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CALIFORNIA: FIRST AS USUAL

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SPEECH

California: First as Usual

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It is a truism of American life that whatever happens in the United States, for good or for ill, happens first in California. Those of you familiar with the national gender bias task force movement, who know that the first task force on gender bias in the courts originated in New Jersey, may be concerned that the focus on gender fairness is one national trend that started on the East Coast first. But fear not. I am here to tell you some of your own history and assure you of your pre-eminence. In this as in all else, it was California, first as usual. Moreover, California's "first" was not a one-time thing. Over the last twenty years, state and federal judges throughout California have initiated and supported many firsts that paved the way for pursuing gender fairness in state and federal courts across the country.

The New Jersey Supreme Court Task Force on Women in the Courts was indeed the first of its kind, but it did not spring forth *sua sponte*. This task force and its progeny were a serendipitous outgrowth of the work of the National Judicial Education Program (known for obvious reasons as NJEP) to Promote Equality for Women and Men in the Courts. And NJEP's original work was done in California, with a California sociology professor at its helm.

That professor was Dr. Norma Wikler, who in 1980 took a two-year leave from the University of California —Santa Cruz to see if she could make real an idea dear to the NOW Legal Defense and Education Fund's heart since its own creation ten years earlier. In 1970 several

founders of NOW (the National Organization for Women) founded the NOW Legal Defense to undertake litigation and education in support of women's rights. One of this new organization's immediate concerns was the federal courts' response to employment-rights litigation on behalf of women. In the late sixties, women's rights lawyers began using Title VII of the Civil Rights Act of 1964 to seek redress for sex discrimination in the workplace, but the law's remedial intent was not being realized.

One of the first Title VII cases to challenge discrimination based on sex was *Weeks v. Southern Bell*.¹ The plaintiff, Lorena Weeks, was a clerical worker who wanted a job as a switchman (right away you know *that's* trouble) for the simple reason that it paid more. The district court agreed with the company that being male was a bona fide occupational qualification for this job because a switchman had to occasionally lift a piece of equipment weighing 32 pounds —as if women do not routinely carry toddlers this heavy.

Lorena Weeks took her case to the Fifth Circuit, which reversed and remanded it to a Circuit judge who was not on the panel, the trial judge having died in the interim. In those days Title VII remedies were limited to the job, back pay, and attorneys fees. So, Weeks' lawyer Sylvia Roberts, expected a brief, uneventful meeting with the judge. Instead she found him clearly uncomfortable with the notion of a woman doing a *man's* job. The judge made comments like, "well, in this job you have to know a

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1. *Weeks v. Southern Bell*, 408 F.2d 228 (5th Cir. 1969).

lot about electricity and I can't even fix my own air conditioner," as if the inability of one man to deal with electrical appliances meant that no woman could possibly handle them.

Sylvia Roberts sat at this meeting stymied as to how she could reach this judge, until she recalled that Lorena Weeks' husband was an engineer. Roberts reasoned that if she told this to the judge, under the Blackstone principal that upon marriage the two become one and the one is you-know-who, the judge would assume that her husband would tell Lorena Weeks what to do, and then it would be all right. It worked.

Lorena Weeks got the job, but Sylvia Roberts emerged from that meeting convinced that unless a way were found to educate judges to the fact that the stereotypes about sex roles that permeate society permeate judicial decision making as well, the remedial purpose of Title VII—indeed of any women's rights legislation—would never be fulfilled, because no law is any more effective than the judge who interprets, applies and enforces it.

In 1970 Sylvia Roberts became general counsel to the newly formed NOW Legal Defense and Education Fund and proposed that NOW Legal Defense create a program to educate the judiciary about the ways that gender bias can undermine fundamental fairness. Her proposal was backed by other lawyers on the board who were acutely aware of the ways gender bias was impeding the goals of Title VII. Among them was your own Judge Marilyn Patel, then a Title VII litigator in New York, who, as you know, went on to become a California state judge, a federal district court judge, and member of the Ninth Circuit Gender Bias Task Force.² A statement by Judge Patel at a judicial education program that I will describe shortly, highlights the central concern of the movement to eliminate gender bias in the courts: women's lack of credibility, in the fullest

sense of that word: that is, not just truthful, but also intelligent, reasonable, competent—someone to be taken seriously. Judge Patel said:

