and watch football while others clean? Will we encourage this child to be nice? Ambitious? Accommodating? Proud?

Our imaginations require that we know the gender of the new person. Only with that information can we begin to organize our expectations and our perceptions. The classic study of infants by Rubin, Provenzano, and Luria (1974) first documented this process, and the results have been replicated since (Karraker, Lake, & Vogel, 1995). Adults looking at the very same babies will describe them differently depending on their belief about the baby's gender. If the adults thought they were looking at a female infant, she was described as sweet, fragile, and fine-featured. If the adults thought they was looking at a male infant, he was described as strong, vigorous, and energetic.

Research on attachment relationships (Main, 1996) has demonstrated that the quality of the relationship between a mother and a child when the child is one year old can be predicted from the mother's

responses to an interview about her own relationships with her parents. The mother's interview took place during the pregnancy, before the baby was even born and available to influence the relationship. This speaks to the power of our expectations to influence our behavior and, even more subtle, the power of our expectations to influence what we see. The research subjects saw a more vigorous baby when they thought he was male. The interviewed mothers saw their new babies through the lens of their own personal relationship histories.

Gender is a core attribute that organizes our thinking consciously and unconsciously. We know this based on psychological research. We know this based on the history of sex discrimination law. We know this when we see Julia Sweeney's *Saturday Night Live* ambiguously sexed character, Pat. At the heart of every Pat sketch is the determination of the other characters to figure out if Pat is male or female. We relate to their frustration because we also want to know. We laugh with the same frustration at the way Pat's partner, "Chris," is equally ambiguous. We are uncomfortable not knowing.

This book offers a sampling of the many ways that gender affects experience. Whether the context is domestic or international, a courtroom or a business or a clinic, gender matters. It influences ideas and expectations, and they shape behavior and laws. Across settings, the experiences of women are shaped by patterns of power and dominance, cultural expectations, economic disparities, and internalized models of social relationships that are defined by gender.

The experiences of women are also shaped by absence and invisibility: what does not get noticed, discussed, valued, or included. This includes invisibility in the workplace. As Fletcher (1999) demonstrates, the relational work that women are expected to do does not quite make it into the job evaluation. It includes the "second shift" of the average working mother, which occurs after she comes home from her paid employment, when she has the primary responsibility for the care of the emotional and physical needs of family members (children, husband, elderly parents, or parents-in-law). She has this responsibility because she is female. She may ask for "help" in these duties, but that they are her responsibility is not likely to be questioned (Hochschild & Machung, 2003). It includes the routine exclusion of women as subjects in health care and drug research, because their inclusion makes the subject pool less "homogeneous" and more complicated statistically (Epstein, 1996), even when women will be the consumers of the drugs.

In every context, we see the power of language to define experience. When it is men defining the experience of women, the results can be surprising. In the law pregnancy is not seen as a gender-related issue because health benefits divide employees into “pregnant people” and “nonpregnant people” (*Geduldig v. Aiello*, 1974). Using this logic, a company can choose not to pay for the health care costs of pregnancy, even if it does cover illnesses related to the prostate. Under similar logic, erectile dysfunction is viewed as a health disorder for which insurance should cover the cost of treatments such as Viagra, while pregnancy is not a health problem and insurers should not be required to cover the cost of birth control pills. Those psychological and legal scholars who use a power and dominance model to explain gender relations will readily note the irony: that we are enabling men to have more sex and simultaneously making it more difficult for women to protect themselves from the consequences of that sex.

Jean Baker Miller (2003), a psychiatrist who has written about the psychological effects of gender, notes the following:

Power is very real and is operating in front of us all the time. Quite amazingly, those who have the most power in our society almost never talk about it, and even more amazingly, they induce many of the rest of us not to recognize it, either. [Through distorted representations of groups in film] we absorbed . . . untruths routinely every week. . . . This is one example of how the “cultural materials” of a dominant group mystify its operation of power.

