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Report of the Maine Commission on Gender, Justice, and the Courts

Maine Commission on Gender, Justice, and the Courts

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REPORT OF THE MAINE COMMISSION ON GENDER, JUSTICE, AND THE COURTS*

INTRODUCTION

A. *Background*

The Commission on Gender, Justice, and the Courts was established by the Maine Supreme Judicial Court in January 1993, pursuant to a resolution adopted by the Conference of Chief Justices in 1988 urging the creation of task forces to study gender bias and minority concerns within court systems. In recent years, forty-one states, the District of Columbia, and two federal circuits have established task forces on gender bias in the courts as part of a continuing effort to achieve equality for women and men in American society. These jurisdictions recognized that access to a neutral and unbiased court is essential to the administration of justice, and is guaranteed to every person under the Constitutions of the United States and most states.

The mandate of Maine's Commission was to identify attitudes and behavior within the Maine judicial system that either reflect gender bias or may be perceived to reflect such bias, to consider how gender affects the treatment of women and men in the legal and judicial environment, and to make appropriate remedial recommendations that could be implemented by the Court. The Court also charged the Commission with developing recommendations to ensure that gender-based myths, biases and stereotypes do not affect judicial decisionmaking. The ultimate goal was to ensure that all participants in the court system be treated fairly and that the justice system operate free of any bias. A copy of the order establishing the Commission is included as Appendix A to this Report.

The Commission is comprised of twelve members, seven of whom are female and five of whom are male.¹ The Honorable Caroline Duby Glassman, Associate Justice of the Maine Supreme Judicial Court, has served as the Court's liaison to the Commission. The members have brought a variety of experience and expertise to the Commission along with their diverse perspectives. That experience

* Presented to the Supreme Judicial Court of Maine on December 4, 1996. Commission Members: Professor Colleen Khoury, Chair; The Honorable Robert E. Crowley; Rita L. Desjardins, Clerk of Court; Peter J. DeTroy, Esq.; Patrick F. Ende, Esq.; Michele Garwood, Administrative Clerk; Catherine A. Lee, Esq.; The Honorable Kermit V. Lipez; Steven D. Silin, Esq.; Patricia M. Stevens, Esq.; Professor Nancy Wanderer; The Honorable Joyce A. Wheeler. Liaison to the Supreme Judicial Court of Maine: The Honorable Caroline Duby Glassman.

1. Thirteen members were appointed to the Commission initially, but one of the original members—retired Superior Court Justice Jack O. Smith—resigned during the first year.

includes the private practice of law in towns and cities around the State; experience as judges and clerks within the Administrative, District, Superior and Supreme Judicial courts; legal practice in the Attorney General's Office, the University of Maine system, other State agencies, and organizations providing legal services to indigent Mainers; as well as experience in law teaching. The members' expertise covers civil, criminal, and family law matters.

B. Definition of Gender Bias

Early on, the Commission developed a working definition of gender bias to guide and inform its research. In the Commission's view, gender bias exists when decisions are made or actions are taken based upon preconceived or stereotypical notions about the nature, roles, and abilities of women and men, rather than upon an evaluation of each individual and his or her situation. Gender bias is reflected in the misconceptions and myths about the social and economic realities of men's and women's lives, in the imposition of burdens on one sex that are not imposed upon the other, and in society's perception of the relative value of women's and men's work. Gender bias does not require deliberate intent and often arises from a lack of knowledge. The Commission's definition of gender bias recognized that all of us, whether judge, lawyer, or layperson, have biases by virtue of cultural conditioning and life experience. The challenge is to be alert to patterns of thought that reflect those biases and to prevent them from being translated into biased decisions and behaviors.

C. Commission's Research Methodology and Process

From the outset, the Commission knew that it could not conduct an independent research study as comprehensive as those done in many other states. First, because of its own lack of financial resources, the Court was unable to provide either funds or the loaned staff to enable the Commission to mount such an effort. Second, it did not seem sensible to "reinvent the wheel." The reports of the other states and federal circuits contain a wealth of data and relevant information on the issue of gender bias in the courts which could inform our work. In addition, there was substantial and striking consistency among the states with respect to the findings and conclusions on the issues studied. The Commission determined, however, that it was essential that we conduct some original research in Maine so that our findings and recommendations would reflect and address the experiences of Maine citizens in their dealings with *our* judicial system.

Working with social science researchers at the Muskie Institute of Public Affairs at the University of Southern Maine, who contributed their time and expertise to the Commission without compensation,

the Commission developed a research design that would enable it to study a number of issues that the Commission believed were important to Maine citizens. In accordance with the Court's order, the Commission members worked in small subcommittees—on Gender and Economics, Gender in the Courts, and Crime and the Courts—to identify the issues the Commission should focus on in doing its Maine research. Ultimately, twelve topic areas were selected.² Concurrently, the non-judicial members of the Commission developed a plan for raising private funds and in-kind contributions from lawyers, law firms, foundations, and other individuals and institutions interested in the unbiased administration of justice.

The Commission's efforts to raise funds and in-kind support were successful,³ but not successful enough to support our original research design. We decided to scale back the scope of the original Maine research, limiting ourselves to issues and methods that were less fund and labor intensive. For example, we recognized that we could not conduct original research on issues such as jury decision-making and damage awards, both of which would require intensive study of case files, personal interviews, and sophisticated sampling. The Commission's limited financial resources also precluded the use of written surveys, public hearings, and case-file audits as research methods.

The private fundraising (and a 1995 allocation from the Court) enabled the Commission to retain a part-time Research Coordinator who worked with us to revise the research design. The revised research design called for Commission members and other volunteers to summarize and analyze, in a systematic way, the findings and recommendations other states had made with respect to the eleven⁴ issue areas on which the Commission's work would focus. The Commission also collected demographic information on the gender characteristics of certain participants in Maine's court system, and court personnel policies and procedures. In lieu of more extensive and expensive research tools, the Commission decided to gather Maine data through the use of focus groups comprised of various court participants—litigants in family law and domestic violence matters, attorneys, judges, and court personnel. As discussed more

2. The issues initially selected for study were Representation in Contested Divorces, Custody and Visitation, Child Support, Alimony and Marital Property, Victims of Domestic Violence and Sexual Offenses, Treatment and Interaction of Participants in the Court System, Hiring and Promotion in the Court System, Criminal Sentencing, Alternative Dispute Resolution, Damage Awards for Lost Earnings, Demographics of the Judicial System, and Jury Decisionmaking.

3. The numerous individuals, firms, and institutions who made cash and in-kind contributions to the Commission and who gave generously of their time to help us complete our work are listed in Appendix B.

4. For the reasons mentioned above, the Commission eliminated the issue of jury decisionmaking.

fully below, a total of twenty-three focus groups were conducted, with the assistance of professional facilitators and volunteer notetakers, in three regions around the State in the period from March to November 1995.

The focus group data were analyzed in detail by a subcommittee of Commission members who reported their conclusions to the Commission. The Commission then compared what it learned in the focus groups to information on the same issue gleaned from our other data source, the reports of other states. The Commission's analysis of these data, glossed by the experiences and expertise of its members in the various aspects of the Maine judicial system, enabled the Commission to develop the observations and conclusions and, ultimately, the recommendations to the Court presented in this Report.⁵

RESEARCH DESIGN

The primary method of collecting the Maine data for this study was focus group research. As will be discussed below, to be fully effective as a research tool, focus group data need to be compared to at least one other data source. In this case, the other data source was the information contained in the reports of the gender-bias task forces of the twenty-six states, including the District of Columbia, and two federal circuits that had been published at the time of our study.⁶

A. Uses, Opportunities and Limitations of Focus Group Research

Focus group technique was first developed by Robert Merton and colleagues in the mid-1940's and has subsequently been refined into a powerful technique with commercial applications. Only recently have social science researchers begun adapting the technique to uses such as those served by this study.

Focus groups have been defined and described as

. . . an interview with a small group of people on a specific topic The focus group interview is indeed an *interview*. It is not a discussion, it is not a problem solving session. It is not a decision-making group. . . .

5. Because of time and other constraints inherent in the focus group method, certain issues could not be explored in the groups. These issues are noted in the various issue discussions in the body of the Report. The data underlying our conclusions and recommendations on those issues are derived exclusively from the reports of other states.

6. Since the Commission was established, eight other states have issued reports, and seven others are in the formation, development or data collection phase of their work. A list of the state reports reviewed by the Commission for purposes of this study is included in Appendix C.

The participants are typically a relatively homogenous group of people who are asked to reflect on the questions asked by the interviewer. Participants get to hear each other's responses and to make additional comments beyond their own original responses as they hear what other people have to say. It is not necessary for the group to reach any kind of consensus. Nor is it necessary for people to disagree. The object is to get high-quality data in a social context where people can consider their own views in the context of the views of others.⁷

In certain research settings, focus group data can be more informative than data collected by other methods, especially if the researcher is searching for an understanding of the levels of feeling and experience from small groups of persons similarly situated. With proper guidance from a focus group leader, group members can describe the details of complex experiences and the reasoning behind their attitudes about and responses to these experiences.⁸

Other advantages of focus groups include the opportunity to gather data more quickly and less expensively than would be the case if each respondent were separately interviewed, to interact directly with participants, and to capture experience in respondents' own words. Focus groups are flexible, in that they can be used to examine a range of topics with a variety of individuals in a variety of settings. In addition, focus group results are generally easy to understand.

The focus group technique also has limitations and disadvantages, many of which are bound up in the advantages just described. They include the following: (1) the small number of respondents and the "convenience nature" of focus group recruiting practices limit immediate generalization to a larger population; indeed, the willingness of participants to self-select into a one- to two-hour discussion may, in and of itself, indicate some difference from the broader population of interest; (2) the interaction of respondents with one another and with the group leader may be skewed by a dominant or opinionated participant; the fact that the responses from members of the group are not independent of one another may also limit the generalizability of results; (3) moderator bias, which can find expression, for example, in cues about what kinds of responses are appropriate or desirable, may skew results; and (4) the open-ended nature

7. "Focus Group Interviews," from Michael Quinn Patton, *Qualitative Evaluation and Research Methods* (2nd Edition), pp. 335-337. Sage Publications, Inc., 1990.

8. Martha Ann Carey, "The Group Effect in Focus Groups: Planning, Implementing, and Interpreting Focus Group Research," from Janice M. Morse (ed.), *Critical Issues in Qualitative Research Methods*, p. 226. Sage Publications, Inc., 1994.

of responses often makes compilation and interpretation of results labor intensive and difficult.⁹

B. *Organization of Focus Groups in This Study*

To effectively gather information on the issues selected for study here in Maine, the Commission decided that it needed to have input from the principal participants in the court system: litigants, attorneys, judges, and court personnel. Because almost half of the issues selected for study related to family law, our litigant cohort was comprised of persons who had been involved in such matters during the preceding two years. For the most part, the names of litigants invited to participate in the focus groups in Portland and Bangor were obtained from attorneys who handled family law cases. As noted below, this selection method meant that most of the litigants in these groups were represented by counsel. This limited our ability to explore the issue of access to representation as fully as we had hoped, as well as our ability to hear from *pro se* litigants. In Aroostook County, the names of family law litigants were supplied by court clerks from dockets over the preceding two years. The names of litigants in domestic violence matters were obtained from court lists and from various programs that work with victims of domestic violence.

The Commission decided to conduct separate focus groups for male and female litigants, lawyers, and judges to encourage open and frank discussion of gender issues among participants.

Nine litigant focus groups were conducted: three with male litigants in family law matters, three with female litigants in such matters, and three with female victims of domestic violence. All told, written invitations to participate were sent to more than 200 litigants in family law matters who resided in all corners of the State; those invited were equally divided between men and women. Twenty-one female litigants attended a focus group meeting, and seventeen of the males did so. Approximately 100 litigants in domestic violence matters received invitations and twelve of these attended one of the three sessions.

The attorneys invited to participate in focus groups were selected from lists of members of the family law and litigation sections of the Maine State Bar Association. These sections were chosen so we could gather data from attorneys who had experience in representing clients in either family law or criminal law matters, or both. The lists were sorted by geographical area, and the names of attorneys to be invited to a focus group in a particular region of the State were then randomly selected. The response to the Commission's invita-

9. David W. Stewart and Prem N. Shamdasani, *Focus Groups: Theory and Practice*, pp. 16-17. Applied Social Research Methods Series, Volume 20. Sage Publications, Inc., 1990.

tion was generally good. Of the sixty or so male attorneys invited, twenty-one were able to attend a focus group. Twenty of the seventy female attorneys invited to participate were able to do so. Virtually all of the invited attorneys expressed interest in participating, but scheduling conflicts made attendance impossible for some.

The Commission decided to invite only judges in the District and Superior Courts to participate in a focus group. Judges of the Maine Supreme Judicial Court were excluded for several reasons. First, there was concern about whether issues of hierarchy would interfere with open discussion. Second, to the extent that most of the issues selected for study related to actual courtroom practice and experience, the Commission wanted to ensure that all judicial participants could speak from their own recent experience. As noted above, because there were only nine female judges in the trial courts at the time the focus groups were conducted, all of them were invited to ensure an adequate response rate. Of those invited, six were able to attend. Invitations were sent to twelve male judges whose names were randomly selected from pools of names that were created to ensure a mix of geographical diversity and court level. Of the twelve male judges invited to the focus group, ten were able to attend.

Five focus groups were conducted with court personnel. Three groups were held with personnel in the clerks' offices: one with Clerks of the District and Superior Courts in Cumberland, Hancock, Penobscot, Piscataquis, Waldo, and Washington counties, and two with Assistant and Associate Clerks from various counties throughout the State. Those invited were selected at random from lists that provided geographical distribution and representation of both court levels. Again, the participation rate was excellent. Of the twelve Clerks invited, eleven attended. Twenty of the twenty-one Assistant and Associate Clerks invited to participate did so.

Two focus groups were held with personnel in the Administrative Office of the Courts (AOC): one for all managerial staff and one for nonmanagerial staff. Of the ten managers invited, nine attended; of the thirteen randomly selected nonmanagerial AOC personnel invited, ten attended. The court personnel focus groups were not intentionally segregated by gender, although by virtue of the demographics of the court system, all the participants in the clerks' meetings were female. The AOC meetings were attended by males and females; males accounted for eight of the nine participants in the managerial focus group, and females constituted nine of the ten participants in the nonmanagerial meeting.

With the assistance of volunteer professional researchers from the Muskie Institute, the Commission designed question clusters for each focus group cohort. To enable comparison of responses, the same or similar questions were asked of as many cohorts as possible.

Inevitably, however, some questions were appropriate only to specific cohorts. For example, there were questions that only judges could answer adequately, and others that were unique to litigants. A copy of the focus group questions asked by facilitators of each cohort is attached as Appendix D.

The research professionals retained by the Commission conducted focus groups during the period from late March to November 1995 at various locations around Maine. A list of the dates and locations of the various focus group meetings is attached as Appendix E [on file with the *Maine Law Review*].

