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Women and the Law: A Symposium

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Women and the Law: A Symposium

Transcript

March 27, 1993

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INTRODUCTION AND WELCOME

PERI HANSEN, PEPPERDINE LAW REVIEW SYMPOSIUM EDITOR

Good morning, and welcome on behalf of both the law review and the law school. We are happy to have you here with us today and we appreciate your support of our program. This year's topic was a relatively easy one for us to select. As you know, for good or bad, 1992 was deemed the "Year of the Woman" by the media; the United Nations declared the '90s the decade for women, and we saw a new focus on women in the 1992 election: a focus on women in government, politics, and public service. Coming up with the topic, therefore, was easy. Our only problem was having a few too many good ideas to squeeze into a one-day symposium. Fortunately, we found eleven wonderful speakers whose various backgrounds, interests, and wealth of experience helped us narrow our topic choices to one that would fit into a single day. I am sure you will enjoy each of the presentations. Again, thank you for joining us. At this time it gives me great pleasure to introduce the dean of the law school, Ronald Phillips.

DEAN RONALD PHILLIPS

It is my distinct privilege to add my word of welcome to this symposium on women and the law sponsored by the Pepperdine Law Review. For a variety of reasons, this is certainly a timely and a vital topic. As we all know, more than half of our citizens are female, and in many instances, seemingly, the more talented half. Much more personally, I have noticed that my mother, my wife, my daughter, and my three granddaughters are all females. They clearly deserve the full advantage of the law.

We all benefit when people are free to reach their full potential, regardless of gender. Too often, however, people are pigeonholed for one reason or another. I recently heard about a case in point that occurred a few years ago, when Margaret Thatcher was Prime Minister of Great Britain. A young British boy was asked by his teacher what he wanted to be when he grew up. After mentioning several very prominent government positions, the teacher inquired, "What about being Prime Minister?" The boy replied, "No, that's a woman's job."

My own family is doing all that it can on the subject of gender equality. My ten-year-old granddaughter is currently demonstrating the fact that a woman's place is anywhere her talent can allow her to succeed. She is the only female on a major league baseball team in Malibu Little League. There are about sixty boys, and Brittany.

I am particularly impressed with the quality of today's speakers; several of them are personal friends of mine as well as accomplished pro-

fessionals. One such individual is today's moderator, Michelle Hiepler. Ms. Hiepler received her B.S. cum laude from the University of Colorado, a J.D. cum laude from the Pepperdine University School of Law, where she was Literary and Citation Editor of the law review, and participated in several moot court competitions, including the National Trial Association competition, and a moot with British law students, in Middle Temple in London. She practiced civil defense litigation in the Los Angeles firm of Adams, Duque & Hazeltine prior to accepting her current position as Associate General Counsel of Pepperdine University.*

I. PATRICIA DIAZ DENNIS, ESQ.

Patricia Diaz Dennis recently joined the Washington, D.C. office of Sullivan & Cromwell, after completing her appointment since 1992 as Assistant Secretary of State for Human Rights and Humanitarian Affairs. She was formerly Vice President of Government Affairs for Sprint, heading its Washington, D.C. office. In 1986, President Reagan appointed Mrs. Dennis Commissioner of the Federal Communications Commission; prior to that appointment, she served three years on the National Labor Relations Board.

Born in Santa Rita, Mexico, Mrs. Dennis received her A.B. from the University of California at Los Angeles, and her Juris Doctor degree from Loyola University of Los Angeles. She initially practiced law at Paul, Hastings, Janofsky & Walker in Los Angeles, later moving to American Broadcasting Company in Hollywood. Mrs. Dennis is a member of several United States international delegations, including the 1985 World Conference on the United Nations Decade for Women held in Nairobi and the U.N. Commission on the Status of Women held in Vienna in 1984. Mrs. Dennis has received numerous awards, including the 1992 Houston YMCA Hispanic Woman of the Year Award.

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* We wish to thank Michelle Hiepler for acting as moderator. Ms. Hiepler introduced the speakers by providing the biographical information preceding each presentation. The law review greatly appreciates the essential role Ms. Hiepler played in the symposium.

"The Glass Ceiling: A Zig-Zag Solution to a Shatterproof Problem"

A. Overview and Nature of the Problem

Thank you for the introduction; it's been a wonderful return to Los Angeles. I'm going to talk about the glass ceiling—hence the title of my talk. I was asked to speak about this subject because I've seen it from very many angles, so I will share with you some personal anecdotes about my experiences over the odyssey of my professional career.

Now the glass ceiling is, by implication, something a woman does not see or notice until she rises high enough in her business or professional career to bump up against it. And that, at least, fits with my own experience. Because the invisible thing we metaphorically call the glass ceiling can best be proved by statistics, you are going to hear some mind-numbing numbers. I will give you a few myself now just to give you an overview.

Since the Civil Rights Act was passed in 1964, women have made some tremendous gains. By 1991, we comprised nearly half of the U.S. workforce, and the representation in management in the corporate sphere has steadily grown over the past couple of decades. But the gains, according to the Department of Labor's report on the glass ceiling initiative, are at the entry level, and first levels of management. As you all know in law firms, for example, there are a lot more women associates than there are partners. In fact, I know that generally it's considered a good statistical representation if a firm has something between nine and ten percent women partners. But there have not been gains in middle and senior levels of management even though, on an objective basis, women have the experience, credentials, and overall qualifications.

In 1990, UCLA and Korn Ferry, an executive search firm, issued a survey in which they found that women and minorities hold less than five percent of managerial positions. This looks good only because this number is up from less than three percent in 1979. Another report shows that it is even worse for minority women. In *Breaking The Glass Ceiling*, however, statistics are cited based on an analysis showing that in 1990, only 2.6 percent of Fortune 500 corporate officers were women, and that number drops down to 2.2 percent when Fortune 50 companies are considered. Two thirds of these companies had *no* women at all at the vice president level or higher! They make up 3.3 percent of all women corporate officers, which is less than one-tenth of one percent of all corporate officers. So, even though the numbers of women in business or the law, or government, are increasing, women are definitely not present in the substantial numbers they should be in more powerful management positions.

B. Personal Early Work Experience

When I began my working career—now I'll give you a little bit of my personal experience—I could not help but notice that women were treated differently. My career choices in fact were ironically created by this discrimination, because my ambition early in life—I was the first in my family to go to college—was to be a teacher. After I finished my undergraduate schooling at UCLA, I looked at the chances of acceptance into an English Literature Ph.D. program, because I wanted to go on and teach at the college level. I realized that I would probably fare rather poorly when there were five applicants for every spot in graduate school and the other four competitors were men. Graduate schools, at least in the early '70s, were not about to waste a graduate education on a woman who would just get married, have children, and never use her education to any advantage. At the suggestion of my husband, who had just finished his third year of law school, and because, as he said, I won all the arguments at home, we thought it would be a good idea to put that attribute to use and go to law school. So I took the LSAT, and off I went.

Now I cannot say that, in law school, it made a significant difference to be a woman—at that time, Loyola had more women than most of the law schools around, fifteen percent. When my husband graduated in 1970 from USC, only three women were in his class. So there were a few more by the time I graduated. But my first real encounter with differential treatment because of my gender was when I interviewed law firms between my first and second year of law school, and then between my second and third, for what is euphemistically called "summer associate" programs. When I interviewed with the firm for which I ultimately worked after my second year, I was interviewed by every single attorney at the firm—there were 34 at the time—before I was given an offer for a summer associate position only. I was the first woman in that firm's history to be hired. I found out later—at the time, it didn't particularly impact me that I had to interview with everybody—that the other two (male) summer associates who were hired had only interviewed with the hiring committee. I realized that the firm was being extra cautious, obviously because I was the first woman. I recognized then that I would have a few more hurdles to clear that the male associates in the firm would not have to overcome. I had no notion at that time, no notion, that there would be other barriers to advancement along the way.

For three years, I worked very hard at learning my craft. I wanted to be a preeminent labor lawyer, even though I was told that all of the deals were signed in the john and that, for that reason (only half-jokingly), I would not be able to be an effective labor lawyer. Of course, what I love to tell people now is, "Yeah, the deals are signed in the john, but it's the women's john."

There were some tough times with the Teamsters and other union people on the other side of the table, especially when I was pregnant—it was a bit offputting to them. The one thing that people used to be concerned about when hiring a woman was that she would get pregnant. Within the first year of becoming an associate, and being the first woman lawyer in the firm, I was pregnant. It was a bit awkward for the union representatives on the other side of the bargaining table. They didn't know how to react. Actually, at that time, my pregnancy was fortuitous for my clients, because it was so disconcerting for the other side that I got away with much more than I otherwise would have. It also happened with judges—my first baby was born on a Monday, and I was in court on the preceding Friday when I was two weeks overdue. The judge wanted to get me out of his courtroom so quickly that he said that he would rule from the bench and not take the matter under advisement. It was great for my clients at that time.

But there were very tough times for me personally. It was a time of great loneliness; it was a time when I had no one else who was like me in the firm to whom I could go for advice or mentoring. I began to realize that it was not going to be the same for me as it was for my peers with whom I graduated from law school. So what I did was pursue what is now called the "mommy track." Raising children, at least then, was for me incompatible with practicing in a large firm. So I left and went to a corporation where I could have much more control over my hours. By that time, I had had a second child. I also had decided that I no longer wanted my husband to have to carry the baby in to my office for nursing so that I could finish my work.

There is one funny story I will share with you. While I was at the law firm, after I had my first child, I was not going to attend a labor section meeting, because I had to finish a memo. My husband had brought our daughter in for her dinner. I was sitting somewhat indelicately with the baby propped up for nursing while I was dictating—at that time we did not have word processing (this really does date me), we had Dictaphones—so I was dictating and nursing at the same time. I had put my "Do Not Disturb" sign on my closed door—it was a little red signal to the rest of the attorneys that I did not wish to be disturbed. Nevertheless, the head of the labor department came bursting into my office that particular evening—he turned beet red when he surveyed the scene, because there are delicate ways of nursing and indelicate ways. I was

not being delicate because I had not expected to be interrupted. He turned beet red and blurted out, "You don't have to come to the labor department meeting!" and quickly slammed the door behind him. He went back to the section meeting and said, "You know, we have the only associate in town who both lactates and dictates at the same time." It really was a time of males acclimating to women in the workforce—both getting to know each other.

After the law firm, I went to American Broadcasting Company, because it was, as I said, more compatible with parenting. At ABC, I had my first real workplace mentor—my husband has always been my mentor, but the first real mentor on the job that I had was my boss at ABC—in Hollywood. I worked there for five years, trying very hard to do it all, to be the Supermom and a super lawyer.

C. Existence of the Glass Ceiling

1. Federal Government

a. MSPB Report

The federal government, with its penchant for stating the obvious, has issued reports that confirm the obvious—the existence of the glass ceiling. The Merit Systems Protection Board has issued a report titled "A Question of Equity: Women and the Glass Ceiling in the Federal Government." The Report makes findings I want to share with you for women in federal civil service. Not surprisingly, the findings are that women do confront inequitable barriers to advancement in their federal careers. These barriers take the form of subtle assumptions, attitudes, and stereotypes which affect how managers sometimes view women's potential for advancement, and their effectiveness on the job. Contrary to conventional wisdom, women are not promoted at a lower rate than men at a particular level, called the GS-13 level, a pretty high level; but rather, women face obstacles to advancement in the pipeline at lower levels, and even lower than the GS-13 level. The result is that there are not enough women coming up through the ranks to create a pool for advancement beyond the GS- and GM-13 levels. This disparity has the effect of reducing the number of women eligible for promotion at higher-graded jobs.

Given current trends, the percentage of professional and administrative jobs women hold will grow from thirty-four percent in 1990 to forty-two percent by 2017. But even by 2017, women will remain significantly underrepresented at senior levels in the federal government,

holding less than one third of senior executive positions. What is especially troubling about the findings in the federal sector is that women who went to law school before my time—and yes, Virginia, there were law schools before the time I graduated—many of them were denied private sector jobs after law school.

You all know the story about Sandra Day O'Connor, whom Gibson Dunn refused to hire except as a legal secretary. She had graduated third in her law school class at Stanford! A lot of women who were denied jobs in the private sector went to work in government. They have been toiling away in government for many, many years and, yet, so few are in senior executive positions. In interviewing women in the federal sector, the MSPB found that a significant minority of women in grades GS-9 and above believe they often encounter stereotypes that (1) cast doubt on their competence, and (2) attribute their advancement to factors other than their qualifications. This is the stigma of being in a particular position because the employee is a woman or a minority, or both, something about which I know quite a bit.

Minority women do have a double disadvantage. Their representation at top levels is even less than that of nonminority women. Minority women currently in grades GS-9 and above have, on average, been promoted less often than nonminority women with the same qualifications. So what does the government recommend we do in the federal sector to increase the number of women in the upper ranks? Well, the MSPB recommends that government agencies and departments reaffirm their commitment to employment opportunities, make special efforts, and evaluate the criteria by which women are judged to do away with stereotypes. Fundamentally, and you'll see I reiterate and stress this theme, what we really need to do is to internalize the commitment to bring qualified women and minorities from the very top of an organization downwards, in the head of the company or agency, in the president him or herself, in everyone who is in a position to hire women and minorities. Far too many organizations assign equal employment opportunity to an EEO office and figure that is all they need to do—but much more is necessary to make equal employment opportunity a reality.

b. Personal experience

I had worked at ABC for five years when I was plucked from obscurity by President Reagan. He appointed me as a Member of the National Labor Relations Board in 1983. The White House was looking for a Democrat. The NLRB, just like most of the five-member independent agencies in Washington, is comprised of only three of the President's party and two of the "others." The White House was searching for one of the "others." When Presidential Personnel found out that not only

did I have ten years of labor law experience, but I was a woman, and a Mexican-American, I navigated through the appointment process at lightning speed—three weeks.

Once I arrived in Washington I encountered what was clearly the toughest period of my professional life. For the first time, I really did collide head on with the glass ceiling, because I was finally on a par with the decision-makers. We often do not see the problems developing in the pipeline, in the early part of the pipeline, in entry level positions, because the discrimination that existed twenty years ago in entry-level positions does not exist today. Where discrimination really occurs, and that's where the glass ceiling lies, is in the upper echelons, because the incumbents do not want to share decision-making and their power with others. It was, I think, surprising to certain of my colleagues that a woman had any views at all, or that she had strong views on what labor law ought to be, and that she was not more pliant. What exacerbated the existing difficulties with the decisionmaking was that I became pregnant again. During this time, I also endured very bad jokes, being on the Labor Board and very obviously pregnant. I was the second woman in the history of the agency to ever be appointed; President Ford appointed the first woman as Chair. I was the first woman in the agency's history—it was created in 1935, so at that point it was fifty years old—to be pregnant while a Member. It was a tough time, not only for my colleagues, but also for those in the industries we oversaw, because some of them still had not dealt professionally with a pregnant woman.

I left the Labor Board to assume a Commissioner's seat at the FCC because, again, the White House was looking for a Democrat who was confirmable for one of the five seats. The seat had been open for about a year, and no one had made it through Senate confirmation. I found the same sort of patronizing attitude at the FCC, too, along the lines of "What do you mean, you've got views on this particular issue?" Some of my male colleagues apparently believed women did not have strong views. There were also some who assumed I was appointed only because I am a woman and Mexican-American, and not because I was a good lawyer. Consequently, I also found some of the lobbying surprising. For example, on one particular issue involving broadcasting, a particular lobbyist brought in a Latino broadcaster, specifically to see me and none of the other Commissioners. I asked the lobbyist if he were also Catholic and from New Mexico to let him know I'd rather discuss issues on the merits and not be treated as if I cared more about atmospherics that had nothing to do with the pending controversy.

After the FCC, I returned to the private sector for a few years and was called back into government just a year ago. I was confirmed as Assistant Secretary of State for Human Rights and Humanitarian Affairs in August 1992. Secretary Baker had returned to the White House and taken a number of people with him from State, including high-ranking women like Margaret Tutwiler, State Department spokesperson, and Janet Mullins, head of congressional liaison, when I came on board. At senior staff meetings every morning with Secretary Eagleburger and the other assistant secretaries, I was the only woman in the room. The point I want to make is that you have to have the commitment of the chief executive, the person who runs the show, for women to get past that barrier of the glass ceiling. Secretary Baker and Secretary Eagleburger both had a strong commitment to furthering the careers of qualified women and minorities. Their commitment really filtered down through the ranks. There were a lot more women in deputy assistant secretary jobs than there had been before.

Some of the lessons I learned were that there are at least three very important characteristics that women should have to succeed. First: commitment. Unfortunately, one of the misperceptions is that women are not committed to their careers. The misperception developed, in part, because we shoulder responsibilities for having children and rearing them to a larger degree than men. A group of personal character traits are also necessary: toughness, being able to make decisions, defending the people who work for you, and personal integrity—they are all extremely important.

Finally, the one really important criterion a woman needs to conquer the glass ceiling is to take a lot of risks. As I told you, at the age of forty, while I was serving on the NLRB, I was asked to go to the FCC. My first reaction was to say no—I did not want to do it. I was frightened, because I thought I did not know enough about communications law. I had been a labor lawyer for over thirteen years. The reaction of the person who called me from Presidential Personnel, that arm of the White House that ferrets out people for appointments, was that because I had worked for American Broadcasting Company for five years, I knew broadcasting. And I said, "Yes, but I think they do other things at the FCC, like regulate telephones, or something." At that time, I thought "common carriers" were trucks and not telephone companies. It was a really risky proposition for me, just as it was risky to leave Los Angeles and move to Washington three years earlier. But I did it, in part, because my husband encouraged me to do it. He reassured me I could do it. By the same token, when I took on the State Department job, I did not exactly have a deep reservoir of experience in international human rights issues. Although, I did have working knowledge about the domestic Title VII issues that are somewhat analogous to the international

human rights standards. But again, you have to be able and willing to take risks, take on new areas of expertise, and just work hard. Hard work will help you through many of the new challenges.

A major problem for women though is that there are norms of acceptable behavior seemingly universally shared by those in power. Women are still viewed as emotional. Being Latin, of course, I am assumed to be extraordinarily emotional or passionate. Yes, I do care passionately about a lot of things. I do not think this is stereotypically true of all Latinos, but it is certainly true of me that I am passionate about certain issues I care about. This type of approach makes a lot of people very uncomfortable, especially those who have been conditioned to hide feelings. I find that what I have to do is to learn the culture of the workplace environment, then tailor my style—tone down some of my reactions accordingly, sometimes. I've worked in corporations, I've worked in law firms, and I've worked in government—universally, there are certain recurring beliefs that contribute to creating this glass ceiling in all those environments. Often, it is the misperception of women. After I had already served on the Labor Board, at the FCC, and was confident of my abilities, when I went back into private practice, a partner of mine told me that I was too effervescent to attract clients. I looked him square in the eye and said, "How many men are called 'bubbly'?" Effervescent is not an adjective that applies to men. What I was really up against is a shared notion or perception that lawyers have to fit a certain mold before they are viewed as competent.

D. Methods of Coping

How do we women cope with these sorts of things, these cultural attitudes, these misperceptions, the fact that I am a person who touches others—how do we cope with motherhood and juggling lots of different needs and expectations? Well, we can try to deny it. When I first began to practice law, a lot of women simply pretended that they were not raising children, or did not have family concerns or, in other words, were "like the guys." And that troubled me. I will never forget when I was an associate at my first law firm, a woman attorney told me I had to try a particular nanny agency because she had found a terrific nanny who put her two daughters to bed before she got home so she did not have to deal with them. And I thought that was just not the way I wanted to do it. I do not want to have to go that route. So I obviously made the choice at that time to leave private practice to work at a corporation to better manage my time.

I think the fundamental answer—and there are exceptions of course—may be what I call the "zig-zag" solution. It is certainly evidenced by my own career. A way to deal with the glass ceiling is not to shatter it, but to go around it. And each time, because I have been a risk taker, with my husband's encouragement, I have taken on increasingly more responsible jobs, and have avoided the glass ceiling. I do not think it is possible yet for a woman to progress linearly or start in one position and then, in a linear way, progress up through the ranks. I have not seen that linear progression in any company in which I have worked, or in government. The zig-zag solution does seem to be a solution that works.

E. American Women—Model for the World

Finally, however, whatever the failings are in our country, I think we American women are unique in the world. In the brief time that I was fortunate to serve as the Assistant Secretary of State for Human Rights, I came home each time from a trip, thanking God I was an American. We have to keep the proper perspective because, as troubling as the problems are in this country, and although we have not progressed in corporate America or in law firms to the extent we should, we have to remember there are women in other countries who have no status at all. There are countries where young girls are routinely circumcised by their grandmothers, where women are not allowed to vote, where women have no political or civil rights at all. One thing I try to bear in mind as we fight our battles along the way and try to zig-zag around the glass ceiling so that those behind us may shatter it eventually, is that we are extraordinarily lucky to be in this country where we can even talk about these problems and try to find creative solutions for them.

There are two future trends discussed in *Breaking the Glass Ceiling* that bode well for acceleration of progress. Even though progress for women has not been as good as we would like, I think these two trends are important ones. There now is a "business imperative" to respond to changing demographics—we all know there are more women, more minorities in the workforce—but also the customer base, the client base, is increasingly comprised of women and minorities. Instead of social responsibility motivating conduct—it is socially responsible to increase the number of high-ranking women and minorities in companies and law firms and so forth—what's really going to do it, I think and so do the authors of *Breaking The Glass Ceiling*, is the business imperative to better respond to a "more diverse labor market and customer base," not just domestically but globally. For example, I worked on a marvelous piece of business in private practice before I went back to government, representing a company bidding on the purchase of the Mexican telephone company. Because I speak Spanish and, because my

roots are in Mexico, it was a natural fit. So I think we will see increasingly more of that kind of focus by corporate America and law firms so that they can better respond to their customers and clients as their workforce itself undergoes changes.

Breaking The Glass Ceiling also discusses the second trend, some recent legal and legislative changes that will accelerate the shattering of the glass ceiling eventually. These include: the 1991 Civil Rights Act, which was very contentious; the guidelines which grew out of the Department of Labor's report on the glass ceiling, and are enforced by the Office of Federal Contract Compliance (OFCCP) Programs; and the OFCCP's conduct of affirmative action audits of companies that are government contractors to "ensure . . . barriers are being eliminated for women and people of color at management levels." These developments will give that extra pressure toward acceleration of women and minorities in upper echelons of management.

With that, I'll end—thank you very much for your attention.

Audience Question: How can large law firms be compelled to bring more women up the ranks?

Law firms are different from corporate America in that there are a lot of women associates in the ranks. As the increasing numbers swell the ranks of associates, the number of partners will have to reflect the increased numbers of women in the pipeline over time. In the last analysis I was able to get my hands on, about six years ago, I read that close to twenty percent of lawyers were women. But the numbers in law schools, obviously, are different—close to fifty percent, I'm told. So one potential solution is that the bulge in the pipeline of women law students is coming and, once it reaches the other end of the pipeline, there will no longer be underrepresentation.

II. THE HONORABLE JOHN COUGHENOUR

Judge Coughenour was born in Pittsburg, Kansas, and graduated from Kansas State College of Pittsburg in 1963. He received his Juris Doctor degree from the University of Iowa in 1966, where he was Order of Coif and a member of the Board of Editors of the Iowa Law Review. He taught trial and appellate practice at the University of Washington School of Law from 1970 to 1973. Judge Coughenour was a

partner at the Seattle law firm of Bogle and Gates when he was appointed to the United States District Court in 1981.

Judge Coughenour has served as Chair of the Ninth Circuit Jury Instructions and the Intracircuit Assignment Committees, and Chair of the Ninth Circuit Gender Bias Task Force. He is President of the Ninth Circuit District Judges Association.

Thank you very much. It's a pleasure to be here. It's a lot of fun to be in a law school and deal with young people in a different context. Ordinarily nowadays when I deal with young people I advise them that we have now arranged room and board for them. I'm somewhat intimidated to learn that these remarks will be transcribed and published; I've had some experience with reading my remarks after they've been transcribed, and I would suggest that those who have the responsibility for editing my remarks will be engaged in a daunting task. Ordinarily my remarks that are transcribed are limited to things like "You win," or "You lose," "twenty-five years," or "fifty years"—something like that. I'll have to try to speak in complete sentences here today.

I'm often asked, Why you? Why were you the chair of the Ninth Circuit Gender Bias Task Force? Beyond the immediate reaction of some that maybe I am Exhibit Number One, others have suggested that if you'll consider the year that I was appointed to the bench, you will, after thinking about it, realize I was appointed to the bench by Ronald Reagan, which in all probability means, and it's correct, that I was indeed a Republican; in fact, my mother was a Republican precinct committee woman for some forty years in southeastern Kansas. I came from a large, then the largest, law firm in Seattle, where I did mostly corporate defense trial work, and trial work tends to be in the minds of many a somewhat macho career. And I guess the answer that I have given to many is that if I can get it, anybody can. And I'm here to tell you that the experience of chairing the Ninth Circuit Gender Bias Task Force was one of the most educational experiences of my life. I'm reminded of a favorite hymn of mine that I will paraphrase, "I once was blind, but now I see." The educational experience of working through the Ninth Circuit Gender Bias Task Force project was something that I wish I could sentence other people to do, because nobody who goes through what I went through in this process would ever be the same person, because there is so much to be learned, and so much to be understood.

Let me also say that I am enormously proud of the Ninth Circuit for being the first federal circuit in over two hundred years of history in the United States to engage in a self-critical analysis of this important topic. And it wasn't without courage that the Ninth undertook this project. There were many who felt that it was inappropriate for courts that

are charged with the responsibility of enforcing Title VII to subject themselves to the kind of critical analysis that would inevitably in the minds of some result in adverse publicity. And in fact it did result in adverse publicity. For reasons I've never quite understood, the press seems to take an almost sadistic delight in reporting the negative things about courts and lawyers, and the press seems to close its eyes to the positive things that abound in the courtroom and in our profession. There were positive things about the Ninth Circuit study: the fact that we did it, and the fact that we were the first in the country to do it, is something that is basically ignored by those who report on the study. The Ninth also, in those areas where we can compare how we were doing with other circuits around the country, in most respects, is doing better. In terms of the number of federal judges, for example, the number of women practitioners, and a lot of things like that, the Ninth looks very good compared to other people around the country. There were some very negative things. It is a difficult and inhospitable environment for women in the profession today. And that is borne out by the numbers that you see in the study that's before you.

