
Law and Gender

Is the Law Male?

Lynn Hecht Schafran

The question "Is the law male?" will be understood by some readers on sight, puzzled over by others as a cundrum, and dismissed by still others as a joke. One way to understand its import is by analogy to how women are treated by the medical profession.

The public has recently become aware of a set of issues that women's health advocates have been discussing for years: the male body as the standard for medical training, research, and treatment. The "maleness" of medicine has been manifested in the use of the male disease model as the norm in medical schools and in the standard definitions of illnesses, in the exclusion of women from clinical drug trials, and in Congress's failure to fund research into women's health problems while putting major money into the illnesses that beset men.

Adherence to the male model in medical schools has meant that physicians are not taught that breast and pelvic exams are part of a complete physical; not taught that illnesses such as ulcers, heart disease, lupus, rheumatoid arthritis, and

gallbladder disease affect women and men differently; and not taught to appreciate the psychological impact on women of radical mastectomy and hysterectomy. What medical students have learned is that it is acceptable to tell women to cut off their breasts and cut out their uteri as soon as they are finished having babies.¹

The use of the male disease model in defining illness has had acute repercussions for female victims of AIDS.² Female AIDS victims rarely get Kaposi's sarcoma, an AIDS-related cancer frequently seen in male AIDS victims. But they do get cervical cancer, candidiasis, and pelvic inflammatory disease. Because physicians were locked into the male model of what AIDS looked like, they failed to diagnose and properly treat many female AIDS victims. Until 1991, the male model of AIDS was also the standard definition used by the Social Security Administration to award disability payments, which locked female victims out of the payments they desperately needed to support themselves and their families.

Women's exclusion from drug trials has made men's response to new drugs the standard, with the result that doctors have little knowledge of how women's physiology and hormones are actually affected by these medicines.³ For example, the fact that women absorb antidepressants and tranquilizers at a different rate than men has implications for dosages.

In one case, an antidepressant approved without being tested on women caused more seizures in women than in

men because of the difference in absorption patterns.

With respect to medical research, a study demonstrating the efficacy of aspirin in reducing heart attacks included 22,071 men and no women. Physicians reading the results of this study had no way of knowing whether women, too, should take aspirin on a preventative basis. One study that determined that heavy caffeine ingestion from coffee drinking did not increase the risk of heart disease and strokes used 45,589 subjects, all male.⁴ Women who read this study were not told that caffeine has unique risks for women, such as fibrous cysts of the breast. They were also not told that these risks were not a part of the study and that the findings were gender-specific to men.⁵ As to why the overwhelmingly male Congress funded research into heart disease in men while ignoring women's diseases like osteoporosis and breast cancer,⁶ Rep. Patricia Schroeder (D-Colo.) observed, "You fund what you fear."⁷

Similarly, the law has treated men's life experience and perspective as the norm. For example, rape laws are a codification of men's fears of false accusations. Fortunately, for more than a decade, a growing number of women in the law and some of our male colleagues have been "asking the woman question," as Duke University law professor Katharine Bartlett puts it, "designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective."⁸ The "maleness" of law is expressed in many different ways—among them laws and regulations; the

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cases that lawyers take or refuse; what is taught in law schools; and how judges, juries, and other decision makers interpret, apply, and enforce the laws—and in many, many more areas than is usually realized.

Laws and Regulations

Until recently the law was literally man-made, since there were no female legislators, lawyers, or judges, and the consequences for women were not pretty. Women were denied the right to vote, own property, enter into contract, sue in their own names, serve on juries, have custody of their children, or engage in many different types of employment.

During the confirmation hearings for U.S. Supreme Court Justice Ruth Bader Ginsburg, the review of the Supreme Court cases that established her as a pioneer litigator for women's legal rights reminded us that less than 25 years ago Idaho had a law that automatically gave gender preference to men when equally entitled petitioners sought to become estate executors.⁹ And the Social Security Act provided less protection to the survivors of working women than to those of working men.¹⁰

Apart from the rape laws,¹¹ state and federal laws have been largely purged of their overt anti-woman content. But there are still instances in which "rules and practices which . . . appear to be neutral"¹² are not. Immigration laws and policies are a paradigm example in their repeated failure to comprehend and allow for the role of domestic violence, rape, and poverty in women's lives.