The Commission recruited volunteers—primarily from the ranks of judicial law clerks to the Supreme Judicial Court and the Superior Court—to serve as notetakers in the focus group sessions. The notetakers were instructed about focus group notetaking techniques and the standards to be used in writing their reports. Not surprisingly, even with instruction, there was variation among the notetakers in approach and style. This variation was, to some degree, a limiting factor in interpreting focus group minutes.

C. *Analysis of Focus Group Data*

Minutes from all focus group meetings were gathered together into a single computer file. The responses of the groups were scanned and sorted to ensure that the responses of participants generally followed the topical arrangement of the questions being asked. (Focus group participants often drift across topics as they talk about their experiences and feelings.) The responses of all groups within each cohort (*e.g.*, male lawyers, female litigants) to each question were then clustered to make the data easier to analyze.

A subcommittee of the Commission was then formed to analyze focus group data. Each subcommittee member independently reviewed the written record of the meetings. They examined the record of each group to ascertain how participants in a single meeting responded to the questions, and compared the responses of participants in each group to the responses of participants from the same cohort who participated in other meetings. Finally, they examined how the same questions were treated across cohorts—that is, how lawyers, litigants, judges, and court employees answered the same or similar questions.

The subcommittee then met as a group to develop findings and consider their implications. The subcommittee did not consider findings from studies conducted in other states. Rather, its charge was to consider focus group data from Maine exclusively.

Meetings of the focus group subcommittee were facilitated by a professional researcher. The group organized its inquiry into the four broad areas that encompassed the specific topics selected for

study¹⁰: *access, treatment and interaction, process and outcomes, and hiring and advancement of court employees.* The reported experiences and views of focus group participants with regard to each of these areas were analyzed. The subcommittee considered questions such as the following: (1) What do respondents report? Do the reports suggest that gender is an issue? If so, does gender bias emerge as a critical factor in any way? (2) To what extent did different individuals, groups and cohorts see the same issues in the same ways? To what extent did they see things differently? (3) What level of confidence do we have in the reports of respondents? What other explanations might account for what they say they experienced? To what extent is it possible to generalize from the reported experiences of the people in these groups? (4) What do the reports mean? What can we conclude from what people said, and at what level of confidence? Where do we think the Commission must look to the reports from other states for a clearer understanding of what focus group respondents in Maine were saying?

The preliminary findings and recommendations of the subcommittee were developed into a report to the full Commission.

D. State Report Research

The process of extracting the voluminous data contained in the gender bias reports of other jurisdictions was an especially arduous task. The first step was to generate a summary of each state's data, findings, and recommendations with respect to the eleven issues that the Commission had selected for study. Commission members and other volunteers—for the most part, judicial law clerks—were asked to complete a detailed questionnaire that elicited information about each state's report on each topic. Every effort was made to ensure that the summaries of the state report information would be as accurate and uniform as possible. It was not feasible, however, to provide the same level of supervision that would have been present had professional researchers undertaken the task. Consequently, there was some variation in the style and quality of the summaries.

Once the state summaries were completed, a further synthesis was needed. The data from all of the states with respect to each of the topics selected for study were compiled by Commission members and other volunteers into issue-specific summaries. These issue-by-issue summaries enabled the Commission to analyze the findings and recommendations of the states on a particular issue, and then to compare and contrast those findings with the Maine focus group data.

10. See notes 2 and 4, *supra*.

E. Analyzing and Interpreting Results from All Sources

After the focus group subcommittee report and the state summaries were completed, the full Commission met numerous times to consider findings from both the state reports and the focus group inquiry. Two of these meetings were facilitated by a professional researcher who guided the Commission through a systematic consideration of the major questions framing the research. The Commission posed for itself the following questions:

1. In what ways, if at all, does gender influence access to representation? How do we account for gender-related differences with regard to access? To the extent differences exist, do they give rise to concerns about fairness? If so, are remedies at hand?

2. In what ways, if at all, does gender influence the way parties experience the litigation process? Is gender a factor in the way the court treats litigants, lawyers, and witnesses? Does it influence lawyers' behavior toward litigants, other lawyers, judges, witnesses, and court personnel? Is the behavior of court employees and court security officers influenced by gender to any significant degree? If gender does influence the litigation experience, what, if anything, ought to be done about it?

3. Does gender influence the ways in which legal matters are ultimately resolved? If so, what are the reasons for this? To the extent outcomes are influenced by gender, is this appropriate or is it the product of bias? If the latter, what remedies would we propose?

4. To what extent, if at all, does gender influence how court employees are treated by other participants in the court system? Is gender a factor in the hiring of court personnel, the assignment of work, or the opportunities for advancement? If so, what remedies would we propose?

The Commission took up each question in turn. As members proposed various answers, the group drew on all the materials at hand to consider: (1) Is this the most plausible answer to this question? Might other equally persuasive explanations apply? (2) Where in the materials is there supportive evidence for this or any other answer? How do the materials from other state reports speak to the question? How do reports from Maine focus groups square with these reports and with each other? (3) What level of confidence do we have in this or any other answer being proposed? (4) If we cannot answer the question with a high level of confidence, how do we propose to deal with the issue?

The findings, conclusions, and recommendations of the Commission that emerged from this inquiry are presented in the following sections of this Report.

STATE REPORTS AND FOCUS GROUPS

Having described the process that guided the Commission's inquiry, we now set forth what we have learned from the reports of the other states and jurisdictions and from the Maine focus groups.

Temporal Issues In evaluating the data from the reports of other jurisdictions and the Maine focus groups, the Commission had to struggle with several temporal issues. As noted above, many of the state reports were based on research conducted more than ten years ago. The Commission recognized that, because of the passage of time and the increased societal awareness of and sensitivity to gender issues, the findings and conclusions in many of the state reports might be out-of-date or inaccurate. We have tried to note this where it is appropriate or necessary.

The Maine focus group data presented a somewhat different temporal problem. Because of the discursive and interactive character of a focus group discussion, it is sometimes difficult to determine whether a particular comment or observation relates to a relatively recent event or describes something that occurred many years ago. Sometimes, the notes clearly identify the time frame of the events, but often either the focus group participants or the notetaker failed to provide a temporal context. Again, we have tried to note this where it is an issue.

Ambiguity in Focus Group Responses Another challenge confronting the Commission was how to deal with the often anomalous and ambiguous nature of the statements made by participants in the focus groups. The Commission recognized that the focus groups were dynamic discussions among human beings and that people are often inconsistent and may hold two seemingly contradictory views simultaneously. These ambiguities are, therefore, reflected in the following discussion of the focus group material.

A. Access

Access to the judicial system is obviously a threshold issue. If a litigant does not have the necessary means of access to the court system, primarily through representation by counsel, she or he is at a continuing disadvantage in pursuing or defending a claim. Because of financial constraints, the Commission looked only at representation of litigants in contested divorces.

Other States

Virtually all of the state reports found that women are less likely than men to be represented in divorce proceedings.¹¹ Although

11. Twenty-one of the twenty-six states whose reports were studied by the Commission either directly addressed the issue of representation in divorce or commented on the issue based on other information. Four states did not address the

many states have procedures that allow courts to award counsel fees, judges in these states either do not use the option or award insufficient fees. Interestingly, one state (Missouri) reported a sharp discrepancy in the perceptions of judges and attorneys regarding judicial willingness to order adequate counsel fees; although a majority of the judges stated that they were willing to make such awards, most attorneys questioned in a companion survey stated the opposite. The attorneys noted that even when judges granted awards, those awards were usually inadequate.

Another state, New York, which has a statute that requires fee awards, reported that judges have not carried out the mandate. In addition, the state reports noted that *pro bono* services cannot keep up with the demand.

The reports of many states also identify as a problem the inability to obtain expedited preliminary hearings for awards of either attorney or expert witness fees early enough in the process to ensure adequate representation.

Maine

In Maine, the issue of access appears to be more a function of economics than of gender *per se*.¹² The consensus of judges, attorneys, and litigants, however, was that women are disproportionately disadvantaged in terms of access—women generally have lower incomes and fewer financial resources, which translates into limited access.¹³

Judges generally agreed that economic factors influence access, and that the general lack of economic parity disadvantages women. They observed, for example:

- “Most of the requests for waivers of fees are filed by women.”
- “The poor are less likely to be represented. Women are poorer than men.”
- “Men in divorce control the purse strings.”

issue of access at all. For obvious reasons, the two Federal Circuit reports studied (District of Columbia Circuit and Ninth Circuit) did not address family law issues. The states that considered the topic drew their information from a wide variety of sources, including surveys, public hearings focus groups, literature, reviews of court decisions, information from existing programs, interviews, and similar methods. Some states used only one or two sources; other states used many.

12. In Maine, focus groups were the primary source of the data obtained for this and other issues. On the issue of access, most of the commentary came from bench and bar. In addition, the experience of Commission members as judges (serving at all levels of the court system), attorneys, and court personnel was brought to bear.

13. In the Maine focus groups, litigants were, almost without exception, represented by counsel. Consequently, they did not have the same opportunity to evaluate the impact of access to counsel that judges and attorneys did.

Some judges noted that access to representation seemed to be less of a problem in the Superior Court than in the District Court. A few judges also observed that in cases involving domestic abuse, women are more likely to be represented by counsel because of the intervention of advocacy groups.

Attorneys in Maine concurred that access is tied to economics. Women attorneys provided further evidence of problems that result from this economic disparity. They described women attorneys who carry women's unpaid bills in their own practices, and abusive husbands who prevented women from gaining access to legal and other services by withholding cash. One attorney noted that husbands sometimes exhaust what are essentially marital funds and use them to retain their own attorney. Some attorneys indicated that awards of attorney fees are not made routinely. In some cases, according to one lawyer's experience, awards are based on an incorrect standard of "bad faith" rather than the correct standard based on the financial circumstances of the parties. Attorneys may be unwilling to push the issue of fees "up front," preferring to wait to address the question of attorney fees until there is a judgment dividing the property.

Although virtually all of the litigants were represented by counsel, several women litigants raised the following concerns:

- Those who were represented in family law proceedings saw attorney fees as a major issue; they had to pay their attorneys a retainer "up front," creating significant burdens on their limited budgets.
- Many of their former spouses who were ordered to pay the women's attorney fees refused to pay, and the women had to forego collection because they could not afford the cost of an enforcement proceeding before the court.
- Having to go to court to compel enforcement of or to update the decree was usually more financially burdensome to women because they made less money than their male counterparts.

B. Process and Outcomes

The Commission also studied the court process and whether gender affects the outcome of their cases.

1. Family Law Matters

In its research and its deliberations, the Commission emphasized family law issues. For one thing, family law litigants were more accessible to the Commission¹⁴ than were litigants in some other matters. In addition, for many of Maine's citizens, their one experience

14. As noted in the Research Design section of this Report, the names of litigants were generally supplied by counsel, or, in some cases, by Clerks of the court.

with the judicial system often arises in connection with family law or other domestic matters. Family law issues were also dealt with extensively by the other states which provided the Commission with a wealth of comparative data. Family law cases, by their very nature and definition, provide unique opportunities to explore issues of gender parity and bias.

In addition to access, the Commission studied the issues of Custody, Child Support, Alimony, Division of Marital Property, and Domestic Violence. However, the focus group research also elicited general comments on judicial processes and procedures in the area of family law. The Commission believes that these comments and observations, although not always related to gender, are important and are summarized here before the discussions of specific issues.

Litigant Attitudes About the Process

In Maine, none of the litigant focus groups, regardless of gender, expressed complete satisfaction with the family law process. With few exceptions, each litigant's sole experience with the judicial processes was in the context of her or his own family law matter.

Generally, the only participants in the focus groups who reacted positively about the system and those involved in the system (such as their attorneys) were those who were satisfied with the outcomes of their own proceedings. Virtually all of the family law litigants were represented by counsel, so the Commission could not examine the differences in perception and attitude between this group and *pro se* litigants. Not surprisingly, the litigant perspective on the system is very different from that of judges, attorneys, and court employees.

Female litigants discussed what they perceived to be unsatisfactory treatment they received in the courtroom or from mediators. This is not to say that all participants felt that they received poor treatment. On the contrary, all of the participants in one group indicated that the judges they appeared before (whether male or female) were supportive. Other groups had more varied perspectives of their treatment by judges. Some of their observations are listed below:

- Male judges who gave husbands (in several cases) ample opportunity to present their side, but cut off the wives.
- Generally being treated more fairly in a Protection From Abuse (PFA) hearing than in the divorce proceedings.
- Being treated "harshly" by a judge and feeling that the judge would not have responded in the same way if her spouse had spoken out.
- A judge granting continuances for a male spouse's vacations (he was retired) but not making allowances for the female spouse who had to miss work.

With respect to their treatment by court personnel, most female litigants said they were treated well, with a few exceptions. Most of the women stated that court personnel (including clerks and bailiffs) had been very supportive of their needs.

The actions of other participants in the proceedings such as attorneys and mediators were the subject of complaint:

- A female mediator who did not permit a litigant to speak as freely as did her husband.
- A male attorney who did not take his client's concerns seriously, especially regarding child care.

With respect to mediators, some were considered to be fair and some were not (because they were condescending, for example).

Male litigants felt discriminated against in family law litigation because of their gender. Most of the male litigants reported that the perception that they would be adversely affected because of their gender begins outside the courtroom. They noted that friends, relatives, and others in their support networks frequently cautioned them against attempting to obtain custody, or presenting arguments pertaining to custody or visitation. Lawyers were apparently involved in perpetuating this perception, making adverse comments about the "system" or about specific judges, whether justified or not.

When asked whether they thought they had been treated fairly in their own divorce proceeding, the male litigants generally responded in the affirmative. Yet the following comments from many of the participants seemed to be at odds with this general response. For example:

- The "system" is biased in favor of women.
- Judges are "totally biased toward women."
- A litigant who gave sworn testimony in his case saw his spouse being allowed to provide unsworn comment on his testimony.
- PFA hearings are "biased totally in favor of women."
- Men are forced to prove "she's bad" rather than "I'm good."
- Men "don't go in on even ground."
- "My attorney warned me the system was biased toward women and I think it is true."

Male litigants also complained about mediators, district attorneys, and state workers:

- "Female DAs assumed I was guilty."
- "The child's counselor was biased against me."
- A litigant with custody was sought by the Department of Human Services for reimbursement after his wife fraudulently obtained benefits; they did not believe he had custody of the child.

- A mediator assumed the children were with the mother, and assumed the mother wanted the house.

There is clearly a significant level of dissatisfaction with the judicial process by groups of litigants of both sexes who feel that the system is not fair to them because of their gender.

