TWO ANNIVERSARIES OF CHALLENGE AND CHANGE

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The tenth anniversary of the *Columbia Journal of Gender and Law* coincides with the twentieth anniversary of the National Judicial Education Program to Promote Equality for Women and Men in the Courts, of which I have been Director since 1981. While a decade or two is a nanosecond in historical time, in the context of women's legal history, these decades from 1980 to 2000 loom large because they have produced such dramatic and positive change.

When the National Judicial Education Program (NJEP) began its work in 1980, judges' and attorneys' gender bias was an invisible problem. Today it is grounds for reversal and sanction. In 1980, knowledgeable judges, lawyers, and journalists told NJEP that judges would never acknowledge that gender bias was a problem in their courts or an appropriate subject for judicial education. At the National Conference on Public Trust and Confidence in the Justice System in May 1999, 500 state chief justices, state court administrators, state bar presidents, and other justice system leaders voted to make implementation of the recommendations of the state task forces on gender, race, and ethnic bias in the courts a priority. Indeed, just the existence of these task forces, established in response to NJEP's educational programs, testifies to the difference these decades have made.

When I was a Columbia Law School student in the early 1970s taking then Professor Ruth Bader Ginsburg's class and seminar on sex discrimination law, the focus was on litigation to eliminate gender-biased statutes and legislation to bar gender bias in the workplace and educational institutions. In the 1980s, NJEP initiated a new focus on gender bias in the application of law. The impetus was the way judges were applying, or failing to apply, new laws intended to end gender bias in situations ranging from hiring decisions to rape trials. There is no point in passing remedial legislation if the judges who interpret and enforce these laws are themselves biased. NJEP also initiated a focus on gender bias in judges' and attorneys' courtroom behavior toward female litigants, witnesses, and attorneys because this behavior is so inimical to women's credibility.

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While NJEP and the state and federal task forces on gender bias in the courts have certainly not eradicated these problems, we have established new norms that make gender-biased decision-making and courtroom behavior unacceptable, and education to overcome gender bias widely accepted. In 1990, the American Bar Association amended its model code of judicial conduct to provide that judges may not manifest bias based on race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, nor permit those under their direction and control to do so. Today, most states have adopted this provision as well as changes to their own rules of professional responsibility that explicitly bar various forms of gender-biased conduct. The gender bias task force reports have been cited in nearly one hundred state trial and appellate decisions on issues running the gamut from divorce and custody to judicial and attorney conduct to rape and murder.[1] Several cases have reversed trial courts specifically for gender bias. In Catchpole v. Brannon,[2] for example, the California Court of Appeals in 1995 relied heavily on the California and Ninth Circuit task force reports in reversing a trial court judge for his gender bias in a sexual harassment case involving an alleged rape. The trial judge was so convinced of the myth that a woman who is "truly" being raped will physically resist that even though the defendant admitted the assault in a call monitored by the police, the judge could not get past his own preconceptions. The judge called sexual harassment cases "detrimental to everyone concerned,"[3] described this case as "nonsense,"[4] showed extreme irritation at having to listen to plaintiff's witnesses, and subjected the plaintiff alone among all the witnesses to a scathing interrogation. Further, he asked the plaintiff whether she blamed herself for letting the assault happen,[5] and wrote in his Tentative Decision that the situation was unbelievable, that she was at fault for not successfully resisting, and that it could be inferred that she pursued her supervisor.[6] The case was appealed on the ground that the judge's gender bias required setting aside his judgment. The Court of Appeals held that "the allegations of gender bias

[1] An annotated list of these cases is available from the National Judicial Education Program, 395 Hudson Street, Fifth Floor, New York, NY 10014. Tel: (212) 925-6635; Fax: (212) 226-1066; email: njep@nowldef.org.

[2] 36 Cal. App. 4th 237 (Cal. Ct. App. 1995).

[3] *Id.* at 249.

[4] *Id.* at 253.

[5] *Id.* at 257.

