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In Memoriam

The Eighth Circuit Gender Fairness Task Force: A Master Class from Judge Diana Murphy in Organizational Leadership

Celeste F. Bremer[†]

When we were asked to serve on the Eighth Circuit Gender Fairness Task Force, little did the members know that we would be participating in a master class in organizational leadership, offered by Judge Diana Murphy. In fact, until the meeting process started, and the subgroups were organized, many of us were not even aware of the guidance and framework that Judge Murphy was providing. I received my invitation from Chief Judge Richard Arnold, who asked me to take a leadership role, which was a compliment to a magistrate judge with only ten years' experience on the bench. I served on the Court Users' Group Subcommittee, and as the chair of the Iowa sub-group. The chair of the Task Force was District Judge Lyle Strom, an inspired choice, as he is not only admired for his judicial service, but as the father of five daughters—one of whom is an attorney—he had observed firsthand many of the issues we studied.¹ It was

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1. The impact of the judge-father and attorney-daughter relationship on judicial decision-making has been the subject of scholarly articles, see generally, Adam N. Glynn & Maya Sen, *Identifying Judicial Empathy: Does Having Daughters Cause Judges to Rule for Women's Issues?*, 59 AM. J. POL. SCI. 37 (2014), and was the topic of a panel at the Infinity Project's Annual Summit Meeting and Summit, held in conjunction with the Eighth Circuit Conference in Omaha, Nebraska, in 2014. See generally Panel Discussion at the 2014 Annual Event and Summit, *Father-Daughter Reflections on Gender and the Legal Profession*, INFINITY PROJECT, <http://www.theinfinityproject.org/2014-annual>

only later, while working on my doctorate in Organizational Leadership in Adult Education, that I realized how Judge Murphy deftly shaped and guided the Task Force, the Eighth Circuit, and the Bar through the steps necessary to get an organization to change its approach and perspective. Judge Murphy provided the leadership necessary that left a lasting impact on issues that continue to affect women's full participation in court governance, on the bench, and in public life. Judge Murphy accomplished this with grace and purpose, instead of argument and strife. Change is difficult, on a personal and organizational level. Fostering change—while acknowledging the work that continues to be necessary—was one of Judge Murphy's hallmarks, and her gift to everyone who has worked or practiced in this circuit.

The Task Force was comprised of legal practitioners—both male and female—from a variety of backgrounds.² In addition to twelve judges (including two circuit court judges, eight district court judges, a bankruptcy judge, and a magistrate judge—myself), there was a Federal Public Defender; an Assistant U.S. Attorney; professors from the University of Minnesota Law School, the University of Wisconsin Law School, and the University of North Dakota School of Law; and lawyers from both private and public practice.³ Every district in the circuit was represented.⁴

I. CONTEXT OF THE TASK FORCE'S WORK

Before reviewing the important work of the Task Force, however, it is worthwhile to note the context in which this work was accomplished. When Judge Murphy was appointed to the Eighth Circuit Court of Appeals in 1994, following her term as a district court judge from 1980 to 1994, she was the first woman to serve on that court since it was established in 1891. She remained its only woman member until 2013, when Judge Jane Kelly was appointed and confirmed.⁵ As a member of an appellate court, Judge Murphy was accustomed to building consensus

-event-and-summit (last visited Oct. 15, 2018). Judge Strom was one of the panelists at this program, with his daughter Cassie Strom.

2. FINAL REPORT & RECOMMENDATIONS OF THE EIGHTH CIRCUIT GENDER FAIRNESS TASK FORCE, *reprinted in* 31 CREIGHTON L. REV. 9, 28–29 (1997) [hereinafter FINAL REPORT & RECOMMENDATIONS].

3. *Id.*

4. *Id.*

5. Judge Murphy assumed senior status on November 29, 2016. She passed away on May 16, 2018, shortly before she retired. Now Judge Kelly is the only woman on this court and carries the burden and responsibility of being

in order to get her opinions adopted. She had not been on the circuit court long before she began laying the groundwork for the Task Force, which published its findings in September 1997. As a driving force behind the Task Force, Judge Murphy modeled collaborative decision-making, and set a collegial tone for the difficult self-study and honest conversations that would take place over two years, before the Final Report & Recommendations⁶ of the Task Force were published.

