

WOMEN ON THE BENCH*

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Hon. L. Priscilla Hall, Hon. Lindsey Miller-Lerman, Hon.
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Hon. Felice K. Shea¹ (moderator):

Good afternoon. My name is Felice Shea, and it is my great pleasure to welcome all of you to the panel entitled Women on the Bench. You will be hearing from a group of very distinguished judges who are sitting on either side of me—all graduates of this great law school.

Columbia Law School has always honored its judges, both men and women. But looking back, there was a long stretch of time when Columbia Law School graduates on the bench were all men. When I graduated in 1950 from the law school, there were no Columbia women on the bench. When I was first elected to the bench twenty-five years later, in November of 1974, there were very few already there: Constance Baker Motley, Nanette Dembitz, Joan O'Dwyer, Hortense Gable, and Beatrice Shainswit. Even when joined by women judges from other law schools, we were a lonely little group. As late as 1983, when I went on the state Supreme Court, the Association of Supreme Court Judges held its dinner at a club that did not admit women members. There were too few of us to matter.

As women entered law school in increasing numbers, the statistical picture started to change. I am told by our Alumni/ae Office that there are now sixty-eight active or retired women judges among our living graduates. They serve or have served in states from coast to coast and in Norway, Ireland, and Taiwan. Of course, our increase in numbers does not tell the whole story. As in the rest of the legal profession, women judges are a minority, disproportionately clustered at the bottom rungs. As President Lee Bollinger² told us last night, "There is a distance yet to go."

This afternoon we are going to explore the question of how women judges have made a difference. We are going to look at the issue from a number of viewpoints and in the format of questions by the moderator and discussion by the panelists. I am not going to make formal introductions because you have been given biographical materials (in much abbreviated form) in your program. If you read the program, you may notice that except for Judge Anita Brody, who is a trial judge on the Federal District Court, all

* Panel held at Columbia Law School on October 19, 2002. See Editor's Note, Introduction to Remarks from the 75th Anniversary of Women at Columbia Law School, 12 Colum. J. Gender & L. 310 (2003).

¹ Justice of the Supreme Court of the State of New York (retired).

² President of Columbia University.

of the panelists are Supreme Court judges. For those of you who have not mastered the intricate structure and exaggerated nomenclature of New York's state courts, I point out that in New York, the Supreme Court is a trial court. Justice Priscilla Hall from Brooklyn and Justice Rena Katz Uviller on my right, who is from Manhattan, serve on New York's major trial court of general jurisdiction. We do have two real Supreme Court judges on our panel. One is Justice Lindsey Miller-Lerman, who sits on the highest court of the state of Nebraska and is the only woman on her court. The other is an Associate Justice of the Supreme Court of the United States. Justice Ruth Bader Ginsburg, you do us great honor by being here this afternoon. We thank you.

I am going to address my colleagues here by their first names because most of us know each other, and if we didn't meet before, we met at lunch. I am going to start with a question that I would like to pose to the entire panel: Are there meaningful differences between men and women on the bench? For example, do you believe that female judges decide things differently from the way male judges do? Do women judges reach different results? Do they use different ways to reach the same result? Do you think women judges listen better, or more sensitively? With more women in the courtroom—not just judges, but more women lawyers, clerks, court officers—do you believe that our justice system has become less adversarial? Does anyone want to be heard on that question?

Hon. Rena Katz Uviller:

I have given Judge Shea's question much thought over the many years I've been on the bench. I would like to be able to say that there is a clear cut distinction between the way men and women perform as attorneys. I know that the presence of women in significant numbers is thought to be, or should be, making a difference. But quite frankly, if I consider both the favorable and unfavorable stereotypes attributed both to women and to men in the court room—whether it be that women are more solution-oriented and men are more victory-oriented, that women are emotional and men are rational—and there are, of course, negatives and positives that are attributed to both sexes—I would say that I find both the favorable and the unfavorable stereotypes distributed randomly amongst attorneys, irrespective of sex.

Has the increasing number of women at the bar made the process more adversarial or less adversarial? I do not think the courtroom has become either less or more adversarial. It is pretty much the same as it has always been. Some women perhaps tend to overcompensate for the stereotypes attributed to them—for example, that women lawyers lack confidence or are overly eager to please—and therefore make up for it by being excessively combative. And some women are naturally more aggressive than others, and more aggressive than many men. It depends on the person, and on the case. Some men are, by nature, conciliatory.

And it depends on the judge. I do not allow bloodletting in my courtroom. And so over the years, fewer and fewer attorneys, whether men or women, engage in the gladiator mode of litigation when they are before me. In my experience, the influx of women has not changed the litigation process in any significant degree.

What has changed is that certain substantive issues affecting women in our society have come to the forefront because of more women engaged in the legal process. But that is different from any change in the process itself.

Hon. Ruth Bader Ginsburg:

I can't resist a comment on Felice's opening remark about "the real Supreme Court justices." As Lindsey knows very well, appellate judges have no power to do anything alone. A trial judge, on the other hand, sits alone in her courtroom. She is, effectively, lord of the manor in control of her own fiefdom. With a firm final judgment rule, no litigant may challenge trial court rulings until the end of the road. But a member of a three-judge intermediate court of appeals must persuade at least one other mind to carry the day and case. And, on my court, I am powerless to resolve a case unless four people agree with me.

