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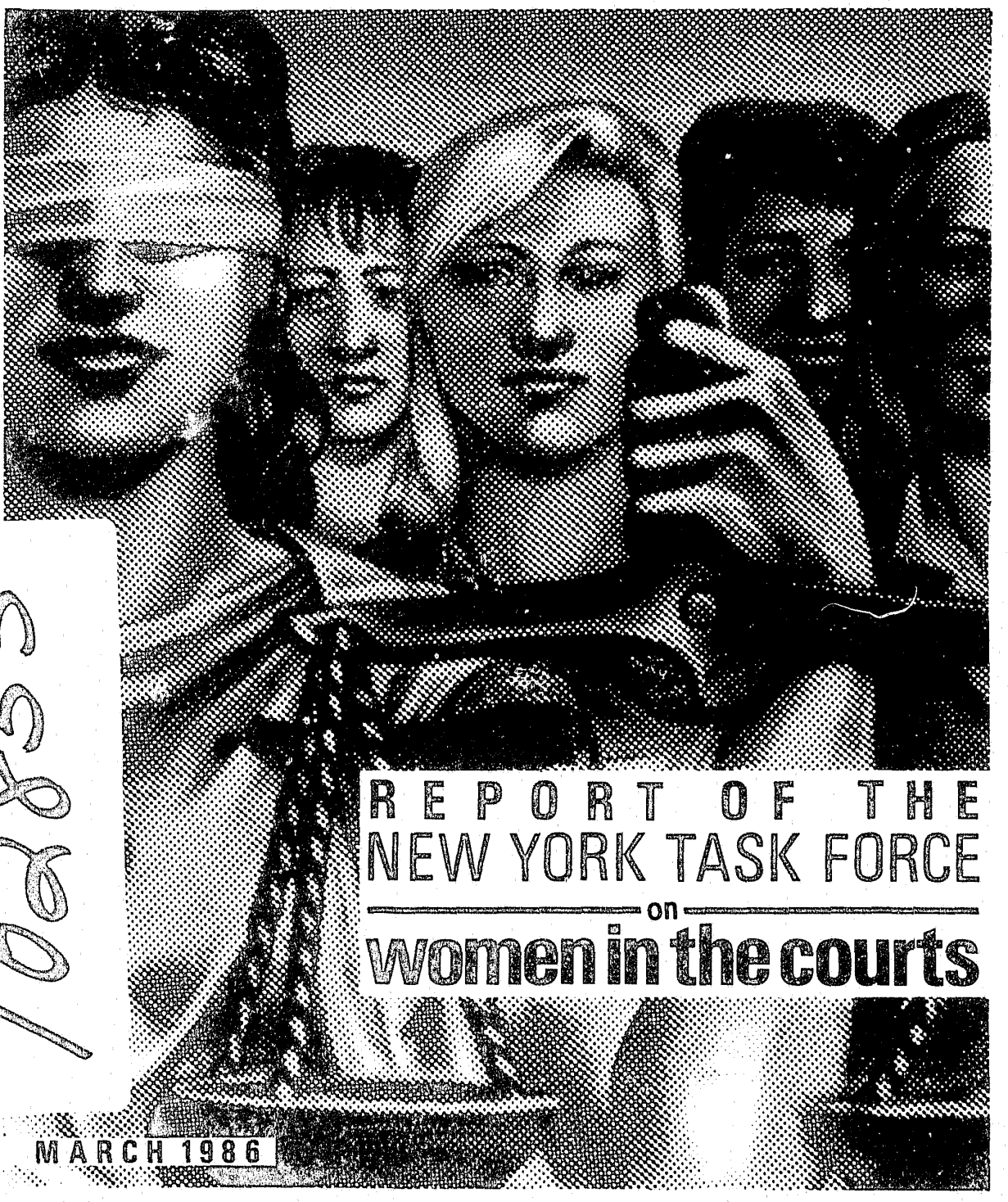

REPORT OF THE NEW YORK TASK FORCE on women in the courts

MARCH 1986

UNIFIED COURT SYSTEM
Office of Court Administration

REPORT OF THE

NEW YORK TASK FORCE

ON

WOMEN IN THE COURTS

March 31, 1986

NEW YORK
TASK FORCE ON WOMEN IN THE COURTS
270 BROADWAY, RM 1012
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March 31, 1986

TO: Honorable Sol Wachtler
Chief Judge of the State of New York

It is with great pleasure that I present to you the Report of the New York Task Force on Women in the Courts. The Report is the product of twenty-two month's labor, during which the Task Force received, reviewed, analyzed and discussed a wealth of material, including the observations and opinions of over 2,000 judges, lawyers, laypersons, academics, court administrators, and other professionals throughout the State. This process was, for many of us, a unique educational experience. We gained a special understanding of practices and conduct that work unfairness or undue hardship on women in the courts. We have endeavored to communicate that understanding in a constructive, informative, and dispassionate manner.

It is appropriate to acknowledge the outstanding contribution made by Task Force Member Edward M. Roth who, as reporter to the Task Force, and with tireless assistance of Advisor Lynn Hecht Schafran, produced this document. Generous assistance was also rendered by Advisors Marjory D. Fields, Lucia Whisenand, and Norma Wikler.

Finally, we wish to express our gratitude to you and your administration for your leadership and support and to your predecessor, the Honorable Lawrence H. Cooke, for his commitment to fairness and equality in the courts as demonstrated by his creating the Task Force. Through your continued leadership and the support of the entire legal profession, we are confident that great strides will be made towards eliminating the problems we have addressed.

Respectfully yours,

Edward J. McLaughlin

Edward J. McLaughlin
Chairperson

PREFACE

The New York Task Force on Women in the Courts has concluded that gender 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.

* * *

With leadership there will be change. Ultimately, reform depends on the willingness of bench and bar to engage in intense self-examination and on the public's resolve to demand a justice system more fully committed to fairness and equality.

NEW YORK TASK FORCE ON WOMEN IN THE COURTS

NEW YORK
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Association of the Bar of the City of New York

Broome County Bar Association

Chemung County Bar Association

Coalition for Abused Women, Inc.

Cornell University Cooperative Extension Program

District Council 37, State, County and Municipal Employees Union (Legal Services)

Erie County Bar Association

Fund for Modern Courts, Inc.

Governor's Commission on Domestic Violence

National Lawyers Guild-New York Chapter

New York State Bar Association

New York Commission on Child Support

New York State Association of Women Judges

New York State Defenders Association

New York State Division for Women

Office of the New York State Secretary of State

Rockland County Bar Association

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Sandra C. Hirsch
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Ann Ruben
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Women's Bar Association of the State of New York

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REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS

INTRODUCTION

Submission of the Report of the New York Task Force on Women in the Courts to the Honorable Sol Wachtler, Chief Judge of the State of New York,[1] culminates a twenty-two month investigation undertaken on behalf of and under the auspices of the Unified Court System of the State of New York. This Report reviews the status and treatment of women who (a) appear before the courts as litigants, (b) practice in the courts as attorneys, and (c) are employed by the courts as non-judicial personnel. It sets forth the Task Force's assessment of (1) conditions in the courts that have an adverse impact on the welfare of women and (2) the consequences of gender bias in the courts, together with (3) the Task Force's recommendations.

On May 31, 1984, the Honorable Lawrence H. Cooke, Chief Judge of the State of New York (1979-1984), an-

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[1] The Honorable Sol Wachtler was appointed Chief Judge of the State of New York on January 2, 1985. Soon after his appointment, he communicated to the Task Force his sense of the importance of its undertaking and requested that the Task Force continue its work under his administration.

nounced the creation of the Task Force. He stated that "in recent chapters of history tremendous strides have been made by women in the legal structure and operation of our State and Nation. . . . The issue remains whether, at this juncture, their allotment of the jurisprudential scheme in the Empire State is fair under all the circumstances."[2]

The Task Force was established to "examine the courts and identify gender bias and, if found, make recommendations for its alleviation." "Gender bias" was defined by Chief Judge Cooke as embracing "decisions . . . made or actions taken because of weight given to preconceived notions of sexual roles rather than upon a fair and unswayed appraisal of merit as to each person or situation." The scope of the Task Force's mandate was sweeping; it was requested to review "all aspects of the [court] system, both substantive and procedural" and ascertain whether "there are statutes, rules, practices, or conduct that work unfairness or undue hardship on women in the courts."

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[2] Remarks of Hon. Lawrence H. Cooke, Press Conference announcing formation of New York State Task Force on Women in the Courts, attached to this Report as Exhibit A of the Appendix.

When examining these issues the Task Force could not overlook the history of women's experiences in the courts. New York's contemporary legal culture arose out of an environment in which women were denied or had limited access to the courts. At Common Law, women were incapable of ordering their legal affairs: "the husband and the wife were treated as one person and marriage operated as a suspension in most respects of the legal existence of the latter. From this supposed unity of husband and wife sprang all the disabilities of married women. She could not make a binding contract or commence an action, because either would imply that she had a separate existence."[3]

Women, permitted to practice law in New York since 1886,[4] have entered the profession in significant numbers only within the past fifteen years. Women could not serve as petit or grand jurors until 1940[5] and were

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[3] Bennett v. Bennett, 116 N.Y. 584, 591-592, 23 N.E. 17, 19 (1889); see P. Bingham, The Law of Infancy and Coverture p. 182 (1849), reprinted by Fred B. Rothman & Co. (Littleton, Colorado 1980).

[4] See L. 1886, ch. 425.

[5] L. 1940, ch. 202, see 596, par. 1. (Qualification that juror be "[a] male citizen of the United States" changed to "a citizen of the United States.") See Matter of Grilli, 110 Misc. 45 (Sup. Ct. Kings Co. 1920).

granted an automatic exemption from jury duty until 1975.[6]

Just as the historical perspective could not be ignored, neither could the considerable progress women have made towards achieving equality. New York was a leader among the States in eliminating by statute these absolute disabilities.[7] Women are now presumed to enjoy nearly the same rights and responsibilities as are men. Barriers to women's professional and civic participation in New York's courts have been removed. Our lawmakers

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[6] L. 1975, ch. 4. This exemption was replaced with a gender-neutral exemption for anyone taking care of a child under the age of 16. L. 1975, ch. 382, sec. 1.

[7] See L. 1848, Ch. 200 (enabled women to own property and enter contracts under their own name). The courts, however, construed these statutes narrowly, stating that it was not their purpose to absolve a woman "from due obedience and submission to her husband as head and master of his household, or to depose him from the headship of his family, which the common law gave him." Coleman v. Burr, 93 N.Y. 17, 25 (1883); accord Nash v. Mitchell, 71 N.Y. 199, 203 (1877) ("the disabilities of a married women are general and exist at common law. The capacities are created by statute and are few in number."); see also, Brandt v. Brandt, 144 Misc. 318, 321 (Sup. Ct. N.Y. Co. 1932), Heller v. Heller, 172 Misc. 875 (Sup. Ct. Kings Co. 1939), aff'd mem. 259 App. Div. 852 (2d Dep't 1940), aff'd 285 N.Y. 572 (1941).

have become more sensitive to prejudicial, gender-based stereotypes.[8]

But the laws of New York, no matter how enlightened, are not self-executing. Judges, attorneys and court administrators must breathe life into legal reforms.

The Task Force has concluded that gender 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.

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[8] For example, the Legislature has expressly prohibited sex-based discrimination in employment, Executive Law §§ 296-301, in education, Education Law § 3201a, in the extension of credit, Executive Law § 296a, and in public accomodations, Executive Law § 296(2). See generally, New York City Commission on the Status of Women, Legislative Achievements for Women in New York State: A 20 Year Retrospective 1965-1985 (1985).

The problems women face -- rooted in a web of prejudice, circumstance, privilege, custom, misinformation, and indifference -- affect women of every age, race, region, and economic status. When women are poor or economically dependent, their problems are compounded. They often must traverse the justice system alone, facing indifference or contempt. Problems are perpetuated by some attorneys' and judges' misinformed belief that complaints by women are contrivances of overwrought imaginations and hypersensitivities.

More was found in this examination of gender bias in the courts than bruised feelings resulting from rude or callous behavior. Real hardships are borne by women. An exacting price is ultimately paid by our entire society. The courts are viewed by a substantial group of our citizenry as a male-dominated institution disposed to discriminate against persons who are not part of its traditional constituency.

This perception and the reality on which it is based require the immediate and sustained attention of New York State's judicial and political leadership and the professional legal community. Active leadership by New York's judicial hierarchy that makes clear that gender-based discrimination in the courts will not be toler-

ated is an indispensable component of meaningful reform. The assistance and cooperation of bar associations, law enforcement agencies, public employee unions, and law schools should be enlisted to ensure that all court-system participants are aware of the adverse conditions women face in our courts and of the means by which these conditions can be eliminated. Appropriate administrative and legislative action should then follow.

THE NATURE AND SCOPE OF THE TASK FORCE'S INQUIRY

The Task Force was determined to learn about the experiences of women who have dealt with New York's court system in its judicial or administrative capacities. The following summarizes the approach of the Task Force and the fact-finding methods and sources it employed.[9]

The Task Force considered relevant to its inquiry: What are the perceptions of women and men -- judges, lawyers, and laypersons -- of the treatment of women in the courts? What treatment do women actually receive? Are women treated differently from men?

In attempting to answer these questions, the Task Force took the following steps:

Review of Research and Literature

The Task Force reviewed numerous articles in legal, judicial and social science publications respecting issues affecting women in the courts, including the areas of domestic violence, rape, equitable distribution, maintenance, child support, support awards enforcement,

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[9] All materials that comprise the Record of the Task Force are available for inspection at the Office of Court Administration, 270 Broadway, New York, New York 10017.

juvenile and adult sentencing, and the courtroom treatment of women litigants, witnesses and attorneys.[10] The Task Force also reviewed published materials from task forces in other states.[11]

Selection of Advisors

The Task Force selected four advisors knowledgeable about issues relating to women in the courts:

Hon. Marjory D. Fields, Judge of the Family Court, Bronx County, Co-Chair of the Governor's Commission on Domestic Violence, author of numerous articles and handbooks in the field of domestic violence and former Managing Attorney of the Family Law Unit of Brooklyn Legal Services Corporation B.

Lynn Hecht Schafran, Esq., Director of the National Judicial Education Program to Promote Equality for Women in the Courts which, since 1980, has designed and participated in judicial education programs about gender bias for more than twenty state and national judicial colleges. Member of the New Jersey Supreme Court Task Force on Women in the Courts and of the National Gender Bias Task Force of the National Association of Women Judges. Advisor to the Rhode Island

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[10] A bibliography of introductory materials on issues affecting women in the courts reviewed by the Task Force is attached to this Report as Exhibit B of the Appendix.

[11] See First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts. New Jersey Chief Justice Robert N. Wilentz established the New Jersey Task Force, the first of its kind, in 1982. Similar investigations are underway in Rhode Island and Arizona. See "Empirical Study Finds Gender Bias in Rhode Island Courts," National Law Journal, February 17, 1986, p. 13, cols. 1-3.

Supreme Court Committee on the Treatment of Women in the Courts and the Arizona Task Force on Gender and Justice.

Lucia Beadel Whisenand, Esq., Member of the New York Commission on Child Support and a Law Clerk to the Supervising Judge of the New York Family Court, Onondaga County. First Director of the Center for Interdisciplinary Legal Studies at Syracuse University College of Law and Former Chairperson of the Syracuse Human Rights Commission.

Norma Juliet Wikler, Ph.D., First Director of the National Judicial Education Program to Promote Equality for Women and Men in the Courts, Member of the National Gender Bias Task Force of the National Association of Women Judges, Advisor to the New Jersey Supreme Court Task Force on Women in the Courts, and Associate Professor of Sociology at the University of California, Santa Cruz.

Public Hearings

The Task Force held four public hearings over a period of seven months -- one in Albany, one in Rochester, and two in New York City -- at which eighty-five witnesses testified.[12] The Task Force specifically invited testimony from persons with special expertise in matters affecting women in the Courts, including matrimonial lawyers, prosecutors in sex crimes units, and repre-

[12] A schedule of witnesses who appeared at the public hearings is attached to this Report as Exhibit C of the Appendix. Witnesses are identified in this Report according to their affiliations at the time they testified. Citations refer to the transcripts of the individual hearings.

sentatives of women's and fathers' rights organizations and battered women's shelters. The public, public officials, and bar associations were notified of the time, place, and nature of the hearings and invited to give testimony on any subject relevant to the Task Force's inquiry.[13] Many witnesses submitted written materials to the Task Force. These included attorneys' and litigants' personal statements about their experiences in the courts and scholarly commentary and research on issues affecting women in the courts.

Regional Meetings with Judges and Attorneys

Through local bar associations, attorneys practicing in the regions surrounding and including Albany, Buffalo, Kingston, New York City, Rochester, and Syracuse were invited to engage in informal discussions with groups of Task Force members. Judges received personal invitations. At each meeting, attendees were asked to assess how gender bias affects the courtroom environment and the application of substantive law, to relate the evidence supporting their assessments, and to suggest how

[13] Advance publicity included issuing press releases and, for the fourth hearing, mailing 3,000 notices to organizations throughout the State. Signers for the deaf attended each hearing.

conditions could be improved. The Task Force also met with members of the New York State Association of Women Judges to discuss these issues.

Regional "Listening Sessions"

The Task Force was charged with conducting a statewide investigation. Because the courts' role and presence in communities differ depending on geographical proximity to an urban center, the Task Force determined that first-hand information should be obtained from representative areas not having ready access to the public hearings and regional meetings. With the assistance of Cornell University's Cooperative Extension Program, the Task Force's Chairman and an advisor to the Task Force planned and held informal meetings with residents of Oneida, Oswego, Jefferson, Herkimer, and Lewis Counties.[14] Lay residents who attended the sessions

[14] A 1984 study published by the New York State Legislative Commission on Rural Resources divided upstate counties into five categories as determined by economic, geographic and demographic considerations. See Eberts, Socioeconomic Trends in Rural New York State: Toward the 21st Century. The counties in which listening sessions were held were chosen so that each classification of counties would be represented; Upstate Metropolitan (Oneida); Rural under extensive urban influence (Oswego); Rural under considerable urban influence (Jefferson); Rural under moderate urban influence (Herkimer); Rural under limited urban influence (Lewis).

offered their views on how the courts affect the welfare of women in their communities.

Surrogate's Court Survey of Fee-Generating Appointments

The Task Force received complaints that women attorneys are disproportionately denied judicial appointments as counsel in more lucrative and complex cases. Although limited resources and personnel prevented the Task Force from reviewing all mechanisms by which counsel are assigned in civil and criminal cases in New York State, a limited study involving the Surrogate's Court was attempted.

Questionnaires were sent to the Surrogates of each of New York's 62 counties asking them to describe how they appoint counsel in cases involving probate and the settlement of estates and trusts. They were asked to tally the number of appointments made during the years 1982-1984 and the number of appointments women attorneys received. A similar inquiry was made into appointments of guardians ad litem.[15]

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[15] A copy of the transmittal letter and the questionnaire sent to the Surrogate's Courts is attached to this Report as Exhibit D to the Appendix.

Inquiry into the Judicial Nominating Process

The Task Force examined the appointive and elective processes for institutional impediments to women's gaining parity in judgeships. Questionnaires were sent to the Judicial Nominating Commission for the Court of Appeals, the Governor's Judicial Screening Committees, and to every bar association that renders recommendations for judicial candidates. Inquiry was made into the composition of the panels, the number of women who have applied for judgeships and who have been favorably reported on, and the existence of any policies providing for the active recruitment of women candidates for judgeships.[16]

Inquiry into the Status of Women Court Personnel: Report of the Center for Women in Government

The Task Force engaged the Center for Women in Government at the State University of New York, Albany, which has studied the status of women in the New York State and New York City civil service systems, to conduct a study of the employment practices and working conditions in the Unified Court System as they affect female

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[16] A copy of the transmittal letters and questionnaire sent to judicial nominating commissions and bar association judicial screening committees is attached to this Report as Exhibit E to the Appendix.

non-judicial employees. The Center's work for the Task Force had three components: (1) a statistical analysis of women's distribution in the full range of employment grades; (2) structured interviews with employees and administrators; and (3) a textual analysis of UCS personnel rules with attention to their impact on women.

On November 22, 1985 the Center submitted its report, entitled: "The Effects of Personnel Practices on Non-Judicial Female Employees of the New York State Unified Court System" to the Task Force.[17] The Center Report is incorporated, in part, into the section of this Report devoted to the Status of Women Court Employees.

Attorneys Survey

The Task Force conducted a survey of attorneys' perceptions and experiences of gender bias in State courts. The survey instrument -- a questionnaire with 107 closed-ended questions and space for narrative responses -- solicited information about forms of gender bias in the courts that had been raised by witnesses at

[17] The Report was prepared by Cynthia Chertos, Ph.D., the Center's Director of Research and Implementation, and Robert LaSalle, a member of the Center's staff.

the Task Force's statewide public hearings, regional meetings, and rural "listening sessions."[18]

Questions were grouped into the following topics: Courtroom Interaction; Credibility of Female Litigants and Attorneys; Equitable Distribution; Maintenance; Child Support; Custody; Domestic Violence; Rape; Adult Sentencing; Juvenile Justice; Negligence; Counsel Fees and Fee-Generating Positions. Respondents were instructed to answer questions only in those areas of law in which they had had experience in the past two years.[19]

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[18] A copy of the survey questionnaire distributed to attorneys is attached to this report as Exhibit F of the Appendix.

[19] As a result, although 1,759 attorneys responded to the survey (of whom 25 did not indicate their sex) varying numbers of attorneys responded to questions relating to each topic:

Topic	Number of Attorneys Responding		
	Total	Female	Male
Courtroom Interaction	1,759	634	1,100
Credibility	1,759	634	1,100
Equitable Distribution	659	220	431
Maintenance	662	220	436
Child Support	679	241	431
Custody	659	229	423
Domestic Violence	690	251	432
Rape	243	77	165
Adult Sentencing	489	122	362
Juvenile Justice	395	108	285
Negligence	619	117	494

Responses to many of the individual questions are

(Footnote continued)

They were encouraged to write detailed comments pertaining to the questions asked, to call the Task Force's attention to aspects of gender bias not dealt with in the questionnaire, and to submit transcripts documenting problems.

The purpose of the Attorneys' Survey was to collect systematic data on attorneys' perceptions and experiences of gender bias in the courts. It was also intended to provide a vehicle for attorneys to communicate directly (and in detail, if desired) to the Task Force their views about the effects of gender on courtroom interaction, on the application of substantive law, and to raise other issues pertaining to gender bias in the courts.[20]

(Footnote 19 continued from previous page)
discussed in the text. Full numerical detail by percentages for each question discussed is given in footnotes. ("*" means less than half of one percent; "-" means no response.)

[20] There was a wide range of reactions to the distribution of the survey. An upstate prosecutor told a Task Force member that by reading the questionaire he became more conscious of a number of issues and, as a result, spoke with the women attorneys in his office about their own experiences and perceptions of gender bias in the courts. Another survey respondent wrote:

> " Many male colleagues have singled me out, with laughing questions, about the survey. Many of them think it a nuisance -- something

(Footnote continued)

Through the cooperation of several bar associations, the questionnaires were distributed widely to attorneys throughout the State. The New York State Bar Association included 42,500 as inserts in the June 1985 issue of the New York State Bar News. Six other bar associations and a legal service unit mailed an additional 7,500 questionnaires to their members.[21] Completed questionaires were received from 1,759 attorneys, of whom approximately 30% added written comments.[22]

Slightly more than one-third of the survey respondents (634) were women; almost two-thirds (1,100)

(Footnote 20 continued from previous page)
very unimportant and they refuse to answer and return it. Not only do they not want to think about these issues, they also are oblivious of the role they play in perpetuating destructive attitudes.

Twenty-nine year old rural female

[21] Broome County Bar Association, Chemung County Bar Association, Erie County Bar Association, National Lawyer's Guild-New York Chapter, Rockland County Bar Association, Suffolk County Bar Association, Women's Bar Association of the State of New York and D.C. 37 Municipal Employees Legal Services.

[22] The response rate to this survey should be calculated on the basis of all attorneys who litigate in State courts. This number is not known. Some rough measure can be gained from combining the memberships of the New York State Bar Association Trial Lawyers and Family Law Sections, which stand, respectively, at 4,999 and 2,896.

were men. (Twenty-five respondents did not indicate their sex.) Inasmuch as women constitute an estimated fifteen to twenty percent of attorneys admitted to practice in New York State,[23] there was a disproportionately higher response from women than from men.

The survey revealed that male and female attorneys often hold very different perceptions of the existence and frequency of undesirable courtroom behaviors, the extent to which gender affects credibility, and the degree to which the application of substantive law is disadvantageous to women. In this sample, women attorneys saw gender bias as a much more frequent and pervasive problem than did male attorneys.

The survey data were also analyzed by age category (below age 35, 36-50, above 51) and by region (Down-

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[23] There exists no precise, readily available compilation of the number of women currently admitted to practice law in New York. Henry Miller, Esq., President of the New York State Bar Association, estimated that, in 1984, 14 percent of attorneys in New York were women. Testimony of Henry Miller, Esq., New York City I Tr. at p. 54 (hereinafter cited as Miller Testimony). In 1985, women were 18 percent of attorneys nationwide. Dept. of Labor, Bureau of Labor Statistics, Employment and Earnings, January 1986, Table 22, p. 175.

state, Upstate Urban, and Upstate Rural).[24] The statistical profile of responses shows that, although there was a slight trend toward younger attorneys of both sexes perceiving more gender bias than did older attorneys, age was not a significant factor. Similarly, apart from a few questions, responses were consistent across the three regions.[25]

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[24] The following counties are included in each region: Downstate: Bronx, Kings, New York, Queens, Richmond, Nassau, Suffolk, and Westchester; Upstate Urban: Albany, Broome, Dutchess, Erie, Niagara, Oneida, Onondaga, Orange, Rensselaer, Saratoga, Schenectady and Ulster; Upstate Rural: the remaining 42 New York counties. Narrative responses quoted in this Report are identified by region, with the downstate region further identified as "New York City" and "Suburban" (Westchester, Nassau, and Suffolk). Narrative responses from Upstate regions are denominated simply as "Urban" and "Rural."

[25] When interpreting the survey results and considering their implications, two important methodological questions arise: To what extent do the views expressed by attorneys in this sample reflect the views of other attorneys in New York State? To what extent do they reflect objective reality? The survey responses received by the Task Force cannot be generalized to describe the perceptions and experiences of all New York attorneys who currently litigate in New York State courts. This degree of generalization would have required a scientifically selected probability sample of attorneys drawn from a known "universe" of attorneys who had been identified as having certain relevant characteristics.

This Survey investigated the perceptions and personal experiences of responding attorneys. The extent to which these perceptions correspond to actual conditions may be measured, in part, by comparison to the

(Footnote continued)

FINDINGS AND RECOMMENDATIONS

The remainder of this Report sets forth in detail the Task Force's findings relating to the status and treatment of women litigants, women attorneys, and women court employees in New York State's court system. The subjects treated are not an exhaustive list of issues affecting women in the courts. Given the magnitude of the Task Force's charge, its most difficult decision was the initial selection of areas of investigation. Time and resource limitations precluded full examination of "all aspects of the [court] system both substantive and procedural." Accordingly, the Task Force limited its study to those matters that appeared to have the most profound effect on the welfare of the greatest number of women. In making these choices, the Task Force recognized that areas other than those studied are also worthy of scrutiny.[26]

(Footnote 25 continued from previous page)
other data collected by the Task Force. The survey results and data from the public hearings, regional meetings, "listening sessions," existing studies and transcripts revealed consistently similar concerns throughout the state and are mutually corroborative.

[26] The Task Force's recommendations of topics for future study are attached to this Report as Exhibit G of the Appendix.

During the course of its inquiry, more than 2,000 judges, lawyers and laypersons communicated with the Task Force through public hearings, regional meetings, rural "listening sessions," the Attorneys' Survey, and letters. The opinions and views expressed reflect a wide spectrum of personal experiences, backgrounds, and agendas. Because of the often elusive nature of the subject matter and the gravity of many claims made, the Task Force was committed to examining the record it compiled thoroughly, deliberately, and dispassionately. Findings were adopted only when well-corroborated in the record. The factual basis underlying the findings and the identity of sources are set forth at length.

Recommendations to improve conditions follow each general topic. They range from general recommendations for the exercise of leadership by the judiciary and the organized bar to specific administrative and legislative reforms. They call for the participation of all persons and groups -- judges, legislators, attorneys, court employees, law enforcement agencies, bar associations, court administrators, law schools, and public employee unions -- who affect the operations of the courts. A separate section of this Report is devoted to

overarching recommendations for institutionalizing reform and monitoring progress.

I. STATUS OF WOMEN LITIGANTS

From the threshold of the judicial process to the ultimate disposition of the case there are obvious signs of women litigants' -- particularly poor and minority women's -- underclass status in our courts. Throughout New York State, women litigants: (1) have limited access to the courts; (2) are denied credibility; and (3) face a judiciary underinformed about matters integral to many women's welfare.

Problems of inadequate information are best understood in the context of how they affect specific areas of substantive law that particularly involve women litigants' claims: domestic violence, rape, post-divorce division of assets, spousal and child support and custody. In each of these areas, cultural myths about women's role in the family and in society and expectations about appropriate modes of behavior at times obscure considerations that are highly relevant to the decision-making process.

Women's lack of credibility is apparent in the way they are treated in the courthouse and in the judicial decision-making process. Women are sometimes treated dismissively, like burdensome children, or disrespectfully, like sexual objects. This affects women's

access to the courts by creating an inhospitable environment. Decision making is marred when the results reached in cases consciously or unconsciously reflect not the merits of the case or the spirit of the law to be applied but prejudiced views of sex roles and characteristics: that women's claims are not to be believed; that women are subordinate to men in the marital relationship.

Problems of access arise, in part, from many women's financial inability to retain counsel in civil cases and the inadequacy of public mechanisms for appointing counsel. Women are, therefore, often unable to plead their causes effectively. Courthouse facilities often fail to accomodate the special needs of women. No place is provided for the children whom many women have no alternative but to bring to court.

The Task Force's discussion of the status of women litigants is divided into four principal parts: (1) the court's response to violence against women; (2) the courts' enforcement of women's economic rights; (3) the court's consideration of gender in custody determinations; and (4) the courtroom environment.

A. THE COURTS' RESPONSE TO VIOLENCE AGAINST WOMEN

Violence against women is a problem of dramatic proportions in New York. In 1984, there were 41,688 calls to police in domestic-violence related cases.[27] During the same year, Family Court figures show that 24,737 new family-offense petitions were filed, the overwhelming majority of which were brought by women against their husbands.[28] In 38.5 percent (24,565) of the 63,853 divorces granted in New York during 1984, physical cruelty was cited as the reason for termination of the marriage.[29] There were 5,571 reported incidents of rape and

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[27] New York State Division of Criminal Justice Services, 1984 Crime & Justice Annual Report, p. 122.

[28] Annual Report of the Chief Administrator of the Courts (Raw Data for 1984).

[29] New York State Dept. of Health, 1984 Vital Statistics (in press). Section 170(1) of the Domestic Relations Law provides that a divorce shall be granted based on "[t]he cruel and inhuman treatment of the plaintiff" when the conduct of the "defendant so endangers the physical and mental well-being of the plaintiff as [to render] it unsafe or improper for the plaintiff to cohabit with the defendant." The nature of violence in the marital setting can in part be measured by the fact that, under this statute, it has been held that one or two separate, single blows by the defendant are not sufficient to grant a divorce. Melville v. Melville, 29 A.D.2d 970 (2d Dept. 1968); Rios v. Rios, 34 A.D.2d 325, 311 N.Y.S.2d 664 (1st Dept. 1970), aff'd mem. 29 N.Y.2d 840, 237 N.Y.S.2d 853 (1971); Ciquemani v. Ciquemani, 42 A.D.2d 851, 346 N.Y.S.2d 875 (2d Dep't 1973).

attempted rape in New York during 1984, of which 1,536 involved the use of a weapon.[30]

New York's courts are principally charged with performing two functions in redressing violence against women: (1) they must review and enforce civil and criminal petitions and orders seeking or mandating protection of women against abuse from spouses or other family members; and (2) they must hear criminal prosecutions brought against men charged with committing assaults and sex-related crimes against women.

1. DOMESTIC VIOLENCE

"Domestic violence is the physical or psychological abuse of one family member by another. This violence occurs in all social groups. Any family member can be a victim, but experience has shown that women, children, and elderly relatives are the most frequent victims."[31]

Over the past decade, there has been an impressive legislative response to domestic violence against

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[30] New York State Division of Criminal Justice Services, 1984 Crimes & Justice Annual Report. The United States Department of Justice estimates that 47% of rapes nationwide go unreported. Bureau of Justice Statistics. The Crime of Rape. Bulletin, March 1985, Table 7, p. 3.

[31] Task Force on Domestic Violence, Second Report to the Governor and the Legislature, p. 2 (November 1982).

women in New York. In 1979, the Governor's Task Force on Domestic Violence (since reconstituted by Governor Cuomo as the Governor's Commission on Domestic Violence) was established to "advise the Governor and the Legislature as to the most effective way for State government to respond to the critical law enforcement and social problems posed by domestic violence."[32] Due to the work of the Commission and to gubernatorial and bipartisan legislative support, many legal reforms have been enacted.[33]

Principal among these was the amendment of Article 8 of the Family Court Act, which governs the procedure in family-offense cases. As originally drafted in 1962 the Article decriminalized family offenses; its

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[32] Executive Order No. 90 (May 17, 1979).

[33] See generally, Task Force on Domestic Violence, Second Report to the Governor and the Legislature, pp. 6-21, (November 1982). Reform was sometimes difficult to realize. As the Domestic Violence Commission observed:

> "[A]buse of women and children was once sanctioned at common law. Until 100 years ago, children and wives had no legal status; they were deemed the property of their fathers and husbands and were under their exclusive control. The influence of that historical legal system has resisted explicit changes in social values. It survives today in the form of tacit condonation of abuse of weaker family members." Task Force on Domestic Violence, Report to the Governor and the Legislature, p. 2 (February 1980).

focus was "not punishment, but practical help."[34] As amended, the Article provides that "a family court proceeding is a civil proceeding and is for the purpose of attempting to stop the violence, end the family disruption and obtain protection."[35] It also provides that no law enforcement official, prosecutor, court employee or other "official . . . shall discourage or prevent any person who wishes to file a petition or sign a complaint from having access to any court for that purpose."[36]

The victim of a family offense has two options when seeking court-ordered protection[37] from harassment, menacing, reckless endangerment, assault and disorderly conduct.[38] The most widely-used mechanism is a Family Court order of protection which is granted upon a showing

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[34] Report of Joint Legislative Committee for Court Reorganization, The Family Court Act, 1962 McKinney's Session Laws (Vol. 2) 3428, 3444.

[35] Family Court Act § 812(2)(b).

[36] Family Court Act § 812(3).

[37] For excellent practitioners' and lay-persons' guides to family-offense matters, see M. Fields, Trial of Family Offenses in the Family Court (1984) and M. Fields & E. Lehman, Handbook for Beaten Women (Rev. Ed. 1984). Copies can be obtained free of charge by writing to the Governor's Commission on Domestic Violence, Erastus Corning Building, Albany, New York 12223.

[38] Family Court Act § 812(1); Criminal Procedure Law § 530.11(1).

(after filing a verified petition) that the petitioner has suffered or is likely to suffer abuse at the hands of a family member.[39] Indigent petitioners and respondents have a statutory right to court-appointed counsel.[40]

The same procedure exists in the criminal courts. Once a sworn accusatory instrument is filed, any complainant or witness may request an order of protection.[41] Prosecutorial discretion to decline to prosecute the case limits the availability of this option.[42]

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[39] Family Court Act §§ 828, 841(d), 842.

[40] Family Court Act § 262(a)(ii). The Family Court Act provides for the hearing of petitions for orders of protection on an expedited basis. When a temporary order is requested, the petition must be filed "without delay on the same day such person appears at the Family Court, and a hearing shall be held on the same day or the next day that the Family Court is open." Family Court Act § 153-c. Upon a showing of "good cause", temporary orders of protection may be granted ex parte. See Family Court Act § 828. A temporary order is not a finding of wrong doing.

[41] Criminal Procedure Law §§ 530.11-530.13.

[42] The options for proceeding in the Family Court or in the criminal courts are mutually exclusive. Family Court Act §§ 813, 821, 845; Criminal Procedure Law § 100.07. The petitioner may within 72 hours of filing, however, transfer the matter from the Family Court to the Criminal Court, provided that there has been no determination on the merits. Family Court Act §§ 812(2)(e), 813(3), 821(2)-(3); Criminal Procedure Law § 530.11(2)(e). Even after 72 hours have passed, a judge of the Family Court may, with consent of the petitioner and notice to the prosecutor, transfer the matter to a criminal court "in the interest of justice." Family Court Act § 813(1).

An order of protection may, among other things, direct the offending party to cease all abusive conduct and to leave or remain away from the family home. When children are involved, the order may require supervised or restricted visitation or may prohibit visitation. A violation of the terms of an order of protection subjects the offending party to arrest and to being held in contempt of court.[43]

The Family Court Act and the Criminal Procedure Law, by and large, provide an effective framework for providing relief from domestic violence. A petitioner is granted prompt access to court and, when indigent, appointed counsel. The court has broad discretion in fashioning relief. Law enforcement agencies have a special duty to protect the beneficiary of a protection order.

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[43] An order of protection is analogous to a warrant for the arrest of a person violating its terms, Family Court Act §§ 155, 168(1). Upon its issuance, the police are deemed to owe a "special duty" to the person to be protected. Sorichetti v. City of New York, 65 N.Y.2d 461 (1985). In the City of New York, police officers are directed to arrest the "offender if there is probable cause to believe he/she has violated an existing, current order of protection and [the] complainant wants arrest effected." Police Department, City of New York, Interim Order No. 16 (4/2/84). "An arrest must be made in all felony cases, including cases where the victim does not want the offender arrested." Id. (emphasis deleted).

This abstract efficacy stands in stark contrast to the reality some women face when seeking court-ordered protection. Seventeen public hearing witnesses -- judges, lawyers, academics, and representatives from shelters for battered women -- addressed the issue of domestic violence in their testimony. They were unanimously of the opinion that barriers to the fulfillment of the laws' remedial purposes remain. Information obtained by the Task Force at its regional meetings, listening sessions, through the attorneys survey, and in transcripts confirm this view. Judges, law enforcement officials and court personnel often misconceive the nature and effect of violence against women. Women's claims are too often met with incredulity or are ascribed to ulterior motives. The courts appear indifferent and women are denied effective relief.

(a) Understanding Domestic Violence

The Task Force found that many judges appear not to understand the nature of domestic violence and the characteristics of offenders and victims. The quality of justice women receive is affected accordingly.

> [B]attered women are characterized by low self-esteem, passivity, feelings of helplessness and

> hopelessness, both emotional and financial dependence on her partner, isolation and a lack of social support. . . . The battered woman frequently experiences ambivalence in her life structure. She tends to blame herself and accepts responsibility for the abuse. A battered woman encounters a society loaded with harmful myths about her, few real facts about the reality of domestic violence, and even fewer services for her and the abuser.[44]

Ironically, the conflicted psychological state of family-violence victims -- and the failure of some judges to recognize it -- prevents women from gaining the relief to which they are entitled.

Judge Richard D. Huttner, Administrative Judge of the New York City Family Court, testified that he had "heard some colleagues state" and at one time agreed (but has since changed his view) that "'I don't feel sorry for them. Why don't they just get up and leave? They have been taking these beatings all these years and now they want me to intercede. All they have to do is get out of the house. It is as simple as that. What do they want from me?'"[45]

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[44] Testimony of Mary Lou Sulkowski, Haven House Battered Women's Shelter, Buffalo, New York, Rochester Tr. at p. 48 (hereinafter cited as Sulkowski Testimony). See generally, L. Walker, The Battered Woman Syndrome (Springer, New York, 1984) (hereinafter cited as Battered Woman Syndrome).

[45] Testimony of Hon. Richard D. Huttner, New York City II Tr. at p. 123 (hereinafter cited as Huttner Testimony).

Barbara Bartoletti, Director of Women's Issues and Social Policy for the New York State League of Women Voters, described the findings of a League study that included interviews with judges, intake officers, advocates and shelter personnel:

> [A]ll too often professionals in the court system are not adequately trained in the psychology of battering, on the battered wife syndrome and its effects on the victim. Too often . . . it is still believed that women must like being battered or they would leave their abusers. Intake officers, often the first court personnel to see the victim, are not taking this crime seriously unless the physical signs are too obvious to ignore. Consequently, they may not inform the victims of their options.[46]

Some judges' seeming lack of understanding of the nature of domestic violence causes them to fail to credit petitioners' claims of victimization. Police, court personnel and judges too often presume that the victim provoked the incident, and that the assumed provocation excuses the violence.

> Victim blaming is common. . . . Judges say to a woman when she walks in the courtroom, what did you do to provoke him? It is incomprehensible to a judge that this woman could have been battered without some justifying action on her part.[47]

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[46] Testimony of Barbara Bartoletti, New York City I Tr. at pp. 155-156 (hereinafter cited as Bartoletti Testimony).

[47] Testimony of Marjory D. Fields, Co-Chair of the Governor's Commission on Domestic Violence, New York City I Tr. at p. 115 (hereinafter cited as Fields Testimony).
(Footnote continued)

More pernicious still is some judges' requirement of visible physical injuries before granting an order of protection. More than 35 percent of male and female respondents to the Attorneys Survey reported that judges in Family Court and criminal courts "sometimes" or "often" ask petitioners why they have no visible injuries.[48] Although evidence of physical injury is relevant to the request for an order of protection it is not the sine qua non of domestic violence. Psychological abuse,

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(Footnote 47 continued from previous page)
Barbara Harris, Director of a shelter for battered women at the Rockaway YM-YWHA, advised the Task Force that "court personnel are most unsympathetic to the plight of battered women . . . . [M]ore than one judge has made remarks like, 'What did you do to deserve this treatment'". Many of the women utilizing this shelter are Orthodox Jews. According to Ms. Harris, "These observant women have had particular difficulty in the court. [There are] slurs like, 'What is a nice Jewish girl doing in a situation like this?' This is certainly most unprofessional on the part of court personnel." Letter of Barbara Harris, dated June 26, 1985.

[48] Female and male survey respondents (F%/M%) reported that petitioners for orders of protection are asked why they have no visible injuries:

In Family Court

Always	Often	Sometimes	Rarely	Never	No Opn.
3/2	16/13	24/23	22/26	13/18	22/18

In Criminal Court

Always	Often	Sometimes	Rarely	Never	No Opn.
3/3	16/12	25/25	17/22	9/16	30/22

threats of violence and menacing with a weapon do not leave physical scars.[49] Injuries are often to parts of the body covered by clothing: breasts, abdomen, groin.[50] The judicial requests for visible proof of injury are perceived to betray an attitude that women's testimony is not credible unless corroborated by a bruise, a laceration, or a black eye.

The heightened scrutiny of battered women's credibility is "in direct contrast to the facts of the domestic-violence literature: Battered women don't exaggerate; they tend to minimize, to deny the severity and the extent of the abuse to protect the abuser and to hide their shame."[51]

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[49] L. Walker, The Battered Woman, pp. 39-40, 43, 74-5 (Harper & Row, N.Y., 1979); Finkelhor, D., "Common Features of Family Abuse" in Dark Side of Families at p. 20 (Sage, Ca. 1983); M. Pagelow, Woman-Battering: Victims and Their Experiences (Sage, Ca. 1981).

[50] Ann Flitcraft, M.D., "Battered Women: An Emergency Room Epidemiology with a Description of a Clinical Syndrome and Critique of Present Therapeutics" (unpublished dissertation (Yale Medical School 1977)), pp. 18-22.

