

2010

Men in Black: Gender Diversity and the Eighth Circuit Bench

Mary Vasaly

Follow this and additional works at: <http://open.mitchellhamline.edu/wmlr>

Recommended Citation

Vasaly, Mary (2010) "Men in Black: Gender Diversity and the Eighth Circuit Bench," *William Mitchell Law Review*: Vol. 36: Iss. 4, Article 2.

Available at: <http://open.mitchellhamline.edu/wmlr/vol36/iss4/2>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in William Mitchell Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

MEN IN BLACK: GENDER DIVERSITY AND THE EIGHTH CIRCUIT BENCH

Mary Vasaly[†]

I. INTRODUCTION.....	1703
II. WHY IS THE EIGHTH CIRCUIT IMPORTANT?.....	1705
III. WHY GENDER DIVERSITY IS CENTRAL TO THE CONCEPT OF EQUAL JUSTICE FOR ALL.....	1706
IV. HISTORY OF EFFORTS TO INCREASE DIVERSITY IN THE EIGHTH CIRCUIT.....	1712
V. WHY IS IT HARDER TO ACHIEVE DIVERSITY IN THE FEDERAL SYSTEM?.....	1713
VI. WHAT WE ARE DOING ABOUT IT.....	1716
VII. CONCLUSION.....	1717

I. INTRODUCTION

For most of the history of the legal profession in the United States, courts were the exclusive domain of “men in black.”¹ The suggestion that women should serve as judges or magistrates was as alien

† Mary Vasaly is a partner with Maslon Edelman Borman & Brand, practicing in the areas of appeals and civil litigation, and is a founding member of the Infinity Project. She is recognized in Best Lawyers in America and has been named a fellow of the American Academy of Appellate Lawyers and the American Bar Foundation. She has taught courses on appellate practice and legal writing as an adjunct faculty member of the University of St. Thomas Law School and the University of Minnesota Law School. She also served as a member of the Amicus Brief Committee for the American Bar Association. She is a past President of the Hennepin County Bar Association, Minnesota Women Lawyers, the Council of Appellate Lawyers and the Appellate Advocacy Committee of the ABA’s Torts Trial and Insurance Practice Section. Ms. Vasaly may be contacted at Maslon Edelman Borman & Brand, 3300 Wells Fargo Center, Minneapolis, MN 55402; by telephone at (612) 672-8321; by email at mary.vasaly@maslon.com; or through her firm’s website, www.maslon.com.

1. “For 145 years after the establishment of the Federal Judiciary, the federal bench was comprised of Caucasian male judges.” ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE JUDICIARY FAIR EMPLOYMENT PRACTICES ANNUAL REPORT 1 (2008) [hereinafter JUDICIARY FAIR EMPLOYMENT PRACTICES]. The first female Article III judge was appointed to an appellate court by President Franklin D. Roosevelt in 1934. *Id.*

to the majority of Americans as the idea that women could serve in office. For the last two decades, however, women have made steady progress toward full participation with their male colleagues both in the political arena and on state district and appellate courts. In Minnesota, for example, in the state district courts and intermediate court of appeals, the number of women judges increased from a mere 11% in 1989² to 28% by 2007.³ For a period of four years in the early 1990s, women composed a majority of Minnesota Supreme Court justices.⁴

But during this same time frame, the number of women appointed to the federal bench did not increase at a similar rate. Indeed, the appointment of Justice Sonia Sotomayor brought into sharp focus the fact that the United States Supreme Court, and the federal judiciary generally, lack sufficient gender diversity.⁵ Of greatest concern is the fact that there has been no significant advance in gender equity on the Eighth Circuit Court of Appeals, a court that was first established in 1891.⁶ More than one hundred years after its founding, Diana E. Murphy became the first woman appointed to that bench in 1994.⁷ Although there were nine appointments to the Eighth Circuit Court of Appeals in the ensuing years,⁸ all nine were men.⁹ As a result, more than fifteen years after Judge Murphy's appointment, she remains the only woman appellate judge among the seventeen active and senior judges who sit on the Eighth Circuit.¹⁰

2. MINN. SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, REPORT SUMMARY S25 (1989), available at http://www.courts.state.mn.us/Documents/0/Public/Other/Gender_Summary.pdf.

3. OFFICE ON THE ECONOMIC STATUS OF WOMEN, MINN. LEGISLATURE, WOMEN IN THE JUDICIARY IN MINNESOTA: FACT SHEET (2007), available at <http://www.commissions.leg.state.mn.us/oesw/fs/Womenjudicia.pdf>.