On what Rena just said, a Justice of the Minnesota Supreme Court, Jeanne Coyne, put it this way: Generally, "a wise old man and a wise old woman will reach the same judgment." I agree. Yet, do I think there's a difference? Yes. Let me explain by speaking of my colleague, Sandra Day O'Connor, for twelve years lone woman on the U.S. Supreme Court. In some important cases our votes divide. (My voting record is closest to Justice Souter's.) But Justice O'Connor, her first year on the bench, wrote for a five member majority in a case called Mississippi University for Women v. Hogan.³ That decision upheld the right of a male student to go to a state nursing school. Up to then, the school enrolled only women. Justice O'Connor understood that the exclusion of men from the nursing school was no true favor to women. She understood that the best way to upgrade wages in a job category filled mainly by women was to get men to enter the field. She had that sensitivity. Despite our disagreements on some issues, in gender discrimination cases for example—VMI,⁴ Miller v. Albright,⁵ Nguyen v. INS⁶—we are almost always solidly together. Do I think gender has something to do with that level of agreement? Yes I do.

³ 458 U.S. 718 (1982).

⁴ United States v. Virginia, 518 U.S. 515 (1996).

⁵ 523 U.S. 420 (1998).

⁶ 533 U.S. 53 (2001).

Hon. Felice K. Shea (moderator):

Thank you. Does anybody else have something to say?

Hon. Lindsey Miller-Lerman:

I do have a couple of remarks, and I may not be entirely on point. But, speaking personally, many years ago, there was an article in the ABA Journal about hardball lawyering and my name was mentioned.⁷ That's my first confession. And at the time, fifteen or twenty years ago, I thought that was terrific because I was litigating, and I thought that might do me some good, and my partners were impressed, if nobody else was.

Now, what I think I have seen—I'm in the middle of the country—may be a tad different than what Rena may have seen, and yet I'm on the appellate level so things are pretty civilized to start with. I find with the men who are appearing before us, and I've been on the appellate bench now about ten years, that they're becoming somewhat more colloquial and, I would say, more courteous and moving toward the middle. I find the women that thought they had to be aggressive to make their mark seemed to have toned it down a little. And this is coinciding with efforts throughout the state to bring civility and professionalism into the courtroom, and perhaps teach it at the law schools and so forth. So I'm happy to report that people are behaving very well in front of us.

In view of Ruth's comment with respect to the dynamics at the appellate level, I am the only woman out of seven on the State Supreme Court and I am the junior-most person and I vote last—we vote in order of seniority. So a lot of people come calling in close cases. I don't know the lesson in this, other than to say structure matters.

Hon. Felice K. Shea (moderator):

Thank you, Lindsey. Is there anybody at the other end of the table who wants to be heard?

Hon. L. Priscilla Hall:

I think that it's not a coincidence, at least here in New York State, that the kinds of courts that are being developed are more user-friendly. There really is a movement afoot to talk about civility. We do have what we call, what Judge Kaye calls, problem-solving courts now: drug courts and a new mental health court in Brooklyn, dedicated domestic violence courts, and youth courts. And in the various District Attorneys' offices—that's the criminal side—there are sex crimes units, child advocacy units, and elder units which have been established within the last twenty years. I'm not saying that all of those ideas were started by women, but I think that we are

⁷ Stephanie B. Goldberg, *Playing Hardball*, 73 A.B.A. J. 48, 50 (1987).

more responsive and more inclined to support those kinds of courts. Now, maybe it's because Judge Kaye is a woman and she's the chief judge of New York State, but it seems to me that there has been a proliferation of courts that are a little more user friendly. For example, we are starting to have courts that meet at night for people who have to work, a greater emphasis on family courts. So I really do think that the fact that there has been an increase in the number of women on the bench is, if not responsible for, certainly indicative of our influence on the judiciary.

Hon. Felice K. Shea (moderator):

Priscilla, thank you. Anita, do you want to be heard?

Hon. Anita Blumstein-Brody:

Yes, I do.

Hon. Felice K. Shea (moderator):

Go right ahead.

Hon. Anita Blumstein-Brody:

I may be last, but I do want to be heard. I generally agree with Ruth, that there are a few narrow issues where it does matter whether it's a man or a woman. But as I've thought about my own experience regarding this issue, I must tell you that I think there's a great deal of difference between someone who just comes on the bench and someone who's been there for a while. As a new judge, you are more likely to bring your life experiences with you. It also matters whether you're sitting on a state or federal bench. I've been a judge for twenty-one years. First, I was a state court judge for eleven and now I've been a federal judge for ten. When I went on the state bench in my suburban community, I had just come from a law practice in one of the county's small communities. I had been involved in the social, political, and school life of the community. I was in the midst of raising a young family. The issues I faced in state court—for example, custody, abuse of women, burglary, illegal drugs—were those I faced in my practice and in my life in the community. My pre-judicial life experiences very much impacted on my decisions.

I've now moved to federal court, and in federal court things are much different. I've moved away from my community. I have become more seasoned as a judge. The issues that I deal with are less personal and are removed from my life in the community. Federal law leaves little discretion to the judge. At least in my experience, the longer I have been on the bench, the less it matters that I am a woman. It also matters less that one is a woman on a federal bench than on a state court one.

Hon. Felice K. Shea (moderator):

Thank you. We're going to go on now to another question, but a related one. I'm going to ask the panel: Is it important that the judiciary be more representative? Would all the panelists agree with the following statement from a recent article in *Judicature*: "The presence of ... minorities in the ... judiciary provides enormous symbolic, and perhaps political, import to a vital branch of government."⁸ The authors of the article, called Women and Minorities on State and Federal Appellate Benches, conclude that although "the judiciary has become somewhat more representative over time, most appellate judges in the United States are still white males."⁹ In March of this year, New York's Chief Judge Judith Kaye cited statistics showing that the percentage of women in the New York state judiciary rose from eleven percent in 1998 to twenty-five percent in 2001.¹⁰ So my questions are: Are there reasons why more women and minorities should be on the bench and at higher levels? What can women judges and women lawyers do to promote a more representative judiciary?