[51] Sulkowski Testimony, supra note 44 at pp. 49-50. One observation shared by a number of witnesses appearing before the Task Force is that courts fail to inquire into all the incidents of abuse set forth in the petition. Instead, they focus only on the most recent incident. In gaining only a limited perspective of the claim before them, these judges erroneously tend

(Footnote continued)

(b) Access to Court and Availability of Counsel

It appears that some judges, court personnel, and law enforcement officials are indifferent to the criminal nature of domestic violence and ignore the statutory prohibition against discouraging domestic-violence victims' choice of seeking legal relief in either a criminal court or the Family Court.[52] Family violence victims with unambiguous claims that a crime has been committed are dissuaded from proceeding in criminal court.

Forty-eight percent (48%) of women and 30 percent of men responding to the attorneys' survey reported that women are "sometimes" or "often" discouraged from seeking orders of protection in criminal court.[53] Fifty-eight percent (58%) of both women and men survey respondents reported that district attorneys are "sometimes" or

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(Footnote 51 continued from previous page)
to mitigate the seriousness of the case. In other instances, judges intent on settling the case fail to take testimony thereby ignoring the facts of the abuse entirely. Testimony of Jo-Anne Mullen, Albany Tr. at p. 148 (hereinafter cited as Mullen Testimony).

[52] Family Court Act § 812(3); Criminal Procedure Law § 530.11(3).

[53] Female and male survey respondents (F%/M%) reported that family-violence victims are discouraged from seeking orders of protection in criminal courts:

Always	Often	Sometimes	Rarely	Never	No Answer
3/3	23/12	25/18	18/30	10/20	21/18

"often" unwilling to prosecute domestic violence complaints in criminal court.[54] This conduct reinforces battered women's perception that their claims are not treated seriously by the courts.

Witnesses and survey respondents recounted numerous incidents of domestic violence victims being referred from court to court by police, court personnel and judges. Jo-Anne Mullen, Community Services Coordinator of Families in Violence, a project of the Schenectady YWCA, testified:

> It is the stated policy of at least one Police Court to give no orders of protection. It was the policy of the Albany Police Court, stated to me by the court clerk and the assistant district attorney that all married women who come to that court are routinely sent to Family Court. Women report to me that the Family Court gatekeepers and judges in that county turn all the unmarried women back to Police Court, even in cases where the law gives the victim access to Family Court.[55]

A Family Court Judge, responding to the Attorneys Survey, concurred, noting:

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[54] Female and male survey respondents (F%/M%) reported that District Attorneys decline to prosecute domestic-violence complaints in criminal courts:

Always	Often	Sometimes	Rarely	Never	No Answer
4/3	32/27	26/31	15/22	5/6	17/10

[55] Mullen Testimony, supra note 51 at pp. 145-146.

> There continues to exist in the "law enforcement community" (police, prosecutor, criminal court judges) a belief that domestic violence cases are "only" family problems and not criminal matters. We continue to receive "transfers" from the Criminal Court. In other cases, the Criminal Court Judge "forces" the petitioner to go to Family Court and file a new petition. Both are inappropriate.
> Thirty-nine year old rural male Family Court Judge

Twenty-Four percent (24%) of men and 35 percent of women responding to the Attorneys Survey reported that domestic violence victims are "often" or "sometimes" discouraged by court or probation personnel from petitioning for orders of protection in Family Court.[56]

(c) Victims' Failure to Press Complaints

A significant number of domestic-violence victims fail to follow through with Family Court and criminal court proceedings. During 1982, 39.8 percent (9,017) of the 22,647 family-offense petitions brought statewide in Family Court were either withdrawn or dismissed due to failure to prosecute.[57] Judge Edward Spain of the Troy Police Court testified that women's failure to proceed

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[56] Female and male survey respondents (F%/M%) reported that potential petitioners are discouraged by Family Court or probation personnel from seeking orders of protection:

Always	Often	Sometimes	Rarely	Never	No Answer
2/1	12/8	23/16	31/34	11/25	21/16

[57] Fifth Annual Report of the Chief Administrator of the Courts, Table A-45 at p. 173 (1983).

has "caused some concern among prosecutors and many mixed feelings among our judiciary as to the prudent way of dealing with issues arising out of a woman's reluctance to press an existing domestic violence complaint."[58]

Battered women who bring petitions but fail to proceed are deterred in part because of the treatment they receive in court. Joan Bukoskey of Unity House Families in Crisis Program, located in Troy, testified:

> Another problem is the ridiculing, belittling and verbal abuse that some women receive not only by Police Court personnel, but by Police Court judges as well. One woman appeared in court and the judge's initial statement was, "Well, well, well, we had a little domestic squabble did we? Naughty, naughty. Let's kiss and make up, and get out of my court." When women are subjected to repeated sarcasm, ridicule not only from personnel but Police Court judges, it's no wonder that they are fearful to both carry through and initiate charges in Criminal Court.[59]

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[58] Testimony of Hon. Edward Spain; Albany Tr. at p. 100 (hereinafter cited as Spain Testimony). Judge Spain added that among the reasons for not proceeding are that "most of them have been threatened by the defendant or at least threatened by the hardships brought about by their dependance on the defendant. . . . I believe that we have a responsibility to [the victim] despite her unwillingness to cooperate." Id.

[59] Testimony of Joan Bukoskey, Albany Tr. at p. 212 (hereinafter cited as Bukoskey Testimony). Judge Amy Juviler testified that whatever reluctance a domestic violence victim may feel about seeing the batterer jailed is compounded in the Bronx and Manhattan by the fact that "complaining witnesses are left to prosecute criminal cases forever on their own, and . . . that is an impossible task." Testimony of Hon. Amy Juviler, New York City II Tr. at p. 238 (hereinafter cited as Juviler Testimony).

Virginia Burns, Lecturer in Criminal Justice at the State University of New York at Brockport, testified:

> The rationale for prosecutors' reluctance in acting on cases of wife battering is that most women drop the charges. But the reality is that attorneys fail to see how their own attitudes affect victims. Women in victim crisis internalize the blame implied by authorities, perceive their handling by the court as a secondary victimization and often abandon legal recourse.[60]

Judge Amy Juviler of the New York City Criminal Court testified that "men and women in the court system" have one of two responses to women's failure to proceed: either they smile, thinking that the court's "minor intercession" has left "these people living happily ever after", or they "snicker".[61] Judge Juviler said of the "snickering" response:

> I don't think it is because the people in the court system believe that the woman made a false complaint . . . I think that what they think is that the woman who accepts this violent behavior and reconciles with the man, even if she reconciles in a split, but doesn't pursue the case, isn't worthy of our respect because she does not respect herself, and I believe that this is unfair and I believe that is one place where we have to rethink.[62]

Judge Spain suggested that despite the reasons victims give for seeking to withdraw, such as that the

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[60] Testimony of Prof. Virginia Burns, Rochester Tr. at p. 179 (hereinafter cited as Burns Testimony).

[61] Juviler Testimony, supra note 59 at pp. 244-45.

[62] Id. at pp. 245-246.

parties have reconciled or that she is concerned that he will lose his job by going to jail or that she is responsible for his violence, "it is probable that a great many of these non-cooperative victims have been intimidated by the defendant."[63] Jo-Anne Mullen shared this view, stating: "Waiting rooms to the courts do not separate victims from assailants. The man is free to sit and harass and coerce the woman or to try to cajole her into dropping the charges. Judges do not ask if the woman was coerced."[64]

Effective help once a woman finally seeks protection increases the likelihood that she will pursue her legal rights. "[W]hen the police come on the scene and effectively intervene, backing up the woman and telling her she has the right to get something done . . . she is reinforced in her ability to follow through."[65] Timely availability of counsel or assistance of an advocate is also critical.

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[63] Spain Testimony, supra note 58 at p. 101.

[64] Mullen Testimony, supra note 51 at p. 166. At the Kingston regional meeting, Ulster County Family Court Judge Karen Peters reported that there is only one uniformed guard in the court and that there have been incidents of violence when petitioners and respondents were in the waiting room together with no security officer present.

[65] Mullen Testimony, supra note 51 at pp 169-170.

> A courtroom has an intimidating male-dominated atmosphere. Some judges may tolerate verbally abusive or harassing behavior by the abuser towards the victim because they are husband and wife. Thus, we may have the dilemma of a doubly intimidating, even hostile system versus a passive immobilized domestic violence victim who needs to be assertive not only to get her legal rights and due process, but to find out what they are.[66]

Although indigent domestic-violence petitioners are entitled to appointment of counsel, in practice they do not receive the full benefit of counsel. Under the Family Court Act, those entitled to court-appointed counsel receive assistance from a lawyer only after their first appearance in the courtroom.[67] They are, therefore, deprived of crucial pre-appearance advice, petition drafting, and representation during that first appearance.

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[66] Sulkowski Testimony, supra note 44 at p. 56. Advocates affiliated with battered-women's shelters may appear in court only to the extent the court permits. Jo-Ann Mullen testified:

> "[A]dvocates are allowed into Family Court only if the judge sees fit. Some counties do not permit advocates in the courtroom at all. The terrified woman is often bullied by the judge even when an advocate is present. . . . I hear from women all the time that it is much worse when no advocate is present."

Mullen Testimony, supra note 51 at p. 155.

[67] Family Court Act § 262(a).

(d) Mutual Orders of Protection

Mutual orders of protection direct each party not to harass, menace, recklessly endanger, attempt to assault, or assault the other party. The Task Force found that many Family Court Judges routinely enter mutual orders of protection in family offense proceedings upon the mere oral request of respondents or sua sponte, without prior notice to petitioners and without an opportunity for rebuttal testimony by petitioners. Nearly two-thirds of male (65%) and female (66%) survey respondents reported that judges "often" or "sometimes" issue mutual orders even though respondents have not filed petitions.[68]

Mutual orders of protection issued in this manner create the appearance that both parties have been found to be violent notwithstanding the absence of proof of the petitioner's conduct.[69] As Judge Richard Huttner testified:

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[68] Female and male survey respondents (F%/M%) reported that mutual orders of protection are issued even though respondents have not filed petitions:

Always	Often	Sometimes	Rarely	Never	No Answer
5/1	38/28	27/38	14/18	5/7	11/8

[69] Indeed, the Family Court lacks jurisdiction to issue a mutual order of protection when no cross-petition has been filed by the respondent. See Family Court Act § 821, 826.

> [T]he woman who came to court for help is now herself a subject of the order of protection, having had no notice of the allegations made by the respondent, totally unprepared to meet them, not having had the opportunity to consult with an attorney beforehand. The man had usually six weeks to seek counsel and prepare his case and the lady six seconds. . . . This is not due process and it is unfair.[70]

In subsequent Family Court proceedings the petitioner will be seen as aggressive, provocative, or violent -- equally responsible for the violence or abuse. As a result, the court may be reluctant to grant a more restrictive order of protection directing the respondent to stay away from the marital home or to hold the respondent in contempt if there is another violent incident. The domestic violence victim with a mutual order of protection is in a worse position than if she had no order.

> The issuance of such orders reinforces the historical fallacy that battered women are responsible for partners' behavior and are equal and active participants in the violence. . . . A woman who experiences difficulty in enforcing a mutual order of protection is left with little protection and her partner is given the message that his behavior is excusable and he will not be held accountable for his violence, thus perpetuating the cycle of battering.[71]

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[70] Huttner Testimony, supra note 45 at p. 133.

[71] Testimony of Nancy Lowery, Vera House Battered Women's Shelter, Syracuse, Rochester Tr. at pp. 211-212, 215 (hereinafter cited as Lowery Testimony).

A mutual order gives police ambiguous direction regarding its enforcement. Officers are put in the position of doing nothing or of arresting both parties because of a violation of the order.

> The police don't know what to do with [them]. They go into a domestic violence situation and are very confused, getting conflicting reports of what happened. I've talked with them, and when there is a mutual order of protection, they throw up their hands. They have no guidance. They don't know what to do, and, in general, arrests are not made.[72]

The victim may withdraw the request for police assistance because the arrest of both parents requires placement of the children with Child Protective Services. She may be unaware of the true import of a mutual order[73] and call the police, to her ultimate regret.

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[72] Bukoskey Testimony supra note 59 at p. 215. At the Rochester hearing Phyllis Korn, Executive Director of Alternatives for Battered Women, Inc., a Rochester shelter, and a member of the Governor's Commission on Domestic Violence, played a tape recording made by a domestic violence victim who called the police when her husband, who had previously strangled and raped her, attempted to gain entry to her home. When the police arrived and saw that she had a mutual order of protection, they insisted that she allow her husband into the house and talk with him. Testimony of Phyllis Korn, Rochester Tr. at pp. 93-96 (hereinafter cited as Korn Testimony).

[73] In a June 1984 Bronx Family Court transcript provided to the Task Force, a judge issued a mutual order "on consent" at the request of the husband's attorney, when no grounds were alleged and the petitioner did not speak. The judge mischaracterized the mutual order to the petitioner by saying it meant only "that he is not to abuse, harrass or menace you."

One rationale proffered for issuing mutual orders of protection is that women sometimes request orders of protection as "tactics" in matrimonial actions. Orders of protection are, therefore, made mutual to "neutralize" perceived tactical advantages.[74]

The Task Force believes this view to be ill-founded. Women often seek an order of protection after starting a matrimonial action because this is when violence is most likely to occur.

> [P]ost service of matrimonial summons is an extremely dangerous point in the violent relationship. The service of a matrimonial summons is a statement of assertiveness. The woman is standing up for herself. She is asserting her right to control her own life. The one thing the wifebeater does not allow is his wife to assert herself.[75]

Moreover, there exist profound disincentives to a petitioner's requesting an order of protection as a mere litigation tactic. If the Family Court petition and divorce complaint have the same allegations, a dismissal of the petition could be given collateral estoppel effect in the matrimonial action. The Family Court hearing

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[74] See, e.g., Arlyn T. v. Harold T., 107 Misc. 2d 672, 435 N.Y.S.2d 651 (Fam. Ct. N.Y. Co. 1981); Ardis S. v. Sanford S., 88 Misc. 2d 724, 389 N.Y.S.2d 539 (Fam. Ct. Kings Co. 1976).

[75] Fields Testimony, supra note 47 at pp. 112-113.

gives the respondent discovery of the petitioner's cause of action for divorce to which the respondent would not be entitled in the matrimonial action.[76] Finally, the petitioner is required to try her case twice, creating a record that can be used against her on cross examination in a subsequent proceeding. These factors make it unlikely that petitioners will misuse family-offense proceedings as tactics in matrimonial actions.[77]

(e) Custody, Visitation and Removing the Batterer from the Home

Custody awards to fathers who are acknowledged wife beaters and the refusal of some judges to order supervised visitation when the non-custodial father has been violent were cited by many witnesses as further demonstrating the attitude that "wife beating . . . [is] not worthy of serious attention".[78] Fifty-four percent

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[76] See C.P.L.R. § 3130.

[77] It was suggested that respondents may coerce petitioners to consent to a mutual order of protection. When, for example, a battered woman seeking a divorce and custody of children also seeks an order of protection, the husband may respond: "Make it a mutual order and I won't fight you on custody." Lowery Testimony, supra note 71 at p. 212; Bukoskey Testimony, supra note 59 at pp. 216-17.

[78] Testimony of Hon. Betty Ellerin, Deputy Chief Administrator of the Courts in New York City, New York City I Tr. at p. 284 (hereinafter cited as Ellerin Testimony).

(54%) of women responding to the Attorneys Survey and thirty-one percent (31%) of men reported that custody awards "sometimes" or "often" disregard the father's violence against the mother.[79] Sixty-six percent (66%) of women and fifty-three percent (53%) of men reported that petitioner's requests for supervised visitation are "sometimes" or "often" refused or ignored, with nearly one-third of women (32%) reporting "often."[80]

Jo-Ann Mullen of the Schenectady YWCA Families in Violence program testified:

> Visitation often puts women in jeopardy; and even in the most serious battering cases, the judge, always when awarding custody, insists that the husband or father be allowed to see the children. I know of one case where the father used visitation to have his wife raped. She was too demoralized to bring any charges.[81]

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[79] Female and male survey respondents (F%/M%) reported that custody awards disregard father's violence against mother:

Always	Often	Sometimes	Rarely	Never	No Answer
6/*	24/9	30/22	21/38	9/22	10/8

[80] Female and male survey respondents (F%/M%) reported that petitioners' requests for supervised visitation between respondent and children are refused or ignored:

Always	Often	Sometimes	Rarely	Never	No Answer
2/1	32/18	34/35	16/29	4/5	12/12

[81] Mullen testimony, supra note 51 at pp. 156-57.

Some judges appear to be unaware of or underestimate the harm to children associated with the abuse of their mother. Marjory D. Fields, Co-Chair of the Governor's Commission on Domestic Violence testified that, "Judges have said on the record in the courtroom and in social gatherings, 'Just because he beats his wife does not mean he is a bad father.'"[82] Stephen Hassett, Esq., of the Family Law Unit of Buffalo Neighborhood Legal Services, stated:

> [B]atterers have found a new weapon in the custody arena. Battered women are losing custody because courts refuse to consider a batterer's violence as evidence of his parental unfitness. Unless the battering has been directed at the children themselves, the courts will generally not deny custody or limit visitation solely on the basis of the father's violence against the mother. . . .
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> [F]requently courts will believe that wife beating will end with divorce and that supervised visitation [is] unnecessary . . . Many battered women are threatened with loss of custody or contempt if they attempt to take precautions to protect themselves from access by the batterer.[83]

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[82] Fields testimony, supra note 47 at p. 117.

[83] Testimony of Stephen Hassett, Esq., on behalf of Joanne Schulman, Esq., of the National Center on Women and Family Law, Rochester Tr. at pp. 16-17. (Hereinafter cited as Hasset Testimony.) In Blake v. Blake, 106 A.D.2d 916, 438 N.Y.S.2d 879 (4th Dep't 1984) (reversing trial court, unreported decision), a Family Court judge awarded custody to the father despite uncontroverted evidence that the father had physically abused the mother for several years, on occasion in the presence of the children. The judge stated he

(Footnote continued)

This problem persists at the trial court level notwithstanding appellate decisions holding that spouse abuse witnessed by children is a basis for suspension of visitation or for requiring supervised visitation.[84]

Children who witness their fathers beating their mothers suffer slowed development and sleep disturbance and feel helpless, fearful, depressed, and

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(Footnote 83 continued from previous page)
based his decision on having "walked by" the battered women's shelter to which the woman and children had fled and determined that this was an inappropriate living arrangement for the children and the father therefore provided a better home. Blake v. Blake, trial transcript at 83. Phyllis Korn pointed out that in addition to the gender bias implicit in awarding custody to the more affluent spouse evidenced in this case, "permanent custody decisions further incorporate gender bias . . . in domestic violence cases when they fail to recognize that children frequently side with the perceived position of power, and may choose to align themselves with the male abuser." Korn Testimony, supra note 72 p. 90. A survey respondent wrote: "I have been particularly stumped by the judicial attitudes and orders in child custody over the last few years. I have seen joint custody awarded to batterers when the women and children are living in shelters at time of hearing." [emphasis in original] Thirty-two year old suburban female

[84] Katz v. Katz, 97 A.D.2d 398, 467 N.Y.S.2d 223 (2d Dept. 1983) (supervised visitation); Goldring v. Goldring, 73 A.D.2d 955, 424 N.Y.S.2d 273 (2d Dept. 1980) (visitation suspended); Molier v. Molier, 53 A.D.2d 996, 386 N.Y.S.2d 226 (3d Dept. 1976) (visitation suspended); Serrano v. Serrano, N.Y.L.J., 1/21/86, p. 17, col. 6 (Sup. Ct. Kings Co.) (visitation denied).

anxious.[85] Studies show that these children also suffer somatic symptoms; they have more hospitalizations, colds, sore throats and bedwetting than children from homes where there was no violence.[86] A high correlation was found between spouse abuse and child abuse.[87]

Witnesses and survey respondents also expressed concern at the unwillingness of some judges to remove a batterer from the family home in situations that appear to warrant such action.[88] Brooklyn District Attorney Elizabeth Holtzman testified that there are some judges

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[85] Wohl & Kaufman, Silent Screams and Hidden Cries (Bunner/Mazel, New York, 1985) at pp. 10, 135; Pfouts, Schopler & Henley, "Forgotten Victims of Family Violence," Social Work, July 1982 at pp. 367-368; Hilberman & Munson, Sixty Battered Women, 2 Victimology 460, 463 (1978); Battered Woman Syndrome, supra note 44 at pp. 63-64 (hereinafter cited as Battered Woman Syndrome).

[86] Hilberman & Munson, loc. cit. at 463; Pagelow, "Children in Violent Families: Direct and Indirect Victims", in Hill and Barnes, eds, Young Children and Their Families, 47, 54 (Lexington Books, Mass., 1982).

[87] Rosenbaum & O'Leary, Children: The Unintended Victims of Marital Violence, 51 Amer. J. Orthopsychiatry, 692, 698; Battered Women Syndrome, supra note 44 at 63.

[88] Female and male survey respondents (F%/M%) reported that when a woman is in a shelter or otherwise out of the marital home because of violence, judges issue orders of protection directing respondents to leave the marital home to enable the women and children to return:

Always	Often	Sometimes	Rarely	Never	No Answer
3/6	12/34	35/30	30/14	8/3	12/13

who erroneously believe that when the man holds title to the home he cannot be required to leave and who force the woman who is the victim to find shelter elsewhere.[89] Thirty-eight percent (38%) of women and 17 percent of men responding to the Attorneys Survey reported that judges "rarely" or "never" issue orders of protection directing respondents to leave the marital home to enable women and children who have left because of violence to return. Two respondents wrote:

- Protective orders may be granted but exclusive use and occupancy of the marital residence is very difficult to obtain. Only in cases of extreme violence, when the women and children are in a shelter, is this relief readily granted.

  Thirty-five year old rural female

- Judges will not remove a party from the home unless there has been a severe beating. [emphasis in original][90]

  Thirty year old rural female

Judge Richard Huttner acknowledged that many judges are reluctant to exclude a man from the house absent what they perceive as severe danger, and that this

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[89] Testimony of Kings County District Attorney Elizabeth Holtzman, NYC I, Tr. pp. 48-49 (hereinafter cited as Holtzman Testimony.)

[90] A recent issue of the Park Slope (Brooklyn) Safe Homes project newsletter provided to the Task Force described a case in which a judge refused to remove a batterer from his home despite requests for such action from the man's psychiatrist and the Department of Social Services' Special Services for children. 2 Wives' Tales 3 (1985).

forces the children out of the home,[91] away from school and friends, and into a shelter, because the mother cannot stay and she is not going to leave the children.[92]

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[91] Ellen L. Bassuk, M.D., Associate Professor of Psychiatry at Harvard Medical School and author of a study of homeless families living in shelters, estimates that 40 percent of women who seek aid from public shelters are battered wives. The findings of Dr. Bassuk's study, which involved 116 homeless mothers and 205 children staying in 14 family shelters and 10 welfare hotels throughout the Commonwealth of Massachusetts, will be published in the Spring of 1986, see "Homeless Kids: 'Forgotten Faces'", Newsweek, 1/6/86, p. 20, col. 1.

[92] Huttner Testimony, supra note 45 at p. 137. Marjory D. Fields, Esq., Co-Chairman of the Governor's Commission on Domestic Violence testified about a case in which a husband had been convicted of assault in the second degree against his wife. During the period between conviction and sentencing the judge refused to order him out of the marital home, in effect forcing the victim and children stay in a shelter at state expense. Fields Testimony, supra note 47 at p. 118. The refusal of many judges to exclude a man from the home can have critical consequences for the woman who seeks such an order specifically to protect her children. Carolyn Kubitshek, Esq. brought to the Task Force's attention a case in which a woman sought an order excluding her husband from the home because he beat up their teen-aged son. Although this order was refused, the Department of Social Services, which is routinely notified by the probation officer handling intake when child abuse is involved, asserted that the judge had issued such an order, charged the mother with abuse and neglect for allowing the husband in the home and removed the teen-aged son and a nursing infant from the home. Testimony of Carolyn Kubitshek, Esq., NYC I Tr. pp. 162-163 (hereinafter cited as Kubitshek). This woman is now suing the Department of Social Services for damages. Davis v. Kong, 84 Civ. 7372 (Goettel, J.). The attorney handling this case,

(Footnote continued)

(f) Enforcement, Mediation, and Self Defense

Witnesses charged that courts do not enforce orders of protection and that delay compounds the violation. According to Mary Lou Sulkowski of Haven House, a Buffalo battered women's shelter:

> A woman who files a violation of the order of protection will probably wait at least six weeks to come before the judge, and during that period of time they experience more abuse and have to file another violation. When the abuser appears before the judge, he will probably be scolded. It is extremely rare for a judge to arrest an abuser and send him to jail or even to remand him to [a] rehabilitation counseling program for batterers, . . . So, in fact, there are no consequences for violating an order of protection.[93]

Wynn Gerhard, Esq., Acting Director of Neighborhood Legal Services in Buffalo, shared this view:

> Another recurring problem in family offense cases involves the inadequate enforcement of orders of protection by the courts. These orders are only effective if the courts back them up . . . [T]he

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(Footnote 92 continued from previous page)
David Lansner, Esq., of New York City, advised the Task Force in a telephone conversation on February 21, 1986 that it is not uncommon for women to have their children removed from the home when they go to court seeking protection for them from the father, and that this is particularly true in sexual abuse cases. He described having a case a few years ago in which a sixteen year old girl was placed in foster care and could not understand why she, who had done nothing wrong, was removed from her home, but her father was allowed to stay. Mr. Lansner stated that he is handling a similar case at the current time.

[93] Sulkowski Testimony, supra note 44 at p. 55.

> Family Court Act gives judges discretion regarding enforcement, including the authority to commit a recalcitrant respondent to jail for six months, or to make and suspend such a sentence . . . [T]he Family Court should not ignore the availability of strong enforcement measures which could also have a deterrent effect in other cases.[94]

District Attorney Elizabeth Holtzman testified that "Defendants against whom a written order of protection is issued may not be verbally admonished to obey it. If they disobey it or if they are convicted of a crime associated with their battering, they are likely to receive a light punishment, if any at all."[95] Joan Bukoskey stated that in her two years as an advocate for domestic violence victims she had "never seen anyone jailed by a Family Court for a violation."[96] Mary Lou Sulkowski pointed out that judges' failure to use arrest as a sanction reflects unawareness of recent studies demonstrating the effectiveness of arrest as a deterrent.[97]

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[94] Testimony of Wynn Gerhard, Esq., Rochester Tr. at p. 83 (hereinafter cited as Gerhard Testimony).

[95] Holtzman Testimony, supra note 89, p. 48.

[96] Bukoskey Testimony, supra note 59 at pp. 217-218.

[97] Sulkowski Testimony, supra note 44 at pp. 55-56. In 1981-82, the Police Foundation conducted a study in which police officers were directed to respond to domestic violence complaints in one of three ways,
(Footnote continued)

Some courts are referring petitioners to mediation to resolve domestic violence complaints. Mediation is not an acceptible alternative to swift and sure enforcement in domestic violence cases.

> The use of mediation ignores the relationship of the battering couple. It ignores the legitimate fear of the battered woman; it trivializes her victimization and disregards that the empowerment of the two parties is disproportionate. . . . It is . . . extremely unrealistic to expect a battered woman to speak openly and without fear. Her fear of retaliation by her partner prevents her from putting her real concern on the table.[98]

Many experts believe that mediation is inappropriate when there has been spouse or child abuse.[99]

(Footnote 97 continued from previous page)
selected by lottery: arresting the suspect; sending the suspect away from the scene of the assault for eight hours; or offering "some form of advice." According to police records, the percentage of repeat violence over the next six months was 24% for suspects sent away; 19% for suspects advised and 10% for suspects arrested. The Minneapolis Domestic Violence Experiment, 1 Police Foundation Reports, April 1984. As a consequence of this study, police departments in many cities have directed their officers that arrest is the first-choice response in domestic violence cases. "More Police Seeking Arrests in Instances of Domestic Assault." The New York Times, January 27, 1986, p. 3, col. 1.

[98] Lowery Testimony, supra note 71 at p. 216.

[99] United States Commission on Civil Rights, Under the Rule of Thumb, 61-76 (1982); International Association of Chiefs of Police, Training Key 245, Wife Beating, 1-3, and Training Key 246, Investigation of Wife Beating, 1-2, (1976); Police Executive Research Forum, N.
(Footnote continued)

The basic predicate of successful mediation is equality of bargaining power between the parties. It is widely agreed by those who work in the criminal justice system that violence in the family destroys the power balance and renders mediation ineffective.[100]

When women defend themselves against abuse, their problems are compounded. Professor Elizabeth M. Schneider of Brooklyn Law School addressed what she described as three distinct but interrelated manifestations of gender bias in the criminal justice system faced by women charged with homicide or assault after killing or

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(Footnote 99 continued from previous page)
Loving, Responding to Spouse Abuse and Wife Beating, 33-50 (1980); Report of the United States Attorney General's Task Force on Family Violence at pp. 16-18 (1984); New York State Office of Court Administration, Guidelines for Community Dispute Resolution Centers; Lerman, Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women, 7 Harvard Women's L.J., 57-113 (1984); New York City Police Department, Area Level Training Bulletin, Instructor's Manual, "Violence in the Family," 43 (1977) and Patrol Guide Procedure No. 110-38 at p. 2 (1982).

[100]L. Walker, The Battered Woman, 64, 206-10 (Harper & Row: 1979); Battered Woman Syndrome, supra note 44 at pp. 145-46 (Springer: New York 1984); Shulberg, A Civil Alternative to Criminal Prosecution, 39 Albany L. Rev., 359, 360-70 (1975); M. Fields, "Wife Beating: Government Intervention Policies and Practices," United States Commission on Civil Rights, Battered Women Issues of Public Policy, 249-56 (1978); Dobash and Dobash, Violence Against Wives, 207-22 (Free Press: New York 1979).

wounding their batterers. Such women are seen as not credible because they have violated the norms of appropriate female behavior. They are viewed as perpetrators responsible for the violence done to them rather than as people who acted in self defense. They are blamed for not fleeing their homes when faced with continuous violence by their husbands.[101]

[101]Testimony of Professor Elizabeth M. Schneider, NYC I Tr. at pp. 62-77. (Hereinafter cited as Schneider Testimony.)

SUMMARY OF FINDINGS

1. Domestic violence -- the physical or psychological abuse of one family member by another -- is a problem of dramatic proportions for women in New York State.

2. The Family Court Act and the Criminal Procedure Law, by and large, provide an adequate framework for providing relief to victims of domestic violence.

3. Notwithstanding the existence of adequate statutory protections, barriers to the laws' remedial purposes remain:

   a. Judges and other professionals in the court system are too often underinformed about the nature of domestic violence and the characteristics of victims and offenders;

   b. Victims' access to the courts is limited by their being dissuaded by law enforcement officials and court personnel from proceeding in criminal and Family courts and by having their claims trivialized or ignored.

   c. Victims are often presumed to have provoked the attack and are not considered credible unless they have visible injuries.

4. Some judges, attorneys, and court personnel erroneously presume that petitions for orders of protection filed by women during the course of a matrimonial action are "tactical" in nature. This assumption fails to appreciate the many legal disincentives to filing a petition as a litigation tactic and that, in a violent relationship, violence is particularly likely to occur after a divorce action has been commenced.

5. Many Family Court Judges routinely enter mutual orders of protection in family-offense proceedings upon the mere oral request of respondents or sua sponte, without prior notice to the petitioners and without an opportunity for rebuttal testimony by petitioners.

a. Mutual orders of protection issued in this manner deny the petitioner due process and create the appearance that both parties have been found to be violent notwithstanding the absence of proof of the petitioner's conduct.

b. Because the petitioner may subsequently be viewed as equally responsible for the violence or abuse, a court may be reluctant to grant a more restrictive order of protection or to hold the respondent in contempt if there is another violent incident.

c. A woman with mutual order is in a worse position than if she had no order at all; the police are given ambiguous direction as to its enforcement, often being forced to choose between doing nothing or arresting both parties and placing children with protective services.

6. Judges making custody and visitation determinations too often fail to consider a man's violent conduct towards his wife and its well-documented detrimental effect on children.

7. Some judges are unwilling to remove a batterer from the family home forcing the mothers and children to live in shelters.

8. A significant number of women who bring petitions for court-ordered protection fail to follow through, leading to dismissals for failure to prosecute. Women who fail to proceed are deterred in part by the hostile or indifferent treatment they receive in court. Intimidation by the respondent is another cause, although judges rarely inquire into whether the petitioner has been coerced.

9. Judges too often fail to enforce orders of protection. Because of the inequality of bargaining power between the parties, mediation is not an acceptable alternative to swift and sure enforcement.

RECOMMENDATIONS

For Court Administration

1. Take necessary steps to assure that judges, court clerks and security personnel are familiar with the nature of domestic violence, the characteristics of domestic violence victims and offenders and the impact of adult domestic violence on children in the home, including:

   a. The battered woman syndrome.

   b. The need for calendar preferences for violation of order of protection cases.

   c. The statutory prohibition against dissuading domestic violence victims from seeking court relief as provided in Family Court Act § 812(3).

   d. The powers of local criminal courts in cases of domestic violence and harassment.

   e. The appropriateness of permitting advocates and others to accompany domestic violence victims into the courtroom as provided by Family Court Act § 838.

   f. The due process violations inherent in granting a mutual order of protection when the respondent has not filed a petition.

   g. The efficacy of educational programs for those found to have been violent toward members of their families.

   h. The effectiveness of ordering those found to have committed family offenses to vacate the family home.

   i. The appropriateness of jail for those found to have violated orders of protection issued by both the Family Court and criminal courts.

   j. Issues of self defense as they pertain to women who kill men who have abused them.

2. Ensure availability of a judge to issue temporary orders of protection seven days a week, 24 hours a day pursuant to Family Court Act § 161(2).

For the Legislature

Enact legislation that:

1. Prohibits mutual orders of protection unless the respondent has filed and served a cross petition requesting that relief.

2. Provides that adjournments in contemplation of dismissal may be conditioned upon the defendant's attendance at educational programs for those charged with family violence.

3. Provides that abuse of one's spouse is evidence of parental unfitness for custody and a basis for termination of visitation or a requirement of supervised visitation.

4. Permits visitation in supervised locations now utilized for children in placement when there has been violence against the custodial parent by the non-custodial parent.

For District Attorneys

1. Establish domestic violence prosecution units in those jurisdictions with sufficient volume to justify a unit.

2. Ensure that assistant district attorneys receive training as to the nature of domestic violence, the characteristics of domestic violence victims and offenders and the impact of adult domestic violence on children in the home, including the same particular areas recommended for judges and court personnel.

3. Provide for paralegal and social work support for domestic violence victims or link to existing services in the community to assure that the safety and social service needs of the victims are met.

4. Request orders of protection for victims of family violence when there is a prosecution pending or upon a conviction.

For Bar Associations

Conduct continuing education programs on domestic violence including the same particular areas recommended for judges and court personnel, and also including:

1. The need for fully informed consents from the client before agreeing to mutual orders of protection as a settlement.

2. The need for social work and other support services for clients who are victims of domestic violence and the availability of community resources.

For Judicial Screening Committees

Make available to all members information concering the nature of domestic violence and the characteristics of domestic violence victims and offenders and the impact of adult domestic violence on children in the home, including the same particular areas recommended for judges and court personnel.

2. RAPE

Rape is a violent crime that until recently was virtually unprosecutable in New York.[102] Successful prosecutions were rare because the law provided more quarter for the accused than protection to the victim.[103] In several steps, New York reformed a rape law that:

(1) considered a woman's complaint, standing alone, incredible as a matter of law;[104]

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[102] In 1972, Governor Hugh Carey noted that "in a recent, typical year, only 16 rape convictions were obtained in the courts of New York, versus thousands of complaints." Governor's Approval Memorandum No. 16, May 22, 1972.

[103] American rape law is rooted in the English common law, which focused attention on the conduct of the complainant rather than the defendant. The 17th century jury charge of Lord Chief Justice Sir Matthew Hale, which became standard throughout the United States, provides that a rape accusation "is one which is easily made and, once made, difficult to defend against, even if the person accused is innocent." Therefore, "the law requires that you examine the testimony of the [complainant] with caution." Berger, Man's Trial: Woman's Tribulation, 77 Columbia L. Rev. 2, 10 (1977).

[104] Prior to 1972, New York State's law of corroboration in sex offense cases was considered the strictest in the country. Corroboration of the victim's testimony was required to "extend to every material fact essential to constitute the crime." People v. Radunovic, 21 N.Y.2d 186, 287 N.Y.S.2d 33, 234 N.E.2d 212 (1967). The 1972 amendments permitted a conviction if the alleged victim's testimony was supported by evidence that she did not consent but was forcibly compelled to submit. L. 1972, ch. 373, Penal Law § 130.15. In 1974, New York took a major step to eliminate the

(Footnote continued)

(2) required as an element of proof a victim's "earnest resistance" of her attacker;[105]

(3) permitted a virtually unbridled expose in open court of the victim's past sexual conduct;[106] and

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(Footnote 104 continued from previous page)
corroboration requirement for forcible rape, sodomy and sexual abuse in all but a very limited category of cases. L. 1974, ch. 14, Penal Law § 138.16. Corroboration is still required if the victim is under 17, mentally defective or incapacitated. The Governor's Approval Memorandum spoke explicitly to the issue of women's credibility:

> [T]he implicit suggestion in the corroboration rule that the testimony of women, who are most often complainants in sex cases, is inherently suspect and should not be trusted without the support of the independent evidence, is without justification and contrary to our strong belief in the principle of complete equality for women in our society.

Governor's Approval Memorandum, No. 2, February 18, 1974.

[105]Not until 1982 was the requirement that a rape victim prove her "earnest resistance" to her attacker repealed. Act of 1982, ch. 560, Penal Law § 130.00(8). This requirement created a particular irony given the advice of law enforcement officials that women submit rather than risk greater injury or death during a struggle. The amended law continued to require that the physical force or threat involved placed the victim "in fear of immediate death or serious physical injury." The word "serious" was deleted in 1983. L. 1983, ch. 449, Penal Law § 130.00(8).

[106]A 1975 amendment to the Criminal Procedure Law limited the defendant's rights to introduce evidence of the
(Footnote continued)

(4) held a man's act of rape (forcible, nonconsensual intercourse) against his wife not to constitute rape.[107]

Notwithstanding the law's reform, all witnesses testifying on the subject of rape concurrred that prob-

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(Footnote 106 continued from previous page)
complainant's past sexual conduct apart from certain exceptions, particularly evidence of the victim's past sexual relationship with the defendant. L. 1975, ch. 230, Criminal Procedure Law § 60.42. Other exceptions are: evidence of a conviction for prostitution within the prior three years; evidence necessary to rebut certain evidence introduced by the prosecution; and a catchall provision permitting admission of evidence of the victim's sexual conduct if it is "relevant and admissible in the interests of justice."

[107]Efforts to repeal the marital rape exemption succeeded only to the extent that, under a law passed in 1978, the husband could be prosecuted if the couple were living apart pursuant to a court order or were legally separated under an agreement stating that the husband could be prosecuted. An effort to totally repeal the marital rape exemption passed the Assembly but failed in the Senate in 1984. In that year, the Court of Appeals held that the marital rape exemption was unconstitutional. Chief Judge Sol Wachtler wrote:

> Rape is not simply a sexual act to which one party does not consent. Rather, it is a degrading, violent act which violates the bodily integrity of the victim and frequently causes severe, long-lasting physical and psychic harm. To ever imply consent to such an act is irrational and absurd. . . . [A] marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity. A married woman has the same right to control her body as does an unmarried woman.

People v. Liberta, 64 N.Y.2d 152, 164, 485 N.Y.S.2d 207, 213 (1984).

lems in enforcement and protection of the victim remain. Lorraine Koury, Esq., Coordinator of the Erie County Citizens Committee on Rape and Sexual Assault, commented:

> [I]n the Citizen's Committee's interactions with criminal justice personnel, we have heard many attorneys, prosecutors, and even judges state privately to us that if they or a loved one were sexually assaulted, they would not use the criminal justice system. A system which would not be used by the very people who administer it needs to change its response to the problem it attempts to solve.[108]

Cultural stigma and myths about the nature of rape, its perpetrators and victims still narrow the law's protective reach. The criminal justice system's response to the unique trauma rape victims suffer is incomplete, compounding distress and discouraging complaints of a most underreported crime.

(a) Equal Protection of Victims

The view of rape as a crime of sex rather than one of violence led to untoward scrutiny of elements of a woman's character unrelated to her veracity or powers of observation. Harsh cultural judgment was explicit: A woman -- whose dress, demeanor, conduct, associations or lifestyle reasonably or unreasonably could be viewed as at odds with traditional notions of womanly virtue and

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[108]Testimony of Lorraine Koury, Esq., Rochester Tr., pp. 196-97 (hereinafter cited as Koury Testimony).

chastity -- implicitly consented to, assumed the risk of, or was unworthy of protection against rape.[109]

Making the woman the issue became more difficult when the Legislature enacted legislation limiting cross-examination of the complainant about her prior sexual conduct and dispensing with the requirement that the victim resist her attacker.[110] But victims continue to be unfairly judged and unfairly denied the protection of our rape laws. The law, even as reformed, incompletely removes the focus on the woman. The attitudes embodied in former law and which resisted its reform

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[109]Examination of some of the most prominent legal and trial practices authorities' writings on rape over the last decades reveals that judges, like all members of the legal profession, have not only been exposed to cultural myths about rape victims, but have been taught that "[p]rosecuting attorneys must continually be on guard for the charge of sex offenses brought by the spurned female that has as its underlying basis a desire for revenge, or a blackmail or shakedown scheme." Ploscowe, Sex Offenses: The American Legal Context, 25 Law & Contemporary Problems 2171 223 (1960); see also 3A J. Wigmore on Evidence § 924a at p. 737 (Chadbourn rev. 1978) (advocating that every complainant of a sexual offense be examined by a psychiatrist to determine whether she fantasized the attack); F. Bailey and H. Rothblatt, Crimes of Violence (1973) at p. 273 (stating that "the average woman is equipped to interpose effective obstacles to penetration by means of the hands, limbs and pelvic muscles.")

[110]See notes 105-106, supra, and accompanying text.

continue to operate in the minds of some judges, jurors, attorneys and prosecutors.

(i) Rape Victims' Credibility

"Because of the prior misconceptions about rape, society still does not understand its true nature and courtroom procedures reflect these misconceptions."[111] Supreme Court Justice Betty Ellerin, Deputy Chief Administrative Judge for the courts within New York City, explained that "while the overt snickering and insensitivity to victims which characterized the manner in which sex crimes were handled not so long ago have moderated, there are still all too many instances of the woman victim being put on trial with an underlying insensitivity permeating the courtroom."[112] Evaluation of a criminal complainant's credibility -- through observation of her demeanor and appearance as well as consideration of the circumstances surrounding the alleged crime -- is central to the fact-finding process. There exists a perception, however, that rape victims' credibility is judged by irrelevant or unduly high standards:

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[111]Koury Testimony, supra note 108 at p. 195.

[112]Ellerin Testimony, supra, note 78 at pp. 283-84.

> High standards for witness credibility become gender biased when they presuppose that females, by nature or behavior, tempt sex offenders, thereby inviting sexual assault, and bear further burdens of self protection from this crime due to sex-role stereotyping that male sexual urges must be guarded against by the female who is expected to protect her virtue.[113]

Lorraine Koury, Esq., Coordinator of the Erie County Citizens Committee on Rape and Sexual Assault, asked: "If rape is a violent crime, why should the criminal justice system treat rape differently from other violent crimes?"[114] She responded:

> One answer is that the community perceives both the rapist and the rape victim much differently than other victims and criminals. The community stigmatizes rape victims to a much greater degree than other crime victims and often blames the victim for the attack. And, because society is reluctant to place the proper responsibility for the rape on the rapist, the community is more reluctant to convict the rapist of that crime.[115]

Grand jurors and petit jurors -- many of whom "have been raised with incorrect attitudes and beliefs

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[113]Testimony of Judith Condo, Executive Director, Albany County Rape Crisis Center, Albany Tr. at p. 35 (hereinafter cited as Condo testimony).

