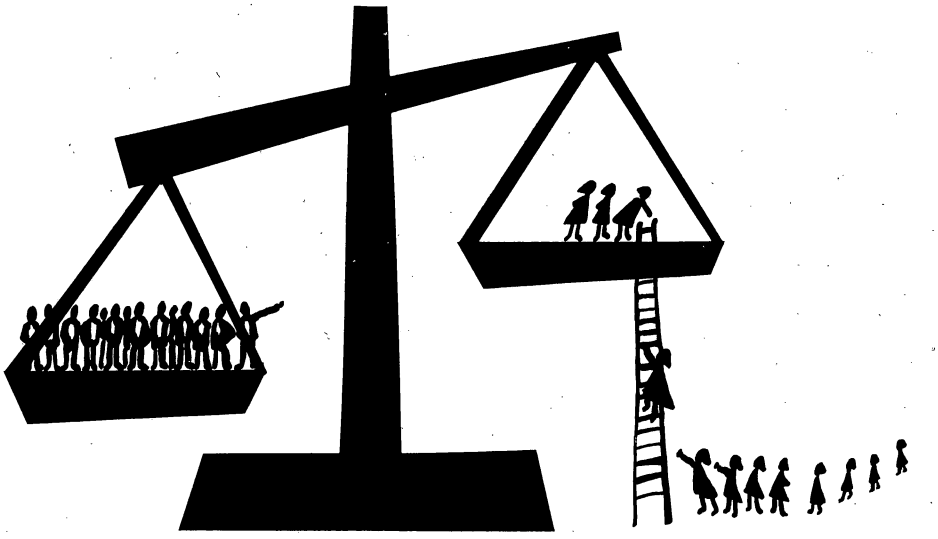
The First Year Report of the

NEW JERSEY SUPREME COURT TASK FORCE ON

WOMEN IN THE COURTS



JUNE 1984

NEW JERSEY SUPREME COURT
TASK FORCE ON WOMEN IN THE COURTS

REPORT OF THE FIRST YEAR

JUNE 1984

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"THERE'S NO ROOM FOR GENDER BIAS IN OUR SYSTEM....THERE'S NO ROOM FOR THE FUNNY JOKE AND THE NOT-SO-FUNNY JOKE, THERE'S NO ROOM FOR CONSCIOUS, INADVERTENT, SOPHISTICATED, CLUMSY, OR ANY OTHER KIND OF GENDER BIAS, AND CERTAINLY NO ROOM FOR GENDER BIAS THAT AFFECTS SUBSTANTIVE RIGHTS.

THERE'S NO ROOM BECAUSE IT HURTS AND IT INSULTS. IT HURTS FEMALE LAWYERS PSYCHOLOGICALLY AND ECONOMICALLY, LITIGANTS PSYCHOLOGICALLY AND ECONOMICALLY, AND WITNESSES, JURORS, LAW CLERKS AND JUDGES WHO ARE WOMEN. IT WILL NOT BE TOLERATED IN ANY FORM WHATSOEVER."

Remarks of
Chief Justice Robert N. Wilentz
at the close of the Task Force on Women in the Courts
presentation to the plenary session of the
1983 New Jersey Judicial College
November 22, 1983

SUPERIOR COURT OF NEW JERSEY

CHAMBERS OF
MARILYN LOFTUS
JUDGE

ESSEX COUNTY COURTS BLDG.
NEWARK, N. J. 07102

On behalf of the entire Task Force, I wish to extend our sincerest appreciation to Chief Justice Robert N. Wilentz for not only taking the progressive step of initiating this precedent setting endeavor, but also for his affirmative leadership role in achieving the goals for which the Task Force was established. We wish to thank Robert D. Lipscher, Administrative Director, Administrative Office of the Courts, for his continuing support.

It has been an interesting, challenging experience to work with so many highly qualified professionals on a subject which impacts not only upon the New Jersey judicial system but upon our society as a whole. I wish to extend my deepest gratitude to these Task Force members as well as to the staff who worked so diligently and enthusiastically during the last one and one-half years. Each contributed not only his or her talents and abilities but also substantial time to this significant endeavor.

In an undertaking of this nature, it is impossible to individually recognize each person who has contributed to the work of the Task Force. However, we wish to specially recognize those individuals and associations whose names are contained in the list of acknowledgements.

As we move into the second phase of the Task Force work, we look forward to the continued cooperation of our Task Force members as well as the participation of the New Jersey judges.

Marilyn Loftus, J.S.C.

CHAIR, NEW JERSEY SUPREME COURT
TASK FORCE ON WOMEN IN THE COURTS

TASK FORCE ON WOMEN IN THE COURTS

Superior Court Judge Marilyn Loftus (Essex), Chair

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New Jersey Law Journal

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Dalton W. Menhall, Executive Director, New Jersey State Bar Association

Presidents and members of the New Jersey Women's Lawyers Associations

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Association of Black Women Lawyers of New Jersey

Atlantic County Women Lawyers

Essex County Women Lawyers

Passaic County Women Lawyers

Tri-County Women Lawyers (Burlington, Camden and Gloucester)

Women Lawyers In Bergen County

Women Lawyers Caucus of Mercer County

Women Lawyers in Monmouth County

Women Lawyers in Somerset

Women Lawyers in Union County

Women Lawyers Committee Hudson County Bar Association

Women's Committee, Middlesex County Bar Association

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COVER DESIGN: Ellen Robb Gaulkin

THE EMERGENCE OF GENDER BIAS AS AN ISSUE FOR THE JUDICIARY

WHAT IS GENDER BIAS AND HOW IS IT EXPRESSED WITHIN THE JUDICIARY?

Gender bias is the predisposition or tendency to think about and behave toward people mainly on the basis of their sex. It is reflected in attitudes and behavior based on stereotypical beliefs about the sexes' "true natures" and "proper roles" rather than independent evaluation of each individual's abilities, life experiences and aspirations.

Gender bias also refers to the greater value society places on men, as evidenced by consistent research findings of a preference for male children, as well as to myths and misconceptions regarding the economic and social problems encountered by both sexes.

Although there has been significant progress in the recognition and elimination of gender bias, it remains a pervasive problem in all American social institutions. Sometimes gender bias works against men. Most often and most severely it impacts on women.

Often, gender bias is expressed in ways which seem so natural to our society that the element of bias is not understood. Sometimes it may be expressed through acts of overt discrimination.

As Justice Alan B. Handler wrote in a case arising from a claim that a school board's mandatory maternity leave policy was sexually discriminatory:

> [N]ot everyone has a nose for discrimination especially in its most subtle forms. We are coming to realize that people are products of cultural conditioning which frequently obscures recognition of social wrongs...The "commonplace" may constitute a Trojan horse of social inequities. Discrimination frequently goes uncorrected because it is undetected. Castellano v. Linden Board of Education, 79 N.J. 407, 420 (1979) (Handler, J., concurring and dissenting).

Some of the more subtle expressions of gender bias with the Judiciary include:

- The judge who in a courtroom setting compliments a female attorney on her appearance is presenting a non-professional image and detracts from her credibility.
- The judge who at conferences in chambers falls into camaraderie with male attorneys while excluding female counsel.
- The judge who expresses gender bias through his or her demeanor, such as leaning forward and giving full attention to a male expert witness while slumping and eyeing the clock when a female expert testifies.
- The judge who acts impatient with victims of domestic violence due to lack of understanding of the psychological and economic constraints on battered spouses.

One would assume that the female stereotypes expressed by the United States Supreme Court in 1873 in a decision denying a woman a license to practice law on the ground that nature and God intended woman for the domestic sphere alone, would have eroded.

> It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.
>
> The humane movements of modern society, which have for their object the multiplication of avenues for women's advancement, and of occupations adapted to her condition and sex, have my heartiest concurrence. But I am not prepared to say that it is one of her fundamental rights and privileges to be admitted into every office and position, including those which require highly special qualifications and demanding special responsibilities. In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position. It is the prerogative of the legislator to prescribe regulations founded on nature, reason, and experience for the due admission of qualified persons to professions and calling demanding special skill and confidence. This fairly belongs to the police power of the State; and, in my opinion, in view of the pecular characteristics, destiny, and mission of woman, it is within the providence of the legislature to ordain what offices, positions, and callings shall be filled and discharged by men, and shall receive the benefit of those energies and responsibilities, and that decision and firmness which are presumed to predominate in the sterner sex.

Bradwell v. Illinois, 83 U.S. (16 Wall) at 141-142 (1873).

Yet, legal and social scientific studies confirm that many stereotypes continue. Moreover, there is evidence that new stereotypes, equally pernicious, are emerging. For example, the possibly mistaken assumption that because new occupational opportunities have opened up for some women, any woman can find a lucrative position may translate into inadequate support awards.

The influx of women into law schools and other professions, the increasing number of women on the bench, and the appointment of a woman on both the United States and New Jersey Supreme Courts may have created some impression that the problem of gender bias will take care of itself. Unfortunately, although the increasing presence of women in the courts serves as a positive step, the underlying attitudes and beliefs which give rise to gender bias and discrimination are so embedded in our culture that they cannot easily be changed unless education and life experiences foster awareness and stimulate change.

HOW HAS GENDER BIAS BEEN RAISED AS A SUBJECT FOR JUDICIAL EDUCATION IN NEW JERSEY?

New Jersey's approach to educating judges about gender bias in the courts has been from the outset far more comprehensive than anything previously undertaken by other states.