Court employees noted that litigant dissatisfaction, often attributed to gender perceptions, was noticeable in domestic cases generally. They reported, for example, that a man would say, "If I were a woman, things might have been different." A woman would say, "If I were a man, things might have been different." The court employees assumed the litigants felt that way only because they had lost their case. There seemed to be a consensus in one group of court employees that, in divorce and other civil actions, judges are generally more sympathetic toward women.

a. Custody

Other States

On the issue of custody, almost all states report¹⁵ that mothers are awarded custody or treated by the court as the primary parent in the vast majority of cases. Most custody decisions are the result of an agreement of the parties and are resolved on an uncontested basis. Several states noted that fathers are often discouraged from seeking custody by their attorneys, based on the attorneys' own biases or on their perception of a bias in favor of mothers in the judicial system.

In contested cases, many states reported that the "tender years doctrine" is still applied on a *de facto* basis, and that mothers (particularly stay-at-home mothers) are favored in custody disputes.

The state summaries were unanimous that courts do apply different criteria to each gender, or apply criteria differently in determining who would be a better parent. In spite of the perceived bias in favor of stay-at-home mothers, many state reports observed that fathers' domestic service is overvalued in making custody determinations. Women with careers are considered less fit than similarly situated men. Many surveys observed that women are held to a higher standard than fathers concerning permissible sexual conduct and are judged more harshly than men. Some states concluded that abusive conduct by the father is not given sufficient weight and that the mother who leaves to avoid being battered is penalized. Other states reported that the relative financial positions of the parents are given too much weight to the disadvantage of women.

Maine

Litigants' Views. There is a frequently expressed perception among the many focus group participants that women are usually

15. Twenty of the state reports considered this topic.

treated more favorably than men in custody matters. Despite this general perception, women litigants feel the system is biased against them in a variety of ways. Litigants in one group complained that their husbands (or their husbands' attorneys) threatened to seek custody of the children as a "bargaining chip" even though their husbands did not really want custody. Another litigant expressed the belief that the system had not treated her fairly with respect to her children because she was a successful businesswoman and not a traditional housewife. Another felt disadvantaged because she was a "stay-at-home Mom."

Male litigants also feel discriminated against in custody matters, as their comments and stories made clear:

- "Society expects women to raise kids, not dads, and it is tough to prevail on custody matters as a father. It is like the presumption that the kids go to the mother."
- "Lawyers ask you what is wrong with the mother."
- Fathers' complaints that a psychologist or guardian *ad litem* recommended that custody of a child be awarded to a father, but custody was awarded to the mother.
- A judge who said that it was against his better judgment, but he would award custody to the mother.
- A judge who said that the litigant's daughter probably shouldn't live with her mother, but had no evidence that the father's home was better—or arguably, according to the litigant, that it was worse.

Men complain that shared custody arrangements do not ensure equal access to the children. They spoke of a desire to have custody and expanded access to their children.

Lawyers' Views. Although male attorneys generally stated that gender does not have a significant influence in the area of custody, they did provide some troubling examples of unequal treatment or stereotypical attitudes:

- Women have an advantage before the judge in custody and parenting issues—one group agreed that "the doctrine of maternal preference in custody awards is alive and well in Maine."
- Several judges were singled out as having said on the record in court that women are better parents and the child must be with the mother.
- Some had encountered difficulty in finding a guardian *ad litem* who would recommend custody be awarded to a father.
- Sometimes, when the father is the nurturer, it is viewed in a negative manner—he is too dependent on the kids; he is substituting, clinging, or dysfunctional.
- There is judicial skepticism about fathers' claims of nurturing, especially when the mother testifies to the contrary.

Female attorneys in one group acknowledged a traditional bias in favor of women in matters of child custody and support. In addition, however, most of the group felt that the bias had been "overcorrected." The cases they cited included the following:

- A case in which the judge awarded equal time to both parents in the custody order even though there had been incidents of domestic violence against the mother in the presence of the children.
- Mothers who are afraid to seek PFA orders for fear that occurrence of the abuse would be questioned when they faced custody hearings.

One attorney noted that her male clients generally perceive a difference based on gender, a view she does not share. The attorneys in one group had differing opinions about how being a working parent affects custody; some believe that men are disadvantaged although others believe they are not.

Attorneys representing female litigants commented that some custody claims by men are tactical assertions to achieve other ends, such as to gain an advantage on support issues. Interestingly, one male lawyer felt that one-quarter to one-half of all custody claims are tactical and that "all fathers" PFA petitions during litigation are tactical.

Judges. A male judge in a focus group noted, "Favoring women in contested custody of young children is something I think we all do." This comment met with general disapproval from other male judges in the group. One female judge noted that judges may read with "a more critical eye" a complaint brought by a male litigant who is seeking custody of children in a PFA hearing.

Court Employees. One person in the clerks' offices commented that able fathers do not get custody and the mother is heavily favored, although another noted that a lot of men get custody if the father proves abuse of some kind. Still another employee asserted that few men really want primary responsibility for the children. Court personnel generally reported that judges "bend over backwards" to be fair.

b. Child Support

Other States

There is consensus among the states that studied the issue that child support guidelines are beneficial.¹⁶ The reports of the states

16. All of the state reports available to the Commission studied this issue. One state generally found the guidelines adequate, with judges strictly adhering to them. Seven states either had no guidelines at the time of their studies or lacked information on their adequacy or effect. The seventeen remaining states had concerns about the adequacy of their guidelines, or found them to be adequate with some qualifications. At the time the reports studied were being written, many of the states were in

that had guidelines express the concern that the guidelines that were in place would not generate adequate awards, or that they were not being properly applied to ensure adequate awards. Many reports emphasized judges' lack of knowledge of the actual costs of rearing a child in a family split by divorce. Some states expressed concern that the support needs of unemancipated children over 18 years of age were not adequately addressed in statutes.

Other states report that women are generally the custodial parents, and to the extent that child support awards are inadequate, the penalty falls disproportionately on women and their children. There are indications that women's bargaining power in the process is limited. For example, women may agree to stipulations that result in lower child support awards in order to avoid custody battles.

In the states that studied deviations from child support guidelines, it is reported that deviations are more likely to be downward rather than upward, to the benefit of the non-custodial parent who is usually the father. In one state study of eighty-two cases,¹⁷ seventeen cases deviated upward from the guidelines, and sixty-five deviated downward. Some of the deviations are related to ability to pay and to special circumstances of the children, but many seem to be tied to preventing battles over custody.

Another area of concern in many states is lack of proper enforcement of awards. The states that studied this issue generally reported that judges are usually unwilling to use available contempt powers, especially incarceration, to punish non-custodial parents who fail to support their children.

Non-custodial parents who fail to pay the support ordered by the court are usually fathers, and the custodial parents are usually mothers. The other states report that since the mothers are likely to be economically disadvantaged throughout and after the divorce proceeding, they are often unable to hire attorneys to assist them in collecting the rightful debt. This problem is exacerbated by the failure of judges to assess costs and attorney fees.

Maine

In Maine, the Commission found fewer voices expressing dissatisfaction about child support, apparently because guidelines for child support are in place, are generally adequate, and are, for the most part, fairly administered. The participants in the focus groups did express some concerns, however.

Litigants. The issues that arise among litigants usually relate to whether income and assets are properly disclosed and weighed. En-

the process of changing standards or anticipated changing standards, pursuant to federal mandates.

17. This study was conducted in Minnesota.

forcement is a concern, but participants noted that the streamlining of garnishment of wages has resulted in more consistent payments. As with other family law issues, some male and female litigants in almost identical situations, who were dissatisfied with the outcome in their own case, blamed the result on gender. (These included situations where calculation of wages for child support were disputed by one or another parent.)

Women litigants expressed some specific concerns including the following:

- The use of guidelines in a specific case was unfair because a noncustodial spouse's high assets were disregarded in the calculation of the support obligation.
- The courts need a system to provide for recalculation of child support when necessary and to police enforcement of the decrees.
- Worksheets are unfair when they do not take into account the extra financial assistance families need when women re-enter the work force.

Male litigants voiced similar complaints. Some litigants noted that there was a need to revise support awards in cases where the children spent more time with the noncustodial father than with the mother.

Judges and Attorneys. Judges and attorneys expressed few opinions on this topic. One judge noted that a father who has custody of the children sometimes does not look for child support and does not seek an order requiring it. Some attorneys felt that women are allowed to avoid payments if they have a low income, or are unemployed or underemployed, but that a man may be expected to pay based on his earning potential.

c. *Alimony*

Other States

Many states report that permanent maintenance or support is seldom awarded, regardless of whether it is warranted.¹⁸ Judges generally have wide discretion which they do not always use to achieve equitable results. Long-term awards are seldom granted. When they are granted, the other states report that the awards tend to be inadequate and fail to equalize the standard of living between divorcing spouses.

The reports of the other jurisdictions that addressed the issue of alimony¹⁹ indicate that homemakers, caretakers of children, and

18. Of the eighteen states that discussed the issue of permanent alimony, seven indicated it was awarded (sometimes or occasionally) and eleven said it was rarely or almost never awarded.

19. Twenty-four jurisdictions addressed the issue of alimony.

those who have been out of the labor market, most of whom are women, are particularly disadvantaged. One state reports that men are not awarded maintenance unless they are disabled.

Judges presume a woman will enter the labor market, regardless of the factors of age, lack of training, or conditions of her marriage (such as long periods as a homemaker). This is a special problem for older homemakers, whose job skills are minimal and who are expected by judges to enter or return to the labor market at a time when most men are retiring. The other states report that courts fail to consider sufficiently the inequities in earning capacities of the respective spouses.

The states report that women are also economically disadvantaged in the area of "temporary" or "rehabilitative" support. The difficulties entailed in returning to the job market, the length of time needed to acquire marketable skills, and the inability to compensate for the years out of the workplace are factors which are not properly considered by judges in making "rehabilitative" awards. Even when they are considered, the preservation of a husband's standard of living is given priority over the wife's. According to the state reports, the equalization of the standards of living, especially based on pre-divorce standards, is not being achieved.

Maine

In Maine, focus group comments indicate that there does not seem to be a universal philosophical or doctrinal underpinning for the award of alimony; one attorney called it a "crapshoot."

Litigants. Various litigants expressed dissatisfaction with respect to alimony:

Women complained of the court's failure to award spousal or child support pending divorce unless there is a protection from abuse order. They expressed a belief of not being treated fairly, and of not receiving the alimony that had been awarded.

Men in the focus groups generally had not paid alimony. Those who had paid alimony generally considered it to be fair. Others complained about the amounts of child support and alimony awarded. Some had fought paying alimony or paid only \$1.00 a year (a nominal award to leave the issue of alimony open should there be a subsequent change in the parties' circumstances).

Attorneys. Male attorneys generally felt that gender did not have a significant influence on awarding alimony, and that alimony was awarded on specified statutory grounds. These attorneys did feel that there are cases where men should get alimony and do not. They also noted that men are awarded alimony today in situations in which they would not have received the award in years past, whether it was warranted or not.

Female attorneys voiced more concerns about the award of alimony to women. Their comments included the following:

- The perception that there are regional differences in Maine in awarding alimony; judges in the northern part of the state are unlikely to award alimony, whereas, in the south, it would be awarded in the same situation.
- Attitudes of mediators regarding alimony are sometimes based on stereotypical thinking, *e.g.*, the mediator who told a client not to worry about alimony because she was a young, pretty girl and could get remarried.
- There is a bias against women in awards because judges think the women should be working.

These attorneys clearly felt that alimony is a problem area which needs attention, and noted specifically that there is more parity for women in child custody than in the economic arena.

Court Personnel. There was little comment on alimony, but one group noted that there is rarely an alimony award in excess of one dollar.

Judges. One judge noted that there are few guidelines for alimony. Another indicated that, even though he believed that he was attuned to gender issues in alimony, three of his decisions had been reversed on appeal because the alimony awarded was too low.

Another judge said that, before making a final decision, she examined her reasoning to determine whether she was imposing her own sense of feminism on a female litigant in making an alimony determination, and wondered whether a different judge would award lifetime alimony rather than rehabilitative alimony.

d. Division of Property

Other States

Other states generally report²⁰ that there is an unequal distribution of marital property even in those states in which the law requires equal or equitable distribution.²¹ An even greater disparity exists with respect to the distribution of liquid assets with men receiving the vast majority. Assets associated with family businesses, as well as retirement accounts and pensions, are similarly distributed more frequently to men than to women.

Some states noted language reflecting stereotypical beliefs in judges' decisions regarding distribution of property. For example, certain assets were labeled women's assets and others as men's assets. At the time when most of the other state reports were being

20. Twenty states, of the reports studied, considered various aspects of this topic.

21. This is true even in community property states, such as California, where one would assume that the law is both clear and settled.

written, an educational degree acquired during the marriage was considered an asset in the distribution of property in only one state.

The reasons given for inequitable property distribution are varied. Many state statutes do not address the division of marital property directly. Judges are given wide latitude in some states in administering the distribution of assets, and their perceptions or biases, as well as their stereotypical ideas about men and women and property can skew the resulting distribution. Inappropriate assumptions regarding the likelihood of the woman remarrying or which assets should be entrusted to a particular gender appear to influence certain distributions. For example, men more frequently receive income-producing assets while illiquid assets such as the family residence are distributed to women.

Insufficient judicial and attorney education is identified in some state reports as a factor in the inequitable division of marital property.

Maine

In Maine, there was little consensus among litigants, and little commentary from the judges and attorneys on the issue of property division. It is clear that the standards for property division are not well understood and that "equal" and "equitable" are used interchangeably. Focus group participants often confused alimony and property division, talking about one as if it were a substitute for the other.

Litigants. Litigants hold widely diverging views on this topic, regardless of gender. In some of the focus groups, neither men nor women had any particular complaints. In others, they felt strongly that property was unfairly divided, and voiced specific complaints:

- A husband said he had paid for an asset and then had to buy it back from his wife.
- Another male litigant noted problems with home ownership and sale, including payments, taxes, and capital gains arising from an unwanted sale.
- If one husband had it to do over, he said he would lie about his assets.

Some male litigants considered the family assets to be their own, making such comments as, "I bought everything to begin with. . ." and "I owned a home when we got married. . . . I'd postponed the capital gains through three houses, and now I'm paying the capital gains on her \$42,000 [wife's share of the marital residence]."

Some women were equally displeased:

- Several agreed to "give up their 50 percent share of the property" because they wanted so badly to be out of the marriage.

- A litigant ended up with one third of the property and many of the family bills.
- In several cases, substantial pension assets of the husbands did not make it onto the worksheets.

Judges and Attorneys. Judges did not specifically discuss division of property. Male attorneys' comments varied widely (and in a contradictory manner) as to the relation of gender to the division of property:

- Property division impacted the less economically able of the pair (usually the woman) because the courts attempted to divide the property equally without considering earning capacity of both spouses.
- Women were treated well (or too well).

Female attorneys voiced several concerns, especially with regard to the "equal" versus "equitable" division of property. The "50-50" (equal) division is what many litigants think of as if it were the only legal basis for division. The "equitable" division, which is a more complex concept grounded in a variety of factors, may or may not meet the needs of the economically disadvantaged party.