The Marriage Fraud Amendments of 1986,¹³ which were directed at couples married for less than two years, effectively barred battered women who were conditional residents from leaving the abusive relationship. It took four years, but in 1990 feminist lawyers and legislators succeeded in adding a waiver provision to the law that would allow these women to obtain residency status without filing a joint petition with their husbands to remove conditional status.¹⁴

Then, in 1991, the Immigration and Naturalization Service (INS) issued an interim rule that eviscerated the waiver for victims of "extreme cruelty" such as kidnapping or threats who had not experienced physical violence. The INS required these victims to submit the affidavit of a licensed clinical social worker, psychologist, or psychiatrist attesting to the abuse. Feminist lawyers pointed out that abused immigrant women can rarely

locate mental health professionals, much less afford their services.¹⁵

Feminist legal advocates are still seeking to remedy this inequity and also provide help to abused women in marriages of more than two years' duration who do not have conditional residency. Under the Immigration and Nationality Act,¹⁶ the petition for residency for the alien spouse must be filed by the permanent resident or citizen spouse. The battered alien wife fears that reporting her husband to the police will lead to her deportation, and the husband effectively holds her hostage by refusing to petition for her residency. The federal Vi-

'You fund what you fear.'

olence Against Women Act, which became law in August 1994, allows for self-petitioning by the alien spouse.¹⁷

Women gang-raped in Haiti and El Salvador because of male family members' political activity have been seeking asylum in the United States.¹⁸ Given how reluctant U.S. women are to report rape to our own authorities,¹⁹ and given the torment experienced by the few immigrant women who have told—or been too ashamed to tell—their stories of rape to U.S. judges,²⁰ it is painful to learn that the Clinton administration has proposed a plan that would expedite the exclusion of asylum seekers at ports of entry but does not take into account these rape cases. As Hope Frye, president of the American Immigration Lawyers Association, said, "It's just not possible for a woman to tell a stranger in uniform at a foreign airport the grisly details of how she was gang-raped by people in uniform in her own country."²¹

Should I Take Her Case?

A threshold issue for civil plaintiffs and crime victims is getting into court, which usually requires getting a lawyer to believe in the case. A lawyer who does not realize what he or she²² does not know about the social and economic realities of women's lives,²³ and who buys into—however unwittingly—the misogynist myths about women's credibility,²⁴ plays a role in denying women access to justice. A story about a sexual harassment case illustrates this.

A few years ago the Washington, D.C.,

judicial conference included a presentation on sexism in torts and damages. The judge who organized the panel contacted several lawyers in the hope of finding female plaintiffs as speakers. One lawyer responded with a long letter. I quote extensively from this letter because it provides a singular evocation of what our profession has yet to learn about women's lives, and how that ignorance affects our advocacy and women's access to the courts. The lawyer wrote:

I had especially hoped to obtain the assistance of one particular former client, whose case was most enlightening to me as an attorney. This lady called several times, nearly hysterical. . . . I tried to avoid talking to her, because she seemed crazy. Finally, our receptionist persuaded me to meet with this lady. Our initial conference started off strangely, as the prospective client asked if I could give her several large manila envelopes. I did, and she placed them strategically on the leather of the chair, before sitting. She explained that she was so upset by the events, that she would sweat profusely whenever she thought about her case.

When she came to my office, she was the chief telephone operator for her private employer. She claimed that the distinguished man who headed the division in which she was employed had harassed her repeatedly, and in most outrageous ways. For instance, as she was photocopying papers, he came up from behind and pressed himself against her buttocks. On one occasion, he called, said it was his birthday, and asked why she had not brought him a card. During lunch, she bought a card and brought it over to his office. He closed the door, grabbed her, kissed her, and brought a hand up under her blouse to touch her breasts. He would call her up, promising "to light such a fire on her tail" that she would never want any other man afterward.

This lady rebuffed and resisted these advances, which occurred in private, without suffering any consequences. But, when on one occasion he tried to touch her while he was in the company of several of his male assistants, she slapped his hand away. Then, all hell broke loose. Everything she did on the job was wrong, and he devoted himself to breaking her spirit and making her an outcast.