[114]Koury testimony, supra note 108 at p. 196. Accord, Testimony of Hon. May Newburger, Member, New York State Assembly, Albany Tr. at pp. 59-60 (hereinafter cited as Newburger Testimony).

[115]Koury Testimony, supra note 108 at p. 196.

concerning rape victims"[116] -- "want to know that the victim is a nice person and a nice girl."[117] The concept "that 'good girls' or women do not get raped and that a woman with an active sexual past cannot be raped"[118] was found by Deborah Sorbini,[119] an Assistant District Attorney in Erie County, to be manifested in "an expectation on the part of judges and juries as to how women sex crime victims will conduct themselves in the court."[120]

> There is that expectation on the part of judges and juries that a woman is going to come into court dressed very nicely, that she is going to be above reproach in many respects, and if a woman comes into court in tight jeans or high boots or whatnot, I think there is an automatic prejudice that still arises in the minds of some juries, some judges, perhaps this woman is promiscuous, perhaps the old

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[116]Testimony of Beverly O'Conner, Director, Rape Crisis Center of Syracuse, Inc., Rochester Tr. at p. 64 (hereinafter cited as O'Conner Testimony). Examples of this cited by Ms. O'Conner were "'Rape victims asked for it'; 'Rape is a crime of sex'; 'Rapists are sex-starved psychopaths'; and 'Rape victims are always young and attractive.'" Id.

[117]Testimony of Mary Ann Hawco, Assistant District Attorney, Monroe County, Rochester Tr. at p. 256 (hereinafter cited as Hawco Testimony).

[118]Koury Testimony, supra note 108 at p. 193.

[119]Ms. Sorbini was speaking on behalf of Sheila Di Tullio, Chief, Comprehensive Assault, Abuse & Rape Bureau (CAAR), Erie County District Attorney's Office.

[120]Testimony of Deborah N. Sorbini, Esq., Rochester Tr. at p. 26 (hereinafter cited as Sorbini Testimony).

> consent idea. Whether or not [consent] is the actual defense in the case, that may arise.[121]

Mary Ann Hawco, an Assistant District Attorney in Monroe County, noted that a prosecutor cannot "ignore the fact that it is grand jurors and jurors that ultimately decide these cases" and that unless the victim "was beaten to death's door, they want to form an opinion about her character."[122]

> Finally, when a victim testifies, her credibility is questioned as she discusses a highly personal and humiliating attack. The community looks at her credibility, her lifestyle, her reputation and her virtue, while the defendant, to a large degree, is spared that scrutiny.[123]

Judith Condo, Executive Director of the Albany County Rape Crisis Center, reported:

> This form of gender bias, coupled with seeming intransigence at all levels of law enforcement, legislature, and court administration to re-educate and replace mythical notions about victims with the volumes of current data on the psychology of the types of sex offenders, encourages sexual assault against women and children and returns adult and

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[121] Id. at p. 29. Ms. Sorbini also noted that sex crime victims are expected to exhibit some emotion but not too much. Calm, matter-of-fact testimony (due perhaps to the passage of time) is deemed to be indifference. Anger or hostility is viewed as irrational. Jurors expect "perhaps some crying, some upsetness." Id. at pp. 26-27.

[122] Hawco Testimony, supra note 117 at p. 256.

[123] Koury Testimony, supra note 108 at pp.195-196.

juvenile sex offenders to the streets to repeat their crimes.[124]

Lorraine Koury voiced a similar conclusion, stating "[t]hese deterrents, as well as a sometimes unsympathetic or insensitive attitude of law enforcement and criminal justice officials, illustrate why the overwhelming majority of victims do not use the criminal justice system."[125]

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[124]Condo Testimony, supra note 113 at p. 34.

[125]Koury Testimony, supra note 108 at p. 196. Columbia County Court Judge John J. Frommer was disciplined by the Judicial Conduct Commission for remarks he made to the press after accepting a rapist's guilty plea to a charge of 3rd degree rape and sentencing him to one year's imprisonment with time off for good behavior. The rapist had entered the victim's apartment wearing a stocking mask and raped her several times. Judge Frommer commented:

> As I recall [the defendant] did go into [the victim's] apartment without permission. . . . He was drunk, jumped into the sack with her, had sex and went to sleep. I think it started without consent, but maybe they ended up enjoying themselves. It was not like a rape on the street. . . . People hear rape and they think of the poor girl in the park dragged into the bushes. But it wasn't like that.
>
> The Hudson Registar-Star, August 19, 1983, p. A-16.

The Judicial Conduct Commission, in ordering that Judge Frommer be censured, stated:

> Respondent's statements were humiliating and demeaning to the victim of the rape, in no small
>
> (Footnote continued)

(ii) Incomplete Legal Protections

New York's rape shield law -- which, subject to specific exceptions, renders inadmissible in a rape prosecution "[e]vidence of a victim's sexual conduct"[126] -- has been described as an attempt "to strike a reasonable balance between protecting the privacy and reputation of a victim and permitting an accused, when it is found relevant, to present evidence of a victim's sexual conduct."[127] Although the law has eliminated the more flagrant kind of cross-examination abuses, and although, according to survey respondents, a number of judges are invoking the rape shield law sua sponte if need be when the improper questioning is specifically related to the

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(Footnote 125 continued from previous page)

> measure because respondent was, in effect, publicly stating that she had probably consented to the sexual intercourse. . . . Moreover, such comments have the effect of discouraging complaints of rape and sexual harassment. The impact upon those who look to the judiciary for protection from sexual assault may be devastating.
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> In the Matter of Judge John J. Frommer, Determination of the New York State Commission on Judicial Conduct, October 25, 1984, p.2.

[126]Criminal Procedure Law § 60.42

[127]Bellacosa, Practice Commentary, McKinney's Cons. Laws of N.Y., Book 11A, CPL 60.42, p. 564.

complainant's prior sexual conduct,[128] it appears that some defense attorneys successfully play on juror prejudice about rape victims.

Professor Virginia Burns testified about research that describes the way in which jurors are influenced by the way defense attorneys portray rape victims. "A sexist defense based on these stereotypes of women [as 'masochistic and provocative'] may result in victims being tried for defying sexual stereotypes and acquittal of a rape defendant because of gender bias and not legal evidence."[129] She reported that in preparation for her testimony she sought to learn from women working in the Monroe County criminal courts whether their experience bore out the findings in the literature.

> I was told by women working in the courts that the way victims of rape are treated is a disgrace . . . that defense attorneys are very sexist in their questioning, that judges overlook or fail to over-

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[128]Female and male survey respondents (F%/M%) reported that when there is improper questioning about complainant's prior sexual conduct, judges invoke the rape shield law sua sponte if the prosecutor does not:

Always	Often	Sometimes	Rarely	Never	No Answer
5/20	14/22	29/24	21/8	6/2	25/22

[129]Burns Testimony, supra note 60 at pp. 181-82, citing H. Kalven and H. Zeisel, The American Jury (1966).

> rule the line of questioning that is posed by defense attorneys.[130]

Erie County Assistant District Attorney, Deborah Sorbini testified that defense lawyers "will never cease to probe as to what [a victim's] lifestyle is like":

> Does she live with a man, does she live with another woman in a homosexual relationship, . . . is she divorced. Any one of a number . . . of clearly improper areas of questions come up in an attempt to subtly impeach the witness, to have her lifestyle negatively reflect on her ability to simply be the victim of a sex crime.[131]

By contrast, Linda Fairstein, Esq., Director of the Sex Crimes Unit in the New York County District Attorney's Office, stated that she could not think of one example in ten years of sex crimes litigation "in which a judge has allowed any improper questioning of a victim."[132] Ms. Fairstein pointed out that the fact "[t]hat some women have been made uncomfortable in the process [of cross-examination] is inevitable, but I distinguish that from the propriety of the proceedings," and

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[130] Id., p. 189.

[131] Sorbini Testimony, supra note 120 at pp. 29-30.

[132] Testimony of Linda Fairstein, Esq., Albany Tr. at pp. 199-200. (Hereinafter cited as Fairstein Testimony.)

stated that her unit has witnessed "a far more humane and dignified treatment of the rape survivor as witness with no erosion of defendant's legal rights."

The rape shield law permits introduction of evidence of a complainant's prior relationship with the accused. It appears that this entire class of prosecutions -- sometimes known as "acquaintance rape" and "date rape" -- is one in which the victim is inadequately protected.

There are conflicting claims about whether more rapes are committed by strangers or known assailants. Although the Federal Bureau of Justice Statistics asserts that "[a] woman is twice as likely to be attacked by a stranger as by someone she knows,"[133] this claim is disputed by experts in the field who believe the majority of rapes are committed by someone known to the victim.[134]

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[133]U.S. Dept. of Justice, Bureau of Justice Statistics, The Crime of Rape, Bulletin, March 1982, p. 2.

[134]E.g., "Why Rape Statistics Lie." Letter to the Editor, The New York Times, April 12, 1985, p. A26, from the Washington, D.C. Rape Crisis Center asserting that more than half of victims know their assailants. The Minnesota Department of Corrections reported that 75 percent of sexual assault victims in Minnesota knew their attackers, who included husbands and boyfriends. Minnesota Department of Corrections, Preventing Sexual Abuse of Persons with Disabilities, 1983.

Judith Condo of the Albany County Rape Crisis Center testified that prosecutorial discretion and reluctance to accept or take to trial cases dissimilar to those previously taken before juries "compounds the problems of reeducating jurors and judges" and "den[ies] the majority of victims, those who knew the offender, the equal protection of the law."[135] Ms. Condo reported that her agency's annual review of local victim reports revealed complaints from a large number of victims who indicated that after reporting a crime to the police and submitting to the hospital evidence gathering procedure, either nothing happened, there was an initial investigation but no arrest even when the offender was known, or the offender received a very light sentence and was already back on the street or would be very shortly. This led the Center to compare data from victim reports, police reports, signed complaints, warrants issued, conviction figures and plea bargains. The data revealed that at many stages of the process the police and prosecutors were interposing their judgments about victim credibility and either declining to go forward with a substantial number of cases or accepting plea bargains "that left the

[135]Condo Testimony, supra note 113 at pp. 35, 37.

victim unsatisfied with the sentence and removed her completely from the process of stating her case against the accused, the major rationale for her initial police report."[136]

A majority of respondents to the Attorneys Survey reported a clear distinction between the way courts deal with stranger rape and acquaintance rape. The majority of both women and men respondents reported that there is less concern on the part of judges, prosecutors and attorneys about rape cases in which there is a current or past relationship between complainant and defendant.[137] Fifty-nine percent (59%) reported judges to be less concerned, 60 percent reported the same about prosecutors and about attorneys.

Seventy-three percent (73%) of men and 82 percent of women also said that bail is "sometimes," "often" or "always" set lower in rape cases where the parties

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[136] Id. at p. 39.

[137] Female and male (F%/M%) survey respondents, asked whether judges, prosecutors, and attorneys demonstrate less concern about rape cases where the parties have a current or past relationship/acquaintance, responded:

	Yes	No	No Answer
Judges	74/53	10/22	16/25
Prosecutors	66/58	22/24	12/18
Attorneys	68/58	19/25	13/18

knew each other than when they were strangers.[138] Sixty-two percent (62%) of men and 73 percent of women reported that sentences in rape cases are "sometimes," "often" or "always" shorter when parties knew one another than when they were strangers.[139]

New York County Assistant District Attorney Linda Fairstein noted the impropriety of distinguishing sex offenses involving assaults by strangers from those committed by acquaintances: "once the legal elements of the crime are satisfied by the assailant, once he has subjected his victim to sexual intercourse by forcible compulsion, we cannot accord the victim of any kind of incident any less respect as a witness than we would to another victim."[140] Assistant District Attorney Mary Ann Hawco suggested that a way to increase indictments in

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[138]Female and male (F%/M%) survey respondents reported that bail in rape cases where parties knew each other is set lower than in cases where parties were strangers:

Always	Often	Sometimes	Rarely	Never	No Answer
21/2	31/30	30/41	6/12	3/6	9/8

[139]Female and male (F%/M%) survey respondents reported that sentences in rape cases are shorter when parties knew one another than in cases where parties were strangers:

Always	Often	Sometimes	Rarely	Never	No Answer
17/1	31/20	25/41	12/14	3/12	13/12

[140]Fairstein Testimony, supra note 132 at p. 198.

acquaintance rape cases would be to have more felony categories for forcible rape than just the current B felony. It is her belief that if grand juries were offered a charge with a sentence less than that of a B felony, they would be more likely to indict in many instances, including those where the grand jury believes the facts as presented by the prosecutor but finds the defendant sympathetic, as often happens in cases of acquaintance rape.[141]

(b) Responses to Victims' Special Needs

Sexual assault is uniquely traumatic in terms of the immediate and long-term psychic injury to the victim and, frequently, the censorious response of the community. Linda Fairstein, Esq. explained:

> We have learned that the damage inflicted by the sex offender is not measured by the physical injury a woman sustains. In fact, such injury occurs, if at all, in less than one-third of all sexual assaults, since victims are often most wise to submit to threats of violence when the assailant has the means to take her life. Rather, the survivor's injury is incapable of assessment in physical terms like a visible scar might be.[142]

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[141]Hawco Testimony, supra note 117 p. 250. See, e.g., Michigan Penal Code § 750.520(a) et seq. which, inter alia, has four degrees of criminal sexual conduct, all of which have similar elements.

[142]Fairstein Testimony, supra note 132, pp. 198-99. A recent, long-term research study conducted by the Medical University of South Carolina and People

(Footnote continued)

Public hearing witnesses stated that specialized prosecutorial divisions and legislation assuring confidentiality of victim-rape counselor communications are necessary to ensure that the criminal justice system does not aggravate this trauma.

(i) Specialized Prosecutorial Divisions

The Task Force received detailed testimony about the effectiveness of specialized prosecutorial divisions that handle only sexual offense cases in making the victims feel more comfortable and better able to negotiate and survive the prosecution process.

Linda Fairstein, Esq., explained that the sex crimes unit in the Manhattan District Attorney's office, established in 1974, was the first unit in a prosecutor's office in the country to be exclusively dedicated to investigating and prosecuting rape, sodomy and sexual abuse cases.

(Footnote 142 continued from previous page)
Against Rape under a grant from the National Center for the Prevention and Control of Rape found that three years post-rape, victims still suffered in varying degrees from many symptoms of post-traumatic stress disorder including fear, anxiety and phobic anxiety. Kilpatrick, The Sexual Assault Research Project: Assessing the Aftermath of Rape, 8 Response 20 (1985). See also, Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 617-19 (1982) (Burger, C.J., dissenting).

> The special bureau grew out of a belief that sex offenses pose unique problems for prosecutors, of course, but, more importantly, for the crime victims and survivors, and that if specialized legal knowledge and understanding of the psychological factors involved were applied to the handling of the cases not only would there be an increase in the low conviction rate, but again, more importantly, the women's experience in the courtroom as witnesses would be made more comfortable, and they would not again be made victims in the process.[143]

In the Manhattan District Attorney's office, every sex offense case is diverted from the regular intake system to the office Sex Crimes Prosecution Unit, which is staffed with experienced men and women attorneys trained to recognize the problems unique to these cases and to anticipate the defenses frequently interposed. Each victim works with one unit member from the first interview through the disposition of her case, so that she need not repeat her story to many different individuals at different stages of the proceedings. An effort is made to present the case to the grand jury on the same day the witness first appears in order to spare her repeated trips to the courthouse. The victim is never made to testify at a preliminary hearing and face the defendant at that stage of the proceedings.

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[143]Fairstein Testimony, supra note 132 at p. 193.

The unit also refers the victim for appropriate medical or counseling services and encourages her to communicate with the assigned attorney about any questions she may have and with the assigned detective if she or a member of her family is subjected to harassment by the defendant or members of his family. Witnesses are prepared to understand the defendant's rights and to anticipate defense tactics including vigorous cross-examination. Ms. Fairstein testified:

> One of our greatest pleasures often comes at the conclusion of a trial, when a rape survivor, perhaps reluctant to have reported the crime originally and whose only prior exposure to the criminal justice system was a made for TV movie about rape trials and their horror -- when such a woman calls to say, "I am glad I did this. It was much easier than I expected it to have been. I never thought he would be convicted and he has been. Your assistant was wonderful to us. The judge was fair." Those calls are quite common.[144]

Deborah N. Sorbini, Esq., an Assistant District Attorney in Erie County (Buffalo), testified that a Comprehensive Assault, Abuse & Rape Bureau was recently established there. As in New York County, a victim need deal with only one district attorney and will not have to retell her story to others at each stage of the proceeding. Ms. Sorbini testified that the unit came about

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[144] Id. at p. 200.

through a confluence of pressure from women's organizations and a realization in the District Attorney's office that "shuffling sex crime victims from D.A. to D.A." was "counterproductive," "insensitive" and "was only adding to the trauma that these people have already endured."[145]

Judith Condo testified that Albany County has a specialized vertical prosecution unit and that this is one of the elements of a victim/criminal justice interface recommended at the 1984 National Symposium on Sexual Assault sponsored by the Department of Justice and the FBI.[146]

(ii) Victim-Counselor Confidentiality

Rape crisis centers staffed with counselors trained to provide information and support to rape victims are of critical importance in easing the trauma of this crime and increasing prosecutions.[147] Beverly

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[145]Sorbini Testimony, supra note 120 at pp. 31-32.

[146]Condo Testimony, supra note 113 at pp. 37-38. Another witness urging specialized prosecution units, Lorraine Koury, also urged specialized court parts so that "both prosecutors and judges [would have] the special expertise and experience needed to prosecute and preside over these trials." Koury Testimony, supra note 108 at p. 197.

[147]Lois Davis, past president of the Rochester Judicial Process Committee, commented on the fact that the impetus for improved treatment of rape victims has

(Footnote continued)

O'Connor of the Syracuse Rape Crisis Center testified about the need for legislation to protect the confidentiality of communications between crisis counselors and victims. Failure to extend confidentiality to crisis counseling incurs the risk of undermining the effectiveness of the counseling. Some victims who need this kind of help now fear to seek it. Without the protection of confidentiality, victims have found their files subpoenaed by the defense and feel betrayed when thoughts and feelings that they considered private are open to public scrutiny in a courtroom.[148] Ms. O'Connor pointed out that statutes extending confidentiality to counseling by psychologists and psychiatrists were passed before the

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(Footnote 147 continued from previous page)
come from outside the criminal justice system.

> [W]ith the advent of rape crisis centers, women have been encouraged to file charges and are given support through the court process. But it is not the court that has given them help, but the not-for-profit agencies. There are still judges and attorneys who consider the women partly responsible for these crimes.

Testimony of Lois Davis, Rochester Tr. at p. 221 (hereinafter cited as Davis Testimony).

[148]O'Connor Testimony, supra note 116 at p. 63. One court, as a matter of common law, has barred a rape defendant from obtaining the records of the complainant's conversation with a rape crisis center counselor. People v. Pena, 127 Misc. 2d 1057, 487
(Footnote continued)

importance of victim counseling was recognized.[149] Under these statutes,[150] only those who can afford private treatment are protected.

(Footnote 148 continued from previous page)
N.Y.S.2d 935 (Sup. Ct. Kings Co. 1985). Several states already have such statutes, see e.g. Pennsylvania, 42 PaCSA § 5945.1(b).

[149]O'Connor Testimony, supra note 116 at p. 63.

The courts' use of pre-sentence victim impact statements in assessing the injury to rape victims was discussed by two witnesses. Beverly O'Connor of the Syracuse Rape Crisis Center testified:

> Judges should allow for, and give appropriate weight to, input at sentencing from victims of rape . . . . The impact of the crime on the victim's physical, financial and psychological well-being must be explained. Id. at p. 65.

Judith Condo of the Albany County Rape Crisis Center urged:

> Prosecutors and judges should use victim impact statement to assess plea bargain implications for the victim and the society at large prior to drastically reducing charges and sentences to avoid court time. Condo Testimony, supra note 113 at p. 40.

[150]See C.P.L.R. §§ 4504 (physician-Patient), 4507 (psychologist-client), 4508 (social worker-client). O'Conner Testimony, supra note 116 at p. 64.

SUMMARY OF FINDINGS

1. Until recently, New York's rape law codified the view that women's claims of rape are to be skeptically received. Through a slow process of reform, the most detrimental provisions have been repealed or struck down as unconstitutional.

2. The attitudes embodied in the former law and which resisted its reform continue to operate in the minds of some judges, jurors, defense attorneys, and prosecutors.

3. As a result, cultural stigma and myths about rape's perpetrators and victims still narrow the law's protective reach.

   a. Elements of a woman's character unrelated to her powers of observation and veracity -- such as her manner of dress, perceived reaction to the crime, and lifestyle -- continue to be unfairly deemed relevant to a determination of the defendant's guilt or innocence.

   b. Victims of rape who had any level of past relationship or acquaintanceship with the perpetrator are less likely to see his conviction and appropriate punishment.

4. Certain legislative and prosecutorial measures can offer a more appropriate response to the unique trauma rape victims suffer.

   a. Specialized prosecution units trained to recognize rape victims' psychological trauma and designed to minimize the need for the victim to repeat her story to many individuals and to appear in court have been successfully implemented in a number of counties.

   b. A statute creating victim-rape counselor confidentiality, similar to that applied to communications between psychiatrists and patients, would permit victims to utilize important crisis

services without fear that privately related statements would be admitted in court.

RECOMMENDATIONS

For Court Administration

Take necessary steps to assure that judges are familiar with:

1. The substantial current data about the nature of the crime of rape, the psychology of offenders, the prevalence and seriousness of acquaintance rape and the long-term psychic injury to rape victims.

2. The difference between vigorous cross-examination that protects the defendant's rights and questioning that includes improper sex stereotyping and harassment of the victim.

3. The appropriate utilization of victim impact statements.

For the Legislature

1. Enact legislation providing for the confidentiality of communications between rape victims and rape counselors.

2. Consider legislation adding one or more felony grades to the crime of rape that are not dependent on the complainant's age.

For District Attorneys

1. Establish specialized prosecution units that permit rape victims to deal with only one assistant district attorney through all stages of the proceeding.

2. Ensure that assistant district attorneys receive training as to the same particular areas recommended for judges.

3. Ensure that acquaintance rape cases are treated with the same seriousness as stranger rape cases.

For Police Departments

1. Establish specialized units to deal with sex offenses.

2. Ensure that police officers receive training as to the same particular areas recommended for judges.

3. Ensure that acquaintance rape complaints are treated with the same seriousness as complaints of stranger rape.

For Bar Associations

Coordinate efforts with rape crisis centers, prosecutors and police to provide community education similar to that recommended for judges.

For Law Schools

Ensure that criminal justice courses provide accurate information about rape similar to that recommended for judges.

For Judicial Screening Committees

Make available to all members information about rape similar to that recommended for judges.

B. THE COURTS' ENFORCEMENT OF WOMEN'S ECONOMIC RIGHTS

The "feminization of poverty"--the disproportionate representation of women among New York's poorest citizens--has impelled the legislative[151] and executive branches[152] of government to identify causes and seek solutions. For most women, unlike men, divorce causes extreme economic dislocation and thus has contributed significantly to the swelling ranks of female single-parent heads of households living in poverty.[153]

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[151] See generally, The Status of Older Women: A Report on Statewide Public Hearings Conducted by the Assembly Task Force on Women's Issues and the Assembly Standing Committee on Aging (New York State Assembly 1983); N.Y.C. Council, The Feminization of Poverty, An Analysis of Poor Women in New York City (1984).

[152] See generally, Minutes of Hearings, Department of State, Hearings on the Feminization of Poverty, Buffalo (June 5, 1984), Syracuse (June 6, 1984), White Plains (June 12, 1984), Hauppauge (June 13, 1984), New York City (June 14, 1984).

[153] See 1983 U.S. Department of Commerce, Bureau of the Census, Child Support and Alimony; Series P-23, No. 141, July 1985; L. Weitzmann, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America (Free Press/MacMillan, 1985); Sterin and Davis, Divorce Awards and Outcomes, Federation for Community Planning/Cleveland Women's Council, 1981); J. Wallerstein and J. Kelly, Surviving the Breakup (Basic Books, Inc., 1980); D. Chambers, Making Fathers Pay: The Enforcement of Child Support (University of Chicago Press, 1979); Shaw, Economic Consequences of Marital Disruption, National Longitudinal Study of Mature Women, U.S. Department of Labor

(Footnote continued)

The courts directly influence the economic welfare of a substantial number of women in New York when they adjudicate women's rights to: (1) property and maintenance upon dissolution of a marriage; and (2) child support. To determine whether the courts have contributed to the well-documented trend of increased economic hardship for women, the Task Force examined the courts' decisions under the Equitable Distribution Law and child support laws.

(Footnote 153 continued from previous page)
(June 1978); Hoffman and Holmes, Husbands, Wives and Divorce in Five Thousand American Families - Patterns of Economic Progress, Vol. IV, Institute for Social Research, University of Michigan (1975).

1. THE EQUITABLE DISTRIBUTION LAW

New York's Equitable Distribution Law (EDL)[154] -- the statute that governs the economic rights of husband and wife upon the dissolution of a marriage -- was enacted in 1980. Immediately prior to the EDL's enactment, New York was one of few remaining states in which property -- i.e., real estate, securities, bank accounts, businesses and other assets -- was distributed strictly to the title holder. Because wives rarely had assets in their own names, and because few assets other than the marital home were jointly held, property accumulated during the marriage usually went solely to the husband after divorce. A wife's years of contributions as primary caretaker for the children, homemaker and spouse had no impact on property distribution. Alimony was terminated on the husband's death and the former wife had no right to inheritance.

In 1985, the New York State Court of Appeals characterized the "conceptual base upon which the [EDL] rests" as an "economic partnership theory" of marriage.[155] The court expressly adopted a view of the

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[154]L. 1980, ch. 281.

(Footnote(s) 155 will appear on following pages)

EDL that one lower court "said so well":

> The function of equitable distribution is to recognize that when a marriage ends each of the spouses, based on the totality of contributions made to it, has a stake in and right to a share of the marital assets accumulated while it endured, not because that share is needed, but because those assets represent the capital product of what was essentially a partnership entity.[156]

Contributions to the formation and growth of marital assets are to be "recognized, considered, and rewarded" whether they are direct or indirect.[157] Indirect contributions not only include a spouse's services -- such as child rearing and household manage-

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[155] O'Brien v. O'Brien, __ N.Y.2d __ (Case No. 629, slip op. at p. 12) (December 26, 1985). In O'Brien, the issue presented was whether a license to practice medicine, "the parties' only asset of any consequence," is "marital property subject to equitable distribution." Id., slip op. at p. 1. The Court of Appeals reversed a decision of the Appellate Division, Second Department, and overruled a decision of the Appellate Division, Fourth Department (Lesman v. Lesman, 88 A.D.2d 153 (4th Dept. 1982)). Judge Richard D. Simons wrote: "[t]he words [of the EDL] mean exactly what they say: that an interest in a profession or professional career potential is marital property which may be represented by direct or indirect contributions of the nontitle-holding spouse, including financial contributions and non-financial contributions made by caring for the home and family." Id., slip op. at pp. 7-8.

[156] Id., slip op. at p. 12, quoting Wood v. Wood, 119 Misc. 2d 1076, 1079 (Sup. Ct. Suffolk Co. 1983).

[157] Id., slip op. at p. 12.

ment -- that free the other spouse to pursue directly income-generating careers and the acquisition of assets, but also embrace the concept of opportunity cost. By undertaking homemaker's tasks, which require the development of skills not readily transferable to the paid labor market, the spouse makes an additional indirect contribution to the partnership enterprise by sacrificing her "own educational or career goals and opportunities."[158]

Over 20 witnesses appearing at the Task Force's public hearings presented their views on the EDL. Some submitted articles and written commentaries on the reported decisions. Professor Henry Foster and others stated that "New York's EDL is alive and well and is being fairly administered,"[159] and that women are in a

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[158] Id., slip op. at p. 9.

[159] Foster, A Second Opinion, 17 Family Law Review 3 (1985), submitted to the Task Force on May 7, 1985. (Hereinafter cited as Second Opinion). Even these individuals agreed that pendente lite awards for counsel and experts have been inadequate, id. at p. 8; that courts have applied the concept of rehabilitative maintenance inappropriately, see Testimony of Julia Perles, Family Law Section, Chairperson of the Committee on Equitable Distribution, New York State Bar Association, New York City I Tr. at p. 7 (hereinafter cited as Perles Testimony); and that substantial assets have been erroneously excluded from consideration as marital property. See Henry Foster, Esq., Letter to the Editor, N.Y.L.J., May 5, 1985, p. 2 col. 6. Perles Testimony at p. 9.

substantially better position now than in pre-equitable distribution days.[160] Few witnesses concurred.

Current application of the EDL was overwhelmingly viewed as working "unfairness and undue hardship" on women.[161] New York City matrimonial attorneys, Harriet N. Cohen and Adria S. Hillman studied 70 reported EDL decisions and offered the following overview which was confirmed by a similar study submitted by Joel R. Brandes, Esq.:

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[160]Perles Testimony, supra note 159 at p. 2. Buffalo attorney Herbert Siegel stated "I don't mean to say for a moment that women are not doing much better today under equitable distribution than they were doing prior to 1980," but added, "it is my position in reference to day-to-day practice, that the economic partnership that I thought was established by way of the passage of the law is a long way off." Testimony of Herbert Siegel, Esq., Rochester Tr. at p. 172 (hereinafter cited as Siegel Testimony).

[161]Statement of Joel R. Brandes, Esq., at p. 2 (hereinafter referred to as Brandes Statement). See also Lester Wallman, a New York matrimonial lawyer and member of the committee that drafted EDL recently stated, "Judges are completely misconstruing it and women are being treated unjustly . . . . The answer is to make some very very substantive changes in the laws." The New York Times, Aug. 5, 1985 at A1. See Joint Public Hearings of the Senate and Assembly standing Committees on the Judicary Respecting Proposed Revisions to the Equitable Distribution Law, March 1985 and Joint Public Hearings of the Department of State and Division for Women Respecting the Feminization of Poverty, June 1984.

> [D]ependent wives, whether they worked at home or in the paid market place were relegated to one or a combination of the following in an aggregate of 49 out of the 54 cases susceptible of this analyis; less than a fifty percent overall share of marital property; short term maintenance after long term marriages; de minimis shares of business and professional practices which, in addition, the courts undervalued; terminable and modifiable maintenance in lieu of indefeasible and equitable distribution or distributive awards; and inadequate or no counsel fee awards.[162]

The results of many lower court decisions involving property distribution and maintenance awards ignore the irretrievable economic losses women incur when they forego developing income-generating careers and vested retirement rights to become homemakers for the benefit of their families. Rather than recognizing the economic partnership theory of marriage, some judges

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[162]Cohen and Hillman, "Analysis of Seventy Select Decisions After Trial Under New York State's Equitable Distribution Law, From January 1981 Through October 1984, Analyzed November 1, 1984" at p. 4 (hereinafter cited as Cohen-Hillman Study). See also Cohen and Hillman, "Report to the Task Force, Diagnosis is Confirmed: EDL is Ailing." (Hereinafter cited as Diagnosis is Confirmed), at p. 4. The authors pointed out that only seventy EDL decisions were reported between July 1980 and October 15, 1984 and joined Mr. Brandes, who submitted an analysis of sixty-five cases, and other witnesses in urging that more decisions be published. They also noted that it is these seventy judicial decisions that set the parameters for the 90 percent of matrimonial cases that end in a negotiated settlement. Cohen-Hillman Testimony, New York City I Tr. at pp. 79, 87.

appear predisposed to ensure that the EDL does not "make reluctant Santa Clauses out of ex-husbands."[163] Equitable sharing of this permanently lost earning capacity upon a marriage's dissolution does not, as some have written, confer a "free meal ticket" to the economically dependent spouse[164] but constitutes a recognition that each partner's contribution to the marital enterprise -- whether through affirmative performance or through foregoing opportunity -- will be equitably compensated out of assets accumulated during the marriage and the post-marriage earning capacity of each party.

(a) Distribution of Marital Property

The EDL directs the courts to consider two types of property upon the dissolution of a marriage: "marital" property and "separate" property. Separate property is defined as property acquired before the marriage or by descent or as a gift from a party other than the spouse or as compensation received for personal inju-

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[163] See H. Foster & D. Freed, "Law and the Family" N.Y.L.J. 1/9/86, p. 1, col. 1 (chastising the "enemies of equitable distribution" as having "abandoned the principle of equal rights" and advocating "'grandmother clauses' in order to make reluctant Santa Clauses out of ex-husbands they may have rejected.")

[164] Id.

ries. The appreciation in the value of separate property is not distributed and remains with the title-holding spouse "except to the extent that such appreciation is due in part to the contributions or efforts of the other spouse."[165]

Marital property is defined as "all property acquired by either or both spouses during the marriage and before the execution of a separation agreement or the commencement of a matrimonial action, regardless of the form in which title is held."[166] Assets deemed marital property must be divided "equitably" according to nine statutory factors and "any other factor which the court expressly finds to be just and proper."[167]

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[165]D.R.L. § 236B(1)(d)(3).

[166]D.R.L. § 236B(1)(c).

[167]Section 236B(5)(d) of the Domestic Relations Law provides that:

> In determining an equitable distribution of property, the court shall consider:
>
> (1) the income and property of each party at the time of marriage, and at the time of the commencement of the action;
>
> (2) the duration of the marriage and the age and health of both parties;
>
> (3) the need of a custodial parent to occupy or own the marital residence and to

(Footnote continued)

Judicial valuation and division of property determine many women's post-divorce economic well being.[168] Lower courts in New York have construed the

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(Footnote 167 continued from previous page)
use or own its household effects;

(4) the loss of inheritance and pension rights upon dissolution of the marriage as of the date of dissolution;

(5) any award of maintenance under subdivision six of this part;

(6) any equitable claim to, interest in, or direct or indirect contribution made to the acquisition of such marital property by the party not having title, including joint efforts or expenditures and contributions and services as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;

(7) the liquid or non-liquid character of all marital property;

(8) the probable future financial circumstances of each party;

(9) the impossibility or difficulty of evaluating any component asset or any interest in a business, corporation or profession, and the economic desirability of retaining such asset or interest intact and free from any claim or interference by the other party.

[168]Given the insufficiency of maintenance and child support awards and the extreme difficulty in enforcing them, many economically dependent wives rely heavily on marital property awards for economic security and survival. See infra pp. 111-118, 128-154.

provisions of the EDL relevant to property division in a manner that greatly disadvantages women and predetermines inequitable results. Economically dependent women's ability to litigate is hampered by inadequate awards of attorneys' and experts' fees. Property divisions place an inappropriately low value on homemakers' services and permanently lost earning capacity.

(i) Women's Ability to Litigate

The EDL empowers the courts to require either spouse to pay the other's attorney's fees so as "to enable that spouse to carry on or defend the action or proceeding."[169] Judges' refusals to award adequate or timely counsel and expert fees were repeatedly cited as critical barriers to women's receiving adequate representation in matrimonial cases.

> Most women do not have the necessary resources to retain an attorney who is very familiar with the law and its practice. No matter how well off the husband, by the time the parties are ready to retain lawyers the wife has been left with very little. Most attorneys require a retainer at the commencement of their representation and are forced to finance the case after the retainer has been used up. As a general rule, where an attorney has been paid a retainer, no matter how small the amount, the courts will not award pendente lite counsel fees. This creates financial pressure on the attorney to con-

[169]D.R.L. § 237.

clude the case and on the spouse who has to worry about the increasing cost of litigation.[170]

Respondents to the Attorneys' Survey said of counsel fees:

> ° The courts do not make reasonable allocations for legal services rendered to female litigants in matrimonial cases which has the effect of depriving female litigants of proper representation in situations where the husband controls the family purse strings and/or has the greater income--which is true in most cases.
>
> Seventy-year old rural male

> ° The greatest area of discrimination in Monroe County involves court awards of counsel fees to women. The courts are excessively stingy and inconsistent in cases where wife has no identifiable assets and husband is able to pay. As a result, members of the private bar will not accept this type of matrimonial case, and deserving women go unrepresented.
>
> Thirty-year old rural male

> ° I've curtailed my matrimonial practice because I can't afford to handle the cases. Most contested matters are guaranteed losers for the wife. Most of [those] I've handled, the husband has the resources to enter into protracted litigation while the wife does not. If I've invested $5,000-$10,000 worth of time into one of these divorces, the court might--on a good day--award me $2,500. The women who most need my services will never have the resources under the present system to be able to pay my fee.
>
> Thirty-six year old urban female

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[170] Brandes Statement, supra note 161 at p. 4. The Cohen-Hillman Study revealed that in the 47 reported decisions where counsel fees were at issue, 21 economically-dependent wives received no counsel fees at the conclusion of trial. Cohen-Hillman Study, supra note 162 at p. 7.

The EDL provides that funds for retaining accountants and appraisers may be awarded to needy spouses "as justice requires."[171] Because the wife must prove the value of the husband's assets, business or professional practice, fees for experts are essential. This "prove it or lose it" aspect of EDL litigation often presents, in practice, acute problems for the economically dependent spouse.

Herbert M. Siegel, a Buffalo attorney, testified that "applications to the court . . . for accounting fees, for appraisal fees and evaluation fees are not being met kindly."[172] He described a case in which his firm advanced $5,000 for an appraisal of a husband's business and was awarded only $400 as reimbursement. Noting that few law offices are willing or able to make large disbursements for experts in matrimonial cases, Mr. Seigel concluded that "oftentimes women are not obtaining

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[171] See D.R.L. §§ 236(b)(5), 237; Gueli v. Gueli, 106 Misc. 2d 877, 878, 435 N.Y.S.2d 537, 538 (Sup. Ct. Nassau Co. 1981).

[172] Seigel Testimony, supra note 160 at p. 168. The Appellate Division, Second Department, has held that expert fees are not to be "granted routinely." Ahern v. Ahern, 94 A.D.2d 53, 58, 463 N.Y.S.2d 238, 241 (2d Dep't 1983).

the necessary expert analysis that they should have prior to going to trial."[173]

(ii) Property Division

The pattern of property division in reported decisions reveals that the view of marriage as an economic partnership has not taken hold. Lillian Kozak, C.P.A., Chair of the NOW-New York State Domestic Relations Task Force testified:

> An examination of decisions reveals that the one family asset which is divided 50/50 most of the time, is the marital residence. Since the vast majority of houses are jointly owned and were therefore divided equally under the old law, the equal division of houses is hardly evidence of an egalitarian perspective. In the few cases where the wife has been awarded the whole marital residence, she has been deprived of far greater interest in income producing property, including businesses, and in pension plans or to obviously hidden wealth. Although cash savings are also being divided, where they have been substantial there has not been an equal division. In the realm of property division, the valuation of businesses . . . has been a hoax and the percentage of the hoax awarded the wife has been 25% or less. There seems to be no offset, in the main, for leaving the husband with this major income producing asset.[174]

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[173]Seigel Testimony, supra note 160 at p. 168. The combined effect of a heavy burden of proof and the courts' denials and "often unrealistic," Second Opinion supra note 159 at p. 8, awards of pendente lite experts' fees significantly undercuts the EDL's purpose, making "possession . . . 9/10ths of the law." Brandes Statement, supra note 161 at p. 7.

[174]Testimony of Lillian Kozak, Chair, NOW-NYS Domestic Relations Law Task Force, New York City I Tr. at p. 141 (hereinafter cited as Kozak Testimony).

The Cohen and Hillman Study analyzed fifteen reported cases in which a marital business property was at issue, of which thirteen involved marriages of long duration ranging from 7 years to 41 years. Eighteen percent of marital property was the median award to wives.[175] In only two were equal awards made. In six cases, the wife was completely denied a share of the business property.[176]

The courts appear to be ignoring wives' "contributions and services as a spouse, parent, wage earner and homemaker and to the career or career potential of the other party."[177] These criteria (which apply both to distribution of marital property and to awards of maintenance) require the courts to consider the contributions made to the "economic partnership," by the non-title holding, non-wage earning spouse.[178] Supreme Court Jus-

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[175]Cohen-Hillman Study, supra, note 162 at p. 90.

[176]There has been dictum in one appellate case to the effect that the wife's homemaker services should be rebuttably presumed to be equal in value to the husband's earnings. Conner v. Conner, 97 A.D.2d 88, 468 N.Y.S.2d 482 (2d Dep't 1983).

[177]D.R.L. § 236B(5)(d)(6) and (6)(a)(8).

[178]Professor Thomas Kershner of the Department of Economics at Union College, testified that "economists have made considerable economic advances in identifying and
(Footnote continued)

tice Betty Ellerin, Deputy Chief Administrative Judge for Courts within the City of New York, testified that "the value of a homemaker/wife's contribution to a marriage is again all too often valued in terms of societal attitudes that deprecate women's role or contribution."[179] Attendees at the Oswego County listening session reported that farmers' wives who have spent all their adult lives helping to keep a farm going do not have their contribution valued and end up with very little in equitable distribution.

One reason for the undervaluation of homemakers' contributions suggested by a survey respondent is that some judges "cannot conceive of a woman having a right to a share of 'the man's business' [which they]

(Footnote 178 continued from previous page)
measuring the various jobs and tasks that homemakers, wives and mothers do." Testimony of Thomas Kershner, Albany Tr. at pp. 229-230. Judith Avner, Esq., Assistant Director of the New York State Women's Division, cautioned, however, that evaluation of the value of particular services as the sole measure of a homemaker's contribution, as opposed to the "joint enterprise" concept, can deteriorate into a debate at the level of whether the homemaker left a "ring-around-the-collar." Testimony of Judith Avner, Esq. Albany Tr. at p. 138. See Avner, Valuing Homemakers Work: An Alternative to Quantification, 4 Fairshare 11 (1984).

[179]Ellerin Testimony, supra note 78 at p. 284.

refer to as 'his business' and 'his house' and 'his pension'. Under equitable distribution it should be thought of as 'their business' and 'their pension', etc."

Among survey respondents, 72 percent of women and 32 percent of men reported that equitable distribution awards "sometimes", "often" or "always" reflect a judicial attitude that property belongs to the husband and a wife's share is based on how much he could give her without diminishing his current lifestyle.[180] Sixty-two percent (62%) of the male respondents and 20 percent of the female respondents reported that this occurs "rarely" or "never."

Seventy percent (70%) of women and 44 percent of men also reported that judges "sometimes", "often" or "always" refuse to award 50 percent of property or more to wives even though financial circumstances are such that even with such an award husbands will not have to substantially reduce their standard of living but wives

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[180] Female and male survey respondents (F%/M%) reported that equitable distribution awards reflect a judicial attitude that property belongs to the husband and a wife's share is based on how much the husband could give her without diminishing his current lifestyle:

Always	Often	Sometimes	Rarely	Never	No Answer
12/2	35/10	25/20	13/31	7/31	9/6

will.[181] Forty-nine percent (49%) of the men and 18 percent of the women reported that this occurs "rarely" or "never."

Other witnesses and respondents stressed the fact that the judiciary is overwhelmingly male and may have little understanding of what homemaking involves. Some judges appear unaware of the economic opportunity cost to the one who has devoted long years to unpaid labor for her family. Rockland County Legislator Harriet Cornell observed:

> [M]ale perspective on family life has skewed decisions in equitable distribution cases. The perception of most men -- and the judiciary is mostly male -- is that care of the house and children can be done with one hand tied behind the back. Send the kids out to school, put them to bed, and the rest of the time free to play tennis and bridge. They think any woman -- no matter her age or lack of training -- can find a nice little job and a nice little apartment and conduct her later years as she might have done at age 25.[182]

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[181] Female and male survey respondents (F%/M%) reported that judges refuse to award 50% of property or more to wives even though the probable future financial circumstances indicate that even with such an award husbands will not have to substantially reduce their standard of living but wives will:

Always	Often	Sometimes	Rarely	Never	No Answer
10/2	41/16	19/26	12/31	6/18	11/8

[182] Testimony of Hon. Harriet Cornell, Albany Tr. at pp. 51-52 (hereinafter cited as Cornell Testimony).