In October 1982, Chief Justice Robert N. Wilentz decided that the New Jersey Judiciary should investigate the nature and extent of the problem within its own system and develop appropriate judicial education courses on the subject of gender bias. To achieve this goal, Chief Justice Wilentz appointed a special Supreme Court Task Force on Women in the Courts, with Superior Court Judge Marilyn Loftus as its chair.

During the 1970's, interest in women's rights law reform focused attention on sex discrimination in the law itself. The Judiciary had not yet come under scrutiny or undertaken any self-examination with respect to gender bias in its own system.

Since 1980, courses and curriculum materials developed on gender bias ranging in length from an hour to several days have been taught by female and male judges, lawyers, and social scientists at the National Judicial College, the California Center for Judicial Education and Research, the New York Judicial College and in other states throughout the nation. The subjects addressed in these courses have included: gender bias in the law itself; bias in juvenile and adult sentencing; the economic consequences of divorce; and the effects of gender on the dynamics of courtroom interaction. Special emphasis was placed on the judge's role in insuring a courtroom atmosphere free of both overt and subtle forms of discrimination.

However, until this Task Force effort, no state court system has attempted to obtain systemwide information from attorneys, educators, and members of the public.

In announcing the formation of the Task Force, Chief Justice Wilentz stated:

> We want to make sure, in both substance and procedure, that there is no discrimination whatsoever against women--whether they are jurors, witnesses, judges, lawyers, or liti-litigants. Obviously, bias of any kind has no place in the Judiciary.

DESIGNING THE TASK FORCE APPROACH AND ACTIVITIES DURING THE FIRST YEAR

The mandate of the Supreme Court Task Force on Women in the Courts is to investigate gender bias in the New Jersey judicial branch and develop educational programs to eliminate any such bias. After examining judicial education programs presented elsewhere, the Task Force decided to focus on the following issues:

1. Does gender affect the treatment of women and men in the legal and judicial environment (e.g., courtroom, chambers, and professional gatherings)?

2. Do gender-based myths, biases, and stereotypes affect the substantive law and/or impact upon judicial decision-making?

3. What can judges do to ensure equality for women and men in the courts?

A subcommittee on Substantive Law investigated whether or not gender bias influences decision-making in the areas of damages, domestic violence, juvenile justice, matrimonial law, and sentencing. The Subcommittee researched these areas by reviewing relevant case law and legal and social scientific studies, interviewing some judges and analyzing statistical materials and studies from the Administrative Office of the Courts as well as other state and federal agencies. Another subcommittee studied court administration, initially focusing on whether or not the standard forms and correspondence utilized by the courts employ gender-neutral language.

In the fall of 1982, a Task Force subcommittee of judges and attorneys designed a questionnaire containing open-ended and closed-ended items to collect information about attorneys' perceptions and experiences with regard to the treatment of women in New Jersey's judicial system. The New Jersey Law Journal published the "Attorneys Survey" as a supplement to its February 10, 1983 edition. (Names were removed from the returned surveys to ensure anonymity. An identification number was assigned to each questionnaire for data analysis. Responses to both open-and-closed-ended items were coded for data entry.) Eight hundred eighty-six (886) individuals returned questionnaires. Of these, 867 were usable for analysis. Two-thirds of the respondents were males and one-third were females. According to data from the New Jersey State Bar Association and the Administrative Office of the Courts, as of September 15, 1983, there were 25,000 attorneys licensed to practice law in New Jersey, of whom 13% are women. Thus, there was a proportionately higher response from women than men.

During the winter of 1983, the Task Force held seven regional meetings hosted by women's bar associations. Approximately, 200 attorneys attended these meetings. A male and female judge, as well as one other Task Force member (usually an attorney) conducted each session. The eighth meeting was held at the New Jersey State Bar Association Annual Meeting in May 1983. At each meeting, bar association members responded to a standardized set of questions about the treatment of female attorneys in court, chambers, and at professional gatherings; the courtroom treatment of female litigants, witnesses, and jurors; and problems in substantive law areas relating to domestic violence, rape, damages, adult and juvenile sentencing, custody, equitable distribution and support awards, and enforcement.

More than 1,100 female and male attorneys communicated with the Task Force through the survey at the regional and state bar meetings and through personal letters and telephone calls. The three methods of data collection allowed the Task Force to collect both substantive data (attorneys' perceptions and personal experiences) and objective data (findings from legal and social scientific studies and statistical data from state and federal government agencies).

With few exceptions, the findings and results of the Substantive Law Subcommittee, the Attorneys Survey, and the Regional and State Bar Association Meetings were mutually corroborative. Although the law as written is for the most part gender neutral, stereotyped myths, beliefs, and biases were found to sometimes affect judicial decision-making in the areas investigated: domestic violence, juvenile justice, matrimonial law, and sentencing. In addition, there is strong evidence that women and men are sometimes treated differently in courtrooms, in chambers, and at professional gatherings.

As a first step in fulfilling the Task Force's mandate to educate judges about gender bias, the Task Force gave an oral presentation of the results and findings of its first year to a plenary session of the New Jersey Judicial College on November 21, 1983 and distributed a summary of this report.

DOES GENDER AFFECT THE TREATMENT OF WOMEN AND MEN IN THE LEGAL AND JUDICIAL ENVIRONMENT?

Responses to both the Attorneys Survey and the questions asked at bar association meetings reveal that both male and female attorneys believe gender sometimes affects the way litigants, witnesses and lawyers are treated in the courtroom, in chambers, and at professional gatherings. The perceptions and experiences reported by female attorneys, however, differed markedly from those of male attorneys in most categories of questions.

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This disparity in the perceptions and experiences of female and male attorneys leads one to ask whether the reported incidents of women's disadvantageous treatment are real or in the eye of the beholder. The Subcommittee reports on substantive law and national studies support the view that the reported instances of womens' differing treatment are real. Because gender bias impacts most directly on women, it should not be surprising that female attorneys are more aware of it than are males. Several male respondents noted that subtle forms of sexism would escape their attention.

> Most sexism is so subtle that I as a male probably miss it when addressed to a female in my presence.
>
> **Forty-nine-year-old male.**

> Frankly, I do not see the need for a Task Force, based on my experiences. However, if I was a woman attorney, no doubt I would be more sensitive and aware of discrimination and/or harassment that presumably exists.
>
> **Forty-three-year-old male.**

Men whose wives are also practitioners may gain sensitivity through their wives' experiences. As one respondent wrote:

> I was not as attuned to [gender bias] until my wife entered law school three years ago and entered the job market last fall. We were appalled when, in interviews with two appellate division judges for judicial clerkships, she was asked:
>
> 1. Did she have my permission to be doing this?
>
> 2. Would she be able to handle the job while being a wife and stepmother?
>
> 3. Was she planning to have children?
>
> **Forty-three-year-old male.**

The Attorneys Survey

As previously discussed, the Attorneys Survey was designed to elicit information about New Jersey attorneys' perceptions and experiences with respect to the treatment of women litigants, witnesses and lawyers in the courtroom, in chambers, and at professional gatherings, as well as in substantive areas of the law.

Categories of survey questions pertained to the perceived overall treatment of women and men in the courts; incidents of sexist behavior; the relative credibility given to women and men; the relative impact of judicial decisions on women and men in various substantive areas of the law; the effect of attorneys' gender on clients' success in court and the award of fee-generating appointments; and attorneys' opinions regarding which of the areas of law that particularly affect women require attention and change.

For each category of questions, respondents reported their experiences and perceptions with regard to judges, counsel and court personnel. To assess the frequency of the behavior in question, the following categories were listed: never, rarely, sometimes and often. In addition, respondents were encouraged to write narrative comments about specific illustrative incidents and to advise the Task Force as to the issues it should address.

Overall Treatment of Women in the Courts

Seventy-one percent (71%) of female respondents but only thirty percent (30%) of male respondents reported having observed incidents where it appeared that judges treated women litigants or witnesses disadvantageously because they were women. Of those who had seen such incidents, one-quarter of both female and male attorneys had observed them "rarely." Forty percent (40%) of the female attorneys observed such incidents "sometimes," compared to eight percent (8%) of men. The same pattern of responses held true for disadvantageous treatment of women litigants and witnesses by court personnel.

When asked whether they had observed incidents in which it appeared that counsel treated women litigants and witnesses disadvantageously because they were women, forty-seven percent (47%) of male respondents and eighty-three percent (83%) of female respondents reported that they had seen such incidents. Fifty percent (50%) of women, compared to fifteen percent (15%) of men, reported observing such incidents "sometimes;" thirteen percent (13%) of women, compared to two percent (2%) of men, reported observing them "often."

A recurring theme in women attorneys' narrative comments to this survey question was that bias and discriminatory behavior is far more prevalent among male counsel than among judges or court personnel. The following comments are illustrative of the numerous complaints received about problems with male attorneys.

> The conduct of male counsel is unquestionably more outrageous than [that of judges]. I have had to deal with everything from comments on my clothing and appearance to outright propositions.
>
> **Thirty-seven-year-old female.**

> I have found judges trying hard to be fair even when they feel awkward..."Fellow" counsel are the bigger problem.
>
> **Thirty-seven-year-old female.**

> [M]ost sexism and resentment seems to come from male attorneys.
>
> **Thirty-four-year-old female.**

A New Jersey law school instructor wrote about her frequent appearances in matrimonial court with her female and male students.