For various historical reasons, a dominant segment in any society tends to divide people with less power into groups by race, class, gender, sexual preference, and the like. The dominant group often gains tremendous power over the less powerful groups in economic, social, political, and cultural realms. But dominant groups do not usually say, “I have great power over your life; I want to keep it and, if possible, increase it because I’m afraid of losing any of it to you.”

It is important to recognize that there are different kinds of power. We use the term “power-to” to mean the ability to make a change in any situation, large or small, without restricting or forcing others. The term “power-over” we apply to situations or structures in which one group or person has more resources and privileges and more capacity to force or control others. Structural power reinforced by power-over practices obstructs growth and constructive change.

Dominant groups usually manufacture false belief systems that act to perpetuate their power-over position and sustain their separation from subordinate groups. Patricia Hill Collins (1990), an African-American sociologist, discusses the impact of controlling images. She notes that dominant groups tend to create sets of images about themselves and about each of the "subordinate" groups. These controlling images are always false, yet they exert a powerful influence, holding each group in its place and maintaining the status quo. We absorb these images about others and ourselves, usually without fully realizing it. . . . This is part of the way dominant groups mystify their power-over practices and entice many of us into cooperation [p. 5].

## MYSTIFICATION AND BIOLOGY

The concept of mystification helps us understand how gender stereotypes can be perpetrated, maintained, and internalized, until we are almost convinced they are true. We live in a culture that provides contradictory messages about almost everything, and gender is no exception. Any challenge to the status quo is met with opposition. Frequently, that opposition takes the form of biological mandates, or "natural law," which suggest that women are limited by the immutable characteristic of sex and it is the result of biology, nature, genetics, or, more recently, evolutionary forces that require women to be in a culturally inferior position.

When women began to assert their rights to education, property, and the vote, the science of the times warned of the health dangers of a higher education. The data were clear: women with college educations tended to have fewer children. In the late 1800s, the explanation was biological: education was literally impairing women's fertility, primarily by exhausting them with all that thinking (Barnes, 1985).

If the health dangers were not enough to keep women from seeking an education, then the genetic explanation was available. The variability hypothesis argued that only males could be expected to achieve great things. This "scientific" hypothesis pointed to the data: the historical records demonstrated that only men had made great intellectual and societal achievements. It also demonstrated that there were more men than women institutionalized for "mental defects." The conclusion was clear: men were genetically endowed with more potential to reach extremes in both directions, while women were re-

signed to mediocrity. The subtext was, Why bother educating women, who could achieve only modest goals (Barnes, 1985)?

As late as the 1960s, women at Harvard Law School were formally required to justify their presence. Alumnae have described an annual ritual, a dinner hosted by the school's dean, Erwin Griswold, where the guest list included all of the women in each class (and none of the men), along with selected faculty and their wives. After dinner the students were called upon, one by one, to answer Griswold's horrifying question, "Why are you at Harvard Law School, taking the place of a man?" (Hope, 2003). While the history of legal education in the United States was primarily that of exclusion of women, professional psychology was not dramatically more liberal. Women began earning Ph.D.s in psychology in the late 1800s, but they did it at the cost of a personal life. One could choose to be a professional or have a family, but not both. Institutions of higher education, even those most accepting of women as professors, required that they leave teaching once they married (Barnes, 1985).

## MYSTIFICATION AND THE PSYCHE

By the early 1900s, psychology was beginning to explain gender inequalities as the result of intrapsychic conflicts. It was not that there was inherently a problem with women's legal, cultural, or economic status. The problem was that women did not willingly accept their inferiority. Freud himself had warned his colleagues, "We must not allow ourselves to be deflected . . . by . . . the feminists, who are anxious to force us to regard the two sexes as completely equal in position and worth" (quoted in Steinem, 1994, p. 20). Modern psychoanalysis continues to struggle with Freud's concept of penis envy. One strategy is to dismiss it as children's fantasy or magical thinking based on a child's naive understanding of anatomy. This leaves open the opportunity to outgrow the "natural inferiority" that little girls experience at the discovery that they are without a penis or to compensate by acquiring a man—and therefore vicarious ownership of a penis.