Hon. Anita Blumstein-Brody:

Well, women judges can do very little, except perhaps to be very competent. Women lawyers can do a great deal. I will never forget when I first went on the federal bench, the Chief Judge of the Second Circuit said to me, "You just got on very recently. How did that happen? You must be very well connected politically." And I got all red. He said, "You see all these federal judges here? There isn't one political virgin among them." The answer is that all of you can have an influence. This is a political process. I'm not telling you that the people who are on there are not well qualified, because I believe they are. But the process is political, and I believe that the lawyers—the women lawyers—can do a great deal within that process to see that there are more women on the bench. And they should.

Hon. Felice K. Shea (moderator):

Is there anybody else who would like to be heard?

Hon. L. Priscilla Hall:

I think I agree with the article you just quoted, that it's important in terms of symbolism. And I also think on my level, because I sit in a trial court, that it does make a difference. I'll tell you a story. I was sitting handling a guardianship matter. I don't know if any of you know what that

⁸ Mark S. Hurwitz and Drew Noble Lanier, Women and Minorities on State and Federal Appellate Benches, 1985 and 1999, 85 *Judicature* 84, 84 (Sept.-Oct. 2001).

⁹ *Id.* at 92.

¹⁰ Susan Master, Women in the Judiciary—Chief Judge Kaye's Perspective, Brook. Daily Bull., Mar. 12, 2002, 12 (citing statistics from the Office of Court Administration).

is, but if a person is elderly and unable to care for themselves, someone can come to court and ask that a guardian be appointed. And the court has to make a determination as to who should be the guardian. I appoint a court evaluator to do an investigation and give me a report. At the trial, I listen and make a determination. I was handling a guardianship matter and the case was called. The court evaluator came up and the petitioner's attorney, the party asking the court to appoint a guardian, came forward. They approached and told me the case involved an elderly woman who needed a guardian and there really was no one from her family capable of caring for her. There was a young woman in the courtroom who was a member of the family, but they dismissed her entirely.

The court evaluator took the position that this young woman, even if I had a hearing and appointed her, would only be back in six months because clearly she was incapable of being a guardian. After they told me this off the record, I said "Fine, step back and make the record." They made a record and told me why I should ignore this young woman. I asked the young woman to step up and tell me her name and if she heard what the lawyers said. And she said, yes she did. Then I asked, "Well, what is your position?" She began to explain and tell me what she had done to serve her relative and that she had been trying to work with this particular facility. She had visited the facility several times. Whatever they asked for, she had produced, but every time she came, there was a new employee who had lost all the documents she had given to them before. She had been to the facility four or five times, given them the documents on four or five different occasions. Before you appoint a guardian, you have to find what kind of background the proposed guardian has and whether they're capable, and I asked her, "Are you employed?" And she said, "Yes." And I said, "What kind of work do you do?" And she said she was an assistant principal of a local school.

Now it seems to me what happened was that the attorneys looked at this young woman, who was black, and made a determination that because she was young and she was black, she was incompetent, incapable of handling the matter. And I think that is really something that a minority judge, woman or black or Latino or whatever, will bring to the bench. You can actually listen and look at the person before making a determination, or at least inquire. Whereas if I'd been somebody else, perhaps I would have just assumed that what the court evaluator was telling me was true, that what the petitioner was telling me was true, without taking the time to actually speak to the individual and to find out who this person was and whether or not they were actually capable of performing this function. That happens to me. I'm sure it has happened to others on the panel in different kinds of situations, and I'm sure it's happened to my colleague, Sheila Abdus-Salaam,¹¹ who is a judge on the Supreme Court in Manhattan. I

¹¹ Justice of the Supreme Court of the State of New York, 1st Judicial District.

won't say it happens over and over again, but it happens often enough that you know it is important to have minorities on the bench, if only for the reason that you're actually going to *see* the people who are in front of you and give them an opportunity to be heard. So, yes, I think it's very important.

Hon. Felice K. Shea (moderator):

Thank you. Ruth?

Hon. Ruth Bader Ginsburg:

One might similarly ask, should juries have people from all segments of the community? Not so long ago, racial discrimination loomed large in jury selection, and women were totally exempt from service. I recall a question in a case I argued before the U.S. Supreme Court in the 1970s, a case about women serving on juries on the same basis as men. One of my current colleagues asked: "Well, you say women and men are equal. If men are women's peers, doesn't it follow that we don't need any women on juries?" [Audience laughter.] A remark of that kind would not be made today. Why diversity on the bench? In part, it's a question of trust in the system. Think back to the old days. Why did juries have such a prominent role in the United States? Because the colonists didn't trust the king's judges; those judges weren't from the people's own communities.

Trust in our courts is enhanced when the talent of all the people of the United States is seen on the bench. We had a President who cared very much about that image of justice. I'd like to take a moment for a tribute to this year's Nobel Peace Prize winner, Jimmy Carter. When he became President, minority members were barely there on federal court benches, and the same was true of women. There was only one woman on a federal court of appeals bench in 1976. She was Shirley Mount Hufstедler. President Carter appointed her his first Secretary of Education, and then there were none. He was determined to appoint minority members and women in numbers. He did so not by compromising quality—as a whole, the women and minority members he appointed were at least as well, if not better, qualified than the people from whom judges were, up till then, generally drawn. By the time Carter left office, he had set a pattern from which no President ever retreated. He was determined to see that happen. He held a reception in October 1980 for the women he had appointed to federal courts. He sensed then, I believe, that he was not going to win the election. He said at the reception, even though no Supreme Court vacancy occurred during his four-year term, he hoped he would be remembered in history for changing the complexion of the U.S. judiciary. He did just that, and I think it's all to the good.