> Our treatment from judges and court personnel has been almost unfailingly courteous, helpful and clearly not sexist. Unfortunately, not all counsel and litigants are as balanced in their treatment. I notice a strong tendency by them to refer to <u>all women</u> (except judges) by their first names, to patronize, and to generally put women in second place.
>
> **Forty-one-year-old female.**

Are women attorneys treated disadvantageously because they are women? Thirty-three percent (33%) of male attorneys said they had never seen such an incident involving a judge, but seventy-six percent (76%) of female respondents said they had. Forty-seven percent (47%) of those women reported experiencing such incidents "sometimes;" twenty-five percent (25%) reported "rarely." Sixty-eight percent (68%) of male attorneys reported never seeing such an incident with court personnel, while sixty-eight percent (68%) of women attorneys had, thirty-one percent (31%) of these women reporting "sometimes" and thirty-three percent (33%) "rarely."

Forty-nine percent (49%) of male attorneys said they had seen incidents in which it appeared that male counsel treated female counsel disadvantageously because they were women, compared to eighty-six percent (86%) of women reporting such incidents. Twenty percent (20%) of the women who reported observing such incidents had seen them "often" compared to two percent (2%) of men. Fifty-six percent (56%) of these women, compared to one percent (1%) of the men, reported observing such incidents "sometimes."

With regard to their personal experiences in court, in chambers and at professional gatherings, seventy-eight percent (78%) of female attorneys reported incidents in which they felt they were treated disadvantageously by judges because they were women. Five percent of these women (5%) said such incidents happened "often;" fifty-one percent (51%) "sometimes;" eighteen percent (18%) "rarely." Fifty-eight percent (58%) of women attorneys had experienced disadvantageous treatment by court personnel, the distribution of responses being five percent (5%) "often," twenty-two percent (22%) "sometimes" and thirty-one percent (31%) "rarely."

Are women litigants and witnesses ever treated advantageously because they are women? Sixty-eight percent (68%) of female attorneys and sixty-five (65%) of male attorneys observed such incidents on the part of judges; sixty percent (60%) of female and male attorneys observed them on the part of counsel; and sixty-six percent (66%) of the women and fifty-four percent (54%) of the men observed them on the part of court personnel. In all three categories, the frequency of such incidents divided evenly between "sometimes" and "rarely." With respect to women lawyers being treated advantageously, sixty-one percent (61%) of females and fifty-six percent (56%) of males reported observing such incidents on the part of judges; fifty-two percent (52%) of women and fifty-four percent (54%) of men had observed them on the part of counsel; and fifty-nine percent (59%) of women and forty-five percent (45%) of men had observed such behavior by court personnel. The frequency of such incidents was reported as being rarer than when women litigants and witnesses were involved.

From the narrative comments on the survey forms, it appears that the incidents perceived as advantageous to women related to so-called chivalrous treatment. Examples given by male respondents included greater courtesy extended to women; deference accorded attractive females; a female attorney given wide latitude in her questioning while the court suggested that the male attorney be a "gentlemen" with respect to his obligations; and leniency in sentencing women offenders. Several female respondents, however, saw chivalrous treatment in a different light, stating that the use of courtly phrases such as "my dear" are patronizing.

Credibility

In the courtroom, "credible" is one of the most important things that a litigant, witness or attorney can be. Survey findings reveal that gender may affect the way credibility is perceived. By an extremely wide margin, more women than men reported that judges sometimes appear to give less credibility to female counsel, witnesses, experts and probation officers than to their male counterparts.

With respect to male judges, forty-one percent (41%) of women compared to nine percent (9%) of men reported such situations involving female experts and probation officers; fifty percent (50%) of women compared to twelve percent (12%) of men reported such situations involving female witnesses; sixty-one percent (61%) of women compared to fifteen percent (15%) of men reported such situations involving female counsel. In all categories, the response was divided fairly evenly between "rarely" and "sometimes." With respect to female judges, thirty-four percent (34%) of women compared to seven percent (7%) of men reported having observed such situations in all three categories, with more respondents reporting "rarely" than "sometimes."

Fourteen percent (14%) of women compared to four percent (4%) of men reported that they had rejected hiring a female expert witness out of concern that she would not be accorded the credibility of a similarly qualified male expert.

There is substantial evidence from social scientific studies supporting the perceptions of the female survey respondents that women as a group are generally viewed as less credible than men, by both men and women.

Legal history reveals that the assumption that women are not credible has been embodied in the laws themselves. Until the end of the nineteenth century, codified laws classed women with children and idiots. Long after the repeal of these laws, leading practitioners continued to advise trial attorneys to treat female witnesses as if they were children.

> Women are contrary witnesses. They hate to say yes. This makes them susceptive to traps. ...Women, like children, are prone to exaggeration; they generally have poor memories as to previous fabrications and exaggerations. They are also stubborn. You will have difficulty trying to induce them to qualify their testimony. Rather, it might be easier to induce them to exaggerate and cause their testimony to appear incredible.

F. Lee Bailey and Henry B. Rothblatt, Successful Techniques for Criminal Trials. Rochester, New York: The Lawyers' Co-operative Publishing Co., 1971, pp. 190-191, Section 205.

> Another type that should be routinely excused is the beautiful, unmarried girl in her 20's; these young women are invariably for the plaintiff in personal injury actions. These girls are usually having the time of their lives. Everyone is attentive and pleasant to them and life is the proverbial 'bowl of cherries.' With With this state of emphoria in their lives, it is unthinkable to them that anyone else should have to suffer.
>
> 16 Am. Jur. Trials §87, "Defense of Medical Malpractice Cases."

Interaction in Professional Settings

The following questions reflect the Task Force's recognition that what might be considered no more than violations of etiquette in some social contexts has serious consequences in the courtroom, where such behavior damages the credibility of female attorneys, witnesses and litigants. Respondents were asked if they had ever observed or experienced: (1) women litigants, witnesses or lawyers addressed by their first names or terms of endearment when similarly situated men were addressed formally; (2) comments on women's dress or personal appearance; (3) women subjected to unwelcome advances, verbal and otherwise; and (4) hostile remarks about women or sexist jokes.

Substantially more female than male respondents reported such incidents. Even in categories where a significant number of men had seen such behavior, the percentage of women reporting it was even higher.

Forms of Address

When questioned concerning inappropriate forms of address, that is, using women's first names or terms of endearment when men are addressed by surnames and/or titles, seventy-six percent (76%) of male respondents had never heard a judge speak to a women lawyer in this manner. Seventy-four percent (74%) had never heard such usage with women litigants or witnesses. The majority of those who had, reported its frequency as "rarely." Among female respondents, however, sixty-one percent (61%) had heard judges address women lawyers by first names or terms of endearment when men were being addressed formally and fifty-seven percent (57%) had heard such language addressed to women litigants and witnesses. In both categories, the frequency response divided evenly between "rarely" and "sometimes."

Although forty-five percent (45%) of male respondents reported having counsel use inappropriate forms of address toward women attorneys, and forty percent (40%) had heard them used with women litigants and witnesses, eighty-five percent (85%) of female attorneys reported observing such incidents with respect to female counsel, and eighty percent (80%) had heard them with respect to female litigants and witnesses. With respect to women attorneys, twenty-nine percent (29%) of women reported such incidents as happening "often," compared to two percent (2%) of men.

With respect to court personnel, seventy-one percent (71%) of women compared to thirty-two percent (32%) of men had heard court personnel use first names and terms of endearment in speaking to female lawyers. Sixty-two percent (62%) of women compared to twenty-nine percent (29%) of men had heard such language directed toward women litigants and witnesses.

The following narrative comments from attorneys convey the personal and professional impact of seemingly "harmless" forms of address:

> I am often referred to as "Marie" during a court proceeding by a judge. ...Immediately, I am perceived as less commanding of respect and importance. It affects my self-image and thus my performance.
>
> **Thirty-nine-year-old female.**

> The most disturbing thing is that I am sure that many of these incidents, such as a judge calling an attorney "pretty" or "dear," are viewed as totally harmless or even complimentary by certain judges. Female attorneys are extremely loathe to appear discourteous to a judge who thinks that he is complimenting them, especially if one feels that taking such a position will hurt a client or a case.
>
> **Thirty-seven-year-old female.**

> I have on several occasions observed the use of a demeaning term of pseudo endearment to belittle and undermine the professionalism of a female attorney. Such terms are used by both some judges and attorneys, to single out a female attorney and set her on a lower plateau. Rather than a direct attack on the legal issue or the argument advanced, the demeaning term is used to dismiss the female attorney's position or relegate it to a lesser status.
>
> **Twenty-nine-year-old male.**

Comments on Dress or Personal Appearance

In regard to comments on women attorney's personal appearance and dress, fifty-four percent (54%) of women respondents had heard such remarks addressed to women attorneys by judges and sixty-eight percent (68%) had heard them from counsel. Fifty-three percent (53%) had heard them from court personnel. Among male respondents, twenty-eight percent (28%) had heard such remarks from judges, forty-five percent (45%) had heard them from counsel, and thirty-three percent (33%) had heard them from court personnel. One woman described how it felt to be the recipient of this kind of attention.

> Judge X totally humiliated me at a calendar call when he said, "You get better looking every time I see you. How come I didn't hire you when you applied for that clerkship?" The other men guffawed freely, since I was the only woman in the courtroom. I'm sure they think I'm a poor sport for fighting back tears of rage instead of being able to take such a compliment.
>
> **Thirty-seven-year-old female.**

With respect to comments about the appearance of women litigants and witnesses, fifty-two percent (52%) of women compared to thirty-eight percent (38%) of men had heard such remarks by judges; sixty-eight percent (68%) of women compared to fifty percent (50%) of men had heard such remarks by counsel; and fifty-seven percent (57%) of women compared to forty percent (40%) of men had heard such remarks by court personnel.