I recall that when I was working on what were called "discrimination cases," I believed that I knew what constituted the burden of proof. Congress appeared to have made that very clear. We all felt that we knew what was meant by a preponderance of the evidence. But I found that usually there was an additional burden of proof for women. Many of the male judges I knew were not aware or did not believe that certain things did or could happen to women, or that women were discriminated against or treated in an unjust fashion.³

NOW Legal Defense's proposal to help judges understand how gender bias affects decision making and court interaction met with skepticism, to put it mildly. Knowledgeable judges, lawyers and journalists insisted that judges would never acknowledge that gender bias exists in the courts or accept it as a legitimate topic for judicial education and self-examination. Potential funders claimed such a project was unnecessary because judges are impartial as dictated by their job descriptions.

Nonetheless, NOW Legal Defense persevered, collecting cases, transcripts and news reports that demonstrated the need for judicial education about gender bias, defined as (1) stereotyped thinking about the nature and roles of women and men, (2) how society values women and what is perceived as women's work and (3) myths and misconceptions about the social and economic realities of women's and men's lives.⁴ After ten years of effort, NOW Legal Defense in 1980 established the National Judicial Education Program (NJEP) and invited the newly formed National Association of Women Judges, the brainchild of California Judge Joan Dempsey Klein,⁵ to become NJEP's co-sponsor.⁶

2. Judge Patel is now Chief Judge of the Northern District of California, sitting in San Francisco.

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

4. Norma J. Wikler, *On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts*, 64 JUDICATURE 202 (1980). Professor Wikler was a professor of sociology at the University of California at Santa Cruz. In 1979 she took a two-year leave to found and steer NJEP. She has

continued to be active with NJEP, including serving as advisor to the first and many subsequent task forces on gender bias in the courts. I succeeded Professor Wikler as NJEP's director in late 1981.

5. Presiding Justice, Court of Appeal, 2nd District, Div. 3, Los Angeles, California.

6. For a complete description of the origins of NJEP and the gender bias task forces, see Lynn Hecht Schafran, *Educating the Judiciary About Gender Bias in the Courts: The National Judicial Education Program to Promote Equality for Women and Men in the Courts and the New Jersey Supreme*

Given that it was federal judges' response to Title VII cases that inspired NJEP's formation, the project from its inception wanted to work with the federal courts. But when NJEP invited the then-director of the Federal Judicial Center —the entity that provides judicial education and research for the federal bench— to join the project's Advisory Committee, he preferred to be listed as an "observer."⁷

Fortunately, Professor Norma Wikler believed that her prior research into other aspects of gender bias and her credentials as a tenured professor at the University of California gave her the status to approach California judicial educators about making the California Center for Judicial Education and Research (known as CJER) the sponsor of NJEP's pilot presentation. Her timing was impeccable. Prior to organizing the National Association of Women Judges, Judge Klein had organized the California women judges, and these judges had been pressuring CJER for some time to include a course on women and the law in its programming. CJER's response had always been that there was no time for it and that the faculty was already committed to other topics. But then, in 1980, a few women judges were at last appointed to the CJER planning committee. When CJER announced a new, week-long program for mid-career, general jurisdiction judges, the women judges, with Judge Marilyn Patel taking the initiative, saw their opening. They insisted that CJER make room for a course on women and the law in this new program.

But what would that course be, and who would be the instructors? Enter Norma Wikler with her new model curriculum. It was a match made in heaven, but CJER's resistance made it far from a done deal. One of the judges deeply involved in helping CJER see the light was Judy McConnell of the San Diego Superior Court, a friend of Norma's from their graduate school days. When I asked Judge McConnell recently what she could recall of this momentous beginning, she said the history was murky, but she remembered spending hours with Norma strategizing about how to bring CJER around,

as the man who was then its director was deeply hostile to the idea.