Hon. Felice K. Shea (moderator):

Thank you. Lindsey had a remark that she wanted to make.

Hon. Lindsey Miller-Lerman:

I think that when you see women on the bench, there are a few constituencies that are interested in that; in my case, perhaps interested in a “curiosity”. And one constituency is women lawyers. About twenty-five percent of the bar in Nebraska are women. When they come into court and see a competent woman, they get the message that you can be what you see. This is what we tell our daughters, and the more they see competent people behave in an intelligent and perhaps gracious manner, that helps the women who are lawyers who come before you.

The other constituency, of course, are the parties to the litigation represented by their counsel at the appellate level. When they come into court, they look at the bench, and they make certain assumptions, as we all do when we meet people, for complex reasons, based on what we’ve learned in life. So, for example, we had a case argued to us not too long ago in an appeal of a dissolution matter, and the lawyer representing the mother in what were custody issues was describing the attributes of the mother, and one of those was that she was a Room Mother for her children’s class. He said, “Now I’ll tell you what a Room Mother is.” And I said, “I know.” [Audience laughter.]

I work with really terrific jurists, and I’m really blessed in this, and one of the other judges said, “She still brings treats to consultation.” So we have, in our way, advised the community that we’re with the program, all of us, and I think that gives them some comfort that we’re in touch.

Hon. Felice K. Shea (moderator):

Thank you. Rena?

Hon. Rena Katz Uviller:

I completely agree with the need for a more diverse bench, especially as we have become a more diverse culture. I have often reflected on my discomfort—extreme discomfort—if I am presiding at a trial where the entire staff—and this very rarely happens anymore in Manhattan—where the lawyers, the staff, and the court officers are all white, and the defendant or the accused is either a Latino or an African-American. I imagine what an alien and discomfiting experience that must be for the accused. It is at those times that I feel most poignantly that greater diversity is critical if the citizenry is to feel that they’re part of this process. The justice system will only function well insofar as the litigants themselves feel they are a part of it, have a stake in it, and believe in it. In Manhattan, at least, I have seen an increasing number of really capable minority attorneys in recent years. That does make a big difference at least as to the perception of justice, if nothing else.

But what I do wish to say, at the risk of being the naysayer here, is that as much as I truly approve and support efforts to make the bench and

bar more reflective of the community, there has to be caution. I know that this may be an unpopular observation, and I hesitate to dissent from the *real* Supreme Court Justice, but I think that while the push for diversity, whether by gender or race, is a worthy effort, it can and has sometimes been accomplished at the expense of quality. If there is anything that makes me cringe as much as the accused being totally alienated from the process, it is the effect of group politics when it promotes people to the bar or bench who are not up to the task. Frankly, as a woman, when it's a woman whose only qualification appears to be her sex, it embarrasses me terribly. We have to be careful in this push for diversity to remember that we do nobody any good by making group politics, whether by gender or race, the main qualification.

Let me add this. A colleague of mine once observed, with considerable irony, that almost every one of our colleagues, from the least to the most competent, believes that litigants are so very fortunate to have him or her as the judge, because that judge is convinced that she or he listens more, or is more race sensitive, or is smarter than his or her colleagues. Judges are accustomed to flattery and, unfortunately, often believe it. This is part of the egotism of being on the bench and, as Ruth says, of having that last word in the little universe of your courtroom. Humility is not the strong suit of most judges. This returns me to the question: "Am I a better judge because I am a woman?" The answer, as far as I am concerned, is a definitive "No."

I do agree wholeheartedly with, I think it was Lindsey or Anita, who said that one of the most important defining characteristics of a good judge is how experienced the judge is. I am a very different judge now from what I was when I began. I hope I have become better at this art of judging. And that has to do, in large extent, with developing more confidence and, I would hope, more humility about what I have to offer. Of course, experience can also make you more impatient.

Hon. Ruth Bader Ginsburg:

If Rena understood me to say we should seek certain proportions, that was not what I meant to convey. With women in law schools in the fifty percent range, one need not worry about the numbers. Women hold up half the sky and they will do so in our courts. They need no favors. They need only equal respect for their talent (and equal sharing by men of the job of bringing up the next generation). I stressed that Jimmy Carter never compromised quality in his appointments. But he looked for people who, for too long, were not wanted as lawyers and judges. I do feel rather strongly on this issue. After all, I am a product of affirmative action.

I would not have been appointed to this law school in 1972 absent the promotion of affirmative action by a man named Stan Pottinger, at that

time head of the Office of Civil Rights of the then-HEW.¹² He told colleges and universities across the country: "If you don't start engaging women as serious tenure track people, your federal funds will be withdrawn." That was during Nixon's administration—people forget that. The year Kellis Parker and I were appointed, Columbia's President McGill, was asked: "How is Columbia doing with affirmative action?" His response: "It's no mistake that the people most recently engaged as professors at the Law School are an African-American and a woman." The Columbia Spectator asked what I thought about that. I replied: "Yes, and it's no mistake that for all the years that preceded 1972, there was never an African-American man or a woman on Columbia's law faculty." [Audience laughter and applause.]

Hon. Felice K. Shea (moderator):

Now we're going to move on to the next question, if you don't mind.

Hon. Anita Blumstein Brody:

I've been overruled. [Audience laughter.]

Hon. Felice K. Shea (moderator):

I'm going to ask the panel now, and I hope it will be just as controversial as the last uncontroversial question: Do women judges have a special responsibility to sensitize the public and to work for improvements in areas that have particular impact on women? I have in mind particularly the field of domestic violence and the field of criminal law where drug laws and sentencing restrictions affect women in particularly harsh ways because of their health needs and their family responsibilities.