Unwelcome Advances

Compared to other forms of discriminatory behavior, unwelcome advances toward women attorneys, litigants and witnesses were perceived as less of a problem than others, although its existence was confirmed. The problem was seen as most serious with respect to the behavior of male counsel.

Regarding advances toward female litigants and witnesses, thirteen percent (13%) of women and six percent (6%) of men reported such advances on the part of judges; thirty-one percent (31%) of women and sixteen percent (16%) of men reported such advances on the part of male counsel; and eighteen percent (18%) of women and ten percent (10%) of men reported such advances on the part of court personnel. With respect to unwelcome advances toward female attorneys, the percentage of men reporting such behavior remained almost the same in all three categories, but

was significantly higher for women. Twenty-five percent (25%) of women had experienced such advances from judges; fifty-five percent (55%) from male counsel, and twenty-five percent (25%) from court personnel.

Hostile Remarks and Sexist Jokes

At the regional meetings, serious concern was voiced about the frequency of hostile remarks toward women and jokes demeaning to women. Survey responses indicated that this behavior was most often engaged in by male counsel. Eighty-six percent (86%) of women and sixty-eight percent (68%) of men reported hostile remarks and sexist jokes by male counsel, with thirty-one percent (31%) of women compared to seven percent (7%) of men reporting the frequency as "often." Sixty-nine percent (69%) of women and forty percent (40%) of men reported such remarks and jokes by judges, with thirty-nine percent (39%) of women compared to seventeen percent (17%) of men reporting their frequency as "sometimes." Fifty-five percent (55%) of women and thirty-nine percent (39%) of men had heard remarks and jokes from court personnel.

Narrative responses to the survey gave the specifics of offensive incidents in which women litigants, witnesses and attorneys were derided, belittled and demeaned. One woman survey respondent wrote about an incident at a crowded calendar call and asked why the judge felt free to say things abut women he would never say about other groups in our society.

> [I]n response to a statement by a female attorney that she had "problems" with her case and wanted to be heard at the second call, [the judge] made a pronouncement that "women are the problem." This comment, again, was received by the audience with a great deal of amusement, laughter, clapping, etc.
>
> What would have happened had this same judge said that Blacks, Jews, Catholics, Orientals or Hispanics were the "problem?" Would that comment have been met with uproarious laughter? Certainly not, but women are still considered a joke.

Case Outcome

The Task Force asked whether attorneys thought that inappropriate forms of address, comments on appearance and sexist remarks affect case outcome. Sixteen percent (16%) of women and three percent (3%) of men thought that they did. Additionally,

comments written on the survey forms indicated that many attorneys believed that, even if the ultimate outcome of a case is not affected, the litigation process overall is prejudiced.

> I can't say a case was ever won or lost because of the above conduct, but I was so frequently embarrassed that I lost my composure. ..."
>
> **Thirty-four-year-old female.**

> I participated in a conference with my male adversary and a male judge in a custody matter. I thought they were going to pass around the brandy and cigars. They made remarks like, "I like my women to be women," etc. I truly believe the judge was prejudiced against my female client and me.
>
> In a JDRC case involving support, the judge asked me if I was the child when I stood to make my appearance. Rather hurts one's credibility.
>
> **Thirty-one-year-old female, emphasis in original.**

Intervention by Judges and Counsel to Correct or Forestall Discriminatory Behavior

Attorneys were asked whether they had ever observed either judges or counsel intervene to correct the problems examined in the survey report on interaction in professional settings. Eighteen percent (18%) of women and seven percent (7%) of men had seen judges intervene in such situations; twelve percent (12%) of women and eight percent (8%) of men had seen counsel intervene. Several attorneys gave specific examples.

> The judge requested counsel to approach the bench and cautioned counsel against use of certain words when referring to female counsel and to stop insinuations.
>
> **Thirty-six-year-old female.**

> Counsel reminded another [counsel] that sex of the woman attorney had nothing to do with how a case should be tried.
>
> **Forty-three-year-old male.**

> [R]ecently I referred to the court reporter as the "girl" and I was immediately admonished by the male trial judge.
>
> **Forty-year-old male, emphasis in original.**

> I have seen certain judges who are overtly conscious to have all litigants and attorneys address a woman attorney as counselor with male attorneys addressed likewise. A certain judge in Essex County instructs all parties prior to trial as to this requirement.
>
> **Twenty-nine-year-old male.**

Bar Associations and the "Old Boys Network"

The survey questions about personal interactions in professional settings elicited numerous responses from women and men asserting that women are often treated in an unprofessional manner at New Jersey's various bar associations, and that the legal profession is an "old boys network" in which women are unwelcome.

> I still note an attitude of superiority among men in bar association activities and a reluctance to accord women lawyers equal opportunity to serve on committees or in leadership positions or to be considered for judicial appointment.
>
> **Seventy-three-year-old male.**

> Sexist-type behavior among male attorneys... appears ingrained in the men's-club atmosphere of the legal fraternity. ...
>
> There is much offensive and sexist conduct, particularly at bar association meetings. ...[M]any women lawyers avoid these meetings as they feel uncomfortable because of the atmosphere.
>
> **Twenty-six-year-old female.**

Perceptions as to Counsel Fees and Fee-Generating Appointments

There was a vast disparity in the way women and men perceive the court's approach to fees and fee-generating appointments. Forty-seven percent (47%) of women, compared to three percent (3%) of men, reported instances in which male judges appeared to award women lawyers lower fees than men in similar cases. Sixteen percent (16%) of women reported seeing this often. While thirty-four (34%) of women reported that female judges also awarded female lawyers lower fees than their male counterparts, only three percent (3%) of men shared this perception. Eight percent (8%) of female respondents reported observing this "often."

When asked whether men or women tend to fare better with respect to fee-generating appointments, seventy-six percent (76%) of men saw no difference with respect to receiverships, seventy-nine percent (79%) of men saw no difference with respect to condemnations, and eighty percent (80%) of men saw no difference with administrations. Among those men who thought there was a difference, the large majority perceived that men fare better. Among women attorneys, however, seventy-two percent (72%) perceived that men fare better with respect to receiverships, seventy percent (70%) perceived that men fare better with condemnations, and sixty-six percent (66%) perceived that men fare better with respect to administrations. Among the women who did not perceive that men fare better with respect to fee-generating appointments, almost all perceived that there was no difference.

Attorney Performance

A notable exception to the general pattern of divergence in the perceptions of female and male attorneys regarding gender bias in the judicial system is their overall agreement in the area of attorney performance. Female and male survey respondents agreed that the sex of the attorney does not affect how clients fare in either civil or criminal matters.

However, it is clear from the narrative answers to the survey that, in the course of achieving good results for their clients, female attorneys must often cope with special pressures and burdens.

> I always try to maintain a professional demeanor, but many judges...treat us like "girls" and expect us to behave accordingly. (I suspect they would accuse me and my colleagues of being oversensitive and not being able to handle some good-natured ribbing. Unfortunately [sic], we can handle it. It's the fact that we have to handle it that distresses me.)
>
> **Thirty-seven-year-old female, emphasis on original.**

> A woman attorney must walk the fine line between being feminine and being assertive. She is held to a different standard than a man. If she is too feminine she is accused of trying to use it to her advantage and is therefore resented, but if she is equally assertive to her male counterpart, she is accused of being too aggressive. To their credit, most of the women attorneys with whom I have had dealings have been able to walk that fine line, but it is usually with much more pressure than is experienced by a man.
>
> **Forty-eight-year-old male.**

> Most frequently, male attorneys attempt to badger me, becoming petulant or unpleasant in the face of my refusal to relent. I have observed this with other women attorneys also. Men have been taught that they are superior and their words carry greater weight and are affronted when a woman does not defer to them and their superiority. I have noted this is particularly evident with older men who also "honey" and "dear" the woman attorney while patting and tapping her.
>
> **Female attorney, age not given, 4.5 years in practice.**

> I have witnessed many incidents of sexism and sexual harassment against female attorneys and litigants by male judges. In my opinion these are far more serious than singular incidents involving male attorneys or court personnel, due to the superior position and power of the judge...[T]here is a real feeling of concern among the female bar that any single incident may be too minor to involve a formal complaint. This encourages a pattern of harassment of such "minor" incidents. The result is that female attorneys often work twice as hard to appear professional and above reproach. Most female attorneys I know feel that they should not let petty sexism and harassment bother them, but, of course, it does.
>
> **Thirty-one-year-old female.**

Areas of Substantive Law Requiring Attention

Finally, respondents were asked whether they believed the substantive law areas of child abuse, domestic violence, sexual harassment, rape and support enforcement were receiving sufficient attention, or required more or immediate attention. In terms of the percentages of women and men reporting a need for immediate attention, the order of their concerns was the same: child abuse, support enforcement, domestic violence, rape and sexual harassment. However, in each category, significantly more women than men saw a need for immediate attention.

Sixty-four percent (64%) of women compared to fifty percent (50%) of men reported that child abuse required immediate attention. Fifty percent (50%) of women compared to thirty-one percent (31%) of men viewed domestic violence as requiring immediate attention.

Sixty percent (60%) of women and thirty-two percent (32%) of men viewed support enforcement as needing immediate attention. As might be expected from the report of the Subcommittee on Matrimonial Law, some of the strongest narrative comments on the survey dealt with support awards and enforcement.