The Ninth Circuit study offered a remarkable opportunity which I think contributed to the interest in the study that was published last summer. If one considers the diversity and breathtaking geographic scope of the Ninth Circuit, you'll realize that we had an opportunity that went beyond what any of the state court studies that had gone before had been able to do. The Ninth stretches as most of you know all the way from Arizona and California through Nevada, Idaho, Oregon, Montana, Washington, Alaska, Hawaii, Guam and the Marshall Islands. In fact, somebody pointed out to me that twenty percent of the surface of the globe is within the boundaries of the Ninth Circuit. Of course, most of it's underwater. In addition, the cultural and ethnic diversity of the Ninth is breathtaking. All the way from Native Americans to residents of Watts to the native Hawaiians, Polynesians—tremendous breadth and scope of ethnic and cultural diversity.

The report itself was issued last summer, at the Ninth Circuit's judicial conference in Sun Valley, Idaho. And for the first time, the federal circuit devoted an entire day to the study of gender bias in the federal courts. We were able to do that because of the support we were given by our chief judge, Clifford Wallace, who never wavered in his support for the Ninth Circuit study, despite the fact that we were constantly going back and asking for more support and more resources, and imposing upon people more and more to get the work done, and make certain it was done well. And it was the topic of an entire day of dis-

cussion and analysis, and it was a very productive day, one in which we had a captive audience. Too often when speaking on this topic I find that I'm preaching to the choir, speaking to a group of interested people who are brought together because they share a common interest in this topic, and I feel frustrated sometimes that the people I really need to talk to may not be in the audience. But at this Ninth Circuit conference, everybody was there, it was a mandatory session, and it was an opportunity to reach a lot of different people who may not have been exposed to some of the data and some of the information that we felt would help them understand this problem better.

Let me talk to you a little bit about some of the findings that are surprising to some, and not so surprising to others. First of all, many people who have not paid attention to this problem mistakenly assume that the perception of the problem for women in our profession or in our courts is a perception that is shared only by a minority, a strident, militant, feminist minority. The fact is that—I won't say virtually all—a very high percentage of the women in the profession and the Ninth Circuit believe that there is a problem. This isn't a problem that is the creation of the minds of somebody who had a distorted perception of reality; this is a problem that is perceived by substantially all the women who are practicing law and going in to the courts in the Ninth Circuit. On the other hand, the men in the room excepted I'm sure, very few men perceive there to be a problem. It's like there are two worlds out there: one of them seen through the glasses of a male, and another seen through the glasses of a woman. They look at the same set of facts and they see two entirely different things, and the data bear this out, you'll see it in the materials that you have. For example, people in the same law firm asked, "Is there a problem with women being promoted in your firm?" Virtually all the women in the firm will say yes. And virtually all the men in the firm will say "We don't have a problem." In fact, one of the things I've discovered on an unscientific basis is that there seems to be a very high degree of correlation between the statement "We don't have problem" and the existence of a problem. For example, many rural bars believe that theirs is a very paternal bar, or more correctly, a collegial bar. And they'll tell you time and again, "We don't have a problem." And yet, more often than not, the data show that it's those bars that have the biggest problems, and the most difficulty. So that one of the important findings of the study, which didn't disclose anything that hadn't been disclosed before, is that the problem as perceived by women is a perception that is shared by virtually all women in the profession. It's interesting because when I look back in my career as a trial practitioner with then the largest law firm in Seattle, I am surprised to learn that substantially all the women thought that we had a problem there, because I didn't hear about it in the firm. Well, why is

that? The answer obviously is that women worry that if they voice these concerns too frequently, it will be career threatening. And men assume that if they aren't hearing about these problems, they don't exist. And it's through the questionnaire instrument, the survey instrument, that you can draw this data out, and see what women say when they know that it's a confidential response, and they don't have to worry about the reaction of the people they work with and the decision-makers who will decide what happens to their career. The other thing that I have learned is that long ago I decided that trying to argue with someone who wants to decide who is right and who is wrong, if you assume the men look at a given law firm and the men say, "We don't have a problem," and all the women in that law firm say "We have a problem," if you try to argue with somebody in the first group and persuade them that the second group is right, it's a very difficult task. And I tried to undertake that task. I think it can be accomplished through education, helping people understand, and to present them with the undeniable data that the Ninth Circuit report presents. But there will be a very significant percentage of those people out there who will ignore the data, or they will read it with a jaundiced mind. Or they won't read it at all. Or they'll read it and say, "All right, I've looked at it and you still haven't convinced me." Whatever the argument is, I concluded long ago that with a significant percentage of people, you have to look at them and say, "Look, let's not argue about who's right and who's wrong. The fact of the matter is, if close to half of our profession think that there's a problem, we have a problem. Whether they're right or not, we have a problem. If most of the women associates in your law firm think they're being treated unfairly, you have a problem that you need to address. And you're wasting your time if you want to expend your energy to try to persuade me, sir, that they're wrong, or to persuade them that they're wrong; you really out to expend your energy on trying to solve the problem that they perceive, and work toward a solution."

We also discovered something that surprised me a little. When we went into this task I thought that the focus of it would be what happened in the courtroom. And, through the efforts of others who were involved in the task force, I was persuaded that we ought to take a broader look at the problem, and focus also on the problems of women practicing law, and what they encountered in their law firms, and in dealing with other lawyers in their professional dealing with clients and the like. There are problems in the courtroom; women do encounter difficult situations in the courtroom, when things are done that are inappropriate. A series of male lawyers will be referred to as Mr. This and

Mr. That and then the woman will be referred to as Mary. Or, comments about the dress of a woman, but nothing said about whether a man's suit looks nice. Or, women even being called "dear" or the like in chambers. These things do occur. I think I was somewhat surprised that the responses to our questionnaire indicated that those problems in federal court are relatively rare. They suggest that the problems are greater in the state court system, for reasons you can speculate about. But the problem is much more serious out in the bar. The women respondents indicate that in dealing with other lawyers, in a deposition context, for example, efforts made to upset women and to take advantage of their gender in order to achieve a strategic advantage in a deposition or discovery context, or in a negotiating context. And even more serious than that is the problem experienced by women in the law firms. Now, we didn't take a look at women lawyers in corporations because we were talking about the Ninth Circuit and federal courts and women in our circuit, but within the law firms, and I think I have to agree with Ambassador Dennis that the law firms probably—and I'm speculating here—are better than the corporate community, but they're bad enough that they need attention. The problems are in hiring, work assignment, and promotion to partner.

Another serious problem in law firms is the tremendous turnover of women in the associate ranks. They will come to me and they will say, "Well, of course we don't have partners; the women aren't committed to the practice. They leave at the drop of a hat. They get pregnant and they leave, or they decide they want to stay home, and they leave, or they do this or they do that, and they leave the firm, so that's why we don't have partners in our firm." My answer is, first of all, I grind my teeth when people say to me that women are not committed to their profession. I mean, how could anybody say that about someone who could go through law school, take the bar exam, and make the sacrifices that anyone has to make when you become a member of our profession? I finally responded to one senior lawyer of a firm that I spoke with recently, "Well, I'm not going to argue with you about that; I've given up on that. But I can tell you this: if I were you I wouldn't go around saying that a whole lot of the time." The message that I am finding is starting to take root in the law firms, and I am trying to deliver with almost an evangelical enthusiasm, is that law firms will solve this turnover problem if they approach it with some flexibility. But if they approach it in the traditional way, that "We did it when I was in practice," the problem will continue because women are confronted with a different set of problems than men are. Men don't bear children. Men aren't given some of the responsibilities in the home, aren't assumed to have certain roles in the home, or rightly or wrongly, women have a different set of pressures they have to deal with. Women, when con-

fronted with a choice between working 2000 hours a year and bearing children, or rearing their children, will make the choice that is sometimes different than men make. And unless law firms will accommodate the different set of pressures that women deal with, they will continue to lose women. And the tragedy of that is that the women they are losing would have, if they were given some flexibility in approach to this problem, come back to the firm with a renewed enthusiasm for the firm and an appreciation of the willingness of the firm to work with them during the childbearing or childrearing years. One women who is a partner in a large law firm in Seattle told me recently that there's about a ten-year window of time when a woman is in childbearing and childrearing, when that is important to their lives, and that if you could work with them with some flexibility during that ten-year period, they would come back to the firm with an enthusiasm that is unbridled, and appreciation that the firm has worked with them to help them through this period of time. The tragedy is that if you don't do that, so many very, very talented women will be lost to the profession and will not come back, because they don't perceive the profession as being hospitable.

And lastly, and perhaps the most startling statistic, and the one that many people have a hard time accepting but which is undeniable in the data of the Ninth Circuit—and we sent out some 4000 questionnaires throughout the Ninth; we had a very high degree of response to our questionnaires. We had the benefit of the director of research at the Rand Corporation in the formulation of the survey instrument and in the statistical analysis of the data, the person whose professional reputation is undeniable on an international scale. The data indicate that this problem is not being solved with the passage of time. As people of my generation and older move out of the profession to retirement and other more drastic effects, the problem isn't going away. A lot of people of my age had assumed that we were the ones who created much of the problem and caused much of the problem, and as people of your age move into positions where you can make decisions and address these issues, the problem would become much less severe. Well, the data indicate that it is just as severe in the younger ranks of our practitioners in the Ninth Circuit as it is in the older ranks. And I thought a lot about that. My initial reaction was denial: it can't be. And then I thought more about it and I think there are a number of reasons for it. I remember hearing a statement by the late Thurgood Marshall, who was asked, "Aren't things a lot better today than they were when you were a young man for African-Americans?" And Justice Marshall said,

"No, they aren't." And I thought to myself, "That can't be true. Racial epithets were used by so many people back in the 1940s and 50s—and the Civil Rights Act, and all this progress that has been made—things must be better today." But if you stop and think about a young, African-American kid growing up in the central district of Seattle, for example, and what opportunities exist for that young person, and what role models, what mentors exist for that young person, things aren't much better today than they were forty or fifty years ago. Now that made me think, maybe this data is right about young women in our profession. When I went to law school—a long time ago—I was in a class that was virtually all male, there were two women in my class at the University of Iowa. When we went looking for jobs, there were no women sitting in the reception area waiting for an interview. There were only men sitting there. When I was worrying about making partner in my firm, there were no other women in that firm competing for that position of partnership. That situation has changed drastically, so that there is a new competitive situation that has come about, where there are a lot of women competing for these jobs, and maybe some men don't react too well to that.

Secondly, the economic situation in the practice has changed dramatically in the last twenty-five years. The profession is, and I hate to use this term because it disgusts me, but so many people perceive the profession to be a business. It's not a business, it's a profession; there's a difference between the two. But setting that aside, as the firms encounter more and more economic pressures and as they respond to the increased cost of overhead, and the deteriorating incomes of the upper level partnership ranks, their reaction to that has been more billable hours. More billable hours result in more income for the firm. The billable hour is a nemesis of people who are trying to deal with pressures outside of the profession: at home and in family life and the like. When I started practice, a responsible year in the firm was about 1500 billable hours a year. That's not easy to do, that's a good solid year, and I worked hard to work 1500 billable hours a year. Now, my young law clerks go out into practice and they tell me if you want to be on a partnership track, and assured that you're not going to be confronted with criticism of your work habits, you're looking at somewhere in the neighborhood of 1900 - 2100 hours a year. Well, if you just work out the numbers of 1500 billable hours, that's really the rough equivalent of working 8 a.m. to 5 p.m. with an hour off for lunch, when you think about how much time you lose moving from project to project, shifting from project to project. That other four or five hundred hours a year, from 1500 to 1900 or 2000 hours, comes from nights and weekends and holidays. And it is very difficult to maintain any kind of meaningful family life if you don't go home at night, and if you don't spend time with

your family on weekends. As a consequence, I think that this economic pressure on law firms has made law firms very inhospitable to young lawyers in general, but perhaps even more so to young women, and has caused a higher percentage of them to leave the practice.

Those are the comments I wanted to make. I recommend the Ninth Circuit study to you; I think you'll find it interesting reading. I'd be happy to answer questions.

Audience Question: You seem to be saying that men do not see a problem because their own comfort level is very high. Apart from making them walk around in a dress and a wig and high heels to actually feel the problem, what do you suggest we do to change their comfort level?

I'm not sure. It's going to take a lot of time. I firmly believe that if confronted with the undeniable facts, people of good will will understand. I'm an optimist. I believe that with educational effort, progress can and will be made. One of the approaches I use is to make myself available to talk to any law firm in the Ninth Circuit about the Ninth Circuit study, and I've done a lot of it. I feel so very strongly that we can help if people will listen and understand, and through the force of my office, given the fact that I'm a bald-headed white male, I can talk to people in the partnership ranks perhaps in a way that others might not be able to. I'm convinced that if I display to them the undeniable fact that the way they are doing business—and I've fallen into the trap of using that word—the way they are running their law office, and the way they are treating their young people, is profoundly offensive to a significant percentage of the people they are dealing with, a lot of people will say, "I don't want to be offensive." That's why people quit using racial epithets a long time ago: they learned that it was profoundly and deeply offensive. With effort and education, I'm hoping that more and more people can be reached. There's an assumption built in that there are people of good will who are in the power positions in law firms, and I believe the assumption is valid. But it requires work and effort to help them understand.

Another message that I carry is what it's like to preside over a trial where a woman sues for sex discrimination; what it means to have a firm's hiring committee files and associate evaluation committee files displayed on an overhead, with reporters out in the audience; and how painful it is for firms to have some of their partners' ugly conduct become the subject of public testimony. I explain to them that the only

way to effectively deal with that kind of conduct when it's encountered is to fire somebody. You cannot sweep it under the rug; you've got to deal with it effectively. And you can no longer ignore it because it's not going away.

Thank you very much.

III. LISA E. BRANDON, ESQ.

Ms. Brandon received her bachelor's degree from California State University at Fullerton. After earning her Juris Doctor degree from Southwestern University in 1987, she joined the firm of Jaffe & Clemens in Beverly Hills, where she continues to practice family law. Ms. Brandon is a member of both the California and Oklahoma state bars. She is an active member of the California Women Lawyers, having served as governor, treasurer, director of the educational foundation, and chief financial officer. At CWL's annual convention last fall, Ms. Brandon was elected president. She will shortly begin her term. Ms. Brandon is a contributing editor to a CEB publication on family law, and she is also co-author of Employee Retirement and Deferred Compensation Plan on Dissolution of Marriage: Valuation, Distribution and Tax Aspects.

Good morning. I want to warn you all that the word "Mesopotamia" is included in my speech. Please, no one leave; it's only mentioned twice.

Thirty-five hundred years ago, the earliest Mesopotamian law codes destroyed what had been the society composed of equalitarian kinship groups and, instead, imposed monogamy only upon women, and transferred jurisdiction over women's cultural transgressions from the kinship group to a city state. A woman's right to control her sexual and reproductive capacities was transferred to her father, her husband, her brother, her son, or to the city state, in that order. A patriarchal, male-dominated society was created, and children socialized into this culture accepted this male versus female gender stratification as if it were the norm. Within 400 years, civilization and the law evolved (more accurately, it had devolved) into treating women exclusively as reproductive property. For example, the Lipit-Ishtar Law Code of the late eighteenth century B.C. held that a woman was, by law, required to marry her rapist, and to remain monogamous with him or face the death penalty. A woman could not inherit or hold property, and she held no right to financial support if her husband were to predecease her, unless of course she was able to marry one of his male relatives. The Code of Hammurabi, which followed in time shortly thereafter, contained the

same legal tenets.

The laws of the Old Testament evidence the laws of ancient Israel, which like the laws of ancient Mesopotamia (that's the last time that word is mentioned) established what Ricky Tannen in a January 1990 *Florida Law Review* Comment described as a "patriarchy, with patrilineal descent, and a woman's subordination to a male-dominated cultural ideology." These laws, which can be found in the books of Deuteronomy and Judges, define "adultery" differently for women and men, and again required women to remain monogamous while men were allowed to enjoy sexual relations with any unmarried woman. Similarly, a woman could not hold or inherit property. For the first time in recorded history, rape was mentioned in the law. However, rape was not considered a criminal act against a woman; instead it was considered a property infringement and whomever held "title" to the damaged goods was compensated for the infringement. In the meantime, the rape victim was forced to marry her rapist. If the rapist was already married, then she was put to death as "damaged goods."

Unfortunately, 3500 years of male-dominated, patriarchal culture has significantly impacted our present-day culture and legal system. Consider how belatedly women have won back to the right to even vote, to hold property rights, to be recognized as an individual capable of making her own sexual and reproductive rights (we haven't even won that one yet) or to retain her individual rights under the law when she marries.

Is there any wonder that change has been painfully slow in our Judeo-Christian-based culture, when the archaic views on the relative value of men and women have been taught to us as part of the socialization of our children for centuries?

Some would argue that our culture has changed, that we no longer devalue women. Instead, we now punish bias through our laws and legislation. As a result, women have made great advances toward being viewed, under the law, as equal to men. We have Title VII, we have Title IX, we have the 1964 and 1991 Civil Rights Acts, we have various pieces of state legislation, we have the Equal Pay Act, etc. All these laws are intended to prohibit discrimination against anyone on the basis of gender (among other things).

Unfortunately, the statistics just don't suggest that we have solved the problem. There are several sectors of our culture wherein the traditional male-based culture has prevented women from remaining or realizing true equality.

For example, fifty to eighty-five percent of American women will experience some form of sexual harassment during their academic or work life. A 1988 survey of U.S. companies found that ninety percent of those companies had received complaints about sexual harassment, and more than one third had been sued by victims.

Worldwide, illegal abortion is still the leading cause of maternal mortality. In this country, women are still not assured of the right to control their own sexual and reproductive activities.

According to a report by the Senate Judiciary Committee, women in the U.S. are eight times more likely to be raped than women in Europe, and twenty times more likely than women in Japan.

Thirty years after the Equal Pay Act was passed, women are still earning only seventy cents for every dollar a man makes. According to a 1990 Business Week study, women earn less than men on every level. Even entry-level jobs for female business school graduates paid twelve percent less than the same jobs for male graduates. Some have argued that during the 1980s, the pay gap between men and women narrowed. Point in fact is that seventy-five percent of that narrowing was attributable to a decrease in men's earnings, and not an increase in women's earnings.

In this country, divorce is one of the leading causes of poverty among women and children. In 1990, about a third of divorced and separated women with children under the age of twenty-one were living below the poverty line. Based on national statistics, in the first year after a divorce, the wife's income dropped on an average of about thirty percent, while a husband's would rise ten to fifteen percent.

Within the legal arena, the evidence of a persistent adherence to a patriarchal legal system which results in a profound bias against women is significant. For example, a 1982 New Jersey Supreme Court task force concluded that "even though the written law was usually gender-neutral, judicial decision-making was often influenced by stereotyped beliefs and biases." The task force found strong evidence indicating that men and women attorneys were treated differently in court rooms, in chambers, and in professional gatherings.

Bias in the legal profession affects not only women lawyers, who attempt to provide fair and reasonable representation for their clients, but also affects female litigants. A New York gender bias task force 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 daily distort courts' application of substantive law."

According to a 1991 National Committee on Pay Equity survey, women lawyers and judges still earn seventy-five percent of what their male

counterparts earn. In a December 1992 survey, published in the California Law Business, only 13.5 percent of the partners in large law firms were women, while 35 percent of the associates were women.

There is little doubt that women are still viewed within our culture as possessing less value than men, despite legislation passed as much as thirty years ago, which suggests otherwise.

The point of my comments is this: until we go about the task of reeducating our culture, legislation directed at punishing biased behavior can do little to change the quality of women's lives in general. Our culture still socializes its children with biased perspectives about women, their function, role, and value in society. Bias takes many forms, some subtle, some glaringly obvious, and it affects so many facets of our lives that without a complete cultural reeducation, no amount of legislation will make meaningful difference for most of us.

Gender bias has been defined as "a tendency to think about, or behave towards, people primarily on the basis of their sex." Children are generally "socialized," or taught cultural norms, by the time they reach puberty. This suggests that their socializers are parents, educational institutions, religious institutions, and the media. A recent survey published in the Los Angeles Times suggests that school-age children are still spending nearly one-third more of their time in front of the television than in the classroom. In terms of time, this statistic would suggest that the media provides the greatest cultural training to children than any other source. Unfortunately, the media, with rare exception, still portrays women as sex objects, who are usually dominated by males of superior intellect, skill, and power. Clearly, the message the media imparts to our children continues the tradition of a male-dominated, paternalistic culture, where women hold a subservient role to men. Is it any wonder that statistics about women just don't seem to get any better?

The cultural bias against women is still being presented to children, of both sexes, to indoctrinate them as to the appropriate roles for men and women. This cultural bias, as presented by the media, still relies heavily on the traditional, male-dominated social structure where men don't cry and women look good but don't think too much. Some media programming directed specifically at children are the worst offenders. How many of us have allowed our children to view "Nick at Night," for example, with its lineup of '50s and '60s styles of "family values" shows? Think of how women are portrayed in such classics as "Dragnet," "The Dick Van Dyke Show," "Get Smart," "Dobie Gillis," "Leave It To Beaver," and "The Mary Tyler Moore Show." What about afternoon programming, when children are most likely to be watching? Consider

such female-bashing series as "CHiPS," "Magnum, P.I.," and "I Love Lucy." Consider also music videos, and cartoons, most of which are filled with violence and inappropriate portrayals of women characters. Does anyone honestly believe that children are not impacted by what they watch on television? Given the number of hours the average child spends watching television, this is the medium through which children become socialized.

The solution? In my opinion, bias must be seen as it really is: a notion that is as dangerous to our society as any health-related or political-related national threat. Regulation of commercial advertisers could be an effective tool in forcing the media into recognizing bias for what it is, and to eliminate it from its programming. By prohibiting commercial advertisers from purchasing air time on programming that presents inappropriately biased portrayals, the media will no longer be financially motivated to present the programming. Eventually, advertisers in all mediums can be controlled so as to end the overwhelming presentation of inappropriate gender roles in advertising.

Of course you may be thinking, as well you should, What about the First Amendment? What about freedom of speech?

Freedom of speech for commercial advertisers has been restricted historically whenever a greater public interest has been at stake. Can we not conclude that it is of greater public interest to teach our children that bias is unacceptable in any form?

Additionally, as lawyers, we have unique access to the laws of our culture, and we have been trained to interpret those laws. Do we not also have a responsibility to teach our communities about these laws, in an effective and preventive manner? I would propose the formation of community action groups comprised of lawyers, teachers, and sociologists who are dedicated to preparing curricula for parenting classes, and dedicated to reviewing public school curriculum with an eye toward eliminating bias in any form in the classroom.

The practice of valuing one human being over another based upon gender, ethnicity, sexual preference and/or a physical or mental disability, is a dangerous practice which, as history has taught us, can only lead to the breakdown of societies, and to the unfair persecution of its members. As lawyers, we hold the power to make the laws, to interpret them, and to enforce them. These laws, just as in Mesopotamia and in ancient Israel, create a social fabric, a culture. We must use our power to reeducate our culture from the ground up if we are ever to achieve true equality in our society.

Only by recognizing bias in every form, and regulating the messages that are delivered to our children, to assure these messages are free of bias, can we begin to reeducate our culture to one that does not stand, does not condone, and does not tolerate bias. Thank you.

IV. DR. EDWARD NEGRETE

Dr. Edward Negrete is an Associate Professor in the School of Education at California State University, Los Angeles. He teaches courses in public education law, collective bargaining in public education, research methods, leadership development, and personnel administration. Dr. Negrete is a past member of the State Bar of California's Ethnic Minority Relations Committee. He currently serves on the State Bar's Committee on Women in the Law and its Commission on Minority Access to the Legal Profession. He is a consultant to the California State Department of Education on vocational equity issues. Dr. Negrete has written extensively in the area of educational opportunities for minority students.

I'd like to specifically remain on the topic of gender bias in the legal profession. What I'd like to do is to share with you some findings of three reports, give you some demographic data from the California Bar, and give you some personal experience dealing with some of those issues and some specific recommendations. The last part of the recommendations are on a personal level in the area of discrimination and biased behavior.

I'd like to begin with the first recommendation—one I think is really important—that you engage in many symposiums like this. You need to have more of these kinds of conferences, and forums on relevant issues and engage yourself in as many activities as possible to bring more awareness. We need to have those kinds of issues brought out. If we don't talk about the issues, they won't get out there. The first thing is to engage yourself in some type of activity along those lines. I'll save the other recommendations for later.

Let me begin with some demographics that the State Bar of California undertook back in August 1991. This was conducted by an independent consulting firm called SRI International. The State Bar at that time took a census in a stratified sample, indicating that the Bar was made up of ninety-one percent Anglos—largely male, seventy-four percent; twenty-six percent of that sample was female. It is a dominant male profession at this point in time. I think that's not a real startling statistic; it's something that you just have to keep in mind as we deal with some of these issues. I generated some questions just to get you into the track of what we're talking about: Is there gender bias in the legal system? The answer is "Yes." I can validate that by not just saying that

there is on a perceptional level, I can give you concrete data based on the Ninth Circuit's Judicial Task Force Report. Second is another document called "Achieving Legal Justice for Women and Men in the Courts," and that was created by the Judicial Council of Southern California. The specific document I will be addressing is the study prepared by Laidlaw & Kipnis in 1989 entitled "Women Lawyers and the Practice of Law in California." That's what I'll be referring to but I want to try to tie in the other two documents and some of the comments and some of the findings of the study.

The answer to that question is, overwhelmingly, "Yes, there is gender bias in the legal system." There are also all kinds of other biases in other institutional systems as well as the legal system, and I'll talk a little bit about the educational institution because that's where I'm coming from. Each report seemed to indicate that there is a significant degree of gender bias in our systems. How prevalent is it? Reports indicate that gender bias is alive and well-entrenched in the legal profession. Where is it? In our court systems, more predominantly in our workplace, and some of the respondents from the Laidlaw study indicated that even a small incidence of biased behavior was reported in law schools. So you see that it does occur in a variety of ways within the legal profession.

I'd like to move to the Laidlaw & Kipnis study and give you some really interesting findings and conclusions of that study. The majority of respondents indicated that gender bias in the legal profession remains a significant problem. Eighty percent of the women surveyed perceived subtle, pervasive gender bias within the profession. Another finding: two-thirds of the women agreed that they were not accepted as equals, something that was alluded to earlier, by their male peers. Another finding: Women of color, and women lawyers of color, viewed themselves as being subjected to a double bias, not only gender, but they were shown other forms of bias. Another finding: sixty-six percent of the women surveyed felt that they had fewer opportunities for advancement as men, again reiterating the glass ceiling effect. They also mentioned one other concept that I thought was interesting hearing Patricia Dennis talk about, the glass ceiling being somewhat linear. There is another term mentioned called the "glass wall," and that's a limitation moving in a lateral sense, in specializing in other areas of particular law, you are restricted to one area of law as opposed to moving across into other areas. And that's considered the "glass wall." Women lawyers in this particular survey also indicated having children was viewed as a liability for a large majority of women in terms of promotional career opportunities. Negative biases in particular were seen or perceived from their superiors and peers. Another counterpart to that would be that negative, biased behavior was perceived by opposing counsel and cli-

ents, and was the most frequently reported. Another particular finding was that in some instances, women reported social isolation, being not valued or being a part or being connected to a corporation, working in isolated areas.