Lillian Kozak's reference to the valuation of businesses as "a hoax" was also noted in the Cohen-Hillman study, which cited several cases in which courts credited the husband's experts' valuation even while acknowledging the husband's financial chicanery. These cases can be read as encouraging a husband to undervalue or hide assets because such behavior is ultimately rewarded in the division of marital property.[183]

(b) Maintenance

The EDL provides for the ordering of "temporary maintenance or maintenance to meet the reasonable needs of a party to the matrimonial action in such an amount as justice requires" as determined by ten factors.[184] In

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[183]Cohen-Hillman Study, supra, note 162 at p. 7.

[184]Section 236B(6)(a) of the Domestic Relations Law provides, in relevant part that:

> [I]n any matrimonial action the court may order temporary maintenance or maintenance to meet the reasonable needs of a party to the matrimonial action in such amount as justice requires. . . . In determining the amount and duration of maintenance the court shall consider:
>
> (1) the income and property of the respective parties including marital property distributed pursuant to subdivision five of this part;
>
> (2) the duration of the marriage and the age and health of both parties;

(Footnote continued)

his legislative memorandum in support of the EDL, Gordon Burrows of the Assembly Judiciary Committee, stated:

> The objective of the maintenance provision is to award the recipient spouse an opportunity to achieve independence. However, in marriages of long duration, or where the former spouse is out of the labor market and lacks sufficient resources, or has sacrificed her business or professional career to serve as a parent and homemaker, "maintenance" on a permanent basis may be necessary.[185]

(Footnote 184 continued from previous page)

> (3) the present and future capacity of the person having need to be self-supporting;
>
> (4) the period and training necessary to enable the person having need to become self-supporting;
>
> (5) the presence of children of the marriage in the respective homes of the parties;
>
> (6) the standard of living established during the marriage where practical and relevant;
>
> (7) the tax consequences to each party;
>
> (8) contributions and services of the party seeking maintenance as a spouse, parent, wage earner and homemaker, and to the career or career potential of the other party;
>
> (9) the wasteful dissipation of family assets by either spouse; and
>
> (10) any other factor which the court shall expressly find to be just and proper.

[185]Memorandum of Assemblyman Gordon W. Burrows, 1980 New York State Legislative Annual at p. 130. The fact that the term "permanent maintenance" is not used in the statute may mislead some judges. At a New York City regional meeting an attorney described an argument before a Nassau County judge who insisted that the EDL bars permanent maintenance.

Maintenance awards are critical to the economic security of the vast majority of economically dependent wives. Lillian Kozak testified: "The greatest asset in most families is the earning power of the supporting spouse to which the homemaker has contributed. The only possible distribution of this asset is via alimony/maintenance."[186]

(i) Duration of Award

The Legislature intended maintenance awards to be short-term when the non-wage earning or economically dependent spouse is young or has a strong potential to become self-supporting after a period of support for education or training. The Task Force found that this concept of "rehabilitative" maintenance is being widely abused. Judges are too frequently awarding minimal, short-term maintenance or no maintenance at all to older, long-term, full or part-time homemakers with little or no chance of becoming self-supporting at a standard of living commensurate with that enjoyed during the marriage.[187] Among survey respondents, 62 percent of women

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[186]Kozak Testimony, supra note 174 at p. 143.

[187]Female and male survey respondents (F%/M%) reported that older displaced homemakers, with little chance of obtaining employment above minimum wage, are awarded
(Footnote continued)

and 38 percent of men reported that older, long-term homemakers with little chance of obtaining employment above minimum wage are "sometimes," "rarely," or "never" awarded permanent alimony. Survey comments on maintenance included:

> ° While I generally support rehabilitative maintenance, I do not believe that a 50 year-old woman who has always been a housewife can be rehabilitated. However, permanent awards for such women are almost non-existent.
>
> Thirty-six year old urban female

> ° I am very disturbed by the court's reluctance and often refusal to award adequate and/or long-term maintenance orders to wives especially those from lengthy marriages (15-30+ years). I am also disturbed by the meager temporary (pendente lite) awards of support which are usually 'barely getting by' awards, especially when the cases involve husbands and fathers with significant income ($50,000 and more). [emphasis in original]
>
> Fifty-four year old rural male

> ° A woman who is minimally self-supporting often receives no maintenance or minimal ($25-$50/week) for a limited period of time, when the man may be earning $30,000-$50,000/year.[188]
>
> Twenty-eight year old urban female

(Footnote 187 continued from previous page)
permanent maintenance after long-term marriages:

Always	Often	Sometimes	Rarely	Never	No Answer
4/15	24/43	36/24	21/10	5/2	10/6

[188]Seeking to explain the reasons behind courts' failure to award appropriate maintenance, another survey respondent wrote:

> ° The attitude seems to be one of "You've
>
> (Footnote continued)

Cohen and Hillman analyzed fifty reported decisions involving requests for maintenance. In forty-four of these cases, the marriages ranged from 7 1/2 years to 57 years in duration. In ten cases economically dependent wives married between ten and fifty-seven years (with eighteen years of marriage being the median) were totally denied a maintenance award. In fifteen cases, economically dependent women who had been married for between eight and thirty-six years (twenty years of marriage being the median) were awarded only rehabilitative maintenance for periods ranging from 1 1/2 years to 5 years. In the remaining nineteen cases economically

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(Footnote 188 continued from previous page)

> gotten your fair share of the marital assets and you're capable of working (whether the wife is 25 or 55 years old; having been married 5 years or 35 years) therefore if you are careful and invest what you have received you will be able to get along." This attitude prevails irrespective of the standard of living of the couple prior to divorce, the presence of children in the wife's home (pre-school or otherwise), past employment or lack thereof by the wife, her level of education or job training, and the disparity of post-divorce income of the couple. (Almost no effort is given to fashioning parity, even for a short duration.) . . . The inequities are apparent, yet the courts (including the appellate courts) have for the most part chosen to ignore them. . . . The insensitivity of the courts in this regard is egregious.
>
> Forty-nine year old urban male

dependent women were awarded long-term or permanent maintenance.[189]

(ii) Amount of Award

Some judges appear to be ignoring "the standard of living established during the marriage" and are relying on parsimonious interpretation of the wife's "reasonable needs". As a result, even women who can obtain employment enjoy a far less generous post-divorce standard of living than do their husbands. The question of post-divorce parity was raised by Herbert Siegel, Esq., who asked:

> When it comes to equitable distribution and the talk of economic partnership, why should there not be an economic partnership not only in property, but in the ability to support themselves or live in a way to maintain a certain standard of living?. . . . I think there should be some parity when it comes to the dissolution of marriages and the question of maintenance itself.[190]

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[189]Cohen-Hillman Study, supra note 162 at p. 93. The range of duration of marriage of this group was seven and a half to forty-one years with the median at seventeen years.

[190]Siegel Testimony, supra note 160, at pp. 170-171.

Female and male survey respondents (F/M) reported the duration of rehabilitative maintenance awards based on length of marriage as:

Duration of Marriage	Average of Years Maintenance
Less than 10	3/3

(Footnote continued)

Julia Perles, Esq., Chairperson of the Equitable Distribution Committee of the Family Law Section of the New York State Bar Association, testified that inadequate maintenance awards are "unfair", but they are "not the fault of the EDL. I think it's the fault and the prejudice of particular judges who hear the cases."[191]

Justice William Rigler, Presiding Judge of Special Term, Part 5 (the matrimonial part) in Kings County Supreme Court suggested that the problem is that this kind of gender bias is injected by the parties themselves. He cited a case in which a physician husband admitted to a net annual income of about $50,000 and the wife, who had worked to put the husband through medical school and had no college degree, requested support for herself and her children and funds to complete her education. The husband rejected this request and submitted his own estimates of what his wife's expenses should be. "His list included only the bare necessities for his wife, while his own list of expenses was quite expansive

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(Footnote 190 continued from previous page)

10-20	4/5
20-30	6/8
More than 30	8/9

[191]Perles Testimony, supra note 159, at p. 29.

and generous, taking into account the social and professional position as a physician."[192]

(c) Provisional Remedies and Enforcement

Despite statutory provisions for full financial disclosure, the preservation of assets, enforcement of awards and interest on arrears, enforcement is seriously deficient.

Practitioners assert that there are no useful sanctions in the EDL to compel disclosure. As a result, "stonewalling" is commonplace.[193] If effective temporary restraining orders are granted to maintain the status quo for equitable distribution,[194] judges rarely impose meaningful sanctions when they are violated.[195]

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[192]Testimony of Hon. William Rigler, New York City II Tr. at pp. 100-101 (hereinafter cited as Rigler Testimony).

[193]Brandes Testimony, supra note 161 at 181.

[194]Female and male survey respondents (F%/M%) reported that effective temporary restraining orders are granted to maintain the status quo for equitable distribution:

Always	Often	Sometimes	Rarely	Never	No Answer
2/4	15/30	35/37	33/15	4/5	11/8

[195]Female and male survey respondents (F%/M%) reported that judges impose meaningful sanctions, including civil commitment, when injunctions are violated:

Always	Often	Sometimes	Rarely	Never	No Answer
*/2	5/9	12/20	46/45	26/14	10/10

In an enforcement action, the EDL requires a judge to enter a judgment for arrears unless "good cause" is shown for failure to seek relief from the amount of maintenance awarded.[196] Ex-husbands often respond to enforcement actions with meritless motions for downward modification or claims that they are financially unable to comply. Myrna Felder, Esq., Chair of the Matrimonial Committee of the Women's Bar Association of the State of New York testified that a motion for downward modification "automatically stops enforcement proceedings in their tracks,"[197] leading to nine to twelve months of delay before the Special Referee's hearing and confirmation of the Referee's report by the Supreme Court Judge who made the reference.

> If a year later, after hearings and the entry of contempt, it turns out that he was able to comply all along, is there a penalty for the man? No. Are there damages? No. Is there an extraordinary counsel fee? No. The fellow has learned a lesson that our courts are teaching the men around the state: It's better not to be so quick to pay.[198]

Survey respondents reported that Courts do not uniformly grant maintenance retroactive to the initial motion date

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[196]Domestic Relations Law § 244.

[197]Testimony of Myrna Felder, Esq., New York City I Tr. at 247 (hereinafter cited as Felder testimony).

[198]Id. at 248.

as required by the Domestic Relations Law and Family Court Act,[199] or effectively enforce the maintenance awarded.[200] Sixty percent (60%) of women and 56 percent of men survey respondents reported that interest is "rarely" or "never" awarded on arrears.[201] The inability of women to afford counsel and the refusal of the courts to award realistic counsel fees were also cited as a factor in enforcement problems.[202]

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[199]Domestic Relations Law § 236(B)(6)(a); Family Court Act § 440(1). Female and male survey respondents (F%/M%) reported that maintenance is granted retroactive to the initial motion date:

Always	Often	Sometimes	Rarely	Never	No Answer
10/16	19/29	26/23	31/20	5/6	9/6

[200]Female and male survey respondents (F%/M%) reported that the courts effectively enforce maintenance awards:

Always	Often	Sometimes	Rarely	Never	No Answer
1/4	12/27	27/38	45/22	10/3	4/5

[201]Female and male survey respondents (F%/M%) reported that interest on arrears is awarded as provided by statute:

Always	Often	Sometimes	Rarely	Never	No Answer
2/4	10/5	19/17	40/39	20/17	10/7

[202]The importance of fees sufficient to vigorously litigate were expressed by a survey respondent who wrote:

> ° The courts' failure to enforce child support and maintenance awards, whether pendente lite or after trial, is a disgrace. I am ashamed to tell my female clients that an award of maintenance and/or child support and/or arrears for same is

(Footnote continued)

SUMMARY OF FINDINGS

1. The manner in which judges distribute a family's assets and income upon divorce profoundly affects many women's economic welfare. Women who forego careers to become homemakers usually have limited opportunities to develop their full potential in the paid labor force.

2. The New York Court of Appeals has recognized that the Equitable Distribution Law embraces the view of marriage as an economic partnership in which the totality of the nonwage-earning spouse's contributions -- including lost employment opportunity and pension rights -- is to be considered when dividing property and awarding maintenance.

3. Many lower court judges have demonstrated a predisposition not to recognize or to minimize the homemaker spouse's contributions to the marital economic partnership by:

   a. awarding minimal, short-term maintenance or no maintenance at all to older, long-term, full or part-time homemakers with little or no chance of becoming self supporting at a standard of living commensurate with that enjoyed during the marriage.

   b. awarding homemaker-wives inequitably small shares of income-generating or business property.

(Footnote 202 continued from previous page)
generally not worth the paper it is written on unless (a) there is an endless supply of money to litigate enforcement or (b) the defendant-husband voluntarily complies with the orders directing the award.

Fifty-five year old NYC female

4. Economically dependent wives are put at an additional disadvantage because many judges fail to award attorneys' fees adequate to enable effective representation or experts' fees adequate to value the marital assets.

5. Many judges fail to order provisional remedies that ensure assets are not diverted or dissipated.

6. After awards have been made, many judges fail to enforce them.

RECOMMENDATIONS

For Court Administration

Take necessary steps to assure that judges are familiar with the statutory provisions governing and the social and economic considerations relevant to equitable distribution and maintenance awards, including studies, statistics, and scholarly commentary on the economic consequences of divorce, women's employment opportunities and pay potential and the cost of child rearing.

For the Legislature

Enact legislation that:

1. Makes equitable sharing of the homemaker's lifetime reduced earning capacity an express factor in the division of property and awarding of maintenance.

2. Provides that a spouse's indirect contribution to the appreciation of separate property (e.g. through homemaker's services) causes such property, to the extent of appreciation, to become marital property.

3. Requires the judge to assume a primary role in the identification and valuation of assets through court appointment of special masters or through required compensation from marital assets of necessary experts retained by the parties.

4. Provides that marital standard of living, not the "reasonable needs," of the party seeking maintenance is the standard by which maintenance should be awarded and that if assets and income are insufficient to maintain both parties at that standard the reduction in living standard should be equally shared.

5. Provides for mandatory awards pendente lite of counsel fees appropriate to the duration and complexity of the case sufficient to enable both parties to pursue litigation.

For Bar Associations

1. Develop informational materials respecting the social and economic considerations relevant to equitable distribution and maintenance awards including studies, statistics, and scholarly commentary on the economic consequences of divorce, women's employment opportunities and pay potential and the costs of child rearing, and make these materials available to members for use in submissions to courts considering petitions for equitable distribution and maintenance awards.

2. Invite judges to join in continuing legal education programs concerning the EDL.

For Judicial Screening Committees

Make available to all members information concerning the economic consequences of divorce similar to that recommended for judges.

2. DAMAGE AWARDS IN PERSONAL INJURY SUITS

Concerns raised in other jurisdictions led the Task Force to attempt to determine whether gender affects the amount of damage awards women receive in personal injury suits.[203] Marion Silber, Esq., a New York personal injury lawyer, testified that after extensive research, discussion with other litigating attorneys and a review of recent cases, she concluded that it appears that juries today are awarding women and men comparable damages for comparable injuries, a significant change from her experience in prior years.

Implicit in this perception, as contrasted with attorneys' perceptions concerning property and maintenance awards in matrimonial actions, is that in personal injury cases homemakers' services are being adequately valued and compensated. This might be explained by a greater availability of counsel in contingency-fee cases who may, in turn, have greater incentive to advance fees

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[203]The Report of the New Jersey Supreme Court Task Force on Women in the Courts cited as a problem in that State the lack of a jury charge that recognizes the economic value of women's unpaid work in the home and some judges' refusal to admit expert testimony on this point. First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts (1984) at pp. 25-32.

for expert witnesses. Another possibility is that the equity of awards is more apparent in the case of a physically injured plaintiff. A third is that these cases are heard by juries.

Ms. Silber advanced three reasons for the improvement in damage awards to women: (1) there are now more women on juries;[204] (2) these women are themselves in the workforce and are familiar with and able to understand the issues involved in awarding damages; and (3) introduction of expert economic testimony as to the value of homemaker work into personal injury and wrongful death cases.[205]

Since the decision of the New York State Court of Appeals in De Long v. County of Erie,[206] the jury

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[204]Ms. Silber's theory that changes in jury attitudes toward women personal injury plaintiffs are due in part to the increased presence of women on juries is of particular interest. New York women were barred from jury service until 1940 and granted automatic exemption from jury duty until 1975. See notes 5-6, supra.

[205]Testimony of Marion Silber, Esq. Albany Tr. at 90-92 (hereinafter cited as Silber Testimony).

[206]60 N.Y.2d 296, 469 N.Y.S.2d 611 (1983). In De Long, the court held:

> It is now apparent, as a majority of courts have held, that qualified experts are available and may aid the jury in evaluating the housewife's

(Footnote continued)

charge relating to homemaker's and maternal services was added, which provides:

> In fixing that value you must take into consideration the circumstances and condition of her husband and children; the services she would have performed for her husband and children in the care and management of the family home, finances and health; the intellectual, moral and physical guidance and assistance she would have given the children had she lived. In fixing the money value of decedent to the widower and children you must consider what it would cost to pay for a substitute for her services, considering both decedent's age and life expectancy and the age and life expectancy of her husband and each of her children.[207]

It appears that counsel in New York have the incentive and zeal to seek adequate awards for women who are killed or injured and that the technical legal framework is present to protect them. The equity of awards is, however, more difficult to assess. Attorneys Survey respondents were almost evenly split as to whether men receive higher awards for pain and suffering than do

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(Footnote 206 continued from previous page)
services not only because jurors may not know the value of those services, but also to dispel the notion that what is provided without financial reward may be considered of little or no financial value in the marketplace.

Id. at pp. 307-308, 469 N.Y.S.2d at pp. 617-618 (citation omitted).

[207]New York Pattern Jury Instruction 2:320.2 (Cumulative Supp., February 1986).

women.[208] More perceived that women employed outside the home receive higher awards than homemakers for pain and suffering,[209] and that husbands receive higher awards than wives for loss of consortium.[210]

3. CHILD SUPPORT

Children living with their mother alone are almost five times as likely to be poor as children in two-parent families. In 1984, 3.1 million (45.7%) of female-headed single-parent families were in poverty as

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[208] Female and male survey respondents (F%/M%) reported that men receive higher awards than women for pain and suffering:

Always	Often	Sometimes	Rarely	Never	No Answer
2/1	16/6	31/19	31/34	9/31	12/9

[209] Female and male survey respondents (F%/M%) reported that women employed outside the home receive higher awards than homemakers for pain and suffering:

Always	Often	Sometimes	Rarely	Never	No Answer
9/3	36/28	26/28	9/19	3/11	17/16

[210] Female and male survey respondents (F%/M%) reported that husbands receive higher awards than wives for consortium:

Always	Often	Sometimes	Rarely	Never	No Answer
7/1	25/12	29/23	20/27	5/25	15/12

compared to 194,000 (18%) of male-headed single-parent families. Only 9.4% of two-parent families were poor.[211]

Gross inadequacies, nationwide, in the ordering and enforcement of child-support led Congress to enact the Child Support Enforcement Amendments of 1984.[212] In response to the Act's requirement that states conform their laws to the new Federal requirements, the New York 1985 Support Enforcement Amendments were enacted.[213]

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[211]Dept. of Commerce, Bureau of the Census, Current Characteristics of the Population Below the Poverty Line, March 1985, Current Population Survey, Series P60 (forthcoming publication April 1986).

[212]Public Law 93-378.

[213]New York State Support Enforcement Act of 1985, L. 1985, Ch. 809. The principal provisions of this law require:

- hearing examiners in Family Court to provide an expedited process for establishing and enforcing obligations of support, Family Court Act §§ 439, 439-a;

- an income execution or court-ordered income deduction from salary and other income to be triggered automatically whenever a payment arrearage accrues that is equal to the amount of support payable for one month, or when the person owing support fails to pay three payments on the dates they were due, CPLR §§ 5241, 5242;

- elimination of the current three-tiered statute of limitations for instituting paternity proceedings, establish a uniform statute of limitations at the child's 21st birthday, and giv-

(Footnote continued)

Provisions of the newly enacted New York law address problems brought to the Task Force's attention, including long delays in obtaining orders of support and inadequate enforcement of support orders. Expedited procedures are authorized. Hearing examiners or judges

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(Footnote 213 continued from previous page)
ing a child standing to commence a paternity proceeding, Social Services Law §§ 111-m, 111-n;

- broader use of state tax refund interception for past-due child and spouse support by making it available to persons receiving child or spouse support who are not recipients of public assistance, Social Services Law § 111-h;

- release by local social services districts of information concerning past due support in amounts over $1,000 to consumer credit reporting agencies who request such information;

- availability to non-AFDC recipients of all the enforcement tools previously available only to AFDC recipients, Social Services Law § 111-n.

Prior to this enactment New York's Family Court Act and Domestic Relations Law already provided for numerous enforcement remedies including income deduction orders, posting of surety, sequestration, money judgment for arrears, interest on arrears and contempt, commitment, probation and criminal proceedings for non-support of a child. See Index to Child Support Laws, New York State Commission on Child Support Report. October 1, 1985, pp. 119-134 (hereinafter cited as Child Support Report). The Child Support Commission reported that the greatest number of complaints it received asserted that "Judges are unwilling to require compliance with court-ordered support or to impose penalties for willful non-compliance." Id. at 73.

must make an immediate temporary or permanent order.[214] Child-support must take priority over all other levies.[215] New, flexible income-execution and income-deduction procedures are provided. State-tax refund intercepts for past due support are authorized, and services of Support Collection Units are now available to persons who are not receiving public assistance. The federal law also requires states to develop guidelines that more realistically establish the amount of support that should be awarded.[216]

These changes in the law make clear the judiciary's obligation to assist in ensuring, and the strong public policy favoring, timely and adequate child support. Notwithstanding these legislated advances, the policies and practices that made this remedial legislation necessary bear continuing examination. Without recognition of the informational and attitudinal barriers

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[214]Family Court Act §§ 433(b), 435(b).

[215]CPLR §§ 5241(h), 5242(c).

[216]New York must enact legislation on guidelines by October 1986. Guidelines used in some states are based on a percentage of gross income, others on net income. Some give priority to the needs of first families. Some take into consideration the needs of second families. Very different results may be reached depending upon the guidelines adopted by a state.

in the judiciary that, in part, contributed to the child-support crisis, reform will be incomplete.

On October 1, 1985 the New York State Commission on Child Support, established by Governor Cuomo in conformance with the requirements of the Federal Child Support Enforcement Amendments of 1984, submitted its report, documenting in detail the massive failure of the system and making extensive recommendations for reform. The Task Force's independent inquiry revealed the attitudes in our judicial system that compelled federal intervention in what had always been a state function and raised profound concerns as to how effectively the new laws will be administered. The Task Force received compelling evidence of human suffering resulting from unconscionable delays in courts' hearing child-support petitions, inadequate child-support awards, courts' failure to impose sanctions for non-payment of awards as authorized by law, and courts' forgiveness of arrears of unpaid child-support. Children living in single-parent households, headed by their mothers, are the fastest growing group of persons living in poverty in the United States today.

(a) Judicial Attitudes Towards Husbands and Wives

Judith Reichler, Esq., Project Director of the New York State Commission on Child Support, summarized the situation that many women face:

> It may seem fanatical to allege that the run around these women are getting in court is a result of gender bias, since some men would also tell you that they receive similar treatment, but I believe that what we are seeing is a not-so-subtle form of bias against women as we continue to see them through this process as litigious, vexatious, harassing, and a little bit crazy, if they continue to pursue something to which they are entitled.
>
> It is almost like a little game, a game where a person with power can put his hand on the head of the person who is angry and let that person flail away, continue to move until he drops from exhaustion, and many do drop from exhaustion. In fact, perhaps the most stable of them do drop from exhaustion or say "the hell with it, let's let him keep his money."[217]

The views of almost all the 15 witnesses who testified about child support were reflected in the testimony of Carol Lefcourt, Esq., Counsel to the New York State Division for Women, who reported:

> Each year . . . I have spoken to hundreds of women who call and write the Women's Division and other organizations and attorneys, seeking help with their child support problems. They have invariably had a disappointing if not devastating experience in the courts. . . . They complain of low court ordered support awards, minimal enforcement of their support

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[217]Testimony of Judith Reichler, Esq., New York City II Tr. at pp. 81-82 (hereinafter cited as Reichler Testimony).

orders, even after they have secured them, and disrespectful treatment from anyone from guards in the courthouse to judges.[218]

Lynn Vallone, Chair of the Coalition of Women for Child Support, a Buffalo-based organization which includes women from all parts of western New York and all walks of life, testified that, on average, members have spent over seven years trying to have court ordered child support enforced. Four-fifths of the members have had to apply for public assistance after divorce, although none of these women had been on welfare before. Ms. Vallone testified, "individually we have been told that our unsuccessful attempts to collect uncollected child support build character. . . . We have also been told that we are vindictive, money-grabbing, that we made our bed[s] and now we must lie in them."[219]

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[218]Testimony of Carol Lefcourt, Esq., New York City I Tr. at p. 222 (hereinafter cited as Lefcourt Testimony).

[219]Testimony of Lynn Vallone, Rochester Tr. at p. 35 (hereinafter cited as Vallone Testimony).

> A random sample study of the members showed that over 50% of the women had their already low child support awards reduced over time whereas only 15% had their awards increased. Among the membership is a group of 20 mothers to whom $225,000 in child support arrearages is owing, and who have collectively made over 275 court appearances over 5-7 years in their efforts to collect. Id.

New York Secretary of State Gail Shaffer testified that "Family Court has made women feel that their attempt to support their children is vindictive, unimportant or even a joke."[220]

At the Jefferson County listening session attendees asked "Why must the burden be put on the custodial parent?" "Why do social service people and the courts treat women like they were criminals because they have no money?"

By contrast, several witnesses and survey respondents reported that fathers' oral representations about their finances are accepted without a demand for proof.[221] At the Rochester regional meeting an attorney reported that that afternoon she had been at a conference in chambers on behalf of a woman who had been attempting to enforce a child-support award for fourteen years. The father's attorney said to the judge, "After all these years, why doesn't she leave him alone?", and the judge said to the mother's attorney, "Yes, why doesn't she leave him alone?"

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[220]Testimony of Secretary of State Gail Shaffer, Albany Tr. at page 21 (hereinafter cited as Shaffer Testimony).

[221]Vallone Testimony, supra note 219 at p. 36; Kozak Testimony, supra note 174 at p. 146.

At the Oneida County listening session another woman who has spent years trying to enforce child support stated that every time she went to court she was "put on the dime" and made to defend every item she had purchased for the children, whereas very little was said about the fact that her husband was not paying.

Carol Lefcourt, Esq., reported that one chief clerk told her that the judges he knew did not enter money judgments because they did not want to ruin fathers' credit ratings.[222]

Judith Reichler, Esq., testified that judges around the state have told her they won't set a temporary award because they might set it too high and the respondent, usually the father, would be stuck with it. This prospective concern for the father leaves the total burden of support on the mother.[223]

Fran Mattera of FOCUS (For Our Children and Us, Inc.), a non-profit agency that assists in the collection of child support in Queens, Nassau and Suffolk, said that many judges are unwilling to issue a wage deduction order against a father out of concern for a negative reaction

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[222]Lefcourt Testimony, supra note 218 at pp. 227-228.

[223]Reichler Testimony, supra note 217 at p. 83.

from his employer.[224] Similarly, Secretary of State Gail Shaffer testified:

> The judicial branch does not often treat the child as a legitimate creditor with interests in unpaid, accrued child support that should not be compromised by parent or by judge without fiduciary accountability. The judiciary must insist that child support be the first deduction from his [the father's] disposable earnings and not the last. It should come before the boat or the house or the luxury items that are often put at the top of the list, . . . [with the attitude that] "Well, when we get to the bottom, we'll decide what to do with the children with what's left over."[225]

(b) Custodial Mothers' Access to Counsel

Numerous respondents pointed out that, as in divorce litigation, the inability of women to afford counsel makes it virtually impossible for them to enforce child support awards. Fran Mattera of FOCUS testified:

> Many men conceal their assets. A woman as a petitioner has the burden of proof when she goes into court. But because women have exhausted their resources . . . to engage a private attorney, and because free legal services are unavailable to them on support matters, the burden of proof is too difficut. However, a man as a respondent in a case is entitled to legal aid if he can prove financial hardship. It seems the court bends over backward to protect a man's rights, but children's rights, through their mother's actions in court, are not being protected.[226]

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[224]Testimony of Fran Mattera, New York City I Tr. at p. 131 (hereinafter cited as Mattera Testimony).

[225]Shaffer Testimony, supra note 220 at pp. 24-25.

[226]Mattera Testimony, supra note 224 at pp. 131-132.

Typical of the comments on the Attorneys Survey is the following:

> ° I have found it almost impossible to obtain counsel fees for relatively indigent clients, thus effectively shutting them out of effective enforcement procedures.
>
> Thirty-seven year old rural female

Judith Reichler, Esq., pointed out that although a petitioner can go into Family Court in the first instance without an attorney, she will not know and will not be told how, for example, to subpoena the father's financial records. Moreover, if an order is made which she believes is incorrect, it will be extremely difficult for her to appeal the decision without the assistance of an attorney.[227]

(c) Timeliness of Awards

The new child-support legislation requires hearing examiners to make an award upon the custodial parent's first appearance. This provision seeks to remedy the financial hardship to mothers with custody of their children who have frequently been denied child support awards immediately upon the separation of the parties. Among respondents to the Attorneys Survey, 30 percent of women and 22 percent of men indicated that

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[227]Reichler Testimony, supra note 217 at p. 78.

temporary child support is "rarely" or "never" granted pending a hearing on the motion pendente lite.[228] The Child Support Commission stated that "the inability to obtain temporary support orders was reported in most of the cases that came to the attention of the commission."[229] Judges are perceived to be more favorably disposed toward the interests of the father and reluctant to award support without a hearing. Such hearings are easily delayed for several months due to court congestion.

> ° The primary problem is that custodial parents must wait months before obtaining any relief including child support and maintenance. Thus, there is no interim support and the household suffers drastically.
>
> Thirty-five year old NYC female

Wynn Gerhard, Esq., Acting Director of a Neighborbood Legal Services program serving low income residents of Buffalo and Erie County testified:

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[228]Female and male survey respondents (F%/M%) reported that temporary child support is granted pending a hearing on the pendente lite motion:

Always	Often	Sometimes	Rarely	Never	No Answer
7/10	30/35	23/28	20/16	10/6	11/6

[229]Child Support Report, supra note 213 at p. 39.

> In a typical case, a woman, left with children and no income, applies to the Family Court for an order of support, hoping to avoid applying for welfare. At the initial court hearing, despite requests and a clear showing of immediate need by the woman, the Family Court declines to issue a temporary order of support, and instead refers the case for further hearings, which can take literally months before a final determination is made. The woman is left with no choice but to apply for public assistance to support herself and her children.[230]

(d) Adequacy of Awards

There appears to be little consistency in the way the amount of child support awards are determined. Amounts awarded are frequently inadequate. Only twenty-eight percent (28%) of all survey respondents, 14 percent of the women responding and 36 percent of the men responding, reported that child support awards "always" or "often" reflect a realistic understanding of local child raising costs, particular children's needs and the custodial parent's earning capacity.[231] Judges often appear to ignore statutorily prescribed factors such as the prior standard of living for the family, special needs of

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[230]Gerhard Testimony, supra note 94 at p. 79.

[231]Female and male survey respondents (F%/M%) reported that child support awards reflect a realistic understanding of the local costs of child raising, particular children's needs, and the earning capacity of the custodial parent:

Always	Often	Sometimes	Rarely	Never	No Answer
1/7	13/29	30/34	39/25	15/3	3/3

the children, and the expenses and nonmonetary contributions of the custodial parent.[232] Others are perceived to give disproportionate weight to what the father can comfortably afford. Testimony by the father as to his limited ability to pay tends to be accepted without substantiation while the mother must prove the expenses of the children. Moreover, there is a strong perception that the father is deemed entitled to retain for himself as much of his own income as possible.[233] Child support awards are often insufficent to furnish even one-half of the actual cost of rearing a child.[234] Consequently, the

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[232]Domestic Relations Law § 236B(7); Family Court Act § 413.

[233]Child support payments as a percentage of the average income of men have remained at about 13 percent since 1978. U.S. Bureau of the Census, Child Support and Alimony: 1983 Current Population Reports, Series P.-23, No. 141 (July 1985), pp. 1-3. It is estimated that in two-parent families, child raising costs amount to 30 percent of family spending in one-child families, 40-45 percent of family spending in two-child families and nearly 50 percent in three-child families. P. Espenshade, Investing in Children: New Estimate of Parental Expenditures. Urban Institute Press, Washington, D.C. (1984).

[234]In 1983, the mean amount received nationwide by all women due child support payments, including those who received nothing, was $1,780. If the full amount due had been paid to all women, the mean amount would have been $2,520. For women with court-ordered payments, the mean payment due was $2,290 but the mean amount received was only $1,330, 58% of the amount due.
(Footnote continued)

income of women and children is dramatically reduced from its level prior to divorce. Attorneys responding to the survey wrote:

> ° I can attest to the sexism prevalent in family law practice. Generally, a mother and two children are to live on the same amount of income as the father by himself.
>
> Thirty-two year old rural male

> ° [I]t is extremely difficult to get adequate child support increases, college tuition, and fair property division. Many of my female clients are close to poverty within a few years of the divorce while the husbands, although not wealthy, are not struggling to make ends meet.
>
> Thirty-four year old rural female

> ° Child support awards are . . . inadequate, being based on what amount will not cause a hardship on the father rather than the cost of raising a child.
>
> Twenty-eight year old urban female

> ° Only recently has the Family Court imposed realistic support awards taking into consideration the real costs of raising a child.
>
> Thirty-six year old rural male

> ° The awards initially are insufficient support for a child. Judges desperately need guidelines as to how much support a child needs . . . I

(Footnote 234 continued from previous page)

Women with voluntary written agreements received 88% of the amount they were due. Their mean child support payment due was $2,960. The mean amount received was $2,590. The mean amount of child support received by women who received some payment was $2,340 per family (i.e., no matter how many children). After adjusting for inflation, average child support payments in 1983 were 15% below the level reported in 1978. U.S. Bureau of Census, op. cit., note 233, supra.

> am personally aghast at the child support awards. It means instant poverty and is an outrage. . . . Not one of 20 clients with children has been able to properly and adequately support her children and self without borrowing. [Emphasis in original]
>
> Thirty-five year old NYC female

Fran Mattera of FOCUS, whose paralegals are in Queens, Nassau and Suffolk County Family Courts on a daily basis testified, "[t]he support awards of $10, $20 and $25 a week ordered by judges in Family Court do not provide for even the essentials such as food, shelter, and sneakers."[235]

(e) Enforcement of Awards

Judges' unwillingness to require compliance or impose penalties for non-compliance was the problem about which the Child Support Commission received the greatest number of complaints.[236] The chair of the Western New

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[235]Mattera Testimony, supra note 224 at pp. 133-134.

[236]Child Support Report, supra note 213 at p. 73. Female and male survey respondents (F%/M%) reported that the courts effectively enforce child support awards:

Always	Often	Sometimes	Rarely	Never	No Answer
1/7	17/32	32/39	38/18	8/2	4/3

National Census Bureau data on child support awards and compliance reveals that since 1978, three to four billion dollars in child support has been uncollected each year. According to the Census Bureau's latest report, in 1983, 57.7% of the 8,690,000 women in the United States with children under twenty-one whose father was absent from the household had child support

(Footnote continued)

York Coalition for Child Support testified that, in Erie County, enforcement is "virtually nonexistent."[237] Secretary of State of New York, Gail Shaffer, reported that "[t]he word on the street is that only fools pay child support because payment is simply not enforced. The message women receive is that child support is not an important matter, that they are not taken seriously, and that they are wasting their time, money and energy."[238]

Respondents to the Attorneys Survey also reported that many judges are not using the statutory enforcement mechanisms that were available to them before enactment of the New York State Support Enforcement Act of 1985. Seventy-four percent (74%) of women attorneys and 65 percent of men reported that "rarely" or "never" are sequestration and/or bonds ordered to secure future child support payments.[239]

(Footnote 236 continued from previous page)
agreements or awards. Of the 4 million women to whom payments were owed in 1983, 50% received the full amount due; 26% received partial payment; 24% received no payment. U.S. Bureau of Census, op. cit., note 233, supra.

[237]Vallone Testimony, supra note 219 at p. 41.

[238]Shaffer Testimony, supra note 220 at p. 23.

[239]Female and male survey respondents reported (F%/M%) that sequestration and/or bonds are ordered to secure
(Footnote continued)

Sixty-three percent (63%) of women and 60 percent of men reported that interest on arrears as provided by statute is "rarely" or "never" awarded.[240] Eighty-two percent (82%) of women and 67 percent of men reported that respondents who deliberately fail to abide by court orders for child support are "rarely" or "never" jailed for civil contempt.[241]

(Footnote 239 continued from previous page)
future child support payments:

Always	Often	Sometimes	Rarely	Never	No Answer
-/*	1/5	11/21	51/51	23/14	14/8

[240] Female and male survey respondents reported (F%/M%) that interest on arrears is awarded as provided by statute:

Always	Often	Sometimes	Rarely	Never	No Answer
3/4	6/10	19/19	37/42	26/18	9/6

[241] Female and male survey respondents reported (F%/M%) that respondents who deliberately fail to abide by court orders for child support are jailed for civil contempt:

Always	Often	Sometimes	Rarely	Never	No Answer
/	4/9	6/16	35/42	47/25	8/7

The rarity of jail as a sanction for child support default in Brooklyn Supreme Court was illustrated by Kings County Supreme Court Justice William Rigler who reported that when he directed that a man be taken to jail, the court personnel did not know what to do. By the time they found the sheriff and had him come over, the father's new wife had arrived and paid the $10,000 he was in arrears at that time. Rigler Testimony, supra note 192 at pp. 110-111.

(Footnote continued)

The New York Domestic Relations Law and the Family Court Act direct that upon a showing that the respondent has defaulted on a child support order, the court is to enter a judgment for the arrears with costs and disbursements unless the respondent shows good cause for failure to apply for relief from the order before the arrears accrued.[242] The Child Support Commission found that this provision is being interpreted to allow a motion for downward modification and reduction of arrears "simply because the respondent alleges an inability to have made the required payments, even though no formal application is made."[243]

Among respondents to the Attorneys Survey, 68 percent of women and 56 percent of men reported that the

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(Footnote 241 continued from previous page)
Refusing to impose a jail sentence for willful failure to pay child support not only fails to sanction the defaulter but deprives the community of a powerful incentive to pay. Studies of the impact of different enforcement practices reveal that counties with high jail rates also have high compliance rates. A rigorous study of twenty-eight Michigan counties found that as the number of jailings went up, so did compliance. The six counties with jailing rates of seven or more per 10,000 persons in the county had 75% compliance rates. D. Chambers, Making Fathers Pay at p. 316 (1979).

[242]Dom. Rel. Law § 244; Family Court Act § 460.

[243]Child Support Report, supra note 213 at p. 60.

courts "sometimes" or "often" reduce or forgive arrears accrued prior to the making of a downward modification motion.[244] The Child Support Commission pointed out that this action works a hardship on the petitioner and encourages respondents to withhold payments, knowing that the accumulated arrears may be reduced prior to judgment and the costs, disbursements and interest will probably not be assessed.[245]

The Child Support Commission offered the following two examples as typical of judges' refusal to use available enforcement mechanisms:

- A respondent had been brought before the court many times for non-compliance with a court order -- once on a bench warrant -- and had accumulated a large arrears. Many of the enforcement techniques had been threatened, but not used. When asked what had happened the last time the case was in court, the commission was told by the judge that the case had been adjourned "to give the respondent an opportunity to voluntarily comply."

- The judge had determined that the respondent was almost $12,000 in arrears, after appearing before the court several times for failing to

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[244]Female and male survey respondents (F%/M%) reported that courts reduce/forgive arrears accrued prior to the making of a motion for downward modification of support:

Always	Often	Sometimes	Rarely	Never	No Answer
/	24/11	44/45	15/30	3/6	13/7

[245]Child Support Report, supra note 213 at p. 60.

> comply with a court order for child support. It was determined that the respondent was in willful noncompliance, and he was ordered to a jail term -- suspended on the condition he make up the arrears by a particular date and keep payments current. On the date set, the respondent was found in default, and there was a new determination that the failure to comply was willful. The respondent was, however, merely ordered to make current payments; no penalty was imposed.[246]

Myrna Felder, a New York City practitioner, and Stanley A. Rosen, an Albany practitioner, testified that adjournments are freely given and that court delay results in judgments coming months, even years, after the initiation of proceedings.[247] Seventy-three percent (73%) of women responding to the Attorneys Survey and 60 percent of men reported that repeated adjournments are "often" or "sometimes" granted to the non-custodial parent.[248]

Judge Richard Huttner, Administrative Judge of the New York City Family Court who served as a member of

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[246] Id. at p. 75.

[247] Felder testimony, supra note 197 at pp. 249-252. Testimony of Stanley Rosen, Esq., Albany Tr. at pp. 175-177.

[248] Female and male survey respondents (F%/M%) reported that repeated adjournments are granted to the non-custodial parent in child support proceedings:

Always	Often	Sometimes	Rarely	Never	No Answer
9/2	41/21	32/39	11/32	1/3	6/3

the New York State Commission on Child Support, described what he found to be the "usual scenario" of delays women face when seeking enforcement of child-support awards:

> A woman takes a day off from her job and usually loses the day's pay to come to court. After waiting the better part of the day, she is given an interview with probation services, she is told that she must return in a week and that her husband will be sent a letter advising him also to attend a settlement conference where hopefully the husband and wife will agree to an order of support.
>
> Usually on this date, the wife appears, losing another day's pay, and the husband is a no-show. Now the woman is marched to our petition room where a petition for support is prepared, and is given a summons with instructions on how to have it served. The date to come back to court is four weeks. On that date she must appear, losing another day's pay, and 30 percent of the time the husband still does not show despite having been served with a summons.
>
> The judge at this time takes an inquest. Or he can take an inquest, rather, and grant a support order and issue a payroll deduction order, garnish the husband's salary and bringing the matter to closure, but some, in fact, most of my colleagues, will choose to notify the husband that a warrant will be issued unless he shows up the next time. The next time the gentleman may show up and the woman is there again for the fourth time at a loss of four days' pay.
>
> Our gentleman, seeing that the lady means business, asks for an adjournment in order to hire an attorney and he gets it. The next time, time No. 5 and five days lost pay for the woman, and possibly a lost job, all the time she has been losing from work, the man's attorney finally shows up and what does he do? He does what seems to me as a trial judge that all attorneys do, he asks for an adjournment.

By the time the woman has a day in court, months without support have passed.[249]

(f) Visitation

Several public hearing witnesses asserted that the reason for fathers' high default rate on child support is mothers' interference with visitation and the courts' failure to enforce visitation rights, a point on which the representatives of father's rights organizations felt keenly.[250] A survey respondent wrote:

> ° There has been a serious and ongoing problem in Monroe County with respect to enforcement of the non-custodial parent's right to exercise visitation. While child support awards are always enforced by the courts, visitation orders rarely if ever are. This instills a perception, which for all intent and purpose is correct, that the courts are sexist with respect to their treatment of parents' rights and obligations for their children. This, in turn, prompts non-custodial parents, who in 95% of all cases are men, to disregard child support orders.
>
> Thirty-five year old rural male

The feelings of many women were summarized by Lynne Vallone of the Buffalo Coalition for Child Support:

> We continue to send our children on court-ordered visits with nonpaying fathers, yet upon returning to court for child support enforcement, a cross petition very frequently accuses mothers of denying

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[249]Huttner Testimony, supra note 45 at pp. 129-131.