- Sometimes the courts do take a long marriage into account and do not just "split down the middle."
- Problems still exist in the division of non-liquid assets (such as a residence) or with retirement benefits.

Female attorneys agreed that men remain better off economically after divorce than women.

2. *Domestic Violence*

Other States

The reports of the other states²² noted that the victims of domestic violence are "overwhelmingly" women.²³

The most consistent theme sounded in the state reports was that participants in the court system at the time the reports were written lacked knowledge of and sensitivity to the nature of domestic abuse. There was a failure on the part of lawyers, judges, court staff and law enforcement personnel to appreciate the complex dynamics of domestic violence. Another common theme was the failure of the system to treat domestic violence as seriously as other types of assault, and to criminally prosecute abusers. Failure to pursue criminal prosecutions was tied to women's perceived lack of credibility. Women's claims were often trivialized, and victims were blamed for provoking attacks. Even when protection from abuse orders were granted, they were often not enforced.

22. Twenty-three states studied some aspect of this issue.

23. In Nebraska, for example, the figure was 98%, in Connecticut 83%. It was considered to be a problem of "dramatic proportions" for women in New York.

Maine

The Commission noted a dramatic difference between the discussion of the issue of domestic violence in the state reports and the comments of Maine focus group participants. These differences likely relate to the passage of time between the studies done for the earliest state reports and the more contemporary data obtained in Maine, the participation of victim advocates, and the significant efforts undertaken by the Maine courts to educate judges and streamline procedures.

Victims. All of the victims of domestic violence who participated in the domestic violence focus groups were female.²⁴ The participants had a wide variety of experiences in their dealings with judges, mediators, attorneys (their own, as well as district attorneys), court clerks, police, and others involved in the system. Victims of domestic violence had nothing but praise for the work of victim advocates. Few participants had any complaints about the judges in their own cases.

Generally, victims of domestic violence who participated in focus groups had few complaints about the civil process. The criminal process, however, was still a matter of concern.

In regard to the civil process, the women generally agreed that the civil process for protection from abuse works properly and they were generally satisfied with outcomes. They noted that the procedures with respect to PFA proceedings were more satisfactory from several perspectives than the procedures in the divorce proceedings in which they were involved. These litigants were not always satisfied with the assistance of their attorneys, however. For example:

- One of the participants felt that her female attorney was not sensitive to her needs and discouraged her from fighting for what she thought she deserved.
- Another woman did not seek a PFA petition in the course of her divorce because her attorney told her that the judge did not approve of them. She obtained one later when the harassment continued.

Victims of domestic violence, for the most part, were not pleased with their experience in the criminal process. As witness/complainants in criminal actions, they felt that they were not treated as they should have been by prosecutors, police, sheriffs, and parole officers. For example:

- One participant believed that the District Attorney's office does not make domestic violence cases a priority.

24. Some male family law litigants said they were victims of domestic violence; others were accused by their spouses of being perpetrators of domestic violence. These participants discussed domestic violence in a family law litigation context and their comments are included in the portion of this section entitled "Family Law Litigants," *infra*.

- Several women thought that the jail sentences for abusers were too lenient and too often suspended.
- Plea bargains were made without consulting victims.

Police and sheriffs were singled out as needing to be more sensitive to victims. In terms of participants' interaction with court personnel, some victims reported that clerks were dismissive of *pro se* litigants. However, other participants reported that the clerks were helpful, thoughtful, and supportive. Victims of domestic violence who had been involved with this process more than once felt that court personnel today are much more sensitive to the issues of domestic violence than personnel were in the past.

Attorneys. A few male attorneys opined that judges tend to believe women in domestic violence situations almost all the time, and that some judges tend to be more protective of women witnesses. Some attorneys also believed that there appears to be a presumption that men are never the recipients of domestic abuse, and that if a man were to complain of battering, he would not be taken seriously. One focus group participant indicated that judges say to men, "You're big enough to take it." Another, however, described a case in which a very large man obtained an order against a very small woman.

Many of the female attorneys voiced concerns over re-victimizing the female victim, and gave examples of such treatment in civil proceedings for both protective orders and divorce. One attorney felt that PFA proceedings are themselves abused, and the judges are in a "hard spot" trying to distinguish real from phony cases. They related experiences ranging from attorneys using PFAs as "bargaining chips" to mothers who are afraid to seek such orders because of their reluctance to discuss the abuse situation in a custody hearing.

Court Personnel. Some court personnel believed that men are at a disadvantage if they are victims of domestic violence, noting that men have no advocacy groups or other support. Other court personnel perceive that some women abuse the system.

Judges. Male judges agreed that domestic violence cases required heightened scrutiny by judges. One male judge noted that the "clerks roll their eyes at men seeking PFAs. They take the attitude that "you ought to be able to take care of yourself." Another said, "I find myself more skeptical of male filed PFAs than female filed PFAs." As noted above, one female judge stated that judges may read with a more critical eye a complaint brought by a male litigant who is asking for custody of children in a temporary PFA case.

Family Law Litigants. The male litigants who discussed the issue held strong views. They believed that they are not treated seriously when they bring PFA petitions. One litigant, however, who complained to the police because of his wife's actions, was able to have her removed from the home. Men who are not domestic violence

victims, but who have been accused of abuse in these proceedings, believe that their spouses inappropriately used the PFA process against them. These litigants did not believe that there was any legitimacy to their spouses' complaints.

3. Sentencing

Other States

Other states²⁵ report that, although women are perceived by attorneys and judges to receive more lenient treatment in sentencing, little statistical data is available to prove or disprove this perception.²⁶

Several states found that women who are primary caretakers for children receive lighter sentences or are more likely to receive an alternative sentence. Conversely, several states found that female juveniles committing status crimes are treated more harshly than male juveniles; that women are incarcerated more often than men for less serious offenses, or longer than men for the same offenses; and that there is a tendency to punish women more harshly than men when they commit "masculine" (violent or drug use) crimes.

Several states noted an interest in adopting gender-neutral sentencing guidelines, and at least two jurisdictions—the District of Columbia and the Ninth Circuit—have already adopted such guidelines.

Maine

Court Employees' Views. There was a perception among some of the personnel in the court clerks' offices that women were indeed given lesser sentences than men would be given for the same crime. A focus group participant referred to one case in which she believed that an unequal standard had also been applied in a bail hearing. For the most part, such comments were followed by caveats, or speculation concerning the particular status of defendants:

- The mother was the custodial parent (and therefore children would be hurt by the mother's incarceration).
- A woman would have a less significant criminal history than a man.
- Pregnant women and women with children will receive lighter penalties.

25. The topic of sentencing was studied by twenty jurisdictions, including one federal circuit.

26. A few states conducted empirical studies or used statistical data from other sources. For example, Georgia collected statistics on sentencing disparities. However, the Georgia report cast doubt on its own data because, as the report noted, the prior criminal histories and circumstances of the particular offense were not taken into account because they were not available.

- Judicial leniency may be driven by available resources rather than gender; “Judges may be equally sympathetic with single fathers, but there are fewer prison beds for women.”

The general consensus in one group was clear that overall, judges treat people fairly and they work very hard to be impartial.

Attorneys. Male attorneys perceived that bias (or at least differential treatment) in sentencing did exist. The consensus in one group was that women criminal defendants get “a better deal” than men. The reasons for this included “cultural reasons” (women as traditional family caretaker or lower economic status), and not because of “intentional bias.” Some attorneys also felt that women were “less culpable” (committing financial crimes for their boyfriends rather than violent crimes) and that women are more sympathetic on the witness stand.

Female attorneys, several of whom indicated that they did not have criminal law experience, had only a few comments in this area. They noted reasons for lighter sentences, but also acknowledged the possibility of unintentional bias:

- Judges consider the fact that women have children at home (an argument that a man might not be able to use successfully).
- Judges use creative sentencing options for women because jail is not a good place for women.
- Judges resist seeing women as “bad.”
- Judges question women about the availability of child care (to a degree that they would not do for a male).

One participant, who had pointed out the inequities of questioning women and not men about child care arrangements, also felt that there was *no* overall trend to sentence men more severely than women.

Judges. Male judges generally agreed that gender does play a role in sentencing, but believed that there are valid reasons for this:

- “If a woman is the primary caregiver, you punish the children when you punish her.”
- “If there is no jail for female offenders in your county she’ll be punished disproportionately by being shipped out to another county.”

They also expressed their feelings subjectively:

- “I have a tougher time sentencing a woman than a man.”
- “Women judges are harder on defendants than their male counterparts.”

Female judges did not comment on sentencing *per se*. They noted, however, that there may be some disparity in favor of females in some phases of criminal proceedings:

- Female defendants get deals (plea agreements) that male defendants would not get.
- Females seem to “get a break on OUI drop downs” from district attorneys.
- Game wardens seem to treat male defendants more severely.
- Criminal charges and bail are lighter for females (e.g., “If you consent to the search, I won’t charge your wife.” “If you plead to this, I’ll drop the charge against your wife.”)

4. *Sex Offenses*

The Commission’s study of the impact of gender in the prosecution of sex offenses and sex offenders was derived solely from the reports of other jurisdictions. This information could not realistically be obtained from focus groups and the resources to seek other data were not available.

All of the state reports that studied sexual offenses²⁷ dealt with acquaintance rape. The general theme was that acquaintance rape is perceived differently than stranger rape and was not considered as serious an offense by police, prosecutors, judges, and jurors as stranger rape. The state reports indicate that the majority of rapes are believed to be committed by acquaintances, and that such crimes are underreported. Acquaintance rape is often not prosecuted because it is difficult to prove.

Stereotypical attitudes prevail in many states. Women are frequently perceived to be lying. One state gives lie detector tests to rape victims. Less than half of rape reports result in an arrest. Plea bargains and reduced charges are common. Sentences inadequately address the seriousness of the crime, particularly where the perpetrator is known to the victim.

The system can be hostile and invasive for the victim. Although investigation and treatment of victims have improved in some states, it is generally perceived that the victim can be further victimized by the system. Victim blaming is common.

5. *Alternative Dispute Resolution*

Other States

Despite the increasing use of alternative dispute resolution (ADR) in legal controversies, only two jurisdictions—Vermont and the District of Columbia—addressed the relationship between gender and ADR. Those jurisdictions found that mediation presupposes equal bargaining power, but that in family disputes the reality is that power is often unequally divided. Both jurisdictions recommended further study of the issue.

27. Seventeen states discussed this topic.

Maine

In Maine, where mediation is compulsory in contested family law cases involving children, there was some commentary in the focus groups on the mediation process. There was no discussion of other forms of alternative dispute resolution, however.

Litigants. Some male and female litigants were satisfied with the mediation process and others were dissatisfied.

Several male litigants commented as follows:

- One litigant felt bias all the way through the proceedings. The mediator assumed the children were with the mother and it took a while for the male mediator to adjust to the idea that the father had the children. The mediator also assumed the wife would want the house.
- A mediator wanted to know if the father was sure that he wanted custody of the children (which he eventually got after an uphill battle).
- Another mediator was thought to have his own agenda and wanted the children to go to the mother.

Some female litigants also experienced what they perceived to be gender bias:

- One felt bias on the part of the mediator (female) when her husband was allowed to speak more freely than she was.
- Another felt the mediator (male) was condescending to her and felt she should not be divorcing her "nice" husband.

Attorneys. Some male attorneys commented on the performance of mediators as follows:

- Mediators, like judges, treat clients differently, especially in regard to custody.
- Mediators are often older men and treat women in a more "traditional" way because of the way they have been socialized.
- Younger mediators do a better job of treating persons in a gender-neutral manner.

In one group, female attorneys reported that mediators do treat litigants differently based on gender. Certain mediators (including females) have "old-school" ideas about parenting.

6. *Damage Awards*

Other States

Most jurisdictions did not address this issue, and only a few did so comprehensively.²⁸ The rather uniform conclusion of the states that

28. Illinois, Iowa, Massachusetts, and the District of Columbia had the most comprehensive examinations of these issues. Several other states discussed the issues and made recommendations based on the more limited information available to them.

did study the issue is that men do receive larger damage awards than women for lost earnings for similar kinds of work. The explanations given are that men generally earn more; women's economic contributions to the household are undervalued; men work in more highly-paid jobs than women; and gender stereotypes affect the size of the awards. Studies with jurors in some states using hypothetical questions found that jurors of both sexes awarded more money to men than women.

In general, states report that women are apt to receive higher damage awards for injuries affecting physical attractiveness or "marriage potential," while men are apt to receive higher awards for injuries affecting physical strength. Jury instructions may not adequately guard against gender-based assumptions and may in fact perpetuate and reinforce them.

Maine

The focus groups generated little information on this topic. The issue was addressed by a few attorneys in the focus group discussions. One group of female attorneys agreed that men will sometimes get more money for psychological damage because "hysterical" women are commonplace whereas a man's claim of emotional damage is taken seriously. One female attorney felt that men make out better on lost wages, and women are awarded more for pain and suffering.

In one group of male attorneys, there was agreement that awards for disfigurement and soft tissue/chronic pain are likely to be higher for women, and that men are likely to receive higher awards in personal injury cases primarily because of their higher earnings. Women are perceived to receive higher awards than men in sexual harassment cases. In another group of male attorneys, there was also a perception that cosmetic injuries bring higher awards for women and economic loss judgments were greater for men. The attorneys perceived that emotional distress awards were higher for women.

C. Treatment and Interaction

Other States

Many of the reports of other jurisdictions were written in the 1980's and reflect the treatment and interaction realities of that time. Several of the more recent reports indicate that incidents of gender-biased conduct are decreasing. Nevertheless, most report that female attorneys still experience gender-biased conduct by judges, attorneys and courthouse staff. This conduct includes gender stereotyping, inappropriate address, sexual innuendo, hostility towards "aggressive" female attorneys, intimidation, condescension,

interruptions by male attorneys, and comments on physical appearance of female attorneys. Female witnesses are often seen as less credible, and their assertions are often given less weight. Male expert witnesses are perceived to have more authority and are also seen as more credible.

Assertive advocacy by females is viewed unfavorably whereas similar conduct by male attorneys is not—indeed, such conduct by males is expected and valued. Male judges have sometimes used inappropriate language when addressing or discussing female attorneys, witnesses, or parties, but rarely do so in addressing or discussing males. Opportunities in legal education and professional advancement, whether through formal or informal networks, are very often controlled by males to the detriment of females. Females are asked to respond in job interviews to different questions than are males (concerning their salary expectations, opportunity for raises, and their ability to control or cope with their family responsibilities).

Discriminatory treatment of females by male attorneys and judges is more likely to occur in informal interactions than within the courtroom. There is a sense that overt, intentionally demeaning conduct comes more frequently from male attorneys than from male judges. Judges, however, tended to exhibit bias by being less respectful to female attorneys or by giving less attention to their legal work or to their clients' claims.