What are some specific recommendations? I would like to touch on just a few of those. One of the recommendations of the State Bar was to work with the District Council as well as local bar associations to achieve environments that would reduce, or at least bring awareness of, biased behavior. That's a good illustration of what's currently going on at the State Bar level.

Another recommendation from the State Bar is education. Educational programs that give you some type of credit are really becoming more and more the thing to do. I'd like to move away from that type of recommendation; I think those are short-term. I'd like to look at some real specific, more long-term and more difficult recommendations because they get at the root of the problem, which is much more complex. There were two comments mentioned about socialization. I strongly believe that a lot of the problems, a great percentage of the problems dealing with the gender bias, or any type of biased behavior, go back to an early socialization of male and female roles. There is no doubt as educators that we see how that is manifested in early childhood programming. We know from research that children at the age of two learn to become very discriminate in terms of colors and behavior. There are programs now aimed at eliminating biased behavior at a very early age. Pacific Oaks College has a whole program devoted to that work with very young children to deal with those issues.

Probably the most important recommendation I could make to you is to take personal responsibility to confront issues of biased behavior. That's real tough to do that, because you may be in a working relationship, and if you hear an offensive behavior or statement, you're either going to confront that individual or you're going to let it go. By letting it go, it sends a message that it's okay. One of the things we learn in our training is strategies of how to confront issues of inappropriate behavior in whatever particular setting you may be. But the main thing is you have to learn to confront it, and there are some specific strategies to do that. But, the first thing is: deal with it. Next, it was mentioned in the report that there are some instances of structural kinds of changes that organizations have to go through. That's a monumental task because change is very threatening to a lot of organizations and if you try to change the structure of the organization, the thinking, the mindset, then it becomes very very difficult. I agree with the comment that if they're

going to make an impact on structural changes, then the changes must begin at the top. Again, those in the power structures must be able to work with you and see that there is value in making such a change. And there must be change in terms of the culture of the corporation.

Next, one of the things that I've observed at a couple of symposiums and conferences is that more men need to be involved in any of the changes I've referred to. You need men as allies to work with or you work in isolation. I worked on two committees in which I saw the very dominant theme that if you don't include men, change comes very slowly. It is a very slow process; that's one of the frustrating parts about dealing with change. We need men to bring some of those issues to the forefront. I was very pleased to hear that Judge Coughenour was the Chair of that task force; I think that's a noble thing to take charge of, and we need more and more of that kind of effort. Finally, my last recommendation is in order to really initiate any kind of major long-term changes, you have to really take responsibility. If you're going to be in that kind of arena, you're not going to sit on the sidelines. There's just no opportunity to sit on the sidelines when these issues are this important. Women's issues are not going to go away. You can't deny that they're here. You have to deal with them, develop better strategies to deal with these issues. In the long term, they have to be met, and I offer this as a challenge to you.

V. WILMA J. WILLIAMS PINDER, ESQ.

Mrs. Pinder received a B.A. in psychology from the University of Southern California in 1962, earned a master's degree in science from Howard University in Washington, D.C. in 1968, and was awarded a Juris Doctor degree from the University of California at Los Angeles in 1976.

Currently Mrs. Pinder is a Deputy City Attorney in Los Angeles' Department of Water and Power. Her position involves the practice of general municipal law and contracts administration of large capital projects. Mrs. Pinder also litigates, negotiates, and settles specially assigned civil liability tort and police/civil rights cases.

Mrs. Pinder is a life member of the American Bar Association. She has served on the California state bar examiners committee as Vice Chair and Chair of the Moral Character Division. She is currently a member of the Minimum Continuing Legal Education Committee, and the National Conference of Bar Examiners Multi-State Bar Examination Committee. Mrs. Pinder is a life member of the California Women Lawyers, and serves on its Board of Governors. She is also a member

of the Langston Bar Association, California Association of Black Lawyers, and Black Women Lawyers of Los Angeles.

I am particularly happy to be here today. I'm really glad I did not have to follow his Honor [Judge John Coughenour], mainly because I was so filled with emotion due to what he was saying, but also because I realized he is a kindred spirit.

My secretary did a quick checklist for me. This [a sheet of paper with large handwritten words on it] is about all the notes I ever make when I do anything, so she had ten points on here, which she was taking down as I was saying them. I said, "Number one: preaching to the choir." So the moment I heard his Honor say "preaching to the choir," I thought "Oh boy, they're going to think that all of us sat here and rehearsed." But I think what you will find out about this panel—and I know I am so pleased to be a part of it, and to hear the comments—is that we are very sincere about our remarks to you. Sometimes you begin to wonder, "Is it me?" And I fight very hard against such negative thoughts—"I know you don't like us, I know you're against us"—that's not part of my personal philosophy. So, in trying to be the person that I see myself to be, many times I personally confront bias, whether for myself or anyone else, head-on. But you know, you just don't want to be the kind of person who just has a chip on his or her shoulder. I would say this to the gentlemen in the audience. I'm a litigator, and as a litigator my focus is on the jury. That's where I watch; I don't watch the judge. The judge knows what he/she is supposed to do. I don't watch the other attorney; he or she knows what they're going to do. I watch the jury. And as I was looking at your faces [the men] your arms started crossing, faces got long, hands came over mouths. We're not here to shake our fingers at anyone; we're here to explore an area, to see if we can be a part of a solution to some of these problems, we have to work together, we're going to be attorneys together. And the one great thing about law—you can be sitting there right now, twenty-three, twenty-four, twenty-five, whatever your age—the second you're sworn in to the bar, I could be facing you in court the next day. So, law doesn't really have an age to it, so therefore, why should it have a gender problem, and why should it have a race problem, if there isn't an age problem. Because when you stand up there before the judge, the judge doesn't care how young you are, they don't check to see if you are wet behind the ears, they don't care about any of those things. They want to know what you are talking about, what does your paper say, and is there a jury waiting in the hall? And I will often make reference

to a jury because I am a litigator. And being a litigator, that's what made me say some of the things I said in my synopsis, and also in the longer law review article.

When I went to UCLA, my children were six, eight, and ten, and UCLA does not have a night program. So I don't have to tell you, perhaps, like many people here, I was very busy. I always wanted to be a city attorney, I wanted to be with the government. I didn't realize at the time that part of that desire is also related to the glass ceiling and the mental conditioning that you have gone through. I can remember now some of the employment interviews at UCLA which were just hilarious. They would ask me questions about my husband; they asked, "Oh, how did you manage to do this with three kids?" and then after they said that, they'd say, "Well, interview's over now, thank you so much." And I realized they had never scratched the surface as to who I was, and what I might have to offer that firm. Of course, that may be because they really didn't want me at that firm, so I felt—and as I found out from the literature—that many, many, many minority women go into government and public service because they feel that the government does "have a law" that you're not supposed to discriminate, so they feel they'll be happier with the government.

But I really saw myself as a knight. In fact, I see all lawyers as knights. Because as a litigator, I see them putting on their armor, taking their shield, and getting their sword, because that's what I do as a litigator. It didn't occur to me that once I put on my armor, and put on my shield, that another knight was going to see me as different from some other knight they have to do battle with. So that's what my first slide shows: the woman dressed in some of the garb of the knight, trying to slay what I call the two-headed dragon. And that is what my article was written about, racism being one of the heads, gender bias being the other. So you see, it doesn't matter what your race is—but I illustrated a Black female, because that's what I am and that is what I have the most knowledge about. But gender bias and racism can affect any person.

Now, one thing about a knight: knights always have a code of chivalry. They're supposed to treat people a certain way. And basically, law as a practice has a code. The code of civil procedures tells you how you go about starting your litigation, what you're supposed to do, how you're supposed to meet. Now, counsel is supposed to meet face to face. You get there, and the counselor is someone you didn't know or didn't expect—it all really starts in deposition and I believe his Honor touched on that—all kinds of gamesmanship.

When I did some of my first trials, there were so many references to sports, by the opposing attorney, a male, that I was really at a loss. I just didn't know how to relate those sports terms to the litigation. So all of a sudden, I was "into" sports. My husband said, "Why are you

watching the football games every weekend?" I told him, "I've got to get these terms down and get them into my spiel! Of course, I finally became pretty good at it; there's hardly a sports term that I cannot use in some way, and tie it to the trial. Of course there are also women on the jury panel, and men (attorneys) don't change their comments to fit the women. Well, I already have the comments to fit the women, right? So now that I also have the comments to fit the men, I'm just working like this [moving to and fro] and covering both sides of the room, so to speak. I had to change, to adapt to where I was. I was not going to go into the courtroom and think, "Oh, God, the judge doesn't like me; I'll bet he and the opposing attorney are in the same club together"—I don't have time for that. The government doesn't pay me to do that. It pays me to go in there, if not to win outright, to at least cut down the damages. And I can't be thinking about myself: "How does this jury perceive me?"

Now, initially I didn't even wear nail polish when I started doing trials. And I noticed when I'd move my hands, the women jurors would move their eyes, following my hands. And I had a few nice pieces of jewelry, and so when it came time for trial, instead of dressing down, I was starting to dress up because women would pay attention, they'd look at your hands, they'd look at your wrists, and as long as they are looking at me, they are what? Listening! I don't think that every woman in the world ought to go out and buy pinstripe suits and try to look just like a man. I wrote something on an extra piece of paper that says: Be Yourself. You have to be yourself, you are a woman. If you think of Joan of Arc—remember Joan of Arc? She had her hair cut real short, and she had on all of the garb of the knight, and she fought and, in essence, ended up dying like a man as well. Now, we don't want to die like a man; we don't want to lose ourselves. Those of you that are going to have children, or want to have children, there's no way you're going to hide that tummy when you're pregnant and have to go into court. There are things you're going to have to do, and you are a woman, and you're just supposed to get comfortable with it. You just can't keep backing up. Now, race of course is even more dominant, and more obvious to everyone.

On my next slide is the doubting Thomas. This doubting Thomas says, "Now listen here. Blacks in particular have made all kinds of strides. No one's calling you racial epithets, nobody's really making you feel bad, I mean after all, you're on the U.S. Supreme Court—what you do you want? There is no problem. There is no problem of racism. There is no problem of gender bias." That's what the doubting Thomas

says. And he crosses his arms and has that look on his face. Well, you're going to meet all kinds of doubting Thomases. The point is, particularly if you are a man, just don't be a doubting Thomas. Now, my colleague on the panel said that you should learn how to confront these things. I will assure you, as a first-year associate, when you notice that there are no women and no minorities in your particular firm, you're *not* going to go and say, "May I see the managing partner? I was at this symposium at Pepperdine, and . . . ." You're *not* going to do that. But there are things you can do. And it is, by the way, how you carry yourself, how courteous you are when you are talking to someone on the phone. The first thing you're not going to do is call other attorneys and insult their secretary, who nine times out of ten times is a woman—that's the first thing you're not going to do. And even if you're a woman, you're not going to do it. Because we women, we get to make the phone calls, and if we're calling secretaries, we're just as bad as the men. So you see, it's not just a male-female thing. Attorneys are notorious for being insensitive, period. So you just have to fight these tendencies, as a knight. You want to have this code of chivalry that extends to other knights, to other attorneys, and to all people that you come in contact with. You do not want to go into court and be rude to the clerk because "she doesn't count or he doesn't count." Or we don't want to be rude to the bailiff or whoever they have at the desk there because "they don't count," and then smile at the judge. That's not the way. So, when you're changing to accommodate minorities and women, you will be accommodating the world, and that's what you want to do.

The lady with the purse back there—what's your name? Okay, Susan, one of the things I observed when you asked a question of another speaker: You were really sad and discouraged. You said, "What are we going to do, your Honor? You told us what the problem is, but what are we going to do?" This is a typical attorney [referring to slide of white male attorney]. It's really the typical male attorney in this auditorium, except for the glasses and he's a little older. This is the typical attorney. And in my paper I say if I could have my way, I would have an experiment called "I Passed As A Black Woman Lawyer." And they (the white male attorneys) would have on a wig, they would have on the shoes (heels) and the bag and they'd have to go about in that attire.

[Next slide: Black female attorney.] If this was Hollywood, you'd just take the two and merge them together, right? And we've seen many plays on this, where the man becomes the woman, the kid becomes the parent, the husband becomes the wife for a week or a day, and you see what the confusion is. Well, if you thought you were sad, that would be one sad man when he was changed into a Black woman attorney—he would not be smiling. First of all he would notice when he popped into court, as he's always done, the male judge would say "Come back to

the chambers," and the attorney would turn and look at the judge, and he'd expect the judge to be looking right at him, but he'd find that the judge wasn't looking at him; he was looking at the other person, who was a white male. Because even the judge, without knowing it, changes his mannerism in response to the particular attorney. And you can only know it if you see the change. The "changed attorney" would find that he moves his chair over, as I've done a few times, like this video camera is doing, trying to stay in the range of where the judge is looking. And then he would find that little subtle comments would be made that kind of make a connection with the other attorney, leaving him out of the conversation. It's not just something that happens with the judge, though, it can be with anybody—and this goes on all the time. But some would say: It's just a little camaraderie there. It has nothing to do with race or gender.

Now I have a double whammy, because I represent the government. So the other opposing attorney will come in and say to the judge, "Oh, you know how the City of Los Angeles is and their attorneys, they don't want to settle this case." And the judge, who would like for me to settle in many instances, so they don't have to go through a long, lengthy trial, says, "Yes, I do know how the City is," and then he turns and scolds me. But fortunately, what happens at that point is, the judge waves the other attorney away and says, "Go outside, let me talk to this City attorney." Now, what I say to a judge face to face in chambers, I will tell you, is very different from what I say to a judge when there's someone else in there. Many times I've had to say, "Your Honor?"—and this is the first time he's had to look up—"You owe me an apology. " He responds: "What? What happened? What do I owe you an apology for?" "Your Honor, you said—" and I name four things that they may have said that I did not like. I don't say it with hostility, I say it in a very nice way, like I'm talking to you. And I've had at least three or four judges say, "Well, you know, I didn't hear myself say it like that, this has really been a bad morning," and they'll go on and share something personal with me. And I'll say, "That's fine, your Honor. But back to the merits of this case," and I get the judge back to the point, and we go on. But that, again, is a "conditioned judge." Yes, that's a conditioned judge. And his Honor [Judge Coughenour] has asked you to be the same. His Honor has some sensitivities because he has been through one of these courses; he knows that there is a problem. Another judge just doesn't realize that he or she is part of the problem. And it can be white female versus minority female. That's why I'm trying to tell you this "thing" isn't just men versus women, Blacks versus Hispanics, His-

panic versus Asians. Rudeness knows no color.

[Next slide: Women jumping over hurdle.] Now, as I said, I could just stop right here and start giving the gender bias lecture. Now I have three women jumping over a gender bias hurdle. I will tell you that's pretty hard to do in a suit and heels. That's pretty hard to do. How would you like to start the day that way? *Okay, I don't really have on tennis shoes, but that's the way I feel, because I've got some damn hurdles to jump over.* How would you like your mother, your sister, your wife, your girlfriend, your neighbor to have to go out the door every day, with this mental picture: *I've got a hurdle to jump.* She is not thinking: "I have a brief that's due," "I have to make a presentation," or "I have to persuade twelve jurors," but "There's some kind of invisible barrier there that I have to jump over." Now, the one on the end closest to us is meant to be Black, the one in the middle is the basic Anglo/Caucasian, and the one on the far end is Asian. Now, there's even something going on in the profession where there's a pitting of these women against each other, as it were—there's competition there. Now, as Patricia Dennis said, she speaks Spanish; she's bilingual. At least if a firm wanted someone who could speak Spanish, you would have some advantage; she would have some value there. And believe me, I don't speak Spanish, so if it were just the two of us and everything else was equal, she would prevail because she can speak Spanish. In California we have the Pacific Rim. There are many companies who, because they are dealing with companies that never deal with women at all, don't "want a lot of women" in their firm. They don't need them because they say, "Well, the Japanese, the this group, the that group, will not deal with women, they're not used to it." There's another problem. They're not going to lose money just to have some woman on the staff. So the woman's going to get a different type of assignment. If you look at my resume, I've traveled to so many countries that were very interesting. When I went to Russia in 1990, I had a bigger crowd around me than anybody else (because I had the cigarettes, of course). I mean, I know what to do! When I climbed the Great Wall of China, there was a little entourage behind me—everybody was saying, "Are they making a film here, what's going on?"—because I had the pens that said "America." I had things to give out, and tried to make friends; I know how to do these things. I'm not saying you're going to go into a legal meeting and do that, but the first thing is that you've got to like people. The worst thing a firm could do would be to send a racist to a country to negotiate something. Don't you see how that would turn out? So if you were a racist person and you said, "Oh, those people over there that I'm going to settle this case with, they're not worth anything, we don't like them, we're trying to trick them out of their money, or make them pay less"—it's best to send someone who likes the people. They're probably

going to do a better job, by definition. So, as a woman I'm speaking out, don't get caught up in this. Sure, you're going to compete with people, but only compete with them as a knight. A knight has no sex, no race—they're just another knight you want to get ahead of. That's okay. But do it on its merits. Do it because this person has something to offer that firm that you just didn't have. That person might even say to you, "I beat you out of this job, but I have a contact from my last interview and you'd be perfect for that spot." It can work like that, it really can.

[Next slide: Single hurdler.] The saddest, and the loneliest, is the solo hurdler. Now I think I stayed in the sun too long when I went to the Olympics in Korea, because of course I saw people from all over the world jumping over all kinds of hurdles. And that was an interesting time in my life, and it still flavors my work, my trials, and even talking to you people. But that's not fun [indicating lone hurdler]; that's not an enviable position to be in. We all have a role to play in this. I don't want to repeat everything I just said in my little outline; eventually you'll receive it in full in the law review. When I was asked to do this, I didn't have any information other than my own personal war stories, and they're not good enough. So I wrote to someone and asked if she had any information about gender bias and racism. The person said, "I'll send you something tomorrow Fed Ex." A Fed Ex package came, and the package I got was this tall [4 to 5 inches] and was all filled with comments, with interviews, with statistics—women all over the United States, and I know his Honor knows what I'm talking about; they're all over the United States, complaining. There were Black women complaining about how they'd been treated. There was one woman, evidently a dark-skinned person, I don't know whether she was Latina or Black, she was one of the two, but she said she was in the court hallway and someone approached her and asked her to clean up something, mistaking her for the janitor. And she went on to say, "I was dressed in a suit, and had on pearls." And the way she said "*and had on pearls*"—it was kind of like when your mom gives you that first little imitation strand, and then you know how you keep working up to the day you get the ones that hang down to your navel, and it's the real thing—but seriously, she was taken aback. She would have loved for someone to have called her "dear." "Dear" wouldn't have been insulting in that particular situation. So there's all kinds of things that happen to women and especially women of color that hurt their feelings. Other people said that they tried to enter the courtroom area through the swinging door, and they had the bailiff jump up and put his arms up and saying, "No, no defendants up here, you've got to wait for your at-

torney." And they replied: "I am the attorney." There are women who make sure that they get the best attache case they can, and they swing it as they walk down the hall—that's a little courage thing for many people: "I don't want to be mistaken for the secretary, so I'm going to have the paraphernalia with me." But of course, when I did criminal prosecution, it was really called: "Here's a file, go to trial." You didn't have to have your attache case. I left the books in the courtroom. I'd show up every day, knowing that the clerk was going to rush in and say, "Here's a file, the judge wants you to start this trial in twenty minutes," and you'd look on the back of the file and hope that other deputy has contacted the witnesses and that their phone numbers are there. Sometimes they were, sometimes they weren't—you still started the trial. So, I didn't carry an attache case. And I had a dear friend who would take me to lunch occasionally—he was not in law—and he would say, "How come you never have an attache case, so that you look like an attorney?" And I said, "You know where I'm an attorney? Here (pointing to my head)—and I carry my attache case with me every day." He never did understand. And sure enough, both of his children are now attorneys, and the first thing he went out and bought for each of them was big attache case, because he had that opinion, too, that you had to have something to prove that you were an attorney—and by the way, my friend is Black. So, I never talked to him about what that probably meant (the attache symbol), because I really don't think he came into awareness of what it probably meant until very recently.

Now, I could stand up here forever, but I am on a panel, and I only have twenty minutes. This is a fascinating area; like they said, we could do this for a week and still we would not have covered everything. I just appreciate your listening, and I ask you to keep an open mind, not only today, but throughout your entire legal careers.

Thank you.

VI. PAMELA L. HEMMINGER, ESQ.

Pamela Hemminger is a partner in the Los Angeles office of Gibson, Dunn & Crutcher. Her practice includes all aspects of labor and employment law, generally representing management. Ms. Hemminger graduated from Pomona College, magna cum laude and Phi Beta Kappa, in 1971 and from the Pepperdine University School of Law, magna cum laude, in 1976.

Ms. Hemminger has represented employers in a wide variety of litigated matters in the judicial, administrative and arbitration forums, including high-profile cases challenging the validity of the California pregnancy discrimination law and defending the constitutionality of

private-sector applicant drug testing. Ms. Hemminger is a frequent author and lecturer on issues of labor and employment law and has presented the management perspective on radio and television, including 60 Minutes.

She is currently a member of the Executive Committee of the labor section the the Los Angeles County Bar Association, and has chaired many of its functions. Since 1988, she has chaired the Legislative Subcommittee of the Employment Relations committee of the California Chamber of Commerce. Ms. Hemminger was appointed by Governor Deukmejian to the California Comparable Worth Task Force in 1984, and co-authored the minority report to the California legislature, recommending against the adoption of comparable worth legislation.

Good morning, or perhaps I should say good afternoon as the clock ticks away. I'm going to speak to you about sexual harassment. But before I do that, I would like to just briefly say a few words about the opportunities for women in law firms. I notice from looking at the speakers today that I am one of relatively few women or men from a private law firm who are speaking here today. I want to make sure that those of you who are listening understand that private law firms offer opportunities for women as well as men. Law firms are making, in my view, a tremendous amount of progress with respect to the numbers of and advancement of women. This is not to say that there isn't a long way to go, particularly with respect to women progressing to the very top levels of firms, but it is definitely a career choice for women that should be considered. I find it interesting that Patricia and I wound up as law firm partners through very different routes. We both started as labor and employment lawyers in Los Angeles law firms in the mid-'70s. Patricia pursued her career working in different corporations, the "zig-zag" route she described, and wound up as a partner in Sullivan & Cromwell. I took a different route: I joined a private law firm, Gibson, Dunn & Crutcher, directly out of law school, remained with that firm and became a partner in the firm. So it is definitely possible for a woman to become a partner in a private law firm setting through linear progression.

Patricia asked the question, "How many?" The answer is not enough. And that is why we need bright women to join law firms and increase those numbers. As more and more women become partners, those women are speaking up and are raising some of the issues that we're hearing discussed this morning. And while some male colleagues may

not quite "get it" yet, when they're spoken to by their women partners and other women whom they respect, they do listen. And now we turn to my subject, which is sexual harassment.

It is in the area of labor employment law that some of the most far-reaching and important steps have been taken to advance the cause of women's equality and economic independence: the Equal Pay Act,[1] requiring equal pay for equal work; Title VII of the Civil Rights Act of 1964,[2] prohibiting discrimination in employment; the Pregnancy Discrimination Act,[3] and the numerous state fair employment laws that have guaranteed the legal right to equal employment opportunity. But for the enactment of Title VII, many of the women attorneys and students in this room would not be in the legal profession or contemplating joining the legal profession, except perhaps as secretaries. Ironically, there are many who do not know that the prohibition against sex discrimination in the Civil Rights Act was added by opponents who felt that there was no way that Congress would enact a law prohibiting discrimination in employment against women.[4] That is how the prohibition against sex discrimination came to be. Yet, despite the fact that sex discrimination has been unlawful for almost thirty years, it was not until recently that the term "sex" in Title VII was interpreted to include sexual harassment. This is despite the fact that if you talk to any woman professional who has been in the workplace for any period of time, that woman will tell you a story of sexual harassment that she has personally experienced.

The EEOC, which is the federal agency responsible for administering Title VII, first declared that sex discrimination includes sexual harassment in its Guidelines in 1980.[5] It was not until 1986 that the U.S. Supreme Court first addressed the issue of sexual harassment in the case of *Meritor Savings Bank v. Vinson*,[6] and held that, indeed, sexual harassment is an unlawful form of sex discrimination. In *Vinson*, the Court adopted the EEOC's description of the types of conduct that can constitute unlawful sexual harassment. For those of you who have not had the opportunity to explore this area of the law, there are essentially two types of sexual harassment. The first is quid pro quo sexual harassment where, for example, sexual favors are made a condition of employment—"Sleep with me, or you're fired." The second type of harass-

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1. 29 U.S.C. § 206(d).
2. 42 U.S.C. § 2000e *et seq.*
3. 42 U.S.C. § 32000e-(k).
4. N. Schlei, Foreword to B.L. Schlei and P. Grossman, *Employment Discrimination Law* (2d ed. 1983), p. xii.
5. 29 C.F.R. § 1604.11.
6. 477 U.S. 57 (1986).

ment, which is often more subtle, is environmental harassment. It occurs when conduct has the purpose or effect of unreasonably interfering with the individual's performance or creating an intimidating, hostile working environment. And that conduct includes jokes, displaying pictures, touching, and the like. In *Vinson*, the Supreme Court stated:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality in the workplace that racial harassment is to racial equality. Surely a requirement that a man or a woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.[7]

In 1991, the issue of sexual harassment exploded onto the national scene with the testimony of Anita Hill at Clarence Thomas' confirmation hearings. For weeks, if your life was anything like mine, conversations in the workplace, at the lunch table, at cocktail parties, revolved around discussions of the hearings. Anyone who participated in those discussions will undoubtedly recall the wide divergence of views on what constitutes, or should constitute, sexual harassment. In the Foreword to the treatise *Sexual Harassment and Employment Law*, Judge Stephen Reinhardt of the Ninth Circuit, who wrote one of the two Forewords to the book, recalls being assured by a taxi driver—who had received an instantaneous legal education from the learned gentlemen sitting on the Senate Judiciary Committee—that sexual harassment never occurs on an isolated basis, that there is always a pattern.[8]

It's not only members of the general public, however, who have struggled with the development of a standard for determining when conduct rises to the level of unlawful environmental harassment. In January 1991, the same year in which the Clarence Thomas confirmation hearings occurred, the Ninth Circuit decided the case of *Ellison v. Brady*.[9] By the way, all of the cases that I'm referring to, and many others, are cited in my materials. The court held that in determining whether conduct is sufficiently severe and pervasive to rise to the level of sexual harassment, the conduct must be viewed from the perspective of the victim. In a sexual harassment case, where the victim is female, as was the case in *Ellison*, the standard is to be one based on the perspective of a reasonable woman.