> Matrimonial matters demand immediate relief. The court system with its motions and procedures is too slow and cumbersome, leaving the experienced matrimonial attorney with a bag of delay tactics. These tactics deplete the woman litigant's limited legal funds and living funds. Punishment to the offending party is extremely slow in coming and usually insufficient.
>
> **Forty-two-year-old male.**

> "Rehabilitative alimony" is invariably awarded to a woman who may well have been an excellent wife and mother. Why does such a woman have to be "rehabilitated?" The term is derogatory and suggests that the woman has to be changed from an incompetent to someone who can earn her own living...I am not suggesting that women should not be awarded money to develop a livelihood. They should simply receive from their ex-husbands the equivalent of the support they gave early in the marriage.
>
> **Forty-six-year-old female.**

> Particularly in matrimonial matters, women are most often left with no more than needed to barely exist -- on a threadbare basis, while the husband improves his standard of living to a luxury level, retaining substantial earnings.
>
> **Fifty-three-year-old male.**

> To my knowledge, there are no real guidelines tending toward uniformity of fair awards of alimony and child support in cases where a husband's net earnings must be allocated to two households, one composed of him alone and the other composed of the wife and dependent children. It appears inequitable to award a deserting husband 60-70% of his salary and his wife and three children the remainder...
>
> The tremendous variations of these awards from judge to judge, county to county, are very frustrating and strike many litigants as irrational.
>
> **Sixty-two-year-old female.**

Employment Opportunities for Women

A point about which the Task Force did not inquire but which was raised with frequency in the survey comments from both female and male attorneys related to women's employment opportunities in law firms, in government service and as law clerks. Many respondents expressed the opinion that women are not being hired, promoted or paid on the same basis as men. Others stated that some judges ask highly inappropriate questions of women candidates during clerkship interviews, and that some judges will not hire female law clerks at all.

The Task Force did not initially inquire into the issue of whether women law graduates had equal employment and career advancement opportunities within the Judiciary and legal profession. However, narrative responses to the attorney's survey form in addition to the results of regional meetings and state and national statistics which came to light indicate that this is a matter deserving the attention of the Task Force.

The October 1983 issue of the American Bar Association Journal contained statistics which indicated that women constitute fifteen percent (15%) or 94,000 of the nation's 606,000 attorneys. Over the past three decades, the percentage of female attorneys has dramatically increased. In 1950, 3.5% of the legal profession were women; in 1970, 4.8% were women; and in 1980, 13.8% were women. Currently three-fifths of the women attorneys are under age 35, whereas one-third of the male attorneys are over age 45. Id. at 1385. These statistics highlight the changing composition of the legal profession.

The national statistics indicate that in 1983 thirty-three percent (33%) of law school graduates were women. Relevant data indicates that these women entering the legal profession are highly qualified. "Law school women (are) more likely to be graduated with honors than men...more women (25%) than men (18%) finished in the academic top ten percent (10%) of their classes." American Bar Association Journal, October 1983, Vol. 69 at 1385. Available New Jersey statistics support this conclusion. In 1983, thirty-eight percent (38%) of the Seton Hall graduating class were women and forty-six percent (46%) of the students graduating with honors were women. Of the twenty-six students on Law Review, sixty-two percent (62%) were female. In the same year at Rutgers-Newark, forty-nine percent (49%) of the graduating class were women, forty percent (40%) of students receiving honors were women, and 42.3% of the students on Law Review were women. At Rutgers-Camden, forty-two percent (42%) of the graduating class were women, and women constituted forty-three percent (43%) of the honors graduates and thirty-three percent (33%) of the students on Law Review.

One aspect of employment which impacts upon the career opportunities of women attorneys is the job interview process itself. Despite the existence of state and federal statutes prohibiting employment discrimination, female job applicants are often asked inappropriate questions at both law firm and judicial clerkship interviews. Women survey respondents reported recurring instances in which they were asked questions concerning their intentions to have children, use of birth control, the availability of child care and whether they had their spouse's consent to work.

In one response describing the hiring of a judicial clerk, it was stated that an Assignment Judge, who had both a civil and a criminal clerk, would never hire a woman for the civil clerk since the clerk would have supervising authority over all other clerks in the courthouse and the salary was higher. The survey responses indicated a perception that some judges consistently and purposefully hire only male law clerks. Other respondents perceive that among the judges who hire women, several showed preference for the wives or relatives of established male attorneys. The problem may lie primarily in the refusal of some judges to consider women for the position of law secretary rather than the actual numbers of women hired.

There also appears to be some stereotyping regarding assignments of women judges. Throughout the country, more women sit in the Juvenile, Domestic Relations and Matrimonial courts than are assigned to administrative positions or the criminal calendar. In this state, no woman has been appointed Assignment Judge or to the Criminal Resentencing Panel, the Intensive Parole Review Panel, the Death Penalty Committee, the Coruzzi Review Committee, or to the Appellate Division Part for Criminal Appeals. Currently, only one woman is assigned to the Appellate Division and one woman to the New Jersey Supreme Court. Additionally, the number of women on the bench appears not to adequately reflect the number of competent women attorneys who meet the qualifications for judicial appointment.

DO GENDER-BASED MYTHS, BIASES AND STEREOTYPES AFFECT THE SUBSTANTIVE LAW AND JUDICIAL DECISION-MAKING?

The Subcommittee on Substantive Law initially concluded that the New Jersey statutes are for the most part gender neutral. However, in certain areas of the law, it appears that decision-making is affected by gender bias. These areas need to receive the continued attention and observation of the Judiciary.

Following are summaries of the Substantive Law Committee Reports on Damages, Domestic Violence, Juvenile Justice, Matrimonial Law and Sentencing and the Report on the Regional Meetings.

REPORT
SUBCOMMITTEE ON DAMAGES IN
PERSONAL INJURY MATTERS

Gender bias in the award of personal injury damages is a subject which has generated some concern and discussion, but little academic or statistical study. The available literature, moreover, is fragmentary, inconclusive and in large part dated. See Nagel and Weitzman, Women as Litigants, 23 Hastings L.J. 171-181 (1971); Jury Verdict Research Project, Adults as Plaintiffs, Parts I (Ages 18 through 39) and II (Ages 40 through 64), Jury Verdict Research, Inc., Solon, O., 1983; Women as Plaintiffs, Jury Verdict Research, Inc., Cleveland, O., 1964; see also U.S. Dept. of Transportation, Automobile Personal Injury Claims (1970); All-Industry Research Advisory Committee, Automobile Injuries and their Compensation in the United States, Alliance of American Insurers, Chicago, Ill., 1979.

Substantial anecdotal material, however, has been offered by practitioners both within and without New Jersey suggesting that gender may be a substantial influence in the award of damages, whether by judge or jury. Among the more frequently described perceptions are (1) that wage-earners receive higher awards for

pain, suffering and disability than do homemakers; (2) that a woman wage-earner is likely to be awarded less than her male counterpart, not only because her wages are lower but because her work is regarded as less important and thus less affected by personal injury; and (3) that women receive modest awards for certain kinds of pain or disability which are regarded as common to or more easily borne by them, e.g., back pain, headaches, while such injuries as scars or other disfigurement generate higher awards for women than for men.

The Task Force does not have the necessary resources (time, money, staff, and expertise) to collect or analyze data which might confirm or disprove these impressions. Cf. Nagel and Neaf, "Racial Disparities That Supposedly Do Not Exist; Some Pitfalls In Analysis of Court Records," 52 Notre Dame Lawyer 87 (1976). In the absence of "hard" evidence of gender bias in the award of damages, we hope that the tabulation of responses to the Task Force questionnaire will at least give some indication of whether the impressions expressed by some practitioners are shared by any substantial segment of the bar.

While the available data does not permit any findings of gender bias in damage awards, we do suggest that the substantive rules of law which guide judges and juries in fixing personal injury damages are themselves unfairly skewed to the detriment of women.

The work performed by a significant number of women is, of course, in the home, as homemaker, wife, or mother. That home career is waged either exclusively or in tandem with an employment outside the home. Personal injury--and the associated pain, suffering, temporary and permanent disability and other consequential losses--all affect a woman's home career as importantly as they affect a wage earner's career. Yet neither our case law nor our Model Jury charges adequately recognize that fact in fixing the criteria for the award of personal injury damages.

Model Charge 6.10 permits the award of damages for medical expenses, loss of earnings, disability and impairment, and pain and suffering. Under its language, a homemaker may not be compensated for any loss of earnings since she works without wages. Any compensation for injuries affecting her home career is awarded, if at all, as damages for "disability and impairment" which the charge defines as

> ...any permanent or temporary injury resulting in disability to or impairment of his (sic) faculties, his (sic) health or his (sic) ability to participate in activities..."

As applied to a woman plaintiff who is engaged in a career as homemaker, disability or impairment is unrelated to her career or work and is reduced to the level of a personal annoyance of little economic value, hardly different from a crimp in her ability to participate in aerobic dancing or bowling. We can also reasonably conclude that the Model Charge encourages a

modest pain and suffering award to a homemaker because her pain and suffering do not affect any work or career and are thus of diminished economic significance.

In short, the major components of a personal injury damage award are closely tied to wage-earning and thus relegate many women to modest awards because their work or career is not compensated. And it is not only the Model Charge that fails to recognize the reality and value of a woman's uncompensated work. In presenting cases on behalf of women plaintiffs, attorneys rarely explore the economic value of uncompensated services in the home and, perhaps more significantly, some practitioners have reported that their efforts to present proofs of such economic value have been rejected or restricted by unreceptive judges.

