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## ARTICLES

### WILL INQUIRY PRODUCE ACTION? STUDYING THE EFFECTS OF GENDER IN THE FEDERAL COURTS

*Lynn Hecht Schafran\**

#### I. INTRODUCTION

When the Ninth Circuit Gender Bias Task Force released its report at the Circuit's 1992 Judicial Conference, Justice Sandra Day O'Connor offered this perspective:

A couple of years ago, I gave a speech in which I discussed the existence of a glass ceiling for women. The next day, headlines and newspaper articles trumpeted my statements as if I had made a surprising new discovery. But it is now 1992, and I don't think most of us were surprised to learn that the [Ninth Circuit] Task Force found the existence of gender bias in a federal circuit. After all, over 20 state task forces already have found gender bias in their judicial systems.<sup>1</sup>

When Justice O'Connor made these remarks, a turning point in the national gender bias task force movement was well underway. Between 1990 and 1994, eight of the twelve federal circuits followed the example of the majority of states by establishing task forces to explore the question: *Do courts treat peo-*

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\* Director, National Judicial Education Program to Promote Equality for Women and Men in the Courts (a project of NOW Legal Defense and Education Fund in cooperation with the National Association of Women Judges). J.D., 1974, Columbia University; M.A., 1965, Columbia University; B.A., 1962, Smith College.

1. Justice Sandra Day O'Connor, *The Quality of Justice*, 67 S. CAL. L. REV. 759 (1994) [hereinafter O'Connor].

ple differently because of their gender?<sup>2</sup> Prior to the 1990s, the opinion, crystallized by the Federal Courts Study Committee in 1990, that a national gender bias task force was unnecessary because "the nature of federal law keeps these problems [*i.e.* those identified in the state task force reports] to a minimum" obviated action.<sup>3</sup> By 1992, however, two circuits, responding to pressure from lawyers within those circuits, had already documented the need for the federal circuits to explore the effects of gender on the treatment of all those with whom their courts interact: litigants, defendants, witnesses, jurors, lawyers, judges and employees. This article summarizes the history behind the federal task forces, their make-up and methodologies, the problems they identified, the reaction to their work and the prospects for implementing their recommendations. Essays from each of the task forces describing their work in detail follow this overview article.

The response to the task forces has differed widely across and within the circuits, ranging from appreciation to animus. The consistency of many of the concerns raised from circuit to circuit, and the fact that parallel inquiries by entities such as the Judicial Conference of the United States identified many of the same concerns, demonstrates the validity of the task forces' findings. The task force reports provide a wealth of information and an action plan for everyone concerned with fairness in the courts. As Justice Ruth Bader Ginsburg observed in her Foreword to the *Report of the Special Committee on Gender of the D.C. Circuit Task Force on Gender, Race and Ethnic Bias*:

Self-examination of the court's facilities and practices . . . can yield significant gains. First, such projects enhance public understanding that gender equality is an important goal for a nation concerned with full utilization of the talent of all its people. Second, self-examination enables an institution to identify, and devise means to eliminate, the harmful effects of gender bias. Third, close attention to the existence of unconscious prejudice can prompt and encour-

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2. The First, Second, Third, Tenth and District of Columbia Circuits explored gender, racial and ethnic bias simultaneously. The Ninth Circuit had sequential task forces on gender and racial/ethnic/religious bias. The Eighth and Eleventh Circuits studied gender bias only.

3. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990).

age those who work in the courts to listen to women's voices, and to accord women's proposals the respect customarily accorded ideas advanced by men. And finally, self-inspection heightens appreciation that progress does not occur automatically, but requires a concerted effort to change habitual modes of thinking and action.<sup>4</sup>

## II. ORIGINS OF THE NATIONAL GENDER BIAS TASK FORCE MOVEMENT

The eight federal task forces on gender bias in the courts and the forty state task forces that preceded them comprise what has become known as the national gender bias task force movement. These task forces emerged from the work of a project of the NOW Legal Defense and Education Fund ("NOW LDEF"), the National Judicial Education Program to Promote Equality for Women and Men in the Courts. In 1970, several founders of the National Organization for Women ("NOW") founded NOW LDEF to undertake litigation and education in support of women's rights. One of this new organization's immediate concerns was the federal courts' response to employment-rights litigation on behalf of women. In the late 1960s, women's rights lawyers began using Title VII of the Civil Rights Act of 1964 to seek redress for sex discrimination in the workplace, but the law's remedial intent was not being realized. The experience of the lawyers bringing these cases was later described by a member of that first NOW LDEF board of directors, Marilyn Hall Patel, now Chief Judge for the United States District Court for the Northern District of California:

I recall that when I was working on what were called "discrimination" cases, I believed that I knew what constituted the burden of proof. Congress appeared to have made that very clear. We all felt that we knew what was meant by a preponderance of the evidence. But I found that usually

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4. Ruth Bader Ginsburg, *Foreword* to REPORT OF THE SPECIAL COMMITTEE ON GENDER TO THE D.C. CIRCUIT TASK FORCE ON GENDER, RACE, AND ETHNIC BIAS, reprinted in 84 GEO. L.J. 1651, 1651-52 (1996) [hereinafter D.C. CIRCUIT REPORT]; see also Ruth Bader Ginsburg, *Foreword* to REPORT OF THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL, AND ETHNIC FAIRNESS IN THE COURTS (1997) [hereinafter SECOND CIRCUIT REPORT].

there was an additional burden of proof for women. Many of the male judges I knew were not aware or did not believe that certain things did or could happen to women, or that women were discriminated against or treated in an unjust fashion.<sup>5</sup>

In response to these problems, the new NOW LDEF board proposed a project that would work with continuing judicial education programs to help judges understand how gender bias affects decision making and court interaction. Their proposal was met with skepticism. Knowledgeable judges, lawyers and journalists insisted that judges would never acknowledge that gender bias exists in the courts or accept it as a legitimate topic for judicial education and self-examination. Potential funders claimed such a project was unnecessary because judges are impartial as dictated by their job descriptions.

Nonetheless, NOW LDEF persevered, collecting cases, transcripts and news reports that demonstrated the need for judicial education about gender bias, defined as (1) stereotypical thinking about the nature and roles of women and men, (2) how society values women and what is perceived as women's work and (3) myths and misconceptions about the social and economic realities of women's and men's lives.<sup>6</sup> After ten years of effort, NOW LDEF in 1980 established the National Judicial Education Program (NJEP) and invited the newly formed National Association of Women Judges to become NJEP's cosponsor.<sup>7</sup> Because the response of federal judges to Title VII cases

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5. NATIONAL JUDICIAL EDUCATION PROGRAM TO PROMOTE EQUALITY FOR WOMEN AND MEN IN THE COURTS, JUDICIAL DISCRETION: DOES SEX MAKE A DIFFERENCE?, INSTRUCTOR'S MANUAL 5 (1981).

6. See Norma J. Wikler, *On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts*, 64 JUDICATURE 202 (1980). Professor Wikler was a professor of sociology at the University of California at Santa Cruz. In 1979, she took a two-year leave to found and steer NJEP. She has continued to be active with NJEP, serving as advisor to the first and many subsequent task forces on gender bias in the courts. I succeeded Professor Wikler as NJEP's director in late 1981.