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7. *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

8. S. Reinhardt, Foreword to B. Lindemann and D.S. Kadue, *Sexual Harassment in Employment Law* (1992), p. xvi.

9. 924 F.2d 872 (9th Cir. 1991).

Ellison was a revenue agent who worked for the IRS in San Mateo, California. Among her coworkers was one Sterling Gray. On one occasion, Ellison went out to lunch with Gray, and thereafter he began hanging around her desk, pestering her, asking her to go out to lunch, and the like. Ellison repeatedly told him no, she wasn't interested. Mr. Gray then began sending her notes. One note talked about how he cried at night over her. Another stated, "I know you are worth knowing, with or without sex . . . . Leaving aside the hassles and disasters of recent weeks, I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away."[10] The notes went on, and talked about how strange it was that such intense emotional sparks had been set off between two people who had never even talked to each other.

Ellison complained to her supervisor about Gray's conduct, and Gray was told not to bother Ellison, to leave her alone. He was transferred to another office, although it's not clear this was in response to Ellison's complaints. However, he was allowed to return to the San Mateo office after he filed a grievance. While this was going on, he sent still another letter to Ellison, based on the premise that there was some sort of relationship between the two of them. Ellison, panicked and became quite fearful of working in the same office as Gray"; she asked for a transfer herself, rather than work in the same office. She also filed a sexual harassment complaint. The district court granted summary judgment in favor of the IRS, holding that Gray's conduct was isolated and trivial and did not rise to the level of actionable harassment. The Ninth Circuit reviewed the district court decision and reversed and remanded, finding that a reasonable woman could have found Gray's conduct to be sufficiently severe and pervasive to constitute harassment.

In so holding, the court rejected a reasonable person standard as the yardstick by which one should determine whether or not unlawful harassment has occurred, stating that it believed "that a sex-blind, reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[11] According to the court, many women share concerns that men don't necessarily share and that because, for example, women are disproportionately the victim of rape and sexual assault, they have a stronger incentive to be concerned with sexual behavior that men might not be concerned about.

While I agree personally with the result in *Ellison* and its recognition of the seriousness of the problem of sexual harassment and the pervasiveness of the problem in the workplace, the adoption of a gender-based standard in *Ellison* is troubling in a number of respects. First, it is not

10. *Id.* at 874.
11. *Id.* at 879.

clear to me that adoption of a gender-based standard was necessary. As noted by dissenting Judge Stephens, the term "reasonable man" as used in the law of torts traditionally refers to the average adult person, regardless of gender, and encompasses both the male and female perspective. To the extent that the *Ellison* court wanted to make clear that it was rejecting earlier cases, primarily two cases that had been decided in the Sixth Circuit, I'm not sure that it was necessary to go so far as to adopt a reasonable woman, as opposed to a reasonable person, standard. For example, one of the cases that the Ninth Circuit rejected was the *Rabidue*[12] case, again cited in my materials. In that case, no harassment was found, despite the fact that the workplace contained graphic posters of naked and partially dressed women. One particular poster was of a woman lying in a golf course with a golf ball on one of her breasts with a man standing over her with a golf club, yelling, "Fore!" There was testimony that at least one male supervisor repeatedly used very demeaning terms in referring to women. The Sixth Circuit stated that it didn't find that the conduct rose to the level of actionable harassment, adopting as a standard the perspective of a reasonable person in a similar environment under essentially like conditions. The dissent in *Rabidue* referred to this as the "prevailing workplace theory" and rejected it, saying that the standard of the particular workplace is not necessarily reflective of the standard of a reasonable person. The Ninth Circuit could have rejected the *Rabidue* standard and the prevailing workplace theory, and still have adopted a reasonable person standard.

Second, the *Ellison* rationale looking to the perspective of the victim is not limited to situations in which the female is the victim. The Ninth Circuit expressly recognized that when a male employee alleges that coworkers have engaged in unlawful harassment, the "appropriate victim's perspective would be that of a reasonable man."[13] Thus, to the extent that male and female perspectives differ, a male offended by the same conduct as a woman will be unable to establish a violation if a "reasonable man" would not be offended. Nor would the analysis stop at gender-based distinctions. Already there have been cases decided that have applied the reasonable African-American standard, and the dissent in one case argued for a "reasonable religious nonadherent" standard.[14] In cas-

12. Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 481 U.S. 1041 (1987).

13. *Ellison*, 924 F.2d at 879 n.11.

14. Stingley v. State of Ariz., 796 F. Supp. 424 (D. Ariz. 1992); Murray v. City of Austin, 947 F.2d 147 (5th Cir. 1991).

es involving individuals of different cultures and national origin, again it will apparently be necessary to utilize a different standard based on the culture and national origin of the victim of the harassment. The bottom line is that the determination of whether particular conduct is unlawful will depend on who the victim is.

Third, and perhaps my greatest concern, is the fact that a reasonable woman standard has a focus on the different perspectives of men and women, and however well-intentioned that focus may be, it carries with it a danger of a return to the paternalistic and protectionist laws of the 19th century and, indeed, of early this century. Those laws embody a particularly invidious kind of discrimination, because they were grounded in what seemed to be a benign effort to protect the different sensibilities of women. In the now-notorious case of *Muller v. Oregon*[15]—those of you who are students I'm sure will find that in your Con Law textbook—decided in 1908, the Supreme Court upheld a woman's protective law forbidding the employment of women for more than ten hours a day, stating that a woman "is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained."[16] The Court noted that the legislation was justified to protect women from the "greed as well as the passion of man."[17]

In the fall of 1991, Justice Sandra Day O'Connor delivered a lecture at the New York University Law School on the history of women lawyers and the changing ways the law has dealt with gender-based differences.[18] Although she was not discussing sexual harassment or the *Ellison* case, I find some of her comments particularly apt. She first noted that the Supreme Court now looks with an appropriately jaundiced eye at loose-fitting generalizations, myths, and stereotypes. However, she noted that while Congress and the courts have adopted a less sanguine view of gender-based classifications, many feminist commentators are asking questions such as whether women have made a difference to their profession and whether women have different styles, attitudes, or liabilities. It has been suggested that women practice law differently than do men. Examples include statements that women are more likely to mediate than to litigate and that women judges are more compassionate than male judges. She noted, "Ironically, the move to ask again the question whether women are different merely by virtue of being women recalls the old myths we have struggled so long to put behind us." She moved

15. 208 U.S. 412 (1908).

16. *Id.* at 422.

17. *Id.*

18. "Portia's Progress," printed as excerpted in *Legal Times*, pp. 10-11 (December 2, 1991).

on to note that "the question of when equality requires accommodating differences is one with which the Court will continue to struggle." While stating that at least with respect to pregnancy, the Court has recognized that "sometimes to treat men and women exactly the same is to treat them differently," she warned that in allowing for this biological difference, "we must always remember that we risk a return to the myth of the 'true woman' that blocked the career paths of many generations of women."

Thus, while I share the goal of the *Ellison* court and agree with the outcome, that is, reversing the summary judgment, I remain troubled by the adoption of a gender-based standard and suggest that careful consideration needs to be given to the adoption of a gender-neutral standard that embodies the perspectives of both reasonable men and reasonable women. Such a gender-neutral standard does not carry with it so many of the dangers which are inherent in a law that focuses on gender differences and that focuses on how women think as opposed to how men think.

Thank you.

Audience Question: If you use a reasonable woman standard, it seems to me that you have to have women jurors in order to use that standard. I have a two-part question: First, do you think that's true, and second, if so, do you think that raises any problems as far as due process rights of a male defendant?

You've raised a very interesting question: If the standard is a reasonable woman standard, does it follow that only women can sit as jurors in sexual harassment cases where women are the victims, and if so, do I see a due process problem? The issue has been how a reasonable woman standard will be applied when you have male jurors, because you would have some constitional problems if you excluded men from the jury. How is a man going to know what a reasonable woman thinks? Clearly, we're in the area of expert testimony and, indeed, in many sexual harassment cases, both sides will bring experts to testify concerning what kind of conduct would be deemed objectionable by a reasonable woman in the workplace. A related issue has been raised: What about the fact that a male employee isn't going to know whether particular conduct will be objectionable to a female employee? The court in *Ellison* responded to that, saying that Title VII is not a fault-based statute and citing to disparate impact cases that hold that you look to the effect of

the conduct rather than the motive of the individual engaging in the conduct. But some of the questions you raised are some of the concerns I have. It would not be necessary for courts to deal with some of those issues if a reasonable person standard were to be utilized, since a reasonable person standard includes the experiences and the perspective of men and women. I'm not ready to believe that the average reasonable man would condone the kinds of conduct that we've seen in many of these cases.

VII. ANGELA "BAY" BUCHANAN

Ms. Buchanan is presently the Executive Vice Chairman of The American Cause Foundation, an educational organization that addresses today's most pressing issues. In addition, she is a television personality, and a guest lecturer.

In 1992 she chaired her brother Pat Buchanan's presidential campaign committee, and was a political analyst for Good Morning America throughout the general election. Since 1991, she has been a regular on CNN and Company, a panel of women debating current topics. Prior to 1992, she had her own financial and political consulting firm in California, ran for statewide elective office in 1990, and was the National Treasurer of Ronald Reagan's presidential campaign in 1980 and again in 1984.

In 1981, she was appointed by Ronald Reagan to be the Treasurer of the United States. At 32, she was the youngest person to ever hold the position and still is. In 1983, Ronald Reagan called upon her to chair his Commission on Women Business Owners, and in 1988 she co-chaired the California delegation to the Republican Convention, and served as Co-Chair of the Defense subcommittee on the Platform Committee. In 1988, she was presented with the Distinguished Service Award by the Republican Party of Los Angeles.

Ms. Buchanan earned her master's degree in mathematics from McGill University in Montreal, Canada, and continued her studies at several other universities, including the University of New South Wales. In 1981, she received an Honorary Doctor of Law degree from Samford University in Birmingham, Alabama, and in 1982 she was recognized by the National Council of Women of the United States as the "Outstanding Woman in Government."

Thank you very much. I know I have about a half hour here, so I'm going to tell you a little story first and then give you an outline of what I would like to do. I would like to make certain you feel comfortable to ask any questions when I'm finished on topics that I've spoken about or

on topics that may be of interest to you that I didn't touch.

You heard I was the youngest U.S. Treasurer. Let me start by telling you how I found that out. I became Treasurer the day after Ronald Reagan took office in '81, and the press was calling. At the time, I was 32. And the press was asking, "Are you the youngest, are you the youngest?"—they like to have something different, some points of interest, to distinguish you from others. At first I simply assumed I was the youngest. Then I started thinking: our founding fathers were very young; I'd better check this out, because they're going to be calling me in a month, saying, "You know, you misrepresented the truth; you aren't the youngest." I asked a fellow who worked for me, a career bureaucrat who worked for the Treasurer for many years, if he could find out if I was really the youngest U.S. Treasurer. He said, "Ms. Buchanan, no trouble, there's a library right here at Treasury, I know everybody who works there, I'll be right back." Off he went. Four to five hours pass. He comes back in my office and he says, "Ms. Buchanan, you *are* the youngest U.S. Treasurer." Well, you can imagine, I was pretty excited. "I am?" I said. "I really am?" He said, "You have to be. Most of them are dead." That was my first experience with a federal employee.

Now, don't get me wrong. There are some very qualified individuals who are in our government—he was just not one of them. But today we are talking about women in politics. When I was asked to speak, I hesitated. I like to talk about politics, about issues, but I usually don't discuss women, or how it's different for women in politics. I don't approach it that way in my own life.

But since I agreed, let me begin. To understand the relationship of women in politics, first you must understand politics. It is unlike any other businesses. Point one: perception is reality in politics. It's reality. If you are as clean-cut a person as they come, and somebody throws mud your way and it sticks, the perception is you're not clean, and it doesn't matter if you are clean. If the perception of the voter is that you're not clean, then you're not clean. Yes, it is an ugly business. Why do you think they throw mud? Not because every single accusation is going to stick, but because they're trying to give the perception that there's something there. Where there's smoke, there's fire. The public soon says, "We've heard so much stuff, some of it must be true." A tough business.

Another fact: there are different approaches to politics. One is very cause-oriented. People get in because they believe in something, they believe in ideas, they want to move that idea further. There's a business side to it, it's a very difficult business, and it's become a big business. There are pollsters, media people, very big money. They don't have any

cause in their heart, they are out there for the dollar. They might be good at their business, they might help a liberal today, and a conservative tomorrow, they could care less about any kind of cause. Then there are people who cross over. Who are in it, they've come to make their living in it, but they are there because of a cause. You have to realize that to be good in politics, in the aspect of making political decisions, there's a certain aspect that you're simply born with. It's an understanding, it's an appreciation of people. It's strictly within your gut. I know people who went through the Reagan years with me, went through the Bush years—they make bad decisions every day when it comes to politics. There are others who, with one year's experience, have a feeling for it, they understand it, they can move it, it's hard to explain, but if you have it in your gut, you've got it. If you don't, then it doesn't matter how many years you spend there, you miss it. Let me give you an example.

First of all, in New Hampshire, I was up there with my brother Pat. We were running against George Bush last year. If you all don't remember, George Bush sure does. And we didn't have any money, I couldn't hire pollsters, but the Bush operation was very wealthy, and they have been notorious over the years to hire the best pollsters. The reason is, they didn't have that feeling. They wanted to be sure—they had to read the polls to know which way to go. Well, we didn't have money for polls. So Pat and I just laughed, thinking, "Just watch what they say, and we'll know what we're doing right and what we're doing wrong."Now, Pat believes in fair trade as opposed to free trade—he's broken with a lot of conservatives as as result—so I knew that that would be a vulnerable point. And so I said, "Pat, they're going to be calling you a protectionist, an isolationist—that's not good. You're going to have to make the people understand you're not a protectionist, you're not an isolationist. Rather that you believe in fair trade, in protecting the American worker, all right?" The Bush people begin saying: "He's a protectionist, he's an isolationist!" And I know they're on target. Then one day they stop saying "protectionist"; it's only "He's an isolationist, he's an isolationist!" And I said, "Pat, it's okay to be a protectionist—they've polled it."

I was at Harvard after the election, and Mary Matalin was up there with her beau and all the Bush people, and I told that story. And she looked over and she said, "You're right!" I knew they polled it. It doesn't take a genius to figure out that when these guys change what they're saying, they did it because they read a poll. Understanding people!

You know what they used to say about Ronald Reagan, what managers would say: "Don't let him get in a cab. Don't let him talk to the everyday guy." Ronald Reagan would listen to somebody he's sitting next to, and he would hear a story, it would make such sense to him, he would go and give a speech and he'd put that in the middle of the speech. Campaign staff would panic: "We haven't researched it! We haven't polled it!"

Whether the story was true was insignificant; it was that he knew that that's how people thought, and now he'd have a way to communicate his point. Far superior to the stuffy "Thirty-eight percent of the people say this, and forty-three say this . . ."—numbers don't have heart. You can meet pollster after pollster; they don't really understand what's going on. If their polls are wrong, they have no clue. Somebody with the heart can read a poll and say, "Something is wrong. This is not how people are thinking." It's that understanding of people, it's having it in your gut, and understanding the issue and knowing "a lot of people don't agree, but *this* is where they *do* agree, and this is where they don't," and moving it accordingly.

So now you have the three aspects of politics: you have people with strong beliefs who don't understand anything about the business. People who believe, and understand something about the business. And then you have the consultants, those folks you hire who then scream at the whole campaign because they don't understand anything you believe in, and they keep telling you to say things you don't believe. It's not easy.

Let me tell you a story about how "perception is reality." I accepted the position of Treasurer of the United States after having worked with the Reagan people for five years as the national Treasurer of the Reagan campaign, controller, and chief financial officer. In government I was the administrator of five thousand people, was in charge of two governmental businesses—making coins and currency—and a member of the senior staff of the Department of the Treasury, with Don Regan at the head of the table. And if you promise not to tell Mrs. Reagan, I happen to be a real fan of Don Regan's. Now remember, I'm the politician on senior staff. I've got all kinds of experience in that area—you can't touch me in campaign work—but they could care less about campaign work. They're trying to pass tax laws, they're trying to worry about France and the movement of the dollar over there, and they're talking about an income tax bill that's coming up, and supply-side economics. They were using words, talking about M1, M2—I thought they were talking about tanks. This was not my area! And I'm reading the *Wall Street Journal* at night. I thought, I've got a short window of time to get myself up to speed. I can't even converse with these people! And they're not real interested in the Bureau of Engraving. I wanted to contribute, but thought if I opened my mouth then, they'd write me off for life. So I'm working away at night and trying to gain a real appreciation for what we were doing—imposing a whole new economic program on the country. In the meantime, I kept myself real quiet. Then, one early morning meeting, Secretary Regan announced: "I'm inviting the President and Federal Reserve Chairman

Paul Volker to lunch here at Treasury, and I want my senior staff outside the dining room to meet them."

Well, I knew I was home. I was set. The day came and I headed downstairs. All the bureaucrats were outside the hall lining up to say hello to the President, and there's a window in the door, so some of them could see inside the dining toom where we were waiting. First through the door were Ed Meese and Mike Deaver, then personal aides, and finally the President. Secretary Regan was introducing them. "I'd like you to meet my undersecretary—hello, how do you do, hello, how you do . . . ." Ed Meese soon spots me—"Hey, Bay! How's it going?" and he gives me a hug and a kiss. Then Mike Deaver—"Hey! Good to see you, Bay!" and then Don Regan comes to introduce the President. And the President says, "Hey, Bay, how's it going?" and gives me a big hug and a kiss. I say, "It's great to call you 'Mr. President' after all these years," and he says, "Great to be here, and I couldn't have done it without all your work." And then he goes in the dining room.

I was set. I didn't need to know M1 and M2 anymore, *I knew the President. And he gave me a kiss.* The word was throughout the place: he kissed her! My clout was established. I was only 32, female, with five thousand hardened bureaucrats under me, but after that moment, I didn't have any trouble. They thought I was going to call up the President if there was any problem. I was set! I can assure you, I wasn't even going to call Ed Meese if I had trouble, but perception is reality!

Let's move on to women in politics. We heard a great deal last year about the "Year of the Woman." How offensive—it's like the "year of the horse"; you get one year, you don't get any more than one year, just make the best of it. Then we have "women's issues," also offensive and limiting. As women, we care about child care, health care . . . of course we do. The economy? Doesn't interest us—that's the men's issue. Who pays the bills at home? Aren't we also out there trying to make a living? Doesn't matter. "Our" issues are limited to a few; "theirs" are all of them.

At the Republican convention four years ago I was asked to be a delegate on Platform Committee. They sent me this form that said, "What areas do you want to be involved in?" There's child care and abortion and family and all these things and I thought, "I know about them," so I put down defense. I knew nothing about defense. I mean, I knew as much as you can know by reading the paper, but I was certainly no student of defense policy. I thought I might as well learn something. So I checked off defense. You know what they did? They made me co-chair of the defense subcommittee. They didn't have any women, so they placed me on the subcommittee and made me co-chair—stuck me up there, thinking the men would run it. Well, I figured, I'm here, I might as well do something. And for the next week I was all over the press, fighting (and succeeding) in changing the platform. Defense is as much our issue

as any other.

Now let's talk about style. As women in politics, we cannot approach it the same way as men, unless we want to bring criticism upon ourselves. If we want to be as successful as men are, especially as candidates, we have to have a different approach than men. Some of it comes naturally to us, some of it does not. Let me give you an example. A man can be extremely aggressive, and people think leadership, strength. A aggressive woman is a "bitch." I debates on television. You can be perceived as bitchy if you're voice gets higher and higher as you go on the offensive. Then click! they turn the channel. Women naturally have higher voices, but if you're on television and the viewer gets irritated by your voice, you lose. So you have to back off a bit. Then if the woman you're debating gets higher, you win. Look at Geraldine Ferraro. She was very hurt by her voice. She was bright as she could be, she had a press conference the impressed the best of them. The problem was her voice. The people down South were saying, "She must be one of those really aggressive women." She had a high-pitched voice and a New York accent. That's perception and that's politics.

Take Margaret Thatcher. Everyone thought she was great. First of all, she's a grandmother-like figure. But she was as tough as she could be. When she went into Parliament, she could hold her own with the best of them. She became beloved by men as well as women. She had worked her way up, gained respect long before she became Prime Minister, and so she was extremely comfortable with herself; that was both the reality and the perception. Look at Barbara Boxer. Her voice is a liability. I've heard *liberal* women say to me, "Oh, I don't know if I can handle this—she's a whiner." It's that perception again. She's bright and competent, and holds a liberal line, and yet liberals are saying, "I don't know if I can handle it."

Now let's talk about philosophy. In politics, to be successful you must get press, and philosophy can make the difference on whether you do or not. If you're liberal and a woman, you are much more likely to get press than if you're a conservative woman. The press is with you when you're a woman and a liberal. Look back to the Year of the Woman. All the women who got the press: they're all liberal women. There were two very strong, conservative women running for the Senate that you didn't hear much about. Now, it's true that liberal women in the last several have done a terrific job of getting farther and farther up the political ladder, far better than conservatives, and so there are more of them out there. That's not due to the press. That's due to hard work. From Emily's List to NOW, credit must be given—they did an excellent job of support-

ing their candidates. Another concern of women candidates is money. It is far more difficult to fundraise if you are a woman. Corporate money goes to the candidate most like to answer the phone when the corporation calls. That's all they care about. They'll give to you whether you're Alan Cranston or Pete Wilson; they don't care, as long as you answer the phone when they call. They want access. And they feel more comfortable getting access from the good old boys. So they give money to the guys. That's starting to change; a lot of women are starting to write checks. It's certainly changed a great deal with liberal women, and I know there are some conservative groups trying to organize to help conservative women. But as it becomes more commonplace to see women in politics, running for office, and running campaigns, the advantages and disadvantages of being a woman will disappear.

Let's go on to one point that's a little bit of aside, although it always comes up in politics. The press in the last couple of years has created the "Superwoman," the woman who can do everything: career, family, children, balancing it all. It is impossible. You cannot do it all. I'm just going to tell you, because I've been there. And it's also disastrous if you think you can.

But in one regard we are more fortunate. We have more choices. We can have a career or we can have a job, rather than a career. And there's a big distinction. A career is something you have to put number one. You have to be there late at night if the boss calls and says you need the report by the next morning. You have to be there on weekends. You have to put it number one so you can move up that ladder as quickly as you can—that's a career. A job is: you go there, you do a great job, you're well respected, but you can leave at five if you have to, and you don't feel pressured. You just put it in your mind that you're not going to be moving up the ladder as fast as the guy who stays till nine. Once you put that in your mind, it's a job. It may be just a job for five years and turn back into a career, but if you think you can have a career and have a family, you can't do it. Reason: kids can't be programmed. If anyone thinks they could have a career, do me a favor before you have any kids: don't sleep for three months. Then see how competent you are. I'm serious—I didn't sleep for seven years! I forgot what it was like to have eight straight hours. The other night I went to bed, I finally had a good night's sleep coming to me. Out of nowhere the number two son falls out of bed, cuts open his eye, and I'm in the emergency room at one a.m. Five stitches at one a.m.—now how could he fall out of bed and hurt himself at one a.m.? He did it. It's amazing what they can do. What if I had a major report the next day? There's no way I could have worked on it. They call home at two in the afternoon, they have to come home from school early. What are you going to do, say "Sorry, you can't"?—they're sick, they're throwing up—"I'm working!" I mean, it doesn't work. You

can't program those little buggers.

Now I'm one of these people who has two careers: I'm a single parent. My one career is with my children; it is full-time. And the other is in politics, a business—I'm trying to move along so by the time the boys are in high school, I can move back into a career pattern. But don't think you can do all three: marriage, children, and a career. You will not be happy. It's just not possible.

Let me finish up in another area. Politics is about as tough a business as there is. I don't want to underestimate it; it's also the most exciting. Once you get into it—as I did at twenty-one years old—it's like something takes hold of you, and you cannot get it out. I was Treasurer of the United States, and for excitement, it couldn't compete with the time in the campaign. A campaign is as fast-moving an operation as they come. You get to the office in the morning and there are seventeen crises, by noon there's another seventeen; you can't even ask anybody for help, you just make decisions. You even make decisions for others, because once a staffer gets you on the phone, he needs an answer. He is in the field and needs to know now: "Do I put balloons up at this event?" Balloons at the event? "How much are they?" I always said. "Oh, way too much money, no balloons, bye!" Just make it up! You just don't have time to run down the hall and have a meeting to discuss the problem. I've spoken with printers and been told "two to three weeks" for an order. The campaign would be over! If I can't have it by tomorrow, the discussion is over. Everything is *now*. Mistakes happen, and they never get corrected—you just don't have the time. It's on to the next crisis.

You're also talking issues, debating, arguing with informed and interesting people. It's invigorating by its very nature. How often in the business world do you discuss foreign aid at lunch? Intellectually, politics is as stimulating a world as you could find.

The downside: I was running for Treasurer of California, and I opened the *L.A. Times* one morning—and it had started out a pretty good morning. "Candidate for Treasurer, Bay Buchanan, has a bad credit rating." I did not have a bad credit rating, but there it is, right in the *L.A. Times*, a million people reading it. I'm on the phone to TRW by nine o'clock, asking, "Do you have something in your computer that I don't know about?" No, they told me that after checking with other credit rating companies, it was clear—my rating was excellent. I met with the *L.A. Times* later. I showed them the reports. They said, "Oh, it was a rumor that hung around for three months so we figured it was true." And they wrote it! My opponent had pushed the rumor long enough that the press wrote it. So they write another story that I don't have a bad credit rating—how

many people read that? You can't imagine the rumors an opponent will float.