Some cases from other jurisdictions have recognized that a woman's career at home is "work" which has a provable economic value and that a tortfeasor may fairly be required to compensate the woman for any "disability or impairment" which affects her ability to realize that economic value. See, e.g., Fox v. Fox, 296 P.2d 252 (Wyo. 1956); Johnson v. Claiborne, 328 S.W. 2d 215, 18 (Tex. Ct. App. 1959); Clark v. Brewer, 471 S.W. 2d 639 (Tex. Ct. App. 1971); Rodgers v. Boynton, 52 N.E. 2d 576, 78 (Mass. 1943); Cornett v. City of Neodesha, 353 P.2d 975 (Kan. 1960); Links v. Highway Express Lines, Inc., 282 A.2d 727 (Pa. 1971); Daly v. General Steam Navigation Co., Ltd., 1 W.I.R. 120 (C.A. 1980). Although no New Jersey case law specifically addresses the question, it is highly significant, and indeed ironic, that our

law does provide for an award of damages for impairment of a woman's ability to perform her household duties, but to her husband who is said to be "entitled to the services of his wife" in attending to those duties. Model Charge 6.11(B). A woman who has no work or career and whose household duties are presented as being merely a husband's entitlement (if the woman has a husband at all) is surely disadvantaged in her claim for damages.

The subcommittee therefore suggests that the Model Charge be supplemented with instructions specifically addressed to the admeasurement of damage awards for a plaintiff who pursues a career at home. The charge should recognize that such a career is "work" and should permit the jury to assess the economic value of the plaintiff's uncompensated services at home and award damages for any dimunition in the plaintiff's ability to produce that economic value. A suggested charge is appended to this report. Although we cannot be sure that juries will be free of gender bias in applying the rules for determining damages, we should at least assure that the rules themselves put men and women on a somewhat more equal footing.

PROPOSED MODEL JURY CHARGE

DAMAGES: Personal Injuries
Loss of Earnings--Plaintiff who works in the home

A plaintiff who is awarded a verdict is entitled to damages for loss of earnings proximately caused by his or her injuries sustained as a consequence of the defendant's negligence (or other wrongdoing). In order to recover such damages he or she must be found to have been disabled from working. A female plaintiff who works in the home as opposed to one who has a job outside the home is also entitled to recover damages for the pecuniary value of the loss of her services as a housewife for _____ weeks (months, years). She has presented testimony that the services she generally performed in her home as a housewife or homemaker were as follows:

The plaintiff has also presented evidence that she performed such services for _____ years, that she had attained certain levels of proficiency in several of her tasks, that she performed certain specialized duties given the nature of her household, etc.

In fixing the amount of damages for plaintiff's pecuniary loss as a result of her inability or diminished ability to perform her services as a homemaker, you may consider the testimony of plaintiff's expert with regard to the cost of such services if

obtained in the labor market. Thus you may evaluate plaintiff's loss by considering the cost of replacing such services as chef, launderer, housekeeper, financial planner, etc. (You may also consider plaintiff's testimony that she had chosen to work in the home as opposed to seek employment in the labor market as a _____, for which she was trained, and the testimony of her expert that such a job in the labor market would have earned an annual salary of $_____.)

Plaintiff has also presented evidence that she will be unable to perform her services as a homemaker in the future. You should take into account the foregoing factors in determining the award and in addition, plaintiff's work-life expectancy prior to her injuries. Again, you may take into account the cost of replacement services over her work-life expectancy. You may also consider the loss of future earnings which plaintiff would sustain if she were unable to return to the work-force at some later date, as she testified she intended to do when her children reached the ages of _____ and _____.

(In the case of a consortium claim by a plaintiff-spouse.)

If you find that plaintiff is entitled to recover for her diminished capacity or inability to perform her household services, such award is in addition to any award you determined the plaintiff's husband, plaintif "X," is entitled to. That is despite the fact that plaintiff's husband may have sustained a loss due to his wife's inability to perform her household ser-

vices, the female plaintiff is entitled to recover in her own right for that inability or diminished capacity to perform her job.

(Where female plaintiff is a mother, an appropriate charge may be adopted to reflect the tasks associated with raising children and expert testimony may or may not be necessary.)

This charge may be adapted to the (interesting, but rare) situation where a male plaintiff works in the home.

REPORT

SUBCOMMITTEE ON DOMESTIC VIOLENCE

The focus of the Subcommittee on Domestic Violence was the Prevention of Domestic Violence Act, P.L. 1981, c. 426; its substance; and its application in the courts of the State of New Jersey in an effort to determine whether gender bias exists to any degree which operates as a barrier to those intended to be protected by its provisions.

Commencing in July 1981, the New Jersey Legislature made its first attempt to address the problem in legislation, P.L. 1981, c. 200, which provided Municipal Court judges with the authority to restrain a spouse believed to have committed an assault, from the common marital residence, for a period of 72 hours.

Public Law 1981, c. 200, has since been repealed and replaced by P.L. 1981, c. 426 entitled the "Prevention of Domestic Violence Act" which has been amended as recently as June 10, 1982.

It is abundantly clear that for several years preceding and during the nine months following the rather feeble attempt at

addressing the problem in the first legislation, the dialogue among women's groups, bar associations and committees, social services groups, and legislators was intense. The degree to which public input was pursued and received was significant. In short, New Jersey has aggressive legislation on the subject of domestic violence; legislation which benefited from a great deal of professional and lay input.

The Prevention of Domestic Violence Act is sex-neutral in its applicability to both males and females who may seek redress under its provisions. Unfortunately, however, the phenomenon of battering tends to favor females. No one would argue the fact that women in overwhelming percentages tend to be the victims of battering. Consequently, the focus of any study on the subject must be whether stereotypical attitudes toward women tend to stand in the way of meaningful redress under the legislation.

It is important to note that many of the issues which presently need to be addressed, existed at the time of the report of the New Jersey Advisory Committee to the U.S. Commission on Civil Rights published in January 1981, prior to the passage of the Prevention of Domestic Violence Act.

Of course, the focus of the investigation conducted by the New Jersey Advisory Committee was broader in scope than the charge of the Task Force to investigate gender bias in the judicial system. However, with regard to the investigation of the judicial response in the substantive area of domestic

violence, an expanded approach is called for. The citizen's perception of the judicial response is often impacted upon by the response of other agencies, which although not part of the court system per se, are a necessary prelude to the instigation of the judicial process.

Therefore, in the study of domestic violence, to focus strictly upon any failures in the judicial process is to ignore the basic fact that any insult meted out by the Judiciary is frequently the compounding factor to those frustrations already borne by the abused woman before reaching the courthouse steps--if she reaches them at all.

THE POLICE

A. Training

The New Jersey Police Training Commission sets minimum requirements for and monitors the quality of training in the academics established for the training of municipal and county police.

Section 4 of the Prevention of Domestic Violence Act provides that:

> The Police Training Commission in the Department of Law and Public Safety shall provide that all training for the enforcement officers on the handling of domestic violence complaints shall stress the enforcement of criminal laws in domestic situations, the protection of the victim, and the use of available community resources.

At the time of the report of the New Jersey Advisory Committee, "a minimum of three hours was required to be spent on domestic disputes. There was no state requirement for a discussion of battering per se in the training."[1]

Presently, a minimum of three hours is still required to be spent on domestic disputes. According to an employee of the Commission, the basic training curriculum has been revised to include the responsibilities of police officers and their respective departments which are mandated by the law (i.e., definitions, authority to arrest, notice to victim of rights, mandatory reporting requirements, etc.).

It does not appear that there is presently any mandated requirement that the subject of battering per se be taught.

Several police academies apparently exceed the Commission's requirements with regard to minimum hours, as well as course content, but are operating without uniform curriculum guidelines.

Many police departments are also experiencing difficulty in scheduling regular police officers for retraining in handling domestic disputes, consequently, the new course format is available primarily to trainees.

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[1] Battered Women in New Jersey, a report of the New Jersey Advisory Committee to the U.S. Commission on Civil Rights, January 1981, p. 14.

If all police officers are to be "properly trained," however we choose to define that term, a number of pertinent details must be addressed, namely: Who will determine curriculum? Who should be trained? How much training is needed?

These concerns among others, were provided to the sponsor of New Jersey's legislation prior to its passage, yet as recently as February 1983, the program coordinator of Bergen County's Alternatives to Domestic Violence Program cited lack of proper police training on the issue of battering, as well as procedures under the law, as an area of primary concern.

Additionally, the fact that community-based groups, such as the New Jersey Coalition for Battered Women, see a need to develop a model training program for law enforcement officers, may be indicative of a lack of direction coming from the law enforcement community itself.

B. Failure to Arrest

The report of the New Jersey Advisory Committee to the U.S. Civil Rights Commission at page 11 states that "most officers saw conciliation, not arrest, as the goal of police intervention in domestic dispute situations."

The Prevention of Domestic Violence Act provides for arrest where there is probable cause to believe that an order of the Court has been violated and/or probable cause to believe that an act of domestic violence has been committed, or in cases where a victim exhibits signs of injury.

In all instances, including probable violations of Court orders, the decision to arrest is discretionary with the police officer if the language of the statute is interpreted strictly. This fact punctuates the point made earlier with regard to the relatedness of the impact of other agency action or nonaction upon the public perception of the judicial response. An order of the Court is not worth the paper it is printed upon, if: 1) police are not mandated to enforce same; and 2) mechanisms do not exist to apprise the Judiciary of this failure. Victims, of course, are free to complain but, realistically as a group, are least likely to do so.