7. For a complete description of the origins of NJEP and the gender bias task forces, 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 RTS. L. REP. 109 (1986) [hereinafter *Educating the Judiciary*]; see also Norma J. Wikler, *Water on Stone: A Perspective on the Movement to Eliminate Gender Bias in the Courts*, 13 ST. CT. J. 13 (1989).

inspired NJEP's formation, the project, from its inception, was designed to work with the federal courts. However, when NJEP invited the then-director of the Federal Judicial Center—the entity that provides judicial education and research for the federal bench—to join the project's Advisory Committee, he preferred to be listed as an "observer."<sup>8</sup> It was not until 1987 that NJEP was invited to present a program for federal judges, arranged for by Judge Patel.<sup>9</sup>

Because the federal courts were not yet ready to address gender fairness issues, NJEP began with the states. In every state in which NJEP conducted judicial education it included information about that state's own courts as evidence that gender bias was a problem in that particular jurisdiction, and to minimize the denial that inevitably comes with raising this sensitive subject. NJEP's emphasis on developing state-specific information for judicial education became the catalyst for the first gender bias task force. When New Jersey Judge Marilyn Loftus asked her court administrator for a committee to assist in collecting local data in preparation for a judicial college course on gender bias, New Jersey's Chief Justice, the late Robert Wilentz, created the New Jersey Supreme Court Task Force on Women in the Courts.<sup>10</sup> The task force's presentation at the 1983 New Jersey judicial college made page one of the *New York Times*,<sup>11</sup> and inspired the national gender bias task force movement. The National Association of Women Judges established the National Task Force on Gender Bias in the Courts to encourage formation of new task forces and implementation of their recommendations. Forty state task forces have now documented gender bias in court interactions among judges, lawyers, court users and court personnel; in court employment practices; and in courts' responses to substantive areas such as violence against women, torts and family law.<sup>12</sup>

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8. Interview with Norma J. Wikler, New York, N.Y. (Jan. 21, 1998).

9. See *Promoting Gender Fairness in the Courts: Workshop for Judges of the Ninth Federal Circuit*, Monterey, California (Jan. 25, 1987).

10. See *Educating the Judiciary*, *supra* note 7, at 117.

11. See *Panel in Jersey Finds Bias Against Women in the State Courts*, N.Y. TIMES, Nov. 22, 1983, at A1.

12. For a summary of the findings of the nine task forces that had reported as of 1989, see Lynn Hecht Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts*, 26 TRIAL 28 (Feb. 1990). Subsequent state reports identified similar prob-

In the words of the 1986 report of the New York Task Force on Women in the Courts:

[G]ender bias against women litigants, attorneys and court employees is a pervasive problem with grave consequences. Women are often denied equal justice, equal treatment, and equal opportunity. Cultural stereotypes of women's role in marriage and in society daily distort courts' application of substantive law. Women uniquely, disproportionately and with unacceptable frequency must endure a climate of condescension, indifference and hostility. Whether as attorneys or court employees, women are too often denied equal opportunities to realize their potential.<sup>13</sup>

In response to these task forces, the Conference of Chief Justices in 1988 and 1993 adopted resolutions urging every state to have a task force on gender bias in the courts and a task force on race/ethnic bias in the courts, and to implement their recommendations.<sup>14</sup> The American Bar Association in 1990 amended its Model Code of Judicial Conduct to explicitly bar manifestations of gender bias by judges, lawyers, court personnel and others under judges' direction and control.<sup>15</sup> Most important, appellate courts accepted judicial gender bias

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lems. For a complete list of the task force reports and how to obtain them, contact the National Judicial Education Program, 99 Hudson Street, Suite 1201, New York, NY 10013; (212) 925-6635; Facsimile (212) 226-1066; e-mail [lschafran@nowldef.org](mailto:lschafran@nowldef.org).

13. REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS, *reprinted* in 15 *FORDHAM URB. L.J.* 11, 17 (1986-87).

14. See Conference of Chief Justices, Resolution XVIII, *Task Forces on Gender Bias and Minority Concerns* (adopted Aug. 4, 1988), *published* in 26 *CT. REV.* 5 (1989); Resolution V, *Urging Further Efforts for Equal Treatment of All Persons* (adopted Jan. 28, 1993).

15. See MODEL CODE OF JUDICIAL CONDUCT Canon 3B(5), (6) (1990). Also prohibited are manifestations of bias based on race, religion, national origin, disability, age, sexual orientation and socioeconomic status. As of 1998 approximately half the states had adopted these new canons.

With respect to the federal courts, the Judicial Conference declined the recommendation of its own Committee on Codes of Conduct to adopt a version of these canons, Proposed Revisions to the Code of Conduct for United States Judges, Canon 3(A)(7), Oct. 31, 1991. Instead it amended the Commentary to Canon 3 to read: "The duty under Canon 2 . . . to be respectful of others includes the responsibility to avoid comment or behavior that can reasonably be interpreted as manifesting prejudice or bias toward another on the basis of personal characteristics like race, sex, religion or national origin." Memorandum from the United States Judicial Conference to All United States Judges, re: Judicial Conference Approves Revision to the Code of Conduct for United States Judges (Oct. 22, 1992).

as grounds for reversal, often citing the task force reports in their opinions.<sup>16</sup>

### III. ORIGINS OF THE FEDERAL TASK FORCES ON GENDER BIAS IN THE COURTS

In 1990, the Federal Courts Study Committee, appointed by Congress in 1988 to examine the federal court system and make recommendations for its long-term improvement, held hearings on its tentative recommendations.<sup>17</sup> Several witnesses urged the Committee to recommend formation of a national task force on gender bias in the courts to undertake in the federal circuits the same type of inquiry ongoing in state court systems since the early 1980s.<sup>18</sup> The Committee declined, writing that although federal judicial education about gender and race bias was in order because of the state task forces' findings, a federal task force was not necessary because "the quality of the federal bench and the nature of federal law keep such problems to a minimum."<sup>19</sup>

In that same year, however, two circuits initiated task forces on their own. The D.C. Circuit Judicial Council, responding to a local bar committee's recommendation that both the federal and local D.C. courts examine gender and race issues, established

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16. For example, in the 1995 case of *Catchpole v. Brannon*, 36 Cal. App. 4th 237 (Cal. Ct. App. 1995), the California Court of Appeal, citing the Ninth Circuit and California task forces' findings on judicial hostility to sexual harassment cases, reversed a trial judge's opinion in such a case stating:

The phrase "due process of law" contemplates the opportunity to be fully and fairly heard before an impartial decisionmaker . . . . The judge's expressed hostility to sexual harassment cases and the . . . misconceptions he adopted provide a reasonable person ample basis upon which to doubt whether appellant received a fair trial.

*Id.* at 245, 249; see also *Iverson v. Iverson*, 11 Cal. App. 4th 1495 (Cal. Ct. App. 1992); *In re Marriage of Davies*, 880 P.2d 1368 (Mont. 1994); *Huesers v. Huesers*, 560 N.W.2d 219 (N.D. 1997); *Johnson v. Johnson*, 544 N.W.2d 519 (N.D. 1996); *State v. Pace*, 447 S.E.2d 186 (S.C. 1994).

17. See JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 31-33 (1990) [hereinafter STUDY COMMITTEE REPORT].

18. See Testimony of Judge Lisa Hill Fenning (October 21, 1989), Professor Myra Raeder (January 29, 1990), Professor Judith Resnik (January 29, 1990), and Lynn Hecht Schafran, Esq. (January 30, 1990), before the Federal Courts Study Committee (on file with the author).

19. STUDY COMMITTEE REPORT, *supra* note 17, at 169.



the first of the federal task forces and appointed then-Judge Clarence Thomas as its chair. However, this task force did not become active until 1992.<sup>20</sup> The second task force appointed, but the first to publish a report,<sup>21</sup> was the Ninth Circuit Task Force on Gender Bias in the Courts, initiated by a resolution of the Lawyers Division of the Ninth Circuit Judicial Conference.<sup>22</sup> Throughout the first half of the 1990s there was strong support for the federal task forces from a variety of important entities, including Congress.