One last point: the press and its strategy of intimidation and labeling. It is prevalent throughout the political world today. You take a position, and you're called something. I debated Jesse Jackson on affirmative action. We are friends, and I have nothing but respect for him, but we disagree on affirmative action. [And because of that] I'm called a "racist." It's intimidating. I'm not a racist. I don't want to be called racist, I don't want people to think I'm racist. But if I take the position that I'm opposed to affirmative action, I'll be labeled. On "Nightline" I debated Martina Navratilova. I disagree with her on the gay agenda. In spite of the fact that I have many gay friends, the next thing you know, the perception is: she must be a homophobe. I'm not a homophobe. I simply disagree with the gay agenda. If they can successfully label you often enough, politically you lose your effectiveness. I'm often labeled "religious right" because I share their values, but I'm not even accepted by the religious right! I'm a Mormon—the religious right does not agree with Mormons. But they continue to say, "Oh, she's religious right." Even more ridiculous: religious right is bad!

As a result of this intimidation, people are becoming more and more reluctant to argue and debate. It is anti-American, to say the least, and the only way to overcome it—and this is the area of politics which I think all of us should look into—is for each of you to decide what you believe. This is critical. Just decide it, look into it, debate it, argue it, you're probably going to change it over the years, but *realize what you believe.* Don't be intimidated to talk about it with the person you're sitting next to, at lunch or in your office, or a friend; express your beliefs. Because that is what the strength of this nation is about, that we can all think different things and get along and enjoy each other's company and respect one another's opinion, and recognize that we are free to speak out for what we believe. Especially if you're going to get into politics. There are so many in politics today who will not address certain issues because they're "too controversial." They want to vote on bills and they don't want to tell the American people where they stand? I don't care if I disagree with you, I just want to know where you stand. It's too controversial—they won't touch it. That is not the way it should be. We have to speak out for what we believe, and we have to try to move a nation toward what we believe is right, to the extent we can. And when we meet the opposing view, speak out, have a good debate. Then let the American people decide with their vote. Sometimes we win, sometimes we lose. But the country will always win if our candidates are honest and forthright.

Thank you very much.

Audience Question: You were speaking about how women have more choices and you cited a career versus a job. I was wondering what other things you see as advantages of being women.

I find one of the most exciting aspects of being a woman is that we go through more phases. Take me, for instance. I first started out in a career. Then I got married, I had a family, I started working part-time. Then I became single, that was an interesting aspect. Then you look around and say, "I've got to start working again, what do I want to do now?" A lot of times men have a lot of pressure to stay on one career and be a good provider, but a woman, if she marries someone who is a good provider, has enormous opportunities to become absolutely involved in volunteerism, or in part-time, or to start her own business and see how it goes. Some men are more fortunate than others, and have this same opportunity, but most never do. They have to be the one on a career pattern. If they aren't, there's far more criticism. If a man were to start working part-time, and things were tough at home, even his own family would be saying, "What are you doing? You've got to get out there and start working, you've got a family to provide for." Women, I belive, end up with more changes in our lives, more challenges, more interesting aspects to our lives, because we go from one thing to the other, whereas men are in the same field for forty years. I know many people in government and in the military; they love it. They get their twenty or so years, they get out, and they start a whole new field. They are so energetic and excited because they have their own business, they've been wanting to do this for twenty years, and here they have that retirement which allows them to do it. Now, it's true, if you're living on your own, or if you're a single parent, you may not have those options. Not every woman does. I just look at my brothers and me. I can't tell you how many different positions I've had, and each lasts about two years and then I get into something else, and that lasts two years. I've had a lot of opportunities, whereas my brothers have each spent a lifetime as an attorney, a dentist, or a CPA. Once they got into it, they didn't know when or how they could get out. I feel extremely fortunate that I have not had to choose one position and stick with it. I would be bored by now.

Audience Question: I'm wondering what your feelings are as to whether the glass ceiling extends to the White House. Also, if you believe there might someday be a woman President of the United States, what different qualities do you think a woman would bring to a job?

There's an enormous glass ceiling in politics on the business side of it for women. Let me just tell you five years ago in my brother's living room—this is my brother, I am his sister—we have these people who want to run his campaign and he's decided he wants me to head it up because he trusts me. This is four years ago, not the last campaign. And there's this old pol, the cigar-smoking, heavy-set guy from the South, saying, "I'm just gonna tell ya: Women can't handle it. They'll get pressured and just start crying." And I'm saying, "Get this guy out of here!" Pat just laughed.

It is hard to break through. One reason is a lot of women think they have to be like the men. I went to a meeting with Ed Rollins, who is the chairman of the Reagan campaign. I had held up this one political operative's consulting agreement because I thought was excessive, and a female field director was fighting to for it; she wanted to hire the operative. She was a good field director, which is like the second level in a campaign. I tell you, the "f-word was flying," as my kids would say. She was using it more than Ed. She felt that to effectively argue, she had to be like them. It was so degrading. You put your own glass ceiling on then. You start dealing with the public and you can't be this hard-nosed, sailor-talking female because it doesn't work.

But as for the big picture, on the candidate side, women are more and more successful. I don't see any glass ceiling there. You have a voting edge with the public. All else being equal, if you have a male and a female running, the woman will win. We're trustworthy, as you already know; we have higher integrity. That's the perception that's out there, and that's something we've all earned—and the men have earned their reputations as well. As for the office of President of the United States, I am convinced that we will have a woman President in my lifetime, and it will be a conservative Republican. For this reason: it's similar to Richard Nixon going to China. He was a conservative—he wasn't, but anyhow—with China everyone said, "No, no, we have to support Taiwan," and he broke the barrier by going to China. If a liberal had gone in, there would have been all heck to pay. But how can the conservatives argue when it was their President who did it? Likewise with the parties. The women in the Democratic party who are most public are very liberal, feminist actually. That won't sell. A conservative, however, will have the conservatives support her, the feminist label will not be there, and so she will bring more people with her than a liberal woman. A feminist could not win in this country right now. Twenty years from now maybe, but someone who is identified as a feminist could not win a national election. But a conservative/moderate could win. The key is, we need to have a number of women from which to choose. Jeanne Kirkpatrick is extremely well-respected in this country, and there is nobody that would say, "Oh, she's a woman"—they wouldn't even think of it. She is like

Margaret Thatcher. She's one knowledgeable, smart, tough lady; that's how she's perceived. I could be wrong. It could be a moderate Democrat, but it won't be one of the feminists.

Audience Question: Earlier you were referring to the tendency of the press to focus more on liberal women than conservative women. Do you think that's attributable to the press, or is it because the press is made up more of liberals?

Oh, yes, the press is as biased as any group you've ever met. There's no question about it. When I debate some times, the moderator and the other two guests are against me. They've got a very strong bias, even in the way they ask questions. It also hurts when the newspapers are constantly against you, if you're a candidate. There is enormous bias out there in most of the press, they have their own agenda, and they're pushing it. And they feel strongly that this is in the best interest of the country, this isn't some power play, this is something they believe in. And so they are using their position to move it. It's not all bad, however. The good side is that the American people do not like the press. So if you get a chance to beat up on the press, your ratings go up. When George Bush took on Sam Donaldson—no, it was Dan Rather, he called him Sam—he went up in the ratings. And that's what'll happen. It's like an arena where there's fighting going on. The American people like a good battle. And then they see somebody hit the press and score one, or the press hits them, it's a game. It is exciting, and they say Good for you! But there's no question there's a strong bias in the press.

Audience Question: Do you think that the practice of only looking at women for certain positions—Attorney General comes to mind—is actually a step forward or step backward for women?

Let me tell you what happened there. There is in Washington—again, this is probably inside the Beltway—four positions in the Cabinet that are considered significant. They're the big guys. Women have never held them. And so when you have someone become President who has supported the women's agenda, they are going to say, "Look, we're tired of those other HHS jobs, we want one of the Big Four: Treasury, Defense, State, or Attorney General." Well, all of a sudden all of them are being filled up, and women are getting the minor roles, just like Republicans are giving them, and the feminists yell, "Stop!" And they had someone

with impressive credentials who spoke for them: she's the First Lady. She simply said, "We want one of the Big Four." Well, Treasury was filled early, State followed quickly, and Defense as well. They said, "There's only one left, and we want it." That's what happened. I agree they should have pushed it. But after they went through three female nominees, it became a joke—you can't find a competent women, what is the problem here, aren't they looking in the right places? That didn't help the Administration. But that's a one-day story, maybe a week at most. It's not long-term damage. What was the purpose? To start moving women into the top four—and they've succeeded.

Audience Question: You're saying that male politicians have succeeded by tap-dancing around issues, but yet you're recommending that women be more idealistic and stick to the issues. How can they do that, knowing that's how they survive in that environment?

I am an ideologue. I'm the first to admit it. Your pragmatist will tell you: Dance around. Once you're in office, unless you are charged with statutory rape or something, you aren't thrown out of office. You have to do something pretty grand to get thrown out, so you're secure. So, to get into office, to win on election day, avoid tough issues, dance around them. I believe this is one of the most harmful things in politics today. And when I said men did it, I meant to say *politicians*, some of which are male. An obviously overwhelming number are men. I think that the American people this past year showed an incredible amount of disgust towards our politicians. They have had it, they don't believe what they say, and they have good reason not to believe it. Americans believe that politicians just say exactly what you want to hear, and they get their little contributions from their special interests, and they secure their own position, and instead of principles or beliefs or what's in the best interest of this country, number one in their minds is taking care of number one. And that's all we have. There's no cause, there's no heart, there's no reason to move the country; they don't see a vision. And the American people feel that. And I think they are really out there, grasping for that vision. As nutty as Ross Perot was, he got nineteen percent of the vote—because he said stuff no one else would say. They didn't care if he was a nut; at least he says it. If he had had the ability not to be so nutty—it's just unfortunate, he's is a nut—he could've won as a third-party candidate. He could've won the whole thing. But as soon as he started going up, he jumped out. Then he jumped back in, and just as he started going up again, he talks about somebody who was going to spy on his daughter's wedding. It was absolutely bizarre politics. The guy was shooting himself to make certain he didn't win.

You can see what the American people are saying: A pox on both your

houses. I don't care if you're Democrat or Republican, you guys are not doing anything for this nation, you will not address the tough issues, you just keep raising the spending and let this deficit run wild, and talk a good line, but you don't do anything. Why? Because they're afraid to go home and explain to the people that they cut spending. What I'm saying to you young people is: This is a great and wonderful nation. It is our job to make certain that if we get into politics that we do something. And if you get there, and give up your principles on the way, then what are you doing? Just getting yourself a job that you like? The purpose of politics is not for people to have a job, it's to change a nation's direction. And so if you get there, and you no longer have your heart, then you're just picking up a paycheck. And you're also harming the system itself.

Audience Question: Where do you see yourself in five, ten, or fifteen years?

I hope I'm still alive! I have no idea. I know that right now I am in the process of setting up a foundation. I'm very close to my brother, I also believe in those issues that he raised, and so I really feel it's important that we start getting people to talk about those issues, addressing them. There's a lot of people out there, whether they be artists or scholars or in other fields, who feel as Pat and I do. They should be heard as well. How many of you have heard of Mary Cummins? She completely stopped a liberal agenda from being imposed on the New York school system, with the mayor against her. Now, that's impressive. You don't hear very much about her. She's a grandmother. One person. We've got to get her on television, get her on radio. We've got to get people inspired. You can step forward, say what you believe! You can change the whole way things are happening. You can alter the way your children are going to be raised.

But what do I see myself doing? I want to get those people exposure. I want them on the radio and television and in columns, so that young people and people across the country say, "Hey, there's more of us. I too can say these things." For the last ten years, a lot of things I believe, you don't even read about. You need a special magazine to find somebody who writes about what you think. And I want to see our ideas read in mainstream publications. If we can accomplish that, then there is going to be a cause that will rise up that will take charge and really combat what I think are very destructive tendencies in this country right now.

Thank you very much.

VIII. DR. LENORE E. A. WALKER

Dr. Walker is a licensed and board certified psychologist, and President of Walker & Associates in Denver, Colorado. The firm provides clinical and forensic psychological services, consultation to business around prevention programs, expert witness testimony and training to mental health advocates, attorneys, judges and community leaders, and in courts around the world. She is also the Executive Director of the Domestic Violence Institute, a non-profit agency with offices in Denver. She maintains an adjunct professor of psychology appointment at the University of Denver's School of Professional Psychology. As former director of the Battered Woman's Research Center located at Colorado Women's College, Dr. Walker received National Institute of Mental Health funds to conduct pioneering research about the Battered Woman Syndrome.

Her expertise on interpersonal violence has prompted many government agencies to solicit her testimony on better ways to cope with domestic violence. Dr. Walker has spoken before several congressional subcommittees concerned with children and families. She has testified as a consultant to the Attorney General's Task Force on Family Violence in 1983. She has been a consultant to NATO programs, to the military, and to the United Nations in Latin America in conjunction with the Ministry of Justice in Costa Rica.

Good afternoon. I am going to change our focus and talk a little bit about being a psychologist, even though most people here today are concerned about the law. I must admit that had a lot to learn about the law when I first began to apply psychology to help answer legal questions. I was first trained as a psychologist researcher, as well as an applied psychologist who used scientific data to explore problems of the schools; a child psychologist; and a clinical psychologist. How I got involved in forensic psychology is still a bit of a mystery to me, although my understanding of community systems and my feminist philosophy had some impact. I am going to spend my time talking about some of the changes that have happened for battered women and other women who have been abused by men over the last ten years or so, when feminism, psychology and the legal system began to work together.

The first thing that I had to learn as a forensic psychologist is that psychologists and lawyers think differently. We simply have different ways of knowing the world. For example, psychologists spend a lot of time learning to be scientists; we learn "truth" by the scientific method. What does that mean? It means that we create a hypothesis, based on previous data in the literature and the theories developed from it, and

then we test that hypothesis to see whether or not our new data are supported. Does our new idea work or does it not stand up to the scientific test? Now, in law, the way you learn "truth" is by the process of deductive reason. It is done in an adversarial process with each side having the opportunity to present its very best version of the "truth" before a judge or jury, who uses the evidence to make a decision. So, the legal way of finding truth is not to start with one perception and test for scientific accuracy, but rather to start with two totally opposite perceptions and come to a decision somewhere between them. Psychology starts in the middle and comes to one side or the other based on inductive reasoning; law starts with the two sides and comes somewhere in between based on deductive reasoning. Psychology uses statistical probabilities as its test; the law uses logical reason. These are two very different ways of thinking about a problem.

I can remember being horrified when I was first accused of being biased in the courtroom because I testified that I started with one particular hypothesis that I used my scientific analysis to prove or disprove. Like most psychologists performing a differential diagnosis, I came to an interview with a battered woman and started with the hypothesis; if she says she's been battered, then let's accept it, while scientifically checking if she appears to have been battered or not. As a scientist, I knew I was trained to be able to say, "I'm very sorry, but you do not fit the criteria," if the data demonstrated that her cognition, affect, and behavior were inconsistent with the research on battered women. Even if I personally wanted to help her with all my heart, as a trained scientist I couldn't ignore the data and I would not do so.

As I began to see large numbers of battered women, a pattern of how their thinking, feeling, and acting changed seemed obvious and I created the hypothesis of Battered Woman Syndrome, which my research then tested scientifically. Lawyers, in cross-examination, said, "She is biased because she starts with a premise that a woman who says she's battered is a battered woman. She should start with a premise of neutrality." First of all, that is not appropriate using the scientific method. But, it is also important to know that you can't be neutral when dealing with somebody who has been abused and still collect reliable and valid data. The psychology of an abuse victim tells us that one of the most significant damages that happens, at least to a woman but I think for men as well, is that victims lose the capacity to understand neutrality and objectivity. Because of the need to protect oneself from further abuse, the abuse victim learns to judge that you are either "with" her or you are considered "against" her. If you are not observably "with" her, then she needs

to protect herself from you, and she'll use whatever methods that she has developed to cope with repeated danger and repeated abuse to make sure you have less of a chance to cause her harm.

Now, what I just described is not bias to the psychologist. I would be biasing the information I gather if I did not recognize the way a battered woman reacts to an interview. Many attorneys become angry with the woman for not giving them accurate information but I suggest that it is just as much the attorney's fault for not knowing how to question her so that she is able to talk about her fears and the details of the abuse. In my work I have learned to do a forensic evaluation in two stages. First, I learn who this person is psychologically. Then, I work with her attorney to learn how to use that information to present her very best version of her side in the court. In an adversarial system, no matter what the litigation is about, the abused woman has the right to present her very best version of whatever it is that is at legal issue, just as the opposing side has the same fundamental right. Sometimes, the abused woman's side can only be told when you have a trained expert to work with her; sometimes that expert must be a witness in the courtroom for the whole truth to be put before the fact-finders.

I'm going to share with you a little bit about what psychologists have done over the years to try to present that kind of a picture in the court. I'm going to use as an example the "battered woman self-defense" defense that has been introduced in homicide cases. Even though we're not really talking about a new defense, we're talking about redefining self-defense, which was necessary to do, so that it is appropriate to women who have been abused and perceived the need for using self-defense. Now, most of you probably are aware that our self-defense laws across the states, in the federal system as well as worldwide, tend to define the reasonable perception of self-defense by using a male standard. Most laws do not actually state that, although in some legal codes they do still use the term "reasonable man." In some states, legislative or case law has clearly been changed to the reasonable person standard. But basically, it's been a male standard that is used, suggesting when someone perceives the need to defend her/himself, that means perceiving immediate danger, usually when the two people involved are equally matched in strength or equally armed in order to be able to repel the perceived danger. Such a definition simply does not hold anymore, since it does not reflect a woman's experience, and we have lots of legal definitions to support the use of a "reasonable woman" or even "reasonable battered woman" standard.

There has been a history over the past fifteen years, starting in the mid-1970s using this more subjective standard for rape victims and then battered women. The first case was here in California, the *Garcia* case. Inez Garcia was sexually assaulted by two neighborhood men who

threatened to come back and do it again. She went home, got a gun, went out looking for them, and shot and killed one of the men a few hours after the initial rape. That case changed the definition of "immediate" danger for a victim whose attacker knows how to find her. The law usually does not say that the perception of danger must be "immediate"; rather, self-defense laws state that it must be "imminent" danger. Although imminent danger had previously been interpreted to mean immediate by the traditional male standard, for most women, imminent means "about to happen." And, as we shall see later, the perception of danger for battered women who have developed Battered Woman Syndrome is more sensitive and uses fewer cues to perceive imminence. If an abused woman like Inez Garcia really believed that because these guys knew where she lived and because she didn't have a witness protection program, that they would come and find her, just as they said they were going to do, then her actions could and were considered self-defense. Take the reasoning behind that opinion one more step and ask, "What about in your own home?" when the abuser lives with the woman and the elements of a battered woman's self-defense are present.

However, even though the law does not require it, the battered woman still must demonstrate why she didn't use a less violent method of self-protection, such as leaving the abusive relationship. Here is where the psychologist comes in. We can present what we have learned from our scientific studies about the dynamics of battering relationships. One of the most important factors that we've learned over the years is that a battered woman who leaves, who terminates the relationship, is still not safe. Whether she just says she is going to leave, she takes certain steps in preparation, or she actually does physically leave the relationship, abusive men are known to stalk the women, find them, and kill them. So termination of a battering relationship does not necessarily stop the violence, and may in fact place the women and children in greater danger.

There has been an increase in homicides against women in this country in thirty-five states during the last ten years. These are pretty frightening statistics, especially since we've also changed most of our laws, or at least the way we enforce the assault laws during this same period as a way to try to better protect battered women and their children. Domestic violence has been criminalized. Many jurisdictions have adopted pro-arrest policies. As a society we're cracking down and getting tough on batterers; even so, women are still getting killed in even greater numbers. The greatest increase in homicides, according to psychologist Angela Browne's research are for the women who leave. The greatest time of danger for being killed is between the point of telling the abusive man

she is going to leave and two years after termination of the relationship. That fact alone should drive the legal response. No longer should we be asking, "Why doesn't she leave?" when we know that leaving the relationship raises the battered woman's and child's risk of dying.

We now have to redefine self-defense to account for the fact that sometimes it may well be the sleeping man who is just as much of a danger to a battered woman as it would be if they both faced each other with guns in their hands. Rarely does that happen. When most women arm themselves, and usually they get a gun, the data suggest that they do so not because they premeditate killing the abuser, but because they want to equal the power difference between the man and themselves. The women believe that these men will respect a gun, even if they don't respect the women. Sometimes the man shoves the gun at the woman, daring her to pick it up and use it on him before he shoots her. Sometimes, they pick up the man's gun and then realize they have gotten themselves into a situation where they cannot *not* use the gun; he either has seen it or they know he's going to see that they've touched it, and they know he will use it on them in retaliation. So, they may inadvertently escalate an already dangerous situation, but they don't do so because they intend to kill the man. They use the gun as a means to protect themselves because they perceive that it will stop the abuser's violence. Again, understanding the state of mind of a battered woman provides a very different view of what self-defense means.

Why use the "Battered Woman Syndrome" or any "syndrome" testimony if a psychologist can testify about abuse in general or educate the triers of fact about the dynamics of battering relationships? Although there are several reasons, the two main ones are, first of all, to bridge the gap between what the perception of self-defense is now considered by most people and what danger really means for a battered woman. And, secondly, we have to help the people who are making the decisions—judges and juries—understand that the danger of the situation is perceived differently by a woman who has been repeatedly abused than it is by someone who hasn't been abused. Most of the time, battered women don't have witnesses who have watched them being beaten. Family violence is a lot like rape. It is very difficult to get eyewitnesses. Psychologist Elizabeth Loftus and others have testified that even if there are witnesses, eyewitness testimony is not necessarily the most reliable kind of testimony to obtain factual "truth." There are all kinds of difficulties with witnesses' perceptions and memories of what they saw. The Battered Woman Syndrome, then, can give us an additional way of judging whether or not the abuse that she has claimed to have experienced did occur by measuring if the expected psychological reaction is present and if it had the expected impact on her state of mind. Later I will spend a little time describing Battered Woman Syndrome so you can get an idea

of how a trained psychologist could assess and diagnose it, and how attorneys could use psychologists to be able to assist in these cases. Let me give you a couple of ideas of the kinds of cases in which you can use it.

Attorneys may want to use Battered Woman Syndrome testimony for at least three specific reasons. (1) Is she a battered woman? (2) Has the battering impacted her state of mind in a way that is consistent with other battered women? Battered Woman Syndrome is simply a shorthand way of saying how to measure that. (3) Did it impact her state of mind at the time that we are talking about? In a criminal case the time in question is usually estimated back to the time of the incident that gives rise to the charges. In criminal cases it is important to remember that a battered woman doesn't automatically have the right to kill someone. She only has the right to defend herself or others from danger, or perhaps to commit another criminal act under duress. If indeed the battering impacted her state of mind at the point she reasonably perceived imminent danger, knowing everything she knew at the time, then Battered Woman Syndrome testimony can be used to demonstrate how this particular woman did indeed use justified lethal force and still conform to the law.

I've used Battered Woman Syndrome testimony in cases other than for battered women who commit homicide, although I have given testimony in about three hundred cases across the country where the woman claims self-defense. I have also worked on at least one thousand other cases where, for a variety of reasons, I have not given testimony. I've also used Battered Woman Syndrome in duress cases where a woman has been accused of a criminal activity that she did either with a codefendant or because of an abusive man whom she believed would have further harmed her. We have had some cases where the codefendant men aren't even charged; they order the woman to take the blame for the crime. Battered women often do so. They often keep quiet—we've been hearing this all day—women have been keeping quiet, not saying what is really on our minds, sometimes to protect men and doing what men have asked us to do.

Psychologists sensitive to women's typical behavioral style can testify to why a particular woman might take the blame for a man's actions. For example, in a lot of failure-to-protect cases in child abuse, many of the mothers accept the blame for what happened to the child, even when the man is the one who struck the blows. One of the fastest-growing kind of cases that are being prosecuted today are what we call "murder-by-omission" cases, where a child is killed and the woman, much like Hedda Nussbaum in Joel Steinberg's trial, has been so badly battered that she

was incapable of protecting the child. Although Hedda Nussbaum was not prosecuted for murder, many less visible women are. Child abuse laws in states have become more harsh. I believe that people are so emotionally affected by the idea of an abused child that they get angry with mothers who aren't protecting their children, without understanding that for many of them, they're doing the very best they can—like Hedda Nussbaum, they, too, could be killed.

I also use Battered Woman Syndrome in civil cases, to help measure the damage, the injury, that has happened from the abuse. I haven't testified as much in battered women cases because often times, if a personal injury case is filed at the same time that a dissolution of marriage case is filed, the two cases end up getting combined in some way so that the woman gets a more equitable settlement, usually in the divorce case. Rape Trauma Syndrome, a subcategory of Post Traumatic Stress Disorder, is more frequently used in rape cases, child sexual abuse cases, and sexual-abuse-by-therapist cases to help assess the psychological damages. A version of Rape Trauma Syndrome and Battered Woman Syndrome is used in sexual harassment cases if psychological damages becomes an issue. The standard in sexual harassment cases filed in federal court at this time does not require demonstrating an individual's personal harm, but, if such information is available, it could be used. Some attorneys also ask for an evaluation to help them assess the strength of their clients' claims. Battered Woman Syndrome has also been used successfully in clemency petitions for women who are already in prison. That has not been true here in California; the governor, as you probably know, has lots of petitions sitting on his desk that he hasn't acted upon.[1] But, governors of other states all over the country are beginning the clemency review process, not en masse as Governor Celeste in Ohio and Governor Schaeffer in Maryland did, but still releasing a few at a time.

The clemency cases are much more difficult because you're applying psychological analysis retrospectively. The women are often quite removed in time from the abuse; often they have already spent a long time in prison, and so it may really stretch a psychologist's ability to be able to make those kinds of judgments. Nonetheless, the trauma that many of these women have experienced doesn't heal as easily if she is confined in prison, and many remnants of the abuse remain. However, for many of these women, justice would be served by their release especially since most of them did not get a chance to introduce Battered Woman Syndrome testimony at their trials.

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1. At press time, Governor Wilson rejected 14 women's clemency petitions based on Battered Woman Syndrome and self-defense. The Governor did grant relief to two battered women, one for health reasons and one because he found she had suffered enough.

