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Women in the Courts Today: How Much Has Changed

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Professor Norton began this morning's program by telling us why the Founding Fathers felt no need to make reference to women in the Constitution. Adherents of John Locke, they saw the world divided into family and state, with women confined to the domestic sphere, debarred from any role in public life. In this Bicentennial year, as you look at this panel of women professionals addressing the Eighth Circuit Judicial Conference, it appears that we are a world away from the attitudes that shaped the Founding Fathers' thinking. Yet despite the genuine gains that women have made, many of the attitudes that prevailed in 1787 prevail today, with direct consequences for women in the courts. Moreover it is often judges' assumption, sometimes explicitly stated, that sex discrimination is a thing of the past, that imperils justice for women in the present.

Fortunately, the Bicentennial also finds us at a point in time when the issue of gender based bias in the courts has become the focus of serious attention, with corrective measures beginning to be taken in judicial and legal continuing education and law schools throughout the country.

Gender bias has three aspects: stereotyped thinking about the nature and roles of women and men, which is principally what we have been talking about thus far this morning; society's perception of the relative worth of women and men and what is perceived as women's and men's work—society talks a good game about valuing the work women do in the home, but when related issues reach

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the courts, in the immortal words of Rodney Dangerfield, they don't get no respect; and myths and misconceptions about the social and economic realities of women's and men's lives. All three aspects of gender bias have deep roots in our history and may affect virtually every area of substance and procedure in the courts. Because I can only touch on this range of issues this morning, I have included in your reading materials articles which document the existence of gender bias in matters ranging from courts' response to violence against women to the hiring of women court employees.¹

The Founding Fathers' stereotype of women as properly limited to home and family has retained its power throughout our history, with serious consequences for women lawyers and jurists. In 1873 the United States Supreme Court denied a woman a license to practice law on the ground that God and nature intended women for the domestic sphere and only men for the occupations of civil life.² In 1983 the New Jersey Supreme Court Task Force on Women in the Courts found that male judges and lawyers frequently asked female applicants for law clerk and associate positions about their family obligations and plans for motherhood. They also assumed that the female applicants would want to handle matrimonial and juvenile justice cases: the domestic sphere of the law.³

A few years ago the American Bar Association representative interviewing Dolores Sloviter with respect to her nomination to the Third Circuit Court of Appeals asked her how she would care for her husband and children saying "that was expected to be a woman's role."⁴

Just last year a speaker at the Florida Judicial Nominating Commissions Institute instructed the commissioners that they must ask about candidate's management skills and, "If it's a female—I don't want to be sexist—but if its a female, to what extent

1. The articles provided in the reading materials were: John D. Johnston and Charles L. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. Rev. 675 (1971). Excerpts. Norma J. Wikler, *On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts*, 64 *Judicature* 202 (1980); Lynn Hecht Schafran, *Eve, Mary, Superwoman: How Stereotypes About Women Influence Judges*, 24 *Judges' J.* 12 (1985); Lynn Hecht Schafran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 *Judicature* 280 (1987) [hereinafter cited as *Task Force Approach*].

2. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872).

3. New Jersey Supreme Court Task Force on Women in the Courts, Administrative Office of the Courts, First Year Report (1984), *reprinted in* 9 *Women's Rights Law Reporter* 129, 144 (1986).

4. Address by Dolores K. Sloviter, United States Circuit Judge, Third Circuit Court of Appeals, Annual Conference of the National Association for Law Placement, Inc. (April 30, 1984).

can she handle the demands of home, child, shopping?"⁵ As you can imagine, I was flabbergasted to hear this directive stated so baldly. Fortunately I was the luncheon speaker at that Nominating Commissions Institute and was able to caution the commissioners that not only was the earlier speaker's advice a perfect illustration of my topic—bias in the judicial selection process—but a clear violation of Title VII. I later wrote to the speaker with the same advice. You will not be surprised to learn that I never heard from him.

Although the number of women lawyers is growing rapidly, and one wit has opined that the judiciary will soon be a woman's profession because the pay is bad and the hours are regular, the number of women in law school must not deflect us from what is happening to women already established in the profession. Women are still less than 8% of both the federal and state judiciaries.⁶ In the Eighth Circuit itself there are no women on the circuit court and only two on the district courts.