What are judges doing, in and outside the courtroom, and what should they be doing to address these issues? Anybody have thoughts about that? I could point out that judges' organizations have acted. The National Association of Women Judges has designed and published a six-hour educational program devoted to the issue of sentencing women offenders, and the New York Association of Women Judges has a Women In Prison committee studying the adequacy of health care services provided to women inmates in the custody of the New York City Department of Corrections. Does everyone think that enough is being done, or that we take cases as we get them and that these matters must be determined on a case by case basis?

¹² The Department of Health, Education and Welfare, created under President Eisenhower in 1953, became the Department of Health and Human Services in 1980. United States Department of Health & Human Services, HHS: Historical Highlights, at <http://www.hhs.gov/about/hhshist.html> (last visited June 1, 2003).

Hon Lindsey Miller-Lerman:

I may say something here that doesn't sound very constructive and may be unpopular. However, I feel, having gone on the bench, that I am highly constrained on issues. There's not so much as a yard sign at my house, and there are other voters in the home, and so this is, I think, really a very complex topic. I think that women and other judges can organize around what Priscilla was referring to as the problem-solving courts, and perhaps that's a channel. But I personally find it very dicey to engage in something that may be perceived as advocacy.

Hon. Felice K. Shea (moderator):

Anybody else? Yes, Ruth?

Hon. Ruth Bader Ginsburg:

David Leebron¹³ was with me a month ago at a reception for an organization called Sanctuary for Families. That organization operates a shelter for battered women and provides legal services for them. I receive invitations by the score. My husband, Marty, can confirm that I could spend every hour of every day speaking to this group or that. Why did I choose to speak to that particular group? One reason was Columbia's connection. Sanctuary for Families gives an annual award in memory of a woman who attended this Law School, Mary Ellen Abley. She was a brave young woman who tragically died in her early thirties. Another reason was the organization's good work for women whose voices are seldom heard. I wanted to say: "I applaud you for what you are doing." I try to accept invitations to address groups that need my encouragement, and to resist invitations when dozens of others are ready, willing, and able to speak to those groups.

Hon. Felice K. Shea (moderator):

That's a very useful contribution. Does anybody else have any thoughts about this? Go ahead, because we don't have unlimited time. Although I said we did, we don't. My next question is: Do you see bias in your courtroom? Do you see bias on the part of lawyers, parties, witnesses, jurors, or, perhaps, non-judicial personnel? I think many of us are aware that task force studies in almost every state document the persistence of gender bias in the state and federal legal systems. Even more striking in these studies is the disparity of perception of bias between men and women. A recent survey by the New York State Bar Association found that thirty-nine percent of women lawyers but only eighteen percent of male lawyers reported observing or experiencing that female lawyers are treated with less

¹³ Columbia Law School Dean of the Faculty of Law and Lucy G. Moses Professor of Law.

respect by their male colleagues in court or in chambers.¹⁴ There's also some evidence that female judges observe gender bias with greater frequency, that they're more sensitive to it perhaps than their male counterparts, and that female judges are more likely to recognize that gender bias can affect the outcome of a legal proceeding. So, I'm going to ask the judges here whether any of them has observed bias in her courtroom. Have attorneys or others brought bias issues to your attention? Have you intervened? And, if so, under what circumstances and by what methods?

Hon. Rena Katz Uviller:

I'll respond briefly to that. The courtroom, particularly a trial courtroom, seems to be a forum for people, who are so inclined, to behave inappropriately. Something about the theater aspect of it. A fool is a fool is a fool. Some people are going to behave badly no matter what the era or the situation. However, the kinds of stupid sexist remarks that were once heard have certainly abated. I rarely, if ever, observe ogling or hear idiotic sexist remarks any more. And when I do, I feel an absolute responsibility to stop it and to reproach whoever is engaging in it. But it's amazing how people find other ways to behave foolishly and inappropriately. Inappropriate behavior of the sexist variety is rare these days, at least in a large urban area like New York County. As I say, it has been replaced by other forms of foolishness.

In any event, a judge, particularly a trial judge, has a definite responsibility to set the tone in his or her courtroom. The judge is the stage manager and the director and has a responsibility to see that nobody is humiliated in his or her courtroom.

Hon. Felice K. Shea (moderator):

Anybody else who has comments?

Hon. L. Priscilla Hall:

I would have to agree with that, especially in a borough like Brooklyn, which is so diverse. In my Part obviously the judge is black, my clerk is black, court officers are usually black and white, and the jurors themselves are extremely diverse, so it's not going to really make any sense for a lawyer to offend the people they are making an argument to. So, I think there's very little of the overt kinds of biases that may have happened in the past, and I think it's specifically attributable to the fact that when they look up and see the person on the bench—it's me. I don't say that in an egotistical fashion, I'm just saying that I'm very obviously black, so you're

¹⁴ New York State Bar Association Committee on Women in the Law, Gender Equity in the Legal Profession 30 (July 2002), available at <http://www.nysba.org/Content/ContentGroups/News1/Reports3/womeninlawreport-recs.pdf>.

obviously going to curtail your speech, to some degree. The jurors are just, in Brooklyn anyway; really overwhelming black and Latino, so you obviously want to be on your best behavior. Though, as Rena said, they can always think of new ways to be offensive. [Audience laughter.]

Hon. Felice K. Shea (moderator):

I would like to ask whether anybody saw more subtle signs of bias. For example, a lawyer calling a witness by her first name, which offended me when I was on the bench and I think is a clear sign of sexist behavior.