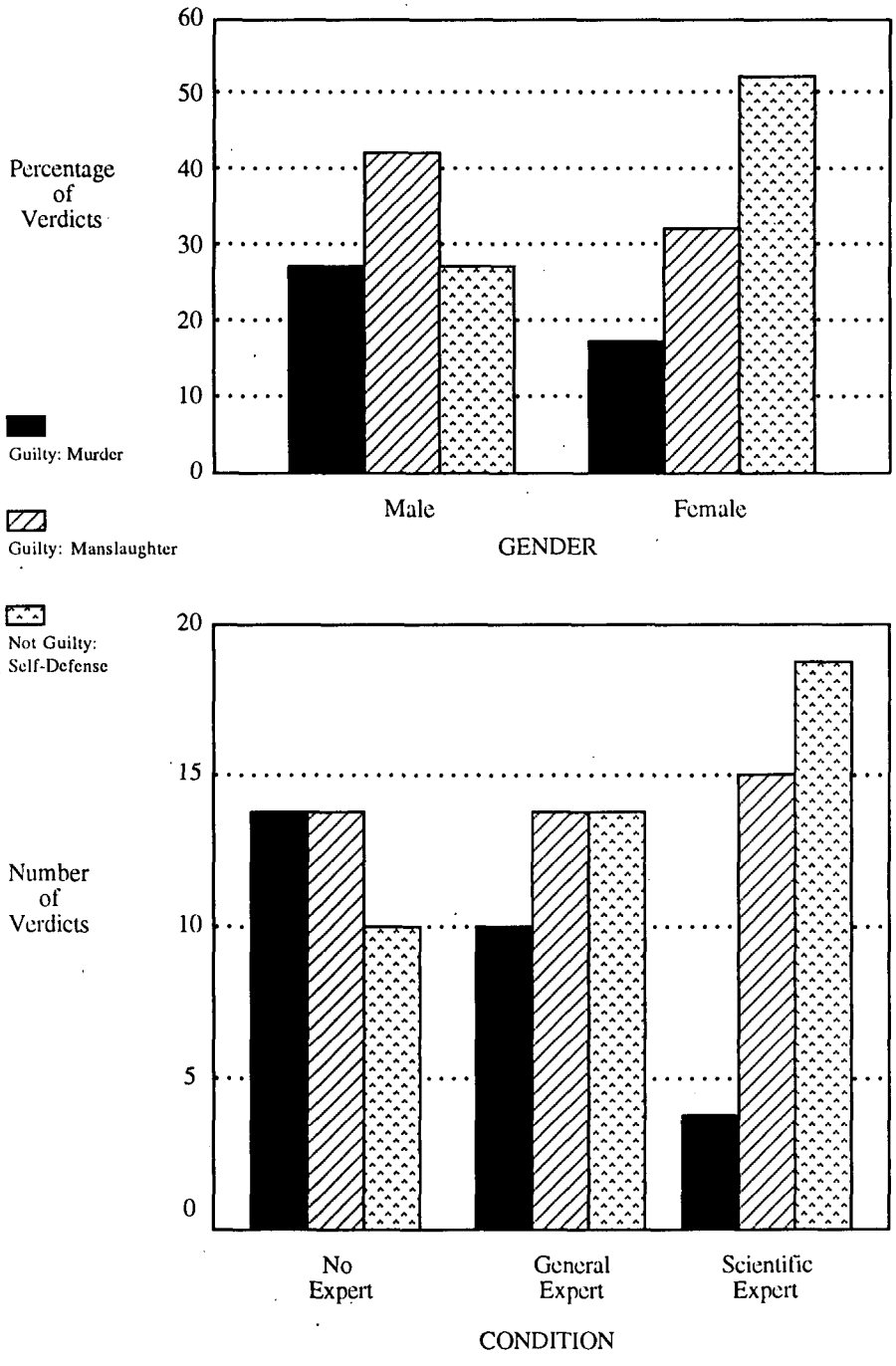
One of the major debates in the field today has been the use of syndrome testimony. Those opposing its use believe that it simply relabels women as mentally ill. They argue that instead of examining the woman's competency—a major issue prior to the introduction of Battered Woman Syndrome testimony—mental illness has now been introduced as part of a justification defense and that may be inappropriate. My own opinion is that properly presented, Battered Woman Syndrome, like other PTSD, is not a mental illness, but rather a way to clinically describe the impact of abuse on the woman's state of mind. Syndrome testimony is necessary to bridge the gap between the stereotyped myths about women in general, the expected impact of abuse on women, and the particular impact on this individual woman at trial. Table 1 sets forth data demonstrating my point that was recently published by psychologist Regina Schuller in one of the most recent editions of *Law and Human Behavior.*

In the top graph [following page], the dark end column represents convictions for murder; the column with the stripes represents convictions for manslaughter, and the column shaded with little dots represents acquittals for self-defense, not guilty by reason of self-defense. The top graph shows the changes in verdicts given by men and women in the study when presented with expert witness testimony in what we call analog studies—these are social science experiments, and the subjects read similar stories but some of them have an expert in it and some of them don't. The experimenters used three different conditions: no expert testimony, general expert testimony, and specific testimony by an expert that deals with Battered Woman Syndrome. The bottom graph shows the differences for each of those three variables.

In this research they tried to find out what was going on for these subjects as they (judges and juries) made those kinds of decisions, and what they found was that the mediating factor was that they began to believe the woman. After they'd heard expert testimony, they took her more seriously, they put the abuse that she talked about in context, and they were much more likely to believe that she had a reasonable perception of imminent danger at the point that she killed the person. Even if the person in the story was sleeping, the subjects found that the woman had a reasonable perception of imminent danger and was justified in using self-defense. Now, this is not a reasonable person standard. This is not even a reasonable woman standard, as Pam mentioned earlier. This is a reasonable battered woman's standard that we're talking about.

Now let's look at the bottom graph, which I think is even more striking in showing you which condition had a greater effect. As you can see, the lack of an expert resulted in more convictions and fewer not guilty

Table 1. Impact of Battered Woman Syndrome Testimony*



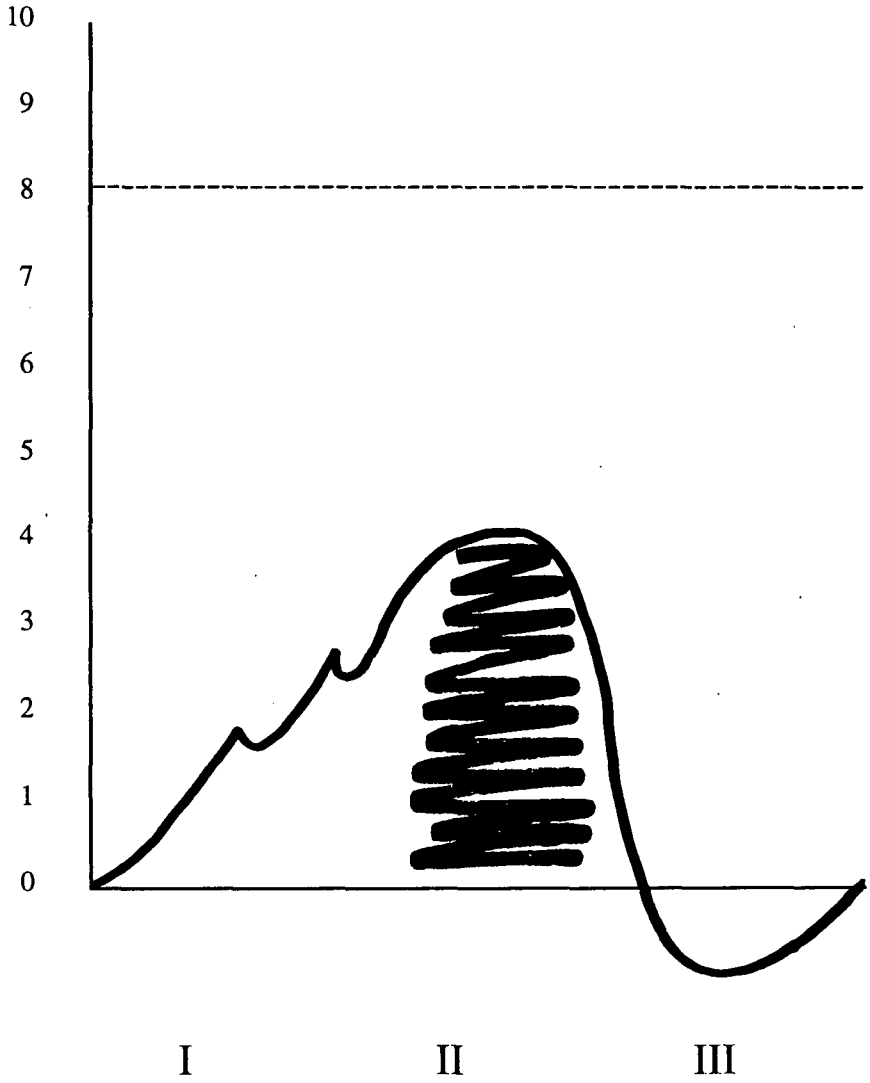
*Schuller, Regina A. (1992). The Impact of Battered Woman Syndrome Evidence on Jury Decision Processes. Law and Human Behavior 16, 597-620 (p. 603-04).

decisions; with a general expert, you have fewer convictions for murder, more on manslaughter and not guilty; and then when you have an expert testifying with specific testimony about that individual woman to help that jury understand who that woman is and what the perceptions are from her point of view, you have much greater findings of manslaughter, and much higher not guilty by reason of self-defense acquittals than convictions on murder charges.

These data support my argument for expert testimony on Battered Woman Syndrome in individual cases. Perhaps someday we will be ready for the general testimony that allows us to understand a woman's perspective, but right now the general public cannot be expected to understand and apply it to individuals. When real jurors are interviewed after a case is over their comments indicate they don't understand what value an expert's testimony had on their decision-making process. Jurors rarely say very much during such debriefing. My best story is a Montana case, in which the jury acquitted the woman by reason of self-defense. After the verdict came in, the prosecutor sent me a letter saying, "Dear Dr. Walker, I think you might want to know that your client was found not guilty; you probably know that anyhow. But I had the opportunity to interview all the jurors and I thought I'd let you know what the jurors said. Two of the jurors thought that you were very bright, very informative, and everything you had to say was just wonderful and really helped them make their decision. The other ten thought you were full of it. Have a nice day."

Now, I thought that was a little like sour grapes. Maybe that's what the jurors said; I don't doubt it if they did. But they voted for self-defense. I guarantee you, that wouldn't have happened had they not heard somebody else giving voice to that woman's story. The large number of women in prisons all over the world with the same story demonstrate my point here. Most battered women who kill do not have the ability at that moment to be able to understand what led up to their doing it. They themselves are shocked that the man died. They didn't start out wanting to kill the man, and in most cases, they have just become widows—they are dealing with the death of a man who was a person who also loved them. And that is part of what you try to explain to the jury when you talk about the dynamics of the battering relationship. That battering does not happen all the time, and that batterers are not mean, awful, horrible men all of the time. That indeed much of the abuse happens in a cycle of violence that has three phases to it, and I thought I'd draw them kind of generically on this graph.

Figure 1. Cycle of Violence

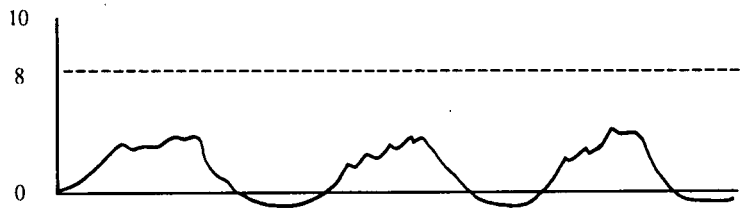


If you think about the vertical axis going from zero to ten, with the greatest amount of tension and the most danger being the higher numbers, and time being the horizontal axis, then you can see there are three distinct phases. The first one is a period of tension building. These are little incidents that happen, some explode, maybe some don't explode, perhaps because the woman does something to calm the man down—because battered women are not passive. Most battered women, even if they have a passive exterior, have an enormous ability to cope with violence. They don't have the ability to believe that they can escape the situation. But they do have the ability to keep him as calm as possible for as long as possible. In the first phase, the only control they have is to speed it up or slow it down to somewhat regulate when a Phase II incident occurs. The simplest way to speed it up is to just show the man her anger. If you are angry with a batterer, he gets more angry with you, and he's much more likely to precipitate an acute battering incident. Or the battered woman can slow the cycle down by doing what he wants her to do, by giving in to all his demands. And so, because during that first phase they have some ability to control the timing, many women believe that if only they can figure out the answer, if they can do something better, then they could make that bad side of him drop out, and they are left with the nice, delightful, nurturing, kind, sweet man that is sometimes the only side that other people see.

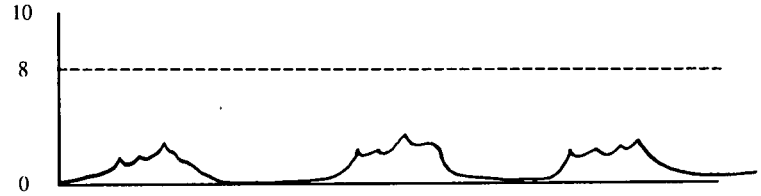
The battering in the first phase escalates to the "point of no return," or the period of inevitability. That's the point that if you don't separate the couple, an explosion will occur—it's just that simple. It is possible to graph a particular battering cycle and then use the data to teach women how to recognize when the violence escalates so that they can seek safety and get away, because they can't leave once the point of inevitability is reached; batterers won't let the women go then. Figure 2 demonstrates the four most common types of battering cycles that have been graphed to date.

The second phase is the explosion, or the acute battering incident. As you can see in Figures 1 and 2, Phase II is the shortest period of time. It usually is over rather quickly, but it's when most of the injuries happen, if they occur at all. Injuries only occur in fifteen to twenty-five percent of the reported cases, and less than ten percent of the women seek medical care, so if you're looking for medical records to back it up, you're not going to find them in those cases. And even if you do find medical records, women rarely say, "My husband beat me and that's how I got the black eye," it's usually "I fell down the stairs," "I was in a car accident," or any of the other excuses that women make up.

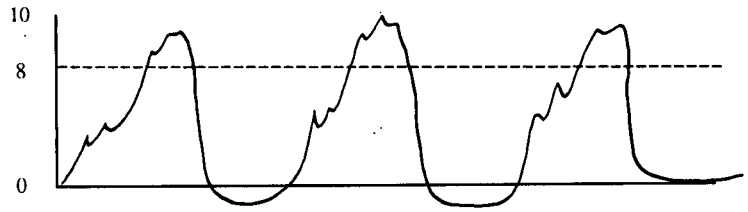
Figure 2. Common Cycles of Violence



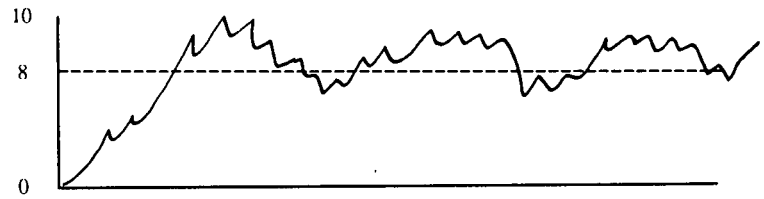
CYCLE TYPE A - The most common cycle of violence. In this particular cycle, the level of battering of the acute battering stage does not reach the threshold of lethality. The acute battering incidents are followed by a period of loving contrition. Just because the threshold of lethality is not reached does not mean that the situation is not dangerous. Any violent act can end in serious injury or death, and any cycle can switch to another more dangerous cycle at any time. Over time, this particular cycle may change into any of the following cycles.



CYCLE TYPE B - In this cycle, the level of battering of the acute battering stage is often less severe than in any of the other cycles; however, the stage of loving contrition is often minimal or missing altogether. Relationships trapped in this cycle may continue for many years. Most do not reach lethal levels.



CYCLE TYPE C - This cycle of violence is characterized by potentially lethal, acute battering incidents followed by stages of loving contrition. This cycle is very dangerous, sometimes ending in death. Over time, the loving contrition stage often disappears completely and the cycle moves on to the next level.



CYCLE TYPE D - The most deadly of all the cycles. Once the acute battering stage is reached, battering usually stays at lethal levels. Unless this cycle is broken by getting the victim safely away from the batterer, this cycle ends in the death of either the victim or the batterer, or both.

After the acute battering incident is over there is a sharp drop in tension that is physiologically reinforcing. It feels better to get that acute battering incident over with. Many people thought that women "provoked" an incident because they were masochists, they wanted to be abused for some unconscious psychological reason. That's not what the research shows. What is seen is that women may appear to be insensitive to the batterer's changeable mood because they know it's going to happen anyhow, they've reached that point of inevitability, and they want to name the time and place where it occurs and get it over with. It is much safer if a Phase II explosion happens in front of other people than if it happens alone at home. So, oftentimes, women will push it. It's much safer if he knows that you've got a family affair to go to the next day that he has to go to because it's his family than if it happened when that is not the case, when he could hide for a few days. So women may learn to be manipulative. Being battered doesn't mean that you can't be manipulative, and indeed they may even become aggressive. They may push aggressive incidents, because that will protect themselves better; they are less likely to be hurt, and that's the goal, to cope with the abuse and to minimize the amount of pain and damage that they receive.

And then we have the third phase—some people call it the honeymoon phase, I call it "loving contrition"—that's when he says he's sorry in some way. He's nicer, maybe he says the words, he promises he'll never, ever do it again. And he often will buy her things and give her gifts, do something to demonstrate that he really means it. Phase III is clearly seen in Figure 1, the generic graph. As I began to do my research, I began to see that not all women have the same kind of loving contrition phase. In fact, sometimes they might have had it earlier in the relationship and you don't see it later on. But the absence of tension is also reinforcing. And so, that third phase can also be drawn that way, as seen in Figure 2, Graph B. There is also another pattern, shown in Figure 2, Graph C, where a battering relationship could have reached a lethal stage. I automatically draw a line at 8, and that was the point of danger.

In my research, eighty-five percent of the women that I interviewed, the 400 battered women, said that they wanted the man to die at some point. For all of you who are prosecutors in the audience, if you define premeditation as being the fact that she tells somebody she wants him to die, or she says she wants him to die, or she believes she wants him to die, then eighty-five percent of battered women would fall into that category. We don't have that many dead men lying around. We don't have that many battered women killing men; there would be too many men who would have to die to measure true premeditation by the woman's

wish to have the man dead.

Somewhere between twelve and fifteen percent of all homicides in this country are committed by women, and that number has been very stable; if anything, it's going down a little bit as we give women more options. Unfortunately, as the number of women who kill goes down, the number of women who die seems to be going up. So I'm not so sure that some of our interventions are as good as we would like to believe that they are, especially when you take a look at that very small segment where homicides occur.

There was some criticism about the generality of the cycle in the early 1980s—"Well, not every woman fits that pattern, not (with) every woman can you see the cycle"—so I did a more detailed analysis of the research data, and you can see that on this chart (Figure 2). Here are four different possible graphs of cycles. There are many more, but these are just four of the most common ones that I drew on the chart. I often will plot an individual woman's particular pattern in my cases, so I can get a very clear pattern of the dynamics of that relationship, and show it to the jury, talking first about the dynamics and the cycles in general and then, showing how this particular cycle fits the pattern.

The first one, Graph A, is a long-term battering relationship: it's pretty stable, increases a little bit at a time, but you can predict that if nothing intervened, that battering relationship could go on for twenty or thirty years. They always get a little bit worse, but some of them increase at very small increments. You can't predict, however, that that's what will happen, because we know that situational factors can increase the abuse. For example, the most common is pregnancy, or the addition of a young child. The second most common time is when there are teenagers; anyone who has ever raised teenagers, and those of you who are not so far away from being teenagers, know why that would happen—it's much more chaotic in the house. Chaos is something a batterer cannot deal with, and something the battered woman spends a lot of time and energy trying to help prevent.

The second, Graph B, shows no loving contrition. The first one shows that there is some; in the second one, he just doesn't do anything very nice, he goes about his business, he does what he wants. He doesn't batter her all the time; it's pretty low-level battering, and so most battered women in that pattern are able to tolerate it for whatever kinds of benefits they're getting out of the relationship other than that period of time. The judicial system rarely sees this family at this time in their relationship.

Let's look at Graph C. That one starts out much more severe than the other one did. This is usually a man who has a record of abuse in other situations, or somebody who has been abusing other women. The first incident here—and that's one of the ways you look at it, you ask what was

the very first incident the woman can remember—is a very serious one, with choking, with life-threatening kinds of behavior, and perhaps a lot of visible injuries. That one gets up to life-threatening levels right away. These are very difficult relationships to walk away from because these men are generally so powerful and controlling, they don't let the woman go. You can see that this one starts out with some loving contrition and then goes very quickly to none. Those in this pattern could erupt in a homicide or suicide very quickly. You don't need long-term abuse like that, from which she can't escape, that is life-threatening before many women may strike back in self-defense.

The last one, Graph D, is the one that's the most difficult for juries to understand. This is one where the danger goes up very high and stays up; it doesn't come back to zero again. This woman always perceives herself in danger. These are the women that may hire somebody to kill, and these are some of the women who may plan to kill when the man is fast asleep, or is otherwise vulnerable and doesn't appear to be a threat that day. They believe that they have no option other than to kill the man because there is no escape, and they're always in danger. That's what the graph of such a pattern would look like. The dynamics of the abuse are much more difficult to talk about.

Let me talk just a little bit about the syndrome itself. The Battered Woman Syndrome is a sub-category of Post Traumatic Stress Disorder. Rape Trauma Syndrome, Child Abuse Syndrome, the effects of sexual harassment, all are part of post-traumatic stress disorders, but so are earthquakes, plane crashes, and combat stresses. They're all diagnosed under the same PTSD category. What that category means today, as described in the Diagnostic and Statistical Manual of Mental Disorders (DSM-III-R), is that any normal person can be exposed to a psycho-social stressor that would cause trauma, or could be expected to cause trauma reaction in any normal person. So you don't have to be mentally ill, you don't have to have some kind of emotional disturbance, to develop a post-traumatic stress disorder.

How do we measure it? The DSM-III-R lists criteria that must be present to give the diagnosis. It becomes very simple if you think about the criteria as coming under three major categories. The first two are a "fight or flight" response to danger. Psychologists have been measuring that from the very beginning of psychology. We know how to measure that fight response, which is high arousal, of all our physical and mental systems. We know the body and the mind get prepared to deal with danger, the parasympathetic nervous system gets activated, all the biochemicals and hormones kick in, and people are ready to deal with danger. They

become hypervigilant, they become nervous, they become ready to pounce, or even irritable, because they are very single-minded and focused, and they are more anxious. We know that these kinds of symptoms do not go away so easily. It takes a while to get all aroused when you think that you're in some kind of trouble or some kind of danger, and it takes a while for your body and mind to calm down when the danger passes.

We have a second system that helps that: the flight symptoms. It is far easier to get the heck out of there if you can than it is to stay and fight the danger. But sometimes if you can't get out of there physically, you can leave *mentally*. So we have a whole host of mental symptoms that represent what we call avoidance or psychological numbing. Those symptoms include depression, repression, denial, minimization, and something that has been further understood through newer research called *dissociation*. That is the ability to make your mind go someplace else so that you don't feel what is happening—it is a separation between mind and body. Dissociation is often seen in children who have been sexually abused. They talk about concentrating on something else while the abuse is taking place so that they don't have to pay attention to the hurt that is happening to them right at that particular time. It is like being in another level of consciousness. Dissociation commonly occurs when abused women perceive they are in a life-threatening situation; it is like the mind shuts off and automatic-pilot reactions occur. Since there is little or no conscious awareness during the dissociative state, there is often little or no memory about what happened during that time. There is also no ability to understand right or wrong or perceive the nature and consequences from actions taken when in a dissociative state.

This is a brief overview to the two systems: fight and flight reactions, the high physiological arousal and the high avoidance and numbing which produce psychological symptoms that are measurable using standard psychological procedures and experts to interpret the results. They work like a hydraulic pump system; you get all aroused and then you try to calm it down. Like any hydraulic pump, when you keep working it again and again, it doesn't happen very precisely. You can turn it on and it doesn't shut off so easily, or you shut it off and it doesn't turn on again quite so easily without stimulating other reactions. If you think about the PTSD symptoms in these terms, it really does not imply mental illness anywhere; rather, it implies a normal, constant, repeated reaction to trauma.

The third set of symptoms to complete the PTSD are changes in memory and cognition, or the way people think and make judgments and how they store and retrieve such information. Battered women become more confused, especially when they are putting an intense amount of focus on one area; they are less able to see the periphery, the rest of the

world. So the focus changes, the context of their lives changes. That makes judgment less well thought through than when you have all the information possible to then make a judgment. Mental confusion also keeps the woman from understanding what is happening to her; the batterer's monopolization of her perceptions is another common way to negatively impact on her cognition.

The other area is memory distortion. Most common are the intrusive memories that keep people who have been exposed to trauma reinfecting themselves because they keep reexperiencing or remembering part or all of what happened to harm them. They do not consciously or intentionally call up the memories; rather, parts of the traumatic events spontaneously pop into their heads. These memories can come into their heads through flashbacks, conditioning processes or a variety of ways that parts of or the entire abuse incident(s) will reappear. Think about this: If you've been repeatedly abused, and you walk into another abusive situation where you believe that you're going to be hurt again, and all of a sudden you get some flashbacks to either real or imagined memories—it could be memory fragments together with the current situation that are in your head or just the memory fragments triggered by the current situation, or the reality of a similar situation. It is important to ask the question, "Is this person responding to the same perceptions as would someone who doesn't have within their mind these other perceptions, too?" The answer is obviously "No." The battered woman, the repeatedly abused woman, the woman who has been abused more than one time, brings to the situation a greater perception of danger. Each successive acute battering incident brings out some memories that might have been temporarily forgotten had another dangerous situation not have arisen. So, it is learning the combination of the fight or flight cycle along with changes in cognition and memory that assists in the healing process.

I argue that we need to learn how to use this kind of syndrome testimony at this point, if for nothing more than at least help explain what's in an abuse victim's mind at a particular time. Obviously, such post hoc predictions cannot be one hundred percent accurate, as it is usually not possible to measure the external situation since witnesses are not usually present. However, those studying memory and eyewitness testimony tells us that we each perceive what is objective "truth" in a different way. So, we must take into account subjective perception, because the law says "a reasonable perception" of imminent danger. I suggest that in these cases specialized psychologists are necessary in order to be able to help understand what that reasonable perception is for somebody who has been

repeatedly abused. Eliminating violence in our families must be a priority if we are to learn to live in peace and harmony with each other.

Audience Question: As a prosecutor, I have the following concern: When there is an aggressive program of prosecution, sometimes the victim is reluctant to go forward. What are we doing to the empowerment of women by forcing them to go forward and in fact impeaching them? We just got a guilty verdict on a case where a very young woman testified that it didn't happen. An expert testified that it did, and the defendant was convicted. My concern is what are we doing to the empowerment of women in forcing them to go forward in situations like this?