[250]E.g., Testimony of Richard Sansone, Rochester Tr. at p. 111 (hereinafter cited as Sansone testimony); Testimony of John Rossler, Rochester Tr. at p. 127 (hereinafter cited as Rossler Testimony).

visits. The visitation issue becomes a predominant issue. Child support is initially ignored, and there is a presumption of denied visits before any evidence is presented.[251]

Attorney General Robert Abrams described a case brought to his attention by his office's Civil Rights Bureau in which a man $22,000 in arrears on child support brought a petition in Family Court alleging denial of visitation. The judge threatened the wife with contempt, assuming without discussion that she had deterred the children from visitation. The judge took no steps to enforce the child support.[252] Among respondents to the Attorneys Survey, almost half of both women (46%) and men (48%) reported that child support enforcement is sometimes denied because of alleged visitation problems.[253] A survey respondent wrote:

° The absolute best defense in a support enforcement action is a defendant's claim of visitation interference and request for change of custody -- including when the father/defendant has been living out of the area, by his choice, for years.
Thirty-six year old female (no region given)

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[251]Vallone Testimony, supra note 219 at pp. 35-36.

[252]Testimony of Hon. Robert Abrams, Attorney General of the State of New York, Albany Tr. at p. 13 (hereinafter cited as Abrams Testimony).

[253]Female and male survey respondents (F%/M%) reported that enforcement of child support is denied because of alleged visitation problems:

Always	Often	Sometimes	Rarely	Never	No Answer
/	19/7	46/48	26/35	3/5	6/4

Courts' failure to enforce visitation is perhaps a function of some judges' failure to understand why some fathers want to be involved parents.[254] Whatever the motivations of the courts, it appears that they are not carrying out their enforcement functions adequately with respect to either child support or visitation.

The New York State Child Support Commission found that while "visitation interference" is frequently raised as a defense to a petition for child support compliance, it is less frequently raised or pursued in an independent action. The Commission also found that raising this defense often resulted in a delay in the support proceedings as well as a stay of the support order, and that failure of visitation by the father is far more frequent than visitation interference by the mother.[255] The Commission urged that visitation and child support be treated as separate matters so that children do not suffer as a result of parental disagreements.[256]

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[254] See notes 265-267, infra, and accompanying text.

[255] The Commission also pointed out that mothers sometimes deny visitation because of fear of physical abuse. See Child Support Report, supra note 213 at p. 86.

[256] Child Support Report, supra note 213 at pp. 85-86. Under the new, expedited support procedures in Family Court, the custodial parent's alleged failure to permit visitation cannot be raised before a hearing examiner. Family Court Act § 439(c).

(g) Family Court Resources

The lack of resources for Family Court personnel was repeatedly cited as a major obstacle to the timely resolution of support cases and as emblematic of the system's attitude toward women. Assemblywoman May Newburger, Chairperson of the Assembly Task Force on Women's Issues, stated:

> I think that we have relegated women to the back seat of the judicial bus for too long in terms of dealing with their issues with parity . . . and nothing reflects this bias more than the situation of the Family Court in our court system. This is a court that should be the lynch-pin court in terms of the kinds of cases. It is the most neglected, most understaffed . . . most under attended court in our system.[257]

Carol Lefcourt, Esq., Counsel to the New York State Division for Women, observed that although there were over 73,000 paternity and support petitions and over 100,000 modification and support petitions filed in the New York State Family Court in 1983, and although Family Court judges handle approximately 1,000 cases for every 300 cases handled by a Supreme Court judge, Family Court receives a far lower allocation of resources than Supreme Court and "with depressive juvenile administration, PINS [and] foster care little time and effort is reportedly

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[257]Newberger Testimony, supra note 114 at p. 71.

spent on support cases." At the Task Force's regional meeting in Kingston, Ulster County Family Court Judge Karen Peters also noted disparities in case loads and resources of the Supreme and Family Courts. Legislator Harriet Cornell told of the crippling personnel shortage in Rockland County Family Court despite vastly increased case loads and a judge and lawyer who described that court to her as the "stepchild of the court system" and "the last to get what is needed and the first to [have it] take[n] it away."[258]

[258]Cornell Testimony, supra note 182 at p. 45.

SUMMARY OF FINDINGS

1. Gross inadequacies, nationwide, in the ordering and enforcement of child support led Congress to enact the Child Support Enforcement Amendments of 1984. In response to the Act's requirement that states conform their law to the new federal requirements, the New York 1985 Support Enforcement Amendments were enacted.

2. The Task Force received compelling evidence of human suffering resulting from the judicial system's failure to adequately administer child support laws.

3. The new law seeks to address enforcement problems by establishing expedited procedures for immediate or temporary support orders and providing for income execution, income deduction, and state-tax refund intercepts.

4. Attitudes and practices in New York's judicial system that compelled federal intervention raise profound concerns as to how effectively the new law will be administered. Although New York law provided numerous enforcement mechanisms prior to federal intervention, many judges failed to utilize them effectively.

5. Among the most prevalent problems are:

   a. Awards frequently are inadequate and appear to be based on what the father can comfortably afford rather than the standard of living of the children and their special needs.

   b. Women's attempts at enforcing support are frequently viewed by judges as vindictiveness.

   c. Judges are perceived to be more concerned about preserving the father's credit rating than effectively enforcing awards.

   d. Women have inadequate resources to retain counsel to assist in collecting awards;

e. Child support arrears are frequently reduced or forgiven without adequate justification.

f. In enforcement proceedings, repeatedly granted adjournments to non-paying parents often compromise the custodial parent's employment due to the necessity of numerous appearances in court.

g. Visitation problems are improperly considered by the courts as justification for not enforcing child support.

h. Resources allocated to the Family Court are perceived to be unfairly low when compared to the resources of other courts.

RECOMMENDATIONS

For Court Administration

1. Take necessary steps to assure that judges and hearing examiners are familiar with:

   a. Current, accurate information respecting the costs of child raising, the costs and availability of child care and other statistical and social data essential to making realistic child support awards.

   b. The economic consequences of divorce from the standpoint of ensuring that parents' financial contributions to child support are proportional to each party's earnings.

   c. All available enforcement mechanisms under new and existing laws and the importance of utilizing them to the fullest extent of the law.

   d. The concept of "good cause" in § 460 of the Family Court Act and Domestic Relations Law § 244 respecting the reduction of arrears.

2. Collect and publish data to enable effective monitoring of child support enforcement cases.

For the Legislature

Enact legislation that:

1. Provides counsel for indigent custodial parents in child support enforcement proceedings.

2. Provides that in any proceeding in which a judgment for support arrears is sought, the grounds constituting "good cause" for permitting untimely requests for modification of the support order be enumerated and strictly limited and that such modifications may be granted only upon a specific finding by the court on the record as to which specific ground has been demonstrated.

3. Provides that child support awards can only be modified prospectively.

4. Establishes a new formula for child support which takes into account the many considerations elaborated in the report of the New York Child Support Commission.

5. Makes penal sanctions for nonsupport of children more readily available as a deterrent measure.

For Bar Associations

Family Law sections and committees should take an active role in ensuring that the new child support enforcement legislation is working effectively and in developing a fair and uniform formula for child support awards in the state.

For Law Schools

Family Law courses should include information about the award and enforcement of child support similar to that recommended for judges and the hardship to children and custodial parents when child support awards are insufficient and unenforced.

C. COURTS' CONSIDERATION OF GENDER IN CUSTODY DETERMINATIONS

Determinations of child custody are among the most perplexing and difficult aspects of the judicial function. Custody is an area of law in which sex-based stereotypes disadvantage both sexes. Gender bias against fathers, as expressed in the ostensibly discredited "tender-years" doctrine which holds that young children belong with their mother, is well known.[259] There is much less awareness of the stereotypes that work to the detriment of mothers. But whether the gender bias works against one sex or the other, the Task Force found that some judges are allowing sex stereotypes to influence their custody determinations rather than "the best interests of the child", the controlling but vague standard.[260]

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[259] In fact, the tender years doctrine in its entirety is biased against mothers as well. "As between parents adversely claiming the custody. . . other things being equal, if the child be of tender years, it should be given to the mother, if it be of an age to require education and preparation for labor or business, then to the father." Okla. Stat. tit. 30, § 11 (1971 & Supp. 1978).

[260] Domestic Relations Law § 240 provides that in a custody dispute "the court must give such direction, between the parties, for the custody, care, education and maintenance of any child of the parties, as, in the court's discretion, justice requires, having re-

(Footnote continued)

There is also confusion about what should be considered evidence of bias. One hearing witness as-

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(Footnote 260 continued from previous page)
gard to the circumstances of the case and of the respective parties and to the best interests of the child. In all cases there shall be no prima facie right to the custody of the child in either parent." "Best interests" includes many factors which have been developed by the appellate courts. In Friederwitzer v. Friederwitzer, the Court of Appeals stated, "[T]he only absolute in the law governing custody of children is that there are no absolutes." 55 N.Y.2d 89, 94, 447 N.Y.S.2d 893 (1982). Because stability in a child's life is of prime importance, id. at 94, Corradino v. Corradino, 48 N.Y.2d 894 (1979); Obey v. Degling, 37 N.Y.2d 768 (1975), weight is often given to the first award of custody. Friederwitzer v. Friederwitzer, supra at 94. The "roller coaster" treatment of custody determinations is to be avoided. Dintruff v. McGreevy, 34 N.Y.2d 887 (1974). "While concerns such as the financial status and ability of each parent to provide for the child should not be overlooked by the court, an equally valid concern is the ability of each parent to provide for the child's emotional and intellectual development." Eschbach v. Eschbach, 56 N.Y.2d 167, 172, 451 N.Y.S.2d 658 (1982). Thus, the "quality of the home environment and the parental guidance the custodial parent provides for the child," id., is of prime importance in determining what custodial arrangement is in the child's best interests. The Court of Appeals "has long recognized that it is often in the child's best interests to continue to live with his siblings. While this, too, is not an absolute, the stability and companionship to be gained from keeping the children together is an important factor for the court to consider." Id. at 173. "While not determinative, the child's expressed preference is some indication of what is in the child's best interests. Of course, in weighing this factor, the court must consider the age and maturity of the child and the potential for influence having been exerted on the child." Id.

serted that the fact that approximately "95%" of children live with their mothers after divorce is evidence of gender bias in the courts.[261] But in the majority of divorces, children remain with their mother by parental choice. There is substantial evidence that when fathers do litigate custody, they win at least as often as mothers do.[262]

1. STEREOTYPES THAT DISADVANTAGE FATHERS

Cultural stereotypes about parenting hold that women are more capable than men of nurturing behavior. There exists a belief on the part of certain judges that,

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[261] Testimony of Sidney Siller, Esq., Albany, Tr. at p. 116.

[262] Polikoff, Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations, 7 Women's Rights Law Reporter 235, 236-7 (1983), citing a number of studies from different states and cities. One New York family court judge awarded custody to men as often as to women during a five year period in the 1970's. M. Wheeler, Divided Children: A Legal Guide for Divorcing Parents 40 (1980). According to Jeff Atkinson, Chairperson of the Child Custody Committee, Section of Family Law, American Bar Association, "[i]n 1982, fathers obtained custody in 51% of all reported custody cases decided nationwide by appellate courts; mothers obtained custody in 49% of the cases. This marks a dramatic increase in custody for fathers from 1980 when it was estimated that fathers received custody in only one out of ten contested cases." Atkinson, Criteria for Deciding Child Custody in the Trial and Appellate Courts, 28 Family Law Quarterly 1 (1984).

absent evidence of serious unfitness, a mother is to be preferred in custody disputes.

(a) Maternal Preferences

Many witnesses and survey respondents agreed with Doris Jonas Freed, Esq. that, "there remains a hard core of judges today who are still reluctant to award custody to fathers except in the most egregious cases of maternal unfitness and unless a demonstrated need for such an award is shown beyond reasonable doubt."[263] Almost three quarters (73%) of female and male attorneys said that custody awards are "often" or "sometimes" based on an assumption that children belong with their mothers rather than upon independent facts. Men (52%) responded "often" to this question more than women (33%).[264] Illustrative survey comments included:

> ° Despite abrogation of tender years doctrine, most judges (particularly when the children are young) leave the children with the mother.
> Fifty-five year old rural male

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[263] Testimony of Doris Jonas Freed, Esq., N.Y.C. I Tr., at pp. 8-9.

[264] Female and male survey respondents (F%/M%) reported that custody awards to mothers are apparently based on an assumption that children belong with their mothers rather than independent factors:

Always	Often	Sometimes	Rarely	Never	No Answer
3/7	33/52	36/24	19/11	4/3	3/2

° Unless a woman is found to be unfit, a man does not have a fair chance at custody. Although the laws are supposed to be gender neutral, I have heard dozens of judges, law clerks, court personnel, and other attorneys comment to me, "You know a mother makes the better parent" or "Home is where the mother is."

Twenty-eight year old suburban female

° [There is] substantial prejudice against males (fathers) in custody cases at every age group of child. . . . [T]he bench is largely of the mind that if the mother wants the children she is going to have them absent evidence that she is truly a horror. [emphasis in original]

Forty-six year old suburban male

John Rossler, Vice President of the Father's Rights Association of New York State, Inc. was among those who testified that awareness of judges' maternal preference inhibits many men from even attempting to litigate custody. "[J]udges' opinions and attitudes reach way beyond the confines of chambers. The facts are that most attorneys feel compelled to dissuade, or at least warn fathers of the requirements of a custody 'win'."[265] When asked on the Attorneys Survey "Do you

[265]Rossler Testimony, supra note 250 at p. 122. A witness who as a college professor had a more flexible schedule than did his wife, who worked at a 9-5 job, took primary responsibility for the day to day care of their children. He testified before the Task Force that although "I had been a mother except in a biological sense. . . I was assured by two different lawyers, there was no possibility of my getting custody. If your wife wants custody, she will get it." He never contested custody. Testimony of Professor John Henning, New York City II Tr. at p. 36.

dissuade fathers from seeking custody because you think judges will not give their petitions fair consideration?" 21% of women attorneys and 47% of men attorneys responded "sometimes" or "often".[266]

(b) Failure to Perceive Men as Involved Parents

Several of the Task Force's respondents suggested that part of the reason for gender bias against men in custody disputes is the judicial system's failure to understand some fathers' desire to be actively involved in parenting.

Richard Kirtland, President of Equal Rights for Fathers in Rochester, New York, testifying about conversations he had with many attorneys about his own, informal joint custody situation, stated "they seemed hard-pressed to understand my concern and my continued involvement with my child, and my insistence on remaining continually involved with it. I would say that these men don't know what I'm talking about, even though they are

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[266] Female and male survey respondents (F%/M%) reported that they dissuade fathers from seeking custody because they think judges will not give fathers' petitions fair consideration:

Always	Often	Sometimes	Rarely	Never	No Answer
1/2	3/17	18/30	28/19	43/28	8/4

also parents."[267] The attitude described by Mr. Kirtland was also noted by a lawyer at the Rochester regional meeting. She described having a male judge ask her why her client, a father, wanted custody of his children, as if that were beyond comprehension, whereas such a question is rarely asked about a custody-seeking mother, who is assumed to want custody.[268]

It appears that assumptions about fathers' abilities to function as parents, particularly of very young children, color decisions about visitation as well. Two Attorneys Survey respondents wrote:

- Once a female judge refused visitation to a father because the child was too young, as if men could not be expected to care for an infant.
  Thirty-one year old NYC female

- I have very often lost motions for overnight visitation 'in view of the young age of the child.' Judges like to believe fathers cannot care for their children. [emphasis in original]
  Twenty-nine year old suburban female

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[267]Testimony of Richard Kirtland, Rochester Tr. at p. 159.

[268]Two witnesses pointed out that this assumption creates its own kind of gender bias, forcing women to fight for or accept custody regardless of their own preference lest they be branded by society as unnatural mothers. Rigler Testimony, supra note 192 at p. 106-7. Sansone Testimony, supra note 250 at p. 104.

2. STEREOTYPES THAT DISADVANTAGE MOTHERS

Maternal preference may appear to be an unalloyed boon to women, but it carries within it negative aspects as well. The stereotype of a mother on which it is based has negative consequences for the custody-seeking woman who does not conform to an image which is both sexist and out of touch with reality. Although some judges adhere to an overriding maternal preference, there are others whose stereotyped assumptions about what a mother should be have resulted in mothers losing custody on grounds unrelated to the child's best interests, or reflecting a highly stereotyped vision of what constitute the child's best interests.

(a) Parenting and Lifestyle Standards

Public hearing witnesses and survey respondents reported that in custody litigation, some judges evaluate women's parenting and lifestyles differently and more harshly than they do men's. Stephen Hassett, Esq. of Buffalo Neighborhood Legal Services testified:

> A mother's parental fitness is tested against the "traditional mother" standard, while the father's parental fitness is tested against the "traditional father" standard. For example, courts are penalizing mothers, but not fathers, who work outside the home. Consequently, if a woman places "undue" emphasis upon her career -- a choice she is ironically under pressure to make in order to support her children and prevent loss of custody to the father with his higher income -- she nevertheless

stands in jeopardy of losing custody. In contrast, the fact that a father has a time-consuming career is not assumed to hinder his ability to parent his children.

Because the father's fitness is tested against the "traditional father" standard, he is not expected to know about "mothering" -- that is, cooking, cleaning, nursing children through illness. His limited attempts (which usually begin after separation) are regarded by courts as not only sufficient but commendable. And, while it is permissible for fathers to leave the family at separation and return years later to seek custody (as is the case in most custody modification actions), a mother who does so is viewed as having "abandoned" her children.[269]

Respondents to the Attorneys' Survey wrote:

° I think a key issue women face unfairly from time to time in custody disputes is that a less than perfect mother is criticized for her imperfection while a father who simply wants his kids is given credit for having that wonderful desire, even if he has done very little child care.

Thirty-four year old rural female

° If the mother is not a saint, she is at a disadvantage in obtaining custody, even if she has always been the primary caretaker, the children are well, and the father will only place the children in nursery school or in the care of his second wife.[270]

Twenty-eight year old urban female

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[269]Statement of National Center for Women and Family Law, submitted to Task Force by Stephen Hassett, Esq. at Rochester hearing, p. 4.

[270]West Virginia is the one state to have adopted a primary caretaker presumption in its custody law. W. Va. Code 48-2-15 (1980). In Garska v. McCoy, 278 S.E.2d 357 (W.Va. 1981), the court enumerated ten factors that comprise, at least in part, primary parenting. These included preparing meals; bathing, dressing and

(Footnote continued)

A woman's lifestyle may be judged by a double standard that holds that a woman's behavior must be blameless[271] but a man's indiscretions are to be ignored

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(Footnote 270 continued from previous page)
grooming; medical care; arranging social interaction among peers; arranging alternative care such as babysitters; putting the child to bed and attending to it during the night; disciplining the child (e.g., teaching manners and toilet training); educating the child (religion, cultural, social, etc.); and teaching elementary skills such as reading, writing and arithmetic. Id. at 363. The primary caretaker presumption operates absolutely with a child under six. The judge may consult children between six and 14 to learn their preference if there is any doubt about an award to the primary caretaker. Above age 14 children may choose their guardians if the parents are fit.

Justice Richard Neely of the West Virginia Supreme Court argues that this presumption provides a sex-neutral standard which avoids judicial bias as to what makes a good parent, lends predictability to the law of custody which reduces husbands' power to threaten custody litigation in order to force their wives to accept inadequate settlement (see note 281, infra) and, by shortening the proceedings, provides security and stability for the children. Neely, The Primary Caretaker Parent Rule; Child Custody and the Dynamics of Greed, 3 Yale Law & Policy Review (1984). Two New York cases which employed the primary caretaker concept are Pawleski v. Buchholtz, 91 A.D.2d 1200, 459 N.Y.S.2d 191 (4th Dept. 1983) and Dodd v. Dodd, 93 Misc. 2d 641, 403 N.Y.S.2d, 401 (Sup. Ct. N.Y. Co. 1978).

[271]In a 1984 Suffolk County case in which custody of two children was awarded to the father, the Supreme Court justice opened his opinion with this language:

> Much testimony and a number of witnesses added very little to a simple theme that the mother . . . found her spouse . . . to be dull,
> (Footnote continued)

or expected as part of what being a man is all about.

> ° [T]he double sexual standard is prevalent. A woman with a boyfriend still gets the Scarlet 'A' while it is expected of a separated male. A woman who leaves the children with her husband is a monster; the opposite is readily accepted.
>
> Forty-seven year old suburban female

Some decisions appear to be shaped by the idea that a good mother is one who stays home with her children.[272] Yet given the inadequacy of maintenance and child support awards and the failure of enforcement[273]

(Footnote 271 continued from previous page)

> boring and sexually inadequate because he was not an ardent lover . . . she departed the marital abode . . . to share a condominium love nest . . . with her paramour.

Nowhere in the opinion is there any suggestion that the mother's relationship to her "paramour" had any impact on the best interests of the children and she waited to leave the marital abode until she found a "love nest" able to accommodate the children. Despite the judge's statement that the mother's sex life is the "theme" of this case, the record indicates that it was the subject of less than four pages of an approximately 800 page record. Ira K. (Anonymous) v. Frances K. (Anonymous), Supreme Court, Suffolk County, No. 84-8250, aff'd ___ A.D.2d ___, 497 N.Y.S.2d 685, 688 (2d Dept. 1985), describing this language as "outworn and archaic terminology".

[272] A survey respondent described a case in which the judge "demeaned and vilified the wife in a matrimonial action placing on her the entire burden to 'make the marriage work' . . . . [B]oth parties work[ed] but the judge condemned the wife for working and leaving the children while lauding the husband for supporting them."

Fifty-seven year old suburban female

[273] See pp. 111-120, 128-150, supra.

few newly divorced women can afford to remain at home. Lawyers at regional meetings and hearing witnesses described the phenomenon of women who had been full-time homemakers prior to divorce who take paying jobs at divorce in order to support themselves and their children and subsequently lose custody to the remarried father in modification proceedings. A survey respondent commented:

> ° "[I]n the custody area it is becoming vogue to award custody to the father because he has remarried and the former wife must work."
>
> Thirty year-old rural female

Among respondents to the Attorneys Survey, 38% of women and 22% of men reported that a change of custody is "sometimes" or "often" granted to fathers because of mothers working outside the home and the presence of "stay at home" stepmothers.[274] This detriment to working

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[274] Female and male survey respondents (F%/M%) reported that a change of custody is granted to fathers because of mothers working outside the home and the presence of "stay at home" stepmothers:

Always	Often	Sometimes	Rarely	Never	No Answer
/	10/1	28/21	38/48	13/24	12/6

Karen Huneke of West Fulton, New York (Schoharie County), provided the Task Force with the decision in her own custody litigation in which she lost custody of her son to her former husband. The judge wrote "The only material change of circumstances . . . is that petitioner father has remarried -- a factor which does enhance his prospects for custody." Huneke v. Huneke, n.o.r. (Schoharie County Family Court, Docket No. v-37-78, December 17, 1982, pp. 14-15).

mothers persists despite the fact that in 1985 62 percent of women with pre-school or school age children were in the paid workforce, almost three-quarters of them working full time.[275]

The judicial attitude appears to be that the woman working full time outside of her home is less of a mother than the stepmother who, by virtue of being in a two-parent family, can afford to be at home, and that a traditional nuclear family must be better than mother and children together without a father present. This preference has a disparate impact on divorced women who, between the ages of 30 and 44, remarry half as often as divorced men.[276]

(b) Economic Barriers

New York has an extremely strict "exceptional circumstances" standard respecting removal of a child from the state when the other parent has visitation

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[275]U.S. Dept. of Labor, Bureau of Labor Statistics. Labor Force Activity of Mothers of Young Children Continues at Record Pace. USDL 85-381, Sept. 19, 1985. See "48% of Mothers of Infants Are Found to Hold Jobs," The New York Times, March 16, 1986, Sec. 1, p. 25.

[276]U.S. Dept. of Health and Human Service. The National Center for Health Statistics, Vital Statistics Report, Vol. 34, No. 3 Supplement, June 28, 1985.

rights.[277] Although the courts expect women to support themselves and contribute substantially to the support of their children after divorce, they make it extremely difficult for a woman to move to advance her career. In Kozak v. Kozak[278] the custodial mother was offered an advancement and salary increase by her employer, IBM, if she moved from New York to Kentucky. The court refused to hold the promotion and advancement an "exceptional circumstance." Professor Henry Foster wrote of this case, "Since the mother was in good faith and commendably was advancing her career, the result is highly questionable and too rigid an interpretation of 'exceptional'. There should be more flexibility and the career interests of the mother deserved greater consideration than was given in this decision."[279]

A survey respondent wrote:

> ° I am distressed to see the Appellate Division, Second Department, not allowing [an] ex-wife as custodial parent to move to a distant locality for business reasons, yet allowing husband as custodial parent to do so. I have often heard women

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[277] See Weiss v.Weiss, 52 N.Y.2d 170, 436 N.Y.S.2d 862 (1981).

[278] Kozak v. Kozak, 111 A.D.2d 842, 490 N.Y.S.2d 583 (2d Dept. 1985).

[279] Foster, Zen and the Art of Child Custody, 5 Fairshare 10, 11 (August 1985).

> executives called 'corporate gypsies' by male counsel over my objection yet the same type [of] pejorative names are not applied to male executives.
> Thirty-three year old suburban female

The irony of courts' expecting women to be economically self-sufficient but denying them the opportunity fully to achieve this status is further compounded by some courts' use of an economic standard to determine custody. More than one-third of women (37%) and one-quarter of the men (27%) responding to the Attorneys Survey reported that custody is "sometimes" or "often" awarded to the parent in a stronger financial position rather than ordering child support payments to the primary caretaker.[280] Phyllis Korn of Alternatives for Battered Women, a Rochester shelter and hotline program, testified:

> Permanent custody determinations seem to reflect a recent and disquieting shift which enhances special privileges for the more affluent and more powerful male. When the father has more money and a nicer home, the courts may decide he is thereby the more 'fit' parent, and grant custody to the parent with the greater assets.[281]

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[280] Female and male survey respondents (F%/M%) reported that custody is awarded to the parent in a stronger financial position rather than ordering child support payments to primary caretaker:

Always	Often	Sometimes	Rarely	Never	No Answer
/	7/2	30/25	46/55	9/14	7/4

(Footnote(s) 281 will appear on following pages)

Although reference to parents' ability to provide for a child financially may appear to be sex neutral, an economic standard disproportionately disadvantages women because of workplace realities. Full-time, year-round employed women earn 64 cents for every dollar earned by full-time, year round employed men. 1984 median earnings for full-time, year-round workers were $23,218 for men and $14,780 for women.[282] Occupational segregation, with the majority of women concentrated in low paying service occupations, continues to be the norm.[283] Even when women and men are in the same

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[281]Korn Testimony, supra note 72 at p. 90. Men's and women's unequal financial status is a factor throughout custody litigation, with men frequently using the threat of a custody fight to force women to accept inadequate, unfair financial settlements. Julia Perles, Esq. has written "Custody questions are all too often raised for leverage and not because one party or the other really wants custody." Perles, Why Mediation is the Wrong Approach to the Custody Dilemma, 5 Fairshare 11, 12 (July 1985), in which Ms. Perles describes how attorneys manipulated the pre-1973 New York State Conciliation Bureau to achieve delay when it was to their advantage and argues that the pending legislative proposal for mandatory child-custody mediation would be similarly subverted.

[282]U.S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series p-60, No. 149, 198 (August 1985), x. Table 11, p. 17.

[283]In 1984, 32 percent of women in the New York State paid labor force were in the federal occupational category called "administrative support, including

(Footnote continued)

occupational category, men earn more.[284] In sum, determining custody on the basis of which parent is more financially able effectively constitutes a paternal preference.

(c) Domestic Violence

Some judges' lack of understanding of the consequences to children of violence against their mothers is leading to decisions in which there is an award of joint custody or custody to the father. Fifty-four percent (54%) of women respondents to the Attorneys Survey and 31 percent of men respondents reported that custody

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(Footnote 283 continued from previous page)
clerical". Eighteen percent of women were in "service occupations". The 16 percent of women in "professional specialty" included those in such female dominated relatively low-paying fields as nursing and teaching. Bureau of Labor Statistics, U.S. Dept. of Geographic Profile of Employment and Unemployment. 1984, Bulletin 2235, May 1985, Table 15, pp. 59-60.

[284]For example, 1984 average weekly earnings for full time workers in service occupations were $180 for women, $257 for men. In the administrative support including clerical category, average weekly earnings were $257 for women and $380 for men. Bureau of Labor Statistics, U.S. Dept. of Labor, Usual Weekly Earnings of Employed Wage-Salary Workers Who Usually Work Full-Time by Detailed (Three Digit Census Code) Occupation and Sex. Unpublished Earnings Tabulations from the Current Population Survey, 1984 Annual Averages, Table A26.

awards "often" or "sometimes" disregard a father's violence against the mother.[285]

A prime example is some judges' response to the fact that many of these women often change their residences.

> Battered women are penalized by courts for a lifestyle which is a direct result of the physical abuse. Many battered women may have to move frequently in an attempt to escape the batterer. They may try to keep their home addresses or phone numbers unknown, and . . . be accused of limiting access between the father and the children. The courts are likely to view this as evidence of instability.[286]

The best interests of the child and society are disserved because, as many studies show, children raised in violent homes learn to use violence as an outlet for their own anger and as the way to resolve conflicts.[287]

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[285]Female and male survey respondents (F%/M%) reported that custody awards disregard the father's violence against the mother:

Always	Often	Sometimes	Rarely	Never	No Answer
6/*	24/9	30/22	21/38	9/22	10/8

[286]Hassett Testimony, supra note 83 at 17-18.

[287]E.g., Pagelow, "Children in Violent Families: Direct and Indirect Victims", in Young Children and their Families at 64-66 (S. Hill and B.J. Barnes eds. 1982); Pfouts, Schopler & Henley, Jr. "Deviant Behavior of Child Victims and Bystanders in Violent Families", in Explaining the Relationship Between Child Abuse and Delinquency 79, 95 (R.J. Hunter & Y.E. Walker eds. 1981).

Messages implicit in the batterer's behavior encourage children to develop characteristics that perpetuate the very roles and relationships that fuel family violence. The batterer as a negative role model for children should be considered in conjunction with the array of other negative effects suffered by children from exposure to domestic violence.[288]

[288] Keenan, Domestic Violence and Custody Litigation: The Need for Statutory Reform, 13 Hofstra Law Review 407, 421 (1985). Other negative effects suffered by children who witness violence against their mothers include shock, fear, guilt, impairment of self-esteem and impairment of development and socialization abilities. Id. at 419. E.g., Hilberman, Overview: "The Wife Beater's Wife Reconsidered", 137 Am. J. Psychiatry 1336, 1340-41 (1980).

SUMMARY OF FINDINGS

1. Determinations of child custody are among the most perplexing and difficult aspects of the judicial function.

2. Guided only by the vague standard of "the best interests of the child," judges are given virtually unbridled discretion to determine what factors should be considered when making custody decisions.

3. Some judges appear to give weight to gender-based stereotypes about mothers and fathers that may have little bearing on the child's best interests and that unfairly discriminate against men and women.

4. Stereotypes that influence some judges and that disadvantage fathers include:

   a. Mothers are presumptively preferred as custodial parents, which presumption is reinforced by some counsel's advice to fathers not to litigate custody because they have little chance of winning.

   b. Some judges do not realize that some fathers genuinely are and desire to continue to be actively involved in parenting.

5. Stereotypes that influence some judges and that disadvantage mothers include:

   a. Fathers who exhibit any involvement in parenting should be rewarded with custody despite years of primary caretaking by mothers.

   b. Women who place great emphasis on careers, whether due to ambition or economic necessity, are sometimes considered less fit to be awarded custody than men who place a similar emphasis on their careers.

   c. Women's extra-marital and post-divorce social relationships are sometimes judged by a stricter standard than are men's.

d. When judges look to financial status or the presence of a stay-home mother to determine custody the lower post-divorce economic status of women -- caused in part by inequitable maintenance, property and child support awards -- disadvantages the mother seeking custody.

e. Women who respond to domestic violence by leaving the home may be viewed as unstable and less fit to receive custody.

RECOMMENDATIONS

For Court Administration

Take necessary steps to assure that judges are familiar with:

1. How sex-based stereotypes about both women and men affect decision making in custody cases.

2. The psychological impact of divorce on children.

3. The effects of spousal abuse on children.

For the Legislature

Enact legislation that:

1. Clearly articulates the factors and standards which constitute the "best interests of the child", and requires judges to state in writing the factors considered in making their decision and to set forth their reasons for disregarding any of the articulated factors.

2. Provides that abuse of one's spouse is evidence of parental unfitness for custody and a basis for termination of visitation or a requirement for supervised visitation.

3. Recognizes the need, in cases of domestic violence, to order supervised visitation to protect the custodial mother.

For Bar Associations

Continue to support committees engaged in the analysis of problems in the law of custody with a view toward eliminating the problems rooted in gender bias described in this report.

For Law Schools

Include information in family law courses about the psychological consequences of divorce for children, the impact of spousal abuse on children and the way in which gender bias against both women and men influences custody decisions.

D. THE COURTROOM ENVIRONMENT

For most people, the courtroom is a foreign environment; it can be intimidating, indeed, frightening. Courtroom procedures are mysterious and the language of its participants incomprehensible. Anxiety is compounded because the courts often play a decisive role in determining the social, economic, and physical welfare of our citizenry. In times of personal trauma people give the judiciary unparalleled power over the core of their lives and expect the judiciary to execute its duties scrupulously, with fairness, dispatch and compassion. Ready access to the courts and the presence or absence of decorum and professionalism influence litigants' confidence in and respect for the courts.

For these reasons, examination of the courtroom environment -- the general manner of conduct, attitude, and receptiveness of judges, lawyers and court personnel to litigants as well as the courts' physical accessibility -- was considered by the Task Force to be an important measure of the status of women litigants.

1. CREDIBILITY OF WOMEN LITIGANTS

The Task Force defined credibility in its

fullest sense: whether a person is "believable, capable, convincing, someone to be taken seriously."[289] Perhaps

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[289]There is a substantial body of social science research showing that in a variety of contexts, both women and men perceive women as being less credible than men in all of the senses of the term as defined here, and that recent years have by no means eliminated these attitudes despite the many other advances towards equality. See, e.g., "The Less Credible Sex" in Schafran, Eve, Mary, Superwoman: How Stereotypes About Women Influence Judges, 24 Judges Journal 12, 16 (1985). A Kent State University Professor in 1985 replicated and extended a 1968 experiment in which 150 male and 150 female subjects were randomly assigned to read an essay with the author's name indicated as either John T. McKay, J.T. McKay or Joan T. McKay and asked to rate it on such qualities as persuasiveness, intellectual depth and style. Although the essays were identical, those believed to have been written by "Joan" consistently received lower ratings from male and female readers than those believed to have been written by "John" or "J.E.". Paludi & Strayer, What's in an Author's Name? Differential Evaluations of Performance as a Function of Author's Name, 12 Sex Roles 353 (1985). Another study found that in managerial jobs or jobs thought to require male characteristics, good looks are an advantage for men and a disadvantage for women. Attractive men were perceived as having gained success on the basis of their hard work and ability. Attractive women were presumed to have succeeded for reasons other than their skill and/or talent, and to be less capable and credible and have less integrity. Heilman and Stopeck, Attractiveness and Corporate Success: Different Causal Attributions for Males and Females, 70 Journal of Applied Psychology 379 (1985); Heilman and Stopeck, Being Attractive, Advantage or Disadvantage? Performance Based Evaluations and Recommended Personnel Actions as a Function of Appearance, Sex, and Job Type, 35 Organizational Behaviour and Human Decision Processes 202 (1985). Among several Attorneys Survey respondents who commented on this phenomenon in court settings, one wrote that in his experience as a law clerk in

(Footnote continued)

the most insidious manifestation of gender bias against women -- one that pervades every issue respecting the status of women litigants -- is the tendency of some judges and attorneys to accord less credibility to the claims and testimony of women because they are women.

Witnesses' testimony is the principal ingredient of the fact-finding process. To be credited, the witness must be credible. Credibility, in turn, may not always depend on the witness's objective candor and reliability for, as Justice Benjamin N. Cardozo once observed: "The forces of which Judges . . . avail to shape the form and the content of their judgments" include "the likes and dislikes, the predilictions and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge."[290]

(Footnote 289 continued from previous page)
appellate court:

> ° Attractive female attorneys . . . clearly face greater difficulty in being treated seriously and occasionally I have seen this manifested by what seem to be offhanded or innocuous comments [by judges] which subtly undermine credibility.
> Thirty year old NYC male

[290]B. Cardozo, The Nature of the Judicial Process at p. 167 (Yale Univ. 1921). Judge Jerome Frank found that "trial-court fact-finding is the toughest part of
(Footnote continued)

Women have long been stereotyped by society as impulsive, emotional, irrational, and unpredictable.[291] In a courtroom setting this may translate into women being presumptively viewed as incredible witnesses. Indeed, two notable trial practitioners advised their colleagues in a practice guide that:

> Women, like children, are prone to exaggeration; they generally have poor memories as to previous fabrications and exaggerations. They are also stubborn. You will have difficulty trying to induce them to qualify their testimony. Rather, it might be easier to induce them to exaggerate and cause their testimony to appear incredible. An intelligent woman will very often be evasive. She will avoid making a direct answer to a damaging question. Keep after her until you get a direct answer--but always be the gentleman.[292]

The Task Force heard compelling testimony at the public hearings from lawyers, legislators, lay advocates and scholars that women litigants' claims are sub-

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(Footnote 290 continued from previous page)
the judicial function. It is there that courthouse government is least satisfactory. It is there that most of the very considerable amount of judicial injustice occurs. It is there that reform is most needed." J. Frank, Courts on Trial: Myth and Reality in American Justice at p. 4 (Princeton Univ. Press 1949).

[291] See Burns Testimony, supra note 60 at pp. 181-182.

[292] F. Lee Bailey and Henry B. Rothblatt, Sucessful Techniques for Criminal Trials § 205, at pp. 190-191 (Lawyers' Cooperative Pub. Co. 1971). This text was not deleted until the 1985 edition.

ject to undue skepticism in New York's Courts. Domestic violence victims are asked why they have no visible injuries and what they have done to provoke their attacks. A woman seeking an order of protection during the course of a matrimonial action may be presumed as engaging in "tactics" in the divorce case.[293]

It is not unusual for women seeking maintenance and child support enforcement to be pressed to account for every dollar they request and defend their expenditures while men's oral representations as to income and expenses are accepted without proof.[294] Rape victims' credibility is uniquely suspect and women who decide to prosecute must be prepared to endure a kind of scrutiny of their lifestyles, appearances, and demeanor unknown to victims of non-sexual assault.[295]

A Family Court judge responding to the attorneys survey expressed particular concern about the impact of sexual behavior on credibility in paternity cases:

> In Family Court, women are often petitioners, who have the burden of proof, which varies (support, paternity, family offenses). Bias could be present but extremely subtle. I am worried about attempts

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[293] See notes 48, 74, supra, and accompanying text.

[294] See notes 192, 221, supra, and accompanying text.

[295] See notes 111-125, supra, and accompanying text.

> to discredit the credibilty of women, particularly in paternity cases, based on sexual promiscuity. Thirty-nine year old rural male Family Court Judge[296]

Assemblywoman Nay Newburger described the stereotypes about women's credibility that made reform of New York's sexual assault laws so difficult to accomplish,

> [W]omen and child victims of sexual offenses have historically not been perceived as people whose testimony is reliable or credible and worthy of belief . . . . It has been assumed . . . that children will lie about incest at the urging of the mothers seeking to gain advantage in a matrimonial action. It has been assumed that women and children have a tendency to fantasize about sexual contact.[297]

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[296]New York City attorney Claire Hogenauer provided the Task Force with the decision in a 1985 paternity case in which a judge rejected the objective scientific evidence (HLA testing) of 99.7% probability of paternity and in his opinion used such phrases as "A partial list of sex partners for this limited period [six men over two years] includes the following impressive array. . ." Barber v. Davis, (N.Y.C. Family Ct. # 3371/82) dec'd 11/15/84, p. 4. Ms. Hogenauer asked, "Wouldn't an unmarried man in New York City be considered . . . at least sexually inactive if he had been with three women on average a year? And would it not affect his credibility not one iota?" Hogenauer Testimony, NYC I Tr. at pp 221-222, 224.

[297]Newburger Testimony, supra note 114, at p. 60. District Attorney Elizabeth Holtzman testified about a Brooklyn judge who asked an 11 year old sexual abuse victim whether she had sexual fantasies. Holtzman Testimony, supra note 89 at p. 39.

One survey respondent discussed some judges' and law enforcement officers' attitudes toward the credibility of women who allege child sexual abuse:

> ° Mothers who suspect child sexual abuse and leave their husbands are often accused of "manufacturing" the issue to "get at" their husbands. I've seen judges (mostly in Steuben and Schuyler Counties, but also elsewhere) buy this argument because the women--in a state of extreme agitation because of her fears--is a "bitch" or a "piece of work". . . . The same labeling happens to women who go to the police after being beaten or seriously threatened. Because she's not "cool, calm, and rational," the police often won't even take her complaint. This is a terrible problem in Chemung County. Many of my female clients refuse altogether to report incidents to the polic because they're put through the third degree.
>
> Twenty-nine year old rural female[298]

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[298]The lack of credibility of women who allege child sexual abuse against their husbands in matrimonial cases has been the subject of extensive recent comment. Dr. Suzanne Sgroi, co-director of the St. Joseph College Institute for the Treatment and Control of Child Sexual Abuse in West Hartford, Connecticut has pointed out that when a mother attempts to protect her child by getting a divorce, her credibility is undermined. Armstrong, Daddy Dearest, Connecticut, January 1984, p. 54. Dr. Roland Summit, a psychiatrist at the University of California specializing in the treatment of sexually abused children has stated, "If a woman allows sexual abuse to occur under her roof, she is accused of setting up the abuse. If she separates with her children, she is accused of inventing prejudicial stories to block her husband's legitimate access to his children." Id. p. 56. In connection with a California case in which the entire court system refused to believe the mother until the physical evidence was overwhelming and the child had become a voluntary mute, Dr. Summit stated to the New York Times, "The bias against mothers who complain is so

(Footnote continued)

In the Attorneys Survey, the Task Force sought the perceptions of attorneys statewide regarding whether and how gender affects credibility in the courts. Respondents were asked:

(1) whether male and female judges appeared to impose a greater burden of proof on female witnesesses than on male witnesses;[299] and

(2) whether male and female judges appeared to give less credibility to female expert witnesses than to male experts based on gender rather than the substance of the expert's testimony.[300]

Men and women have different perceptions of how gender affects witnesses' credibility. Women attorneys were much more likely to indicate that women witnesses

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(Footnote 298 continued from previous page)
bad that a woman who is aware of it is often told that she may do well not to bring it up because it will only bring trouble on herself." Lindslay, "A Mute Girl's Story; Child Abuse and the System," The New York Times, May 12, 1984, p. 45.

[299]Female and male survey respondents (F%/M%) reported this conduct to be engaged in by:

	Always	Often	Some-times	Rarely	Never	No Answer
Male Judges	1/*	12/2	29/6	23/15	21/73	15/4
Female Judges	*/-	3/*	16/5	32/16	23/65	25/13

[300]Female and male survey respondents (F%/M%) reported this conduct to be engaged in by:

	Always	Often	Some-times	Rarely	Never	No Answer
Male Judges	1/*	7/1	21/5	22/14	17/62	32/18
Female Judges	1/-	2/*	11/4	29/14	19/58	38/23

are held to a higher standard than men. With respect to the burden of proof imposed on witnesses, 36 percent of women compared with 8 percent of men said that male judges "sometimes" or "often" impose a greater burden of proof on female witnesses than on male witnesses. About one fifth (19%) of women respondents compared with 5 percent of men indicated that female judges "sometimes" or "often" act similarly.