As crazy as all of this sounded, I told this lady I would not represent her until I had spoken with her psychiatrist and psychologist. The client agreed and got up to leave, but first threw away the manila envelopes, which were indeed soaked.

I spoke to her psychiatrist. . . . He told me that there was no evidence of fabrication, and he believed her story. Her psychologist concurred, so we plunged ahead.

The case was assigned to Judge X, and full discovery was held. Still, as of a few days before pre-trial, there was no independent corroboration, and my only strength was the believability of my client. Then, an unrelated woman employed in a different area at the same institution called and asked for an appointment. She came in and told her tale. It turned out that she had been harassed by the same man, in many of the same ways. She was quite willing to be a witness and also directed me to a third person, in yet another department, with similar experiences at this man's hands.

Amazingly, my client and the other two ladies had all brought their complaints to their employer's internal Equal Employment Opportunity Commission office. When a request was made to add these two witnesses at pre-trial, and Judge X discovered that the defendants had known of these other complaints, the case settled rather quickly. . . .

Now the reason I have burdened you with such a long letter is because of my feeling that the objective at this judicial conference is extremely important. I do not think I am any less sensitive than most lawyers, but in this case, I was about to reject a meritorious case because it seemed to be too awful to believe. And I was mistaking the client's desperate cries for justice with hysteria.

I am not saying that I have learned how to do this without making mistakes, but all of us, lawyers and judges, need to remember that unspeakable acts are sometimes committed even by respected people and that the most severely injured of their victims may be the hardest to believe.²⁵

This is a moving letter, and I thank the lawyer who wrote it for his willingness to expose his own ignorance in order to further reform. I consider the crucial point of his letter the phrase "[a]s crazy as all of this sounded" (emphasis supplied) after the description of the harassment this woman had endured. I believe in verifying clients' allegations, but why did he perceive this woman's story as "crazy"? It certainly does not sound crazy to me.

Georgetown University Law Center professor Robin West has written about the often strikingly different reactions of women and men to the statistics and specifics about violence and harassment

against women. She asks, "Why is my reaction so *different* [than men's]?"

I attribute it to this: my reality—both internal and external—includes that violence, the pain it causes, and the fear it engenders. Not only have I lived it (and they haven't), but I talk to women (and they don't) and women talk to me (and not them). Like all women I know, I hear narratives of violence which are not heard by any man with the sometimes exception of male therapists. My male colleagues think my neighborhood is safe; they weren't told (I was) the details of a recent rape. I *hear* about the date rapes of students . . . ; my male colleagues do not. . . . I *hear* (men don't) about marital violence. . . . I *hear* women's memories of early sexual abuse. . . . I draw this simple inference: Women and men have wildly different "ignorant" intuitions about the amount of danger, violence, and fear in women's lives because women live it and men don't, and women *tell* other women and not men.²⁶

What Is Taught in Law Schools?

Making women's real life experiences visible and understood as they relate to the law means, for example, informing the profession about the actual rates of sexual and domestic assault against women as well as the omnipresent fear of this pervasive violence. This needs to begin in the law schools.

A University of Kentucky law professor²⁷ begins the rape section of her criminal law course by asking each male student to tell the class what he does on a daily basis to protect himself from sexual assault. The response is a puzzled silence.

Then she asks the female students, each of whom has something to say: I do not go to a certain mall because its parking lot is badly lit. Before I get into my car I look to see if anyone is in the back seat. I do not come to campus at times when there will not be many people around. I sleep with my windows locked no matter what the weather.

The first time the law professor tried this teaching technique one woman said, "I don't worry about anything anymore. I carry a loaded gun," and opened her handbag to take out a pistol. Each year the men in the class are stunned to learn that the fear of rape is a daily reality for their female colleagues and in many ways conditions their lives.²⁸

When law professors teach this kind of material without being fully informed themselves, the results can distort reality and mislead students. A few years ago

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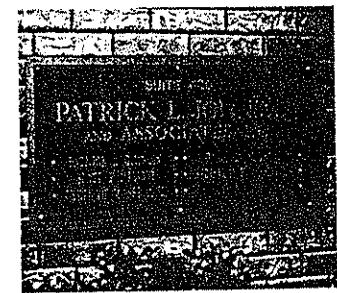
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I learned that a lawyer teaching the law and psychiatry course at a New York law school had told his class that it was a good thing if police did not arrest the batterer when they responded in a wife beating case.