II. TASK FORCE MEMBERS AND WOMEN JUDGES IN THE EIGHTH CIRCUIT

When Jan Symchych and I were appointed as U.S. magistrate judges in 1985, we felt we were part of a wave of women Article I judges appointed in the Eighth Circuit.⁷ By 1985, women held five of thirty-eight magistrate judge positions, one of sixteen bankruptcy judge positions, and two of fifty-nine district court judge positions; there were no women on the Eighth Circuit Court of Appeals.⁸ According to 2018 reports, women now hold twenty of fifty magistrate judge positions, ten of twenty-two bankruptcy judge positions, eighteen of sixty-seven district court judge positions, and yet, following Judge Murphy's death, there is only one woman on the Eighth Circuit Court of Appeals.⁹ When the Task Force began, there was hope that more women would be appointed to Article III judgeships, and that the trend of diversity on the bench would continue.

The Eighth Circuit was neither the first, nor the last, federal district to study this issue. Gender Fairness Task Forces were developed in state and federal judiciaries beginning in 1982 and

seen as speaking on behalf of women, because we are underrepresented in this sphere.

6. See generally FINAL REPORT & RECOMMENDATIONS, *supra* note 2.

7. Jan Symchych served as a U.S. Magistrate Judge from 1985 to 1989. See generally *Hon. Janice M. Symchych (Former)*, JAMS, <https://www.jamsadr.com/symchych> (last visited Oct. 15, 2018).

8. These statistics were compiled by Eighth Circuit Librarian Melissa Schutjer and Archives Librarian Joan Voelker from several sources, including the FJC's Biographical Directory of Article III Judges, Eighth Circuit Library Archives, the Register of the Department of Justice and Federal Courts, Eighth Circuit Annual Reports, court websites, and the Internet. See, e.g., *Biographical Directory of Article III Federal Judges, 1789-Present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges> (last visited Oct. 15, 2018); *U.S. Courts Library 8th Circuit*, U.S. CTS., <https://www.lb8.uscourts.gov:444> (last visited Oct. 15, 2018).

9. Including senior and recalled judges. See *supra* note 5.

1990, respectively.¹⁰ At the time the Eighth Circuit Task Force began, four states in the circuit were studying or had studied the impact of gender and race in the justice system.¹¹ The resources and support committed to the study should be commended; this would not have happened without Judge Murphy presenting the opportunity to Chief Judge Arnold and the Eighth Circuit Judicial Council in such a manner that they felt that the issues identified in other studies warranted review in the Eighth Circuit. The topics addressed through a series of subcommittee meetings, surveys, focus groups, and debate included civil practice in the Eighth Circuit, gender fairness in the bankruptcy courts, gender fairness in the criminal justice system, courtroom interaction, and the court as an employer.¹²

A. JUDGE MURPHY'S BACKGROUND

Judge Murphy, a Minnesota native, pursued a legal career at a time when there were few women in the field. She graduated with a bachelor's degree from the University of Minnesota in 1954, and completed coursework toward her graduate degree before deciding to stay home to raise her children. Before entering law school, Judge Murphy had gained significant leadership experience through active participation in civic and political community groups. Judge Murphy did not receive her J.D. from the University of Minnesota Law School until 1974—when she was forty years old.¹³ After working in private practice for two years, she was appointed to serve as a judge on the Hennepin County Municipal Court in 1976.¹⁴ From 1978 to 1980, she served as a

10. MOLLY TREADWAY JOHNSON, *STUDYING THE ROLE OF GENDER IN THE FEDERAL COURTS: A RESEARCH GUIDE* 4–5 (1995). In 1982, New Jersey became the first state to establish a task force on gender issues in the courts. *Id.* at 4. The Judicial Council for the District of Columbia Circuit and the Ninth Circuit Judicial Conference both established task forces in 1990. *Id.* at 5.

11. The task forces in Minnesota, Missouri, Iowa, and Nebraska released reports prior to the establishment of the Eighth Circuit Gender Fairness Task Force. See *FINAL REPORT OF THE EQUALITY IN THE COURTS TASK FORCE, STATE OF IOWA* (1993) (reporting on gender bias in the Iowa court system); *MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, FINAL REPORT* (1989), reprinted in 15 WM. MITCHELL L. REV. 825 (1989); *MISSOURI TASK FORCE ON GENDER AND JUSTICE, REPORT OF THE MISSOURI TASK FORCE ON GENDER AND JUSTICE* (1993), reprinted in 58 MO. L. REV. 485 (1993); Roberta L. Christensen, *Gender Bias: An Update of the Education Subcommittee of the Gender Bias Task Force*, NEB. L., Sept. 1997, at 20–21.