Hon. Rena Katz Uviller:

That we're all engaging in here. [Audience laughter.]

Hon. Felice K. Shea (moderator):

I agree that the grosser forms of gender bias thankfully have receded into the past. But we know it still exists as all the studies show. I don't want to take the microphone away from Ruth who wants to be heard.

Hon. Ruth Bader Ginsburg:

I don't know whether I'd call it bias as much as traditional habits of thought and...

Hon. Felice K. Shea (moderator):

That's very charitable. [Audience laughter.]

Hon. Ruth Bader Ginsburg:

My favorite example. Last term was the first term no one called me Justice O'Connor at oral argument. [Audience laughter.] Distinguished people made that mistake in prior terms, for example, Harvard Law School Professor Laurence Tribe, and Bruce Ennis, a super lawyer who served as the ACLU's Legal Director for many years. They heard a woman's voice. Sandra and I don't speak alike and we don't look alike. But if you're facing a long bench and you hear a woman's voice, and you know that a woman has been there since 1981, and that her name is Justice O'Connor.... The National Association of Women Judges forecast that this would happen. The Association held a reception for Sandra and me when I was newly appointed to the Court. They gave us gifts well within the limit we could accept. The gifts were t-shirts. Hers reads: "I'm Sandra not Ruth"; mine: "I'm Ruth not Sandra." [Audience laughter.]

Hon. Felice K. Shea (moderator):

Thank you. Lindsay did you have something to say too?

Hon. Lindsey Miller-Lerman:

I agree with Ruth and this is true in probably every level of courtroom practice. I know that lawyers are nervous when they are in front of us for appellate argument and they have twenty minutes to say everything they had come to say. I had an experience as recently as May of last year, with a gentleman I know personally from Bar affairs and so forth. I am a woman, and we discussed his wife's breast cancer. He's a very competent individual. He made an argument to the court, and he said, "Now Gentlemen," and he did it again, and then quite a few times. And I just had to sit there and say to myself, "Do I intervene?" or "Do I not?" The topic of intervention is something we could have spent a lot of time on: I knew him to be a fair-minded individual and I knew he was nervous and I knew he knew I'm a woman. By then the law clerks were giggling, so [audience laughter], that was the remedy.

Hon. Felice K. Shea (moderator):

Thank you very much. I'm going to ask a last question of the entire panel and I have to limit you to a three minute answer, so that we can get to questions from the audience. We'll start on the left with Priscilla. And the question is: How has being a woman mattered in your career? Priscilla, if you want to, there's no compulsion.

Hon. L. Priscilla Hall:

I don't know. Perhaps the only way that I can think of is that I was a Manhattan District Attorney, and I think it was easier for older judges to mentor a young woman than a young male. So there were older judges on the bench who probably felt a lot more comfortable making suggestions and recommendations to me than perhaps they would to one of my male colleagues. That was definitely an advantage for me, because I could go to a judge who now is on the Court of Appeals and talk to him or to other judges who were on the Appellate Division and ask for advice and counsel, and I think they were just more receptive. Now I don't know if that's good or bad, but I think that that's true.

And then sometimes it would happen that someone would give you an opportunity that perhaps they would not have given someone else. So that was one of the reasons I went to the Manhattan District Attorney's office. At that point I think there had been two female black D.A.'s before me. There was one who'd been there for many years, and I think I'd read that there was one initially back in the 40s. And so, when they decided to look around, they said, "Oh, here's somebody who went to Columbia, so she probably knows what she's doing. I'll make an offer to her."

The same thing [happened] when I went to criminal court. That was a funny kind of thing. There were actually *two* of us who applied to criminal court and there had not been a black criminal court judge, [or a] woman in some time. So then the question was, which one of us was it

going to be. The other person was an Assistant U.S. Attorney, Pat Williams. Many thought there's only going to be one. Mayor Koch actually fooled us and appointed us both. So, I think being a woman has been an advantage for me personally. If there's ever been a disadvantage, I don't know about it.

Hon. Felice K. Shea (moderator):

Thank you. Anita?

Hon. Anita Blumstein Brody:

Well, I would not be where I am now were it not for the fact that I am a woman. At least it was a "but-for" cause. When I left law school in 1958, I worked as a lawyer for a while. I then got married, had children, and stayed home and raised them. My staying home allowed me to meet people in the community, have clients when I returned to practice, and become active in politics. When it became time to make an appointment to the state court, then-Governor Thornburg insisted that he would only appoint a woman to the bench where there had never been one before, and there I was. My being a woman came into play again when I sought an appointment to the federal bench. My senator, Arlen Specter, wanted to appoint a woman to my spot. (In general the federal judges on my level are selected by their senators.) Senator Specter had not recommended a woman for appointment before and there was only one woman on the district court bench at the time, and once again there I was. There is no question that you have to be able to be qualified for the position. I also recommend in volumes that you have a lot of good luck.

Hon. Lindsey Miller-Lerman:

My recollection of being in the practice is that it was not a huge hindrance, but, on the whole, a disadvantage to be female litigating securities matters. When it came time for a vacancy at the Nebraska Court of Appeals, I did have a lot of luck because there was a new court level created with six vacancies at once. Even though I felt personally I wasn't ready to abandon the practice and go on the bench, when there are six vacancies at once and no history of women appellate judges in your state, it just looked like I should try and make the move at that time. So I think gender was a topic in that discussion.

When it came to the current job I have, which is on the Nebraska State Supreme Court, at that point I was Chief Judge of the Court of Appeals of the state and a vacancy opened up on the State Supreme Court and so it was logical to apply. The individual responsible for appointments would have to find a good reason not to take a serious look at an individual so situated. So I actually think that gender was less at play than it had been at the court of appeals, although, in the Nebraska context, the appointment of the first woman to the Nebraska Supreme Court was more historical.

