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Some Reflections on Women and the Judiciary

The Honorable Rosalie E. Wahl*

Women in this and preceding generations have struggled, in their private lives and in their professional and public lives, to have the talents of women and the contributions of women to the body politic accepted and valued. They have struggled to achieve power and to use that power to redress injustice and to create an environment in which all can live freely and fully, without fear or want. The struggle never ends. If women falter in their efforts, if they pause to regain strength, if the many dimensions of their lives distract them for the moment, the pervasive sexism of our social institutions sweeps like an incoming tide over the field of their endeavors, erasing all evidence of progress. Even though women are equal before the law as regards most responsibilities and burdens, bigotry persists, sometimes covert and disguised.

The truth is, despite proclamations of equality, the lives of many women today are impoverished, sometimes violent, and most often marginal in terms of participation, power, and self-determination. The poor in this country are disproportionately women—old women and younger women with children. Women in the workforce earn sixty cents for every dollar earned by men.¹ Women, many of whom are the sole support of their families, hold most part-time, low-paying jobs,² without benefits or security. The truth is also, however, that women in greater numbers than ever before are entering business, government, and the professions.³ Yet even at the top, women are at the bottom. A 1984 study commissioned by Minnesota Women Lawyers, Inc. reveals that women who graduated from law school between 1975 and 1981 had a median 1982 employment income of \$26,810, while the median 1982

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1. Report of the Comm'n on the Economic Status of Women, *Women in Minnesota* 19 (1984).

2. *Id.* at 15-16, 19-21.

3. In law, for instance, between 1965 and 1976, while the student population in accredited law schools nearly doubled (from about 60,000 to over 117,000), the number of women in law school increased 1,200% (from about 2,500 to 30,000). Spangler, Gordon & Pipkin, *Token Women: An Empirical Test of Kanter's Hypothesis*, Draft, Am. B. Foundation (1977).

employment income for men who graduated from law school between those years was \$33,410, with Minnesota women attorneys earning 80% as much as men.⁴

For change to occur in this basic inequity of power, we must challenge the belief that the imbalance is somehow right, natural, or unavoidable. Gender-based stereotypes, myths, and biases must be eliminated in every American social institution and profession, with the judiciary an important priority. According to sociologist Norma Juliet Wikler, as a result of the movement for women's rights, most institutions have been forced to undergo critical self-evaluation of the sexism embedded in the structural features of their institutions and manifest in the attitudes of the individuals who participate in them.⁵ We have come face-to-face and are grappling with institutional sexism, a term describing "a society in which all the major institutions discriminate on the same basis and to the same degree because of shared beliefs about the inferiority or difference of women."⁶ It is a self-reinforcing system. "Barriers in one organization reinforce barriers in other organizations; and the male club is the linchpin of the system."⁷ Political scientist Beverly Blair Cook describes this network of discriminatory organizations by listing the percentage of women presidents, directors, senior partners, trustees, cabinet officers, and other top officials in the ten most important socioeconomic sectors in our country in 1980: military, 00.0%; investments, 00.9%; insurance, 01.1%; law, 01.8%; banking, 02.3%; industry, 02.4%; utilities, 04.3%; mass media, 06.8%; government, 07.7%; university, 10.6%.⁸ Cook notes the institutions with the most financial, coercive, and legal power have the smallest percentage of women, but in every socioeconomic sector, the percentage of women is within the boundaries of tokenism. By Rosabeth Moss Kanter's measure of tokenism—less than 20% of one sex⁹—women judges in the country provide only token representation in the vital process of dispersing justice in a population composed of 51% women. Any lasting change in the position of women in our society will be reflected in greater numbers of wo-

4. Leslie Gerstman, *The Status of Women in the Legal Profession: A Profile of Minnesota Attorneys*, in A Report Commissioned by Minnesota Women Lawyers, Inc. 20 (June 1984).

5. Norma Juliet Wikler, *On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts*, 64 *Judicature* 202, 203 (1980).

6. Beverly Blair Cook, *Sex Discrimination in Politics and the All-Male Club*, Paper Presented to Symposium for Women Judges, sponsored by Nat'l Center for State Courts (April 16, 1982).

7. *Id.*

8. *Id.* This proportion is double the 1970 statistics, except for the military.

9. Rosabeth Moss Kanter, *Reflections on Women and the Legal Profession: A Sociological Perspective*, 1 *Harv. Women's L.J.* 1, 10 (1978).

men beyond the level of tokenism in the judiciary and in the legal profession.