4. Minnesota State Law Library Docket Series, Chronological List of Justices and Judges of the Minnesota Appeals Courts, <http://www.lawlibrary.state.mn.us/judges.html#SCT> (last visited Apr. 14, 2010).

5. Of the 111 justices appointed to the Supreme Court, only three have been women. Charlie Savage, *Sotomayor Sworn In as Supreme Court Justice*, N.Y. TIMES, Aug. 8, 2009, at A12. In fiscal year 2008, 23.4% of all federal judges were female. JUDICIARY FAIR EMPLOYMENT PRACTICES, *supra* note 1, at 3. Of the federal appellate judges, 22.7% were female. *Id.* at App. 3.

6. Fed. Jud. Ctr., Courts of the Federal Judiciary, U.S. Court of Appeals for the Eighth Circuit, Legislative History, http://www.fjc.gov/history/courts_coa_circuit_08.html (last visited Apr. 14, 2010).

7. *Id.*

8. *Id.*

9. *Id.*

10. U.S. Court of Appeals for the Eighth Circuit, Eighth Circuit Court of Appeals Judges, <http://www.ca8.uscourts.gov/newcoa/judge.htm> (last visited Apr. 14, 2010).

II. WHY IS THE EIGHTH CIRCUIT IMPORTANT?

The lack of gender diversity on the Eighth Circuit¹¹ is of concern for several reasons. First, the Eighth Circuit is important in that it is the court of last resort for most federal cases within its jurisdiction. There were more than 3000 appeals filed in the Eighth Circuit in 2008 alone.¹² Of these cases, many address issues of particular concern to women. For example, cases of employment discrimination constitute 10% of the civil caseload in the federal courts.¹³ In the District of Minnesota, in 2008, products liability cases made up the majority of civil cases heard at the district court level.¹⁴ A substantial number of these involved female hormone-replacement drugs.¹⁵ Although family law is generally considered to be a subject matter within the jurisdiction of the state courts, the federal courts also serve as a forum for international child custody disputes under the International Child Abduction Remedies Act and the Parental Kidnapping Prevention Act.¹⁶ Federal courts also enforce federal anti-trafficking laws, and women and children are the primary targets of human trafficking.¹⁷

The Eighth Circuit is important for another reason—it is one of the thirteen federal appellate circuit courts that serve as pipelines for

11. The United States Court of Appeals for the Eighth Circuit includes seven states and ten districts: Arkansas (eastern and western), Iowa (northern and southern), Minnesota, Missouri (eastern and western), Nebraska, North Dakota and South Dakota. U.S. Court of Appeals for the Eighth Circuit Home Page, <http://www.ca8.uscourts.gov> (last visited Apr. 14, 2010).

12. 2008 OFFICE OF THE CIRCUIT EXECUTIVE OF THE EIGHTH CIRCUIT, ANNUAL REPORT B-1 (2008).

13. Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL L. STUD. 429, 432 (2004). At least one study has concluded that the presence of a woman on the appellate panel makes a difference in the outcome of gender discrimination cases. Female judges are approximately 10% more likely to rule in favor of the plaintiff and the presence of a female judge on the panel causes their male colleagues on the panel to rule more often in favor of the plaintiff. Christina L. Boyd, Lee Epstein & Andrew D. Martin, *Untangling the Causal Effects of Sex on Judging*, AM. J. POL. SCI. (forthcoming 2010); cf. *infra* note 24 and accompanying text (discussing the affirmative action case *Grutter v. Bollinger* and perceptions of legitimacy when the makeup of the judiciary matches that of the population).

14. OFFICE OF THE CIRCUIT EXECUTIVE OF THE EIGHTH CIRCUIT, *supra* note 12, at 54.

15. *Id.*

16. See International Child Abduction Remedies Act, 42 U.S.C. §§ 11601–11610 (2006); Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2006).

17. Trafficking Victims Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1466 § 102 (2000) (codified at 22 U.S.C. § 7101 (2006)) (“The purposes of this chapter are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”).

the appointment of justices to serve on the United States Supreme Court. Each one of the nine justices presently serving on the Supreme Court first served as a judge on a circuit court of appeals.¹⁸ It is clear that gender diversity remains an important issue for that Court.