Stereotypes about appropriate behavior for litigators and appropriate behavior for women combine to keep women out of certain areas of trial practice, such as top spots in criminal prosecution and defense, and to confound women trial attorneys with what sociologists call the "double-bind" for the professional woman.⁷ If she displays stereotypically feminine traits such as soft-spokenness and deference she is dismissed as too soft to do the job. If she is forceful and direct, she is put down as pushy, abrasive or worse. Across the country women attorneys report, in the words of one witness before the New York Task Force on Women in the Courts, "Aggressive behavior is rewarded or tolerated from men, and viewed as out of place or even unacceptable from women."⁸

The difficulty some judges, lawyers and court personnel have in accepting women as professionals is reflected in behavior toward women lawyers and law clerks ranging from overly familiar forms of address, to sometimes well meant but inappropriate compliments on appearance, to sexist jokes and sexual harassment.⁹

5. Address by Dr. Mel Reid, Eleventh Institute for Judicial Nominating Commissions (Jan. 22, 1986).

6. Fund for Modern Courts, Inc., *The Success of Women and Minorities in Achieving Judicial Office: The Selection Process*, inside cover (1985).

7. Lynn Hecht Schafran, *Abilities v. Assumptions: Women as Litigators*, 19 Trial 36 (Aug. 1983).

8. Report of the New York Task Force on Women in the Courts, Office of Court Administration, N.Y. (1986), *reprinted in* 15 *Fordham Urban L. J.* 11, 143 (1987).

9. See, e.g., New Jersey Supreme Court Task Force on Women in the Courts, *supra* note 3, at 136-144; Report of the New York Task Force on Women in the

You will be pleased to know that the federal courts are generally seen as presenting significantly less of a problem in this regard than state courts, but the problem is by no means non-existent. One woman attorney at this conference, for example, was asked by a district court judge in another circuit to stand, for the sole purpose of his complimenting her on her suit. How does a lawyer establish her credibility as a professional when she has just been defined by the judge as a fashion plate?

The roots of the second aspect of gender bias, society's perception of the value of women and women's work, are traceable not merely to 1787, but to the Bible. *Leviticus* states that if a man is killed, his family is to receive fifty silver shekels. But if a woman is killed, her family is to receive only thirty.¹⁰

You may think this attitude is remote from today's courtrooms, but let me tell you about the settlement Union Carbide initially proposed to offer the families of those killed in the Bhopal disaster: \$30,000 for an employed man, \$15,000 for an unemployed man, \$12,500 for a woman, and \$10,000 for an older woman.¹¹ Before you tell me that the lawyers only proposed this schedule because they thought they could get away with it in India, where women are held in low esteem, you should know that this settlement offer was devised well before it was known whether it would have to be approved in India, or by a United States District Court. An American expert consulted by Union Carbide about this schedule told the company that these categories, "didn't make much sense, especially in the differentials between men and women: In the Bhopal area, women contribute more than half the household income."¹² But even he made no reference to the unpaid work that women in Bhopal, like women the world over, do: bearing and raising children, cleaning, cooking, sewing, and what I call keeping the family's emotional motor running.

We frequently see this devaluation of so-called women's work in damages cases and in many judges' decisions about the division of marital property at divorce.¹³ Marriage is not seen as an eco-

Courts, *supra* note 8, at 126-153; Final Report of the Rhode Island Committee on Women in the Courts, Gender Bias in the Court Environment 11-22 (1984).

10. *Leviticus* 27: 3-4.

11. Tamar Lewin, *Casting an Anthropological Eye on American Consumers*, N.Y. Times, May 11, 1986, at F6, col. 1.

12. *Id.* (quoting Steve Barnett, cultural anthropologist).

13. See, e.g., New Jersey Supreme Court Task Force on Women in the Courts, *supra* note 3, at 145; Lynn Hecht Schafran, *The Single Mother in Court*, in *Single Parent Families: Myth, Reality and Social Policy* (Elizabeth Mulroy ed. 1988) (in print); Sally F. Goldfarb, *Recognizing the Homemaker's Contribution to Appreciation of Separate Property*, 18 N.Y.St. B. A. Fam. L. Rev. 11 (Mar. 1987); Judith I.

conomic partnership. Women's unpaid work in the home is not seen as having economic value of its own, or as having contributed to the ability of the principal wage earner to focus on enhancing his earning capacity, his mind unencumbered by domestic concerns.