A recent study of police tactics in domestic assault cases conducted by the Police Foundation has concluded that the "best way for the police to prevent acts of violence in the home, may be simply to arrest men suspected of assaulting their wives or lovers."[2] While the study is not considered to be conclusive due to the narrowness of the research data, it certainly has important implications.

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[2]"Domestic Violence: Study Favors Arrest," New York Times, Tuesday, April 5, 1983.

An informal survey of shelter workers and legal services staff conducted at the writer's request indicates that the failure of police to arrest even for violations of valid and properly served orders, continues to be a problem. Feedback from regional meetings included complaints concerning police officers who tend to trivialize domestic violence complaints.

If New Jersey is to be guided by the experience of other jurisdictions with similar legislation, it is clear that mere changes in regulations are not likely, without more, to change attitudes which give rise to arrest-avoidance patterns.

For example, in 1980, attorneys in Oregon filed actions against local police departments as a result of refusal to arrest for violations of restraining orders. Oregon had passed a statute in 1977 making police arrest mandatory where there was probable cause to believe an assault or felony had been committed, or the victim was in fear of imminent serious bodily injury.[3]

C. Lack of Cooperation in Emergencies

Despite court directives requiring 24-hour judicial coverage, there continue to be reports of difficulties with regard to after-hour access to the courts in emergency situations.

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[3]Woods, Litigation on Behalf of Battered Women, Women's Rights Law Reporter, Volume 5, p. 43.

Feedback from regional meetings included complaints regarding judges who appeared and are resistant to the additional burden of being on call nights and weekends under the 24-hour emergency provisions of the Act; some judges' reluctance to accept com-complaints where prior complaints have been withdrawn; probation officers discouraging victims from filing complaints until after a "cooling off" period. Responses to the attorneys' questionnaire mirrored those concerns.

Attorneys, shelter and other social services personnel complain of an apparent lack of uniform procedures in the courts for after-hour emergency relieve.

Due to the nature of the municipal courts, upon which the responsibility for emergency access has been placed, some would argue that absolute uniformity in procedures is difficult at best. Every effort should be made, nevertheless, to assure that: 1) procedures have been instituted in the various municipalities; and 2) to the extent possible, that these procedures are uniform.

The judicial system must not in any way by its own failure to act, encourage inaction on the part of those persons or agencies who are a necessary prelude to the judicial process.

THE PROSECUTION

As noted previously, at present the victim of domestic violence is not likely to be represented by counsel at any level of proceeding provided under the legislation.

This is certainly the case in the municipal courts of the state where the majority of criminal charges arising out of domestic violence situations and approximately 31% of domestic violence complaints are filed. The majority of these courts either: 1) do not provide municipal prosecutors; 2) provide for prosecutors in selected cases (usually where a police officer is involved); or 3) have no policy at all with regard to the representation of victims of domestic violence.

No attempt has been made at this time to survey policies within the various county prosecutors' offices, although it is suggested that such a survey should be conducted in the future, for the lack of representation may ultimately impact upon the ability of the Judiciary to make intelligent decisions based upon as complete a presentation as possible of the facts and circumstances involved.

The reduction or charges by prosecutors and thereby, in the opinion of many women's groups, the minimization of the abused woman's plight, remains a controversial issue deserving of future debate. There are wisdoms on both sides of the issue, one of

which holds that the likelihood of a speedy resolution of a case at the municipal court level is actually to the advantage of the victim. While others still urge that crowded Superior Court calendars necessitate such a practice.

Resolution of these issues and the competing demands placed upon the judicial system, are more likely to be resolved to the public's satisfaction to the extent that prosecutors' offices, both municipal and county, devote highly visible and properly trained staff to intercede at all levels.

THE COURTS

A. Judicial Attitudes

With the passage of the Prevention of Domestic Violence Act in January 1982, the Legislature of this state formally recognized the fact that: "...even though many of the existing criminal statutes are applicable to acts of domestic violence, previous societal attitudes concerning domestic violence have affected the response of our law enforcement and judicial systems, resulting in these acts receiving different treatment from similar crimes when they occur in a domestic context."

The feedback collected through the various methods of data collection already described, indicates that almost two years after the passage of the Domestic Violence Act in this state, there continues to be evidence of a perception among members of the public and the bar, that the victim of abuse continues to

face barriers in seeking help from the Judiciary. It is only fair to note that the public and bar also generally felt that judges as a group attempt to meet the spirit of the Domestic Violence Act.

At first blush, these statements may appear to be inconsistent with one another. However, if we understand that the barriers being referred to are gender-based biases, stereotypical attitudes and, even on occasion, well-intentioned ignorance, there is no inconsistency.

Inadequate support orders and child visitation arrangements which force the abused to have contact with the abuser are viewed as evidence of judicial insensitivity to the dependency factors present in the abusive relationship, regardless of how well-intentioned the judge may have been.

Judges who try to convince the complainant in a criminal matter that "what we really have here is a domestic problem," have trivialized the plight of the female as victim and in doing so have expressed a bias.

The judge who allows, without comment, an abuser to testify as to what his partner did to earn her beating, is viewed as participating in the expression of the prejudice which holds "wife as property" and violence as a "victim precipitated" crime.

Judges who fail to enforce and appropriately punish violations of domestic violence orders silently express a reluctance

to exercise their discretion in a circumstance that clearly would not be tolerated except in the domestic context.

In a recent article, Norma Wikler, an associate professor of sociology at the Unifersity of California and consultant to the Task Force on Women, stated:

> "Though sexism per se is rarely mentioned as a potential source of bias by members of the Judiciary, recognition of the very nature of the society in which judges have been socialized suggests that it could hardly be otherwise. Until the recent challenges from the movement for women's rights, American society rigidly defined sex roles and held women in subservient and inferior status. And most adults in the United States, judges included, learned traditional sex stereotypes and misconceptions through the social institutions which still reflect and reinforce them. It is axiomatic that biases, attitudes and beliefs persist unless education or life experiences oblige men and women to become self and socially aware."

Judicial training on the subject of domestic violence has already begun in the State of New Jersey.

On April 24, 1983, a conference attended by judges of the Juvenile and Domestic Relations Court, as well as Superior Court judges assigned to hear matrimonial matters, devoted a full day to the subject.

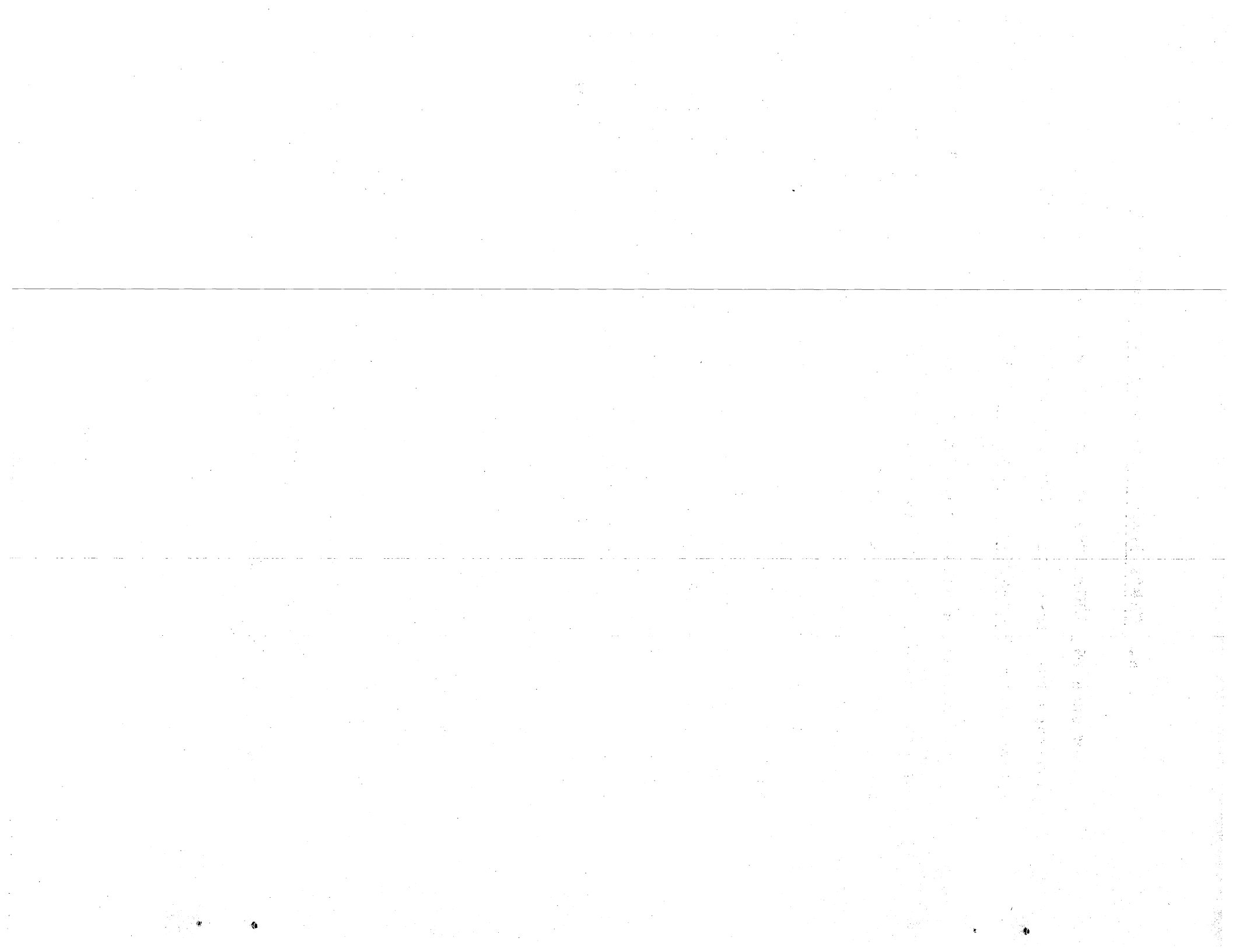
Additionally, the subject of domestic violence was the topic of discussion at the last annual Judicial Conference of Municipal Court Judges held on October 27, 1982.