Discriminatory treatment in the judicial system has had unfavorable consequences for women. Women attorneys are given fewer court appointments and are paid smaller fees than men for their court-appointed work. The clients of women attorneys lose confidence in their attorneys and in the justice system as a whole when this discrimination is observed first-hand. Women attorneys' clients and their claims are treated less seriously than male attorneys' clients.

Maine

Because of the discursive and interactive character of a focus group discussion, it was sometimes difficult for the Commission to determine whether a particular comment or observation related to a relatively recent event, or described something that occurred many years ago. Sometimes, the notes clearly identify the time frame of the discussion. But, often, either the focus group participants or the notetaker failed to provide a temporal context. This was especially true with respect to the issues dealt with in this section. The Commission has tried to take this into account in presenting this summary of the focus group discussions.

The consensus among Maine focus group participants was that gender affects the way some participants experience the judicial pro-

cess. All focus group participants generally agreed, however, that inappropriate speech and behavior from male judges, male attorneys and court personnel was a greater problem in prior years. Women attorneys in one group, for example, stated that “things were much worse ten years ago” and that there has been great improvement in how women attorneys are treated in the court system. One woman attorney, who offered specific examples of the inappropriate behavior she experienced in the past, emphasized that she has not experienced similar problems for a long time. Several women court personnel recounted incidents with judges (touching or inappropriate language), but indicated that these happened “many years ago.” Women judges felt that women clerks used to be disdainful of women attorneys and judges, but reported that for the most part this attitude is gone.

Female Attorneys. Women attorneys reported that women participants in the judicial process are not subjected to the kind of overtly biased treatment that they might have received in the past. Nevertheless, they did provide examples of more subtle, gender-biased behavior on the part of judges, court personnel, mediators, witnesses or parties. For example:

- Judges who assume familiarity with a woman attorney by using her first name.
- A judge who asked a woman physician, who was an expert witness in a recent court case, if he could call her by her first name; she said she preferred to be called “Doctor”.
- Mediators who address men by their titles and women by their first names.
- Police officers who make “inappropriate comments” about women litigants.
- A male litigant in a divorce proceeding who called his spouse’s female counsel “honey” while testifying.

Women attorneys generally expressed a belief that a gender-biased atmosphere and inappropriate expectations surround them. Their perceptions of what they face include the following:

- Women “must be careful to be nice” while men can get away with being indifferent or even short with people.
- Women must not appear to be weak, but at the same time cannot be too aggressive.
- Women must deal with the existence of the “old boy network” and its exclusionary atmosphere.
- Women (especially younger ones) find that they often are not readily identified as attorneys by others in the courthouse.

One female attorney described the following incident:

A pregnant attorney asked for a continuance because her expert witness was unavailable. The judge, thinking that the attorney wanted the continuance because of her pregnancy,

responded to her request by saying, “Won’t you just ask for another [continuance]?” The attorney said no and explained that the expert witness would be available at all other times. The judge said, “Well, you’re pregnant aren’t you, or is that just a fat dress you’re wearing?”

Male Attorneys. Although male attorneys generally stated that they did not see inappropriate speech and behavior as a significant problem, they did provide examples of such speech and behavior on the part of other male attorneys, court officers and police:

- Attorneys using belittling terms about women.
- Bailiffs and sheriffs treating female court staff members “in a way that one would think would offend a woman.” (The attorney wondered whether women in such situations have to modify their perceptions of what is offensive in order to remain in their jobs.)
- “Offensive” treatment of women by police officers.

One male attorney stated that he himself refers to women as “dear” or “babe.”

Some male attorneys also commented that female attorneys have to work harder to be recognized or to achieve “a certain subjective eminence”; that some attorneys (male and female) assume that to be a good trial attorney you have to be a man; that male attorneys are part of an “old boy network,” and do not deal with male and female attorneys in the same way. Others stated that judges (male and female) are “more deferential” to female attorneys, and female attorneys use it to their advantage.

Litigants. Inappropriate behavior was noted by litigant groups as well. One litigant felt “demeaned” when the male judge appeared to treat her female attorney with less respect than he treated the opposing male attorney—for example, by addressing the female attorney by her first name while referring to the male attorney as “Mr. _____.”

(Many of the concerns of male and female litigants with respect to treatment and interaction arise in connection with family law matters. These comments were described in the preceding section of this Report.)

Judges. Female judges provided specific current examples of inappropriate conduct by attorneys and court officers, including:

- Lawyers calling female witnesses by their first names.
- Court security officers demonstrating a lack of sensitivity, telling dirty jokes or “putting moves” on female jurors.

Female judges also discussed the ways in which stereotypes and generalizations about women and men affect them in their judicial role. For example:

- In counties in which more than one woman judge presides, lawyers, litigants and clerks will refer to them all as “the woman judge.”
- A male attorney was overheard telling his client, “What else would you expect from a woman judge?”

Several male judges concurred with the female judges that bailiffs and court security officers often acted in an inappropriate manner.

Court Employees. Some female court employees noted that certain male attorneys were “rude and nasty” toward female judges or made inappropriate comments about female judges that they would not make about a male judge. They also noted certain inappropriate behavior by bailiffs and other court officers who, for example:

- “rated” the attractiveness of female jurors,
- harassed a female court worker,
- used terms of endearment toward female court personnel such as “dear” and “honey,” and
- “talked down to” or addressed women in a condescending manner.

Court employees and female judges also pointed out various ways in which stereotypical thinking about women affects court personnel. For example, lawyers frequently assume that male employees are managers and female employees are “mere secretaries.”

Treatment of Witnesses

Male attorneys and female judges both observed that male expert witnesses are regarded by jurors as more authoritative than female experts, except for child psychiatrists or psychologists. They also noted that attorneys are less likely to “tear apart” a woman expert on the stand, perhaps due to the perception that a woman expert is less believable.

Intervention

Intervention to end inappropriate language or behavior was discussed by some of the participants. Judging from the comments made in the focus groups, intervention is not common, and the manner in which it takes place is varied.

Attorneys. Some attorneys provided examples of intervention by fellow attorneys. One described a case in which one male attorney commented snidely on a pregnant attorney’s letter to the court regarding her due date and another male attorney “went out of his way” to disassociate himself and other male attorneys from the remark. Several women attorneys felt that they could not file complaints against judges, and that it was best to handle situations on their own.

Judicial Intervention. One female attorney discussed an incident in which her opponent’s closing argument played on stereotypes of

females. The judge chastised opposing counsel in chambers in the presence of the attorney.

In another case, a male attorney described a judge's intervention in a situation in which a male attorney was questioning a woman witness about taking her car to a service station for an oil change:

The attorney made the generalization, "You girls take your cars in to get the oil changed." The woman judge coughed in an effort to make the attorney aware of his "faux pas." The attorney did not get it. His next question also began with a generalization: "You girls . . .," and the judge interrupted him. "You girls?" she asked. The attorney responded, "Excuse me. You ladies" The judge just put her head in her hands. (The narrator noted that the attorney lost the case.)

D. How Court Employees are Treated (Hiring, Assignments and Advancement)

Other States

Sixteen of the other jurisdictions studied or made recommendations with respect to the recruitment, hiring and promotion of court personnel. Many of those reports indicate that while women comprise a substantial majority of all court employees, the positions they hold tend to be the clerical and other lower-paid positions. Men, on the other hand, hold a substantial majority of the top- and mid-level management and administrative positions.

Only four states²⁹ studied the recruitment process for court personnel and all of those focused exclusively on judicial recruitment. Only five states³⁰ studied the issue of advancement and promotion of court employees in depth, although eleven other reports addressed the issue to some extent.

The states that studied the issue of advancement and promotion of nonjudicial court employees found that most court employees did not believe that gender was a major factor in promotion or advancement. However, some women did feel that gender was a major factor in their not getting a promotion. One state reported that although gender did not seem to affect the extent to which women receive promotional opportunities in clerical or probation officer positions, it may play a role in attaining management positions. Another state reported that some male supervisors have discouraged women from applying for supervisory or management positions, that women are impeded by inconsistently applied promotion criteria, and that male supervisors act as mentors for male employees more frequently than they do for women.

29. Georgia, Hawaii, Missouri, and Vermont.

30. Iowa, Massachusetts, Nebraska, Utah, and the District of Columbia.

With respect to the judicial recruitment process, the general theme in the reports is that gender is a significant factor in the judicial selection process. Women generally are not well represented on judicial nominating boards or commissions. Women may be excluded from the informal networks that influence or determine judicial nomination or appointment. In states where judges are elected, female judicial candidates have more difficulty raising campaign funds than male candidates do. One report noted a lack of formality and uniformity in the selection process as a negative factor. Another opined that judicial rotation to different locations conflicts with family responsibilities and may be a barrier to women's service on the bench.

Five jurisdictions discussed affirmative action policies. Of those, four had such policies in place.

Maine

The charge to the Commission from the Court focused on the development of recommendations that the Court itself could implement. For this reason, the Commission studied only hiring and advancement of court employees who are not judges. Judges, of course, are nominated by the Governor and confirmed by the State Senate.

With respect to hiring and advancement of court employees, the Maine experience mirrors that of other states. Men dominate the managerial and higher-pay categories and women hold the overwhelming majority of the lower-paid positions.³¹

Clerk's Office Employees. Although clerk's office employees recognize that their offices are filled almost exclusively by women, they do not attribute this fact to gender bias on the part of the court system. Some explained that "it's a woman's job"; that "men do not like this kind of work," "men would not like the emotional part of this job." Others stated that men don't want to work with women because they are afraid of being accused of sexual harassment and that the environment (apparently meaning predominantly female) would be difficult. Other focus group participants attributed the small number of men in clerks' offices to limited opportunities for advancement, *e.g.*, "the playing field is limited," and to low salaries and pay freezes, *e.g.*, "a man could not support his family on the salary."

The participants in one focus group expressed contradictory views on the availability of advancement within the court system. Some noted that gender does influence their opportunities for advance-

31. See judicial department employment data in Appendix F which contains various demographic data on participants in Maine's court system [on file with the *Maine Law Review*].

ment, but other members of the group said that no changes are needed because there is no gender problem.

There was consensus in one group that women in the clerks' offices make less than if men also did the job—there would be “more money and less work if men were there.” Members of that focus group also stated that women are not promoted from within the judicial branch, and that court administrators all come from outside the system. They noted that there are four regional court administrators, all of whom are male.

AOC Nonmanagerial Employees. These employees uniformly expressed the view that gender is a pervasive influence in hiring and advancement of personnel in the Administrative Office of the Courts (AOC).

Focus group participants expressed concern about what they perceive to be “discrimination” against in-house promotions. They stated that opportunities for advancement from nonmanagerial to managerial positions are generally not available to in-house nonmanagerial employees, most of whom are women. The group generally believed that there might be more advancement opportunities for women if more women were in managerial positions. They noted that (at the time the focus group was held) there was only one female manager.

Participants presumed that the failure to promote from within the AOC was attributable to the fact that the managers prefer to hire persons with whom they feel comfortable, i.e. males. One participant noted the lack of an affirmative action plan as a symptom of a general lack of concern over issues of gender equity. Other participants concurred that top managers simply do not consider these to be important issues.

Focus group participants also complained about the lack of training opportunities for nonmanagerial employees. They noted that the lack of funds for training makes in-house advancement more difficult. To the extent that funds are made available, they only allow the employee to remain current and do not permit advancement. Members of the focus group also complained that more money seems to be available for training of judges, most of whom are men. One participant suggested, however, that this might be a function of a pro-judicial bias, rather than gender bias.

AOC Management Staff. At the time this study was conducted, the management staff of the AOC was comprised of nine men and one woman.³² On the question whether gender influences the way people are treated in the workplace, the consensus of the group was that differences in the way staff members are treated are attributa-

32. As of October 1996, the AOC managerial staff consisted of eleven positions, four of which were held by females. See Appendix F, Judicial Department Classification by Gender [on file with the *Maine Law Review*].

ble more to class and power than to gender issues. Participants in the group recognized that although rank-and-file employees may perceive that gender influences the way in which they are treated by their superiors, this perception is based primarily upon the fact that because the nonmanagerial employees are female they "probably believe" that the different treatment is gender-based.

The fact that the AOC managers and court administrators are predominantly male was attributed to the higher academic credentials and other qualifications required for such positions which generally preclude promotion to management positions from within the court system. The group members expressed the hope that the situation will improve because more female employees now hold quasi-managerial positions and will therefore be in a better position to apply for the top managerial positions as they become available. Participants in this group did note, however, that the general applicant pool for recent openings for management positions in the AOC, from all sources, is evenly divided between males and females.

In discussing why most employees of the clerks' offices are female, the group concurred that the applicant pool for those positions is predominantly female. They noted that the jobs often require clerical skills and that the female candidates are generally the ones that possess those skills. Few men apply for the positions and those that do are often unqualified because they lack good clerical skills.

OBSERVATIONS AND CONCLUSIONS

A. *General Observations and Conclusions*

1. *Judicial System as a Reflection of Culture and Society*

The Commission recognizes that Maine's judicial system cannot be viewed in isolation from broader societal forces and mores. The court system is an institution within our society, and as such it reflects and, to some extent, incorporates the very preconceptions and myths in which gender bias is rooted. It is not surprising that cultural attitudes that hold one gender to be stronger or weaker than the other, to be more or less nurturing, or more or less competent would find their way into the judicial process. The difficult issue, of course, is how to eliminate the potential for injustice that is inherent in the acceptance of such attitudes.

Through its research, the Commission has become aware of some of the ways in which the judicial system perpetuates existing gender-related inequalities and imbalances. It is, for example, more likely that male litigants in family law matters have greater economic power and access to financial resources than do female litigants. It is also more likely that male litigants in such cases will have greater

knowledge about the nature and extent of family assets than will their wives. These inequalities and imbalances do not originate in the court system, but rather are the result of broader economic and cultural factors. In some cases, however, the application by a court of otherwise neutral laws and procedures serves to reinforce the gender-related inequalities and power imbalances that the litigants bring to court with them. This means, for example, that, absent a procedure that affirmatively addresses the imbalance, female litigants in family law matters are less likely than their spouses to be represented by counsel and are less able to make informed decisions with respect to support, custody and division of marital property.

The complexity of these issues means that the court system cannot simply rely on gender-neutral processes and procedures to remedy the actual or perceived inequity or unfairness. The Court will also need to develop and institute procedures that will identify and, if necessary, correct the underlying cultural and economic inequalities and imbalances that accompany the legal matter presented.

2. *Gender Bias and Disparate Impact*

In the course of its study, the Commission also learned that it was important to distinguish between unfairness and injustice that results from gender bias *per se* and that which arises from the application of otherwise gender-neutral laws and procedures that has a disparate and adverse impact on only one gender. As noted in the Introduction, gender bias exists when decisions are made or actions are taken based upon preconceived or stereotypical notions about the nature, roles and abilities of women and men, rather than upon an evaluation of each individual and his or her situation. With respect to a few issues, such as custody awards and sentencing in criminal matters, the Commission found that there is a perception, whether or not based in fact, of gender bias in the way decisions are made.