Hon. Felice K. Shea (moderator):

Rena?

Hon. Rena Katz Uviller:

Well, I can say that when I first left this law school, to which I am so grateful for providing me with the education that has led to such a rewarding career—although I was not a happy camper when I was here—finding a job was very, very difficult. I met my husband shortly after I graduated when he interviewed me for a job. He hired me, but not for the job for which I believed he was interviewing me. But finding a professional position was both difficult and demeaning. My interests were civil liberties, or criminal defense work, or possibly labor law. I had heard of a well-known woman partner in a firm that did a lot of First Amendment work. And I thought, “Well, she might well be someone who will be sympathetic and, you know, possibly a good fit.” At my interview with her, she was unspeakably rude to me and terribly down-putting. Perhaps it was a matter of her being a product of her era. But she made it clear that she did not welcome young women into her field, and preferred to remain the queen bee. That really set me back substantially in my quest.

Ultimately I entered what was considered a “girl’s field,” and that was family law in the Family Court of the City of New York. I found my work there extraordinarily interesting and exciting. Yet I always blanched a bit that I was relegated to this so-called woman’s field. My husband, Richard, once observed that when people asked me where I was practicing—I was a defender in the family court—I would hedge, because I did not want to be pigeon-holed or disregarded.

So obviously, I was in significant conflict about who I was and what I was doing, although my work was rewarding. Then I moved on to the Civil Liberties Union where Ruth was an esteemed colleague.

I never had any aspiration to be a judge. When I was elected to the lower trial court in New York City, I believe that I was very much a recipient of special consideration in the so-called electoral process, which was dominated by special interest groups of the day. The court to which I was nominated and then elected was one for which I had no qualifications at all; it was a commercial court with which I had no experience whatever. But this was in the late 70s, and I was a woman, and I came from the Civil Liberties Union and that was the politically correct place to be at that time.

I tell you quite frankly that when I was appointed to my present position on the State’s highest court of trial jurisdiction, a friend of mine who worked for then-Governor Cuomo called me and advised that there were four judicial openings for my present position. The Governor wished to appoint one African American, one Italian, one politician from Queens, and one woman. I shall always remember traveling up to my appointment interview in Albany; there I met the other three candidates: Lawrence Tonetti, an Italian American; Dennis Edwards, a wonderful man who

became a mentor to me, and who is African American; one Queens politician; and me. So, to a great extent, being a woman has been to my distinct advantage, although it has made me somewhat cynical about sexual politics.

But I will also say to all of you who think about becoming part of the judiciary, it is a great career. It is the most rewarding and inspiring way to be a part of this profession. And I do believe that I have been the recipient of great good fortune.

Hon. Felice K. Shea (moderator):

Thank you, Rena. Ruth, do you want to be heard?

Hon. Ruth Bader Ginsburg:

A comment on how it was then, and how I think it is now. When I graduated from Columbia Law School, not a single firm in the entire borough of Manhattan made a bid for my services. That came as a rude awakening. I had good grades, and my mother-in-law had given me a proper black suit for interviews. Nothing worked. But, as Anita said, a little bit of luck helps. I began teaching at Rutgers Law School in 1963. How did I get my job at Rutgers? Walter Gellhorn, a truly great teacher from this law school, then served, informally, as a one-person placement office for the Association of American Law Schools. In the early 1960s, when I was working as a research associate for Columbia Law School's Project on International Procedure, he called me to his office. "Ruth," he said, "I understand you're interested in teaching." I anticipated too much. "Walter," I asked, "Is Columbia interested in me?" He replied, "Not Columbia, but Rutgers." Why was Rutgers interested in me in 1963? Rutgers had on its faculty an African American man, Clyde Ferguson, who taught Civil Procedure. He left to become dean of the Howard Law School. Rutgers wanted a like kind replacement, but was unsuccessful in that quest. The next best thing, Rutgers apparently thought, was a woman. That's how my teaching career began.

Then, in the late 1960s, the women's movement came alive. I was still teaching Civil Procedure at Rutgers. New complaints started to trickle in at the New Jersey affiliate of the American Civil Liberties Union. The new complainants were women. For example, women who were schoolteachers and were told when they became pregnant: "Once you begin to show, you are out. We put you on something called maternity leave. It is unpaid leave and you have no right to come back. If we want you we will call." Another typical complaint: gainfully employed women who wanted to get health insurance for their families were often told by their employers that family coverage is for male breadwinners only. Women could get coverage only for themselves. Complaints of that type came in increasing numbers. The ACLU, in 1971, decided to start up a Women's Rights Project, which I co-founded. More than a little bit of luck.

There were brave women in the generations that preceded mine who thought the same things, and made the same arguments. But they were talking to the wind. In the late 1960s and the 1970s, people were beginning to listen to arguments they had tuned out earlier. I am a beneficiary of President Carter's project to change the face of the U.S. judiciary. That explains my appointment to the U.S. Court of Appeals for the D.C. Circuit. For the Supreme Court appointment, I would say, being a woman was a plus—not that Clinton was necessarily looking for a woman, but it didn't hurt, as it surely did hurt when I graduated from this law school. So you can understand the exhilaration I feel thinking about how it once was and how it is now.

Hon. Felice K. Shea (moderator):

Thank you. I'd like to take a few questions. If nobody stops me, we'll go a few more minutes. You all have microphones that you have to activate by pushing a button. Yes, what's your question?

Audience Member One:

I've thought a lot about these questions that you've raised from the perspective of scholarship, and from the perspective of working in the political branches on federal judicial appointments, and now as a sitting judge, but I ...