So, exactly how they did it is lost in the mists of time. But with the joint efforts of Judge McConnell, Judge Patel (who was then still on the state bench) and San Diego Superior Court Judge Artemis Henderson of the CJER planning committee, the log jam was broken. In January 1981 CJER presented NJEP's pilot course "Judicial Discretion: Does Sex Make a Difference?" Marilyn Patel was the fearless faculty leader and Judy McConnell croaked through her facilitator duties despite terrible laryngitis. The two courageous male judges were Mike Ballachey from the Oakland Superior Court, and Gene Premo from Santa Clara County Superior Court. The program included an examination of several rape case hypotheticals in the context of California's then-new rape shield law, subject matter which held tremendous importance for NJEP's future. There was a short segment on the mistreatment of women lawyers in court interactions, and a lengthy presentation by Professors Lenore Weitzman and Carol Bruch on the devastating consequences of the minimal —and minimally enforced— alimony and child support awards that Lenore had recently documented in the Los Angeles courts.

Everyone held their breath going in, but the evaluations at the end were outstanding. The trial judges were so impressed by the course segment on the economic consequences of divorce that they insisted it be repeated for the family court judges two months later. After that program, however, the good feeling was not quite so unanimous. At the end, a male judge in the audience confronted Judge Ballachey, who this time was the lone male faculty member who moderating the Bruch - Weitzman presentation, and demanded, "How could you let those women say those things?" Another male judge became so apoplectic that he seemed to be having a heart attack and was rushed to the hospital.

Nonetheless, NJEP was launched, and our myriad programs on gender fairness for judges across the country in the two decades since all stem from this California first. Additionally,

Court Task Force on Women in the Courts, 9 WOMEN'S RTS. L. REP. 109 (1986) and Norma J. Wikler, *Water on Stone: A*

Perspective on the Movement to Eliminate Gender Bias in the Courts, 13 STATE CT. J. 13 (1989).

7. Interview with Norma J. Wikler (Jan. 21, 1998).

California itself continued to take the issue of gender fairness seriously and to make it a key part of a new CJER course on judicial fairness, a course which became a model for other states. California can also take credit for the first program on gender bias for *federal* judges. Thanks again to Judge Marilyn Patel, the National Judicial Education Program was invited to present at the 1988 Workshop for Judges of the Ninth Circuit in Monterey.

Our session, "Promoting Gender Fairness in the Courts" focused on the second generation of employment discrimination cases where the issues of sex stereotyping are more subtle than the flat-out refusal to hire women that characterized cases like *Weeks v. Southern Bell*. I brought as a speaker a friend who was one of the first women to be a partner in the famed management consulting firm of McKinsey and Company. She spoke about the fact that no matter which major U.S. corporation she was consulting for, she could walk into the middle of a meeting about promotion decisions and know immediately whether the candidate being discussed was a man or a woman without ever hearing a name or a pronoun. When the candidate was a man, the talk was about his job performance. When the candidate was a woman, the talk was about her family.

I was inspired to bring this speaker by a conversation I had with several federal judges when I was planning the program. They had noticed in meetings about candidates for bankruptcy judge that one did not have to know the name or sex of the candidate under discussion to know whether it was a man or a woman because the adjectives some district court judges used to describe the candidates were so strikingly different, based upon the candidates' sex.

How little has changed is starkly apparent in the following two statements. The first is from testimony presented by Dr. Susan Fiske, the expert witness on sex stereotyping in the case of *Hopkins v. Price Waterhouse*,⁸ which we discussed in detail at the 1988 Ninth Circuit Judges' Workshop. Ann Hopkins was the Price Waterhouse manager who brought in millions

of dollars of business but did not make partner because her appearance was insufficiently feminine. The man who was her staunchest supporter advised her that to change his partners' minds she needed to walk more femininely, talk more femininely, wear jewelry and wear makeup.

Dr. Fiske had reviewed the written evaluations of Ann Hopkins, and this is how she testified way back in 1985:

When I looked at the ways the two different groups of people described the very same behavior, it was striking to me that her supporters described her behavior as . . . out-spoken, sells her own ability, independent, courage of her convictions, stamina. All attributes that you would think of as positive.