When I contacted him, the professor said that he was not teaching that the police should do nothing. He was advocating that they should take the batterer to a hospital for a shot of Thorazine. When I told him that the incidence of domestic violence is not confined to a few men having psychotic episodes, but is in fact an epidemic that crosses all economic, racial, religious, and ethnic lines and is minimally estimated to affect 2 million women every year,²⁹ he was shocked.

Is the Law Male? Let Me Count the Ways

In my 1989 book, *Promoting Gender Fairness Through Judicial Education: A Guide to the Issues and Resources*, I listed more than 50 substantive and procedural areas in which gender enters the legal arena. Obviously, the book was written as a tool for developing judicial education programs for judges, lawyers, and law students. But the title can suggest a double meaning.

"Judicial education" is not just what goes on at the National Judicial College or a circuit conference. Lawyers educate judges in the course of every case. Lawyers are the essential complement to the other kind of judicial education, especially because judges have very different notions of what they can take judicial notice of, and they want lawyers to bring this information into the courts.

Promoting Gender Fairness Through Judicial Education covers subjects ranging from abuse and neglect to trial skills, with issues, such as driving while intoxicated, medical negligence, municipal liability, and law and psychiatry in between. The section covering law and psychiatry, for example, addresses a host of gender-related issues, such as battered woman's syndrome and rape-related post-traumatic stress disorder. It also provides research showing how sex-stereotyping can color mental health professionals' evaluations and expert witness testimony in a multitude of legal contexts.

Blaming mothers but not fathers for their children's problems is rampant in the professional literature. Mothers have been indicted for 72 kinds of psychopathology in children, ranging from stuttering to schizophrenia.³⁰ Although current research demonstrates the fallacy of

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blaming mothers and points to the genetic origin of many of these problems, not all practitioners have discarded this fallacy.

Stereotyping women as passive and dependent can affect mental health professionals' assessments of competency and fitness in women who are in fact assertive and independent.³¹ Research indicates that gender bias among social workers is nearly always against women, and social workers tend to adhere to traditional male and female sex roles, damning the mother or father who does not conform to traditional sex roles in parenting or work.³²

Lawyers using any psychological testing should be aware of the biases there. For example, in the widely used Minnesota Multiphasic Personality Inventory, responses by female victims of domestic violence may produce results similar to those produced by paranoid personalities.³³ There is an ongoing fight over the *Diagnostic and Statistical Manual of Mental Disorders'* addition of diagnostic categories such as "Self-Defeating Personality Disorder" that can be wrongly used to describe women trapped in abusive situations.³⁴

Spreading the Gospel

The title of this article comes from a series of continuing legal education programs presented by the American Bar Association's Commission on Women in the Profession. In addition to encouraging the audiences at its "Is the Law Male?" programs to learn about feminist legal theory because it enhances advocacy, the commission charges its audiences with bringing this knowledge to their male and female colleagues and encouraging them to use it.

Undoubtedly, many of you reading this have just said to yourselves, "The men I know in this profession are not going to come to a program called 'Is the Law Male?'" And you are right. That is why, when you want to be sure that men as well as women will attend, you should avoid using words such as male, female, gender, and feminist in the program titles. Instead, integrate the material into continuing legal education programs for your local and state bars, your own law office if you conduct in-house training programs, and any teaching you do at law schools.

The 1992 *Report of the Select Committee on Gender Equality of the Maryland Judiciary and the Maryland State Bar Association* provides a model. This

report states that by using *Promoting Gender Fairness Through Judicial Education*, the Judicial Institute of Maryland has included gender issues in the following list of programs:

1. Specialty Topics in Addiction
2. The Right to Forego Treatment
3. Marital Property
4. Mental Health Issues Affecting Maryland Courts
5. Contempt
6. Fairness in the Courtroom
7. Demeanor and Efficiency in the Courtroom
8. The Use of Experts in Disputed Custody Cases
9. Expert Testimony in Juvenile and Domestic Court
10. Handling the Chronic Youthful Offender
11. Emergency Ex-Parte Orders
12. Alternative Dispute Resolution
13. Race and the Criminal Process
14. Employment Law³⁵

The effectiveness of this integrated approach in attracting an audience is illustrated by a story from Justice Rosalie Wahl of the Minnesota Supreme Court, chair of the Minnesota Task Force for Gender Fairness in the Courts. At a statewide meeting of judges, a session on family law was so popular that judges "were fighting to get into the room."