III. WHY GENDER DIVERSITY IS CENTRAL TO THE CONCEPT OF EQUAL JUSTICE FOR ALL

There are at least four ways in which our system of justice is served by increasing gender diversity on the bench. As Lynn Hecht Schafran has observed:

Having women judges of all colors matters for the same reason that having male judges of all colors matters. A diverse bench promotes trust and confidence in the courts from a diverse public; it teaches people to broaden their views about who can rightfully hold positions of authority; it provides role models who demonstrate what people can aspire to; and it enriches the justice system by bringing the full array of individual life experiences to the substance and procedure of the law.¹⁹

The first reason Ms. Schafran identifies above is perhaps the most critical—the judgments of a diverse judiciary command greater acceptance in a diverse society. The judiciary depends entirely on the confidence of the American people to give its decisions authoritative effect.²⁰ Over the last decade, the judiciary has experienced an unprecedented number of attacks on its independence. Judicial elections have become politicized.²¹ Judges have been criticized for rendering unpopular decisions.²² The other branches of government

18. See The Supreme Court of the United States, Biographies of Current Justices of the Supreme Court, <http://www.supremecourtus.gov> (choose “Biographies of Current Justices” under the “About the Supreme Court” menu, located under the heading “Supreme Court Information”) (last visited Apr. 14, 2010).

19. Lynn Hecht Schafran, *Not from Central Casting: The Amazing Rise of Women in the American Judiciary*, 36 U. TOL. L. REV. 953, 964 (2005).

20. Justice Stephen G. Breyer has said:

Although we on the Supreme Court do not face the problems associated with judicial elections, we are, of course, judges. And so the dangers attendant to attacking the legitimacy of courts and judges affect us much as they affect other judges. Courts and judges must have public support if they are to receive the resources they need to fulfill their responsibilities.

Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View From the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 95 (2006).

21. See *id.* (discussing the judicial election process in California and other states).

22. *Id.* at 94.

have sought to invade the court's jurisdiction.²³ These attacks undermine public confidence in the judiciary and threaten the rule of law. Lack of gender diversity can only add to the public's skepticism of the decisions rendered by the bench. In *Grutter v. Bollinger*, Supreme Court Justice Sandra Day O'Connor made a related observation about the perceptions of leaders' legitimacy when she wrote that for "legitimacy [to be realized] in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."²⁴ The court's job is to safeguard the constitutional rights of both women and men, as well as vulnerable and disadvantaged minorities. The public will have more confidence in judicial decisions when those decisions are rendered, not by a body of isolated elites, but by judges who reflect and understand the multicultural society we live in today.²⁵

Second, a deliberative process enhanced by collegiality and a broad range of perspectives improves judicial decision-making and results in a fuller and richer evolution of the law.²⁶ The more variety that exists among members of a judicial panel in terms of race, gender, ethnicity, and socioeconomic background, the more likely it is that the panel will probe deeply into the facts of the case. A judge's perspective is shaped by his or her values, life experiences, gender, race, ethnicity, and a host of other factors.²⁷ It is simply not true that a

23. See, e.g., Dahlia Lithwick, *Activist Legislators: The Boundless Overreaching Behind Congress' New Schiavo Bill*, SLATE, Mar. 21, 2005, <http://www.slate.com/id/2115124> (criticizing Congress members' attempt to "constitutionalize the nowhere-to-be-found legal principle that a 'culture of life' is a good thing.").

24. 539 U.S. 306, 332 (2003).

25. It has been suggested that the homogeneity of the profession alienates some citizens. As a result they are deprived of "their day in court" and do not feel that the principle of "equal justice for all" applies to them. Carolyn B. Lamm, *Diversity & Justice: Promoting Full & Equal Participation in the Legal Profession*, JUDGE'S J., Summer 2009, at 1.

26. At least one study has found that there is no substantive difference between male and female judges; in other words, sex is not a factor in determining who would make a "better" judge. Stephen J. Choi, Mitu Gulati, Mirya Holman & Eric A. Posner, *Judging Women*, L. & ECON. RES. PAPER SERIES (Univ. Chicago Law Sch.), Sept. 29, 2009, at Paper No. 09-38 and 09-54. Thus, there is no loss of quality when women are considered for the bench.