However, these are counter-stereotypic for a woman. They are what you want in a manager . . . and so for a woman to be a manager she has to behave . . . in sex role incongruent ways, to be independent, aggressive and so on.⁹

It is now fifteen years later, but a forthcoming special issue of *The Judges' Journal*, focused on gender bias in the courts, will include an article on this double standard by a former Dean of the California Judicial College, Judge John Kennedy. Based on his administration of the Meyers-Briggs personality-type inventory to 400 female judges and 1,000 male judges he observes, "Another way thinking women can suffer from gender stereotyping is when, true-to-type, they communicate as tough-minded thinkers rather than tender hearted feelers. Frequently, decisions which would be routinely accepted from male judges are seen as cold and unfeeling when rendered by women, even though the decisions and [the] manner of communicating them are identical."¹⁰

The problems for the woman lawyer are identical as well. The zealous advocacy applauded in men and required by the code of professional responsibility is castigated as bitchy and worse in women. I will never forget the following incident, related by a woman attorney in her response to the New York Task Force on Women in the Courts' attorneys' sur-

8. *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109 (D.D.C. 1985), *aff'd*, 825 F.2d 458 (D.C. Cir 1987), *rev'd and remanded*, 490 U.S. 228 (1989).

9. Trial Transcript at 558, *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109 (D.D.C. 1985) (No. 84-3040).

10. John W. Kennedy, Jr., *Judging, Personality, and Gender: Not Just a Woman's Issue*, 39 JUDGES' JOURNAL 17, 19 (Spring 2000).

vey. She was cross-examining a male witness when the judge interrupted and said, "Young lady, you stop that. Would you ever speak to your husband that way?"¹¹

NJEP's first program for federal judges down in Monterey had other interesting aspects and repercussions as well. Judge Marilyn Patel had persuaded Judge John Coughenour, a Federal District Court judge from Seattle, to be (as he describes it) our panel's token white, male, Republican. When he received the evaluations for the program he called me, greatly concerned that I would be upset by what he characterized as the "relatively low rating and the large number of hostile comments." For example, the judge who wrote, "This panel was a waste of time. It was a brain wash attempt on how we decide future gender bias cases. It has no place in a trial judges' seminar." I, however, accustomed to receptions just short of a tomato in the face, thought that getting a five on a rating scale of one to seven was terrific, and loved the many positive comments, especially the one that said, "New thoughts, hard to hear." There was a judge striving to get past the stereotypes.

Ours was the one program at the workshop that all the judges' spouses (read wives) and daughters attended. At the end, one of these women stood and said she hoped that next year they would invite the daughters of judges who themselves are lawyers, doctors, CPA's and business persons to tell about the problems they have encountered. It has been my experience that daughters in these situations do not always tell these hard truths to their powerful fathers because they do not want to look like victims. This is a critical opportunity missed, because it is often these fathers who become our most important allies.

NINTH CIRCUIT GENDER BIAS TASK FORCE

Now we all know that no good deed goes unpunished, and this was indeed the case for Judge John Coughenour, the "token male" at NJEP's first federal program. When California lawyers initiated another gender fairness first, Judge Coughenour's participation in Monterey marked him as the man to chair the Ninth Circuit Gender Bias Task Force, the very first *federal* task force to publish a report.¹² (Although the D.C. Circuit Task Force was officially established first, because then-Judge Clarence Thomas was the Chair, nothing happened there until he moved on.)

In 1987 California had established the California Judicial Council Advisory Committee on Gender Bias in the Courts, with eighteen state and federal judges. Among its thirty-four members were Norma Wikler as advisor and Bobbie Welling, an attorney on the Judicial Council's staff, as Program Manager and Program Attorney. The Committee released its marvelously comprehensive draft report for comment in April 1990.¹³ California attorneys on The Lawyers Representation Coordinating Committee to the Ninth Circuit Conference were inspired by the Advisory Committee's work to draft a resolution for the 1990 conference meeting, urging the Ninth Circuit to establish a Special Study Committee on Gender Bias in the Courts, to conduct research and publish findings and recommendations. The lawyers thought this resolution was such a lost cause they were hesitant to lobby for it. But Los Angeles Bankruptcy Judge Lisa Hill Fenning (a member of the state task force) urged them on. She told them that many judges were for it, that it would be hard to speak against it, and she was

11. REPORT OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS, reprinted in XV FORDHAM URBAN L.J. 1, 144 (1986-1987).

It is important to know that this double standard is not imposed on business and professional women by men only. I am, as you can imagine, very interested in the Senate race in New York. I have known Hillary Clinton since 1987 when the American Bar Association created its Commission on Women in the Profession, of which I was a member and she was the chair. You may be aware of the endless press stories about the fact that so many of the New York women who should be her natural constituency are ambivalent if not openly hostile to her. Recently a group of women who, like myself, have long professional friendships with Hillary

formed a committee to go in teams to speak at small gatherings of women at which those present can ask any questions they want and vent. And do they ever. How dispiriting it is in the year 2000 to have a woman who herself goes to work every day say to me about Hillary "but she's so ambitious" as though that were a crime against nature.