The session was actually the pilot test of a curriculum on spousal and child support created by the Women Judges' Fund for Justice.³⁶ Afterward, Wahl overheard two male judges discussing the program and saying, "Well thank goodness we don't have any of this gender stuff—gender education—this time." As Wahl said, "The funny thing is . . . we had a *half day* of it! They didn't even recognize it! It may be that when you label it, some of them don't like it, but they don't recognize it when they see it."³⁷

Avoiding program titles with words like "gender" in them is not cowardice. Integrating gender issues throughout legal and judicial training under substantive law headings is the best way to ensure that these issues will not be perceived as something tangential to the real work of the courts.

If these issues are integrated consistently and repeatedly into education programs for law students, lawyers, and the judiciary, then women's perspectives will eventually become integrated into the law and legal practice. Programs titled "Is the Law Male?" will become meaningless once the diversity of human experience is fully recognized. □

Notes

- 1 Isadore Rosenfeld, *Health Care for Women: Taking Affirmative Action*, VOGUE, Feb. 1993, at 134.
 - 2 Philip J. Hilts, *AIDS Definition Excludes Women, Congress Is Told*, N.Y. TIMES, June 7, 1991, at A19.
 - 3 Philip J. Hilts, *F.D.A. Ends Ban on Women in Drug Testing*, N.Y. TIMES, Mar. 25, 1993, at B8; Reuters, *Heart Research Gaps Are Criticized*, N.Y. TIMES, Sept. 16, 1992, at C14.
 - 4 Katrine Ames, *Our Bodies, Their Selves*, NEWSWEEK, Dec. 17, 1990, at 60, 60.
 - 5 Mary Rose Oakar (D-Ohio), *Caffeine Health Study Excluded Women*, N.Y. TIMES, Oct. 11, 1990, at A24 (Letter to the Editor).
 - 6 Heart disease is the biggest killer of women, and men also get breast cancer. The widely held belief that women do not have heart attacks, however, has meant that women have been ignored in the medical research, and that treatment for female victims of heart disease has been too little and too late. Grace Lichtenstein, *Crimes of the Heart*, MIRABELLA, Sept. 1992, at 154.
 - 7 Karen Tumulty, *Women in Congress Issue Ultimatum on Abortion*, L.A. TIMES, Sept. 15, 1993, at A5, A8.
 - 8 Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837 (1990).
 - 9 *Reed v. Reed*, 404 U.S. 71 (1971).
 - 10 *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).
 - 11 Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993). Rape laws continue to express a supremely male view of the world in their premise, absurd to women but a wishful truth for men, that every woman is willing to have sex with any man at any time. It is no accident that it was during Indira Gandhi's tenure as prime minister that India switched the burden of proof in rape cases to require men to prove consent. Rafiq Zakaria, N.Y. TIMES, Oct. 20, 1991, at A14 (Letter to the Editor).
 - 12 See *supra* note 8 and accompanying text.
 - 13 Pub. L. No. 99-639, 100 Stat. 3537 (1986).
 - 14 8 C.F.R. §216.5 (1994).
 - 15 Martha F. Davis & Janet M. Calvo, *INS Interim Rule Diminishes Protection for Abused Spouses and Children*, 68 INTERPRETER RELEASES, June 3, 1991, at 665.
 - 16 8 U.S.C. §§1101-1525 (1988).
 - 17 H.R. 1133, 103d Cong., 1st Sess. (1993).
 - 18 Deborah Sontag, *Asking for Asylum in U.S., Women Tread New Territory*, N.Y. TIMES, Sept. 27, 1993, at A1, A13.
 - 19 Victim studies disclose extremely low rates of rape reporting. Findings range from a high of 16 percent (NATIONAL VICTIM CENTER & CRIME VICTIMS RESEARCH AND TREATMENT CENTER, *RAPE IN AMERICA: A REPORT TO THE NATION 6* (1992)) to a low of only 7 percent (MAJORITY STAFF OF THE SENATE COMM. ON THE JUDICIARY, 102D CONG., 1ST SESS., *VIOLENCE AGAINST WOMEN: THE INCREASE OF RAPE IN AMERICA 1990 7* (Comm. Print 1991), reprinted in *Violence Against Women: Victims of the System, Hearings on S. 15 Before the Senate Comm. on the Judiciary*, 102d Cong., 1st Sess. 180, 194 (1992)).
- Rape victims are reluctant to report because they fear retaliation, disbelief, the loss of privacy, and the criminal justice system. Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979, 1013-17 (1993).