#### A. *Congressional Support for Federal Task Forces on Gender Bias in the Courts*

Congress became familiar with the state gender bias task force reports while developing the Violence Against Women Act ("VAWA"), ultimately passed as part of the Violent Crime Control and Law Enforcement Act of 1994.<sup>23</sup> Beginning in 1991, Congress heard testimony about state courts' response to violence against women in which witnesses cited these reports extensively.<sup>24</sup> After conducting its own research into these reports, the Senate Judiciary Committee issued a report on the need for the proposed VAWA that quoted from these reports at length.<sup>25</sup>

Having seen the value of the state gender bias task forces in identifying areas where women were being denied equal access to the courts and to justice, Congress decided to encourage similar inquiries in the federal system as well. The VAWA

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20. See D.C. CIRCUIT REPORT, *supra* note 4, at 1657, 1666.

21. See THE EFFECTS OF GENDER IN THE FEDERAL COURTS; THE FINAL REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE, reprinted in 67 S. CAL. L. REV. 745 (1994) [hereinafter NINTH CIRCUIT REPORT].

22. See 1990 Resolution No.9 (Amended): Create an Advisory Committee on Gender Bias in the Courts, reprinted in Mark Mendenhall, 1990 Ninth Circuit Judicial Conference Report, 132 F.R.D. 83, 115 (1990).

23. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified at 42 U.S.C. § 13701-14223 (1994)) [hereinafter Violent Crime Act].

24. See *Women and Violence: Hearings Before the Senate Committee on the Judiciary*, 101st Cong. 108 (1991); *Violence Against Women: Hearing Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong. 70-82 (1992).

25. See S. REP. NO. 103-138, at 45, 49 (1993).

included the Equal Justice for Women in the Courts Act,<sup>26</sup> which provided funding for the federal circuits to establish gender bias task forces and implement their recommendations.<sup>27</sup> The Act also provided funds for the Administrative Office of the Courts to be the clearinghouse to disseminate nationally the federal task forces' reports and implementation materials; and for the Federal Judicial Center to conduct educational programs on the issues identified by the task forces. Unfortunately, the Equal Justice in the Courts Act was not funded because in the interval between passage and appropriation, a controversy over the D.C. Circuit report caused certain members of the Senate Judiciary Committee who had once supported funding for the task forces to oppose it. This opposition is discussed below under the heading "Opposition to the Federal Task Forces."<sup>28</sup>

#### *B. Support from the National Association of Women Judges and the Federal Judicial Center*

In 1992, the National Association of Women Judges ("NAWJ") convened the Second National Conference on Gender Bias in the Courts.<sup>29</sup> Because most of the state task forces had by then completed their reports, the conference theme was "Focus on Follow Up." NAWJ was concerned, however, that the federal courts had been slow to undertake this important work and invited to the conference a representative from each of the federal circuits and the Federal Judicial Center ("FJC"). The federal representatives attended a special pre-conference program for those just beginning the task force process. At the end of the conference, the FJC's representative convened the federal circuit representatives to explore how the Center could assist them with this work. The FJC subsequently convened a meet-

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26. Violent Crime Act, *supra* note 23 (codified at 42 U.S.C. § 13991 (1995)).

27. *See id.* (codified at 42 U.S.C. § 14001).

28. *See infra* notes 40-47 and accompanying text.

29. March 17-21, 1993, National Center for State Courts ("NCSC"), Williamsburg, Virginia. The first National Conference on Gender Bias in the Courts, convened by the NCSC, The National Association of Women Judges, and the William Bingham Foundation, took place on May 18-21, 1989, at NCSC headquarters in Williamsburg, Virginia. *See* Marilyn Roberts & Dixie K. Knoebel, *National Conference on Gender Bias in the Courts: An Overview*, 13 STATE CT. J. 12, 15 (1989).

ing of these representatives to explore data collection methodologies.<sup>30</sup> In 1995, the FJC published *Studying the Role of Gender in the Federal Courts: A Research Guide*,<sup>31</sup> which built on an earlier manual developed for the state gender bias task forces.<sup>32</sup>

### C. *Support from the National Commission on Judicial Discipline and Removal*

Congress established the National Commission on Judicial Discipline and Removal in 1990 to evaluate the process for disciplining and impeaching federal judges. In 1993, the Commission invited testimony from the National Association of Women Judges, the National Judicial Education Program and others with relevant information respecting gender and other types of bias. After hearing testimony about the state and Ninth Circuit gender bias task force reports and federal judges' sexual harassment of court personnel and law clerks,<sup>33</sup> the Commission recommended that "each circuit that has not already done so conduct a study (or studies) of judicial misconduct involving bias based on race, sex, sexual orientation, religion, or ethnic or national origin, including sexual harassment . . . ."<sup>34</sup>

### D. *Support from the Judicial Conference of the United States*

The Judicial Conference of the United States is the governing

30. Gender Bias Workshop, Federal Judicial Center, Washington, D.C. August 5-6, 1993.

31. MOLLY TREADWAY JOHNSON, *STUDYING THE ROLE OF GENDER IN THE FEDERAL COURTS: A RESEARCH GUIDE* (1995).

32. See NORMA J. WIKLER & LYNN HECHT SCHAFFRAN, *OPERATING A TASK FORCE ON GENDER BIAS IN THE COURTS: A MANUAL FOR ACTION* (1986).

33. See Hearings of the National Commission on Judicial Discipline & Removal 411-80 (Jan. 29, 1993) (Statements of Justice Elizabeth Lacy, National Association of Women Judges, at 411; Dean Barbara Safriet, Yale Law School, at 422; Lynn Hecht Schafraan, National Judicial Education Program, at 426, 454; Statement submitted for the record by Professor Judith Resnik, Member, Ninth Circuit Task Force on Gender Bias in the Courts, at 470) [hereinafter *Hearings on Judicial Removal*].

34. REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL: *Hearing Before the Subcomm. on Intellectual Property and Judicial Administration of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 126 (1993).

body of the federal courts. In 1992, the Conference concluded that "bias, in all of its forms, presents a danger to the effective administration of justice in federal courts" and resolved to encourage "each circuit not already doing so to sponsor educational programs for judges, supporting personnel, and attorneys to sensitize them to concerns of bias . . . and the extent to which bias may affect litigants, witnesses, attorneys and all those who work in the judicial branch."<sup>35</sup>

In 1993, the Conference found "great merit" in the Equal Justice in the Courts Act then pending in Congress that encouraged "circuit judicial councils to conduct studies with respect to gender bias in their respective circuits . . ."<sup>36</sup> In March 1995, the Conference declared that "[i]nvidious discrimination has no place in the federal judiciary" and again encouraged the circuits to study "whether bias exists in the federal courts . . . and whether additional education programs are necessary."<sup>37</sup> During 1994-1995, the Judicial Conference was developing the Long Range Plan for the Federal Courts. Throughout the drafting process, the Long Range Planning Committee recognized the importance of eliminating bias in the courts. Recommendation 78 of the final plan states: "Since both intentional bias and the appearance of bias impede the fair administration of justice and cannot be tolerated in federal courts, federal judges should exert strong leadership to eliminate unfairness and its perception in federal courts."<sup>38</sup> The commentary to this recommendation recites the history of the Conference's support for the task forces and concludes: "Several federal circuits have undertaken such studies; the Ninth Circuit's sets a high standard, one that other courts would do well to emulate."<sup>39</sup>

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35. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 64 (1992).

36. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 28 (1993).

37. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 13 (1995).

38. JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS 112 (1995) [hereinafter LONG RANGE PLAN].

39. *Id.* at 113

## IV. OPPOSITION TO THE FEDERAL TASK FORCES

Despite this stellar support, the task forces also encountered considerable hostility. The most prominent objectors were a group of D.C. Circuit Court judges who denounced their task force as "improper," "inappropriate," and "the advance guard of a radical political movement to politicize the courts."<sup>40</sup> They persuaded the chair of the Senate Judiciary Committee subcommittee on Administrative Oversight and the Courts to oppose the appropriation of funds for the federal task forces authorized in the Equal Justice in the Courts Act and to direct the General Accounting Office ("GAO") to investigate the methodology and findings of the Ninth and D.C. task forces, the only two that had reported as of 1995. Three Senators placed a colloquy in the Congressional Record decrying the task forces as "ill-conceived," "deeply flawed," "methodologically biased," and "divisive," and stating that no bias studies could be supported by federal funds.<sup>41</sup> Nine other Senators placed their own colloquy in the Congressional Record calling the task forces "critical to the administration of justice" and supported funding.<sup>42</sup> Judges who believed in the importance of the task forces wrote to the Judicial Conference urging it to press for the appropriation.<sup>43</sup> Some wrote directly to the Senate and House Appropri-

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40. Chief Judge Patricia M. Wald, Remarks to the Aspen Law & Business Third Annual Institute: Woman Advocate 1995, at 20-21 (June 12-13, 1995) (describing the opposition) [hereinafter Wald]; see Patricia M. Wald, *Glass Ceilings and Open Doors: A Reaction*, 65 *FORDHAM L. REV.* 603, 614-15 (1996); see also Laurence H. Silberman, *The D.C. Circuit Task Force on Gender, Race, and Ethnic Bias: Political Correctness Rebuffed*, 19 *HARV. J.L. & PUB. POL'Y* 759 (1996) [hereinafter Silberman]; Saundra Torrey, *Federal Judge Assails Courthouse Bias Study*, *WASH. POST*, Mar. 27, 1995, at B3.

41. 141 *CONG. REG. S* 14691-92 (daily ed. Sept. 29, 1995) (statement of Sen. Orin Hatch). Senator Hatch participated in a colloquy with Senator Charles Grassley and Senator Phil Gramm.

42. 141 *CONG. REC. S*18173, S18174 (daily ed. Dec. 7, 1995) (statement of Sen. Joseph Biden). Senator Biden participated in a colloquy with Senators Paul Simon, Edward Kennedy, Robert Kerrey, Bill Bradley, Barbara Boxer, Frank Lautenberg, John Glenn and Dale Bumpers regarding funds for gender bias studies in the courts in the FY1996 Commerce-Justice-State Appropriation Bill. Congressional Representative Constance Morella also entered a statement of support. See 141 *CONG. REC. E*2302-02 (Dec. 6, 1995), available in 1995 WL 716129.

43. See Memorandum from Eighth Circuit Chief Judge Richard Arnold to Seventh Circuit Chief Judge Richard Posner (Oct. 10, 1995) (on file with author).

ations Committees to explain why the circuits needed to go forward with this work.<sup>44</sup>

The value of the task forces' inquiries was confirmed by the GAO which found that while the D.C. and Ninth Circuit task forces drew some conclusions that the GAO did not find supportable absent more baseline statistical data, each of these studies

covers a broad range of topics pertaining to court operations and provides a variety of useful descriptive data and some statistical data that can serve as baseline measures for future descriptive studies in these Circuits . . . . Overall, the methods selected in each study were appropriate for describing court participants' perceptions and experiences about court work life.<sup>45</sup>

The immediate outcome of this debate was that Congress declined to fund the Equal Justice in the Courts Act appropriation for the gender bias task forces. However, several circuits were committed to going forward and sought approval from the U.S. Judicial Conference to use their own funds and funds they could raise. As Judge Lyle Strom, Chair of the Eighth Circuit Gender Fairness Task Force stated in his letter to the Conference's Executive Committee, "Those of us who have devoted our time and energy to this important work feel strongly that we should be allowed to complete it."<sup>46</sup> Thus, the Second, Third, Eighth, Tenth and Eleventh Circuits established or went forward with their task forces.<sup>47</sup> The findings and recommen-

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44. For example, Tenth Circuit Chief Judge Stephanie Seymour wrote:

In my judgment, it would be a great mistake to now eliminate funding for the gender bias studies from the judiciary appropriation. Recently as Chief Judge I was made aware of an extremely serious and long standing situation involving sexual harassment in a court unit in one of the district courts in the Tenth Circuit, so I can assure you that gender bias still poses a serious problem. My hope is that our gender bias studies will begin a dialogue that will raise consciousness of the issues and generally educate our court family.

Letter from Chief Judge Stephanie K. Seymour to Senator Robert C. Byrd (Oct. 31, 1995) (on file with the author).

45. GENERAL ACCOUNTING OFFICE, *CIRCUIT BIAS TASK FORCE REPORTS* 3 (1996).

46. Letter from Judge Lyle E. Strom to Judge Gilbert Merritt, Chair, Executive Committee, Judicial Conference of the United States (Jan. 25, 1996) (on file with the author).

47. The Sixth Circuit indicated its wish to follow suit but said it could not do so

dations of the six task forces that have reported are described below.

## V. WHAT THE FEDERAL TASK FORCES FOUND

All the task forces examined the effects of gender on court interactions, appointments and employment. Some explored gender effects in substantive law areas. The most striking aspect of the task forces' findings is the overlap of many of the concerns identified.

### A. *Task Force Members and Methodologies*

The federal gender bias task forces were comprised of trial and appellate judges, court administrators, lawyers, law professors and social scientists. They were joined by numerous committees of lawyers, law professors, and judges who became the volunteer research arms of the task forces. Together they collected data using the variety of quantitative and qualitative research methods suggested by the Federal Judicial Center's study guide and the Ninth Circuit task force's research design, developed by Dr. Deborah Hensler of RAND's Institute of Civil Justice. These methods included: public hearings and surveys of thousands of judges, attorneys, court personnel, parties and jurors; focus groups with lawyers in specialized practices or from individual districts; focus groups with court personnel; reviews of court personnel policies; and reviews of written decisions and original empirical studies.

### B. *Court Interaction*

The task forces inquired into the way those who work in and use the courts interact with one another. The good news was that the federal courts had a much lower incidence of gender-biased behavior than the state courts. As in the state courts, however, male attorneys were cited as the offenders far more often than judges, and women judges, lawyers, witnesses, parties and employees are still not treated with the same respect

accorded their male counterparts. Women in the federal courts must on occasion contend with demeaning forms of address ("honey," "sweetheart"), gender-related put downs, offensive or embarrassing public comments about their physical appearance or clothing, sexually suggestive comments, verbal and physical sexual harassment, disparaging comments about the professional competence of female attorneys as a group, disparaging comments about the competence of female judges as a group and refusal to consider maternity issues in the same manner as other medical absences when setting trial schedules or granting extensions of time. The Second Circuit task force stated succinctly, "Some biased conduct toward parties and witnesses based on gender or race or ethnicity has occurred on the part of both judges and lawyers. Biased conduct toward lawyers . . . has occurred to a greater degree."<sup>48</sup> The Eighth Circuit task force reported that sixty percent of female attorneys had experienced incidents of gender-related incivility within the courts in the last five years and noted:

Through such gender-based incivilities, participants in the judicial process signal to women that their presence is, at best, unexpected and, at worst, unwelcome. Certain types of comments also tend to focus on the woman's physical appearance, suggesting to female attorneys that they are viewed as sexual objects, rather than legal professionals.<sup>49</sup>

Eliminating gender bias in court interactions is hampered by what the Ninth Circuit task force called the "two different worlds" phenomenon.<sup>50</sup> Men and women in the federal courts have different experiences, leading to different views of the definition and prevalence of gender bias. Men generally do not see, or do not comprehend, the negative consequences of the gender-related incivilities (and worse experiences) that confront

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48. SECOND CIRCUIT REPORT, *supra* note 4, at 113.