On most issues, however, the research revealed inequities and unfairness that are not attributable to bias *per se*, but are the result of other, more complex factors. The Commission found that on balance, women were more likely than men to be adversely affected or otherwise disadvantaged by these factors. Women, for example, are more likely to be caretakers of children and to have more limited earning capacity than men because of their family role during a marriage. Therefore, any inequities or disparities in the application of support laws will have a greater impact on women than on men. Likewise, it is more likely that wives will have more limited economic resources and more limited access to family resources than their husbands do. To the extent that women are unable to obtain sufficient funds early in the litigation process to pay a retainer for an attorney, they are disadvantaged in their access to legal representa-

tion and to the courts in family law matters. Victims of domestic violence are overwhelmingly women. Any failure to enforce civil or criminal statutes dealing with protection from abuse will have a disproportionate impact on women.

3. *Lack of Resources in Judicial System*

The Commission's deliberations also underscored that the chronic lack of resources in the judicial system tends to exacerbate some of the problems discussed above and to compound any gender-related unfairness that exists in the system. Many of the Commission's recommendations call for procedures and approaches that demand more time and effort from already overburdened judges and other court personnel. As discussed more fully below, the Commission believes that the perception of gender bias with respect to custody decisions would be alleviated if judges were able to spend more time explaining to litigants the factors that were taken into account in making the decision in their particular case. Similarly, the adverse effects of gender-related economic and power imbalances in divorce would be mitigated if judges were able to give greater scrutiny to settlement agreements and the like.

B. *Issue-Specific Observations and Conclusions*

The Maine focus group data, supported by the findings of the other jurisdictions that have studied the issue of gender bias in the courts, clearly show that gender influences nearly every aspect of the way in which people experience the court system in Maine. Gender affects whether and how a litigant gains access to legal representation in family law matters, the ways in which the various participants in the system deal with one another, the outcomes of various matters, and the operation of the court as an employer.

To say, however, that gender has a pervasive influence on the judicial process and the court system is not necessarily to say that this influence results from any institutional gender bias or even from the gender-biased behavior of individuals. The Commission did not have the resources to document whether such bias exists. Nevertheless, we have identified a few areas in which there is a widely-held *perception* that gender bias affects the ways in which people are treated and the outcomes of various legal matters. More common than any perception of gender bias, however, are the Commission's findings of gender-related inequality and unfairness that are attributable to the application of otherwise gender-neutral laws and procedures that, for various reasons—economic, cultural, and societal—adversely impact one gender more than the other. These are explored through the four research questions that framed the Commission's study.

I. Access

The data from the Maine focus groups and the findings of other jurisdictions lead the Commission to believe that gender adversely and unjustly disadvantages women in their access to legal representation in family law matters.

The general perception, in Maine as in other jurisdictions, is that women are less likely than men to be represented by counsel in family matters, and that economic factors rather than gender bias tend to account for this gender-related difference. Women typically have lower incomes than their husbands and are less likely to have knowledge of and access to the family's financial resources. As a consequence, they are often unable to pay a retainer for an attorney at the beginning of a divorce.

The Maine statute authorizes the award of attorney fees for the prosecution or defense of a divorce action and establishes a procedure under which litigants can petition for fees at the commencement of the action. Without representation of counsel, however, it is unlikely that a litigant will be aware of this possibility. The Commission believes that the inequity is exacerbated by the fact that the financially disadvantaged spouse, usually the wife, must ask the court for fees from marital funds which are often in the control of her husband who does not have to petition the court to use marital funds to retain an attorney.

Attorneys in Maine perceive that attorney fees are not awarded routinely. There is also an indication that some judges may apply an incorrect legal standard of "bad faith," rather than assessing the financial circumstances of the parties in considering a request for attorney fees. The Commission has no empirical basis for determining how frequently attorney fees are sought or awarded. To the extent that fees are not awarded early in the process to the financially disadvantaged spouse to obtain counsel, the Commission believes that the impact falls disproportionately upon women and unjustly disadvantages them in obtaining effective access to the courts.

2. Process and Outcomes

It is broadly perceived that the gender of a litigant influences the ways in which some matters are resolved, including family law matters, sentences that are meted out for some crimes, and damages that are awarded for personal or other injuries. There is no empirical evidence in Maine or elsewhere to support or refute these perceptions. Nevertheless, whether they are real or imagined, the perceptions that decisions and outcomes are gender biased must be addressed by the courts. Failure to address and correct the perception of unfairness will impair the court's authority and undermine the public's attitude toward the justice system.

Family Law Matters

The Commission believes that the small number of complaints from focus group participants about *child support* generally, or any perceived gender bias in connection with child support, is the result of the application of relatively neutral mechanical formulas. To the extent that the guidelines provide for awards that are adequate and are administered fairly, they engender a sense of justice in the process. The Commission notes that the statutory guidelines have not been revised since they were adopted in 1988.³³ Several focus group participants and some members of the Commission questioned whether the existing guidelines ensure an adequate level of support for children.

To the extent that problems do exist in the area of child support, they relate to enforcement of child support orders, and the level of scrutiny given to requests for downward deviations in child support awards. Other states report a reluctance on the part of judges to use their contempt powers to punish noncustodial parents, usually fathers, who fail to support their children. This reluctance has an adverse effect upon the custodial parents, who are usually women, and their children.

The Commission also believes that courts may not give sufficient scrutiny to requests for downward deviations from the child support guidelines to ensure that adequate child support is not bargained away inappropriately.

With respect to *custody*, male litigants in Maine and elsewhere unanimously perceive a systemic bias in favor of mothers in custody proceedings. This perception is apparently reinforced by the advice they receive from their lawyers, their families and friends who caution them against attempting to obtain custody or presenting other arguments pertaining to custody and visitation. Some lawyers perpetuate this perception of bias by making adverse comments about the "system" or the alleged gender bias of a specific judge in dissuading their clients from seeking custody. Some of the participants in other focus groups also indicated that they thought that women were favored in child custody matters, although they often noted that in many cases the facts and circumstances favored the mother as the custodial parent.

Interestingly, despite the general perception of bias in favor of women in custody matters, women litigants apparently feel that the system is biased against them as well. They complain about the tactical use of the custody petition as a bargaining chip in the settlement of support and property matters.

33. See Appendix G, Child Support Guidelines Table [on file with the *Maine Law Review*].

It appears that primary custody is awarded to mothers more often than to fathers. The Commission has no empirical basis for determining whether this outcome is the result of actual gender bias in custody proceedings or because mothers, more often than fathers, have been the primary caretakers of the children prior to the divorce litigation. Nevertheless, the widespread perception of bias among male litigants and some other focus group participants is a troubling one. Failure to address this perception may convert a perception of bias into a self-fulfilling prophecy. Men may not seek custody in appropriate cases, and the judicial system will be blamed for the result.

The Commission believes that the perception of bias in custody matters exists, in part, because judges may not have sufficient time to fully explain to litigants *all* the factors that were taken into account in making the custody decision in the particular case.

With respect to *alimony*, the findings from other jurisdictions indicate that permanent alimony is rarely awarded, that temporary alimony awards often do not accurately reflect the transitional needs of the economically disadvantaged spouse, and that alimony awards generally fail to equalize the standard of living between divorcing spouses. Because the economically disadvantaged spouse is usually female, the financial hardships and inequities that result from the absence of a rational and consistent approach to spousal support have a disproportionately adverse effect on women.

The findings from the Maine focus group data are consonant with those of other states. It appears that alimony awards are often not pursued even in appropriate cases. The Commission believes that this is true, in part, because of widespread confusion about what alimony is and what it ought to be. Focus group participants, including lawyers, often discussed alimony and division of marital property as if they were the same thing.

In Maine, as in other states, the philosophical and legal underpinnings for the award of alimony are no longer clear. There have been significant changes in the cultural norms surrounding alimony (for example, greater emphasis on "rehabilitative" alimony rather than lifetime support). There seems to be little consensus about what is fair and reasonable. This failure of agreement and the combination of power and economic imbalances between spouses, the use of economic factors as bargaining chips in the proceedings and broad judicial discretion³⁴ lead to perceptions, whether or not based in fact, of gender bias in the award of alimony.

34. A review of the cases of the Law Court evaluating alimony indicates that the discretion allowed trial-level judges is considerable, and that extreme abuse of discretion and mathematical miscalculations are normally the only grounds for overturning an award.

Although the alimony statute offers parties and their lawyers a broad array of reasons for pursuing an alimony award, it lacks a clear statement of the purpose of alimony. In addition, it provides no standards to assist judges in weighing the various factors to be taken into account in making an award.

The ambiguity and confusion with respect to alimony carries over into the *division of marital property*. Other states report that even when equitable distribution of property is required by statute it is rarely achieved, and that when the distribution is equitable on a dollar basis, men tend to receive a greater share of the liquid assets and those associated with businesses that provide a continuing income stream to the recipient. This works to the long-term disadvantage of the economically dependent spouse who is generally female. These concerns were echoed in varying degrees in the Maine focus groups.

The Commission believes that many of the problems in this area arise because the spouses have unequal access to information about marital assets at an early stage in the proceeding. The economically dependent spouse often does not have an accurate picture of the family's financial position or of his or her rights in a divorce proceeding. This lack of information is compounded to the extent that the dependent spouse is unable to obtain representation of counsel at the outset of the proceedings. In addition, in cases involving unrepresented litigants, judges do not have sufficient time or resources to carefully scrutinize settlement agreements to ensure that economic and other power imbalances do not adversely affect the already economically disadvantaged spouse.

Domestic Violence

The focus group data lead the Commission to believe that the civil process for dealing with domestic violence matters is working well and in general is fairly administered. The female victims of domestic violence in the Maine focus groups are more satisfied with the civil process in Maine than were similarly-situated women in the other jurisdictions that studied this issue. There is, however, a perception that male victims of domestic violence are not taken seriously and that, although they are few in number, male victims may have a harder time obtaining a Protection from Abuse (PFA) order than a similarly situated female would. Male litigants and court personnel reported that advocacy services are not generally available to male victims of domestic violence.

Female victims of domestic violence in Maine are less satisfied with the criminal process, however. Like victims in other jurisdictions, they complain about insensitivity on the part of prosecutors and other law enforcement personnel.

Focus group participants in a variety of cohorts reported that the PFA procedures, which provide for a speedy resolution of custody

and other issues, have sometimes been used inappropriately as a tactic in resolving other family law matters. It appears that the PFA process is abused less often than it may have been in the past, as attorneys and judges have become more aware of the issue. The Commission believes, however, that the inability of litigants to obtain a speedy custody hearing in absence of a PFA petition is a major contributing factor to whatever systemic abuses may occur, and that expedited access to the courts on other grounds needs to be made available.

Sentencing

There is a perception in other states that women receive more lenient treatment in sentencing than do men. Participants in Maine focus groups share this perception although many indicated that the differential treatment is frequently based on the specific circumstances of a given case. Female defendants, for example, are often custodial parents. In Maine, there are also fewer correctional facilities for women that are close to their homes.

There is little statistical data to either support or rebut the perception of gender bias in favor of women in sentencing. The data that are available do not account for factors other than gender that might affect the sentence meted out to a defendant. For example, currently it is difficult to assess whether the circumstances of the crime itself, or the criminal backgrounds of the male and female defendants are comparable.

Sexual Offenses

The Commission's study of the impact of gender in the prosecution of sexual offenses was derived solely from the reports of other jurisdictions. Those reports suggest that acquaintance rape has, at least in the past, been perceived by prosecutors, judges and juries to be a less serious offense than stranger rape, has been underreported and often not prosecuted. It also appears that plea bargains and reduced charges are common in acquaintance rape cases and that sentences often do not adequately address the seriousness of the offense.

Although some states reported that the investigation and treatment of rape victims have improved in recent years, these reports also indicate that victim blaming is still common.

Alternative Dispute Resolution

Few of the other jurisdictions have even addressed, much less studied, the impact, if any, of gender bias in alternative dispute resolution (ADR). Some of the comments made in the focus groups with Maine litigants reflect a perception that gender-based myths

and preconceptions may come into play in the family law mediation process.

In light of the increasing use of ADR to resolve legal controversies, the Commission believes that the Court needs to take steps to ensure that gender-related bias does not infect the process. It would be unfortunate, indeed, if gender bias was successfully eliminated from the courts only to reappear in other dispute resolution forums.

Damages

The findings from other states suggest that gender may influence the damage awards received by men and women for various types of injuries. The limited information collected from the Maine focus groups on the subject of damages also suggests that there is a perception that gender affects the amount recovered for particular injuries. These findings suggest the need for a deeper inquiry into this issue, with the benefit of adequate resources.

3. Treatment and Interaction

The Commission believes that gender affects the way some participants experience the court system. This is consistent with the findings in Maine and in the other states. Although there has been a substantial amount of recent progress, problems in treatment and interaction were reported by all cohorts in the Maine study. Although the overtly biased treatment that occurred in the past has virtually disappeared, more subtle gender-based behavior on the part of judges, court personnel, mediators, witnesses and parties continues. Subtle, gender-based behavior may be no less damaging than the more overt forms of discrimination that existed in the past. Discriminatory behavior, whether subtle or overt, affects the ability to ensure that all participants in the court system are treated fairly.

Although attorneys and judges reported instances of intervention when gender-based speech and behavior occurred, these instances reflect the difficulty in intervening. The Commission believes that judicial intervention is appropriate and indeed required under the Maine Code of Judicial Conduct; however, how and when to intervene is not a simple matter. The nature and timing of the intervention by a judge will be affected by, for example, whether the behavior occurs in front of a jury and the rights of a defendant in a criminal case might be affected or whether the behavior occurs in a conference in chambers. It is equally as complex for an attorney to intervene, whether the biased behavior is that of a judge, another lawyer, or a participant.

4. *Hiring and Advancement of Court Employees*

The pattern of employment in the court system in Maine and elsewhere reflects two primary societal patterns: 1) that there is something called “women’s work” and that such work is more poorly compensated, and 2) that the higher paying positions in the hierarchy of the court system are dominated by men and virtually all other levels are dominated by women. Although there is no evidentiary basis for concluding that these patterns reflect conscious gender bias on the part of the Maine court system, the Commission is troubled by the existence of a hierarchy in which men are almost uniformly at the top.

The Maine focus group data reflect some dissonance in the perceptions of nonmanagerial and managerial employees about why the highest level of the AOC management is predominantly male. Nonmanagerial employees attribute the phenomenon to the fact that there are few opportunities for advancement within the AOC and that the managers prefer to hire persons with whom they feel comfortable, *i.e.*, males. Management employees, on the other hand, attribute the small number of female managers to the fact that the AOC managerial positions require academic credentials and other qualifications that women in quasi-managerial positions within the AOC do not possess. They note, however, that the general applicant pool for management positions, which presumably includes many applicants from outside the court system, is evenly divided between males and females.