20 Sontag, *supra* note 18, at A13.

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21 *Id.*

22 Being a woman, even a feminist woman, does not automatically confer knowledge. For example, in her recent *Atlantic* article, *Feminism's Identity Crisis*, noted feminist Wendy Kaminer wrote, "[I]n some feminist circles it is heresy to suggest that . . . being raped by your date may not be as traumatic or terrifying as being raped by a stranger who breaks into your bedroom in the middle of the night." *ATLANTIC MONTHLY*, Oct. 1993, at 51, 67. Kaminer is apparently unaware that extensive clinical research has shown that a victim's response and recovery are not determined by the relationship between rapist and victim nor the amount of force used to accomplish the rape. Victims of nonstranger rape (the vast majority of victims) often have a more difficult time recovering because the rape was accomplished by gaining the victim's confidence, thus shattering the rape victim's ability to trust anyone again. Schafran, *supra* note 19, at 1018-20 and cites therein.

23 Lynn Hecht Schafran, *Credibility in the Courts: Why Is There a Gender Gap?* 34 *JUDGES' J.*, Winter 1995, at 5.

24 Lynn Hecht Schafran, *The Less Credible Sex*, 24 *JUDGES' J.*, Winter 1985, at 16.

25 Letter to a judge of the Superior Court of the District of Columbia concerning the 1988 Washington, D.C., Judicial Conference on Racism, Sexism, and Gender Orientation in the Law (Apr. 26, 1988) (for reasons of confidentiality, the names of the lawyer and the judge have been omitted).

26 Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 *WIS. WOMEN'S L.J.* 81 (1987) (paper prepared for the Feminism and Legal Theory Conference: University of Wisconsin Law School (1986)).

27 Carolyn S. Bratt, Professor of Law, University of Kentucky; B.A. 1965, SUNY at Albany; J.D. 1974, Syracuse University.

28 MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR* (1988).

29 *1986 Bureau of Justice Statistics as cited in Women, Violence, and the Law: A Fact Sheet: Hearings Before the House Select Comm. on Children, Youth, and Families*, 100th Cong., 1st Sess. 3 (1988).

30 Paula J. Caplan & Ian Hall-McCorquodale, *Mother Blaming in Major Clinical Journals*, 55 *AM. J. ORTHOPSYCHIATRY* 345 (1985).

31 *BIAS IN PSYCHOTHERAPY* (Joan Murray & Paul R. Abramson eds., 1983).

32 Dennis M. Dailey, *Are Social Workers Sexists? A Replication*, 25 *SOC. WORK* 46 (1980).

33 Lynne Bravo Rosewater, *The Clinical and Courtroom Application of Battered Women's Personality Assessments*, in *DOMESTIC VIOLENCE ON TRIAL* 86, 89-90 (Daniel Jay Sonkin ed., 1987).

34 Joan Einwohner, *Controversy Over DSM III-R Psychiatric Categories Continues to Grow Throughout the Country*, 38 *N.Y. ST. PSYCHOLOGIST* 19 (1987); see Brina Caplan, *Crazy by Definition*, *SAVVY*, Sept. 1986, at 82.

35 *REPORT OF THE SELECT COMMITTEE ON GENDER EQUALITY OF THE MARYLAND JUDICIARY AND THE MARYLAND STATE BAR ASSOCIATION* 5-6 (1992).

36 The Women Judges' Fund for Justice is the 501(c)(3) education arm of the National Association of Women Judges.

37 As quoted in JEANNETTE F. SWENT, *GENDER BIAS AT THE SEAT OF JUSTICE: AN EMPIRICAL STUDY OF STATE TASK FORCES* 74 (1992).