49. FINAL REPORT & RECOMMENDATIONS OF THE EIGHTH CIRCUIT GENDER FAIRNESS TASK FORCE, *reprinted in* 31 CREIGHTON L. REV. 3, 133 (1997). Gender-based incivilities encompassed behaviors and comments which are clearly gender-related, either because their content is gender-based or their targets are typically women. Such behaviors included "addressed in unprofessional terms," "mistaken for non-lawyer," "offensive public comment about appearance," "offensive remarks or jokes about women," and "offensive remarks or jokes about men." *Id.*

50. NINTH CIRCUIT REPORT, *supra* note 21, at 951.



women. Men do not realize that these behaviors have direct impact on others' perceptions of women lawyers' credibility and on their ability to represent their clients. Thus, it is not surprising that, although a majority of judges surveyed said they would intervene to stop gender-biased conduct (and there were reports of significant problems with male attorneys' behavior in pre-trial and chambers conferences), the task forces also found that judges very rarely act to stop this biased behavior.<sup>51</sup>

### C. Court Appointments

Federal judges make appointments to a wide range of judicial and non-judicial positions: magistrate and bankruptcy judges, special masters, receivers, mediators, Criminal Justice Act lawyers, bench/bar committees, and their own law clerks. As the Second Circuit task force observed, "a judge-made appointment is a particular mark of professional prestige for the appointee and . . . the cumulative effect of these individual decisions [appointments] alters the composition of legal bodies."<sup>52</sup> The task forces obtained (or developed) statistics on the gender of those appointed and examined the processes by which these appointments are made. An important factor in evaluating the numbers was to review them by district rather than in the aggregate. Although women often appeared to be appropriately represented among appointees, there were districts in which no women filled these positions at all. For example, although twenty-one percent of bankruptcy judges and thirty percent of magistrate judges in the Second Circuit are women, four of the six districts have no female bankruptcy judges and two have no female magistrate judges.<sup>53</sup>

Several task forces noted concerns with appointments from the Criminal Justice Act panels ("CJA panels") to represent indigent federal defendants. The sense among female and mi-

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51. The importance of appropriate intervention is explored in Vicki C. Jackson, *What Judges Can Learn From Gender Bias Task Force Studies*, 81 JUDICATURE 15 (1997) (Professor Jackson was co-chair of the Committee on Gender of the D.C. Circuit task force), and Lynn Hecht Schafran, *The Obligation to Intervene: New Direction from the American Bar Association Code of Judicial Conduct*, 4 GEO. J. LEGAL ETHICS 53 (1990).

52. SECOND CIRCUIT REPORT, *supra* note 4, at 44.

53. *See id.* at 47 (tbl. L), 49 (tbl. M).

nority respondents was that they could not get appointments even though they put their names on the panel lists. While some circuits made generalized recommendations that districts should publish more information about the CJA panels and consider formalizing the method of assignments, the Third Circuit moved immediately to establish a full-scale certification procedure for would-be CJA lawyers. The certification process includes training programs and non-compensated opportunities to second-chair seasoned CJA attorneys in order to gain experience and become known to the judges, who are now required to follow a rotation list in making these appointments.<sup>54</sup>

#### D. *Court Employment*

The federal circuits are large-scale employers with decentralized employment responsibilities. Consequently, each district and individual court has considerable autonomy. The federal task forces found significant inconsistencies and deficiencies in individual courts' employment policies and practices, resulting in gender-related disparities. In the United States District Court for the District of Wyoming, within the Tenth Circuit, for example, female employees reported that only women were required to follow rigid work schedules with time-limited breaks and lunches, dress professionally, and perform menial tasks such as coffee-making. In one instance, a married man was selected for promotion over an equally qualified single mother specifically because of "his family responsibilities."<sup>55</sup>

The federal task forces reported that some districts and courts had *no* equal employment opportunity or anti-sexual harassment policies at all. Some courts communicated their policies so ineffectively that they were essentially inoperative. Many courts had never provided training about gender discrimination and sexual harassment for judicial or nonjudicial court personnel. In the Eighth Circuit, for example, only one-third of judges had written discrimination and sexual harassment policies and procedures for chambers and staff; seventy-five percent

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54. Interview with Judge Anne E. Thompson, Chair, Third Circuit Task Force on Equal Treatment in the Courts and its Implementation Committee (Feb. 6, 1998).

55. FINAL REPORT OF THE TENTH CIRCUIT GENDER BIAS TASK FORCE WYOMING STUDY COMMITTEE 15 (1996).

of unit heads had no sexual harassment policies at all; and the majority of employees did not know whether their units had such policies or had provided training on them.<sup>56</sup> Most instances of sexual harassment reported by court employees involved co-workers, but in some cases the offender was a judge. Women perceived that it was risky to complain and that perpetrators were not meaningfully sanctioned.<sup>57</sup>

Task force critics claim that "mechanisms are already in place to deal with charges of discrimination and harassment."<sup>58</sup> However, the task forces' findings on court employment were validated when the Judicial Conference of the United States issued its Model Employment Dispute Resolution Plan in March 1997. As discussed in the Tenth Circuit task force's essay, the Congressional Accountability Act of 1995 directed the Judicial Conference to prepare a report on the application of eleven anti-discrimination and employment laws to judicial branch employees, including judicial officers. The Conference found that certain judicial branch procedures needed enhancement, particularly those relating to enforcement and dispute resolution. Every Circuit received the Model Plan with instructions to adapt it to the local needs of individual courts and adopt and implement it no later than January 1, 1999.<sup>59</sup>

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56. See PRELIMINARY REPORT OF THE EIGHTH CIRCUIT GENDER FAIRNESS TASK FORCE, EXECUTIVE SUMMARY 12 (1997).

57. This perception was born out in a case not mentioned in the Second Circuit Report but discussed in testimony before the National Commission on Judicial Discipline and Removal. See Hearings on Judicial Removal, *supra* note 33, at 452. A judge had an affair with his court reporter and was angry when she ended it. He demanded that she meet him in a bar where he ripped her blouse open and was arrested. Her suit against him for sexual harassment was settled on the eve of trial. See *Judge and Employee Settle Harassment Suit*, N.Y. TIMES, Oct. 6, 1992, at B1. Her disciplinary complaint was dismissed with a finding that the judge suffered from the ill-advised combination of prescription drugs and alcohol. See *In re Charge of Judicial Misconduct*, No. 89-8521 (2d Cir., Nov. 9, 1990); Dan Herbeck, *Panel of Jurists Clears Elfvin*, BUFFALO NEWS, Nov. 14, 1990, at C14. This judge is now sitting on a major sexual harassment case. What can the plaintiff think of her chances for a fair trial before this judge?

58. Editorial, *Judicial Intimidation*, WALL ST. J., May 1, 1996, at A14.

59. See Memoranda from Leonidas Ralph Mecham to all United States Judges (May 8, 1997 and Sept. 5, 1997).

## VI. THE NATURE OF FEDERAL LAW

When the Federal Courts Study Committee held hearings on its tentative recommendations, Professor Judith Resnik challenged its claim that a national gender bias task force was unnecessary because the nature of federal law keeps the problems identified in the state task force reports to a minimum. Professor Judith Resnik disagreed, stating,

That claim is simply wrong; "traditional" women's issues (*e.g.*, family) are a major part of the federal court docket via the constitutionalization of family law. Moreover, (as the report ought to have acknowledged), women are participants in the commercial world, are tort litigants and criminal defendants, do make claims under federal statutes (such as social security cases), and are lawyers who represent litigants in such cases. Hence, nothing in the "nature of federal law" makes it immune from concerns about gender bias.<sup>60</sup>

Professor Resnik's assessment was validated by the four task forces that inquired into aspects of the effects of gender on litigants in the federal courts. Like the legal academics who examine federal law through the lens of feminist jurisprudence, these task forces found that coding certain areas of law as not about gender cannot withstand investigation.<sup>61</sup> The Ninth Circuit inquired into substantive law areas few would perceive as affected by gender. Their results demonstrated that gender is significant and worked to women's disadvantage in contexts as diverse as bankruptcy and social security law.<sup>62</sup> The state find-

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60. Professor Judith Resnik, Remarks to the Federal Courts Study Committee 8-9 (Jan. 29, 1990) (on file with author); *see also*, Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS 952, 966-70 (Summer 1996); Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682 (1991).