27. Susan Maloney Smith, *Diversifying the Judiciary: The Influence of Gender and Race on Judging*, 28 U. RICH. L. REV. 179, 183 (1994); see also Anita F. Hill, *The Embodiment of Equal Justice Under the Law*, 31 NOVA L. REV. 237, 252 (2007) (proposing that gender, racial, and ethnic experiences influence perspectives and worldviews, including one's sense of justice and how it should be achieved; that the contribution of perspectives reaffirms the promise of equality under the law by suggesting that all citizens have the chance to participate in democracy; and that the failure to have a broad array of perspectives represented undermines judicial integrity and contributes to false ideas

judge applies the law without regard to this unique perspective. Perception of the facts of a case is influenced by all the factors constituting an individual's worldview.²⁸ In other words, "justice is created by, and defeated by, people who have genders, races, ethnicities, and religions."²⁹ Those entering the courts come from various backgrounds and life experiences. Judges must be able recognize that they themselves have unique points of view that may color their perceptions of the facts; judges must also be able to perceive the points of view of the litigants and consider them equally—that is, impartially.³⁰ This, as Kenneth B. Karst observed, fosters impartiality in decision-making:

The impartiality we can fairly demand is not devotion to some self-applying principle that eliminates judgment from judging. Rather it is an effort to decide the case from an independent standpoint, as opposed to the point of view of one of the parties, and to approach all parties' contending positions with sympathetic regard.³¹

A diverse panel will naturally possess a broader and deeper understanding of the facts, allowing the panel to apply the law more fairly. This is particularly true when an appellate panel reviews a summary judgment order. In such cases, the outcome depends on the judges' view of the facts because the question the court must answer is whether a jury might decide the case differently on the facts presented.³² A different perspective on these facts could generate a different outcome. Indeed, some scholars argue that "a judge's antecedent presumptions and perspectives often influence judicial decisions as much or more than her purported principles and precedents."³³

Pre-existing judicial perceptions also affect appeals in criminal cases. For example, in determining whether a defendant was subject to a custodial interrogation, the judge must decide whether a person

about intellect and competency).

28. See Smith, *supra* note 27, at 193 (discussing how the outcome of certain cases is affected by the judge's gender and race affecting how she views the facts).

29. *Id.* at 186 (quoting Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 14 (1987)).

30. *Id.* at 189–94 (observing that gender is a factor that may impact how one defines justice).

31. *Id.* at 194 (quoting Kenneth B. Karst, *Judging and Belonging*, 61 S. CAL. L. REV. 1957, 1966 (1988)).

32. See, e.g., *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986) (holding that summary judgment is required when the judge determines that there are insufficient facts to support a plausible finding for the non-moving party).

33. Jon D. Hanson & Adam Benforado, *The Drifters: Why the Supreme Court Makes Justices More Liberal*, BOSTON REV., Jan./Feb. 2006, <http://bostonreview.net/BR31.1/hansonbenforado.php>.

in the defendant's situation would have felt free to walk away.³⁴ An understanding of a defendant's social milieu will aid in this determination. In short, judges must have a broader perspective than the dominant view to engage in a rich discussion; if they all have the same view, the result is a superficial discussion and the law does not evolve.³⁵

Certainly, the more perspectives on the bench, the more confidence we can have that the court has considered all important aspects of the decision. We should not be left with the suspicion that a fact was omitted from consideration because a point of view was absent from the room. Moreover, it is particularly important that these other perspectives be delivered not by a party, or the party's counsel, but by a colleague in a professional, respectful, and collegial setting. The Supreme Court Justices do consider the views of their colleagues. As Supreme Court Justice David Souter wrote in a dissent, "Anyone who has ever sat on a bench with other judges knows that judges are supposed to influence each other, and they do. One may see something the others did not see, and then they all take another look."³⁶

Supreme Court Justice Ruth Bader Ginsburg has given a vivid example of this phenomenon. Justice Ginsburg observed that Justice Thurgood Marshall often helped the rest of the Court understand the facts from a different perspective.³⁷ Justice Marshall would, for example, describe his experience growing up in segregated Maryland and as a civil rights lawyer traveling through the South.³⁸ These experiences were entirely foreign to the other members of the Court. Similarly, Justice Antonin Scalia said that Justice Marshall's very pres-

34. See, e.g., *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) ("Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'").