I think that's an excellent question because I do believe that—although I use this from a defense standpoint—this is testimony that could and should be used by prosecutors to do just what you're saying. And I have indeed worked with prosecutors to get this kind of conviction. There are going to be some women who find it too dangerous to be able to testify that this has happened to them. On the other hand, when you talk to the women, they say that they want to be able to take their stand just in case it doesn't go as well as you want them to believe it's going to go. Because these women say, "I have to go back and live with him," or "I have to live with his family," or "His friends are in the neighborhood, and so I have to demonstrate that I'm on his side, but go for it. Go ahead and do what you're doing." On the other hand, I don't believe that we should ever force a women into testifying when she doesn't want to testify. I know that there have been some cases where women have actually been held in contempt of court because they have refused to testify. I think that's disempowering to the woman. But if we collect the evidence, which obviously you were able to do in that case, so that we have the police trained to go in and make an arrest, and to take away the need for her to sign the warrant, but have the police sign the warrants or have warrantless arrests, and gather the data and the evidence at the scene of that crime, just like they would do in a homicide case, they can certainly do it as well in an assault case. If they do that well, get pictures, get an expert involved, then her testimony is less necessary, and so you don't have to force her to do it. If we also do pro-arrest policies where we have very specific, good intervention programs for the men on the other side, women are much more likely to cooperate because they don't want them sent off to jail or prison; they want them to stop the battering. So, if we try to use the system as a way to get them to stop, then they are much more cooperative with the system than if we're not giving them those kinds of options. So it really depends on how we design those systems.

Audience Question: Do you have studies of what happens, generally, when these men get released? It's a misdemeanor battery, but they might not get any more than a few years. So how does it really help the problem?

You're lucky if it's a few years. Misdemeanor battery is sixty to ninety days. I don't necessarily know that jail helps the problem; sixty to ninety days is not going to stop him. But what it does is it gives her sixty to ninety days to catch her breath, and maybe make some decisions. If we also give her some options to seek resources, she may be less frightened; she's going to learn to live without him in the house for a little while, and that can be very refreshing to many of these women. So it has its benefits in that way. What we have to do is stop prosecuting at a misdemeanor level when we're really dealing with attempted murders. This summer I testified in federal court in St. Croix in the Virgin Islands. The prosecutor recognized that this man kidnapped the woman, forced her to sign custody of the children over to him, put the woman on a plane against her will to get her out of the Virgin Islands—before he did that, he also had raped her. When the plane landed, she called, hysterical because she had a tiny baby who was not even two months old at home, heard the baby crying and pleaded, could she come back. She came back, he raped her again that night, and then he went off to work in the morning, certain in his arrogance that she would never leave. I suspect she wouldn't have, had the neighbor next door not heard the abuse and knocked on the door and saw how bad she looked and pleaded with her to go to the police. The police and the prosecutor's office held this woman's hand for the four or five months that it took to get that conviction. He didn't prosecute on assault; [the defendant] was charged with kidnapping for extortion, and two sexual assault charges. And, just as you might predict, while he's in prison, he contacts the woman and tells her that she has to lie, and tell them to drop the charges, etc.—this is very typical—but the woman knew he was going to do it, because he was trying to do it during a visit she had arranged. She did just what you'd predict: she took all kinds of goodies to him in jail. Then on her way home, she went—she had developed this alliance with the prosecutor and with the police officer, and I'm sure that's what did it—she went to them and said, "I think he's going to call me." So they wired her up, and they got him on witness tampering as well, because they got him on tape. He followed the prediction.

Now, that prosecutor spent a lot of time, a lot of money, and a lot of energy; it wasn't, as someone said earlier this morning, 'Here's a file, go

to trial.' You can't do that with this kind of a case. It took a lot of time to do it. But we went out to lunch when the jury was sent out to deliberate; they went to lunch at the same time. And we didn't even finish lunch when we were told to come back and they had convicted him on all four counts. He'll spend the rest of life in prison.

Now, that's unusual. What we're also doing is, we're doing all kinds of things to help protect women when their men get out, or even if the men don't go into jail. All of the new anti-stalking laws that have been passed. Twenty-one states now have those laws, and that's going to help. I work with a company that is designing ankle bracelets to put on the man's ankle so that if he goes near her house and violates the restraining order, she has a communicator box in her house—eventually we hope they can be portable, so she can carry it with her; right now the technology is such that it can only be in her house, so it's not going to protect her from being killed if he wants to stalk her and kill her. But what it will do is it will communicate to a message center that he was there. He can't go into a court when she files a contempt of court charge and say, "No, I was just out at the bar, drinking with my buddy Bill," and bring Bill in to say, "Oh, yes, he was here with me." We now have hard copy that says he was there. And that's going to help add to the credibility. Should we have to add to women's credibility in court? Absolutely not. But those data that I showed you earlier show that unless—particularly for men, they don't believe women, they don't believe women's perceptions, and they trivialize what has happened to women—until we change men's attitudes, and women who also have what I call "androcentric" kinds of attitudes, because they have to survive in a male world—I think Patricia said it so well this morning; we have to learn both worlds. We have to traverse both men's worlds and women's worlds. Men don't seem to have to do it. I suggest to the men in this audience, if you learn anything today, you've got to know our world too. We have to share each other's worlds so that we can communicate with each other, and if we can do that, then I think we're well on our way to stopping abuse against women.

IX. PROFESSOR MYRNA S. RAEDER

Professor Raeder teaches at Southwestern University Law School, where she specializes in evidence and trial practice. She has served on many faculty committees and was the faculty advisor to the law review from 1980 to 1982, and the moot court advisor from 1983 to 1990. Professor Raeder received her undergraduate education at Hunter College in New York, where she was a member of several honor societies. She graduated summa cum laude with honors in political science. She

attended law school at New York University, where she was Order of the Coif, and a member of the law review. She graduated cum laude in 1971. From 1971 to 1973, she participated in the Georgetown Legal Intern Program in Washington, D.C. She later served as assistant professor and co-director of the Criminal Law Clinical Program at the University of San Francisco School of Law. In 1975, she received her LL.M. in trial practice from Georgetown, and then joined the litigation department at O'Melveny and Myers in Los Angeles. Professor Raeder is the author of numerous publications, including a book on federal trial practice. She is currently working on a second edition of that book.

Today we have already heard about a variety of types of women: professional women, political women, empowered women, harassed women, battered women. Now we are going to hear about a segment that is often overlooked and not oftentimes viewed very sympathetically: women who are victimizers. In fact, what is interesting and possibly Judge Marshall may get a little more into this, is that oftentimes those women who are female offenders start out as victims and only later become victimizers. What I am going to focus on in particular is what happens to females in sentencing when we ignore the fact that we live in a gendered world in which many women have well-defined roles; not only gendered roles, but expectations about such things as child rearing and male-female relationships.

As an aside, I've been listening to the speakers from an academic perspective, and it's interesting to hear the variety of views that have been proposed here. The great divide that separates where you stand on issues, which really exists out there in feminist jurisprudence, is "Do you believe that everyone should be treated the same?", i.e., "Is gender neutrality going to solve all the problems of women?" In other words, "I'm bright, just give me the same standard and I'll live up to it." Or, do we rather take the position that gender neutrality sometimes doesn't work? Particularly when it ignores the realities of the women's lives we're trying to deal with. When you take an offender population and say, "We're going to ignore the facts of their particular socialization," then what we oftentimes wind up doing is disadvantaging those women who are living very well-defined existences. Particularly, I will focus on the difficulty concerning children and the fact that it is the female population, obviously, who takes care of the kids. Females, for the most part, have sole and primary parenting roles. That isn't to say there aren't men who are taking care of children, but if you take a look at societal expectations of who takes care of the kids, it typically is the female. Thus, when you observe

the offender population, those people who are taking care of the children are female. To ignore the fact that there are gender roles when we look at sentencing issues oftentimes disadvantages women and their children.

Now that isn't to say that gender neutrality isn't a terrific goal, it's just to say that sometimes we have to deal with existence as we find it. In order to get to the next step, a little like Dr. Walker has been talking about, you may have to use the law in a particular way that ultimately you would like not to do, because it may characterize women in a way you don't like. But the problem is that if you jump from step one to step five, everybody in the middle is really disadvantaged by your having done so.

Now, when you look at sentencing, it's really interesting that the first question you ask is whether any gender bias exists in sentencing. The knee-jerk reaction to that is, "Yes, but it favors women; therefore, we'd better not talk about it." When I say it favors women, anecdotally, you ask anybody, any judge, any criminal law practitioner, "Do women get lighter sentences than men?" and I can guarantee you that most people will say "Yes" without thinking about it. Obviously that's all anecdotal—the question is, what's really happening? In fact, when you look at the empirical studies, they also seem to indicate that women do better in sentencing than men. But the question we're left with is whether that is a gender difference. The answer, when you look at it in a more sophisticated manner, is "No." It's not because of gender per se. You take a look at women and their roles: in the first place, many women are first offenders; their role in a conspiracy might typically be much more minimal because of socialization factors in terms of their relationship with the other people in the conspiracy. There is very little violent crime by women—in fact, back in the '70s, people said, "Now that we have women's liberation, we're going to get women's crime in the same way we have men's crime." Yet, the women's crime that we have is heavily property- and drug-oriented; it's not violent crime. Thus, when you look at offense characteristics and at the criminal background of the individual being sentenced, oftentimes you can explain why it is that women seem to, as a category, have lighter sentences than men.

But there actually is one other factor that hasn't been taken into account much in determining whether women do get lighter sentences than men. That has to do with the question of women as primary and sole caretakers of children. Now, in the wonderful world before Sentencing Guidelines, and I should say to you that you have my paper in your materials, but if you are interested in the Sentencing Guideline question and the effect of gender on sentencing, in the forthcoming issue of the law review you can read more than you want to because I have written one of the articles that has more than five hundred footnotes on this topic; obviously, in fifteen minutes I'm not going to be able to give you a real

background that will make you understand all of my support for what I'm saying. Therefore, this is going to be a gross summarization of what I have written.

If you take a look at whether or not there is disparity in sentencing of males and females, it is fair to ask, "What is the role of child care?" Before Sentencing Guidelines, judges didn't have to explain how they reached a sentence—lots of discretion. To the extent that empirical studies found that gender was significant, even after you controlled for offense characteristics, many of those didn't ask, "Was that really a gender effect, or was it really because the woman was a single mother or a primary parent of young children?" The few studies that did focus on this issue recognized that what they had previously thought was gender bias was really a pro-family bias in the individual situations. Now, the Sentencing Guidelines said we are in the world of gender neutrality. We've got an absolute ban, which forbids gender from being taken into account. We also have some policy statements, one of which is that family circumstances cannot ordinarily not be taken into account in determining whether to give a sentence below the Guidelines range.

To understand how this restricts sentencing options, you have to know a little bit about how the Sentencing Guidelines work. We have a structure in the federal court system which basically tries to define everything you've done into categories and come up with a score primarily based on offense characteristics. The only real offender characteristics it considers is your prior criminal background in terms of how many offenses the defendant has. This matrix doesn't ask if you are a good person, what are your community ties, or what was your mental condition during the incident. It doesn't look at the individual, except to the extent of these policy statements that say, don't ordinarily take those personal factors into account in determining whether to depart downward from this particular range that is determined by simply counting up the points assigned to the relevant factors.

The reason for creating this system, which may sound Byzantine to some, is that there was concern about unwarranted sentencing disparity. In other words, why should somebody in New York get a different sentence from somebody in California for the very same crime, accomplished in the very same way, i.e., the same weapon involved, the same amount of drugs involved. In trying to devise this system, they came up with a mathematical formula from which the judge can depart only under very limited circumstances: one, the departures are either listed within our structure, or the departure is a factor that wasn't considered at all within the structure of the Guidelines.

The Guidelines started off with this premise, which limits judicial discretion, then added the overlay that in the federal system we've gotten very tough on crime generally. There are a lot of mandatory minimum sentences, i.e., you commit a certain crime and that's it, five years, ten years, three years extra, whatever the statutory amount happens to be. A judge can't do anything about the mandatory minimum unless the prosecutor comes forward and says, "This person has been of help to me"—substantial assistance—that's the only way of departing below the mandatory minimum. This kind of structure imposes much heavier penalties because of the combination of the Guidelines and mandatory minimums, partially because we've become very afraid of crime. Yet what do we envision as crime? Interestingly, the war on crime is based on a male model of violent, dangerous offenders. Yet female criminals, even in the federal system, commit property crimes and drug crimes. Even in the drug crimes, they are low-level in the conspiracy: and who is the other member of the conspiracy? Obviously, a male with whom the female has some sort of relationship. Generally, females exhibit a different type of criminality than do men.

But what has happened to the kids? You take the policy statement that says don't ordinarily take family circumstances into account, and where do the children wind up? Where do the children of men offenders wind up? I've got a good answer: they wind up with their mothers, whether or not the male is currently married to the person or was never married to the person. The surveys show that more than ninety percent of the children of male offenders reside with their mothers when the male is incarcerated. Ask me where the children of female offenders are. The answer is quite different. Depending on your survey, anywhere from twelve to thirty percent of those children reside with their natural fathers. What happened to the other seventy percent? They're either with relatives, friends, foster care or institutionalized.

Should a judge in federal court be able to take into account what happens to the children in sentencing the mother when this policy statement says family circumstances should not ordinarily be taken into account? It's fascinating because judges in some circuits say, "Single parent: ordinary! Everybody gets divorced. Lots of them in our society. This issue must have been contemplated by the Commission when they set up the Guidelines; therefore, I can't give a departure on that grounds." Other circuits, primarily the Second Circuit, are much more open to family departures for single parents. But in fact, you've got a lot of bad law in some of the circuits, saying, for example, that you can't take into account the fact that this is the mother of four young children. You can't take that into account at all, even though, if you take a look pre-Guidelines, that woman probably would not have received any kind of incarcerative sentence at all. Why do I say that? Because before the Guidelines almost

two-thirds of women were on probation. After Guidelines it's closer to one-third. Certainly all of the Guidelines statistics would indicate that sentencing has become more severe for everybody; I'm not saying that men are doing any better. In fact, men are still doing worse than women, even under the Sentencing Guidelines. However, the only study that has tried to control for multiple variables discovered that this disparity could be accounted for by offense characteristics and not gender factors.

What should be done? My article argues that in the first place, "ordinary" is being interpreted in a way that is much too strict. The number of female offenders has obviously grown a lot—sixteen percent of the population—but certainly the single mother problem and what happens to their children is not the ordinary case in federal court, i.e., it's not the ordinary case in terms of the general offender population. I also review statistics and studies to show that the impact on the children of single mothers was not considered by the commission. Therefore in terms of the current way of obtaining departures, you can argue this is not ordinary and you can also argue that the child factor is not one that was considered by the Commission. Maybe one can say that the Commission generally considered the effect of family relationships, but it certainly didn't consider the disparate effect of disruption of children's lives in terms of the female population.

I just want to mention briefly a couple of other things that I deal with in the paper. One is battering. Dr. Walker mentioned that one way in which battering is used is related to sentencing. In fact, the departure matrix would, even in federal court, permit that coercion or a defense not amounting to a complete defense in terms of the actual elements of the case to be considered as a mitigating factor in sentencing. Though, interestingly, ordinarily the battering must be physical to obtain a departure. There are a number of these cases in federal court that almost make you say, "What are state crimes doing in federal court?" Take a look at all the drug cases in federal court. People also forget that federal territories include entire Indian reservations and federal bases. There are lots of local crimes in federal court that generate cases. But where battering is most frequently raised as a defense in terms of sentencing is in drug conspiracies, where women argue that they were coerced into, or coerced into staying, in the conspiracy because of their fear of their significant other.

Battering also is relevant at the other end of the spectrum. There is a departure that permits lowering a sentence because of the victim's wrongful conduct, if that contributed significantly to provoking the offense. Obviously, for those few cases of murder and manslaughter where

the woman is not acquitted because of self-defense or even if she is does get manslaughter, this factor can still be considered by a judge in terms of sentencing itself.

To me, the more interesting question goes beyond the typical issue of battering to that of dominance. There are lots of situations where socialization of females tends to lend itself to a particular way of reacting. While one could say, "I wouldn't do that and I'm female," you've got to really look at your population. The population of women who are female offenders are usually a much more traditional, acculturated group who are very bound up by their roles. Dominance can go beyond mere battery to psychological coercion, economic coercion in some instances, to cultural differences that would tend to dictate relationships. In the Second Circuit there is a district court case by Judge Weinstein in which he recognized dominance as a reason to lower a sentence. This was fairly controversial.

There have also been cases in which Guideline departures for mental condition have been granted, but again, with the limitation that they are "not ordinary." What's not ordinary? At least one decision found that a woman who had a history of physical and sexual abuse as a child made her situation extraordinary. However, even here, there's a limitation. The departure for an extraordinary childhood history has to relate to the mental condition having something to do with the offense itself; it's not merely that this person had a terrible childhood and was in a terrible state, but rather it really had to directly relate to the offense, which can be very hard to do.

The final category, which I think is even more fascinating and harder to deal with because it's difficult to determine a just solution, concerns co-conspirators. Oftentimes women in conspiracies act as facilitators. They answer the phone and open the door; and what happens? The drug deal is based out of the home, and drug cases all have mandatory minimums. So if the woman is arrested, she may get five or ten years. For what? For acting to facilitate her relationship with her husband or live-in intimate. And yet, as a practical matter, is she committing a criminal act? In most of these cases, there's enough evidence to prove yes, she knew it. She's getting the benefit of drug money. But what is her alternative? Leaving the relationship with her children is very difficult. That isn't to say that we should decriminalize all this. On the other hand, it is to say that we should take a look at how mandatory minimums and the Sentencing Guidelines work in these cases. In fact, the prosecutor has sole discretion as to what charge to give the woman and whether or not to use substantial assistance, which could get her below the mandatory minimum. As a practical matter, if substantial assistance really means what it says, she's not going to be able to give substantial assistance. She is a cog; she is just there. She may not be a person who has the kind of

information warranting departure, other than to give up her intimate. But normally the prosecutor wants more, such as other people in the conspiracy, and she may not have that. So what often happens in these circumstances is her gendered role in the relationship which leads her into the criminal activity may very well inhibit her ability to obtain a sentence that would be reasonable under the circumstances. There are lots of issues raised by Sentencing Guidelines and, as I've said, if you're interested, you can read the article.

X. THE HONORABLE CONSUELO B. MARSHALL

Consuelo B. Marshall is a Judge of the United States District Court for the Central District of California at Los Angeles. She received her B.A. and L.L.B. degrees at Howard University in Washington, D.C. and was admitted to the California Bar in 1962. She then joined the Los Angeles City Attorney's Office as a Deputy City Attorney, handling civil and criminal trials. When she left the City Attorney's Office in 1967, she joined the law firm of Cochran and Atkins. In 1970, Judge Marshall was appointed to the Superior Court as a Commissioner. She was assigned to Juvenile Court and also sat in Domestic Relations, Law and Motions, and other civil courts.

She was then appointed to the Inglewood Municipal Court by Governor Brown in 1976, and the Los Angeles County Superior Court in 1977. She was elected to the Executive Committee of the Superior Court by her colleagues in 1977.

In September of 1980, President Jimmy Carter appointed her to the United States District Court. She is the recipient of many awards, including the Ernestine Stahlhut Award, Woman of the Year Award, and the Judicial Excellence Award.

My topic this afternoon is the female inmate. There is a lot to cover in this topic. For those of you who are interested in learning more than the highlights I'll be able to give you, there's a lot of literature available, and if you contact me I'll be glad to share it with you.

So we're now talking about the female inmate. We have gone through her life, she has already been sentenced; it is true that under the Sentencing Guidelines judges have very little discretion because of the mandatory minimum sentences, and she is now in an institution. We are looking at her as an inmate, examining the differences between her and

her male counterpart in an institution, considering what programs should be made available to her. Those are our issues.

I am going to share with you some statistics about the inmate populations; I think that's necessary in order for you to understand a little about the topics I will address today. The former director of the Bureau of Prisons, Michael Quinlan, indicated that the radically increasing numbers of the female offenders in June of 1992 were 7.4 percent of the Federal Bureau of Prisons total offender population. We have also seen an increase in litigation aimed at forcing equal treatment for women, but he raised the question of whether "equal treatment" really means equal treatment—treating all inmates the same—or are we suggesting that it's time for us to look at the special needs of some inmates even though that might result in different services and programs being available.

In preparing my remarks, I talked with people in Washington at the Federal Bureau of Prisons, and learned that now they are referring to the female inmate population as well as many others that have special needs as the "special need offender," as opposed to the female offender, handicapped offender, and so forth. Female offenders can be placed in that category because they have some special needs.

Let's take a look at the statistics. I will comment briefly on some of the state prisons but most of my comments concern the Federal Bureau of Prisons.

The total number of inmates—current from March 1993—was 5000 females, 68,000 males. The average age for females: 36; for males, 37. The total population of females sentenced under the new Sentencing Guidelines Professor Raeder was discussing is a little over four thousand; males, 45,000. The total number of females sentenced under the old law was 1125; males, 23,000. You can see the striking difference that has occurred as a result of the Sentencing Guidelines. This means that under the old law, many of these people received probationary sentences and did not go to prison; under the new law, the mandatory minimums require prison time. Under the new law, the expected length of stay for females is five years; for males, seven years. Under the old law, the expected length of stay for females was eight years; for males, eleven years. As Professor Raeder indicated, what we see under the new law is that people are spending less time in prison than previously. In actuality, what I have found is that I am sending people to prison that under the old law I would have placed on probation.

The following is the racial breakdown of inmates: white, eight percent female, four percent male; black, thirty-nine percent female, thirty-three percent male; Indian, one percent female, two percent male; Asian, one percent female, one percent male; Hispanic, twenty-four percent female, twenty-seven percent male; non-Hispanic, seventy-six percent female, seventy-three percent male.

The offenses for which these people are going to prison are as follows: drugs, sixty-eight percent for females, sixty-nine percent for males; property crimes, four percent for females, three percent for males; extortion and fraud, seven percent for females, five percent for males; robbery (generally bank robberies, not street robberies) four percent for females, eleven percent for males; white collar crime, two percent for females, one percent for males; and violent crime, two percent for females, three percent for males.

The security levels at which these persons are placed are as follows, in the categories of minimum, low, and high security. Minimum security has forty-nine percent females, twenty-six percent males; low security has thirty-three percent females, thirty-two percent males; medium security has ten percent females, twenty-four percent males; high security, two percent females, eleven percent males.

Under the old law, persons served about thirty-three percent of their sentence; they were released early on parole. Under the new law, they serve about eighty-five percent of their sentence. One reason for that is that parole is no longer available in the federal system. One is therefore not released early on parole; you serve your entire sentence except you do earn good time credits, or you might earn good time credits within the institution—about fifteen days per year. Another difference in terms of the new Sentencing Guidelines is that a defendant cannot ask the court to reduce the sentence after it has been imposed. A prosecutor may request a sentence reduction if the defendant is cooperating with the prosecution, but no provisions exist for the defense to do that.

I thought it might be interesting for you to know more about the person that we're talking about, this female inmate. She is normally a single parent. She lived alone with one to three children before she went into the institution. She comes from a single-parent home, or a broken home. She is generally a runaway, or was a runaway in her teenage years. She is generally the victim of sexual abuse. She has alcohol and drug history, prior arrests and convictions; she is a high school dropout. Her previous work experience was in sales, services, or clerical work, and her earnings were between $3.36 to $6.50 per hour.

In the federal system, not every state has an institution. This is one of the reasons, as you will hear me say this afternoon, for the very serious problems faced by the institutionalized woman who has children. Many of these women are placed long distances from their home. Their families do not visit them, for economic reasons—they just don't have the money for transportation. Some of the facilities are located in very remote areas, like one of the female facilities in West Virginia, Alderson, a

female camp. I spoke with one of the former wardens of that facility, and I think it was the first time that I gave much thought to the difference between the woman in prison and the man in prison, in terms of what life is like. The warden explained that most of these women have children that they leave behind when they go to prison and, as Professor Raeder indicated, it is not the male in her life that takes care of the children; it is her mother, her sisters, the other female supporters in her life. Because those people are caring for her children, they're not able to come visit her, so the female inmate does not get as many visits as the male inmate. Some authors have suggested that when the male goes to prison, he just loses his freedom, but when a female goes to prison, she loses not only her freedom, but her family and so many other things. What is typically said is that the male who goes to prison still has the female supporting him. She visits him, she often moves to a location closer to the prison facility so that she and children can visit with him. When a female goes to prison, the the male in her life often is no longer in her life. He does not visit her and does not continue to support her. Therefore, one of the problems obviously is location of the facility and the inability for visitation.

Some facilities house both male and females. One such facility is the Metropolitan Correctional Center in New York. Males have the privilege of leaving their units with passes, or reporting to a daily work detail, while females must be escorted and their movement is limited. Males can be transferred to another facility, such as Otisville in New York, which, as prisons go, is a very nice-looking place. The woman often has no other place to be transferred, so she stays in that facility until she is sentenced. The result of this is greater restlessness, agitation, and depression. The woman lives an average of 160 miles away from her family, so that presents the transportation problem that I addressed. Also, females often complain about lack of supplies in the institution. They never have enough underwear; uniforms do not fit properly. The same uniform is given to a pregnant female that is given to a non-pregnant female. If you visited the courtroom you'd see that this woman must be uncomfortable because her body is in a dress that is simply too small. The commissary doesn't sell specific female items, and child care is a problem, as we've addressed. Staff members who have worked in institutions with females said it takes about five to ten minutes to handle the problem of a male inmate, and thirty to forty minutes to work out a problem for a female inmate, just because of the nature of the problem. Medical complaints, of course, are different from the medical complaints of men. The prisons are beginning to try to staff them so that women are provided with better prenatal care and receiving the medical care they need, but that's been a problem for a long time.

The pregnant female is a serious problem in an institutional setting.

The question is not only what happens to those children she left in the community, but what happens to the infant born while she is in prison? There is not a large number of these women, but it is large enough to cause concern and to cause us to examine what should we do with that female and the baby born when she is in custody.