These comments raise at least two concerns. The first is whether the Court is doing enough to enhance opportunities for internal advancement within the AOC and the judicial department in general. The second is to explain why, if the general applicant pool for managerial positions in the AOC is fifty-fifty male to female, so few of the managers are women. Higher educational and other qualifications may explain why women in the nonmanagerial ranks do not rise to management positions, but they do not explain why women candidates in the broader fifty-fifty applicant pool are not qualified.

We recognize that positions in the Administrative Office of the Courts are relatively few in number and that they are subject to limited turnover. These realities make it all the more difficult to draw conclusions about the pattern, and they also make it more difficult to effect change. The Commission notes that since the focus groups were conducted there has been a reorganization at the AOC and that there are now three female members of the ten-person AOC management team. Women occupy the positions of Budget Officer and Financial Operations Officer (these two positions were formerly a single position), and Director of Human Resources. The remaining seven positions including the position of State Court Adminis-

trator, and all four Regional Court Administrator positions are held by males.

RECOMMENDATIONS

Access

1. To ensure parity between the spouses in family law litigation, judges must award adequate attorney fees during the pendency of the litigation, taking into account the issues in dispute and the capacity of each spouse to pay attorney fees and related expenses from non-marital funds. The Court should create a mechanism that will ensure early determination of need and allow prompt awards of attorney fees and costs to the economically dependent spouse.

2. The Court should require the parties to make full financial disclosure early enough after the commencement of a family law proceeding to ensure that both spouses are adequately informed about the amount and nature of the marital assets.

3. Family law financial forms should be simplified to ensure that, regardless of the educational level of the litigant and whether he or she is represented by counsel, the forms can be completed and the necessary information secured.

4. Family law litigants should be provided with educational materials regarding the divorce process and the issues involved therein, including marital assets and the right to request the award of attorney fees for the prosecution or defense of a divorce. Such materials, which may be presented in writing, on videotape or by court personnel or volunteers, should be made available prior to or at the commencement of divorce proceedings to reduce any imbalance in information between the spouses.

5. The Rules of Civil Procedure should be amended to require that motions pending in family law matters be acted on in a timely manner. Although domestic violence cases should continue to take precedence, spouses who are not victims of domestic violence and their families should not be subjected to excessive delays in interim determinations.

6. Education should be provided to judges and attorneys regarding the economics of divorce, the impact of economic factors on litigants and children, and the procedures for requesting and awarding attorney fees at the commencement of the proceedings to ensure access to representation and the courts.

Family Law Matters

1. General

1. Additional resources should be made available to enable the courts to provide timely hearings and provide appropriate allocation

of court time on motions pending, divorces and post-divorce motions.

2. Consideration should be given to the establishment of an organizational scheme or system that would allow single justice assignment in family law cases to foster continuity, predictability, early compliance, and timely enforcement of court orders.

3. Seminars and continuing legal education programs in the area of family law for judges and attorneys should contain a component dealing with issues of gender fairness, including disparate impact, where appropriate.

4. The Court should develop procedures and the Legislature should make resources available that will permit judges to examine all cases involving an unrepresented litigant to ensure that power imbalances within the family framework, including economic dominance, are not being used to affect custody, alimony and child support awards. The Court might consider, for example, the use of magistrates or other judicial officers whose job it is to work with the parties and make recommendations to the judge.

2. *Custody*

1. Standards that apply to the award of custody should be clear, explicit, and set forth in the statute. For example, "best interests" of children could be further defined by the Legislature to require judges to consider, as one of the factors to be taken into account in making the determination, who has provided primary psychological parenting throughout the child's life. Primary psychological parenting includes such activities as (a) providing for the child's physical needs; (b) regularly supervising daily activities; (c) arranging and providing day care; (d) attending to health needs; (e) attending to educational needs; (f) teaching basic skills; (g) sustaining emotional growth; and (h) providing stability and reliability in the child's life.

2. Judges, mediators, lawyers, and litigants should be educated about all the considerations involved in a custody determination, the importance of standards in evaluating custody issues and the gender-neutral application of those standards.

3. Resolution of custody disputes through the adversarial process is, among other things, damaging to the psychological well-being of children and parents. The Court should explore making greater use of nonadversarial forums, in addition to mandatory mediation, for consideration of custody matters. Such forums are likely to facilitate custody arrangements that are more consensual and less damaging to children and parents.

4. In light of the heightened sensitivities of parties, judges should endeavor to provide an explanation to litigants of all the factors taken into account by the judge in making the custody determination.

3. *Child Support*

1. Child support enforcement should be given priority (and not limited to families receiving Temporary Assistance for Needy Families, formerly AFDC). Judges should be educated as to the efficacy of using significant penalties (including incarceration) to enforce child support payments.

2. Hearings on child support enforcement proceedings should be expedited. Judges should not permit proceedings for modification of child support awards to be used to delay proceedings for enforcement of existing child support orders, except in unusual circumstances and for good cause shown.

3. Downward deviations from child support guidelines should be scrutinized with care to ensure that the deviation will not adversely affect the minor child or the child's primary residential parent.

4. The statute establishing the child support period should be amended to permit a court to require support for the child up to age 21, taking into account the likelihood of the child becoming self-supporting and the ability of the child to be self-supporting in fact.

5. The Legislature should conduct continuing and realistic evaluations of child support guidelines to account for the actual costs of child raising and to reduce income disparity between custodial and non-custodial households.

4. *Alimony and Division of Marital Property*

1. Although the alimony statute offers parties and their lawyers a broad array of bases for pursuing an alimony award, the Legislature should consider amending the statute to provide a clear statement of the purpose for alimony to guide the court in weighing the various factors.

2. The Legislature or the Court should study whether acrimony and family disruption in divorce matters could be mitigated through the adoption and use of appropriate guidelines for the award of interim, temporary and permanent support of a spouse, similar to those used in determining awards for the support of children.

3. The Legislature or the Court should consider the appropriateness of a rebuttable presumption for the award of permanent alimony to the economically disadvantaged spouse in cases of marriages of long duration.

4. Judges should not permit requests for modification of an alimony award to delay proceedings for enforcement of an existing award except in unusual cases for good cause shown.

5. Judges and attorneys should be educated regarding the nature of the assets in a marital partnership to be divided on divorce. Of particular concern are issues regarding the distribution of income producing and non-income producing assets, liquid and illiquid as-

sets, and the disparate economic consequences to women and men of the dissolution of the marriage and the division of marital property.

6. Judges and attorneys should be educated regarding the factors, such as lost career opportunities, that can be considered in the division of property and the award of alimony. In addition, judges should be provided with information that will enable them to make more realistic assessments about whether and how long it will take the economically dependent spouse to re-enter the labor market and what that spouse's earning potential is.

Domestic Violence

1. Education of all involved in the protection from abuse process—judges, prosecutors, other attorneys, court officers, clerks, and police—should be continued to ensure that there is support for domestic violence victims and their families and that appropriate action is taken in each case. We applaud the substantial judicial education that has already been done in this area.

2. The Court should make every effort to ensure that males who are victims of domestic violence receive the same support and consideration that females receive under the same circumstances. The Court should encourage the development of a volunteer-led advocate system to serve male victims of domestic violence who may not be served by existing programs.

Sentencing

1. To the extent that such factors as the needs of children for a parent or the effect of incarceration on a family are considered by a sentencing judge, these factors should be considered for both men and women.

2. At the next Maine Criminal Justice Sentencing Institute, the issue of possible gender disparity in sentencing should be explored.

3. State policies and practices should ensure that jail and prison facilities, probation, alternatives to incarceration, placement, access to rehabilitation opportunities, educational programs, and early release programs are equivalent for women and men.

4. As the court system increases its capacity to store and analyze computerized data, the Court should include data that will permit an analysis of the role of gender in sentencing decisions.

Sexual Offenses

1. More education should be provided to prosecutors, lawyers, and law enforcement officers to dispel myths and stereotypes about rape in general and acquaintance rape in particular, to assist victims of sexual offenses, and to increase the effectiveness of investigations.

We note that Maine's judges have recently participated in a three-day conference on this issue.

2. Judges should examine plea bargains in sexual offense cases to ensure that the seriousness of the offense is recognized.

Alternative Dispute Resolution

1. Judicial education programs developed to deal with issues of gender bias should also be made available to mediators and those involved in pilot projects on alternative dispute resolution.

2. Those responsible for recruiting mediators and attorneys involved in pilot projects on alternative dispute resolution should be sensitive to the need to include women in these roles.

Damages

1. Jury instructions and juror-education videos and handbooks should be developed to ensure that jury decisionmaking is as gender-neutral as possible.

2. Jurors should be educated, through orientation materials and instructions, that gender is an impermissible basis for making decisions regarding damages for lost earnings.

3. Jury instructions should be supplemented or amended to specifically address the measure of damages to be awarded to plaintiffs who are homemakers.

4. An in-depth study should be conducted into whether gender influences the award of damages in Maine cases, including cases of sexual harassment and gender discrimination in which plaintiffs are generally female.

5. A discussion of the impact of gender bias and gender-based stereotypes in the award of damages should be included in all relevant judicial and continuing legal education programs and materials.

Treatment and Interaction

1. The Court should formulate a statement of policy declaring that gender-biased behavior in the courts by judges, attorneys, court employees, and court security officers has no place in the courts of Maine. This statement should be posted and distributed with other information that the courts issue from time to time. All new judicial appointees and new judicial department employees should receive the statement when they commence work.

2. The Court should explicitly communicate in jury orientation programs the necessity to avoid gender bias and stereotypical thinking in jury interactions and decisionmaking.

3. The Court should revise all existing rules, forms, policies, court orders, and correspondence so that the language is gender-neutral. The Court should also develop procedures to ensure that

all new court documents, opinions, and publications use gender neutral language. The Legislature should review all statutes to ensure that the language is gender neutral.

4. The Commission believes that the issue of judicial intervention in court proceedings is significant and requires deeper discussion among members of the bench and the bar. The Court should create discussion forums for judges and attorneys to consider the issue of intervention, including how to deal with inappropriate, gender-based interaction and treatment, and appropriate modes of intervening in various settings.

5. The Court should create an informal process for handling inappropriate interaction and treatment by judges based on gender that do not constitute grounds for discipline under the Code of Judicial Conduct.

6. All judges should receive informational materials and continuing education and training on issues of gender bias including the following:

- a. identification of gender bias in the courtroom and its consequences for attorneys, litigants, witnesses, and court employees;
- b. how to avoid the appearance of gender bias in the performance of their duties;
- c. effective techniques to prevent inappropriate conduct on the part of attorneys and court employees and to take appropriate corrective action if it occurs;

7. Similar informational materials and training on gender bias should be provided to all court employees.

8. The Court should urge the Maine State Bar Association, the Maine Bar Foundation, the Maine Trial Lawyers Association, Maine Trial Judges Association, and local and county bar associations to adopt the statement condemning gender bias and to stress their commitment to eradicate bias. These associations should print the statement in their membership publications and establish mechanisms for the education of their members regarding bias in the court system.

9. The Court should urge the University of Maine School of Law to review and, if necessary, revise teaching and curricula to promote the elimination of gender-based conduct on the part of attorneys. In particular, clinical programs should be reviewed with respect to their roles in training new attorneys for the courtroom.

Hiring and Advancement of Court Employees

1. Hiring practices should be monitored to eliminate gender factors in personnel decisions and assure equal opportunity in hiring and promotion.

2. The Court should undertake a continuing review of qualification requirements and pay scales to ensure that judicial department employees are being paid equally for equal work.

3. In its recruitment efforts, the Court should make an affirmative effort to ensure that women are fairly represented in the applicant pool for all positions in the court system, and that there is equal opportunity for women and men at all levels.

4. The Court should review recruitment and hiring procedures in the judicial department and make efforts to ensure that both male and female employees are included in the screening and interviewing process.

5. The Court should encourage hiring and advancement from within the court system. This effort would extend to advancement within the Administrative Office of the Courts and opportunities for advancement from other positions, including clerks' offices, into the Administrative Office of the Courts for qualified employees. The Court should encourage opportunity for advancement by making on-the-job training and other appropriate educational opportunities more accessible to employees. To this end, the Court should consider whether greater use of flex-time scheduling would enable employees to fulfill their job responsibilities and get the education and training they need for advancement within the court system.

6. The Court should review its training programs for all managerial and supervisory employees to ensure that it includes information about gender bias and disparate impact.

7. The Court should develop appropriate grievance procedures to deal with complaints of gender bias and encourage employees to utilize such procedures.

8. All judicial department personnel manuals and handbooks should be reviewed to ensure that gender neutral language is used.

9. The Court should review current policies and procedures on job postings to ensure that notification is given to employees throughout the court system, and that it is timely enough to allow employees to deliberate and make application for the position.

10. The Court should make the findings and recommendations of this Commission available in written form to all employees of the court system.

Implementation

Finally, the Commission recommends that the Court establish an advisory committee that will be charged with implementing these recommendations as directed by the Court.

APPENDIX A

STATE OF MAINE
SUPREME JUDICIAL COURT
ORDER ESTABLISHING THE COMMISSION ON
GENDER, JUSTICE, AND THE COURTS
Effective January 1, 1993
Docket No. SJC-136

On August 4, 1988, the Conference of Chief Justices adopted a resolution urging positive action by every chief justice in the country to address gender bias and minority concerns in the state courts and further urging each chief justice to establish separate task forces devoted to the study of (1) gender bias in the court system and (2) minority concerns as they relate to the judicial system. Resolution XVIII, Conference of Chief Justices (August 4, 1988). The resolution was based on the belief that bias of any kind has no place in the Judiciary, that all participants in the judicial system should be treated fairly, and that the judicial system should operate free of discrimination against any person on the basis of race, sex, color, national origin, religion, age, or handicap.

In 1989, the Maine State Bar Association's Committee on the Status of Women Attorneys requested that the Supreme Judicial Court of Maine establish a Gender Bias Task Force. In June of 1989, Chief Justice Vincent L. McKusick appointed an exploratory committee of judges and lawyers and a bill was submitted to the Legislature seeking funding to support a study of gender bias in Maine's courts. Because funding was not available, no further formal action was taken.

Task forces have since been established by many states' chief justices or highest courts and, in some instances, by bar associations "to collect and disseminate information on the existence of gender bias in decision making and court interaction" and "to propose reforms and recommend mechanisms to institutionalize those reforms." ABA Commission on Women in the Profession Report to the House of Delegates, June 1988, pg. 10, n. 10. At least 32 states, the District of Columbia, Puerto Rico, and two federal circuits have established task forces. Each task force has been charged with examining the nature and extent of gender bias within the court system and making appropriate remedial recommendations after gathering information from judges, court staff, attorneys, educators, and members of the public.