35. See CIARA TORRES-SPELLISCY, MONIQUE CHASE & EMMA GREENMAN, BRENNAN CENTER FOR JUSTICE, *IMPROVING JUDICIAL DIVERSITY* 4 (2008), available at http://brennan.3cdn.net/96d16b62f331bb13ac_kfm6bplue.pdf ("[A] diversity of viewpoints will produce a more robust jurisprudence."). An interesting example of this is the incident involving Harvard law professor, Henry Louis Gates, Jr. See Tracy Jan, *Harvard Scholar Taken from Home*, BOSTON GLOBE, July 21, 2009, at 1. Professor Gates was arrested at his home as a suspected burglar after Gates had difficulty unlocking his front door. *Id.* From the point of view of the police, their actions were justified based on their experience. From the point of view of a black individual, the police's actions were another example of racial profiling, resulting in violation of Professor Gates' rights. *Id.*

36. *Calderon v. Thompson*, 523 U.S. 538, 570 (1998) (Souter, J., dissenting).

37. Sherrilyn Ifill, *Who The Supreme Court Needs Now*, THE ROOT, May 1, 2009, <http://www.theroot.com/views/who-supreme-court-needs-now>.

38. *Id.*

ence on the bench exerted a “gravitational pull” more powerful than his single vote.³⁹ “Marshall could be a persuasive force just by sitting there,” said Scalia in an interview for a biography of Justice Marshall by Juan Williams.⁴⁰ In conferences, “[h]e wouldn’t have had to open his mouth to affect the nature of the conference and how seriously the conference would take matters of race.”⁴¹ Justice Lewis Powell also observed that “a member of a previously excluded group can bring insights to the Court that the rest of its members lack.”⁴²

Justice Ginsburg also observed that women have a similar impact on their colleagues when they serve as judges. She explained that the presence of women on the bench “made it possible for the courts to appreciate earlier than they might otherwise that sexual harassment belongs under Title VII [as a violation of civil rights law].”⁴³ Thus, whether or not diverse perspectives affect the outcome in a particular case, the presence of diverse viewpoints assures that the decision will have been “tested” by individuals with a broad variety of views who were thinking deeply and critically. In other words, we can be confident that the decision was as “informed” as possible.⁴⁴

The view that the law is a neutral set of rules that have no particular gender or ethnic bias fails to account for the fact that the law traditionally recognized the male gender as normative.⁴⁵ We are all familiar with the fact that the male paradigm has historically dominated other fields, such as medical research and treatment. So it has been with the law, which arose from a truly “man-made” tradition. Until recently, there were no female legislators, lawyers, or judges, and women had no right to vote, own property, enter into contract, sue in their own names, or serve on juries. As a result, the law has treated

39. Adam Liptak, *The Waves Minority Judges Always Make*, N.Y. TIMES, May 31, 2009, at 1.

40. JUAN WILLIAMS, THURGOOD MARSHALL: AMERICAN REVOLUTIONARY 388 (1998).

41. *Id.* at 389.

42. Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5, 26 (2004).

43. Emily Bazelon, *The Place of Women on the Court*, N.Y. TIMES, July 12, 2009 (Magazine), at 22.

44. See Sally J. Kenney, *Breaking the Silence: Gender Mainstreaming and the Composition of the European Court of Justice*, 10 FEMINIST LEGAL STUD. 257, 270 (2002) (observing that “[w]hether one wants better deliberation, truly meritorious selection, or legitimacy and compliance, all are served by a Court that includes women members.”).

45. Smith, *supra* note 27, at 187–88 (the basis of the approach to rulemaking in our system is “abstract universality” which “made maleness the norm . . . all in the name of neutrality” (quoting Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1377 (1986))).

the male life experience and perspective as the norm.⁴⁶ As Schafran observed more than ten years ago, the “maleness” of law is expressed in our statutes, the cases that lawyers take or refuse, what is taught in law schools, and how judges, juries, and other decision makers interpret, apply, and enforce the laws.⁴⁷ It can only benefit society as a whole when a variety of views—including the views of women—are involved in the process of making law for society as a whole.⁴⁸

Third, diversity is important because it promotes the selection of the best judges by broadening the base of highly qualified candidates. Women have made up approximately 50% of law school graduates for many years.⁴⁹ Their achievements in law school have equaled those of male graduates.⁵⁰ It is then obvious that 50% of the top 10% of lawyers are likely women.⁵¹ To exclude this group in the selection process results in the selection of a less qualified judiciary.