On my calendar recently I had a a brother and sister from Ghana, Africa, who were caught carrying drugs into this country. The woman left two children in Ghana and was pregnant when she left there. She entered our facility two months pregnant in May 1992 and we just tried her case about two weeks ago. The jury found her not guilty. Frankly, I was very happy because I was very relieved. She would have faced a ten-year mandatory minimum sentence, and I don't think there would have been any basis for departing. I saw it as at least a ten-year sentence for her. The quantity of drugs was large; there was no question. Her defense? Knowledge. She said that she did not know that the drugs were in the suitcase she was carrying. They were concealed behind a lining and customs discovered them. When I called our facility to find out what happened to the woman, where she had delivered her child, I was told—and this is typical of what I've heard from wardens—that the woman stayed in the institution until she was ready to deliver. The female inmate in labor goes to a contract facility for twenty-four to forty-eight hours—usually twenty-four if she has no medical problems. She goes back to the institution within that twenty-four-hour period. If she has medical problems she might stay in the hospital a bit longer. Generally, arrangements have already been made for the care of her child. If she has family in the area, the child will go to them, or social services intervene and the child is placed, or the child might be given up for adoption if that's what the woman decides. She goes back to the institution and her child is in the community in one of the situations I have described. For the woman who is an illegal alien, as this woman was, I saw it as even a more serious problem. She now has a child who is a United States citizen. I don't have a background in immigration law, but on my staff we were all discussing what happens to the child if the woman is deported and returns to her country. Would the child be left here, would the child be taken back to Africa? Since that child was born in the United States, is it easy for that child to just come back to this country at a later time in the child's life? I was told by those who have immigration knowledge that if a child like this goes with his mother to Africa and grows up there, that child must reapply for citizenship. He does not automatically retain U.S. citizenship.

Let's return to the story of the woman herself. After giving birth, she

returns to the Metropolitan detention facility to await trial. Since she was found not guilty, she is now facing the deportation process. That's another interesting question for those of you taking immigration law; this is something that should really be examined closer. It is not uncommon for us to receive writs of habeas corpus from inmates asking us to order immigration officials to start the deportation process before these people complete their sentences. What generally happens is that the process is not started, and those inmates who have to serve sentences complete those sentences, and then immigration begins deportation. I spoke to a warden at Lexington, one of the female institutions, and she said that they normally keep the women there for another month just waiting for the immigration process to commence so that they can then place her someplace else. Apparently no federal facility exists for the detainment of these persons who have been held in federal prisons and are now going through the immigration process. I asked someone on my staff to find out what happened to this woman who was found not guilty. She is still in the community. She was denied parole, so she will now be detained until the deportation process can be completed and then eventually—I am told the process will take four to six months—I am sure she will voluntarily deport. I don't think the woman has any interest in staying here at all. But it will be that long before she can leave, so that's one of the big problems that we see.

Your question is probably, "What's happening as far as the Bureau of Prisons is concerned?" The Bureau of Prisons has adopted a policy that would permit the pregnant inmate to go into a community correctional center program. She would enter the program about two months before her delivery time, and she would stay in the community in this program about two months after the birth of her child. She would make the necessary arrangements for child care and then would return to the institution. I read the policy and became very excited to think that women would not have to endure labor in prison and then go to a hospital for just twenty-four hours. But when I called around to see what was really happening in a practical way, I didn't find any facilities that have actually implemented the policy. I heard instead that in federal penitentiary facilities here in Los Angeles, women who are awaiting sentence or awaiting trial are not likely to be permitted to participate in these programs. The reason for this is that they don't meet the criteria of a person we would release to a community. If they met that criteria, they would probably be on bond and they would not be in the institution pending trial or sentence. So, it appears that for a woman who didn't bail out and who is in custody pending trial or pending sentence won't go to one of these community placements to have her child and have the opportunity to spend a few months with the child before she returns to the institution. As I mentioned, the warden at Lexington said that the institution is very excit-

ed about implementing the program, but they haven't yet because they do not yet have a place in the community for these women to go. Their problem was not one to do with the Bureau of Prisons, but the zoning regulations within the community. Apparently the community is concerned that if zoning laws are changed to permit these women's correctional centers to be in a particular section of the city, then it would constitute a federal correctional institution. They're not worried about these women in particular, but they are worried about other correctional institutions coming into that community. The assistant warden at Alderson, another female institution, indicates that they have not yet implemented the policy either. They are a currently contracting with a facility in Richmond, Virginia, and they're hoping that they will have a facility soon where these women will be able to go.

The other woman in prison that we are concerned about is the older female offender. You might ask, "How old is 'older'?" I have to smile because she's defined as a woman who is fifty-five or older; "elder" is defined as sixty-five or older, and "aged" is seventy-five to eighty-five. There *are* women this old in institutions.

The older woman says that she is concerned about younger women inmates rushing through the hallways that might knock her down and cause her to hurt herself or break a bone. She is confused by the noise and all the instructions she receives. She is humiliated by strip searches. She is also concerned about the sores that she receives from having to sleep on a thin prison mattress. She doesn't understand the reprimands she is receiving. She worries most about dying in a friendless place.

The older woman in the institution of course has many other medical problems: menopause, breast cancer, osteoporosis; she needs mammograms, physical therapy, Pap smears, and counseling on crisis intervention. There are also terminally ill people in institutions. Many hospice workers volunteer to help these women who are terminally ill. You might think that these are people we wouldn't send to prison, but sometimes with the Sentencing Guidelines we're not able to exercise that discretion. Judges have lost that discretion with these Guidelines; therefore, these people are still being institutionalized.

Aa very large number of inmates are HIV-positive. One of our concerns in the courtroom about them is if, prior to incarceration, they are receiving medication that has not yet been approved by the Federal Drug Administration, will the institution continue that medication? The answer is that they are not supposed to. If the drug is experimental and not yet approved by the Federal Drug Administration, it cannot be given to an inmate in the prison system. However, the Bureau of Prisons has a phi-

losophy or a policy to maintain the treatment an inmate was receiving before she entered. Wardens say that some experimental drugs will continue to be given if a doctor says they are necessary to maintain the person. Some of the wardens also indicate there's something that's called "compassion release." If the person sentenced to prison has only two to six months left to live, the prison will recommend to the court that she be released. So some people are being released because they are so close to death.

Just before I complete my remarks, I want to share with you the figures on HIV-positive inmates. According to the study based on the testing of nearly 11,000 inmates entering ten prisons' hospitals between 1988 and mid-1989, the study found that 2.1 to 7.6 percent of male inmates were infected, and 2.5 to 14.7 percent of females were infected. At nine of the ten correctional facilities, women had higher rates of HIV infection than men; the difference was greatest among prisoners under twenty-five years of age, with 5.2 percent of women in that age group testing positively, compared with 2.3 percent of men. Minority groups also ranked higher: 4.8 percent overall, compared with 2.5 percent of white inmates. In April of 1992, twelve percent of the HIV-positive inmates in the Federal Bureau of Prisons were women. However, the rate of infection among women was higher: 1.52 percent versus .9 percent for males.

I don't want to leave you feeling too discouraged. I do think that the Bureau of Prisons has some very positive programs, and I think some of that is due to the fact that there are more women working in the prisons now. The new director of the Federal Bureau of Prisons is a woman; her name is Kathleen Hawk and I didn't learn that until I was preparing these remarks. Apparently the new director was appointed in December 1992. She is the head of the Federal Bureau of Prisons and will manage sixty-seven prisons housing over 80,000 inmates. Her most pressing problem is overcrowding, the prisons are operating at about 145 percent of capacity. The population has grown forty percent in the last five years. She is a psychologist. I find it interesting that so many of the people at the top of the Bureau have social science backgrounds as opposed to law enforcement backgrounds. [This woman] was an associate warden at one point, she was the warden at a facility in North Carolina for two years, and in 1988 she took over supervision of the Bureau's program review division.

Again, so I don't leave you on a negative note, I do want to point out that there are places in the world, other countries, specifically, that have decided that the answer to the problem of the woman who is pregnant when she enters prison, or the woman who has young children, is to allow the child to stay in the institution with the woman. This is quite a controversial subject. Canada has a task force recommending that such a woman be permitted to keep her baby in the institution at least until age two. There was a time in this country, at Alderson, that women gave

birth at the institution and kept their children. Around the 1960s, social workers decided that prison was no place for children and they tried to come up with another solution. California, New York, and a few other states have adopted legislation that permits the woman who is pregnant when she enters an institution to actually go to a community facility if her sentence is six years or less. She will then serve her sentence in the community; her children are able to join her there. They do require that these women participate in parenting skills programs and educational programs that benefit them once they serve their sentences. This is certainly one solution. It seems to me that it costs less for us to have the woman in a community placement or facility with her children, rather than to have the children cared for by someone else, with social welfare probably paying that cost. It not only solves some of the problems of placement, but it also helps with the bonding and the relationship between the woman and her child.

As I mentioned when I began, a lot of material exists on this subject for anyone who is interested in pursuing it. I would be happy to share more of that information.

XI. WILLIAM HANDEL, ESQ.

Bill Handel is the Director of the Center for Surrogate Parenting in Beverly Hills, now in its thirteenth year. He is a renowned expert on the legal aspects of reproductive technology and has provided legal counsel for several hundred cases of third-party reproduction. He has appeared on numerous television shows including "60 Minutes," *the* "Today Show," "48 Hours," *BBC Television, and CNN, and has lectured at universities and medical conferences on several continents. He has been featured in numerous articles on this topic in the* New York Times, Washington Post, Wall Street Journal *and other publications.*

Mr. Handel received his B.A. at California State University Northridge and his J.D. at Whittier College of Law. He has been an Adjunct Professor of Law at Whittier College School of Law, where he taught "Legal Aspects of Reproductive Technology."

He is perhaps best known as a talk show host on Los Angeles radio KFI-AM 640, where he discusses legal issues as well as topics of general interest.

What I want to do is spend some time discussing the issue of reproductive alternatives, third-party reproduction alternatives. It is a field of law that is literally exploding. California, thank God, is where it is all

happening, where it will happen. There are a couple of real fundamental issues here. It is nice for me to be in an area of law where I don't deal with defendants. I'm not involved with people suing each other; I help people create families, and it is a terrific way to make a living practicing law. The issue that I am involved in, of course, is surrogacy. I've been an attorney specializing in the area of reproductive alternatives, surrogate parenting, for thirteen years.

I am considered one of the top two attorneys in the entire world who specialize in surrogate parenting—there are only two of us who do this. My esteemed colleague got a call from God to do this. I got a call from a doctor. I only went to law school because I have a Jewish mother who harassed the hell out of me. I was not going to practice law whatsoever, and it was literally a question of spending $25,000 for a law degree (at one time it actually cost this) or spending four years in therapy. So I said, "Fine, I'll go to law school, now leave me alone." I worked my way through law school in a construction business, in which I did a horrible job remodeling homes. At this time, I was over budget by a quarter of a million dollars in remodeling a doctor's home. I passed the bar exam, hung out my shingle and was hired by this doctor as his general counsel. Rather than have me continue to work on his home, I guess he thought, "Why not?" Actually, I told him, "Listen, I owe you a lot of money, I can't pay you, so I'll be your lawyer." That is when I started practicing law. Three months later, this doctor, who is a very highly regarded reproductive endocrinologist on the Westside, called me and said, "I have a very interesting case, Bill. A woman on whom I have performed six surgeries has had every problem one could have with infertility: adhesions, blocked fallopian tubes, endometriosis—she is a classic medical school case." He did surgery after surgery, and finally he told her, "It's not going to happen, it's time for adoption." She would not accept this, and ran an ad in the *Los Angeles Times* in 1979 saying, "Is there a woman out there who will be artificially inseminated with my husband's sperm and carry our child? We will pay you. We'd like to have a child, at least with my husband's sperm." Six women applied. She chose one and went to this successful doctor, who then asked, "Do you have a contract? You've got to have a contract; it is a contractual relationship. Do you have a lawyer?" They said "No," whereby he immediately called me, his lawyer. I had been practicing all of three months and had just hung out my shingle. He called me up and he told me: "Bill, I've got this very interesting situation: a woman wants to hire a surrogate to bear her child. Do you know anything about surrogate parenting?" I'll never forget the question I asked him: "Will they pay me?"

"Yes, they'll pay you," he said.

"Then I know everything about it," I told him. "I am an expert."

Now, if any of you are going to start practicing law on your own, I can

guarantee you that the first year or two you will specialize in what we call "the law of the paying client." I remember seeing a film in Psychology 101 in which rhesus monkeys are taken away from their mothers at birth, and they have this contraption, sort of a plastic and metal thing that they somehow bond to. I had no idea what he was talking about, so I went to the dictionary and looked up the word *surrogate.* I realized that this was a very strange area of law that I was about to get into.

It took me seven months to write the first contract. There was no such thing as a surrogate mother contract in the law in 1980. The couple did not wait; they inseminated and the surrogate was seven months pregnant by the time I finished the first contract. Then something wonderful happened. The *L.A. Times* ran an article, and I got a call that afternoon from a little television show called "60 Minutes," saying they'd like to do a segment on my law practice.

The lady they assigned to be the producer was an infertile woman who had been trying to adopt a child for six years, and she thought surrogacy was the most magical thing in the entire world. I won the "60 Minutes" lottery! Every first-year lawyer in the country put their name in a hat, they pulled out Bill Handel, and said, "Here's what you win, Bill: your name on '60 Minutes.' You write the story, you tell us what to do, you be the editor, whatever, just tell us what to do." It couldn't have been better than that! Morley Safer came to Los Angeles and gave me a fourteen-minute commercial one Sunday night in 1981. Effectively, Morley Safer said, "This is crazy, this is weird, but this is wonderful. It helps infertile people have children, and by the way, this guy named Bill Handel is the one who does it, and he's good." That was at seven o'clock, when no one knew who I was. Fourteen minutes later, I became nationally known as an expert on surrogate parenting. So, that's how you build a national reputation: get a story on "60 Minutes," where they like you, and you're in business! That's how I did it!

It is a pretty bizarre field, but it's a wonderful field. There is a lot of controversy involving surrogacy, because it is the ultimate decision a woman can make. Can a woman make a decision to have a child for someone? Is this her independent choice? Or should we protect women against their own ability to have this child, thereby saying that there is no such thing as informed consent, that a woman cannot consent to have a child for another couple? The adoption world will not let a woman decide to relinquish the child until well after the birth. In California, it's a six-month rule. A woman can change her mind as often as she wants, up to six months after the baby is born. In the world of surrogacy, we contend that the issues are not the same. We think that the woman has the

ability, before birth, before conception, to make a decision to carry a child for an infertile couple and give it up to them. In my opinion, everyone should be held accountable. What is fascinating is that the feminist community is split right down the middle on this subject. Half think that it is the woman's choice, as long as she knows what she is doing, and that she should be held accountable to her decision. The other half say that we have to protect women against any decision they make. I have debated Betty Friedan (a veteran feminist) three times. Betty Friedan refuses to call me by my name, refuses to call me a lawyer, refuses to call me "my esteemed colleague, the attorney." All she says is, "That reproductive pimp, sitting on the other side of the dias, says . . ." That is how she refers to me. She doesn't agree with surrogate parenting. She does not think women should be able to do this.

Surrogate parenting presents an unusual legal situation, as there is no precedent for it. Is it contract law? Public policy issues are involved. Can a woman make an informed choice? Yes. Some say no. Can you give an informed choice to give up a child you've bonded with? Well, let's talk about bonding. Women agree that they bond differently with different children, anyway. We know that women have the ability to not bond with children at all. We read too many times about women throwing their newborns into dumpsters, or women abusing their kids, women leaving three- and four-year-olds without enough to eat. Then there are some women who are, like my mother, obsessive. Even now, she calls me five times a day.

There are two types of surrogacy: traditional surrogacy, in which the man artificially inseminates a surrogate, and I.V.F. surrogacy, in which the embryo (created by the husband's sperm and his wife's egg) is implanted into the surrogate, who has no biological connection to the child. When a woman decides to become a surrogate for a couple, it must be an informed decision, with no coercion. She is represented by counsel and has psychological counseling; she must be fully aware of what she is doing. Once she has made the decision and becomes pregnant, it is irrevocable. To perceive this situation any other way is sexist. One of the arguments that Gloria Steinem made was regarding hormonal influence on a pregnant woman: these hormones going through a woman's body are so influential, she should not be held accountable regarding decisions she makes, especially concerning her pregnancy. That alone is the best argument you can make for not having a woman president who is premenopausal. Every twenty-eight days, boom! There goes the bomb! Amazingly, we have feminists who are very bright women arguing that women should not be held accountable. Others say that women are intelligent adults who should be accountable.

How do we make sure that surrogates are prepared to give informed consent? One of the things we do is accept only those women who have

had children. They must have a history of pregnancy, delivery of healthy kids, and reasonable, stable relationships with their children. We believe that a woman who has not had a child before cannot make an informed decision or give informed consent.

Regarding surrogacy by artificial insemenination, it is argued that the surrogate mother, who is genetically and biologically related to the child, is the mother of the child and therefore, the case is handled just like adoption, where the woman has six months in which to change her mind. We argue that this should be a shorter period of time because this is not a teenager who got pregnant in the backseat of a Chevy and now has an enormous decision as to what to do with her life. With surrogacy, this is an intelligent, adult woman, average age of twenty-seven, average income of $35,000 per year, 2.2 kids, and two-thirds of them are married. They are stable, actualized and directed women, which is why nearly all surrogates (99.8 percent) never change their minds. Approximately six thousand women have been surrogates, and eleven have changed their minds. Surrogate parenting is not Mary Beth Whitehead running down the courthouse steps in Hackensack, New Jersey, screaming, "They've taken my baby, they've taken my baby." Surrogate parenting is done by intelligent women who have decided and are really committed to helping infertile couples. They are paid ten or twelve thousand dollars for a year and a half of work.

Should the surrogate be accountable to uphold her contract? Absolutely! In the *Calvert v. Johnson* case, both the Superior Court and Appeals Court held the contract enforceable. The California Supreme Court's last question when recently hearing this case was, "Should the enforceability of this contract be held against the public policy of California?" In 1991, Senator Diane Watson introduced a bill, SB938, entitled Alternative Reproductive Act of 1991. I thought it was one of the most brilliantly written, most intelligent, cohesive pieces of legislative writing I had ever seen. Mainly because I wrote most of it. What it sought to do was enforce the surrogacy contract and establish a groundwork for surrogacy in the state of California, in which some very strict controls were presented. The contract is enforceable in the case of I.V.F. surrogacy. In the case of artificial insemination surrogacy, the State Assembly Judiciary Committee was not going to rule to enforce the contract, so we split the issue down the middle. We can require stepparent adoptions in the case of artificial insemination, but we want enforceability of the contract. The legislature passed this bill. However, Governor Wilson vetoed it, the great liberal that he is.

Viewpoints differ on surrogacy, state by state. In Arizona, it is a felony

for anyone to engage in surrogacy, pay a surrogate, or engage in drafting a surrogacy contract. It is also a grade A felony in Washington, Utah, and Michigan. In Arkansas, surrogacy is perfectly legal. In Nevada, the contract is specifically enforceable. And now in California, contracts may be held enforceable. Diane Watson reintroduced the Alternative Reproductive Act, and it's the most extraordinary bill I've ever seen. It's now two pages instead of the previous eight-page bill, and all it says is that the intent of the parties shall govern. That's it! It effectively says that if parties get together and they intend that a surrogacy arrangement should occur, then we will go along with the intent. If we think about that, that's the only logical approach. Here's a hypothetical; you are a lawyer trying to figure this out. I'm going to present to you a couple that is totally infertile. She has had a total hysterectomy, and he—let's say because he went to law school and had too many frozen Stouffer's dinners and got too close to the microwave oven—has no viable sperm. So, we have a couple that is totally infertile: no sperm, no eggs, no uterus. They hire an egg donor, a sperm donor, and a surrogate to carry the intended child. They have contractually arranged for it—and by the way, this is in the bill that is currently being contemplated. This is not science fiction, this is real; this is going on in society. We have three women and two men. Who is the mom and who is the dad? Figure that one out. The woman who carried the child? She is the surrogate. The egg donor? Well, she has a genetic connection—but wait a second, we have sperm donors in California who are genetically related to kids, and the law certainly recognizes sperm donors as having no rights. They cannot be fathers; they cannot be held liable.

When we have a group of adults who come together to create a child, the only way to approach this is with a contractual agreement to show intent. This has already been done with the Sperm Donor Act, which most people don't realize. California has a civil code, 7000 et al., that says that a man who donates sperm to someone other than his wife, where her husband consents in writing and a physician does the insemination, is not the father. He is biologically connected to this child, is not the father, has no rights, and has no liabilities. As a matter of fact, he is the only one, in California, who does not have standing to sue for paternity. With artificial insemination surrogacy, it is the same scenario. Thus, fathers who artificially inseminate surrogates may fall under the Sperm Donor Act. They have no standing to walk into court and sue for paternity. They are excluded under the Evidence Code and they are excluded under the Civil Code. So, what I did in these circumstances is sue the state of California. I claimed that this was discriminatory and unconstitutional. The Court tossed me out, saying, "Get someone who really has been denied paternity." I don't have any such father yet, because every case has been uncontested. If you read *Handel v. State of California*,

there is dicta in the last paragraph of the case indicating it has strong misgivings about the constitutionality of the Sperm Donor Act. So, the Court has already dealt with this issue, and that was 1983. Since then, we've been moving ahead.

Obviously my view on public policy issues regarding third-party assisted reproduction is that surrogate parenting is good, and that infertile couples should be able to have their own children where technology exists and it is possible. Surrogates should be held accountable for the decision they make, as long as the decision is open, voluntary, free, without coercion, and represented by counsel.

In my Center for Surrogate Parenting, we have interviewed thousands of women who want to be surrogates. We've had 275 babies born in my program and we have thirty women who are pregnant right now. I have been involved in hundreds of these cases and counseled many outside of my program. Psychotherapists have been involved every single time. We have spent thousands of dollars studying surrogacy, and we have come up with appropriate protocols. We are not doing this in a vacuum. The main concern people have with surrogacy is the question of who is going to lose in a dispute between a surrogate who says "This is my child" and the couple who has been trying desperately to overcome their infertility for fifteen or twenty years? So, they spend the last dime they have trying to create a child and they put their genetic material into a surrogate. It's a real strong argument—remember, I'm a lawyer representing the couple. These are my clients, so I'm fighting real hard for them, and there may be legitimate arguments for the other side—I've just never heard one.

There have been questions regarding couples that are not infertile and whether they are entitled to select surrogate parenting. I personally don't think they should. Whether, constitutionally, you have a right to tell a fertile couple, "You can't do this, you can't hire a woman for convenience," I don't know.

At the Center for Surrogate Parenting, all of our couples are infertile. We measure infertility according to the medical definition: one year of sustained activity (called sex), in which the couple is trying to get pregnant and has been unable to do so. Or a woman has had a hysterectomy and there is no uterus, and there are no ovaries in her body. We also have women with high blood pressure who shouldn't carry a child. We have women who with a history of miscarriages—seven, eight, nine miscarriages—who can't carry a child. We all know these people. We maintain a very high-level profile and, because we're so much in the news, we mandate that our practice be clean and ethical. Once surrogacy becomes completely legal, we are going to see abuse; there's no question. There

are going to be rich women who want to do this for convenience. You will see some women saying, "I don't want to carry my own child." By the way, in the thirteen years I've done this, I've had two calls like that, from women who've said, "I'd rather not do this. I want to hire somebody."

Audience Question: There are certain things in the law that are perfectly legitimate until the point when money changes hands.

You're right. On that basis, money should not change hands. We should make this an altruistic relationship between the couple and the surrogate because this is so holy, this is so sacrosanct, having a child and giving it up. Now let me throw you another argument: everybody gets paid except the woman! The doctor gets paid, the laboratory gets paid, the delivering physician gets paid, the embryologist gets paid, the cabdriver who delivers the surrogate to the hospital, he, of course, gets paid. But the surrogate, who puts in two years of work to help this infertile couple have a child, is not going to get paid. The argument is, don't you think two years of a woman's work is worth some money? I think so. This is work. This is what we deal with. This is not money for a child. Because if anybody argues how much a child is worth, unless you don't like your kids very much, you are definitely going to say much more than ten or twelve thousand dollars.

Audience Question: I was just wondering, in the scenario with the totally infertile couple, why wouldn't you just limit them to adoption?

Why should people be limited to adoption? Let's say to the infertile community, "You can only have kids via adoption." Why don't we go even further, and limit them to special-needs kids? They can't even adopt healthy kids. We've got mixed-race kids, we've got special-needs children who are sick, who will need help. we'll limit you to taking care of those kids because there are half a million of them who need adoption. The point is, do you limit people in terms of their choices of having children, or do you open it up as wide as possible and say that procreation is a fundamental right? Creating a child via surrogacy, sperm donation and egg donation is just an extension of your right to procreate. By the way, this is all hypothetical; the courts have never ruled on this. This is brand new. We're going to see the first Supreme Court case in history being ruled in the next three or four weeks by the California Supreme Court and the issue's going to be very narrow. Is this contract enforceable, yes or no? Is it against public policy? No? Then it is enforceable. It is not going to be any gut-wrenching, socially huge decision.

One more question and I'll wrap it up.

Audience Question: If the theory behind enforcing surrogacy contracts is that a woman can consent to this type of contract, and if a woman doesn't necessarily bond with the child she carries for nine months, why the distinction between I.V.F. Surrogacy and Artificially Insemination Surrogacy?

That was precisely my argument. When you artificially inseminate a surrogate, she is genetically and biologically related to the child, and we assume that surrogates bond more with children they are genetically connected with than the ones that they are not. That's bunk. There are thousands of women who have had biological children and have not bonded with the child. By the way, does bonding matter in terms of enforceability? Even if she does bond, would you still enforce the contract against her?

Personally, I would. But you said before that you made the distinction between the two issues.

We had to. We had to make a political distinction. That's what the legislature forced us to do. You want to know how weird the legislature is? They had no problem saying that a surrogate mother who is not genetically related to the child is not a mother and has no rights and, therefore, the contract is enforceable. They had no problem saying that a surrogate who is biologically related to the child is the mother, and they have to handle that as a stepparent adoption. Then I said, "Okay, let's take it to step three: egg donor, sperm donor, surrogate." They said they were going to handle that the same way we handle artificial insemination surrogacy. The surrogate is the legal mother and has to adopt out the child, even though she has no genetic connection to the child. Because the prospective mother has no genetic connection, we'll make the surrogate the legal mother, and then force the infertile wife to adopt the child. This is state legislation. As Ronald Reagan once said, "Sausage and legislation are simply two things you don't want to watch being made. It's great at the other end, but my God, it's disgusting while it's happening." That's the problem we've got; no one knows how to deal with this issue.

What's in the future? Well, the future is that California is going to go for surrogacy in a big way. It is going to be enforced in this state, there will be legislation in which surrogacy is upheld, and you will see with no

great surprise, once again California will establish laws that the rest of the world is going to follow. Ten, twelve years from now, you'll be reading in the case books, right here at this school, cases that happened here in Southern California that broke new ground.

Thank you.