The Founding Fathers' view of the world as divided into family and state, with state being what counts, permeates our legal system, to the significant detriment of women. Family law issues such as the award and enforcement of spousal and child support are the principle issues that bring women into the courts. They are also the issues our legal system has never valued highly and that our courts would like to be rid of. How significant that although family law cases are a, if not the, major category on almost every state's docket, to my knowledge only one law school in the nation requires family law along with contracts, real property and torts. Today women pursuing family law claims are being pushed out of the courts and into mediation,¹⁴ where there is no record and no accountability. After decades of struggling to make the courts treat seriously the issues generated by the domestic sphere, women are once again seeing these issues privatized. Moreover, because the courtroom is clearly a part of the public sphere, women, as creatures of the domestic sphere, have less credibility there than men and are often subjected to a heavier burden of proof.

The third aspect of gender bias is myths and misconceptions about the economic and social realities of women's and men's lives. In 1972 a Florida appellate court refused to continue a middle aged woman's alimony, stating that this was the age of women's liberation and that any woman could get a job and support herself adequately.¹⁵ This was not true in 1972 and it is still not true in 1987. And here we come to a critical distinction: the difference between having gender neutral statutes, which is what Judge Ginsburg has been talking about, and applying those statutes in a way that recognizes the actual circumstances of the parties involved. The facts are that women who have invested their human capital as long term homemakers have great difficulty obtaining jobs above minimum wage. Women with young children cannot go into the paid

Avner, *Valuing Homemaker Work: An Alternative to Quantification*, 4 Fairshare 11 (Jan. 1984).

14. See Charlotte Germane, Margaret Johnson and Nancy Lemon, *Mandatory Custody Mediation and Joint Custody Orders in California: The Danger for Victims of Domestic Violence*, 1 Berkeley Women's L.J. 175 (1985); Laurie Woods, *Mediation: A Backlash to Women's Progress on Family Law Issues*, 19 Clearinghouse Rev. 431 (Summer 1985).

15. *Beard v. Beard*, 262 So. 2d 269, 271-72 (Fla. Dist. Ct. App. 1972).

workforce unless they can find and afford that scarce and expensive commodity: child care. Occupational segregation which channels the majority of women into low paying jobs with little mobility is still the norm.¹⁶ Yet across the country, women are frequently reduced to poverty status after divorce by judges who award only a year or two of rehabilitative alimony on the assumption that these women will have no difficulty in achieving well paid employment.¹⁷

Misconceptions about the social realities of women's lives are evident in the comments made by judges in employment discrimination cases. It is scarcely credible that a major business entity in the national spotlight because of a sex discrimination suit pending before the United States Supreme Court would deliberately subject its women employees to sexual harassment. Yet while the *Hishon* case, which determined that Title VII applies to law firms,¹⁸ was before the high court, the defending law firm subjected its women summer associates to a wet T-shirt contest. During the argument of that case, upon being told that sex discrimination was still an issue for women lawyers, one of the male justices responded incredulously, "This is 1983. I can't imagine a law firm deliberately discriminating against somebody on the basis of sex."¹⁹

Time prevents my giving more examples, but this remark is not an aberration. The regrettable reality, which it is sometimes difficult for a powerful white man—which is what most judges are—to see, is that although this is the 1980s and there are women supreme court justices and astronauts, women's and men's experiences of the world continue to be different in many ways because of gender based bias.

It is not only the failure to be aware of these attitudes and incidents that can create problems for women in the courts, but

16. See, e.g., Nadine Brozan, *Former Wives: A Legion of the Needy*, N.Y. Times, July 29, 1987 at C1; Displaced Homemakers Network, A Status Report on Displaced Homemakers and Single Parents in the U.S. (1987).

17. See, e.g., *Beard v. Beard*, 262 So. 2d 269 (Fla. Dist. Ct. App. 1972). "In this era of women's liberation movements and enlightened thinking, . . . the woman continues to be as fully equipped as the man to earn a living and provide for her essential needs." *Id.* at 271-72; Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985); *La Rocque v. La Rocque*, 139 Wis. 2d 23, 406 N.W.2d 736 (1987) (overturning award of eighteen months rehabilitative alimony and directive to return to teaching for homemaker of twenty-five years who had sporadic experience as part-time substitute teacher but no public school teaching certificate).

18. *Hishon v. King & Spaulding*, 467 U.S. 69 (1984).