[6] *Id.* at 258.

are meritorious"[7] and reversed and remanded for a new trial before a different judge. The Court wrote:

> [T]he phrase 'due process of law' . . . minimally contemplates the opportunity to be fully and fairly heard before an impartial decision maker . . . [t]he 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.[8]

The most recent attorneys' conduct case is Mullaney v. Aude[9] in which the Maryland Court of Special Appeals upheld sanctions against two male attorneys for gender-biased behavior toward their female adversary during discovery. The trial court had written:

> These [gender-biased] actions . . . have no place in our system of justice and when attorneys engage in such actions they do not merely reflect on their own lack of professionalism but they disgrace the entire legal profession and the system of justice that provides a stage for such oppressive actors.[10]

In its affirmance, the appeals court cited several of the gender bias task force reports and wrote:

> While strategy and tactics are part of litigation, and throwing your adversary off-balance may well be a legitimate tactic, it is not legitimate to do so by the use of gender-based insults . . . [We] have long passed the era when bias relating to sex . . . is considered accepted as a litigation strategy.[11]

Continuing education for lawyers and judges has changed markedly over the last two decades. Continuing legal education is now largely mandatory and includes a component on ethics. Judges increasingly recognize that judicial education is neither a punishment nor an admission of ignorance. Much of the gender bias in the courts results from a lack of factual knowledge about the social and economic realities of women's and men's lives. NJEP has developed model curricula for judges to address this information gap in a variety of areas. Understanding Sexual Violence: The

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[7] *Id.* at 241.

[8] *Id.* at 245, 249.

[9] 126 Md.App. 639 (1999).

[10] *Id.* at 655.

[11] *Id.* at 658.

Judicial Response to Stranger and Nonstranger Rape and Sexual Assault, for example, provides judges with the most recent research on victim impact, sex offenders, and rape jurors' biases, together with an opportunity to explore the relevance of this information to judges' responsibilities during the pre-trial, trial, and sentencing phases of a cases, and as leaders in the criminal justice system. The response demonstrates the importance of bringing this information to the judiciary. When judges tell us that they had never before had any education about victim impact, we understand why they have no understanding of how a victim may freeze with fright, even if the rapist is someone she knows and uses no weapons, and thus distrust her for failing to fight back. When judges express surprise at the data showing that most nonstranger rapists are serial rapists and that their victims usually sustain greater psychological damage than victims of stranger rape, we understand why the sentences for these men are often minimal.

The existence today of nearly fifty state and federal task forces on gender bias in the courts, the changes in the codes of judicial and professional conduct, and the judicial opinions condemning gender bias in decision-making and court interaction are concrete examples of how much has changed in women's legal history in the last two decades. So, too, is the tenth anniversary of the *Columbia Journal of Gender and Law*. In my own law school days, none of us involved in the fledgling effort to have the justice system take gender issues seriously could have imagined that there would be a law school journal devoted to them. Surely our opponents would have laughed if we had told them that there were enough issues to fill ten years' worth of volumes. But the fact that "asking the woman question,"[12] to use Katherine Bartlett's indelible phrase, always reveals new problems and new subtleties, is clear.

In 1963, Congress passed the Equal Pay Act to cure the inequities in women's and men's earnings. We then realized that workplace sex segregation was so widespread that even if the Act was enforced (still not fully the case), it would not help the majority of employed women. In 1997, as I started work on a National Judicial Education Program model curriculum, titled When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts, and began "asking the woman question" about what seemed to be generic problems in the courts, I found that there were indeed gender issues hidden within them. Everyone knows, for example, that for a non-English speaker, a skilled court interpreter is the gatekeeper to justice. But how many know that non-English speaking women who charge men from their own communities with domestic violence or sexual assault often have their cases undermined by court interpreters from their own communities who dismiss the seriousness of

[12] Katherine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829, 837 (1990).

these offenses and do not want the community's dirty linen washed in public?

We look to the *Columbia Journal of Gender and Law* to continue asking important questions so that all of us can benefit from new insights in the decades to come.