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

13. JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS (1990).

right. In the summer of 1990, the Ninth Circuit Judicial Conference endorsed the resolution.

As a consequence of that historic decision, on August 5, 1992, the Judicial Conference of the Ninth Circuit was the first federal circuit conference to receive a preliminary report of results from its task force on gender.¹⁴ This task force included judges —Marilyn Patel, John Coughenour and Proctor Hug (of the U.S. Court of Appeals, Ninth Circuit)— social scientists, law professors, and lawyers from throughout the Circuit. It was augmented by a legion of judges and lawyers, law professors, and court administrators who volunteered their time as reporters and as participants in research committees on particular substantive issues. It is likely that some of you were part of that enormous enterprise. I think the importance of this work is attested to by the fact that the volunteer human capital investment was so extraordinary. In the report, the acknowledgments list is thirty pages long.

The United States Judicial Conference in its 1995 Long Range Plan for the Federal Courts recognized that effort when it wrote, "the Ninth Circuit's [gender bias study] sets a high standard, one that other courts would do well to emulate."¹⁵ I was particularly appreciative of the Ninth Circuit's delving into substantive law areas that few would perceive as affected by gender, such as bankruptcy and social security, because in 1990 the Federal Courts Study Committee had opined that there was no need for a federal task force on gender bias in the courts because, "the nature of federal law keep[s] such problems to a minimum."¹⁶ Unfortunately, although many other circuits did establish task forces, this is one aspect of the inquiry in which they did not follow the West Coast's lead, opting to focus on the safer topics of court interactions, appointments and employment.¹⁷

REVERSING JUDGES FOR GENDER-BIASED DECISION MAKING:

California can also claim one of the most important firsts of all: the first case in which a judge was reversed specifically because of gender-biased decision making. In *In re Marriage of Iverson*¹⁸ the California Court of Appeal held in 1992 that the oral statement of a trial judge who upheld the validity of a premarital agreement was "so replete with gender bias we are forced to conclude Cheryl [the wife] could not have received a fair trial." The trial judge's description of Cheryl Iverson as a "lovely girl" who was not well-educated and "had nothing going for her except for her physical attractiveness," displayed gender bias against her as a credible witness. The trial judge also displayed gender bias in favor of the ex-husband who testified that he did not want to marry Cheryl and that the two resided together before their marriage. The judge explained:

[T]he impetus for marriage must be coming from her side, because there's nothing further Mr. Iverson is going to get out of it. . . [Marriage is] a deprivation of his freedom. . . . And why, in heaven's name do you buy the cow when you get the milk free. . . .

Subsequent to *Iverson* another panel of the California Court of Appeal decided what I consider the leading case among those that have reversed judges for gender-biased decision making, because it deals with the area in which women have least credibility in the courts: rape. *Catchpole v. Brannon*¹⁹ decided in 1995, was a bench-ried sexual harassment case involving an alleged rape by a supervisor and a plaintiff who did not physically resist.

The trial judge was so convinced of the myth that a woman who is truly being raped will physically resist that even though the supervisor admitted the assault in a call monitored by the police, the judge could not get past his own preconceptions. His behavior and decision ex-

14. See NINTH CIRCUIT REPORT, *supra* note 10.

15. LONG RANGE PLAN FOR THE FEDERAL COURTS, RECOMMENDATION 78 at 113 (1995).

16. JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 169 (1990).

17. See Lynn Hecht Schafran, *Will Inquiry Produce Action? Studying the Effects of Gender in the Federal Courts*, 32 U. RICH. L. REV. 615 (1998).