12. See generally *FINAL REPORT & RECOMMENDATIONS*, *supra* note 2.

13. *Murphy, Diana E.*, FED. JUD. CTR, <https://www.fjc.gov/history/judges/murphy-diana-e> (last visited Oct. 15, 2018).

14. *Id.*

judge on the Minnesota District Court, Fourth Judicial District. President Jimmy Carter nominated Judge Murphy to serve on the U. S. District Court for the District of Minnesota in 1979;¹⁵ she was confirmed the following year.¹⁶ Judge Murphy served on the district court until 1994, when President Bill Clinton nominated her to serve on the Eighth Circuit Court of Appeals.¹⁷

The work of the Task Force began in 1995 against the backdrop of an ongoing debate about the need for change in the system of judicial appointments in order to increase diversity in the federal courts. Significantly, Judge Murphy had been appointed to the Eighth Circuit just one year prior.

Judge Murphy showed us how to analyze the systems in place and to look for ways to change them. But it was not enough for the Task Force or an individual to describe the change needed, or identify the challenges in a system. Leadership required the ability to inspire others to follow. Judge Murphy used her seat at the table to identify issues, and gain the support of stakeholders that addressed the challenges involved in the delivery of justice. She inspired work that resulted not only in an increase in the appearance of fairness, but also in an increase in the delivery of fairness in the work of the circuit.

III. TASK FORCE WORK THROUGH THE LENS OF LEADERSHIP AND POWER

Despite the fact that Judge Murphy was newly appointed to the Eighth Circuit in 1994, she applied leadership¹⁸ skills that

15. President Carter used a selection process aimed at seeking qualified women and minority group members. However, the American Bar Association (ABA) Standing Committee on the Federal Judiciary did not support nominees who did not have trial experience. For example, the Committee gave Professor Joan Krauskopf a “not qualified” rating, effectively blocking her from serving on the Eighth Circuit. The Committee also gave Judge Murphy a “not qualified” rating in 1979 before she was appointed to the district court. Attorney General Griffin Bell succeeded in getting the ABA to reconsider its vote on Judge Murphy, and it ultimately gave her a “qualified” rating before President Carter appointed her. For a study of the effects of the ABA’s judicial qualification ratings on female and minority candidates, see Maya Sen, *How Judicial Qualification Ratings May Disadvantage Minority and Female Candidates*, 2 J.L. & CTS. 33 (2014).

16. *Id.*

17. *Id.*

18. See generally LEE G. BOLMAN & TERRENCE E. DEAL, *REFRAMING ORGANIZATIONS: ARTISTRY, CHOICE, AND LEADERSHIP* (6th ed. 2017) (discussing various approaches to leadership). They approach opportunities for leadership from various frames, and offer lessons for strengthening organizations through

she developed in the decades of community work before attending law school, the relationships she built while serving as a trial judge, and her influence as a circuit court judge to promote the work of the Task Force. Judge Murphy challenged us to become more aware of processes and prejudices that cause women to be neither seen nor heard. She challenged us to do more than simply acknowledge underrepresentation, but to identify and remove barriers to full participation by women in the justice system.¹⁹

Judge Murphy guided the Task Force, both formally and behind the scenes, in examination of the institutional structure and barriers that prevented full utilization of women in positions of authority. For example, the Task Force challenged judges to look at how they selected law clerks, senior management for court units, and Article I judges. The increase in the number of women serving in these positions in the Eighth Circuit is a testament to this work.

Judge Murphy and Chief Judge Arnold were strategic thinkers. They knew that the chair of the Task Force needed to be a judge who possessed credibility with his peers and who could both understand and explain gender bias in a nonthreatening way. The chair needed to inspire and sustain the work of the Task Force, and to challenge what we've always done. It was the ability of Judge Murphy and Judge Strom to manage conflicts within the groups, build relationships, and gain commitment to a new mission that allowed the work of the Task Force to continue in challenging political times.²⁰

The Task Force related the impact of gender bias as experienced by its members and as reported by attorneys and court staff. Judge Murphy could demonstrate to her colleagues that her lived experience and other women's path to the bench was different, and not as direct, than their own. Her requirement that the Task Force conclusions be supported by rigorous social science analysis and data not only led to adoption of the Task

work in the following areas: structural, human resources, political, and symbolic. *Id.* This is the framework that I have used in reflecting upon Judge Murphy's styles of leadership.