The judiciary, which is called on to determine the effectiveness of other social institutions in eliminating sex discrimination, is only now beginning to examine its own sex bias and underrepresentation of women. Much of that self-critique results from the efforts of women judges. Even so, sociologist Wikler has found, "there is overwhelming evidence that gender-based stereotypes, biases and myths are embedded in the law itself and in the attitudes, values and beliefs of some of those who serve as judges."¹⁰ In fact, the research of Professors Johnston and Knapp indicate that, with certain notable exceptions, American judges "have failed to bring to sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues."¹¹ With regard to race, for instance, judges, at least in their opinions, "exhibit a conscious attempt to free themselves from habits of stereotypical thought."¹² Not so in the area of sex discrimination, these researchers conclude. After analyzing a wide variety of cases dealing with the subject, Johnston and Knapp state "[s]exism—the making of unjustified (or at least unsupported) assumptions about individual capabilities, goals and social roles solely on the basis of sex differences—is as easily discernible in contemporary judicial opinions as racism ever was."¹³

How will women judges make a difference? Many have asked whether a vote based on the sex of a prospective judge is a better guarantee of performance than a vote based on other factors. On the basis of her research, Cook assures us that, during this period when gender identity still has tremendous cultural salience, "women voters can vote for women judicial candidates with as much profit as men have voted party. And women's organizations can continue to encourage and support women with feminist attitudes and records, with a high probability of getting egalitarian public decisions for women from the bench."¹⁴

Women in the judiciary still have the exhilarating sense of making history. On October 3, 1977, I became the seventy-second

10. Wikler, *supra* note 5, at 203.

11. John D. Johnston & Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. Rev. 675, 676 (1971).

12. *Id.*

13. *Id.*

14. Beverly Blair Cook, *Will Women Judges Make a Difference in Women's Legal Rights?: A Prediction from Attitudes and Simulated Behavior*, in *Women, Power, and Political Systems* 216, 237 (Margherita Rendel ed. 1981).

justice and the first woman to serve on the Minnesota Supreme Court. This opportunity opened because the women in Minnesota had become sufficiently organized and sufficiently powerful to say to a governor, "Nine—zip won't do it." Women have learned the hard way that those holding power never share it until it becomes politically necessary to do so. In 1982, Justice M. Jeanne Coyne made Minnesota the first state in the union with two women on its highest court. Three members of our state's twelve-member court of appeals are women—Susanne Sedgwick, Harriet Lansing, and Doris Huspeni—and an increasing number of women sit on the trial bench, though still only twenty-one out of 234 state trial court judges in Minnesota are female. The pool of women lawyers qualified or qualifying for judicial appointment increases yearly, and best of all, perhaps, the horizons of girl children are expanding. It is exciting to open the newspaper and find a girl like Hilary in our local comic strip, "Sally Forth," who, at Halloween, is admiring her costume of black robe in the mirror. She says to her mother, who holds a witch's hat in her lap, "Oh put away the hat, I'll just go as a Supreme Court Justice."

Such evidence of increased participation is sweet, even though what I and others have experienced as dramatic leaps ahead are, in a larger perspective, only the slow erosion of individual and institutional sexism. How can women judges make our increased participation most meaningful to the interests of other women and of our society? Now that enough women are in the bar and on the bench to form a mass, a critical mass, large enough to be a catalyst, what are our responsibilities for change? Women with access to power and status must not allow this to separate them from their knowledge of what it means to be female in this society. Certainly every woman of accomplishment owes it to another woman to reach out and assist her growth and aspiration. We are responsible, socially and individually, for helping other women achieve their desired goals. Thus, in our own sphere, we work for the election or appointment of women judges to the bench. Once there, we expect and anticipate women judges will fulfill expectations of judicial excellence.

We also have a right to expect from women judges an intense commitment to fairness, growing out of a personal recognition of the injury of injustice and unfairness. We expect, of course, that women judges will treat men and women fairly; that, in itself, will have profound effects. Our responsibility is even broader than gender even-handedness, however. Will we take this sensitivity to fairness and apply it to all who come before us? Will we transform our specific knowledge of the shifting social rules and the limiting

assumptions about the individual capabilities, interests, and goals of women into a broad ethic of fairness to all persons whose existences are controlled by such cultural limits? As judges, will we challenge ourselves to question how and why some persons are traditionally considered "bad," incompetent, or unable, and who and what makes some people more likely to be faulted socially, and thus legally, for their actions? The old, the poor, the differently abled, members of racial, ethnic, cultural, and affectional preference minorities, like women, have all suffered from these assumptions. A comprehensive ethic of fairness requires this breadth of vision of what equal treatment might mean. As we face every party who appears before us in our role as judge, whether in person at a trial or on the record in appellate review, such concerns must be in our minds.

The poet Audre Lourde has given us rich and interesting words of advice. "[T]he master's tools will never dismantle the master's house," she warns. "They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change."¹⁵ On entering what may have been the master's courthouse and picking up the tools of justice, which also belong to us, we must work not only at dismantling the injustices which once excluded us. We must hammer and saw diligently and with joy to build a home for all.

15. Audre Lourde, *The Master's Tools Will Never Dismantle the Master's House*, in *This Bridge Called My Back: Writings of Radical Women of Color* 98, 99 (Cherríe Moraga & Gloria Anzaldúa eds. 1981) (emphasis omitted).