Because the existence of gender bias has now been well documented nationally, it is feasible to address this problem in Maine by concentrating on education and remediation. To achieve the goal of ensuring that all participants in the justice system are treated fairly and that the justice system operates free of any bias based on gender

or minority status, the Supreme Judicial Court hereby establishes the Commission on Gender, Justice, and the Courts.

THE COMMISSION ON GENDER, JUSTICE, AND THE COURTS

Mandate: To identify attitudes and behavior operating within the Maine judicial system that either reflect gender bias or may be perceived to reflect gender bias and to make appropriate remedial recommendations.

The Commission will consider how gender affects the treatment of women and men in the legal and judicial environment and will develop a program to ensure that gender-based myths, biases, and stereotypes do not affect judicial decision making.

Structure: The following persons are hereby appointed the chair and members of the Commission on Gender, Justice, and the Courts:

Professor Colleen A. Khoury, Chair

Hon. Robert E. Crowley

Rita Desjardins, Clerk

Peter J. DeTroy III, Esq.

Patrick F. Ende, Esq.

Michele Garwood, Deputy Clerk

Catherine A. Lee, Esq.

Hon. Kermit V. Lipez

Nancy Wanderer Mackenzie, Esq.

Steven D. Silin, Esq.

Hon. Jack O. Smith

Patricia M. Stevens, Esq.

Joyce A. Wheeler, Esq.

Hon. Caroline D. Glassman, Associate Justice, Supreme Judicial Court, will serve as liaison to the Commission.

The Commission will oversee the study of gender bias and the development of recommendations for the elimination of gender bias, and it will assist with implementing the recommendations. The Commission will draw upon the resources and skills of the affected community and may be assisted by such volunteers and staff as it is able to arrange. The day-to-day work of the Commission will be accomplished through three subcommittees:

– The Subcommittee on Gender and Economics will assess gender bias in the treatment of certain types of civil cases, focusing particularly on how gender bias may affect the size of monetary damages, alimony, child support, and the division of marital property and will

propose appropriate remedial measures, including an educational program, to address any bias that might be found.

– The Subcommittee on Gender in the Courts will assess gender bias in the treatment of litigants, witnesses, jurors, and lawyers by those who work in the courthouse, as well as bias in the appointment of attorneys as counsel, guardians *ad litem*, and the like, and will propose appropriate remedial measures, including an educational program, to address any bias that might be found.

– The Subcommittee on Crime and the Courts will assess the treatment of participants in the criminal justice system with particular emphasis on the experience of people involved with domestic violence and of victims of sexual assault and propose appropriate remedial measures, including an educational program to address any bias that might be found.

The subcommittee will be comprised of Commission members and volunteers from the Maine State Bar Association Committee on the Status of Women Attorneys and other organizations.

Methodology: The first method of information gathering will be to review the findings and recommendations of other states that have issued reports. In addition, the Commission may use the following methods:

- Surveys to judges, attorneys, bar sections, jurors, and court personnel
- Group meetings and individual interviews with judges, litigants, abuse victims, family law practitioners, court personnel, and representatives from other affected populations
- Regional meetings with judges, lawyers, and lay people
- Focus groups
- Review of administrative procedures and documents such as court forms, rules, codes of conduct, and jury instructions.

Schedule: The Commission will fulfill its mandate in four phases:

Phase I

- Each subcommittee reviews and analyzes reported findings and recommendations of other states.
- Where indicated, each subcommittee develops a plan for identifying gender bias in Maine's courts.

Phase II

- Commission reviews and analyzes plans of subcommittees and prepares a coordinated plan for identifying gender bias in Maine's courts.

At the conclusion of Phase II, and no later than September 1, 1993, the Commission shall present a status report to the Supreme Judicial Court.

Phase III

- Commission gathers information through the various methods set forth above

Phase IV

- Commission analyzes information gathered about gender bias in Maine courts and reported findings and recommendations of other states
- Commission develops a plan to ensure that Maine's courts will be free from gender bias.

Phase V

- Final Report
- Commission begins implementing its recommendations
- Commission develops and recommends to the Supreme Judicial Court methods for monitoring and educating with regards to gender bias after implementation of the plan.

This order shall be recorded in the *Maine Reporter*.

Dated: January 4, 1993

Daniel E. Wathen
Chief Justice

David G. Roberts
Caroline D. Glassman
Robert W. Clifford
Samuel W. Collins, Jr.
Paul L. Rudman
Associate Justices

APPENDIX B

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The Commission is deeply indebted to David Karraker, Research Associate at the Muskie Institute of Public Affairs at the University of Southern Maine, and Suzanne Hart, formerly of the Muskie Institute and now associated with the Margaret Chase Smith Center for Public Policy at the University of Maine for the invaluable assistance they provided, without compensation, in the development and implementation of the Commission's research design. David Karraker also contributed countless hours to assist the Commission in facilitating the judges' focus groups, analyzing the Maine focus group data, comparing and contrasting those findings with the state reports, and guiding the Commission in its consideration of the research.

Special thanks are also due to

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Joan L. Cook, Esq.
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* * * * *

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Bernstein, Shur, Sawyer & Nelson
Norman, Hanson & DeTroy
The University of Maine School of Law
Vafiades, Brontas and Kominsky

APPENDIX C

Reports Reviewed by the Commission

CALIFORNIA: The Draft Report of the Judicial Council Advisory Committee on Gender Bias in the Courts, March 1990

COLORADO: Final Report, Colorado Supreme Court Task Force on Gender Bias in the Courts, 1990

CONNECTICUT: Report of the Connecticut Task Force, Gender, Justice and the Courts, 1991

DISTRICT OF COLUMBIA: Final Report of the Task Force on Racial and Ethnic Bias and Task Force on Gender Bias in the Courts, May 1992

FLORIDA: Report of the Florida Supreme Court Gender Bias Study Commission, March 1990

GEORGIA: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System, August 1991

HAWAII: Ad Hoc Committee on Gender Bias, Achieving Gender Fairness: Designing a Plan to Address Bias in Hawaii's Legal System, 1989

IDAHO: Report of the Fairness and Equality Committee of the Supreme Court of Idaho, 1992

ILLINOIS: Illinois Task Force on Gender Bias in the Courts, 1990

IOWA: Final Report of the Equality in the Courts Task Force, Submitted to the Supreme Court of Iowa, February 1993

KENTUCKY: Kentucky Task Force on Gender Fairness: Equal Justice for Women and Men, 1992

LOUISIANA: Louisiana Task Force on Women in the Courts, Final Report 1992

MARYLAND: Report of the Special Joint Committee on Gender Bias in the Courts, May 1989

MASSACHUSETTS: Report of the Gender Bias Study of the Supreme Judicial Court, 1989

MICHIGAN: Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Courts, December 1989

MINNESOTA: Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report, 1989

MISSOURI: Report of the Missouri Task Force on Gender and Justice, March 1993

NEBRASKA: Nebraska Supreme Court Task Force on Gender Fairness in the Courts, Final Report, December 1994

NEVADA: Final Report of the Nevada Supreme Court Task Force on Gender Bias in the Courts, 1988

NEW JERSEY: The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts (New Jersey Supreme Court Task Force on Women in the Courts), June 1984

NEW YORK: Report of the New York Task Force on Women in the Courts, March 1986

RHODE ISLAND: The Final Report of the Rhode Island Commission on Women in the Courts, A Report on Gender Bias, June 1987

WISCONSIN: Wisconsin Equal Justice Task Force Final Report, January 1991

UTAH: Utah Task Force on Gender and Justice, Report to the Utah Judicial Council, March 1990

VERMONT: Report of the Vermont Task Force on Gender Bias in the Legal System, June 1991

WASHINGTON: Final Report of the Washington State Task Force on Gender and Justice in the Courts, 1989

DISTRICT OF COLUMBIA CIRCUIT: Preliminary Report to the Task Force of the D.C. Circuit on Gender, Race and Ethnic Bias, May 1994³⁵

NINTH CIRCUIT: The Final Report of the Ninth Circuit Gender Bias Task Force, July 1993

35. The Final Report of the D.C. Circuit had not been published when the Commission commenced its research.

APPENDIX D

FOCUS GROUP QUESTIONS

A. *Litigants in Family Law Matters*

1. Did you have a lawyer in your divorce proceeding? Was your former spouse represented by counsel? If not, why not?

a. (for unrepresented litigants) Do you think not having a lawyer made a difference in what happened and how things turned out? PROBE: Did anyone tell you the court might have ordered the other side to advance funds to pay your legal fees?

b. (for litigants represented by counsel) When did it become obvious to you that you needed legal help? How did you find a lawyer? Were you pleased with the help you got?

FOR ALL THE FOLLOWING QUESTIONS, PROBE: Do you think gender played a role? If so, how?

2. When you think back on your experience with all the people in the legal proceeding, do you think you were treated fairly? My question at this point is more about *how things went along* rather than how things turned out.

3. Now tell me about the mediator in your case. Did the mediator treat you fairly? PROBE for women's groups where spousal abuse is mentioned: Did the court order mediation? If so, how did that affect your experience and the result?

4. When you consider the outcome of your case, would you say on balance that it came out fairly?

TOPICAL AREAS TO COVER IN ANSWERING THIS QUESTION

Alimony (Discussed? Awarded?)

Custody/visitation

Child Support (award in conformance with guidelines? If not, why not?)

Property division

5. Have you been back to court for any reason? If so, why? How did things turn out?

6. When you think back on the whole experience, what kinds of change, if any, do you think should be made to assure fair treatment?

B. *Women in Domestic Violence Matters*

1. Is this the first time you pursued legal action to resolve this problem? If not, what made you finally decide to act? How long did it take to get your matter resolved?

FOR THE FOLLOWING QUESTIONS, PROBE: Do you think gender played a role?

2. We'll talk about how things turned out in a moment. But right now I want to focus on what you experienced when you got to court.

Did the people in the court treat you in a way that was sensitive to your circumstances?

Actor Types

Nature of Response

Lawyers

Judges

Court personnel

Advocates

3. Now, please tell me how things finally turned out for you in court. What did the judge order in your case? Was that fair?

TOPICAL AREAS

Restraint

Custody/visitation

Property award

Child support

4. Have you subsequently been back to court? If so, why? How did things turn out?

5. When you think back on the whole experience, what kinds of changes, if any, do you think should be made to assure fair treatment?

C. Lawyers before the Family Bar/Criminal Bar

1. Do you think the gender of litigants affects their access to legal representation? If so, how?

2. Do you think gender influences the way people in court proceedings get treated? If so, what are they?

Judges?

Litigants?

Lawyers?

Witnesses?

Advocates?

Have you ever experienced this yourself?

3. Are you aware of inappropriate behavior in and around courtrooms that you attribute to gender? Have you observed or experienced this behavior yourself?

PROBE: Use of first names

Terms of endearment

Comments about physical appearance/apparel

4. When inappropriate gender-based behavior occurs, does anyone ever intervene? If so, what has been the outcome?

5. Do you think the gender of a client makes any difference in the *outcome* of a legal matter?

TOPICAL AREAS

Alimony

Damages

Custody/visitation

Sentencing

Child support

Property settlement

Domestic violence

PROBE for factors such as professional women clients, working women, 'aggressive' women, juror perceptions of gender, gender of jurors.

D. Judges

1. Do you think the gender of litigants affects their access to legal representation? If so, how?

2. During judicial proceedings, does gender ever influence the way lawyers treat litigants?

lawyers treat witnesses?

lawyers deal with each other?

court personnel and lawyers deal with each other?

judges and lawyers deal with each other?

judges deal with litigants and witnesses?

PROBE: Use of contempt citations

Unrepresented litigants

Treatment of advocates

3. Are you aware of inappropriate behavior in and around courtrooms that you attribute to gender? Have you observed or experienced this behavior yourself?

PROBE: Use of first names

Terms of endearment

Physical appearance/apparel

When and if you do observe inappropriate behavior, what do you do about it?

4. Do you think jurors are ever influenced by gender in their consideration of a matter? PROBE: judges; litigants; lawyers; witnesses.

5. Do you believe there are ways in which gender influences the *outcome* of a matter before a court? If so, how?

TOPICAL AREAS:

Gender of the clients

Gender of witnesses

Gender of the lawyers

Gender of jurors

Gender of the judge

NATURE OF THE PROCEEDINGS:

Domestic violence

Property division

Child support

Criminal

Custody/visitation

Personal injury

Alimony

Contract

6. Do you think there are circumstances in which gender influences your own response to matters before your court? If so, what are they?

PROBE: Sentencing, custody, alimony/support

E. Court Personnel

This discussion is about whether and how you think gender influences what happens in the courtroom and around the courthouse. I'm mostly interested in finding out what you think is happening in two important areas: (1) what you see or hear concerning procedures and outcomes in court; and (2) what happens to people who work for the court system in Maine.

First, I'd like to learn about the work you do.

1. Could each of you talk a little about what your work is like and the people with whom you interact in the course of a normal working day?

Now I'd like to find out what happens in the courtroom.

2. Do you think gender influences the way people in court proceedings get treated?

Some of the areas we're concerned about could involve

How judges treat people in a case and are themselves treated by others.

Litigants and witnesses: how they are treated and how they treat each other

Jurors: how gender might influence their view of people and things that happen in court

Lawyers: how they treat litigants and witnesses; how others deal with them (including other lawyers)

3. Do you think gender influences the outcome of different kinds of legal proceedings? For example

Criminal matters

Domestic violence (PROBE: Do victims get fair treatment?)

Alimony and child support awards

Custody and visitation

Civil litigation

4. Are you aware of inappropriate behavior in and around the courthouse that you would attribute to gender? Have you observed this behavior yourself?

PROBE: Use of first names

Terms of endearment

Comments on physical appearance/apparel

If and when this happens, what if anything is done to stop it?

Now I'd like to talk about what working for the court is like.

5. Do you think gender influences the way people who work for the court get treated?

TREATMENT INITIATED BY

Judges

Lawyers

Administrative/managerial staff

Others

6. Do you think the gender of court personnel influence their opportunities for advancement and professional development?
PROBE: How do people find out about these opportunities?

7. When you think back on what you've all said today, is there anything about what happens inside the courtroom or around the courthouse that you'd change if you could? Suppose you could write the rules. What rules would you write?

F. AOC Personnel

1. Are you aware of inappropriate behavior in and around the courthouse that you would attribute to gender? Have you observed this behavior yourself?

PROBE: Use of first names
Terms of endearment
Physical appearance/apparel

If and when this happens, what if anything is done to stop it?

2. Do you think gender influences the way people who work for the court get treated?

TREATMENT INITIATED BY

Judges

Lawyers

Administrative/managerial staff

Others

3. Do you think the gender of court personnel influences their opportunities for advancement and professional development?

PROBE: How do people find out about these opportunities?