19. MARY BEARD, *WOMEN & POWER: A MANIFESTO* 33–34 (2017).

20. When a new group of legislators swept into Congress in 1994, one of the objectives of their "Contract with America" was to defund all gender bias task forces in the courts.

Force recommendations, but continues to support research in this field.²¹

Through the work of the Task Force, the Court Users' Group was introduced to the concept of "gendered institutions," a term used in political science literature to describe fields, careers, or industries that are predominated by one gender. As observed by Professor Laura Cooper in 1997, during an Eighth Circuit Gender Fairness Task Force meeting:

Scholars of organizational theory recognize that when an organization is historically developed and currently dominated by persons of one gender, the organization becomes gendered. It becomes structured and operates in such a way as to be responsive to the needs of persons of the majority gender, and fails to be responsive, or even recognize the needs of persons of the other gender. Imagine how welcome a male would feel litigating in the federal court system that had never, in its more than 200 year history, had more than two men serve on its Supreme Court or more than one male ever serve on the Eighth Circuit Court of Appeals. The Courts are a gendered institution, and that gender is male.²²

As Professor Mary Beard recently noted,

You cannot easily fit women into a structure that is already coded as male; you have to change the structure. That means thinking about power differently. It means decoupling it from public prestige. It means thinking collaboratively, about the power of followers not just of leaders. It means, above all, thinking about power as an attribute or even a verb ('to power'), not as a possession. What I have in mind is the ability to be effective, to make a difference in the world, and the right to be taken seriously, together as much as individually.²³

The experience of watching Judge Murphy work collaboratively and collegially demonstrated to all of the Task Force members and her colleagues how to use one's power to make a difference for all who practice in the Eighth Circuit.

A. THE INFINITY PROJECT – JUSTICE MUST NOT ONLY BE DONE, IT MUST BE SEEN TO BE DONE

Judge Murphy's influential leadership on the Task Force inspired others to mobilize in pursuit of gender fairness within the Eighth Circuit. One of these groups is the Infinity Project, which was created for the purpose of increasing female representation on the bench in the Eighth Circuit; Judge Murphy was one of its

21. See, e.g., Louise F. Fitzgerald, *Still the Last Great Open Secret: Sexual Harassment as Systemic Trauma*, 18 J. TRAUMA & DISSOCIATION 483 (2017).

22. Notes from the Eighth Circuit's Gender Fairness Task Force Meeting (quote from Professor Laura Cooper) (1997) (on file with author).

23. BEARD, *supra* note 19, at 86–87.

founders.²⁴ The Infinity Project's recommendations for increasing gender diversity on the bench, described in Professor Sally Kenney's book, *Gender & Justice: Why Women in the Judiciary Really Matter*, echo the work of the Task Force.²⁵

Kenney makes five arguments in favor of increasing gender diversity on the bench. First, Kenney states that advocates for gender diversity should not argue from difference.²⁶ Women should be represented on the bench, not because they reach different results, but because when women are excluded, the process and result lack legitimacy.²⁷ Justice must not only be done, it must "be seen to be done."²⁸

Second, Kenney argues that the burden of proof should be reversed—instead of asking "What is distinctive, unique, or different about women that renders their presence necessary on the bench?" one should ask "What justifies their exclusion?"²⁹ Third, exclusion stigmatizes—when a court lacks women judges, it sends the message that women are second-class citizens, "incapable of impartiality or objectivity," inherently suggesting that these are qualities exclusively possessed by white men.³⁰

Kenney further argues that the dearth of women judges should be analyzed under the framework of employment discrimination.³¹ "If women receive more than 50 [sic] percent of law degrees but do not hold high judicial office, the assumption is something about the selection process or path toward promotion operates to winnow them out unfairly."³²

Kenney's final argument is perhaps her strongest—that of representation.³³ Kenney asserts that courts are representative institutions, and when female representation is sought, that does not mean that the merit system has been abandoned.³⁴ For

24. *About the Infinity Project*, INFINITY PROJECT, <http://www.theinfinityproject.org/about> (last visited Oct. 15, 2018). The Infinity Project periodically gives the "Judge Diana Murphy Legacy Award" to outstanding champions of gender equality. *Id.*

25. SALLY J. KENNEY, *GENDER & JUSTICE: WHY WOMEN IN THE JUDICIARY REALLY MATTER* 175–82 (2013).

26. *Id.* at 175.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 176.

31. *Id.* at 177.

32. *Id.*

33. *Id.* at 178.