B. Child Support, Custody and Visitation

On June 29, 1983, the Administrative Director of the Courts published the first statistics captured with regard to the utilization of the Prevention of Domestic Violence Act.

An analysis of the available statistics in the areas of child support, custody and visitation may reveal whether there continues to be any apparent pattern of reluctance on the part of the Judiciary with regard to utilization of certain remedies available under the legislation. For instance, for the period April 1982 - March 1983 in the Juvenile and Domestic Relations Courts, child custody was granted to the victim in 82% of the cases where requested, while child support was granted in 56.3% of the cases where requested. Visitation (which tends to be a male-oriented issue, since greater percentage of victims are female) was granted in 129.2% of all cases, which indicates that relief was granted more often than sought.

Of course, a partial explanation with regard to the statistics involving visitation may be the following: 1) there is probably a disinclination on the part of female victims granted custody and fearing physical harm to seek any relief which would tend to necessitate contact with the abuser; 2) the hearing held in the Juvenile and Domestic Relations Court represents the first opportunity for the defendant to make such a request; and 3) due



to the nature of the abusive family setting where children are involved, judicial silence would be most inappropriate even where no request is made by either party.

However, there does appear to be some dissatisfaction on the part of the public as well as the bar, with regard to the nature of visitation orders, as well as the failure of the Judiciary to enforce violations of same.

Inadequate support awards and child custody, continue to surface as an area of concern, with regard to judicial tendencies in utilizing remedies under the legislation.

This concern is not a new one, and is expressed generally with regard to the disproportionate economic consequences borne by women involved in marriage dissolution.

Certainly, not all victims seeking support under the provisions of the domestic violence legislation are simultaneously seeking marriage dissolutions. While it may be argued that any harm done by inadequate awards can be corrected at such time as the decision concerning dissolution is made, if the suspicion of the Task Force Subcommittee on Marriage and Family Law, that there is gender-based maldistribution of earnings and resources at and after marriage dissolution proves true, this corrective action is not likely to occur.

More importantly, those who understand the dependency factors present in abusive relationships, also understand that the judicial resolution of economic factors is likely to loom large in the victim's decision to remain in the abusive setting.

Consequently, judicial prejudices which continue to show a "material preference" in custody awards while holding on to the myths that women lead indolent lives on support, can get a job if they really want to, or find some other man to support them,[4] must be attacked through education.

Additionally, even judges inclined to attempt fair support awards must be periodically updated with regard to the economic position of women in society generally, the impact of economic decisions in the abusive relationship, as well as general information with regard to the economics of running a household.

C. Enforcement of Judicial Orders

As mentioned in the preceding section entitled "Failure to Arrest," there is evidence of concern among the public and bar that judicial orders under the legislation are not properly enforced. It appears that there exists no fail-safe mechanism for the Judiciary to monitor the decisions made in order to

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[4]Wikler, "On the Judicial Agenda for the 80's: Equal treatment for men and women in the courts," Judicature, Vol. 64, No. 5, November 1980.

ensure compliance, other than the victim's complaint. Of course, any such complaint is more likely to reach the ears of a judge when an attorney represents the complaining spouse. It is appropriate to stress that a victim is not likely to be represented by counsel. This subject is discussed in more detail in the section entitled "The Prosecution."

D. Mandated v. Recommended Counseling

The program coordinator of the Alternatives to Domestic Violence Program in Bergen County cites the following snag encountered with the judicial system with regard to counseling:

> Although referrals have appropriately been made to ADV and treatment plans developed and sent to the Court for action, to date, no counseling has been mandated--only recommended.

During the recent training conference presented by the Administrative Office of the Courts, lecturers who were intimately involved with counseling in the abusive setting, were most vocal with regard to the need for court-mandated counseling, and their perception that generally judges were reluctant to order same. On this point, there was disagreement among those at regional meetings as to whether counseling should be mandated by the Court or made available on a voluntary basis. This reluctance is apparently received by the community as an expression of judicial "non-faith" in the counseling process as a viable vehicle through

which they may impact upon the cycles of violence. This perceived attitude is putting the Judiciary at philosophical odds with the professional community which is attempting to deal with the treatment of abusive spouses and which desires the full weight of the Court behind it.

Statistics reported in the June 1983 Report on the Prevention of Domestic Violence Act indicate that the period April 1982 - March 1983, professional counseling was granted by Juvenile and Domestic Relations Court judges in 72.1% of all cases where requested. This statistic at first glance appears inconsistent with the public perception of underutilization of counseling as relief. It should be noted, however, that the Monthly Report form utilized by all courts to capture data makes no distinction between mandated as opposed to recommended counseling.

E. Contempts for Violations of Court Orders

N.J.S.A. 2C:25-15(b) provides that:

> violation of an order issued pursuant to sections 10, 11, 13 or 14 of this Act shall constitute contempt and each order shall so state.

N.J.S.A. 2C:29-9 provides that:

> A person is guilty of a crime of the fourth degree if he purposely or knowingly disobeys a judicial order....

In spite of the above statutory provisions, there appears to, exist a great deal of confusion with regard to how proven violators

of domestic violence orders are to be handled. There are those who feel clarification is needed with regard to whether the domestic violence legislation intended criminal contempt proceedings in such matters or civil; and if civil, is the hearing to be handled in a summary fashion or formally upon notice.

The practice has developed in at least one of the larger counties of the state to proceed upon civil contempt in a summary fashion as provided by Rule 1:10-1.

RECORD KEEPING

In July 1982, Sec. 13 of the domestic violence legislation was amended to require the Court to consider among other factors, at the time of hearing on domestic violence complaints "the previous history of domestic violence between the co-habitants, including threats, harassment and physical abuse."

In March 1981, the informal comments to Senator Wynona Lipman prepared by the Family Law Task Force, the following comments concerning reporting and record-keeping procedures under the proposed legislation were made:

> ...lack of reliable data as to the prevalence and nature of domestic violence significantly cripples efforts to make our legal, social services and law enforcement systems more responsive, responsible and efficient....Often a judge does not know that there has been a previous history of domestic violence, that he is seeing an abuser after several calls have been made, or that an abuser has been fined in other courts.

As a practical matter, the most persuasive evidence of prior violence is likely to be contained in official police documents rather than the verbal recitations of victims. In reality, however, despite the record-keeping requirements mandated by the Act, systemic deficiencies may continue to hamper the administration of justice.

Under the Act, police officers who respond to a domestic violence call, are required to file a separate domestic violence offense report. Information contained in the forms is required to be forwarded to the State Bureau of Records and Identification in the Division of State Police.

On the municipal level, reports of domestic violence are not presently incorporated (and perhaps appropriately so) in the defendant's official criminal history. Consequently, absent an actual arrest or some provisions for a separate compilation of a domestic violence history, a municipal court judge would be unaware of the previous pattern of behavior. A similar problem may exist with regard to data available to Juvenile and Domestic Relations Court judges.

REPORT

SUBCOMMITTEE ON GENDER BIAS IN NEW JERSEY'S JUVENILE JUSTICE SYSTEM

Concern about gender bias throughout our legal system has prompted a reexamination of the juvenile justice system in recent years. Researchers drawing on data from various points in the United States and from the nation as a whole conclude that a sexual double standard seriously distorts our perceptions of female and male behavior and, as a result, disparate treatment on the basis of sex occurs at all stages of the juvenile process. It is by now well known that females are primarily charged and adjudicated in connection with status offenses, such as incorrigibility, while males are primarily charged with quasi-criminal conduct. The statistics thus create the impression that the underlying behavior of the two groups is quite different. However, studies based on juveniles' accounts of their own behavior (self-report studies) show that the rate and pattern of misconduct by the two sexes is far more similar than official arrest and adjudication records would indicate. With respect to status offenses, females are treated more severely than males at every stage in the detention and adjudication process even though

females may receive more lenient treatment with respect to certain crimes. As a result, young females are often institutionalized for longer periods than young males.[1]

The roots of disparate treatment in the juvenile justice process appear to be deeply planted in the system of sexual stereotyping which expects chastity of women, especially young women. At the time the juvenile system was being introduced, any sexual exploration by females was regarded as predictive of promiscuity and perhaps even prostitution. While our views are no longer so extreme, concerns about sexuality probably remain a central preoccupation in our views of women, and a double standard as to sexual behavior still persists.[2]

Available data from New Jersey indicate the state has generally conformed to the national pattern. In accordance with the changes in New Jersey's juvenile justice system that became effective in 1974, status and criminal-type offenses receive different treatment under the New Jersey Code. From 1974 through 1984, juveniles who committed status offenses were regarded as Juveniles In Need of Supervision (JINS) who could not be confined

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[1] See, e.g., Chesney-Lind, "Young Women in the Arms of the Law," in Bowker (ed.), Women, Crime, and the Criminal Justice System, (Chapter 6) (1978); Wikler, "On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts," 64 Judicature 202 (1980); Report by the American Bar Association, Little Sisters and the Law (ABA, 1977).

[2] Id.