Hon. Felice K. Shea (moderator):

Do you want to tell us your name? I'd like to ask each of you to introduce yourself.

Audience Member One:

Sarah Wilson. But I just wanted to make an observation, because I responded very viscerally to the dialogue between Justice Ginsburg and Judge Uviller about diversity versus quality, to the extent that those things are dichotomized. My experience working on federal judicial appointments during the last administration, and this really surprised me with respect to gender, was that, still in this day and age, there was often a conflict between a male candidate, generally a white male candidate, who, although sometimes quite well-qualified, sometimes not in conventional terms, had much stronger political, and sort of patronage, political connections—you know he had been a party chair, state party chair, or contributed in a significant way to the political decision-maker at the state-level—versus a woman with spectacular educational and experiential qualifications. So that was often a real tension in a particular choice, and invariably the patronage politics would win out over the straight qualification. So I guess it led to my conclusion that, absent the sort of political force of identity politics that is first woman, wanting to put a first woman in a district or a circuit that has never had one, or wanting to just have more women or more African-

Americans on the bench that women would be even further behind in terms of their representation on the federal bench, even in this day and age. It may be different in New York State, I understand that, but at the federal level, my experience was that it was oftentimes a conflict between diversity and quality on the one side versus patronage politics and the lack of diversity on the other.

Hon. Felice K. Shea (moderator):

One of the questions that we didn't reach was judicial selection and the whole issue of appointed versus elected judges. It's a very big issue and there are many considerations affecting women that we don't have time to get to, but I think you raise a very valid point. We'll take another question unless somebody on the panel wants to be heard.

Hon. Lindsey Miller-Lerman:

I have a quote for you all if you can indulge me.

Hon. Felice K. Shea (moderator):

Yes. We'll indulge you.

Hon. Lindsey Miller-Lerman:

This is a quote from 1914 by O.H.P. Belmont, a prominent suffragist. Some of you may know the name. Speaking to the Women Lawyers' Association about appointing women to the bench in New York City, she says, "We are told all occupations are open to women. But appointments which depend upon political power manage in a mysterious way to fall only to men. Yet some of us have such confidence in our women lawyers that we have become very bold and now we want women judges...."¹⁵ And it goes on in this vein from the year 1914. Everything old is new again.

Hon. Felice K. Shea (moderator):

Yes. In the front row.

Audience Member Two:

There have been some comments made. Judge Hall gave the example of the woman to whom she carefully listened, and gave the opportunity to represent herself, the assistant principal. Jane Spinak¹⁶ had commented this morning how frequent the complaint is from women that

¹⁵ Karen Berger Morello, *The Invisible Bar: The Woman Lawyer in America 1638 to the Present* 225 (1986).

¹⁶ Columbia Law School Edward Ross Aranow Clinical Professor of Law; Director, Clinical Programs.

their voices are not heard in family courts, and Carol Sanger¹⁷ made a comment, as she was accepting her position, about how, when women speak in public places, they have an extra concern about the impressions they are making that men might not have. To me one of the big questions, that I don't know if the judges know the answer to, it might be that the audience may know the answer better. I have felt as a woman, not being tremendously experienced in court, I have always been perhaps a little bit more nervous speaking than a lot of the men that I know. I have never encountered a case where a woman judge has cut me off. Although I have at times encountered cases where men judges have, not necessarily cut me off more than the men—I am not sure about that—but I think, as a woman, I was slightly more intimidated by overbearing male judges. I felt freer to express myself and to have the confidence to represent my position with judges who didn't do that and who listened more carefully. I wonder if there is any perception, either by a show of hands or any other way, as to whether other women lawyers might share the perception I have that women judges are slightly more likely not to cut people off or to listen more.

Hon. Anita Blumstein Brody:

I think that is one of the important aspects of having more women on the bench. Because we, at least in my court, we have lunch together. I always say to the lawyers, if you made a mistake, apologize before lunch because we talk to each other all the time. I find that we now have five judges on my bench and it makes a big difference. I think that the lawyers, the male judges have become sensitized to issues and look us in the eye the way they didn't look us in the eye ten years ago when I went on the bench. There seems to be a much higher comfort with women, and the lawyers have told me that they can sense the difference throughout the whole courthouse of having more women on the bench, and that the males are more comfortable with having women lawyers. Obviously I haven't done any statistical studies on it, but I think it's an observation, and I think it goes to the importance of having women on the bench because I think they sensitize their colleagues and perform in certain accepting kinds of ways.

Hon. Felice K. Shea (moderator):

I can take only one more question. Mr. Wales in the back.

Audience Member Three:

Fortunately, each member of the panel has been in some way or another a beneficiary of changing winds, and you knew how to take advantage of it. And what is going to be facing the next generation of women lawyers who aspire to the bench? What will they have to do? Will

¹⁷ Columbia Law School Barbara Aronstein Black Professor of Law.

the winds still be blowing in their favor? Will they have to fight it out the way men do? What do you see as the future?

Hon. Rena Katz Uviller:

I think the overwhelming issue for women is the difficulty of combining, or the complexity of combining, a family life and a professional life. A young woman at lunch today observed that most of us managed in some way or another. But now that there are so many more women in the profession, there will have to be some sort of institutional change, so that women are not compelled to abandon their careers for substantial periods in order to maintain any semblance of family life. That is probably the most personal and immediate problem facing most of the young women in this law school today. That's my sense of it.

Hon. Felice K. Shea (moderator):

Ladies and gentlemen, thank you very much for being here. And thank you very much to the distinguished judges who came to talk with us this afternoon. There's one more panel, and I hope we'll see you all there and at the dinner tonight.