One strategy is to "equalize" the child's dilemma: girls wish they had a penis, and boys wish they could have babies, because children (and perhaps adults) do not want to acknowledge any limitations. All difference is loss at the preoperational level of cognitive development (Fast, 1990). In classical psychoanalytic theory, the core issue is power:

who has the advantage between the sexes and who is lacking and therefore inferior. Girls make the heartbreaking discovery that they are not “as good as boys,” and they spend their lives trying to make up for it. The question of sexual identity is thus complicated by the value judgment that says girls are lesser.

Chodorow (1978) redefined the early childhood struggle as one of connection and separation. In this scenario, it is the boys who have the more difficult challenge of separating from the nurturing mother in order to identify with the same-sex parent. Boys have to give up the regressive pull toward mother in order to be “masculine.” Those who do not will face the ultimate criticism from peers: that they are weak, sissies—in other words, like girls. This model offers an explanation for the intensity of feeling around masculinity, and the ever-present fear of being emasculated, as if masculinity were a fragile and precarious state of being, subject at any time to being lost or stolen. Women do not worry about “losing” their femininity any more than they worry about misplacing an arm or a leg.

What these theories have in common is the locus of control. Feelings about gender identity come from within and are an inherent part of the developmental process of all humans. They are ultimately biologically based, the result of millions of years of evolution, and they are unlikely to be changed.

## **MYSTIFICATION THROUGH THE LANGUAGE OF PROTECTION AND PHYSICAL STRENGTH**

While psychologists theorized about the nature of gender identity for the individual, the law was required to make concrete decisions about the importance of gender in employment and other social relationships. Early legal decisions purported to want to protect women from the strains of the industrialized workplace by limiting hours (*Muller v. Oregon*, 1908). Making assumptions about the physical characteristics of women, these early decisions also helped promote stereotypes. It was now a legal fact that women were not as strong as men, and it was a legal value to protect women. More specifically, this was a value to protect women's bodies.

Consider the comments of Gloria Steinem (1994) about the history of the treatment of women's bodies:

Though cultural differences were many, there were political similarities in the way women's bodies were treated that went as deep as patriarchy itself. Whether achieved through law and social policy, as in this and other industrialized countries, or by way of tribal practice and religious ritual, as in older cultures, an individual woman's body was far more subject to other people's rules than was that of her male counterpart. Women always seemed to be owned to some degree as the means of reproduction. And as possessions, women's bodies then became symbols of men's status, with a value that was often determined by what was rare. Thus, rich cultures valued thin women, and poor cultures valued fat women. Yet all patriarchal cultures valued weakness in women. How else could male dominance survive? In my own country, for example, women who "belong" to rich white men are often thinner (as in "You can never be too rich or too thin") than those who "belong" to poor men of color; yet those very different groups of males tend to come together in their belief that women are supposed to be weaker than men; that muscles and strength aren't "feminine." . . .

If I had any doubts about the psychological importance of cultural emphasis on male/female strength difference, listening to arguments about equality put them to rest. Sooner or later, even the most intellectual discussion came down to men's supposed superior strength as a justification for inequality, whether the person arguing regretted or celebrated it. What no one seemed to explore, however, was the inadequacy of physical strength as a way of explaining oppression in other cases. Men of European origin hadn't ruled in South Africa because they were stronger than African men, and blacks hadn't been kept in slavery or bad jobs in the United States because whites had more muscles. On the contrary, males of the "wrong" class or color were often confined to laboring positions precisely because of their supposedly greater strength, just as the lower pay females received was often rationalized by their supposedly lesser strength. Oppression has no logic—just a self-fulfilling prophecy, justified by a self-perpetuating system. . . .