Treatment of expert witnesses is also seen differently by men and women. While 62 percent of men have "never" seen male judges give less credibility to female than to male experts because of gender rather than substance, only 17 percent of women responded likewise. Similarly, a higher proportion of men (58%) than women (19%) said female judges "never" give less credibility to female than to male expert witnesses.[301]

(a) Inappropriate and Demeaning Conduct

Lack of credibility is manifested by the unacceptable frequency with which women litigants and wit-

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[301]One survey respondent observed:

> ° The reaction depends on the area of expertise, i.e., whether the male judge thinks it is an area in which a female might be an expert, say in social work as opposed to auto mechanics.
>
> Thirty-five year old NYC female

nesses are subjected to sexist remarks and conduct by judges, lawyers, and court personnel. The immediate effect of such conduct may be humiliation. The more enduring consequence is that this conduct distorts the judicial process and indicates a lack of respect for the litigant that may, in turn, ultimately and more subtly manifest itself in denial of the litigant's substantive rights.[302] Attorney General Robert Abrams testified that "Women continue to call our Civil Rights Bureau, complaining of sexist treatment by judges, and court personnel. In many of these instances, the women are in contact with the court system as a result of a domestic crisis, and inequitable treatment by the judicial system serves not only to demean the women but also to aggravate an already emotionally-charged situation."[303]

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[302]"Attitudes are unconscious usually, and when they cause injustice, they can be likened to malignancies, because if they go undetected and untreated, they are fatal to impartiality of the judge and, consequently, to the judicial process. And no matter how dispassionate a judge believes he is, nevertheless, ever so subtly, and ever, ever so imperceptibly, these attitudes infect and mar the decision-making process and the lives of litigants as well as those who become the victims of these errors of judgment."

Huttner Testimony, supra note 45 at p. 119.

[303]Abrams Testimony, supra note 252 at p. 12. As an example he cited a judge in the southern tier who, in

(Footnote continued)

In the survey questionnaire, attorneys throughout the State were informed that the Task Force "received testimony from judges and attorneys about the ways in which seemingly trivial negative conduct toward women in courtrooms and in chambers interferes with the administration of justice." Respondents were asked a series of questions about the perceived frequency of the inappropriate and demeaning conduct most commonly cited:

(1) Whether judges, counsel, and court employees address women litigants or witnesses by first names or terms of endearment when men are addressed by surnames or titles;[304]

(2) Whether judges, counsel, and court employeees make inappropriate comments about the personal appearance of women litigants or witnesses when no such comments are made about men;[305]

(Footnote 303 continued from previous page)
a divorce proceeding involving a physically abusive husband, shouted at the woman that she was making a cause celebre out of the situation and said "You must consult on matters regarding the children's schedule. I don't mean you have to sleep together, ha, ha, ha."

[304]Female and male survey respondents (F%/M%) reported this conduct is engaged in by:

	Always	Often	Sometimes	Rarely	Never	No Answer
Judges	1/-	13/2	29/9	33/27	16/59	8/3
Counsel	2/*	31/4	32/18	18/29	7/44	10/4
Ct. Emp.	1/-	18/3	29/11	28/26	14/55	10/5

[305]Female and male survey respondents (F%/M%) reported this conduct to be engaged in by:
(Footnote continued)

(3) Whether judges, counsel, and court employees subject women litigants or witnesses to verbal or physical sexual advances;[306] and

(4) Whether judges, counsel and court employees make sexist remarks or jokes in court or in chambers that demean women.[307]

The responses of male and female attorneys to these questions differed markedly. For example, most women respondents (67%) indicated that sexist remarks or jokes are "sometimes" or "often" made by counsel. Conversely, 70 percent of men said this "rarely" or "never"

(Footnote 305 continued from previous page)

	Always	Often	Sometimes	Rarely	Never	No Answer
Judges	1/*	12/3	25/11	31/22	22/61	9/4
Counsel	3/*	22/5	32/17	20/24	13/50	10/5
Ct. Emp.	2/*	15/5	24/13	29/23	19/52	11/6

[306]Female and male survey respondents (F%/M%) reported this conduct to be engaged in by:

	Always	Often	Sometimes	Rarely	Never	No Answer
Judges	*/*	1/*	8/2	30/11	49/83	12/4
Counsel	1/-	5/1	18/6	30/16	33/73	13/5
Ct. Emp.	*/-	2/1	12/4	29/12	43/78	14/6

[307]Male and female survey respondents (F%/M%) reported this conduct to be engaged in by:

	Always	Often	Sometimes	Rarely	Never	No Answer
Judges	1/*	14/3	36/12	25/25	22/56	3/3
Counsel	3/*	27/6	40/20	15/29	11/41	4/4
Ct. Emp.	1/1	13/4	29/17	29/24	21/50	7/5

occurred. The responses to each of the remaining questions and categories follows a similar pattern.

Attorneys responding to the survey commented on both the existence of this kind of behavior toward women litigants and its consequences:

> ° On several occasions, a hostile reaction from . . . any female client to a remark, joke, advance, etc. has caused a judge, or, more often, counsel and court personnel, to treat our case lightly, or with less concern or courtesy than they extend to male . . . clients.
>
> Thirty-five year old NYC female

> ° [F]emale witnesses/litigants . . . subjected to either condescending or inappropriate or sexist comments have become embarrassed or flustered. . . . [T]his has the effect of making them appear less credible.
>
> Thirty-two year old urban female

> ° One opposing attorney flustered female client by making lewd remarks.
>
> (No age given) NYC male

> ° I have seen and heard reports of a clerk sexually harrassing pro se litigants: the clerk was in a position of taking orders to judges to be signed. I assisted in bringing the matter to the attention of the local administrative judge. Problem was temporarily abated, but clerk returned in other similar position where he would harrass female litigants and I continued to hear stories to this effect.[307]
>
> Thirty-six year old NYC male

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[307] One survey respondent noted:

> ° [C]ourtroom behavior often carries over into written opinions where, for no good reason, adult women are referred to by their given names,
>
> (Footnote continued)

(b) Race and Economic Status as Affecting Credibility

Attorneys attending a New York City regional meeting reported their concern that gender bias in the courts is particularly a problem for poor and minority-group women. Similarly, Marcia Sitkowitz, Esq., testifying for the Women's Committee of the New York Chapter of the National Lawyer's Guild, stated:

> Our members have observed that sexism is often compounded by racism and classism so that poor women and minority women, both litigants and attorneys, are subjected to discrimination even more frequently than white middle class women.[308]

These comments led the Task Force to inquire in its survey about the interrelationship of sex and race and sex and economic status. Attorneys responding to the Task Force's survey commented:

(Footnote 307 continued from previous page)
rather than by last names as stated in the litigation.

Sixty year old suburban female

Compare Hotel Prince George Affiliates v. Maroulis, 62 N.Y.2d 1005, 1008-1009, 479 N.Y.S.2d 489, 490-91 (1984) (female partners in action for accounting referred to in opinion as "Rose" and "Norah") with Nishman v. DeMarco, 62 N.Y.2d 926, 929, 479 N.Y.S.2d 185, 186 (1984) (male law partner in action for division of fees referred to in opinion as "defendant DeMarco").

[308]Testimony of Marcia Sitkowitz, Esq., NYC II Tr., pp. 6-7 (hereinafter cited as Sitkowitz Testimony). Ms. Sitkowitz also stated that "member-attorneys practicing in Family Court witness an enormous amount of paternalism expressed toward female litigants." Id. p. 6.

° As a legal services attorney from 1976 to 1985, I have had occasion to observe the conduct of the courts in relation to the problems of poor people. In general, I have found the courts to be unresponsive to the special problems of poor people and especially poor women. In both Family Court and Landlord-Tenant Court, where I have practiced on a fairly regular basis, most -- though decidedly not all -- judges have shown a lack of understanding of (1) the limited resources that poor families and especially single mothers have to bring up their children, provide necessities and pay their rent and other bills; (2) the fear and lack of understanding that poor people, particularly women, have about the way that the courts function and their rights.

Forty year old NYC female

° Most of my clients are Black and Hispanic welfare recipients, often single mothers. It is clear to me that judges and court personnel have a profound lack of respect for these clients. Whether this influences their decisions, I could not state for sure, but the lack of respect is manifested by rude comments, clear expressions of dislike, etc., both from the bench and from court personnel. [At] the very least, it convinces my clients that they cannot expect to find justice in such a courtroom.

Twenty-eight year old urban male

° The court system itself seems to be biased against low-income minorities. Specifically, the Family Courts and landlord-tenant courts are dirty, crowded, and staffed with personnel who do not respect the litigants. Here, especially, sexist comments are prevalent and the judges condone same.

Twenty-nine year old NYC female

° As a Legal Services attorney, all my clients are poor and almost all are women . . . In court, and by other attorneys, my clients are never afforded the same respect as a typical litigant is. When a client is on welfare, other attorneys seem to feel freer to attack a woman's personal choices (e.g., to have children, to have multiple sexual partners, to not be married) as a way to attack

credibility and denigrate the client. [emphasis in original][309]

Twenty-seven year old rural female

Non-English speaking people -- particularly those who have recently emigrated -- face the special problem of language barriers. One attorney responding to the survey commented:

> It is especially difficult for women with language problems and/or disadvantages based on economics to feel confident as witnesses and litigants. . . . Certainly, opposing counsel takes full advantage of the situation and often the judge does not place any limits on the scope of the situation.
>
> Twenty-nine year old rural female

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[309] One respondent disagreed, noting:

> ° I have represented many minority men and women who are economically disadvantaged. In my experience each has been treated fairly and without bias.
>
> Forty-four year old suburban male

2. ADEQUACY OF COURT FACILITIES

The adequacy of physical facilities affects the integrity of the judicial process. The courthouse's classical architecture, the raised bench, and the judicial garb are unmistakeable symbols intended to apprise all of the importance and seriousness of the courts' responsibility. Conversely, inadequate facilities communicate indifference to and denigrate the judicial process.

It is no secret that court facilities in New York[310] are in disrepair. The New York State Court Facilities Task Force determined in its July 1982 Report that "[f]ully 58.5% of the total space occupied by the courts throughout the State is in buildings found . . . to have major inadequacies. When analyzed by building units rather than square footage, 110 of the 299 buildings were found to have major inadequacies." Although major efforts have been undertaken to fund the rehabili-

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[310]New York's Court facilities are located in 299 buildings throughout the State and occupying a total amount of space equivalent to both towers of the World Trade Center (8,269,591 gross square feet).

tation of these facilities,[311] the Legislature and localities have failed to provide necessary funds.

Ill-maintained facilities negatively affect all citizens, regardless of gender. There are, however, features of inadequacy causing special hardship to women. They bear mentioning because they have the practical effect of limiting women's access to the courts.

Several witnesses noted that facilities often do not account for the needs of women who must bring their children with them to court. Carolyn Kubitshek, Esq. of New York City, an attorney with MFY Legal Services testifying for the Women's Committee of the New York City Chapter of the National Lawyers' Guild, reported:

> Housing court is filled primarily with poor women and their children. Some judges do not allow children in courtrooms at all, while others will order a mother and child to leave the courtroom if the child begins to fidget. Mothers are then put in the untenable position of leaving their children alone in waiting areas or losing their cases by default. Moreover, it can take an entire day for a woman to get an order to show cause signed, and since the court has no facilities for children, they too must wait the entire day.[312]

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[311] Chief Judge Sol Wachtler recently referred to the need to improve court facilities as one of the three "cornerstones" of future court reform, "Wachtler Urges Drive to Rebuild Decaying Courts," The New York Times, 10/23/85, p. 1, col. 1.

[312] Kubitshek Testimony supra note 92 at pp. 160-161 (hereinafter cited as Kubitshek Testimony).

Lois Davis, past president of the Rochester Judicial Process Committee, a court watching organization that observes the Monroe County and Rochester courts, testified:

> When mothers of small children must come to court as victims, witnesses, defendants, or family of defendants, there is no provision made by the court for child care, and some judges will not allow small children in the courtroom.[313]

Laura Blackburne, Esq., counsel to the New York NAACP, President of the Institute for Mediation and Conflict Resolution, and Professor of Law at St. John's University, observed that not only is there no appropriate waiting space for children, there is a dearth of facilities that even provide an area where a parent can change a child's diaper.[314]

These are not petty concerns. As with the disabled person whose very access to the courts may de-

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[313] Davis Testimony, supra note 147 at p. 222. The New York State Association of Women Judges also raised the issue of lack of child care facilities in courts, pointing out that mothers rightly fear that it is dangerous to leave children alone in the court corridors.

[314] Testimony of Laura Blackburne, Esq., New York City II Tr. at pp. 265-266 (hereinafter cited as Blackburne Testimony). This observation is confirmed by the Court Facilities Task Force finding that more than half of the buildings found to have inadequate public waiting space house Family Courts -- a court that experience has shown to be a "woman's" court.

pend on the presence of ramps, hand rails, or elevators, a mother unable to obtain child care may be effectively precluded from attending court proceedings central to her welfare.

SUMMARY OF FINDINGS

1. The Task Force defined credibility as whether a person is "believable, capable, convincing, someone to be taken seriously."

2. When judges and attorneys deny a person credibility based on gender, professionalism is breached and substantive rights can be undermined. The presence or absence of decorum and professionalism in the courtroom environment influences litigants' confidence in and respect for the courts.

3. Perhaps the most insidious manifestation of gender bias against women -- one that pervades every issue respecting the status of women litigants -- is the tendency of some judges and attorneys to accord less credibility to the claims of women because they are women.

4. Many women who seek relief in court for matters such as domestic violence, rape, child support, paternity, and divorce are subject to undue skepticism.

5. Lack of credibility is also manifest in the unacceptable frequency with which women litigants and witnesses are subjected to sexist remarks and conduct by judges, lawyers, and court personnel.

6. Poor and minority women appear to face even greater problems of credibility.

7. The adequacy of physical facilities affects the integrity of the judicial process. One aspect of this inadequacy -- the dearth of space available for children whom mothers must bring to court -- effectively precludes many women from appearing in court.

RECOMMENDATIONS

For Court Administration

1. Issue a declaration of policy condemning sexist conduct by judges, lawyers and court personnel directed against women litigants and announce that all appropriate administrative action will be taken to eradicate it.

2. Establish an internal unit and publicize a procedure for dealing with complaints.

3. Develop and conduct regular training for sitting and newly elected and appointed judges and court employees designed to make them aware of the subtle and overt manifestations of gender bias directed against women litigants and its due process consequences.

4. Review all forms, manuals, and pattern jury instructions to ensure that they employ gender neutral language.

5. When undertaking improvements to physical court facilities in the Unified Court System, take into account the special needs of parents by providing for a supervised area where children may wait with their parents and may stay while their parents attend proceedings.

For Judges

1. Monitor behavior in courtrooms and chambers and swiftly intervene to correct lawyers, witnesses, and court personnel who engage in gender-biased conduct.

2. Ensure that official court correspondence, decisions and oral communications employ gender neutral language and are no less formal when referring to women litigants than to men litigants.

For Bar Associations

Develop and conduct an informational campaign designed to make members aware of the incidence and consequences of gender-biased conduct toward women litigants on the part of lawyers, judges and court personnel.

For Law Schools

Include information and material in professional responsibility courses to make students aware of the subtle and overt manifestations of gender bias directed against women litigants and its due process consequences.

For Judicial Screening Committees

Make available to all members information concerning the incidence and consequences of gender-biased conduct towards women litigants.

II. STATUS OF WOMEN ATTORNEYS

In an adversarial system of justice, litigants must depend on their chosen advocates. It is essential that the training, experience, and performance of those advocates not be adversely affected by bias on the part of courtroom participants, whether they be judges, attorneys, or non-judicial court employees.

With women entering the legal profession and reaching professional maturity in greater numbers, they are increasingly represented in all facets of New York's legal system: government;[315] private practice; the judi-

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[315] New York State Attorney General Robert Abrams testified that, during his six years in office, 44 percent (207) of the lawyers hired by the New York State Department of Law were women, and that women now constitute 35 percent of the Assistant Attorneys General in the department. Abrams Testimony, supra note 252 at pp. 5-6. Kings County District Attorney Elizabeth Holtzman testified that when she came into office in January 1982, no women held executive level positions in that office. As of November 1984 five of eleven bureau chiefs (45 percent) and six of eighteen deputy chiefs (33.3 percent) were women. Holtzman Testimony, supra note 89 at p. 50. Justice Betty Ellerin, Deputy Chief Administrative Judge for the Courts Within the City of New York testified that approximately one-third of the Assistant District Attorneys in New York County are women, and that women comprised 50 percent of the 1983 entering class. Ellerin Testimony, supra note 78 at p. 281.

ciary;[316] and professional organizations.[317] Several survey respondents reported that, in recent years, there has been a significant improvement in the way women attorneys are treated in the courts, particularly by judges, and that some judges are exemplary in their equal treatment of male and female counsel. Professional ac-

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[316] See pages 242-247, infra.

[317] Henry Miller, Esq., President of the New York State Bar Association, testified to efforts made by that association to bring women into the association's activities and leadership. He noted that almost none of NYSBA's committees are all male, that 17 percent of committees and sections are chaired by women, that 10 percent of the house of delegates is women, and that the by-laws have been revised to employ gender neutral language. Mr. Miller also described NYSBA's decision to stop holding meetings at the all male Fort Orange Club in Albany and Century Club in New York and to adopt a policy barring the conduct of official business at any place which discriminates against women. Miller Testimony, supra, note 23 at pp. 54-57. In November 1980, Chief Judge Lawrence H. Cooke promulgated a similar rule prohibiting the transaction of any official business of the Unified Court System at facilities which discriminate on the basis of sex, race, color, ethnic origin, religion or creed. 22 NYCRR 20.21. Since Mr. Miller testified, the first woman president-designate of the NYS Bar Association, Maryann Freedman, Esq. of Buffalo, was elected.

Robert McKay, Esq., President of the Association of the Bar of the City of New York, testified that several members of the Association's executive committee are women, that at least twenty of the standing and special committees are chaired by women, and that the number of women active as committee members exceeds their proportion of the total membership of the Association. Testimony of Robert McKay, Esq., NYC I Tr. at p. 217 (hereinafter cited as McKay Testimony).

ceptance of women attorneys has not, however, been uniform. Irene A. Sullivan, President of the Women's Bar Association of the State of New York, testified:

> Too many women attorneys practicing law in our state describe their contact with the court system in negative terms. The comment of one lawyer that, "We are too often either treated disrespectfully or simply ignored," was echoed by many others with whom I spoke.[318]

The experiences of women Assistant Attorneys General led Robert Abrams, Attorney General of the State of New York, to conclude that "some judges and lawyers do not treat women attorneys with the same dignity, the same respect with which they treat male attorneys. Male attorneys do not have their gender or their lives brought gratuitously into the courtroom."[319] Elizabeth Holtzman, District Attorney of Kings County, reported that "discrimination against women exists in our Courts and manifests itself in many forms, [including] disrespectful and demeaning comments and behavior in the courtroom by male judges, court personnel and opposing counsel."[320]

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[318]Testimony of Irene Sullivan, Esq., New York City I Tr., at pp. 98-99 (hereinafter cited as Sullivan Testimony).

[319]Abrams Testimony, supra note 252 at p. 9.

[320]Holtzman Testimony, supra note 89 at p. 37.

The failure of acceptance -- the unwillingness of some judges, attorneys, and court employees to treat male and female attorneys with equal respect -- manifests itself in the courtroom environment and in professional opportunities. In the courtroom environment, women attorneys are frequently subject to demeaning or dismissive conduct. Some judges and attorneys -- consciously or unconsciously -- appear to view women attorneys not as equals but as subordinates.

Women attorneys have adapted to the challenges they face in our courts. When confronted by discriminatory treatment, they doggedly and successfully pursue their clients' best interests. Nevertheless, the added pressures engendered by a climate of disrespect or hostility distract the attention of the judge, jury, and attorneys from the merits of the particular proceeding and thereby reduce the quality of justice received by all. Until the "lingering residue of bias in the legal profession . . . . is fully rooted out, women will not be able to take their rightful place as full equals with their male counterparts in strengthening the administra-

tion of justice, whether in courts, in law offices, in government, or in legal education."[321]

Questions about women attorneys' professional opportunities in the courts focus on whether they receive their fair share of judgeships and judicial appointments to lucrative and challenging guardianships, felony cases or other desirable assigned-counsel positions. Leaders of the women's organized bar believe that their constituents are not treated with the same favor as are male attorneys in judicial assignments to fee-generation positions. Women's representation on the State's bench has significantly increased, but most women judges sit in New York City Courts or on courts of limited jurisidictions; few occupy the State's most powerful and prestigious judgeships.

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[321]McKay Testimony, supra note 317 at pp. 218-219.

A. PROFESSIONAL ACCEPTANCE

Professional acceptance of women attorneys -- the manner in which women attorneys are treated and perceived by judges, attorneys, and court personnel -- is critical to determining their status in New York's courts. The question whether judges, counsel, and court personnel professionally accept women attorneys is important from the standpoint of dignity and decency and because it has genuine consequences for the administration of justice and due process.

Irene Sullivan, Esq. testified that "[c]omments by judges and court officers directed not to the matter before the court but to . . . the sex of the attorney appearing in the courtroom, are distracting and frustrating and too often negatively impact on the ability of the attorney to perform at her highest level of competence and to provide to her clients the type of representation to which they are surely entitled."[322] It has been the experience of Barbara Billauer, President of the Metropolitan Women's Bar Association, that "the attitudes of

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[322]Sullivan Testimony, supra note 318 at p. 100.

judges and of court personnel . . . have an insidious effect on jurors."[323]

Attorneys responding to the survey expressed similar views:

> ° It is very difficult to trace the consequences of being addressed as "dearie" or by other inappropriate terms directly to the outcome of the case. It appears obvious that whatever the outcome of the case, such trivializing discriminatory remarks pose an additonal burden upon a woman attorney, requiring her to overcome needless obstacles and irritants not encountered by the men.
>
> Fifty year old NYC female

> ° On occasion, female . . . attorneys subjected to either condescending or inappropriate or sexist comments have become embarrassed or flustered. . . . [I]t impedes their ability to effectively communicate their position and, as corollary, represent their clients effectively.
>
> Thirty-two year old urban female

> ° I believe that the failure of some women attorneys to respond positively to some judges' advances have had a detrimental effect on the clients.
>
> Thirty-seven year old downstate male

> ° It undermined the attorney's confidence -- or client's confidence in the attorney or proceeding.
>
> Thirty-eight year old rural female

> ° Judge repeatedly refers to female attorneys as "dear" and "young lady" while males are referred

[323]Testimony of Barbara Billauer, New York City I Tr. at p. 259. At a New York City regional meeting, a young male lawyer, after listening to women lawyers discuss these kinds of behavior, defended such conduct saying: "It's a game. It's tactics to throw you off . . . . It's permissible for me to do that to prey on the jurors' sociological bias."

> to as "Mr." This is done in open court and obviously affects witness response to the attorney on cross examination as well as client confidence. I've heard male attorneys make such overtly sexist comments as, "Fix your slip, you're giving me a hard-on" and "You pain in the ass women should be home where you belong -- in bed." This was said in open court, again with no chastisement by the court and, at the least, affects the attitude of opposing counsel and the client's confidence.
>
> Twenty-nine year old urban female

> °[I]t is extremely tiresome and detracts from the time I would otherwise spend representing my clients to continually respond to all the sexist comments and inappropriate statements about the physical appearance of women (but not men) in the courthouse.
>
> Thirty-three year old New York City female

Also to be considered is the effect such conduct may have on litigants' overall view of the court system. Irene Sullivan, Esq. questioned:

> If highly-educated professionals perceive that the treatment they receive from judges, court personnel, and other members of the profession is too often inequitable and at its worst demeaning, how must litigants similarly situated by virtue of their gender perceive the process by which justice is administered in our courts?[324]

Notwithstanding these effects and that judges and attorneys who engage in sexist conduct are subject to professional discipline,[325] the Task Force found such

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[324]Sullivan Testimony, supra note 318 at pp. 96-97.

[325]The New York State Commission on Judicial Conduct recently disciplined two Supreme Court judges because of sexist comments. In 1983, Brooklyn Supreme Court

(Footnote continued)

professional conduct to occur with unacceptable frequency in New York's court system.

(Footnote 325 continued from previous page)
Justice Anthony Jordan was publicly censured for calling a woman attorney "little girl," and, at the close of argument, saying to her in a voice the Commission characterized as "insulting and demeaning," "I will tell you what, little girl, you lose." In the Matter of Jordan, New York Law Journal (March 2, 1983), at p. 12.

In 1985 Nassau County Supreme Court Justice William Dolittle was admonished after he, over a period of years, referred to female attorneys as "kitten," "bitch" and "Jewish-American Princess," commented on physical attributes such as a "well-endowed chest" and "great legs," and remarked that attractive women attorneys could have anything they asked for. In the Matter of Dolittle, New York Law Journal (July 24, 1985), at p. 1.

Justice Jordan, who was represented by a former judge, urged that calling a woman attorney "little girl" was no different than calling her "sweetheart" or "darling," thus implying that the latter are not inappropriate. Justice Dolittle explained that he made his remarks in an effort to promote camaraderie during case conferencing and thought of them as "affable pleasantries and compliments." Resp. Mem. to Judicial Conduct Commission at p. 5.

1. IMPROPER FORMS OF ADDRESS AND SEXIST REMARKS

With unacceptable frequency, judges, attorneys, and court personnel address female attorneys in a manner ranging from the falsely endearing to the unambiguously sexist and disrespectful. Irene A. Sullivan, Esq. testified that "[w]omen attorneys still complain about tasteless and unprofessional comments routinely made by certain judges to women attorneys appearing before them. These comments range from blatant sexual innuendo to more subtle and perhaps subconscious remarks."[326] Sexist comments leveled at women attorneys practicing in the Attorney General's office were cited by Robert Abrams. He said: "In addition to being addressed with such familiar and degrading terms, women attorneys continue to

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[326]Sullivan Testimony, supra note 318 at p. 99. Even when comments are unconscious, inadvertent or intended as a compliment, they can still be damaging. One survey respondent wrote:

> ° Although there are judges who have a real problem in this area, most of the problems are caused by those who do it inadvertently and/or non-maliciously, making it extremely difficult to confront this issue without aggravating the situation or making it into a trial issue that could affect clients' interests.
>
> Thirty-four year old NYC female

receive unsolicited comments on and questions about their personal lives."[327]

John D.H. Stackhouse, Judge of the Civil Court of the City of New York, stated that he has witnessed:

> innumerable incidents involving . . . gender bias, particularly directed against female attorneys. I have seen them humiliated, I have seen them disparaged -- sometimes to their face, sometimes behind their backs -- I have heard judges make offensive remarks to other Court personnel, to stenographers, to Court officers, [and to] male attorneys appearing before them concerning the physical attributes and sexual attributes of the female defense attorneys in the criminal term.[328]

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[327] Abrams Testimony, supra note 252 at p. 8. Although a substantial majority of women attorneys who testified at the public hearings and responded to the attorneys' survey noted the incidence of improper forms of address and sexist remarks, it was not universally cited. Marion Silber, Esq. testified that she could not recall one instance in which she had been subjected to the kind of humiliating experencies described by other witnesses. Silber Testimony, supra note 205, at pp. 94-97.

[328] Testimony of the Hon. John D.H. Stackhouse, New York City II Tr. at pp. 294-295 (hereinafter cited as Stackhouse Testimony). Judge Stackhouse added that, while "this bias is not as prevalent as it was" when he first started practicing law, "it is still a present reality." Id. Stanley L. Sklar, Acting Justice of the Supreme Court, characterized gender bias against women attorneys as "an important and pervasive problem both in terms of courtroom interaction and the substantive application of the law", and stated that he has witnessed "many male attorneys referring to female adversaries, witnesses, [and] court personnel in an unprofessional manner." Testimony of the Hon. Stanley Sklar, New York City I Tr. at pp. 16, 21 (hereinafter cited as Sklar Testimony).

District Attorney Elizabeth Holtzman offered several examples:

> ° On a very hot summer day, after a male defense counsel was given permission to remove his jacket, an assistant district attorney in my office asked the male judge in open court if she too could remove her jacket. The judge replied, "Don't remove your jacket unless you intend to remove all of your clothes!"
>
> ° During a plea conference, another male judge told a buxom Brooklyn prosecutor, "My clerk and I have a bet on whether you have to wear weights on your ankles to keep you from tipping over."
>
> ° A woman prosecutor in my office who disagreed strongly with a male judge over a legal point was told, "I will put you over my knee and spank you."[329]

Marcia Sitkowitz, Esq., testifying for the Women's Committee of the New York Chapter of the National Lawyers' Guild, offered similar examples:

> Member attorneys have witnessed numerous comments from judges and other court personnel regarding the physical appearance of a woman attorney. Examples of such remarks include comments such as ..." It's nice finally to have someone pretty around here" or "she can go first. She has nicer legs than you do."

She cited a judge who said to two attorneys appearing before him, "'Why don't we dispense with these motions and you just take her out to lunch? She's so pretty.'"[330]

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[329]Holtzman Testimony, supra note 89 at pp. 36-37.

[330]Sitkowitz Testimony, supra note 308 at p. 5.

Attorneys statewide were asked a series of survey questions as to the perceived frequency of inappropriate and demeaning conduct most commonly cited at the public hearings and regional attorneys meetings:

(1) Whether women are asked if they are attorneys when men are not asked.[331]

(2) Whether judges, counsel and court employees address women attorneys by first names or terms of endearment when men attorneys are addressed by surnames or titles;[332]

(3) Whether judges, counsel and court employees make inappropriate comments about women attorneys' personal appearance when no such comments are made about men;[333]

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[331] Female and male survey respondents (F%/M%) reported this conduct to be engaged in:

Always	Often	Sometimes	Rarely	Never	No Answer
4/1	48/7	31/22	10/32	6/37	2/2

[332] Female and male survey respondents (F%/M%) reported this conduct to be engaged in by:

	Always	Often	Sometimes	Rarely	Never	No Answer
Judges	*/-	15/3	34/10	30/30	18/55	2/2
Counsel	3/*	39/6	35/22	13/30	6/37	4/4
Ct. Emp.	3/*	30/4	28/13	24/29	11/49	4/5

[333] Female and male survey respondents (F%/M%) reported this conduct to be engaged in by:

	Always	Often	Sometimes	Rarely	Never	No Answer
Judges	1/*	14/2	26/10	27/22	26/64	4/2
Counsel	3/*	26/5	33/14	18/25	15/52	5/4
Ct. Emp.	2/*	17/3	24/12	27/23	24/56	6/5

(4) Whether judges, counsel and court employees subject women attorneys to verbal or physical sexual advances.[334]

As with the treatment of women litigants, men and women have very different perceptions of the frequency of inappropriate conduct directed against women attorneys.[335] Whereas 79 percent of women said that women attorneys are "sometimes" or "often" asked if they are lawyers when men are not, (48 percent reporting "often"), 69 percent of men reported that this kind of questioning "rarely" or "never" occurs. The majority of men (55%) compared with 18 percent of women reported that judges "never" address women attorneys by first names or terms of endearment when men are addressed by surnames or titles. Among women attorneys, 49 percent said it happened "sometimes" or "often."[336] Sixty-four percent

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[334]Female and male survey respondents (F%/M%) reported this conduct to be engaged in by:

	Always	Often	Sometimes	Rarely	Never	No Answer
Judges	*/-	3/*	13/3	31/10	47/82	6/4
Counsel	2/-	9/1	27/6	27/17	29/72	6/5
Ct. Emp.	1/-	3/1	15/3	30/12	44/78	8/6

[335]See pp. 192-194, supra.

[336]Even an issue that women see as an infrequent problem, men see as "never" happening. Substantially, more men (82%) than women (47%) reported that sexual advances by judges never occurred. An additional 31 percent of women compared with 10 percent of men said such behavior "rarely" occurred.

(64%) of men compared with 26 percent of women responded that judges "never" make inappropriate comments about women attorneys' personal appearance. Forty percent (40%) of women reported this to occur "sometimes" or "often." Women attorneys responding to the survey provided numerous examples of inappropriate behaviors:

> ° It is the judges' and court personnel's treatment of female attorneys both in chambers and in the courtroom that really grates. I am called by my first name or 'dear' when opposing counsel is called 'Mr. X' or 'Sir'--my clients notice. [emphasis in original.]
>
> Thirty-five year old urban female

> ° Upon learning that I was a grandmother [the judge] proceeded to call me 'grandma' in front of court personnel and my opponent.
>
> Forty-nine year old NYC female

> ° I thought the responses of my male colleagues . . . to your survey was interesting. Many 'filed' (i.e., they threw it away) and considered it a joke without value. I heard these comments made after a chambers conference wherein a female defendant was joked about in a sexual context, a female attorney was described by her manner of dress and physical attributes.
>
> Thirty-year old rural female

> ° On one occasion when I was personally going through a divorce, a Supreme Court Justice made inappropriate advances to me in chambers during a pre-trial conference while the other attorney spoke with her client.
>
> Thirty-two year old rural female

Other survey respondents commented:

> ° As a woman making frequent court appearances, I am disturbed by the number of attorneys, court personnel, and judges who greet me by asking if I am an

attorney -- it happens four out of five times!! My age (30) may be a factor, but it still kills me!
Thirty year old suburban female[337]

° Several judges have inquired whether I am an attorney but I have not observed the same question being asked of male attorneys approaching the bench.
Fifty-seven year old suburban female

° I find it disconcerting and a distraction when I have prepared as a professional to begin a pre-trial motion, etc., and a reference, however well intentioned, is made about my looks. Often it's a remark between the male judge and my male adversary.
Forty-four year old urban female

° I have personally been invited to sit on the lap of a landlord/tenant judge while arguing a motion before the judge.
Thirty-five year old female (no region given)

° Women trial lawyers are schooled by experience to overlook the demeaning remarks from some trial judges. It is an insult they become accustomed to accepting so that they may try the true issue of the case. [emphasis in original.]
Sixty year old suburban female

Male counsel were repeatedly cited by female survey respondents and, to some extent, by male survey

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[337]Some survey respondents suggested that this questioning of women's attorney status is strictly a function of the relative youth of women lawyers. Although younger lawyers did report more of this questioning, it was clearly an issue for older women as well. Among women survey respondents, two-thirds of those under thirty-five reported this kind of questioning as happening "sometimes" or "often", more than half of those between thirty-five and fifty reported it happening "sometimes" or "often", and almost a third of those over fifty-one said it occurs "sometimes" or "often."

respondents, as more frequently displaying objectionable behavior than either judges or court personnel.

When asked whether judges, counsel and court personnel make sexist remarks and jokes that demean women, 67 percent of women attorneys and 26 percent of men attorneys reported such conduct as occurring "often" or "sometimes" on the part of counsel compared to 50 percent of women and 15 percent of men who reported it occurring "often" or sometimes" on the part of judges. Forty-one percent (41%) of women and 21 percent of men reported that court personnel "often" or "sometimes" engage in this conduct.[338]

Attorneys responding to the survey commented:

> ° While I have rarely had inappropriate comments made to me by judges and court personnel, sexual comments, advances, and innuendo are freqently "dished out" by male counsel. It is very disappointing and disheartening to be treated with disrespect even if I conduct myself in a professional manner and I am dressed in a conservative, appropriate manner. (Example, "I don't know if you're smart but you sure have great legs.") You do not have to be 'sensitive' to develop this feeling -- it is just a "fact of life" in practice.
>
> Thirty year old suburban female

> ° I have a young female associate who is often accorded less respect from counsel and the court than she would have received if she was a man. Male attorneys, quite often, must assert themselves when opposing counsel is a female.
>
> Fifty-eight year old NYC male

[338] See note 307, supra and accompanying text.

° The problems arise when I deal with middle-aged male attorneys; some of them cannot get used to, indeed, cannot stomach, the idea of female attorneys. They must be educated and they must accept the fact that female attorneys are as dedicated and hard-working as male attorneys.

Thirty-one year old NYC female

° I have found that male attorneys (my adversaries) (young attorneys) are the ones who question whether I'm an attorney, make comments about my appearance and some have made verbal advances in the courtroom when the judges were not present which I felt were inappropriate, unprofessional and embarrassing.

Twenty-eight year old suburban female

° It appears to me that the major problem of sexism comes from other attorneys who, under the guise of strong advocacy, attack female counsel in ways different than male opponents. The judges seem to take their cue from counsel as to what constitutes acceptable behavior in this regard. Thus, my opinion is that the major problem is of attorneys and that the solution must be directed at attorneys.

Thirty-seven year old urban male

It is critical for judges not only to refrain from biased behavior themselves but to intervene when it occurs. Survey respondents were asked whether they had ever seen a judge intervene to correct such behavior on the part of lawyers and court personnel. They reported, however, that few judges take firm steps to eliminate such behavior.[339] Those who had witnessed such interventions described their salutary effects.

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[339] Female and male survey respondents (F%/M%) reported that judges or counsel intervened to correct any of the situations described in footnotes 304-307 and 331-334:

(Footnote continued)

° Judge admonished opposing counsel for referring to my co-counsel as a 'girl attorney.' The bench instructed opposing counsel (male) never to repeat such a phrase in court, chambers, or elsewhere and informed counsel that his conduct was highly unprofessional.

Thirty year old NYC male

° On one occasion I was interrupted and referred to as 'honey' by a male opposing attorney during the argument of a motion in chambers. The judge (male) berated the attorney and demanded that he show respect in his chambers.

Twenty-eight year old urban female

° During one session of a trial of a matrimonial action two court officers made remarks regarding a female attorney and her female client. At recess the presiding justice called the officers in chambers and instructed that if such conduct continued he would file complaints with the appropriate authority requesting disciplinary action.

Twenty-eight year old NYC male

° Judge intervened to correct court personnel's reference to female attorney as "our mascot."

Thirty-nine year old urban male

° I believe that when women attorneys are treated as less serious professionals than men, such as when addressed by first names or terms of endearment, that their position in litigated controversies is seen as less serious or less important as well. Yes, women judges have intervened to correct such situations. [emphasis in original.]

Thirty-two year old NYC female

° Most instances of sexism that I have witnessed in the courtroom have been redressed by female judges.

Thirty-three year old NYC male

(Footnote 339 continued from previous page)

Yes	No	No Answer
12/7	67/61	20/32

One survey respondent noted an instance in which a judge had been immediately responsive to her request for intervention:

> ° One attorney persisted in calling me "honey," "baby" and "sweetheart" in a pre-trial in chambers. The judge granted a verbal order to terminate his use of those words.
>
> Thirty-eight year old rural female

Another respondent, however, noted that problems can arise when the judge must be asked to intervene rather than doing it sua sponte:

> ° When sexist remarks have been objected to by women, judges have 'tapped the hands' of the offenders verbally, but manage to convey the impression that the only reason is because the woman appears to be irritated by the remarks, thereby placing the burden of the court's intervention on the woman as to both cause and effect. [emphasis in original.]
>
> Forty-four year old NYC female

At a meeting with the New York State Association of Women Judges, members reported incidents in which male counsel interrupted women lawyers, attempted to make their arguments for them, commented on their appearance during argument, and made sexist jokes. They also described similar incidents related to them by attorneys and court personnel about male judges who not only do not curb this kind of behaviour but engage in it themselves. The women judges expressed concern that some of their male colleagues are insufficiently sensitive to the due process aspects of such biased behavior. They emphasized

the difficulty a female attorney faces when she must decide whether making an issue of such behaviour on the part of a judge or adversary will prejudice her client's case.[340]

B. DISMISSIVE AND INTOLERANT CONDUCT, AND THEIR EFFECT ON CREDIBILITY.

The Task Force found that some judges routinely treat women attorneys dismissively, and with less tolerance than their male counterparts.[341]

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[340] These judges also noted that disrespectful conduct by counsel extends to female judges. For example, a Civil Court Judge described an incident in which she declined to accept a stipulation between an attorney and a pro se adversary on the ground it was onerous. The attorney responded: "Listen, honey, this is what we decided."

[341] Some female survey respondents, concurring with the views of several male survey respondents, said they felt they had been treated with particular courtesy and patience because they are women. Even what appears to be extra kindness may, however, be misguided chivalry that ultimately works against the attorney's interests. One survey respondent, a law clerk in an appellate court, wrote:

> " Treating female attorneys [paternalistically] appeared to me to have a negative effect on their effectiveness in that the attorney is not pressed to focus on difficulties in the argument or given an opportunity to identify the judge's concerns with their positions. It also gives the appearance that the panel is not giving complete credence or serious consideration to that attorney's comments.
>
> Thirty year old NYC male

> Women lawyers, especially those newly admitted to practice . . . report that there is a difference in the respect afforded them in the courtroom in comparison with their male counterparts. In the view of many of these women, judges too often adopt a patronizing or tutorial tone when dealing with women attorneys that they do not use with male attorneys of comparable experience and ability. Along these lines, women attorneys note in general that judges seem far more willing to accept non-conforming behavior from male attorneys than from female attorneys. Aggressive behavior is rewarded or tolerated from men, and viewed as out of place or even unacceptable from women.[342]

Karen Burstein, Esq., President of the New York Civil Service Commission and the Co-Chair of the Governor's Commission on Domestic Violence, described this phenomenon:

> Some of the things that I experienced remain a reality for women in the courts -- the dismissive language by which women attorneys are addressed, the inability to include them in conferences easily, the discomfort about being honest in regard to their performance in the ways that judges will take a young male attorney under their wing.[343]

Eileen Millet, Member of the Board of the Association of Black Women Attorneys, also commented on performance appraisal:

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[342]Sullivan Testimony, supra note 318 at pp. 100-101. Commenting on how male counsel respond to women attorneys' aggressiveness, a survey respondent wrote: "Only by being terribly aggressive and by winning can women earn the respect of males who then, of course, complain about their lack of femininity and good grace."

[343]Testimony of Karen Burstein, Esq., Albany Tr. at p. 85.

> Lack of feedback is devastating . . . . How many times have I heard judges ask a male practitioner to come into his chambers and later be informed that he was chewed out for some gross inadequacy? How many fewer occasions, if at all, did I witness the same approach with a woman?[344]

Male and female survey respondents reported similar perceptions of dismissive conduct, comparative intolerance and exclusion from the "Old Boys Network", and noted the critical bearing that these attitudes have on women attorneys' credibility:

> ° It is difficult to determine if the public jokes and comments made by judges affect their fairness at decision making time. However, it is very clear to me that judges do not give female attorneys the same courtesy, respect, and credibility they do male attorneys. Since credibility is vital in dealing with judges, women are frequently at a general disadvantage.
>
> Thirty year old urban male

> ° It is plainly obvious to any frequent observer that women [attorneys] are the object of extreme discrimination in the courtroom . . . . In chambers it seems to be worse as judges rarely seem to give female attorneys the time of day much less the opportunity to adequately respond to questions.
>
> Thirty year old NYC male

> ° Male judges especially seem to listen less to us than to my male counterparts. I am often treated as

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[344]Testimony of Eileen Millet, Esq., Albany Tr. at p. 77 (hereinafter cited as Millet Testimony). Ms. Millet observed that "[i]n what is still primarily a male domain, [male judges and attorneys] are looking for someone that fits, someone who gets along, someone one trusts. This is very subtle territory. How does a group formerly exclusively male feel that a woman is going to fit? That is no easy task." Id. at p. 76.

though I were a 'little girl' by both judges and fellow attorneys. I feel that they don't listen to my positions and that they do not see me as a competent credible attorney. There is also an atmosphere of an 'old boys club' outside the courtroom. Women are clearly excluded from this interaction most of the time. When I have been included, it's to receive some comment like 'who's the hiring partner where you work, Billy Rose? Each one of you is prettier than the next.' As a competent attorney, I resent this behaviour. It is demeaning to me, to women, and to the profession.