18. *In re Marriage of Iverson*, 15 Cal. Rptr. 2d 70 (Ct. App. 1992)

19. *Catchpole v. Brannon*, 42 Cal. Rptr. 2d 440 (Ct. App.), *review denied* (Cal. 1995)

emphasize every negative attitude toward sexual harassment cases described by the state and federal task forces on gender bias in the courts, as well as how adherence to rape myths produces gender-biased decision making. The trial judge called sexual harassment cases "detrimental to everyone concerned" and described this case as "nonsense."²⁰

He showed extreme irritation at having to listen to plaintiff's witnesses. After the director of the North Coast Rape Crisis team testified about the symptoms of rape trauma syndrome and opined that the plaintiff exhibited them all, the judge suggested that the witness "should check and see if rape victims come in with a big 'R' stamped on their forehead in red letters, and then we'll all know."²¹ He subjected plaintiff alone among all the witnesses to a scathing interrogation that reads as if it were scripted by Lord Hale (author of the infamous jury charge that rape is a crime easy to charge and difficult to defend so the female complainant must be examined with extra caution). The judge asked the plaintiff whether she blamed herself for letting the assault happen,²² whether her father blamed her,²³ and whether she had considered "just leaving without your clothes?"²⁴ He wrote in his Tentative Decision that the situation was unbelievable, that she was at fault for not successfully resisting, and that it could be inferred that she pursued her supervisor.²⁵

The case was appealed on the ground that the judge's gender bias required setting aside his judgment. The Court of Appeals held that "the allegations of gender bias are meritorious"²⁶ and reversed and remanded for a new trial before a different judge. The Court wrote that "the phrase 'due process of law' . . . minimally contemplates the opportunity to be fully and fairly heard before an impartial decision maker,"²⁷ and that "the judge's expressed hostility to sexual harassment cases and the misconceptions he adopted provide a reasonable person ample basis upon which to doubt whether appellant received a fair trial."²⁸ Cor-

recting these misconceptions is the heart of NJEP's model curriculum titled *Understanding Sexual Violence: The Judicial Response to Stranger and Nonstranger Rape and Sexual Assault*, which, again, owes debts to California.

UNDERSTANDING SEXUAL VIOLENCE CURRICULUM

In describing NJEP's 1981 pilot program at CJER, I noted that it included a segment on California's then-new Rape Shield Law. When I became NJEP's director in the Fall of 1981 and read this one-hour segment, I knew immediately that it had to become a program of its own. Like the founding of NJEP itself, it took another decade to realize this dream, but in 1991 we secured funding to create a two-day model judicial education curriculum on rape trials that is now given across the country, including in California.²⁹ This year we will complete a four-hour video version of the curriculum which will give judges immediate access to the medical, psychological and social science information that debunks the myths to which the *Catchpole* judge subscribed. The moderator for the eight Judge Panel segments in the video is, of course, a judge from California: Susan Finlay from San Diego, another former dean of the California Judicial College.

WOMEN OF COLOR CURRICULUM

California also played an important role in the creation of another NJEP model judicial education curriculum: *When Bias Compounds: Insuring Equal Justice for Women of Color in the Courts*.³⁰ Once again CJER hosted our pilot program, held across the bay in Oakland in January 1998, and once again CJER has folded material from that pilot into its own programming in courses on fairness and on domestic violence.

For this pilot, I am happy to report, no strategizing or arm twisting was needed to persuade CJER to be our partner. Our Advisory Committee included Judge Alyce Lytle and the

20. *Id.* at 249, 252.

21. *Id.* at 252.

22. *Id.* at 257.

23. *Id.* at 250-51.

24. *Id.* at 257.

25. *Id.* at 258.

26. *Id.* at 241.

27. *Id.* at 245.

28. *Id.* at 249.

29. NATIONAL JUDICIAL EDUCATION PROGRAM, UNDERSTANDING SEXUAL VIOLENCE: THE JUDICIAL RESPONSE TO STRANGER AND NONSTRANGER RAPE (1994). To obtain this curriculum contact NJEP at njep@nowldef.org or call (212) 925-6635.

30. To obtain this curriculum, contact NJEP at njep@nowldef.org or call (212) 925-6635.

late Judge Benjamin Aranda, and two CJER program attorneys, Robin Pierce and Arline Tyler. Ben also served as faculty for the pilot program itself as did Judge Candace Cooper, Judge Fred Horn, Judge Fumiko Wasserman and San Francisco attorney Jim Brosnahan. A great deal had changed since 1980. That change is apparent in the final California first about which I want to tell you.