61. *See* TERESA A. SULLIVAN ET AL., AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA, ch. 8 (1989); Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073 (1994); Karen Gross, *Re-vision of the Bankruptcy of Individual Debtors*, 88 MICH. L. REV. 1506 (1990).

62. *See* NINTH CIRCUIT REPORT, *supra* note 21, at 855, 870, 894-903. The Study Committee's comment on the "nature of federal law" was also undoubtedly a reference to the state task forces' focus on sexual assault and domestic violence, areas widely misperceived as outside the jurisdiction of the federal courts. In my own testimony to the Second Circuit Task Force, I explained why violence against women is in fact the

ings with respect to courts' devaluation of rape victims' experiences were echoed in the federal task forces' findings on sexual harassment suits. The D.C., Second, Eighth and Ninth Circuits cited a variety of concerns with these cases. Some judges view sexual harassment cases as not having a legitimate claim on the courts' time, resulting in inadequate discovery periods and refusal to hear expert witnesses. The Ninth Circuit task force reported that "in sexual harassment or discrimination cases before a male judge, plaintiffs' lawyers report a minimization of their clients' trauma and 'across the board lack of understanding' as to the female plaintiff's situation and point of view."<sup>63</sup> The Second Circuit task force reported that many of the specific complaints and comments it received related to judicial "disfavor" of sexual harassment litigation, and that witnesses related "various disturbing stories" and rare instances of trial judges making "openly discriminatory statements" in these cases.<sup>64</sup> The report also noted that devaluation of plaintiffs' harms and adherence to stereotyped thinking was apparent in certain district court opinions. In one, the judge assumed that a woman who submitted to her supervisor's repeated demands for

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hidden jurisdiction of the federal courts. The jurisdictional grounds are called Title VII, Title IX, carjacking, forfeiture and civil rights violations (among others), but the cases are about the kinds of violence against women that concerned the state gender bias task forces. See, e.g., *United States v. Lanier*, 117 S. Ct. 1219 (1997) (involving 18 U.S.C. § 242 criminal civil rights violation by judge who raped and sexually assaulted a litigant and court employees in his chambers); *Franklin v. Gwinett County Pub. Sch.*, 503 U.S. 60 (1992) (involving Title IX action based on sexual assault by high school coach on student); *United States v. Rivera*, 83 F.3d 542 (1st Cir. 1996) (holding that a rape during a carjacking did not constitute "serious bodily injury" for purposes of enhanced sentence. This case resulted in the Carjacking Corrections Act of 1996 to ensure no repetition of this holding); *Eagleston v. Guido*, 41 F.3d 865 (2d Cir. 1994), *cert. denied*, 116 S. Ct. 53 (1995) (involving § 1983 civil rights suit against police department for failing to protect battered woman from her assailant); *United States v. Sixty Acres in Etowah County*, 736 F. Supp. 1579 (N.D. Ala. 1990), *rev'd* 930 F.2d 857 (11th Cir. 1991) (holding that duress is not an acceptable defense to forfeiture for a woman terrified of her violent husband who beat his first wife to death); *Spencer v. General Elec. Co.*, 688 F. Supp. 1072 (E.D. Va. 1988) (involving Title VII suit in which plaintiff alleged three years of sexual harassment culminating in rape). These cases are a tiny fraction of those that could be cited. The realization that domestic violence is an issue for the federal courts in both criminal and civil cases led the Federal Judicial Center to present two nationally televised educational programs for federal court personnel, *Domestic Violence Awareness for Probation and Pretrial Services*.

63. NINTH CIRCUIT REPORT, *supra* note 21, at 887.

64. SECOND CIRCUIT REPORT, *supra* note 4, at 88.

able with the mere adoption of generalized recommendations.<sup>67</sup>

The five task forces that have reported recommend that districts:

- provide ongoing training for judges and court personnel on the effects of gender in the federal courts, what constitutes biased behavior and how to avoid it, and, for judges and court administrators, appropriate means of intervention;
- attend not only to behavior in court, but also in chambers, in court-sponsored alternative dispute resolution, and in other court-related activities;
- adopt local court rules defining unacceptable biased conduct and indicating the court's intention to take corrective action where appropriate;
- affirm that the federal statute governing judicial discipline considers gender, racial and ethnic bias, sexual harassment and comparable discriminatory conduct as "conduct prejudicial to the effective and expeditious administration of the business of the courts;"<sup>68</sup>
- improve procedures for filing grievances against judges and court personnel for biased behavior and publicize these procedures so that the public knows of available remedies and how to use them;
- investigate treatment of litigants in employment discrimination cases;
- strive for diversity in appointments by widely publicizing opportunities for appointment, including notice to women's and minority bar associations, examining appointment processes and criteria to ensure that they are not exclusionary, documenting the race, gender and ethnicity of those appointed, and requiring use of rotating lists of potential appointees;

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67. REPORT OF THE THIRD CIRCUIT TASK FORCE ON EQUAL TREATMENT IN THE COURTS, reprinted in 42 VILL. L. REV. 1355, 1388 (1997) [hereinafter THIRD CIRCUIT REPORT].

68. See 28 U.S.C. § 372(c) (1994).

sex in order to keep her job could not have suffered any emotional damages because she received pay raises and promotions.<sup>65</sup> In another it appeared that the judge considered the plaintiff's consumption of alcohol at a business dinner the proximate cause of her fellow employees' raping her.<sup>66</sup>

Even though only four task forces addressed sexual harassment cases, they are of particular relevance to both the history of the federal gender bias task forces and the implications for future progress. It was the federal courts' failure to make Title VII a meaningful remedy for other forms of on-the-job sex discrimination in the late 1960s that catalyzed judicial education about gender bias in the courts, the forerunner of the gender bias task forces in the state and, subsequently, the federal courts. The persistence over thirty years of Title VII as an area of the law in which harms to women continue to be stereotyped, misunderstood, trivialized, devalued and ignored demonstrates the fallacy of assuming, as many do, that gender bias is a problem that will self-correct as younger men and women come to the bench and bar. Only a commitment to on-going self-scrutiny and effective implementation of the task forces' recommendations can dismantle so tenacious a problem.

## VII. RECOMMENDATIONS

The Third Circuit task force recognized the value of a task force inquiry as the basis for recommendations that will truly enhance fairness in courts. It explained,

The process of self-examination has revealed facts which would not have otherwise been discovered. As significant, the manner in which these facts have been disclosed, through a public format rather than in isolation, has already prompted remedial action in several areas. Moreover, the investigative tools utilized by the task force—public hearings and surveys to jurors, criminal defendants, debtors, attorneys and employees—provided critical insights into the condition of our courts that would have been unavail-

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65. *See id.* at 89.

66. *See id.* at 89-90.

- provide diversity training for judicial and non-judicial court personnel;
- adopt the Model Employee Dispute Resolution Plan developed by the Administrative Office of the Courts;
- ensure that the designated EEO officer for each court unit is not employed within that unit;
- develop written criteria for promotion, leave taking, flexitime and job-sharing;
- adopt sexual harassment policies for judicial and nonjudicial court personnel and provide training in prevention and complaint procedures;
- establish a standing Circuit-level committee on fairness comprised of judges from all levels, lawyers, court staff and non-lawyer representatives;
- pursue, and coordinate decentralized, district-by-district implementation of all recommendations;
- recognize that federal courts do not operate in isolation and work with state courts, tribal courts, United States Attorneys and Public Defenders offices, the Department of Justice, the Bureau of Prisons, the Sentencing Commission, local law enforcement officials, adjudicators and staff at regional offices of federal agencies, bar associations, law schools and the community to enhance all aspects of fairness.

### VIII. IMPLEMENTATION

While the recommendations of the federal gender bias task forces are similar in many respects from circuit to circuit, the disparity of the circuits' approaches to implementation raises the question posed in the title of this article: *Will Inquiry Produce Action?* The first two task forces to report, in 1993 and 1995 respectively, have had markedly different implementation experiences.