Thirty year old NYC female

° [S]ometimes both male and female judges and male attorneys (no age difference with judges, but especially older male attorneys) have expressed greater annoyance and less tolerance if a female attorney makes a poor argument or presentation than if a male attorney made the same argument or presentation.

Thirty-eight year old NYC male

° In matrimonial law, women attorneys are frequently viewed by judges as being over-emotional, too-involved, non-objective advocates -- hysterical! With rare exceptions, they tend to have 'less weight' with the judges. I have heard judges make 'off the record' remarks in chambers to male attorneys about certain women attorneys as being 'a bitch' and similar remarks.

Thirty-eight year old rural male

° I have personally either been ignored or made to feel insignificant during bench conferences while my adversary and the judge 'horsed around.' Of course, a judge's failure to listen to or credit my position adversely affected my effectiveness.

Thirty-seven year old suburban female

° It's very frustrating to arrive in court well-prepared, and to do everything possible to represent a client in a dignified, professional and ethical manner, only to find that you're dealing with men who resent your presence, and disregard or discount what you have to say.

Thirty-three year old NYC female

Similarly, Marcia Sitkowitz, Esq. testified:

> Women attorneys are frequently assumed to be litigants and told to wait outside of the courtroom or warned not to approach the bar. This attitude occurs with greater frequency towards minority women. For example, a black woman attorney in a business suit carrying a briefcase was told upon trying to enter a Family Court courtroom, "Only the attorneys, please. Mothers wait outside."
>
> [W]e have all endured the attitude by judges and/or our adversaries, of assumed incompetence. The general belief that we cannot know what we are doing or talking about.[345] We have also seen that our Black and Latina sisters are presumed even more frequently to be incompetent.[346]

Eileen Millet, Esq. commented on the combination of sex and race bias in the problems encountered by Black women attorneys:

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[345]Professor Judy Long, Chairperson of the Department of Sociology at Syracuse University presented extensive testimony on this point.

> One of the characteristics of sex stereotyping in our society that has been well-documented is the equation of competence with masculinity. Activities that are considered masculine are more highly evaluated than activities considered feminine. People who succeed at masculine tasks are attributed more ability and given higher rewards than people who succeed in feminine tasks.
>
> I would like you to think about the implications of the enormous threat posed by seeing women do effectively activities which have been associated not just with masculinity in the abstract, but with particular men's sense of competence and masculinity, which are joined in the culture.

Testimony of Professor Judy Long, Rochester Tr. at pp. 230-231 (hereinafter cited as Long Testimony).

[346]Sitkowitz Testimony, supra note 308 at pp. 6-7.

> If it is true that a woman may feel alien in the courtroom surrounded by male court officers, male court clerks, and an opponent who's more often than not male and, of course, a male judge, she's even more out of place if she happens to be Black. The indignity of being referred to as Dear or Dearie or being called "this girl here," when given a particular tone or inflection, gives cause to wonder as to whether or not one is being addressed in this manner because one is a woman or because one is Black.[347]

Irene Sullivan's statement that "Aggressive behavior is rewarded or tolerated from men, and viewed as out of place or even unacceptable from women" was the subject of many comments, particularly from survey respondents. Professor Judy Long testified that "there is . . . substantial research that shows that females who violate sex role expectations are . . . negatively judged."[348] Female survey respondents noted the consequences of this attitude, particularly with respect to cross-examination.

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[347]Millet Testimony, supra note 344 at p. 75. One survey respondent commented:

> ° When the judge or defense counsel begins acting condescendingly towards me as a Black woman, I believe it affects the case. If a jury sees that the judge is treating me differently, they recognize it and have less confidence in me.
> Twenty-seven year old NYC female

[348]Long Testimony, supra note 345 at pp. 231-232.

° In Suffolk County . . . [i]f a male attorney objects repeatedly during trial he is 'going all out for his client' and is 'a real fighter.' If a female attorney objects similarly, she is a 'bitch' or a 'tough broad.' Do you know one attorney actually came over and tried to kiss me to seal his victory after a hard fought trial?

Thirty-seven year old suburban female

° Judges, counsel and court personnel will act more favorable towards women who fit their perceptions of a 'good' woman, good meaning one who acts 'appropriately,' e.g., feminine, helpless, who defer to the 'better judgement' of men.

Thirty-three year old rural female

° Problems arise when opposing counsel or judge truly just hate women and any softness or emotion is not tolerated. Men can yell, scream, be abrupt, impolite--women cannot in any way exhibit anger--it is strongly remembered and taken out in a future case against her.

Forty-three year old NYC female

° If an attorney represents her clients aggressively, she develops a reputation as a 'bitch' where aggression on the part of male attorneys is admired. I have often had to play the game of not being offended by comments on my attire and appearance or by being called by my first name or a term of endearment to avoid antagonizing judges and court personnel, placing my client's interests above my own instincts and sensibilities.

Thirty-two year old urban female

° I believe that judges permit a greater latitude of vigorous cross examination of male witnesses by male lawyers. Judges often seem to resent women lawyers who aggressively cross examine or exhibit any sarcastic tones toward male witnesses, while permitting the men to employ the same tactics as standard operating procedure. Some years ago, a judge admonished me in front of a jury in the middle of a cross examination for overstepping what he thought were the proper bounds of a woman lawyer. He said, 'Young lady, you stop that. Would you ever speak to your husband that way?' Of course this same judge would never require the men to address

every female witness as though they were addressing loving wives: this is a perfect illustration of some judges' mentality that all women, even women lawyers, must at all times be submissive to all men, even if that man is a hostile witness.

Fifty year old NYC female

SUMMARY OF FINDINGS

1. The question whether judges, counsel, and court personnel professionally accept women attorneys is important from the standpoint of dignity and decency and because it has genuine consequences for due process and the administration of justice.

2. With women entering the legal profession and reaching professional maturity in greater numbers, they are increasingly represented in all facets of New York's legal system: government; private practice; the judiciary; and professional organizations.

3. Although in recent years there has been a significant improvement in the way women are treated in the courts, particularly by judges -- with some judges being exemplary in their equal treatment of men and women counsel -- professional acceptance of women attorneys has not been uniform. There exists a widespread perception that some judges, men attorneys and court personnel do not treat women attorneys with the same dignity and respect as men attorneys.

4. Among the most commonly-cited types of inappropriate and demeaning conduct are:

   a. Being addressed in familiar terms.

   b. Being subject to comments about personal appearance.

   c. Being subject to remarks and conduct that degrade women and verbal or physical sexual advances.

5. Men attorneys are viewed as engaging in this conduct more frequently than judges and court personnel. Many judges fail to intervene and remedy such conduct.

6. A more subtle obstacle to professional acceptance is women attorneys' being treated dismissively and with

less tolerance than men attorneys. Examples of this include:

a. Aggressive behavior is rewarded or tolerated from men attorneys but viewed as out of place or even unacceptable from women attorneys.

b. Women attorneys do not receive professional performance appraisal from judges as often or as in depth as men attorneys.

7. Although women attorneys who confront gender biased conduct in the courts doggedly and successfully pursue their clients' best interests, the attention of judge, jury, and attorneys is distracted from the merits of the case, thereby reducing the quality of justice.

RECOMMENDATIONS

For Court Administration

1. Issue a declaration of policy condemning sexist conduct by judges, lawyers and court personnel directed against women attorneys and announce that all appropriate administrative action will be taken to eradicate it.

2. Develop and conduct regular training for sitting and newly elected and appointed judges and court employees designed to make them aware of the subtle and overt manifestations of gender bias directed against women attorneys and its due process consequences.

3. Direct that all forms and correspondence employ gender neutral language.

For Judges

1. Monitor behavior in courtrooms and chambers and swiftly intervene to correct lawyers, witnesses and court personnel who engage in gender-biased conduct toward women attorneys.

2. Ensure that official court correspondence, decisions and oral communications employ gender neutral language and are no less formal when referring to women attorneys than to men attorneys.

For Bar Associations

1. Develop and conduct an informational campaign designed to make members aware of the incidence and consequences of gender-biased conduct toward women attorneys on the part of lawyers, judges and court personnel.

2. Ensure that forms and correspondence employ gender-neutral language.

For Judicial Screening Committees

Make available to all members information concerning the incidence and consequences of gender-biased conduct toward women attorneys.

B. PROFESSIONAL OPPORTUNITY

The Task Force's examination of women's professional opportunities in the courts focused on two areas: fee-generating appointments and election or appointment to judicial office. The question whether women are receiving their fair share of these opportunities is a complicated one. Its resolution requires consideration of:

(1) the relative number of men and women attorneys who seek and are qualified to assume these opportunities;

(2) the number of opportunities available; and

(3) the relative number of opportunities received by men and women.

Limitations of time and resources precluded a full-scale examination of this type. Nevertheless, the Task Force acquired sufficient information to gain a better understanding of issues and perceptions respecting women attorneys' professional opportunities in the courts.

1. FEE-GENERATING APPOINTMENTS

Public hearing witnesses and survey respondents asserted that women attorneys are disproportionately denied the most desirable and lucrative assigned-counsel positions, the appointments for which are vested in the discretion of individual judges. Irene Sullivan, Esq. reported that:

> An almost overwhelming impression exists that women attorneys are not favored with the same number or the same quality of assignments as their male counterparts. In some locations, women attorneys have been regularly assigned to women clients and male attorneys to male clients. This impression extends to appointments to receiverships, and foreclosures, as guardians ad litem, and as assigned counsel in criminal cases. The perception is that the most complex, interesting, and lucrative cases are assigned to male attorneys, and the leftover cases go to women.[349]

Kings County District Attorney Elizabeth Holtzman also cited fee-generating appointments as a problem area, noting that "the Kings County list of lawyers eligible for court appointments in Family, Surrogate and Criminal Court contains only 44 women out of a total of 515 people (8.5 percent)."[350]

Bonnie Gail Levy, a criminal defense attorney and President of the Central New York Women's Bar Association, concurred with this view. She found that, with respect to assignment of criminal cases, "the first type of clients [women attorneys] generally obtain are female."[351] She added that, whereas women attorneys are generally assigned petite larceny cases for which the fees are small, they are rarely, if ever, assigned homi-

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[349]Sullivan testimony, supra note 318 at p. 102.

[350]Holtzman Testimony, supra note 89 at p. 44.

[351]Testimony of Bonnie Gail Levy, Rochester Tr. at p. 71.

cide or violent felony cases, which are more challenging and carry a higher rate of remuneration.[352]

At regional meetings, a Rochester woman attorney stated that although women are one of every six Rochester attorneys, women are appointed to only one of every twenty foreclosures. Women attorneys attending the Albany regional meeting said that referee and conservator appointments go to male attorneys in both large and small firms, and that women receive fewer than their share of guardian appointments, even if they are active in the controlling political party.

Survey respondents reported similar concerns:

> ° Women attorneys as a group, and I as an individual, do not get a fair share of court referrals and they get few to none of the lucrative court appointments.
>
> Fifty-seven year old suburban female

> ° Big discrimination here . . . no receiverships -- no opportunity for business experience.
>
> Thirty-seven year old urban female

> ° Of particular concern is the failure of judges to assign women felony cases, particularly cases likely to go to trial. This impairs women's ability to gain trial skills and to qualify for homicide assignments.
>
> Twenty-six year old urban female

A survey respondent who is currently an assistant district attorney described the importance of that experi-

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[352] Id. at pp. 72-75.

ence in getting ahead in her county and the "extreme" difficulty women have had in obtaining positions in the District Attorney's office until the last three or four years. She wrote:

> It has come to my attention, as an Assistant District Attorney and as a friend to many of the former prosecutors who were involved in hiring decisions, [that decisions were made] not to hire women because of a belief that they "would not get along with the cops" or they would spoil the "camaraderie" of the all male office. As a result, women in private practice today have not made the contacts with judges and other attorneys which is such a great benefit of a position in this office. This is particularly reflected in the assignments given out by the local, county and Supreme Court judges. I have also noted that there are few, if any, women on the 18-B criminal panel. . . . [I]n the three years since I have been an Assistant District Attorney in this county . . . I have never seen or heard of a woman defense attorney trying a felony case. [emphasis in original.]
>
> Thirty-one year old urban female

Attorneys were asked in the survey questionnaire a series of questions designed to elicit their perceptions about the quality and quantity of fee-generating positions women attorneys receive:

> (1) whether women attorneys on assigned-counsel panels are assigned to represent women and men attorneys are assigned to represent men;[353]

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[353] Female and male attorneys (F%/M%) reported that this occurred:

Always	Often	Sometimes	Rarely	Never
1/1	21/8	33/28	28/32	17/31

(2) whether women and men attorneys who are eligible for assigned-counsel positions and have made these interests known have been appointed to a fee generating position within the past two years;[354]

(3) whether women attorneys on assigned-counsel panels receive their proportional share of violent felony cases;[355]

(4) whether women attorneys on assigned-counsel panels receive their proportional share of rape cases;[356] and

(5) whether women attorneys are awarded lower counsel fees than men attorneys for similar work.[357]

Although all attorneys were asked to answer these questions, varying numbers responded to each question. Of the 214 female attorneys and 588 male attorneys

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[354]Female and male attorneys (F%/M%) responded:

Yes	No
70/50	30/50

[355]Female and male attorneys (F%/M%) responded:

Yes	No
43/76	57/24

[356]Female and male attorneys (F%/M%) responded:

Yes	No
41/80	59/20

[357]Female and male attorneys (F%/M%) reported that this occurred:

Always	Often	Sometimes	Rarely	Never
4/*	23/3	36/13	21/32	17/51

who indicated they are eligible for fee-generating positions and have made their interest known, 70 percent of females compared to 50 percent of males responded that they had been appointed to such a position within the past two years. Significantly more women (59%) than men (16%) reported that female attorneys are "sometimes" or "often" awarded lower counsel fees than men attorneys for similar work. Moreover, 57 percent of responding women attorneys report that women attorneys do not receive their proportional share of violent felony cases and 59 percent reported that women attorneys did not receive their proportional share of rape cases.

The Task Force attempted to learn about the number and quality of fee-generating positions women attorneys received from the Surrogate's Court. Many Surrogates from upstate counties thoughtfully and thoroughly completed the Task Force's questionnaire. Insufficient information statewide was received, however, to undertake any useful analysis. The Task Force did not receive the level of cooperation from Surrogates in urban counties it had hoped for. Some indicated that they were too busy to complete the questionnaire; most did not respond at all, notwithstanding two follow-up calls.

2. ACHIEVING JUDICIAL OFFICE

A court system can be fairly judged by the degree to which opportunity is accorded to all qualified attorneys -- regardless of gender -- who seek judicial office. Determining conclusively whether women attorneys are achieving judicial office in numbers appropriate to their percentage of the total, qualified attorney population in New York required an empirical analysis that the Task Force was not equipped to undertake. The difficulty is compounded by the byzantine structure of New York's court system and myriad mechanisms (appointive and elective) by which attorneys are elevated to the bench.[358]

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[358] In New York, judges from the courts of record are selected by either an elective or an appointive process, depending on the court and the nature of the vacancy. Judges from the State's highest court, the Court of Appeals, are appointed by the Governor, from a list of names submitted by The New York State Commission on Judicial Nomination, and are subject to confirmation by the Senate.

Other appointed judicial positions are (1) judgeships in the Court of Claims (the court which adjudicates claims against the State), who are appointed by the Governor from names submitted by the State Judicial Screening Committee, subject to confirmation by the Senate; (2) judgeships in the New York City Family Court and Criminal Court, who are appointed by the Mayor from a list of three names submitted by the Mayor's Committee on the Judiciary; and (3) judgeships in the New York City Housing Court, who are appointed by Administrative Judges of the Civil Court.

(Footnote continued)

The Fund for Modern Courts, Inc., in its recently released study entitled "The Success of Women and Minorities in Achieving Judicial Office: The Selection Process," includes valuable statistics for courts throughout the United States.[359] The figures it compiled for New York's courts, as well as information the Task Force received from the Office of Court Administration indicated that women are underrepresented in New York's highest judicial posts. Only one of the seven Judges of the Court of Appeals is female -- the first in the high

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(Footnote 358 continued from previous page)

Judgeships in the State Supreme Court (the trial court of general jurisdiction), the County Court, the Surrogate's Court, the New York City Civil Court, the Family Court outside of New York City, the District Court, and the City Courts outside of New York City, are elected in partisan primaries and general elections. Intra-term vacancies for all of these courts are filled by executive appointment.

Judges of the Appellate Division of the Supreme Court -- the State's intermediate appellate court -- are designated by the Governor from among the elected Justices of the Supreme Court.

[359]The Fund concluded from its study: "If the courts of the United States are to reflect the population the serve, their women and minority group members must come to the bench in increasing numbers. And the evidence of this study is clear -- women and minorities have a better chance of attaining judgeships in State courts through an appointive process, Executive Appointment or Merit Selection than through any elective process, either partisan or non-partisan."

court's history. None of the four Presiding Justices of the Appellate Divisions is female -- no women have ever been appointed to that position -- and no women currently hold one of the top four positions in the Office of Court Administration.

Women's representation in all of New York's principal courts (excluding Town and Village Justice Courts) as of the Fall of 1985 is set forth in the following table.

Court	Total Judges	Total Women	% Women
Court of Appeals	7	1	14.3
Appellate Division	44	6	13.6
Supreme Court	314	17	5.4
Court of Claims	30	2	6.7
County Level[360]	216	16	7.4
NYC Family	39	14	35.9
NYC Criminal	102	10	9.8
NYC Civil	117	22	18.8
NYC Housing	30	6	20.0
District	49	1	2.0
City-upstate	143	8	5.6
	1,097	107	9.7

Although women now constitute 9.7 percent of judges sitting in New York State's courts of record, 49.1 percent of these women sit in New York City's Family, Criminal, Civil, and Housing Courts. Women hold only 54

[360]These courts include the County Court, the Surrogate's Court, and the Family Court outside of New York City.

of the remaining 809 judgeships (6.7 percent). The New York Association of Women Judges informed the Task Force that 43 of New York's 62 counties have no women sitting in their courts of record.

When representatives of the Judiciary or the Office of Court Administration speak to the press or directly to the public, the "face" of the court system is overwhelmingly male. When the leadership of a system is unbalanced in this way, litigants and attorneys perceive it to be unrepresentative of the community. Cultural stereotypes that assume men are best qualified to assume leadership positions are reinforced.

At regional meetings, several women judges and attorneys commented on the importance of the ratings given by county bar association judiciary committees in judicial elections and appointments. They cited the composition of some committees and certain questions some women candidates are asked as evidence of gender bias. For example, a female New York City judge said that she was asked how she could manage being a judge, wife and mother while her husband, who appeared before the same panel, was not asked about his ability to manage work and family life. Another woman refused to answer the committee's question about her marital status and number of

children, saying "Would you ask these questions of a man?"[361] Two women judges who had been advocates in women's rights cases, reported that they were asked whether they could be fair to men.

The Task Force attempted to gain systematic data on this issue by sending questionnaires to the Judicial Nominating Committee for the Court of Appeals, the Governor's Judicial Screening Committees, and to every bar association that renders recommendations for judicial candidates to determine the composition of the panels, the number of women who have applied for judgeships and who have been favorably reported on and the existence of any policies providing for the active recruitment of women candidates for judgeships. Regrettably, the Task Force received a limited response and insufficient information to undertake a meaningful analysis.

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[361] Dean Robert B. McKay, President of the Association of the Bar of the City of New York, testified that, if he did not sit as a member of the New York University Law School Placement Committee that reviews complaints, he "would scarcely believe the questions that are still being asked" of women by "recruiters from prestigious law firms and important corporations" which are "in direct violation of instructions in the law school's placement handbook." McKay Testimony, supra note 317 at p. 218.

SUMMARY OF FINDINGS

1. In determining the level and quality of women attorney's professional opportunity in the courts, inquiry was made into whether women receive their proportionate share of fee-generating appointments and judgeships. Limitations of time and resources precluded a full empirical analysis of these questions.

2. Leaders of the organized women's bar reported a widespread perception among their membership that women attorneys are not treated with the same favor as are men attorneys in judicial assignments to lucrative and challenging guardianships, felony cases or other desirable fee-generating positions.

3. Although women have been achieving judicial office in greater numbers, they are underrepresented in New York's highest judicial posts and are not well represented throughout the New York State judiciary. Nearly half of all women judges, who constitute 9.7% of New York's judiciary, sit in New York City's Family, Criminal, Civil, and housing courts. Forty-three of New York's 62 counties are reported to have no women judges in their courts of record.

RECOMMENDATIONS

For Court Administration:

Maintain the records of appointments to fee-generating positions by sex of appointee.

For Bar Associations:

1. Review the assigned counsel mechanisms in local jurisdictions in which members practice and develop means to ensure that appointments to fee-generating positions are not only fairly received by qualified male and female attorneys but are perceived to be fairly received.

2. Review mechanisms by which judges are nominated and elected or appointed, identify impediments to achieving a fair representation and develop means that would assist qualified women in gaining judicial office.

III. STATUS OF WOMEN COURT EMPLOYEES

The Task Force commissioned a study of the effects of personnel practices on non-judicial women employees of the New York Unified Court System ("UCS"). The study was conducted by the Center for Women in Government at the State University of New York, Albany.

Chief Administrative Judge Joseph W. Bellacosa (in a memorandum to Deputy Chief Administrative Judges, Administrative Judges and Office of Court Administration Unit Heads requesting that they offer the Center their "fullest assistance"), noted that the Center "has conducted groundbreaking research in various public jurisdictions on the structure of career ladders and the civil service promotion process" and "has gained national recognition for innovation and leadership in its work to achieve equal employment opportunity for women and minority men in government."[362]

The Center's work for the Task Force had three components:

> (1) a statistical analysis of the UCS work force which included an evaluation of the relative representation and status of women in the full range of employment grades;

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[362]Center Report, supra note 17 at p. 95.

(2) structured interviews with administrators and 101 women employees in female-dominated job titles[363] intended to assess their perceptions of the impact of UCS employment practices including hiring practices, job requirements, transfer opportunities, promotion opportunities, training opportunities, work-related stress, work hours, decision-making, communication, sexual harrassment, and women's support groups; and

(3) a textual analysis of UCS personnel rules with special attention to their potential impact on women.

On November 22, 1985 the Center submitted to the Task Force its report, entitled: "The Effects of Personnel Practices on Non-Judicial Female Employees of the New York State Unified Court System" (the "Center Report"). The report included an extended discussion of the perceptions of 101 women in female-dominated job titles, as related during interviews, about the UCS work environment. The interviews were conducted in a format of lengthy group discussions in Albany, Buffalo, Manhattan and Syracuse.

The Center reported that the concerns raised by these 101 women were virtually identical in all regions and principally related to systemic problems such as a lack of communication within UCS, lack of training and

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[363] Female-dominated or male-dominated job titles refer to those titles filled 60% or more by that sex.

lack of input into decision making.[364] Although these are problems with negative consequences for both women and men, they are of concern to the Task Force because they tend to weigh most heavily on the lowest-level employees, and women, as discussed below, are disproportionately the lowest-level employees in UCS. Similarly, the textual analysis of personnel rules revealed ambiguities and indefiniteness that would permit constructions that disadvantage employees irrespective of gender. The Task Force transmitted the Center's complete report, including its discussion of these systemic concerns, to the Chief Administrative Judge. This section of the Task Force's Report focuses on those aspects of the Center's report which relate specifically to gender bias: occupa-

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[364]The list of concerns raised by the women interviewed included: lack of training beyond that for specific tasks so that employees have little sense of how their work contributes to the system; being refused permission to attend traning when it is offered; lack of communication; lack of input into decision making; questions about the fairness of the hiring process relating to competitive and non-competitive positions; job requirements for skills that are not in fact used on the job; test content that is irrelevant to the job; provisional employees being fired because they fail tests despite years of good job performance; and lack of career mobility and promotional opportunities. Some of these concerns were discussed by the Joint Committee on Judicial Administration. See Initial Report of the Joint Committee on Judicial Administration, pp. 57-79 (November 25, 1985).

tional segregation, personal chores and errands as part of women's work and sexual harassment.

The Center's study revealed acute occupational segregation. Women are disproportionately found in the lowest salary grades of UCS employment. Minority women seem at an even greater disadvantage than white women. Conversely, men are distributed far more evenly through the UCS titles and dominate the higher-salary grades of employment. Moreover, the question whether lower-grade titles dominated by men pay more for jobs with lesser responsibilities than lower-grade titles dominated by women requires examination. Finally, some women are expected to perform personal chores and errands for supervisors as part of their job; some women are subjected to sexual harassment and either cannot get their supervisors to take action to halt it or are unaware that it is illegal.

The Task Force is deeply concerned by the unequal opportunity for women in the court personnel system documented by the Center's findings and by its implications for the way judges and court personnel carry out their judicial and administrative functions. Just as laws are not self-executing but depend upon judicial discretion for their interpretation and application, the

personnel policies of the UCS, which incorporate equal employment opportunity provisions for all qualified persons, including women, are implemented -- or not -- by administrative judges, individual judges, and high-level non-judicial court personnel.

Those with hiring authority in the UCS enjoy considerable discretion. To the extent that numbers may serve as a guide, hiring decisions appear to be based upon "weight given to preconceived notions of sexual roles rather than upon a fair and unswayed appraisal of the merit of each person." Thus, the acute occupational segregation revealed by the Center's study may be seen as a further manifestation of attitudes that disadvantage women in areas of substantive law and in the courtroom environment.

A. WOMEN'S REPRESENTATION IN THE UNIFIED COURT SYSTEM

Although approximately one-half of all non-judicial employees in the UCS are women, this distribution is not reflected throughout all judicial grade levels or occupational categories. Men consistently dominate the higher-grade, higher-paid positions. Women are vastly overrepresented at the lower levels.

The statistics reveal considerable differences in the employment status of women and men in the UCS.

These inequities place women in structurally disadvantageous positions within the employment hierarchy which can further influence several aspects of their careers including promotion, transfer and training opportunities, work-related stress and sexual harassment.

1. OCCUPATIONAL SEGREGATION

There is significant occupational segregation in the Unified Court System. Using the Federal Occupational Categories, the Center found that almost 80 percent of minority women and over 84 percent of white women compared to less than half of white and minority men are in office/clerical occupations.[365] Men are spread much more broadly across the eight categories than are women and hold the majority of positions in five of the eight occupational groups:

Officials/Administrators	81.1% male
Professionals	68.7% male
Protective Service Workers	87.1% male
Skilled Craft Workers	63.1% male
Service Maintenance Workers	81.7% male

[365]The Center estimated an error rate of 1-2 percent due to manual tabulation. In an independent tabulation by the UCS Equal Employment Opportunity Office of some figures compiled by the Center, in most cases the retabulated figures fell within this range. In all but one category in which the UCS tabulation varied by more than 1-2 percent from the Center's tabulation, even greater occupational segregation was demonstrated than was found by the Center.

Only one occupational group, technicians, is sex integrated (approximately 59 percent male and 41 percent female).

Women dominate only two occupational categories:

Office/Clerical	66.0% female
Para Professionals	80.6% female

Over 53 percent of all women in UCS work in large female-dominated job titles. Reviewing just those titles in which there are more than 100 incumbents and in which more than 60 percent of those incumbents are female produces the following list, which accounts for over 3,000 of the more than 5,500 women employed in UCS.

	JG	Hiring Salary	Total Employees	Percent Female	Total Females
Office Assistant	4	$11,311	204	85.8	175
Office Typist	4	$11,311	511	88.2	451
Data Entry Clerk	7	$13,266	146	89.0	130
Senior Office Assistant	8	$14,042	299	88.3	264
Senior Office Typist	8	$14,042	336	97.6	328
Senior Office Stenographer	9	$14,840	106	100.0	106
Principal Office Assistant	12	$17,638	373	87.4	326
Law Stenographer	14	$19,813	158	91.2	144
Court Assistant	16	$22,184	249	71.8	179
Court Interpreter	16	$22,184	140	60.0	84
Senior Secretary to Judge	17	$23,463	462	98.7	456
Assistant Court Clerk	18	$24,832	145	65.5	95
Court Clerk	18	$24,832	162	67.3	109
Chief Clerk III[366]	21	$29,086	103	78.6	81
Clerk (part time)			133	72.9	97

[366]Although this figure may make it appear that a significant number of women are Chief Clerks, it should

(Footnote continued)

Occupational segregation is clearly a problem in the Unified Court System. The Center calculated an occupational segregation index to determine what proportion of current employees would have to change jobs for women and men to be equally distributed across all occupational groups. It found an occupational segregation index of 62.8 percent for the UCS overall, meaning that 62.8 percent of all employees would have to change jobs in order for both sexes to be equally distributed throughout the UCS workforce.

2. DISTRIBUTION BY JUDICIAL GRADE

The UCS has a salary plan consisting of 38 grade levels similar to that which operates in the executive branch of State government. The dollar amounts associated with each grade are arrived at through collective negotiations between the UCS and the various organizations representing employees.

(Footnote 366 continued from previous page)
be understood that the Chief Clerk series runs from I to VII, with the level relating to the population of the community served and the type of Courts in that community. Chief Clerks III are largely found in small, upstate communities. Of the forty-eight Chief Clerks V, VI and VII, who have starting salaries ranging from $42,240-$61,124, only 12 1/2 percent are women.

As of June 13, 1985, the date of all salary figures in this report, starting salaries ranged from $11,311 for JG 4, the lowest grade to which the UCS assigns a title, to $64,258 for JG 36, the highest grade to which UCS assigns a title. Because UCS contracts provide for a biannual fixed increment for each grade in addition to any raise negotiated with new contracts, an employee at JG 18 could be earning between $24,832 and $32,182, or more.

Over 88 percent of men compared to approximately 49 percent of women non-judicial employees are in JG 16 (starting salary $22,184) or higher. In the highest grades, over 40 percent of men compared to approximately 18 percent of women are in positions at JG 23 (starting salary $32,347), or higher. No judicial grades above 19 are dominated by women. Of the 17 highest judicial grades (JG 20 and above) only four are sex integrated. The remaining 13 are male dominated.

Almost all lower-level grades, those JG 15 or below, are dominated by women. The three lower-level grades dominated by men are JG 6, JG 10 and JG 11. All of these have few people in them and are dominated by one or two traditionally male titles. In JG 6 the title is custodial aide (60% male), in JG 10 the titles are court

aide (51% male) and confidential attendant (97% male) and in JG 11 they are driver/messenger and computer operator (100% and 75% male respectively).

The largest proportion of white women is employed in JG 8 (senior office typist - starting salary $14,042), where over 11 percent of all white women are employed. The largest proportion of minority women is in JG 4 (office assistant or office typist - starting salary $11,311), the lowest judicial grade to which UCS assigns a title. Almost 18 percent of all minority women are employed in JG 4. In marked contrast, the modal category for both white and minority men is JG 18 (starting salary $24,832) where over 17 percent of white men and almost 13 percent of minority men are employed.

There is evidence of at least one case in which a lower-grade male-dominated title with arguably lesser qualifications and lesser responsibilities than an even lower-grade job dominated by women pays more. A UCS Employment Announcement posted December 4, 1985 obtained by the Task Force sought applicants for the positions of senior office typist (JG 8) and driver/messenger (JG 11). The senior office typist position, a title 97.6% occupied by women, was competitive, required relevant experience and involved supervising small clerical sub-units as well

as clerical and typing duties. It paid $14,042. The driver/messenger position, a title 100% occupied by men, was non-competitive, required an eighth grade education and involved transporting court employees and documents and some clerical tasks. It paid $16,666.

B. GENDER-BIASED CONDUCT

Two concerns raised during the Center's interviews with women court employees involve explicit examples of gender-biased conduct: requiring women court employees to perform personal chores and errands and instances of sexual harassment. Although these problems do not appear to be widespread, they do require attention.

1. PERSONAL ERRANDS AND CHORES AS PART OF WOMEN'S WORK

Some women reported being required to make coffee, run personal errands outside of the office and purchase personal items. All these were performed for supervisors, including judges. One woman commented, "You still have the old theory around here that women are housewives (to the office)."

Almost all women would have preferred not to do these tasks. They felt, however, that if their "boss" required it of them, they would be ill-advised to refuse. The women feared that a refusal would make their work

lives more difficult or, in the extreme, they would be fired.

2. SEXUAL HARASSMENT

Most respondents reported that sexual harassment[367] is not a serious problem in UCS. Although in the course of interviews some women told of incidents of sexual harassment, they generally categorized them as "not serious" because the problem was resolved. A common example is that a supervisor was told about the incident(s) and put a stop to the harassment by talking directly to the perpetrator.

A few women described incidents of sexual harassment which they considered serious and which were not

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[367]The Equal Employment Opportunity Commission definition of sexual harrassment provides: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Harassment on the basis of sex is a violation of Sec. 703 of Title VII of the Civil Rights Act of 1964.

Equal Employment Opportunity Commission, Guidelines on Discrimination Because of Sex, 29 CFR Part 1604.11.

resolved. In these cases superiors were notified but were unwilling to force the issue and make the men involved stop.

Particularly disturbing is the Center's finding that some women feel that putting up with sexual harassment is just "part of the job". These women described incidents such as offensive jokes, unwanted physical contact and demeaning sexual comments. Oftentimes these were so regularly a part of the women's work-lives that they did not understand that these <u>are</u> forms of sexual harassment and that these behaviors are illegal. The Center reported that until the discussion of sexual harassment during the Center's interviews, many women simply believed that this is an unavoidable experience for women in the workforce and that there was nothing they could do.

RECOMMENDATIONS

For Court Administration

1. Implement the broadest possible recruitment efforts for all positions on a continuing basis.

2. Include in the court system's affirmative action program specific efforts designed to address those titles in which women are underrepresented.

3. Increase opportunities for training, transfers and promotions.

4. Monitor the hiring process as it affects women, especially with respect to those positions that are filled on a non-competitive basis.

5. Review qualification requirements and salary grades of all non-judicial titles.

6. Provide sexual harassment prevention training to all employees, supervisors, and managers.

7. Issue a directive stating that employees are not to be asked or expected to perform personal services and errands for their supervisors.

IV. MECHANISMS FOR INSTITUTIONALIZING REFORM AND MONITORING AND EVALUATING PROGRESS

The Task Force's recommendations are a first step towards remedying the problems women litigants, attorneys, and court personnel face in New York's court system. Their promise is much more likely to be fulfilled if means for institutionalizing reform and monitoring progress are implemented. Accordingly, the Task Force proposes several measures intended to ensure lasting equality for women and men in the courts.

A. APPOINTING A SPECIAL ASSISTANT AND AN ADVISORY COMMITTEE

It is the hope and expectation of the members of the Task Force that this report will lead to a better understanding of the deleterious effects of gender bias as it is experienced by women attorneys, litigants and court personnel. That understanding, coupled with the implementation of recommendations made will result in progress being made toward achieving a system of justice in which gender bias plays no part.

The focus of the best-intentioned leaders, however, cannot remain long on one particular facet of progress. There are too many areas in which improvements

are needed; too many emergencies that may take precedence.

The Executive Branch has recognized the need to create a permanent Division for Women in the Executive Chamber, with its director now serving as a member of the Governor's cabinet. The Task Force recommends that the Chief Judge recognize that same need within the Judicial Branch and create a high-level staff position. The Special Assistant could perform the following major functions:

a. Signal to members of the bench, bar, and public the commitment of the Judicial Branch to a system of justice that treats all litigants, attorneys, and personnel with equal dignity;

b. Develop, design and implement specific training programs for judges and for nonjudicial personnel to help them better understand the effects of gender bias, and to provide the tools to remedy situations that arise;

c. Establish internal procedures to collect and investigate complaints of gender bias and make recommendations to the Chief Administrator as to appropriate action;

d. Review court rules, legislative and administrative recommendations, and Office of Court Administration public statements to insure that they are gender neutral; and

e. Act as liaison to a Community Advisory Committee appointed by the Chief Judge, composed of representatives of bar associations, judges associations, court employee groups, organizations with special expertise in recognizing and combatting gender bias, and others with special interest in the issue.

The last function, that of liaison with a Community Advisory Committee, would provide a mechanism for the Office of Court Administration to hear from a diverse group of concerned organizations about the perceptions of the public and the bar as to problems with gender bias in the court system. Perhaps as important, the Committee could help the Office of Court Administration to disseminate accurate information concerning progress that has been made and opportunities for change within the courts.

B. JUDICIAL EDUCATION

Throughout this Report, the Task Force has recommended judicial education and training respecting a wide range of issues in which gender bias is a factor. During the Task Force's public hearings, the need for judicial education to help judges understand their own biases about women in general and in specific areas of substantive law was a repeated theme, with judicial witnesses among the strongest proponents of this kind of training.

Judge Richard Huttner, Administrative Judge of the New York City Family Court, spoke of the judicial education programs he has arranged for his own court to counteract gender bias and urged that the Office of Court Administration expand presentation of this kind of material at the judges' formal training sessions at the State University of New York at Buffalo Law School.[368] Speaking of the kinds of sex biased attitudes that "corrupt the impartiality of justice and lie hidden from all," Judge Huttner stated,

> What I believe is vitally necessary to combat this situation is judicial training aimed at raising the consciousness and sensitivity of our judges. Re-examination and soul searching, if you will, of long accepted beliefs about the role of women.[369]

Supreme Court Justice Stanley Sklar testified:

> [M]any, if not most of us, are sexist to one degree or another without ever realizing it. . . . I submit that education will help us, especially those of us charged with equal enforcement of the law, to reduce sexist shibboleths, attitudes and rulings.[370]

New York City Civil Court Judge John Stackhouse, when asked what he would recommend to eliminate the problems he had described to the Task Force,

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[368]Huttner Testimony, supra note 45 at p. 125.

[369]Id. at p. 120.

[370]Sklar Testimony, supra note 328 at p. 16.

replied, "I think education is the answer" and, like Judge Huttner, urged the expansion and repetition of such education at the judges' summer training sessions.[371] Supreme Court Justice William Rigler, when asked whether he had any solution to the problem areas he had identified responded: "Education."[372] Judge Ira Rabb, New York State Governor of the American Judge's Association, spoke of the "sex stereotyped, prejudicial attitudes and behavior" in a variety of substantive law areas as well as courtroom interaction and stated:

> I believe that the root cause of these unacceptable occurrences is the cultural conditioning of a male oriented judiciary. . . . Judicial education and training is the answer. Judges must unlearn their male oriented cultural conditioning.[373]

Numerous non-judicial witnesses concurred in

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[371]Stackhouse Testimony, supra note 328 at p. 297.

[372]Rigler Testimony, supra note 192 at p. 108. Justice Rigler also stated that at a program urging mediation that he had recently attended he had asked:

> You are talking about educating mediators. I think it is more important that you educate judges. I don't feel...you can take a judge and just sit him in the matrimonial part. Where is the education of the judges? Id., at p. 113.

[373]Testimony of Judge Ira Rabb, N.Y.C.I Tr. at p. 63, 67.

these calls for judicial education about gender bias,[374] in particular with Justice Rigler's assertion that training for judges responsible for matrimonial cases is essential. Rockland County Legislator Harriet Cornell urged that the Office of Court Administration establish a permanent commission "with the mission of educating the judiciary on all matters regarding domestic relations and family problems and of monitoring judicial actions. Further, this commission shall see that current and accurate information be given judges about living costs, child care costs and other statistical or social data that may be pertinent in helping the judiciary reach unbiased decisions."[375]

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[374]For example, Elizabeth Holtzman, Kings County District Attorney recommended:

> Comprehensive training programs should be established for all judges and other court personnel to increase their awareness of the impropriety of demeaning women and their obligation to act swiftly to counter it.

Holtzman Testimony, supra note 89, p. 39. Accord Sitkowitz Testimony, supra note 308, p. 7; Condo Testimony, supra note 113, p. 40; Koury Testimony, supra, note 108, p. 197; O'Conner Testimony, supra note 116, pp. 62, 64 (sexual assault cases); Bartoletti Testimony, supra, note 46, p. 155; Schneider Testimony, supra, note 101, p. 72 (domestic violence cases).

[375]Cornell Testimony, supra, note 182, pp. 54-55.

Judicial education about gender bias should be accomplished through courses that are fully devoted to this issue and through the integration of relevant materials into courses on specific areas of substantive law. For example, gender bias in the application of the rape shield law should be discussed in courses on criminal evidence. Courses about the Equitable Distribution Law should include material about the different economic consequences of divorce for women and men. Judicial education about gender bias must be an ongoing effort, not a one time response to this Report.

C. EXAMINATION OF RULES GOVERNING JUDGES' AND ATTORNEYS' PROFESSIONAL CONDUCT

Under current rules governing professional responsibilities and ethics, attorneys are admonished in very general terms to "assist in maintaining the integrity and competence of the legal profession."[376] Similarly, judges are required to "observe high standards of conduct so that the integrity and independence of the judiciary may be preserved"[377] and to conduct themselves "at all times in a manner that promotes public confidence

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[376]Code of Professional Responsibility, Canon 1.

[377]Rules of the Chief Administrator, 22 N.Y.C.R.R. Part 100 (Judicial Conduct) § 100.1.

in the integrity and impartiality of the judiciary."[378] Although much of the gender-biased conduct identified in this Report clearly falls within the ambit of prohibited conduct under these rules, the Task Force believes that express definition and recognition of this type of unethical conduct, either in the rules themselves or in accompanying commentary, would give notice to judges and lawyers of the seriousness of the impropriety and the consequences to the impartial administration of justice. This task may be most appropriately undertaken by bar associations.

D. BAR ASSOCIATION RESPONSE

The response of the legal profession to the issues identified and discussed in this Report will be an important measure of the prospects for reform. It is incumbent on lawyers, as officers of the court ethically bound to promote justice and the public understanding of the judicial process, to take a leading role in seeking to remedy the perceptions of gender bias in the courts and the realities upon which those perceptions are based.

The Task Force recommends that all bar associations in the State place as a priority item on their

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[378] Id., § 100.2(a).

agendas the issues of women litigants', women attorneys', and women court employees' status and treatment in the courts. Through frank and open discussions, statewide and local issues will be better understood. Creative solutions can be developed and implemented. By publicizing specific responses to these troublesome issues, public confidence in the profession's commitment to equality in the courts will be enhanced.

CONCLUSION

A number of attorneys questioned the need for and the purpose of the Task Force's undertaking. Some said:

> ° I think the Task Force is placing too much emphasis on this problem -- it appears to me the area of concern is that of attitude rather than actuality.
>
> Forty-five year old rural male

> ° To the extent that [gender bias] exists, it will disappear on its own with the passage of time because of the increasing number of women in the law schools and in the profession, and because of the attitude of young people about sexual bias. It seems to me that a lot of time and money could be saved if the Task Force were abolished and the problem, if there is one, be allowed to disappear without exacerbating it by holding public hearings and studying it to death.
>
> Fifty-eight year old rural male

> ° Accept certain things as they are. Society will change as people grow with the times. Don't force people to accept attitudes spurred by hostility . . . . Gender bias is not a crime -- it is merely an outgrowth of 3,000 years of culture. Old habits die hard. Be patient -- your time will come.
>
> Thirty-two year old NYC male

Calls for complacency in identifying gender bias in New York's courts and for sole reliance on the passage of time for its amelioration misapprehend the nature and consequences of gender bias in our society. The Courts have a special obligation to reject -- not reflect -- society's irrational prejudices.

Attitudes invariably influence conduct. Conduct influenced by gender bias in an institution with

profound power over those who come before it can wreak substantial injustice and can undermine the courts' prestige and authority by eroding public confidence in the justice system. It is fitting, therefore, that New York's court system examine and seek to rid itself of any bias.

With leadership there will be change. Ultimately, reform depends on the willingness of bench and bar to engage in intense self-examination and on the public's resolve to demand a justice system more fully committed to fairness and equality.