CALIFORNIA JUDICIAL COUNCIL ISSUES MEETING

California has opened the new millennium with another gender fairness first that we devoutly hope will once again become the wave of the future across the land. In January 1999 the Gender Fairness Strategies Project, a joint effort by five national judicial and legal organizations³¹ to implement and institutionalize the recommendations of the gender bias task forces, convened a small conference called "Maximizing Our Gains." We brought together ten of the most active task force implementation committees to talk about how they accomplished their successes, how they overcame barriers, how they dealt with the inevitable weariness that comes with pursuing a social reform effort for so many years, how they had evaluated their task force's impact, and how to export their level of achievement to the less active—if not moribund—states.³² Judge Judy McConnell—still in the trenches after all these years—attended the conference and was sparked to initiate a thorough review of the status and impact of the California task force's recommendations on her return.³³

Working with State Court Administrator Bill Vickery and Assemblywoman Sheila Kuehl (an original member of the California Gender Bias Task Force) Judy arranged to have a Judicial Council Issues Meeting, jointly sponsored by the Judicial Council³⁴ and the Legislature,

examine the status of the recommendations from all the groups covered by the Judicial Council Advisory Committee on Access and Fairness. This committee works to implement the recommendations of the task forces on gender, racial, and ethnic bias in the courts and to assess bias issues for other groups, such as people with disabilities and unprotected sexual orientations.

In preparation for this meeting, Council staff examined the status of the 270 recommendations from the various task forces, the large majority from the gender bias task force. The staff distinguished carefully between what NJEP calls "checkmarks and change." It is easy to run down a list of recommendations and check off all those that have been implemented. Those check marks are important because they tell you about the system's willingness to act on the task force's recommendations. But it is far more difficult to determine whether implementation has resulted in change, and whether it has been positive change—never forget the law of unintended consequences. The Judicial Council staff found that a very high percentage of recommendations could be checked off as having been "done," but they needed to know a lot more to assess whether there had been any change.

Based on this staff review, participants in the Judicial Council's Issues Meeting developed a set of recommendations that were first submitted to the Council's executive committee and then taken up in the courts' annual strategic planning meeting held each March. The just concluded meeting put these fairness issues on the front burner. As a result of this assessment of the degree to which recommendations have been institutionalized, the Judicial Council first identified twenty-two issues as possibly meriting further action, then selected nine on which to focus, and committed itself to periodic progress

31. These five organizations are the National Association of Women Judges, National Judicial College, National Center for State Courts, the American Bar Association Commission on Women in the Profession and the National Judicial Education Program/NOW Legal Defense and Education Fund. The Gender Fairness Strategies Project is funded by the State Justice Institute.

32. In 2001 The National Judicial Education Program will publish a manual about these task force implementation committees' strategies before and in the wake of the "Maximizing Our Gains" conference. Currently available is the

Gender Fairness Strategies Implementation Resources Directory describing implementation projects undertaken by gender bias task forces and supportive organizations nationwide which can be readily adopted or adapted in other states. For information about the manual and the directory, contact the National Judicial Education Program at njep@nowldef.org or call (212) 925-6635.

33. Judith McConnell & Kathleen Sikora, *Gender Bias and the Institutionalization of Change*, 39 JUDGES' JOURNAL 13.

34. The Judicial Council is the policy-making body for the California court system.

reviews. This structure for periodic review is to my knowledge the first. The institutionalization of concern for these issues is what we have been striving for, and I hope that California's lead will, as usual, be widely followed.

My narrative has been filled with California's firsts and successes, but I have no illusions about how much has yet to be accomplished, here as everywhere else. I know that activity does not equal progress and that, to paraphrase Thomas Jefferson, eternal vigilance is the price of gender fairness in the courts.

But this year is the National Judicial Education Program's Twentieth Anniversary, and thus a time for celebrating the good things we have accomplished working together. Two decades ago, when CJER reluctantly agreed to host NJEP's pilot program, the issues we cared

about were either invisible or laughable. Twenty years later, we have created a legal concept called "gender bias in the courts" and it is institutionalized in the law. Judges have sanctioned lawyers who exhibit this behavior, judicial conduct commissions have sanctioned judges, codes of judicial conduct now prohibit it expressly for judges, lawyers and court personnel, and most important, appellate judges have reversed trial court judges when gender bias undermines due process.

I am delighted that my invitation to speak to the Queen's Bench Judges' Dinner came in this anniversary year, so that I can publicly thank the California state and federal judiciary for their essential role in the progress we have made as a country toward the goal of equality for women and men in the courts.