The Ninth Circuit made numerous, wide-ranging recommendations. These were adopted in their entirety by the Judicial Council which immediately appointed the Gender Fairness Committee to implement them. As that committee's essay for



this symposium describes, the Circuit went immediately into an active implementation mode, functioning on both a circuit-wide and district-by-district level. The Ninth Circuit's commitment to education for judicial and nonjudicial court personnel on the gender effects in federal courts is underscored by its publication of *A Resource Guide on Gender Fairness Topics*. This document outlines the videos, training materials, books, articles and reports useful in educational seminars.<sup>69</sup>

By contrast, the D.C. Circuit task force felt constrained in making its recommendations by the strenuous opposition it encountered. Despite the modesty of its recommendations, many were attacked (and some ultimately rejected) by the Judicial Council. For example, despite endorsement by the Federal Courts Study Committee and the United States Judicial Conference of education for judges and court staff on gender and race issues, opponents attacked the task force's recommendations for educational programs as implicit acknowledgment that judges are biased and need re-education.<sup>70</sup> Among the recommendations this task force was able to implement was creation of a sexual harassment policy for judicial and nonjudicial court personnel. Opponents asserted that while such a policy was fine for court staff it was unnecessary for judges.

The Second, Third, and Eighth Circuits all issued their reports in 1997 and thus have had much less time to implement their recommendations. Nonetheless, the differences in their approaches are already striking.

The Second Circuit adopted an approach which postpones implementation. This task force published its draft report for comment in June 1997 and its final report in November 1997. However, the implementation committee appointed by the Judicial Council announced in March 1998 that it is reviewing the work and recommendations of the task force and its committees, again soliciting comments, and will report to the Judicial Council by mid-year.<sup>71</sup> Within the circuit, however, individual

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69. This *Resource Guide* can be obtained from Mark Mendenhall, Assistant Circuit Executive for Communications, 95 Seventh Street, Suite 429, Post Office Box 193939, San Francisco, CA 94119-3939; (415) 556-6177; Facsimile (415) 556-6179; e-mail [mmendenhall@ce9.uscourts.gov](mailto:mmendenhall@ce9.uscourts.gov).

70. Silberman, *supra* note 40, at 760.

71. See Letter from Judge Jose Cabranes, Chairman, Special Committee on Gen-

judges and districts have taken action on the report. A judge in the Southern District of New York who was a task force member met with the Criminal Law Committee of the New York Women's Bar Association to explore "Gender Differences in the Courtroom: What Can Be Done?"<sup>72</sup> The District of Connecticut, at its annual retreat, presented a program on the report entitled, "Exerting Strong Leadership to Eliminate Unfairness and Its Perception in Federal Courts."<sup>73</sup> The Chief Judge of the Southern District of New York appoint a committee to implement the task force's recommendations within that district.<sup>74</sup>

The Third Circuit was immediately very active. Task force chair Judge Anne Thompson agreed to chair the implementation committee and is travelling to each district to help establish implementation plans and to share useful materials. Each district was required to submit a report on how it will implement the task force's recommendations. The implementation committee met with all unit leaders—clerks of court and bankruptcy court, chief probation officers, chief pre-trial services officers, public defenders and marshals (and their deputies) to explore a coordinated effort to effect implementation. The clerk of court has been directed to work with the Federal Judicial Center to develop diversity training for all judicial and nonjudicial personnel. EEO officers have been reassigned to units other than those in which they work.<sup>75</sup>

The Eighth Circuit began implementation on a creative note by commissioning a play for the July 1997 Eighth Circuit Judicial Conference about incidents reported to the task force.<sup>76</sup>

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der, Racial, and Ethnic Fairness of the Judicial Council of the Second Circuit, to Kathy Rodgers, Esq., Chair, Committee on Women and the Profession, Association of the Bar of the City of New York (March 3, 1998) (on file with the author). It is noteworthy that the head of this committee styles himself "Chairman." One of the principal findings of all the state task forces was the importance of using gender neutral language, an issue not addressed in the Second Circuit report.

72. *Gender Differences in the Courtroom: What Can Be Done?*, N.Y. WOMEN'S BAR ASSN, Dec. 1997, at 3.

73. Oct. 24, 1997, Trumble, Conn.

74. Interview with Professor Diane Zimmerman, Reporter to the Committee on Gender of the Second Circuit Task Force (May 20, 1998).

75. Telephone Interview with The Honorable Anne E. Thompson, Chief Judge of the United States District Court for the District of New Jersey, Feb. 6, 1998.

76. *See Play: Is It Something I Said? A Play About Gender Fairness in the Eighth Judicial Circuit*, Mixed Blood Theatre Company (1997).

The play encompassed fifteen scenarios such as a judge denying a pregnant attorney's request for a continuance to accommodate her due date while granting one to a male attorney for his hunting trip, and a female secretary afraid to complain about a judge's demand that she run personal errands and put up with his suggestive remarks. Several scenes included asides in which a male judge, a male attorney, a female judge and a female attorney ruminated on the right action to take in the situation. Although the play was well received, the task force's recommendations were not adopted at the subsequent Judicial Council meeting. Rather, the council appointed an implementation committee and directed it to consider which recommendations should be adopted and report back in April 1998.

The Tenth Circuit is unique in that its inquiry is proceeding district-by-district. Each district was asked to review the AOC's Model Employment Dispute Resolution Plan in order to adapt it to its own needs. In April 1998, judges and court staff will receive training in the procedure for reporting, counseling and remedying workplace disputes, including gender bias and sexual harassment. The districts will formally implement the plan on June 1st.

The Eleventh Circuit task force, even before issuing its report, began implementation by presenting a program on gender issues at its 1997 Circuit Conference. The task force made a training video about incidents of inappropriate behavior calling for intervention that prompted discussion about how judges can intervene without prejudicing the jury or undermining attorneys. This video was also presented at the District of Connecticut's program, noted above, a good example of inter-circuit communication and how ideas and materials developed by one task force can benefit the others.

The disparity in the circuits' approaches toward implementation and the fact that not every circuit has a task force creates a potential leadership role for the entities that guide and service the federal courts at the national level: the U.S. Judicial Conference, the Administrative Office of the Courts ("AOC"), and the Federal Judicial Center ("FJC"). These entities could publish a compendium of the recommendations on which every circuit could draw; create model policies (as the AOC did with the Model Employee Dispute Resolution plan); create model

training programs (as the FJC has done with respect to sexual harassment); and undertake monitoring and evaluation to determine the effect of the implementation of task force recommendations. Strategies that are working well in a given district or circuit could be made known nationwide, following the model of the Third Circuit task force within its own circuit. That task force identified a variety of good practices in different districts that it was able to publicize for guidance in other districts.

#### IX. RESPONSE TO THE FEDERAL GENDER BIAS TASK FORCES

The high value many in the federal circuits place on the task forces is attested to not only by the list of supportive organizations discussed earlier, but by the legion of judges, lawyers, law professors and court administrators who served as task force members and volunteered their time as reporters and participants research committees. The human capital investment in these task force reports is extraordinary. The potential of these reports to enhance the fair administration of justice is clear, as demonstrated by the Third Circuit task force's admission that "[t]he process of self examination has revealed facts which would not have otherwise been discovered."<sup>77</sup> In addition, the fact that districts have already replicated the appropriate practices of other districts, brought to light by that examination, further demonstrates the potential of these reports.