The more I learned, the more I realized that belief in great strength differences between women and men was itself part of the gender mind-game. In fact, we can't really know what those differences might be, because they are so enshrined, perpetuated, and exaggerated by culture. They seem to be greatest during the childbearing years (when men as a group have more speed and upper-body strength, and women have better balance, endurance, and flexibility) but only marginal during

early childhood and old age (when females and males seem to have about the same degree of physical strength). Even during those middle years, the range of difference among men and among women is far greater than the generalized difference between males and females as groups. In multiracial societies like ours, where males of some races are smaller than females of others, judgments based on sex make even less sense. Yet we go right on assuming and praising female weakness and male strength. . . .

But there is a problem about keeping women weak, even in a patriarchy. Women are workers, as well as the means of reproduction. Lower-class women are especially likely to do hard physical labor. So the problem becomes: How to make sure female strength is used for work but not for rebellion. The answer is: make women ashamed of it. Tough hard work requires lower-class women to be stronger than their upper-class sisters, for example, those strong women are made to envy and imitate the weakness of women who “belong” to, and are the means of reproduction for, upper-class men—and so must be kept even more physically restricted if the lines of race and inheritance are to be kept “pure.” That’s why restrictive dress, from the chadors, or full-body veils, of the Middle East to metal ankle and neck rings in Africa, from nineteenth-century hoop skirts in Europe to corsets and high heels here, started among upper-class women and then sifted downward as poor women were encouraged to envy or imitate them. So did such bodily restrictions as bound feet in China, or clitoridectomies and infibulations in much of the Middle East and Africa, both of which practices began with women whose bodies were the means of reproduction for the powerful and gradually became generalized symbols of femininity. In this country, the self-starvation known as anorexia nervosa is mostly a white, upper-middle-class, young-female phenomenon, but all women are encouraged to envy a white and impossibly thin ideal [Steinem, 1994, pp. 94–96].

## MYSTIFICATION OF POWER AND DOMINANCE

Jean Baker Miller (2003) reminds us that gender definitions have served as a means of domination and control, with this control often achieved through violence. To change the definitions of gender “appropriateness” is revolutionary and dangerous. Women have been killed for their difference (the witchcraft trials in Salem, Massachusetts, in the

late seventeenth century). Women have been killed for their conformity (funeral pyres for the wives of deceased men). Women are killed for the behavior of others (honor killings of rape victims). Women are still routinely mutilated in Africa, and they are routinely beaten in America (domestic violence).

Gender equality is not an academic or philosophical issue. It has life-and-death implications for women, whether it involves access to safe abortions in Western culture, access to medications needed to treat HIV in Africa, or protection from murder (as an adult female in rural India or as a newborn female infant in China). In recent news stories, we have seen rape trials treated as “he said—she said” relational disputes. We have discovered numerous police departments that have hundreds of “rape kits” in storage that were never sent off for DNA analysis. The explanations were consistent: it was too expensive to analyze this evidence of a crime. The results were also consistent: alleged rapists went free or never went to trial in the first place. This is violence by omission.

## MYSTIFICATION THROUGH INVISIBILITY

Law professor Leslie Espinoza (1997) describes the way in which even informed and well-intentioned professionals can disregard the perspectives and feelings of women:

After a while, try as we might, domestic attorneys, whether we are clinical law professors or representing for-pay clients, become inured to the most shocking of social taboos. Abuse becomes normalized for us. Rape of a child is awful, but it happens. Family law attorneys have routine ways of redressing the situation. This is the standard response: temporary protective orders in district court, divorce action filed in the probate court, and temporary orders during the pendency of the divorce providing for support, custody, and protection. The temporary probate court orders become permanent upon the final adjudication of the case.

The standard response is comforting to the attorney—you get to feel like the knight in white armor. It allows you not to think of the reality of what this family is going through. . . . A contextual understanding of what happened does not really matter. Only enough of the background to support the outcome is relevant.