19. Mauro, *Yes, Law Firms Do Discriminate*, USA Today, Nov. 1, 1983, 104, col. 2.

the failure to understand the *meaning* of certain events for the women who experience them. Last year the Sixth Circuit held in a Title VII case alleging an offensive work environment,

The sexually oriented poster displays had a de minimis effect on the plaintiff's work environment when considered in the context of a society that condones and publicly features and commercially exploits open displays of written and pictorial erotica at the newsstands, on prime-time television, at the cinema, and in other public places.²⁰

This court's assumption that the fact that women cannot buy a newspaper without seeing the covers of *Hustler* and its ilk means that they are not troubled by this, and its failure to appreciate the crucial qualitative difference in impact between the magazine cover on the newsstand and posters displayed in a work area where, in effect, they define who and what that woman is in that place, are painful examples of judicial gender bias rooted in misconception. Again, this case is not an aberration.

I began by saying that there are two realities for women in the courts today: the continuing reality of gender bias, and the new reality that this problem is beginning to be acknowledged and addressed.

The program of which I am the director, the National Judicial Education Program to Promote Equality for Women and Men in the Courts, known as NJEP, was established in 1980 to help judges understand how gender based stereotypes, myths, and biases affect decision making and the courtroom environment.²¹

When NJEP began, knowledgeable judges, lawyers, journalists and others told us that what we proposed could not be done. We were warned that judges would not accept gender bias as a legitimate topic for judicial education or be willing to engage in the self-scrutiny necessary to eliminate it. I am happy to say that they were wrong.

Over the last seven years NJEP has been invited to present judicial education programs at national and state judicial colleges across the country, including, among Eighth Circuit states, Missouri and Iowa. Although we have met with some skepticism and denial—gender bias is a difficult and sensitive problem to discuss—we have also had many judges tell us, in the words of one judicial

20. *Rabidue v. Osceola Refining Company*, 805 F.2d 611, 622 (6th Cir. 1986).

21. See Lynn Hecht Schafran, *Educating the Judiciary About Gender Bias: The National Judicial Education Program to Promote Equality for Women and Men in the Courts and the New Jersey Supreme Court Task Force on Women in the Courts*, 9 Women's Rights Law Reporter 109 (1986). The National Judicial Education Program can be reached at 99 Hudson Street, Suite 1201, New York, N.Y. 10013, (212) 925-6635.

organization, "Your presentation made us focus on a problem that most assumed to be non-existent."²²

As an outgrowth of NJEP's work, chief justices across the country are appointing task forces to investigate gender bias in their own state court systems and recommend ways to eliminate it.²³ Among Eighth Circuit states, the Minnesota Supreme Court Task Force on Gender Fitness in the Courts was established in June 1987.

The recommendations of the three task forces which have completed their work, which stress education, are now being implemented. Judicial and legal continuing education programs are going forward using the data developed by these task forces. Law schools are being asked to integrate this data into their own curricula, so that the next generation of lawyers and judges can be sensitized early on. The American Bar Association last year endorsed judicial education about gender bias for both state and federal judges.²⁴

Professor Norton quoted to you Abigail Adams' letter urging the Founding Fathers to "Remember the Ladies" in their "new Code of Laws." As we know well, they did not. I congratulate the Eighth Circuit for "Remembering the Ladies" in this Bicentennial program, and trust that the other Circuits will soon follow your excellent example.

22. *Id.* at 116-17.

23. See Lynn Hecht Schafran, *Task Force Approach*, *supra* note 1. As of April, 1988, gender bias task forces in New Jersey, New York and Rhode Island had issued reports and were in an implementation phase. Task forces established by, or with the endorsement of, the chief justices of Arizona, California, Connecticut, Florida, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, Utah and Washington State were in various stages of organization and data collection. Task force formation was in an exploratory phase in Colorado, the District of Columbia, Kentucky, Montana, North Dakota, Oregon, Wisconsin and Vermont.

Readers interested in establishing gender bias task forces in their own states should consult Lynn Hecht Schafran and Norma J. Wikler, *Operating a Gender Bias Task Force: A Manual for Action*, available from the Women Judges' Fund for Justice, 1225 15th Street, N.W., Washington, D.C. 20005, (202) 462-4243.

24. Summary of Action of the House of Delegates, 1986 Annual Meeting (Aug. 11-13, 1986).