Respectfully submitted,

NEW YORK TASK FORCE
ON
WOMEN IN THE COURTS

New York, New York
March 31, 1986

APPENDIX

Exhibit	Description
A	Remarks of Hon. Lawrence H. Cooke, Chief Judge of the State of New York, announcing formation of the New York State Task Force on Women in the Courts, May 31, 1984.
B	Bibliography of introductory materials on issues affecting women in the courts reviewed by the Task Force.
C	Schedule of witnesses appearing at public hearings.
D	Transmittal letter and questionnaire sent to Surrogate's Courts.
E	Transmittal letters and questionnaires sent to judicial nominating committees and bar association judicial screening committees.
F	Survey questionnaire distributed to attorneys.
G	Recommended topics for future study.

EXHIBIT A

Remarks of Lawrence H. Cooke, Chief Judge of the State of New York, at Press Conference announcing the formation of the New York Task Force on Women in the Courts, at the House of the Association of the Bar of the City of New York, 42 West 44th Street, New York City, Thursday, May 31, 1984 at 11:00 a.m.

* * * * * * * * * * * * * *

The concept of justice is broad in reach and serious in nature; it is antithetical to any discrimination triggered by prejudice.

None of us had any choice of the home in which we were born; a higher power decided that circumstance. To deny anyone anything because of race, creed, color, national origin, gender, or any such irrelevant consideration is the basest kind of misbehavior. It is a surrender of the human to the animal instincts.

Distinctions grounded on improper concerns have no place whatsoever in the operation of our legal system and every reasonable effort should be made to guarantee that the scales of justice are balanced evenly for every person who comes before the courts. They expect no less and, certainly, are entitled to no less. There must be no corridors of special privilege, high hurdles for some, or bans on any. There must be no institutional hypocrisy.

It was not much more than 100 years ago that the United States Supreme Court upheld the constitutionality of an Illinois statute prohibiting women from gaining admission to that State's Bar. The words, that all are created equal and are endowed with certain inalienable rights, yielded no life, liberty or pursuit of happiness to those before whom doors were closed in search of

their noblest aspirations or those who were told they could not enter the legal profession because of sex.

There are those, particularly such substantial groups as the New York State Association of Women Judges and The Women's Bar Association of the State of New York, who have expressed concern with the situation of women in our legal system. There is no question but that in recent chapters of history tremendous strides have been made by women in the legal structure and operation of our State and Nation. The issue remains whether, at this juncture, their allotment of the jurisprudential scheme in the Empire State is fair under all the circumstances.

To answer this question the New York Task Force on Women in the Courts is being organized. The general aim of the Task Force will be to assist in promoting equality for men and women in the courts. The more specific goal will be to examine the courts and identify gender bias and, if found, to make recommendations for its alleviation. Gender bias occurs when decisions are made or actions taken because of weight given to preconceived notions of sexual roles rather than upon a fair and unswayed appraisal of merit as to each person or situation. In determining the fact or extent of its existence, the focus of the Task Force should be upon all aspects of the system, both substantive and procedural. An effort should be made to ascertain if there are statutes, rules, practices, or conduct that work unfairness or undue hardship on women in our courts.

Recently, a similar study was conducted on behalf of the court system in New Jersey. Its leadership is to be commended and its methodology provides an exemplar for the study to be conducted here in New York.

The Task Force is made up of outstanding, representative and independent citizens. The members are charged with fulfilling their mission dispassionately and with reasonable dispatch.

The Task Force will be chaired by Edward J. McLaughlin, Administrative Judge of the Family Court of Onondaga County, formerly a President of the Family Court Judges Association of New York State and at one time employed by the "Hughes Judiciary Committee." The other members of the Task Force are:

--Jay C. Carlisle, Esq., Professor of Law, Pace University School of Law, White Plains;

--Hon. Hazel Dukes, President of New York Conference of NAACP, Roslyn Heights;

--Haliburton Fales, II, Esq., President of New York State Bar Association, New York City;

--Neva Flaherty, Esq., Assistant District Attorney, Monroe County, Rochester;

--Hon. Josephine L. Gambino, Commissioner of New York State Department of Civil Service, Bayside;

--Marjorie E. Karowe, Esq., Past President of Women's Bar Association of the State of New York, Albany;

--Hon. Sybil Hart Kooper, Justice of the Supreme Court and President of New York State Women Judges' Association, Brooklyn;

--Ms. Sarah Kovner, Chair, Board of Directors, First Women's Bank, New York City;

--Hon. David F. Lee, Jr., Justice of the Supreme Court, Norwich;

--Ms. Joan McKinley, President of New York State League of Women Voters, Saratoga Springs;

--Hon. Olga A. Mendez, New York State Senator, Bronx;

--Hon. S. Michael Nadel, Deputy Chief Administrator of the Unified Court System, New York City;

--Edward M. Roth, Esq., Senior Law Assistant to Chief Judge, Monticello;

--Oscar W. Ruebhausen, Esq., Former President of the Association of the Bar of the City of New York, New York City;

--Fern Schair, Esq., Executive Secretary, The Association of the Bar of the City of New York, Scarsdale;

--John Henry Schlegel, Esq., Associate Dean, State University of New York at Buffalo Law School, Buffalo;

--Richard E. Shandell, Esq., Past President of New York State Trial Lawyers' Association, New York City;

--Florence Perlow Shientag, Esq., Member of the Bar, New York City;

--Sharon Sayers, Esq., Member of the Family Law Section of the Monroe County Bar Association, Rochester;

--David Sive, Esq., Stimson Award Winner of New York State Bar Association and Lecturer at Columbia Law School, Ardsley-on-Hudson;

--Hon. Ronald B. Stafford, Chairman of Codes Committee of New York State Senate, Plattsburgh;

--Hon. Stanley Steingut, Former Speaker of New York State Assembly, Brooklyn.

Technical services for the Task Force will be supplied by the Equal Employment Opportunity unit of the Office of Court Administration under the leadership of Adrienne White, Director.

Patricia P. Satterfield, Assistant Deputy Counsel in the Counsel's Office of the Office of Court Administration, will serve as the Task Force's Counsel.

EXHIBIT B

BIBLIOGRAPHY OF INTRODUCTORY MATERIAL ON ISSUES AFFECTING WOMEN IN THE COURTS

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D. Juvenile Justice

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E. Rape

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F. Support Awards and Enforcement

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EXHIBIT C

SCHEDULE OF PUBLIC HEARING WITNESSES

Public Hearing, November 19, 1984
Association of the Bar
42 West 44th Street
New York, New York

Convening: 9:15 a.m.

Doris Jonas Freed, Esq.
Dweck & Sladkus

Hon. Stanley L. Sklar
Acting Justice, New York State Supreme Court

Julia Perles, Esq.
Chair, Committee on Equitable Distribution, Family Law Section, New York State Bar Association

Hon. Elizabeth Holtzman
District Attorney, Kings County

Henry G. Miller, Esq.
President, New York State Bar Association

Elizabeth M. Schneider
Associate Professor of Law, Brooklyn Law School

Harriet N. Cohen, Esq.
Chair, Matrimonial and Family Law Committee, New York Women's Bar Association

Adria S. Hillman, Esq.
Member, Matrimonial and Family Law Committee, New York Women's Bar Association

Irene A. Sullivan, Esq.
President, Women's Bar Association of the State of New York

Marjorie D. Fields, Esq.
Co-Chair, Governor's Commission on Domestic Violence

Frances Mattera
Founder/President, FOCUS ("For Our Children and Us, Inc.")

Lillian Kozak, Esq.
Chair, Domestic Relation Law Task Force, NOW/New York City

Barbara Bartoletti
Director of Women's Issues and Social Policy, State League of Women Voters

Carolyn Kubitshek, Esq.
MFY Legal Services; Member, Women's Committee of the New York City Chapter of the National Lawyer's Guild

Joel R. Brandes, Esq.
Co-Chair, Continuing Legal Education Committee, Family Law Section, New York State Bar Association

Nancy D. Perlman
Executive Director, Center for Women in Government

Dean Robert B. McKay
President, Association of the Bar of the City of New York

Carol Lefcourt, Esq.
Counsel, New York State Women's Division

"Mary Jones"
Litigant

Myrna Felder, Esq.
Chair, Matrimonial Law Committee, Women's Bar Association of the State of New York

Barbara P. Billauer, Esq.
President, Metropolitan Women's Bar Association

Hon. Betty Weinberg Ellerin
Deputy Chief Administrative Judge for Courts in New York City

Public Hearing, January 29, 1985
Legislative Office Building
Albany, New York

Convened: 10:00 a.m.

Hon. Robert Abrams
New York State Attorney General

Hon. Gail S. Shaffer
New York State Secretary of State

Judith Condo
Executive Director, Albany County Rape Crisis Center

Hon. Harriet Cornell
Rockland County Legislature; Chair, Legislative Commission of the Rockland County Commission Women's Issues

Hon. May Newburger
New York State Assembly; Chair, New York State Assembly Task Force on Women's Issues

Eileen Millet, Esq.
Board member, Association of Black Women Attorneys

Hon. Karen Burstein
President, New York State Department of Civil Service; Co-Chair, Governor's Commission on Domestic Violence

Marion Silber, Esq.
Member of the firm, Gordon & Silber

Hon. Edward Spain
Police Court Judge, Troy, New York

Sidney Siller, Esq.
Founder, National Organization for Men

Judith Avner
Assistant Director, New York State Women's Division

Jo-Ann Mullen
Community Service Coordinator, Families in Violence

Stanley Rosen, Esq.
Attorney

Karen DeCrow
Former President, National Organization for Women

Linda Fairstein, Esq.
Assistant District Attorney, New York County
Director, Sex Crimes Prosecution Unit

Joan Bukoskey
Victim Advocate, Unity House

Marsha Anderson
Chair, Columbia County NOW

Thomas Kershner
Professor of Economics, Union College

Public Hearing, March 5, 1985
Appellate Division Court Room
Hall of Justice
99 Exchange Street
Rochester, New York

Convened: 10:00 a.m.

Stephen Hassett, Esq.
Staff Attorney, Neighborhood Legal Services

Deborah N. Sorbini, Esq.
Assistant District Attorney, Erie County

Lynn Vallone
Coalition for Child Support

Mary Lee Sulkowski
Haven House

Beverly O'Connor
Executive Director, Rape Crisis Center of Syracuse

Bonnie Gail Levy, Esq.
Attorney

Wynn Gerhard, Esq.
Acting Director, Neighborhood Legal Services

Phyllis Korn
Executive Director, Alternatives for Battered Women, Inc.

Richard Sansone
Litigant

John Rossler
Vice President, Father's Rights Association

Marion Scipioni
Litigant

Richard Kirtland
Litigant

Herbert M. Siegel, Esq.
Attorney

Prof. Virginia Burns
Professor of Criminal Justice, SUNY-Brockport

Lorraine M. Koury
Coordinator, Citizens Committee on Rape and Sexual Assault

Samantha Moore
Litigant

Nancy Lowery
Social Worker, Vera House

Lois Davis
Ex-President, Judicial Process Committee of Rochester

Prof. Judy Long
Department Head, Department of Sociology, Syracuse University

Mary Ann Hawco, Esq.
Assistant District Attorney, Monroe County

Joseph Heath, Esq.
Attorney

Public Hearing, May 7, 1985
1 World Trade Center
New York, New York

Convened: 12:00 p.m.

Marcia Sikowitz, Esq.
National Lawyer's Guild, New York Chapter

Susan Tucker
Co-Chair, Women's Rights Committee, New York State NOW

Gail V. Conklin
Litigant

J. A. Rodriguez-Sierra
Litigant

Prof. John Hennings
Professor of Economics, Maxwell School, Syracuse University

Karin Huneke
Litigant

Susan Leelike
Good Old Lower East Side

Judge Ira Raab
New York State Governor, American Judge's Association

Judith Reichler, Esq.
Project Director, Governor's Commission on Child Support

Hon. William Rigler
Justice of the Supreme Court, Kings County

Judge Richard D. Huttner
Administrative Judge, New York City Family Court

Doris Jonas Freed, Esq.
Dweck & Sladkus

Amy Ellman
Women Against Pornography

Evelina Kane
Women Against Pornography

Linda Scavetti
Certified Public Librarian

June Nemet
Litigant

Dr. Lawrence Nannery
Litigant

Peter A. Pless
Litigant

Claire Hogenauer, Esq.
Attorney

Hon. Amy H. Juviler
Judge of the New York City Criminal Court

Laura Blackburne
Institute for Mediation and Conflict Resolution

Arthur Katz
Litigant

Hon. John Stackhouse
Judge of the New York City Civil Court

Ruth Laitman
Litigant

EXHIBIT D

NEW YORK
TASK FORCE ON WOMEN IN THE COURTS
270 BROADWAY, RM 1012
NEW YORK, NEW YORK 10007
(212) 587-5847

October , 1985

Dear

The Task Force on Women in the Courts, appointed in May, 1984 by then Chief Judge of the Court of Appeals Lawrence H. Cooke, is investigating a number of issues regarding possible gender bias in the New York courts. Among the topics assigned to the Subcommittee on Women in the Courts is the process by which judges select and assign counsel for litigants or parties who need representation. The Task Force has received some information on this topic through public hearings. The Subcommittee is following up with additional fact-gathering.

It would greatly assist the Subcommittee if you could complete the attached questionnaire on such judicial appointments and return it in the enclosed envelope, to the address specified on the questionnaire by November 15, 1985. Please attach to the questionnaire any written material requested.

Thank you for your assistance.

Very truly yours,

Edward J. McLaughlin
Chairperson

cc: Neva S. Flaherty, Esq.
Chair, Subcommittee on
Women in the Courts
Adrienne White, Equal Employment
Opportunity, Office of Court
Administration

TASK FORCE ON WOMEN IN THE COURTS

Questionnaire on Judicial Appointments
of Attorneys in Surrogate's Court

County:

Judge:

Phone Number:

---

1. What procedure does your court follow for selecting attorneys for appointment as guardians ad litem in estate cases (pursuant to SCPA §402[a] and §403[b])?

_____

_____

_____

_____

2. For the years 1982 through 1984, please complete the following table regarding appointments at various stages in estate proceedings (place in column A, the total appointments for the year, and place in column B, the total number of women appointed):

Probate of Will	1982 A	1982 B	1983 A	1983 B	1984 A	1984 B
Estates of under $100,000						
Estates of $100,000 - $499,000						
Estates of $500,000 - $999,000						
Estates of $1 million or more						
Judicial Settlement of Estates	**1982**	**1982**	**1983**	**1983**	**1984**	**1984**
Estates of under $100,000						
Estates of $100,000 - $499,000						
Estates of $500,000 - $999,000						
Estates of $1 million or more						
Judicial Settlement of Trusts	**1982**	**1982**	**1983**	**1983**	**1984**	**1984**
Estates of under $100,000						
Estates of $100,000 - $499,000						
Estates of $500,000 - $999,000						
Estates of $1 million or more						
TOTAL						

3. What procedure does your court follow for selecting administrators of estates?

_____

_____

_____

_____

4. Please complete the following chart on public administrator appointments (place in column A, the total appointments, and place in column B, the total number of women appointed):

	1982 A	1982 B	1983 A	1983 B	1984 A	1984 B
Estates under $100,000	____	____	____	____	____	____
Estates of $100,000 - $499,000	____	____	____	____	____	____
Estates of $500,000 - $999,000	____	____	____	____	____	____
Estates of $1 million or more	____	____	____	____	____	____

5. a) What procedure does your court follow in appointing guardians ad litem for <u>infants</u> in guardianship/custody proceedings brought under Social Service Law §384-b?

Check one:

1) Contract with Legal Aid Society
_____ (SPCA §403-a[3][a])

2) Appellate Division Agreement with attorneys
_____ (SPCA §403-a[3][b])

3) Panel designates by Appellate Division
_____ (SPCA §403-a[3][c])

4) Other procedure (please describe):

_____

_____

_____

_____

b) If your answer is Appellate Division Agreement, how many attorneys have entered such agreement?

_____

(1) How were the attorneys selected?

_____

_____

_____

_____

_____

(2) How many were women? _____

(3) If more then one attorney is available, by what method does the court distribute assignments?

_____

_____

_____

_____

_____

c) If your answer is "Panel Designated by Appellate Division", how is the panel selected?

_____

_____

_____

_____

(1) What qualifications must attorneys meet?

_____

_____

_____

_____

(2) How many are are on the panel? _____

(3) How many are women? _____

(4) What procedure does the Court use in distributing assignments (i.e., is a rotation system used)?

_____

_____

_____

_____

(5) If your court uses a procedure other than the procedures specified in SCPA §403-a(3), please complete the following table concerning appointments:

	1982	1983	1984
Number of Appointments made	____	____	____
Number of Appointments to Women	____	____	____

6. Please complete the following table for guardian ad litem appointments made under Social Services Law §384-b:

	1982	1983	1984
Number of Appointments made	____	____	____
Number of Appointments to Women	____	____	____

7. What procedure does the court use for appointing guardians ad litem for indigent parties pursuant to SCPA §407 (respondent in proceedings under Social Services Law §384 and §384-b; parents opposing adoption of child)?

_____

_____

_____

_____

_____

_____

_____

_____

8. Please complete the following table for guardian at litem appointments made under Social Service Law §384-b:

	1982	1983	1984
Number of Appoitments made	____	____	____
Number of Appointments to Women	____	____	____

Please return this questionaire by November 15, 1985, to Neva S. Flaherty, Esq., Chair of Subcommittee on Women in the Courts, 201 Hall of Justice, Rochester, New York 14614. Questions concerning this questionaire can be directed to Ms. Flaherty at (716) 428-5680.

EXHIBIT E

NEW YORK
TASK FORCE ON WOMEN IN THE COURTS
270 BROADWAY, RM 1012
NEW YORK, NEW YORK 10007
(212) 587-5847

October , 1985

Judicial Nomination & Screening (Same letter for each name)

Dear

The Task Force on Women in the Courts, appointed in May, 1984 by then Chief Judge of the Court of Appeals Lawrence H. Cooke, is investigating a number of issues regarding gender bias in the New York courts. Among the topics assigned to the Subcommittee on Women in the Courts is the judicial selection process. The Task Force has received some information on this topic through public hearings and the subcommittee is following up with additional fact-gathering.

It would greatly assist the subcommittee if you could complete the attached questionnaire and return it, in the enclosed envelope to the address indicated on the questionnaire by November 15, 1985. Please attach any written material requested to the questionnaire.

Thank you for your assistance.

Very truly yours,

Edward J. McLaughlin
Chairperson

cc: Neva S. Flaherty
Chair, Subcommittee on
Women in the Courts
Adrienne White, Equal Employment
Opportunity, Office of Court
Administration

TASK FORCE ON WOMEN IN THE COURTS

JUDICIAL NOMINATION COMMISSION QUESTIONNAIRE

SCREENING —

(COURT OF APPEALS)

1. Number of members on the panel. _____

2. Number of male members who are attorneys. _____

   Number of male members who are non-attorneys. _____

   Number of female members who are attorneys. _____

   Number of female members who are non-attorneys. _____

3. Number of vacancies, if any. _____

4. Describe the procedure followed by the panel in evaluating candidates. Please also attach a copy of any written rules or procedures used in evaluating candidates. _____

5. For the past three years, please provide the following information:

	1982	1983	1984
Number of candidates evaluated	____	____	____
Number of women candidates evaluated	____	____	____
Number of candidates recommended to the Governor	____	____	____
Number of women candidates recommended to the Governor	____	____	____

6. Judiciary Law Section 64(1) directs the commission to establish procedures to encourage qualified attorneys to agree to submit to considerations as judicial candidates, in addition to those who request or are recommended for consideration. Describe your committee's recruitment procedures. In other words, how do you decide who shall be encouraged to apply? Please send a copy of any written rules or procedures regarding recruitment. _____

7. Since the panel's inception, how many judicial nominees has the panel recruited by these procedures? _____

8. How many of these recruits were women? _____

9. Do you believe the recruitment process is working effectively? _____ If not, why not? _____

_____

_____

_____

_____

_____

10. Please recommend changes that you believe would improve the recruitment process. _____

_____

_____

_____

_____

_____

Please note that the Task Force is not asking for names of any nominees. Please send the requested information to Fern Schair, Executive Secretary, The Bar Association of the City of New York, 42 West 44th Street, New York, N.Y. 10036, by November 15, 1985. If you have any questions, please call Ms. Schair at 212-382-6600.

EXHIBIT F

State of New York
Court of Appeals

Sol Wachtler
Chief Judge

ATTORNEY SURVEY OF THE NEW YORK COURT OF APPEALS TASK FORCE ON WOMEN IN THE COURTS

The possibility of gender bias in the justice system has been recognized as a matter serious enough to warrant the establishment, in 1984, of the New York Task Force on Women in the Courts. In order to determine the extent to which this gender bias may exist, and the real or perceived effect it may have on courtroom interaction and the decision making process, it is important that certain information be gathered.

Toward this end, the enclosed questionnaire has been prepared by the New York Task Force on Women in the Courts. The information sought through this survey is essential to the work of the Task Force and I urge you to complete and return the survey as quickly as possible.

Very truly yours,

Sol Wachtler

PLEASE COMPLETE THIS SURVEY EVEN IF YOU DO NOT HAVE STRONG FEELINGS ABOUT GENDER BIAS WITHIN THE JUDICIAL SYSTEM. IT IS IMPORTANT THAT WE OBTAIN THE VIEWS OF AS MANY ATTORNEYS AS POSSIBLE. YOUR RESPONSES WILL HELP US OBTAIN A MORE COMPLETE PICTURE OF GENDER BIAS IN THE NEW YORK STATE COURTS.

This survey is based on the specific concerns raised at the Task Force's four public hearings and in meetings with judges and lawyers throughout the State. Questions are divided into several areas relating to court interaction and substantive law. *Please answer questions only in those areas in which you have had experience in the past two years.* Circle the response which best describes your experience, perception, or opinion. Responses are: (1) Always, (2) Often, (3) Sometimes, (4) Rarely, or (5) Never.

Space for comments is provided at the end of the survey. Please use this space for more detailed responses and other issues you would like to bring to the Task Force's attention. Attach additional sheets, if necessary. The Task Force is especially interested in reviewing transcripts. Please send applicable transcript sections, if you have them, along with your completed survey. The Task Force will consider purchasing transcripts in appropriate cases when all information necessary to identify the case is provided.

Please do not put your name on the survey. Upon receipt, envelopes will be destroyed. You will not be identified with your responses in any way. They will be summarized with those of other attorneys. Please mail your completed survey *no later than July 26* to R L Associates, 15 Chambers Street, Princeton, New Jersey 08542. Thank you for your participation.

1 = **A**lways, 2 = **O**ften, 3 = **S**ometimes, 4 = **R**arely, 5 = **N**ever

COURT INTERACTION: The Task force received testimony from judges and attorneys about the ways in which seemingly trivial negative conduct toward women in courtrooms and in chambers interferes with the administration of justice. These questions seek information about the perceived frequency of the behaviors most commonly cited.

Approximate number of appearances in court or chambers during the last two years _____

	A	O	S	R	N
1. Are women asked if they are attorneys when men are not asked?	1	2	3	4	5
2. Are women attorneys addressed by first names or terms of endearment when men attorneys are addressed by surnames or titles:					
(a) by judges?	1	2	3	4	5
(b) by counsel?	1	2	3	4	5
(c) by court personnel?	1	2	3	4	5
3. Are women litigants or witnesses addressed by first names or terms of endearment when men are addressed by surnames or titles:					
(a) by judges?	1	2	3	4	5
(b) by counsel?	1	2	3	4	5
(c) by court personnel?	1	2	3	4	5
4. Are inappropriate comments made about the personal appearance of women attorneys when no such comments are made about men:					
(a) by judges?	1	2	3	4	5
(b) by counsel?	1	2	3	4	5
(c) by court personnel?	1	2	3	4	5
5. Are inappropriate comments made about the personal appearance of women litigants or witnesses when no such comments are made about men:					
(a) by judges?	1	2	3	4	5
(b) by counsel?	1	2	3	4	5
(c) by court personnel?	1	2	3	4	5
6. Are sexist remarks or jokes that demean women made in court or in chambers:					
(a) by judges?	1	2	3	4	5
(b) by counsel?	1	2	3	4	5
(c) by court personnel?	1	2	3	4	5
7. Are women litigants or witnesses subjected to verbal or physical sexual advances:					
(a) by judges?	1	2	3	4	5
(b) by counsel?	1	2	3	4	5
(c) by court personnel?	1	2	3	4	5
8. Are women attorneys subjected to verbal or physical sexual advances:					
(a) by judges?	1	2	3	4	5
(b) by counsel?	1	2	3	4	5
(c) by court personnel?	1	2	3	4	5
9. If you have experienced or observed any of the conduct described in questions 1-8, do you believe it affected the outcome of the case? IF YES, please describe on the last page	1 Yes 2 No Y Don't know				
10. Have judges or counsel intervened to correct any of the situations described in questions 1-8? IF YES, please use the last page to describe the situation and the way it was handled.	1 Yes 2 No				

CREDIBILITY: In the courtroom, "credible" in its fullest sense (believable, capable, convincing, someone to be taken seriously) is one of the most important things that a litigant, witness, expert, or attorney can be. Because of testimony received at its public hearings, the Task Force seeks your perceptions of whether and how gender affects credibility in the courts.

	A	O	S	R	N
1. Do male judges appear to pay less attention to and/or give less credibility to female attorneys' statements/arguments than to those of male attorneys?	1	2	3	4	5
2. Do female judges appear to pay less attention to and/or give less credibility to female attorneys' statements/arguments than to those of male attorneys?	1	2	3	4	5

1 = **A**lways, 2 = **O**ften, 3 = **S**ometimes, 4 = **R**arely, 5 = **N**ever

	A	O	S	R	N
3. Do male judges appear to impose a greater burden of proof on female witnesses than on male witnesses?	1	2	3	4	5
4. Do female judges appear to impose a greater burden of proof on female witnesses than on male witnesses?	1	2	3	4	5
5. Do male judges appear to give less credibility to female expert witnesses than to male experts based on gender rather than the substance of the experts' testimony?	1	2	3	4	5
6. Do female judges appear to give less credibility to female expert witnesses than to male experts based on gender rather than the substance of the experts' testimony?	1	2	3	4	5

INTERRELATIONSHIP OF SEX/RACE AND SEX/ECONOMIC STATUS: Testimony received by the Task Force suggests that women from minority groups and women who are economically disadvantaged sometimes receive particularly unequal treatment in both courtroom interaction and substantive decisions. The Task Force seeks further information from attorneys who have observed or experienced these compound forms of bias. Please use the last page of the survey and attach sheets as necessary to provide your general analysis of this issue and concrete incidents that illustrate how these factors interact to the disadvantage (or advantage) of adult and juvenile females in the courts.

EQUITABLE DISTRIBUTION

Approximate number of equitable distribution cases handled during the last two years _____

	A	O	S	R	N
1. Are effective temporary restraining orders granted to maintain the status quo for equitable distribution?	1	2	3	4	5
2. Do judges impose meaningful sanctions, including civil commitment, when injunctions are violated?	1	2	3	4	5
3. Do judges refuse to award 50% of property or more to wives even though "probable future financial circumstances" indicate that even with such an award husbands will not have to substantially reduce their standard of living but wives will?	1	2	3	4	5
4. Do equitable distribution awards reflect a judicial attitude that property belongs to the husband and a wife's share is based on how much the husband could give her without diminishing his current lifestyle?	1	2	3	4	5
5. Do judges make remarks which indicate that awards of maintenance or property distribution are based on the likelihood of the wife's remarriage?	1	2	3	4	5
6. Are women plaintiffs refused equitable distribution when husbands default, all papers are in order and there is no question of notice?	1	2	3	4	5
7. Is there a rule of thumb in your county regarding division of marital property under equitable distribution?	1 Yes 2 No Y Don't know				

If Yes: _____% to wife _____% to husband

MAINTENANCE

Approximate number of spousal maintenance cases handled during the last two years _____

	A	O	S	R	N
1. Are older displaced homemakers, with little chance of obtaining employment above minumum wage, awarded permanent maintenance after long-term marriages?	1	2	3	4	5

1 = **A**lways, 2 = **O**ften, 3 = **S**ometimes, 4 = **R**arely, 5 = **N**ever

2. If permanent maintenance is not always granted after long-term marriages, what is the trend in your county regarding the number of years for which maintenance other than a jurisdictional award is granted for each of the following years of marriage category:

   (a) 10-20 years: _____ years of maintenance (b) 21-30 years: _____years of maintenance

   (c) Over 30 years. _____ years of maintenance

3. If there is a trend in your county with respect to the duration of rehabilitative maintenance awarded after marriages of less than 10 years, what is the usual duration of these awards: _____ years _____no trend

	A	O	S	R	N
4. Is temporary maintenance granted pending a hearing on the *pendente lite* motion?	1	2	3	4	5
5. Is maintenance granted *pendente lite*?	1	2	3	4	5
6. Is maintenance granted retroactive to the initial motion date?	1	2	3	4	5
7. Do the courts effectively enforce maintenance awards?	1	2	3	4	5
8. Is enforcement of maintenance denied because of alleged visitation problems?	1	2	3	4	5
9. Are maintenance arrears reduced to judgment at the time arrears are established?	1	2	3	4	5
10. Is interest on arrears awarded as provided by statute?	1	2	3	4	5
11. Do courts reduce/forgive arrears accrued prior to the making of a motion for downward modification of support?	1	2	3	4	5
12. Are income deduction orders granted when there are maintenance arrears?	1	2	3	4	5
13. Are downward modifications granted in response to support enforcement motions?	1	2	3	4	5
14. Are decreases in maintenance awards granted in cases in which decreases are warranted?	1	2	3	4	5
15. Are increases in maintenance awards granted in cases in which increases are warranted?	1	2	3	4	5
16. Are sequestration and/or bonds ordered to secure future spousal support payments?	1	2	3	4	5
17. Are respondents who deliberately fail to abide by court orders for maintenance jailed for civil contempt?	1	2	3	4	5

CHILD SUPPORT

Approximate number of child support cases handled during the last two years _____

	A	O	S	R	N
1. Do child support awards reflect a realistic understanding of the local costs of child raising, particular children's needs, and the earning capacity of the custodial parent?	1	2	3	4	5
2. Is temporary child support granted pending a hearing on the *pendente lite* motion?	1	2	3	4	5
3. Is child support granted *pendente lite*?	1	2	3	4	5
4. Is child support granted retroactive to the initial motion date?	1	2	3	4	5
5. Do the courts effectively enforce child support awards?	1	2	3	4	5
6. Are repeated adjournments granted to non-custodial parents in child support proceedings?	1	2	3	4	5
7. Is enforcement of child support denied because of alleged visitation problems?	1	2	3	4	5
8. Are child support arrears reduced to judgment at the time arrears are established?	1	2	3	4	5

1 = **A**lways, 2 = **O**ften, 3 = **S**ometimes, 4 = **R**arely, 5 = **N**ever

		A	**O**	**S**	**R**	**N**
9	Is interest on arrears awarded as provided by statute?	1	2	3	4	5
10	Do courts reduce/forgive arrears accrued prior to the making of a motion for downward modification of support?	1	2	3	4	5
11.	Are income deduction orders granted when there are child support arrears?	1	2	3	4	5
12	Are sequestration and/or bonds ordered to secure future child support payments?	1	2	3	4	5
13.	Are downward modifications granted in response to support enforcement motions?	1	2	3	4	5
14	Are decreases in child support granted in cases in which decreases are warranted?	1	2	3	4	5
15.	Are increases in child support granted in cases in which increases are warranted?	1	2	3	4	5
16.	Are respondents who deliberately fail to abide by court orders for child support jailed for civil contempt?	1	2	3	4	5

CUSTODY

Approximate number of custody cases handled during the last two years _____

		A	**O**	**S**	**R**	**N**
1.	Are custody awards to mothers apparently based on an assumption that children belong with their mothers rather than independent facts?	1	2	3	4	5
2.	Do judges give fair and serious consideration to fathers who actively seek custody?	1	2	3	4	5
3.	Is temporary custody (pending final divorce) awarded to mothers despite fathers' petitions for same?	1	2	3	4	5
4.	Do you dissuade fathers from seeking custody because you think judges will not give their petitions fair consideration?	1	2	3	4	5
5	Is custody awarded to the parent in a stronger financial position rather than ordering child payments support to the primary caretaker?	1	2	3	4	5
6.	Are mothers denied custody because of employment outside the home?	1	2	3	4	5
7.	Are mothers granted custody on the condition they not work outside the home?	1	2	3	4	5
8.	Are custody awards to mothers conditioned on limitations of social relationships or activities?	1	2	3	4	5
9.	Are fathers denied custody because of employment outside the home?	1	2	3	4	5
10.	Are fathers granted custody on the condition they not work outside the home?	1	2	3	4	5
11.	Are custody awards to fathers conditioned on limitations of social relationships or activities?	1	2	3	4	5
12.	Are visitation provisions sufficient for meaningful participation in children's lives by non-custodial parents?	1	2	3	4	5
13.	Is change of custody granted to fathers because of mothers working outside the home and presence of "stay at home" stepmothers?	1	2	3	4	5
14.	Is joint custody imposed over the objections of one or both parents?	1	2	3	4	5
15.	Do custody awards disregard father's violence against mother?	1	2	3	4	5

DOMESTIC VIOLENCE

Approximate number of domestic violence cases handled during the last two years _____

		A	**O**	**S**	**R**	**N**
1.	Are Orders of Protection directing respondents to stay away from the home granted when petitioners are seriously endangered?	1	2	3	4	5

1 = **A**lways, 2 = **O**ften, 3 = **S**ometimes, 4 = **R**arely, 5 = **N**ever

	A	O	S	R	N
2. When a woman is in a shelter or otherwise out of the marital home because of violence, do judges issue Orders of Protection directing respondents to leave the marital home to enable the woman and children to return?	1	2	3	4	5
3. Are Family Court petitioners granted *ex parte* temporary Orders of Protection?	1	2	3	4	5
4. Are Criminal Court complainants granted *ex parte* Orders of Protection?	1	2	3	4	5
5. Do District Attorneys decline to prosecute domestic violence complaints in criminal courts?	1	2	3	4	5
6. Are mutual Orders of Protection issued even though respondents have not filed petitions?	1	2	3	4	5
7. Are petitioners' requests for supervised visitation between respondent and children refused or ignored?	1	2	3	4	5
8. Are Family Court petitioners asked why they have no visible injuries?	1	2	3	4	5
9. Are Criminal Court petitioners asked why they have no visible injuries?	1	2	3	4	5
10. Is adequate support awarded for domestic violence victims living apart from respondents under Orders of Protection?	1	2	3	4	5
11. Are support awards to domestic violence victims and their children firmly enforced?	1	2	3	4	5
12. Are potential petitioners discouraged by Family Court or Probation personnel from seeking Orders of Protection?	1	2	3	4	5
13. Are victims discouraged from seeking Orders of Protection in Criminal Court?	1	2	3	4	5
14. Does Supreme Court grant Orders of Protection when there is a pending matrimonial action?	1	2	3	4	5
15. Does Family Court grant Orders of Protection when there is a pending matrimonial action?	1	2	3	4	5

RAPE

Approximate number of rape cases handled during the last two years. _____

	A	O	S	R	N
1. Is bail in rape cases set lower than in other B felony offenses?	1	2	3	4	5
2. Are defendants in rape cases released on their own recognizance more often than defendants charged with other B felony offenses?	1	2	3	4	5
3. Are sentences in rape cases shorter than in other B felony offenses?	1	2	3	4	5
4. Is bail in rape cases where parties knew one another set lower than in cases where parties were strangers?	1	2	3	4	5
5. Are sentences in rape cases shorter when parties knew one another than in cases where parties were strangers?	1	2	3	4	5
6. When there is improper questioning about complainant's prior sexual conduct, do judges invoke the rape shield law *sua sponte* if the prosecutor does not?	1	2	3	4	5
7. Do you think there is less concern about rape cases where parties have a current or past relationship/acquaintance, on the part of:					
(a) judges?	1 Yes	2 No	Y Don't know		
(b) prosecutors?	1 Yes	2 No	Y Don't know		
(c) defense attorneys?	1 Yes	2 No	Y Don't know		

1 = **A**lways, 2 = **O**ften, 3 = **S**ometimes, 4 = **R**arely, 5 = **N**ever

ADULT SENTENCING

Approximate number of criminal trials handled during the last two years _____

	A	O	S	R	N
1. Do women receive lighter sentences than males with similar prior records convicted of similar crimes when comparable facilities are available?	1	2	3	4	5
2. Do women who are the primary income earners for their children receive lighter sentences than women convicted of similar crimes who are not employed outside the home?	1	2	3	4	5

JUVENILE JUSTICE

Approximate number of juvenile hearings handled during the last two years _____

	A	O	S	R	N
1. Are female juveniles dealt with more harshly than male juveniles charged with similar status offenses?	1	2	3	4	5
2. Are male juveniles dealt with more harshly than female juveniles charged with similar delinquency offenses?	1	2	3	4	5
3. All other factors being equal, do females and males receive equal adjudications?	1 Yes 2 No Y Don't know				
4. If no, who receives more lenient adjudications?	1 Females 2 Males Y Don't know				
5. All other factors being equal, do female and male juvenile delinquents receive equal periods of secure placement?	1 Yes 2 No Y Don't know				
6. If no, who receives shorter periods of secure placements?	1 Females 2 Males Y Don't know				

NEGLIGENCE

Approximate number of negligence trials handled during the last two years _____

ALL OTHER FACTORS BEING EQUAL:	A	O	S	R	N
1. Do men receive higher awards than women for pain and suffering?	1	2	3	4	5
2. Do husbands receive higher awards than wives for loss of consortium?	1	2	3	4	5
3. Do women receive higher awards than men for disfigurement?	1	2	3	4	5
4. Do women employed outside the home receive higher awards than homemakers for pain and suffering?	1	2	3	4	5

COUNSEL FEES AND FEE GENERATING POSITIONS

	A	O	S	R	N
1. Are women attorneys awarded lower counsel fees than men attorneys for similar work?	1	2	3	4	5
2. Are women attorneys on assigned counsel panels assigned to represent women and men attorneys assigned to represent men?	1	2	3	4	5
3. If you are eligible and have made your interest known, has a judge appointed you to a fee generating position within the last two years?	1 Yes 2 No				
4. If yes, please indicate the number of each: Guardian ad litem _____; Receiver _____; Conservator _____; Administrator _____; Other (please specify _____					

5. Are you on an 18-B (assigned counsel) panel in your county? 1 Yes 2 No

6. Do women attorneys on assigned counsel panels receive their proportional share of violent felony cases? 1 Yes 2 No Y Don't know

7. Do women attorneys on assigned counsel panels receive their proportional share of rape cases? 1 Yes 2 No Y Don't know

DEMOGRAPHICS (To be used for statistical purposes only)

1. Age _____

2. Sex 1 Female 2 Male

3. Race/Ethnicity _____ 4. Number of years practicing in New York _____

5. Primary county in which you practice _____

6. Areas of specialization _____

7. Type of Practice

1 Sole practitioner
2 Law firm
3 Corporate/house counsel
4 Public Defender
5 Prosecutor
6 Public agency counsel
0 Other: _____ (please specify)

Please use the space below for more detailed responses to any of the foregoing questions and other issues you would like to bring to the Task Force's attention. If necessary, please attach additional sheets.

PLEASE RETURN YOUR COMPLETED SURVEY TO: R L Associates, 15 Chambers Street, Princeton, New Jersey 08542 by July 26. Thank you for your cooperation.

EXHIBIT G

TOPICS FOR FURTHER STUDY

I. Juvenile Justice

Many studies of the juvenile justice system have shown girls being treated more harshly than boys, for lesser offenses.* The Task Force received a letter from the Executive Director of Statewide Youth Advocacy, Inc. stating:

> The issue of sexism within the juvenile justice system is a serious one. Ancedotal data received by SYA from social service workers, law guardians, etc. indicate an over-response to misbehavior of girls. In particular, all nonconforming actions which imply or are incidences of precocious or promiscuous (in the eyes of the viewer) sexuality bring forth the full effort of the state to 'protect' the girl from the presumed ill effects of her sexual action.**

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* E.g., M. Chesney-Lind, From Benign Neglect to Malign Attention: A Critical Review of Recent Research on Female Delinquency. In S. Davison (ed.) Justice of Young Women, Tucson, AZ: New Directions for Young Women, 1982, pp. 51-72; Wells, R. and Boisvert, M. Toward a Rational Policy on Status Offenders. Social Work, (May, 1980), p. 230; Female Offender Resource Center. Little Sisters and the Law. U.S. Department of Justice, 1977. This last study, by the American Bar Association stated, "The average confinments of girls in this period [1976] were longer than those of boys,...even though the vast majority of the boys (82 percent) were criminal offenders" (Girls were non-criminal). Id. at 38-39.

** Letter of Eve Brooks, Executive Director, Statewide Youth Advocacy, Inc., Rochester, New York, July 3, 1985.

Survey respondents had rather a different perception. For example, 46 percent of women and 88 percent of men reported that female juveniles are "rarely" or "never" dealt with more harshly than male juveniles charged with similar status offenses.*

Given the findings in regional and national studies, on how gender effects juvenile justice, and the overarching findings in this report concerning how gender affects application of substantive law, this topic appears worthy of additional study.

II. Legal Education

The question of what kinds of attitudes toward women are being fostered in our law schools today is a critical one. Laura Blackburn, Esq., Director of the Institute for Mediation and Conflict Resolution and a faculty member at St. John's Law School testified, that law school is "the point of entry into the system for lawyers and those who will become judges, administrative judges and chief judges."** The increasing number of women in law schools

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* Female and male survey respondents (F%/M%) reported that female juveniles are dealt with more harshly than male juveniles charged with similar status offenses:

Always	Often	Sometimes	Rarely	Never	No Answer
1/1	6/1	35/5	24/47	22/41	10/5

** Blackburne Testimony, supra note, p. 273.

is not enough by itself to eliminate gender bias in the courts. Law schools must be certain that there are women on the faculty, because their presence there bears on what Ms. Blackburn described as setting "the vision of who should be in [the legal] system."* Law schools must also be certain that the course materials used and the information and attitudes conveyed by faculty provide students with current, accurate data about the spectrum of issues discussed in this report.**

New York State's law schools need to review the casebooks and materials used in all their courses to determine whether they are gender biased, and, if so, what steps should be taken, such as the inclusion of supplementary materials, to overcome this bias.

III. Prostitution

Public hearing witnesses and survey respondents cited prostitution as an area where there is extreme and

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* Id.

** A forthcoming study entitled "Sex Bias in the Teaching of Criminal Law" reviewed the seven most commonly used criminal law casebooks to see how gender related topics were treated. Sex Bias in the Teaching of Criminal Law. Professor Nancy Erickson, Principal Investigator. Funded by the Affirmative Action Office of Ohio State University and the Ohio State University College of Law. June 1986 publication.

obvious gender bias. Lois Davis, part president of the Rochester Judicial Process Committee, reported on her organizations' experience court watching in Rochester and Monroe County since 1969.

> In a male dominated system, women defendants have been discriminated against most blatantly when there are sex roles involved in the charge. Hundreds of women are arrested on charges of prostitution, but only a handful of men are arrested on charges of patronizing a prostitute. The charges are equally serious as listed in the Penal Code. When a woman is arrested, she is held in jail for a medical examination, which may not be completed for several days. She is ususally fined or given a jail sentence. Many of the women resort to prostitution because it is the only way they can support themselves and their children. The few men who are arrested for patronizing are rarely held in jail, are not required to have a medical examination, and are often given a conditional discharge with a statement from the judge who says that being arrested was punishment enough. Men patronize prostitutes purely for pleasure.

The New York State Bar Association Committee on Revision of Criminal Law recently issued a report advocating repeal of the current prostitution law and stating that current enforcement efforts "merely move the problem from one location to another while concentrating more and more on women only on the poorest and on minorities."* This

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* "Call for Repeal of Prostitution Law," State Bar News, February 1986, p. 3.

area of the law, particularly the courts manner of enforcement of prostitution laws, is worthy of future study.