The resistance to the task forces and to implementing their recommendations reflects the double-barreled denial that is endemic to exploring bias in any context. Some will acknowledge that a particular event occurred but deny others' perceptions of the cause or impact of the event. Some will deny that the event occurred at all. District of Columbia Chief Judge Patricia Wald, who appointed the D.C. Circuit task force observed:

During the debate there was much talk of perceptions as opposed to reality: "What was in our heads" as opposed to "what was happening in the real world?" Women perceived they were treated differently; but we were told repeatedly

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77. THIRD CIRCUIT REPORT, *supra* note 67, at 1388.

the perception was of our own making. It didn't seem to matter that the women answering the questionnaires and in the focus groups reported actual incidents that happened to them or that they had personally observed—it was still only a perception—we were told—that the cause had anything to do with their gender, even when it happened so much more often to women than to men as to be statistically significant. Unless you could reach in and pull out the smoking discriminatory intent from the hearts and minds of the perpetrators, it was not worth bothering about.<sup>78</sup>

This demand for “the smoking discriminatory intent” reveals a fundamental misconception about the way the mind works. Critics of the task forces, and even some task force members uncomfortable with their own findings, insist that whatever problems were identified, the action or inaction of the judges was not “intentional,” as if that meant there was no need for remediation. This focus on intentionality ignores the fifty years of cognitive research documenting that the human mind is hard-wired to think in stereotypes. We do this because it is “cost effective.” We could not function if we had to start from scratch every time we came upon a new or unfamiliar object, person, or event.<sup>79</sup> But, as the American Psychological Association wrote in its brief to the Supreme Court in a sex discrimination case in which an expert testified at trial about sex stereotyping, “this research indicates that stereotyping is part of the normal psychological process of categorization that under

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78. Wald, *supra* note 40, at 22. Although some judges object to giving credence to perceptions of bias and dismiss them as soft evidence, the military takes just the opposite approach. The Military Equal Opportunity Climate Survey asks respondents about their *perceptions* of the equal opportunity climate in their units. If responses indicate that the environment is perceived as less than fair, commanders work to discover the basis for these perceptions and attempt to change whatever gave rise to them. The military believes that this approach is essential to morale, and, thus, to readiness. See Mickey R. Dansky & Dan Landis, *Measuring Equal Opportunity Climate in the Military Environment*, 15 INT'L J. INTERCULTURAL REL. 389 (1991). Given that the Code of Conduct for the United States Judges requires then to “avoid impropriety and the appearance of impropriety” and to “promote public confidence in the integrity and impartiality of the judiciary,” Canon 2 and 2(A), one would expect the military’s concern with perceptions to be of concern to the courts as well. See, for example, the statement of the Judicial conference Long Range Planning Committee that “both intentional bias and the appearance of bias impede the fair administration of justice . . . .” LONG RANGE PLAN, *supra* note 38.

79. See Irwin A. Horowitz & Kenneth S. Bordens, *Social Perception: The Construction of Social Reality*, in SOCIAL PSYCHOLOGY 87, 91 (1994).

pertinent conditions can lead to inaccurate generalizations about individuals, often transformed into discriminatory behavior.<sup>80</sup> Apparently decent people who are not hostile bigots can discriminate on the basis of stereotypes.<sup>81</sup>

How acting on automatic pilot results in discriminatory behavior based on stereotypes, and the negative consequences for the target, are described by Judge Wald in her analysis of an issue that plagues women lawyers: not being recognized as such by judges, court personnel and other attorneys.<sup>82</sup> The D.C. Circuit task force found that nonrecognition of an attorney's lawyer status by a federal judge was reported by 1% of white men, 10% of black men, 9% of white women and 33% of black women.<sup>83</sup> When it came to nonjudicial court personnel, 42% of women attorneys reported that they had been assumed to be someone other than a lawyer.<sup>84</sup> With respect to opposing counsel, 3% of white men, 31% of minority men, 39% of white women, and 50% of minority women reported nonrecognition of their lawyer status.<sup>85</sup> Assuming that a woman, particularly a black woman, is not a lawyer despite her professional appearance and brief bag speaks to the tenacious power of stereotypes. Central casting for a lawyer is a white male. One step removed from the norm is a white woman or man of color. Women of color are two steps removed from the norm and, as the 33% and 50% nonrecognition statistics show, bear not just a double but a compounded burden. While some would dismiss this nonrecognition as inconsequential, Judge Wald points out:

No one infers conscious bias from this statistic, but . . . how can one discount the effect nonrecognition has on the women lawyer (or the black lawyer) and the image that projects to everybody else in that courtroom? Honest mistake, possibly, but nonprejudicial error, I don't think so. It

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80. Amicus Brief of the American Psychological Association at 4, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (No. 87-1167).

81. See Patricia G. Devine & Steven J. Sherman, *Intuitive Versus Rational Judgment and the Role of Stereotyping in the Human Condition: Kirk or Spock?*, 3 PSYCHOL. INQUIRY 153, 156 (1992).

82. Wald, *supra* note 40, at 20-21.

83. See D.C. CIRCUIT REPORT, *supra* note 4, at 1743.

84. See *id.* at 1724.

85. See *id.* at 1743 n.92.

says to the misidentified player, you are not in friendly territory. This is not your game, yet.<sup>86</sup>

Because this automatic process of stereotyping is so natural for everyone, we must all make a conscious effort to strive for controlled processing: the formation of impressions with conscious awareness and attention to the thinking process. Individuals can learn to recognize categorization, resist evaluating individuals in categorical terms, and break the link between categorization processes and judgmental consequences, thus reducing the likelihood that stereotypic thinking will be transformed into discriminatory action.<sup>87</sup> Why it is important for everyone in the courts to learn to check their own and others' stereotyped thinking is captured in Justice O'Conner's concluding remarks to the 1992 Ninth Circuit Judicial Conference:

The Gender Bias Task Force Report asks us to take seriously claims that may not bother us personally . . . . By acknowledging and not trivializing the effects of gender on reasonable women and men, courts can work toward ensuring that neither men nor women will have to run a gauntlet of abuse in return for the privilege of being allowed to work and make a living.<sup>88</sup>

## X. CONCLUSION

The Judicial Conference of the United States tells us that "bias, in all its forms, presents a danger to the effective administration of the federal courts."<sup>89</sup> The task force reports tell us that gender and other forms of bias are realities with which the federal court judges must address in their roles as managers, employers and decision makers. The task force recommendations tell us how these problems can be confronted and overcome. Whether the circuits will follow this roadmap to fairness remains to be seen.

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86. Wald, *supra* note 40, at 17.

87. Devine & Sherman, *supra* note 81, at 155-56.

88. O'Connor, *supra* note 1, at 761.

89. LONG RANGE PLAN, *supra* note 38.

## COMMENTARIES ON BIAS IN THE FEDERAL COURTS

First Circuit: A Study of Gender Bias in and around the Courts .....	<i>The Honorable Bruce M. Selya</i>	647
Second Circuit: Study of Gender, Race, and Ethnicity .....	<i>George Lange, III, Circuit Executive</i>	703
Third Circuit: Gender, Race, and Ethnicity—Task Force on Equal Treatment in the Courts..	<i>The Honorable Dolores K. Sloviter</i>	707
Fourth Circuit: The Judicial Council’s Review on the Need for a Gender Bias Study .....	<i>Samuel W. Phillips, Circuit Executive</i>	721
Fifth Circuit: Study of Gender Bias .....	<i>Gregory A. Nussel, Circuit Executive</i>	723
Seventh Circuit: Fairness in the Federal Courts .....	<i>Collins T. Fitzpatrick, Circuit Executive</i>	725
Eighth Circuit: Gender Fairness Task Force .....	<i>The Honorable Lyle E. Strom</i>	731
Ninth Circuit: The Gender Bias Task Force .....	<i>The Honorable Procter Hug, Jr. The Honorable Marilyn L. Huff The Honorable John C. Coughenour</i>	735
Tenth Circuit: Gender Bias Study—Continuing Education and Training .....	<i>The Honorable David M. Ebel</i>	745
Eleventh Circuit: “Executive Summary”—Report of the Eleventh Circuit Task Force on Gender Bias .....	<i>Executive Summary</i>	751
D.C. Circuit: Study of Gender, Race, and Ethnic Bias .....	<i>The Honorable John Garrett Penn Matthew J. DeVries</i>	765