. . . We do not wrestle with the impact of gender-related trauma. Likewise we do not recognize that race matters. . . . Our legal distance

validates the dysfunctional normalization of abuse that usually occurs in abusive families.

... The stories of women who are traumatized by abuse are suppressed by the normalization of violence toward women and children. Subordination of women—treating them like objects of property—is our cultural legacy. Historically, this violence has been acknowledged as the private right of men ruling families. Violence and rape of women are now tacitly allowed by the suppression of knowledge about abuse and the failure of the society to redress abuse. When women and children do speak, their stories are distorted to make them willing victims, liars, provocateurs, and crazies.

... Who is listening and how they listen affect the ability of the speaker to talk. There is an interaction between speaker and listener. In a symbiotic way they can work together for deeper levels of understanding [pp. 904, 905, 908, 915, and 923].

## PSYCHOLOGY AND THE LAW

The courts must make decisions about cases before them in a timely manner. The U.S. Constitution guarantees a “fair and speedy trial” to criminal defendants. The courts do not have to rely on the most current research on gender, but they do have to provide decisions that are consistent with past legal decisions (that is, precedent). Court decisions tend to reflect well-established social norms and conservative interpretations of the law, because the obligation to follow precedent tends to prevent dramatic changes in legal decision making. In examining legal cases related to women, we can see how the judges are viewing women and their role in society, and we can see how that role is then expanded or constricted as a result of their decisions. The courts give power to enforce gender roles when they define what is acceptable and not acceptable (not constitutional) treatment of women by employers, insurers, or the government itself. Scholars analyzing legal cases must spend as much time reading between the lines as they do reading the words of Supreme Court justices, since much of what affects women is in the unspoken assumptions made by those in power.

## ABOUT THIS BOOK

This book brings together the perspectives of legal scholars, practicing attorneys, academic psychologists, and clinicians. Our hope is that this juxtaposition of ideas and perspectives will provoke valuable dis-

cussion. How does the law view women, and is it consistent with what academic researchers are presenting from their empirical research? In what ways have both fields fallen under the power of stereotyping and the mystification that seems to justify inequality? What should each field do when they become aware of both the overt violence related to gender (wartime rape, honor killings, infanticide) and the quiet “disappearing” of women, that is, the invisibility of the contributions of women to every aspect of life?

The differences between membership in a dominant social group and membership in a subordinate social group are profound and pervasive, influencing every aspect of life: money, health, education, family relationships, employment, even the cost of living. While this book can only hope to begin to describe one aspect of the dominant-subordinate experience—that of sexism—there are very few individuals who have the luxury of fighting on only one battleground. The function of prejudice is to simplify and objectify. The status quo of the dominant culture is maintained to the extent that groups are described in stereotypes and pitted against each other. These are the oldest tricks in the book: divide and conquer; create an us and a them; set a standard that few can reach, so that individuals feel different from each other and lesser than one another. Although gender is the focus of this book, it is presented with the understanding that women come to every encounter with many characteristics: racial identity, socioeconomic status, mental and physical health, sexual identity, educational achievement, occupation, family structure, and individual personality and history.

The book begins with history. Natalie Porter gives an overview of psychological research and theory related to gender, and Andrea Barnes describes the evolution of gender-related legal decisions.

The workplace is the next focus. Nancy Lynn Baker and Jay M. Finkelman look at sexual harassment in the workplace, first from the individual's perspective and then from the viewpoint of the organization. Joyce K. Fletcher describes the way that women's contributions to the workplace, particularly the interpersonal management and team-building behaviors that are essential to the effective functioning of a company, can become invisible when they do not fit a model of productivity and documentation. Lisa Wilson then describes the ambivalence of the courts in cases involving pregnant employees.

The next group of chapters examines issues related to women's health and sexuality. Andrea Barnes presents an update of both the psychological and legal sides of abortion. Judith C. Appelbaum and