34. *Id.*

example, when politicians have sought to achieve geographic diversity on the bench, no one has complained that it endangers the court's representation as a meritocratic institution.³⁵

The American Bar Association (ABA) also followed the lead of the Eighth Circuit Gender Fairness Task Force, and other task forces. Observing a pipeline problem in the legal community, whereby opportunities for diverse attorneys are limited, the ABA passed Resolution 113 in 2016.³⁶ The Resolution urges law firms and corporations “to expand and create opportunities at all levels of responsibility for diverse attorneys,” and encouraged clients to steer a greater percentage of their legal work to diverse attorneys.³⁷ The ABA also recently adopted a new policy to combat sexual harassment in the legal workplace. Resolution 302 urges all employers to adopt and enforce policies addressing “harassment and retaliation based on sex, gender, gender identity, sexual orientation, and the intersectionality of sex with race and/or ethnicity.”³⁸ Clearly, Judge Murphy and the Task Force were on the leading edge of changes to make the justice system not only appear to be fair, but to actually be fair.

B. LEADERSHIP EXEMPLIFIED

The two years of Task Force committee meetings, subcommittee work, and building consensus for conclusions and recommendations drawn from the mass of data acquired was difficult. Judge Murphy modeled the way by never asking any subcommittee to do more work than she was willing to dedicate to this task herself. She did this work on top of her regular duties as an Eighth Circuit judge, her substantial contributions to the U.S. Sentencing Commission Guidelines, and her advocacy in judicial associations.

By virtue of her experience in practice and her path to the bench, she could speak authentically and encourage a dialogue around topics that impact access to justice, and the experiences of those in the justice system. She leveraged her seat at the table to provide an opportunity for others to step up, and applauded their efforts when they did so. She encouraged others to act,

35. *Id.* at 178–79.

36. *House of Delegates, Resolution 113*, A.B.A. (2016), <https://www.americanbar.org/content/dam/aba/images/abanews/2016%20Annual%20Resolutions/113.pdf>.

37. *Id.*

38. *House of Delegates, Resolution 302*, A.B.A. (2018), <https://www.americanbar.org/content/dam/aba/images/abanews/mym2018res/302.pdf>.

without seeking attention or applause for her efforts. The group success, the dialogue channeled by Judge Strom, and the evidence and findings contained in the Final Report of the Task Force allowed the system to change. This change was based upon trust, garnered through the development of data that reflected experiences in the Eighth Circuit, not merely generic suggestions from other districts or states. Judge Murphy's work to secure the budget for a large survey and other evidence-based methodology was crucial to establish the credibility of the Task Force Report,³⁹ and its acceptance as the basis to implement change.

The work accomplished by the Task Force continues to serve as the basis for the study of gender bias, as informed by our practices of the last twenty-five years and issues identified in more recent events, such as discussions surrounding the "#MeToo" movement.⁴⁰ There is still work to be done on the issue of gender fairness in the courts. Although the Task Force Report did not work like a magic wand to solve all of the problems identified, Judge Murphy's leadership allowed our discussions to continue. She modeled the way, and changed the institution's ability to deliver justice, through the work of court users' groups, staff, and judges by identifying issues and presenting ideas to change policies and procedures. Judge Murphy demonstrated collegiality and a shared vision for the delivery of justice in a way that continues to inspire public confidence in the rule of law.

Judge Murphy enabled others to act. She used her power for the good of the system, to enlighten and challenge the incumbents and the status quo. She shared her seat at the table with younger judges and lawyers and provided a roadmap so that the work of the Task Force was not just resigned to bookshelves, but continues to guide policy and practices—allowing justice not only to be done, but to be seen to be done.

39. See generally FINAL REPORT & RECOMMENDATIONS, *supra* note 2.

40. The "#MeToo" movement has been around since long before Alyssa Milano tweeted the hashtag in October 2017. Tarana Burke started the "Me Too" movement in 2006—beginning on MySpace—to help the survivors of sexual violence, in particular young women of color from disadvantaged communities. ME TOO., <https://metoomvmt.org> (last visited Oct. 15, 2018); see also Abby Ohlheiser, *The Woman Behind "Me Too" Knew the Power of the Phrase When She Created It—10 Years Ago*, WASH. POST (Oct. 19, 2017), <https://www.washingtonpost.com/news/the-intersect/wp/2017/10/19/the-woman-behind-me-too-knew-the-power-of-the-phrase-when-she-created-it-10-years-ago>.