46. Lynn Hecht Schafran, *Law & Gender*, TRIAL, Aug. 1995, at 13–14.

47. *Id.* Professor Sherilynn A. Ifill has observed that we tend to operate from the perspective that whiteness is the transparent neutral position and thus, accept the false premise that a white person can judge all cases neutrally, but a person of color must view cases through a color barrier. Am. Constitution Soc’y, Streaming Video: Diversifying Our Courts (2009), <http://www.acslaw.org/node/13869>. In fact, it is the case that all of us, whether we are white, black, Hispanic or something else, view cases through our own unique backgrounds. *Id.* See also Schafran, *supra* note 19, at 964 (“[A]part from those for whom it is news that white males have a race and a sex, there is widespread acknowledgement that jurists’ views are informed by their life experience, of which race and gender are ineluctably a part.”).

48. A vivid demonstration of the fact that the white male view is considered normative occurred when Judge Constance Baker Motley, the first African American woman to serve on the federal bench, was asked to recuse herself from a gender discrimination case involving an African American female plaintiff. Hill, *supra* note 27, at 255–57. Responding to the suggestion that her race and gender somehow prejudiced her in the matter, she noted that she was not the only member of the judiciary who possessed both a race and gender: “[I]f background or sex or race of each judge were, by definition, sufficient grounds for removal, no judge on this court could hear this case.” *Id.* at 256 (quoting *Blank v. Sullivan & Cromwell*, 418 F. Supp. 1, 4 (S.D.N.Y. 1976)).

49. Almost a decade ago, one reporter noted:

Women, who made up about 10 percent of first-year law students in 1970, accounted for 49.4 percent of the 43,518 students who began law school last fall, according to data to be released soon by the American Bar Association, and that rate of growth is expected to continue. As of March 9, more women than men had applied for admission to law schools this fall.

Jonathan D. Glater, *Women Are Close to Being Majority of Law Students*, N.Y. TIMES, Mar. 26, 2001, at A1.

50. See Cara L. Nord, “What Is” and “What Should Be” an Empirical Study of Gender Issues at Gonzaga University School of Law, 10 CARDOZO WOMEN’S L.J. 60, 107 (2003) (noting that while women’s academic success is lower than men’s in the first year, grades even out by the time the students graduate).

51. See *id.* at 108.

Fourth, women who serve in the judiciary provide a model for women about what they can aspire to be, and for the community generally about who can rightfully hold a position of authority.⁵² Nebraska Supreme Court Justice Lindsey Miller-Lerman observed:

I think that when you see women on the bench, there are a few constituencies that are interested in that; in my case, perhaps interested in a “curiosity.” And one constituency is women lawyers. About twenty-five percent of the bar in Nebraska are women. When they come into court and see a competent woman, they get the message that you can be what you see.⁵³

Justice Rosalie Wahl, formerly of the Minnesota Supreme Court, agreed: “[A]ny lasting change in the position of women in our society will be reflected in greater numbers of women beyond the level of tokenism in the judiciary and the legal profession.”⁵⁴ That level of representation will substantially eliminate stereotypes, myths, and biases.⁵⁵

IV. HISTORY OF EFFORTS TO INCREASE DIVERSITY IN THE EIGHTH CIRCUIT

The Eighth Circuit boasts the worst record of all the circuits in terms of gender diversity, despite the fact that efforts to increase diversity began decades ago. As women began to enter the legal profession in greater numbers in the 1970s and the 1980s, the profession began to explore the impact of gender bias in the courts. The National Judicial Education Program (NJEP) pushed for circuit-specific information out of a growing concern that gender bias was having an impact on the administration of justice.⁵⁶ As part of this effort, then-Chief Judge Richard S. Arnold of the Eighth Circuit appointed Judge Diana E. Murphy to chair a gender task force that was charged with examining the effects of gender on “both processes and people in the Eighth Circuit judicial system.”⁵⁷ After completing its work, the task force issued the *Final Report and Recommendations of the Eighth Circuit*

52. Schafran, *supra* note 19, at 964.

53. *Id.* (quoting *Panel Transcript: Women on the Bench*, 12 COLUM. J. GENDER & L. 361, 381 (2003)).

54. Smith, *supra* note 27, at 197 (quoting Rosalie E. Wahl, *Some Reflections on Women and the Judiciary*, 4 LAW. & INEQ. J. 153, 154–55 (1986)).

55. *Id.*

56. Gender Fairness Task Force, *Final Report & Recommendations of the Eighth Circuit Gender Fairness Task Force*, 31 CREIGHTON L. REV. 9, 11 (1997).

57. *Id.* at 31.

Gender Fairness Task Force.⁵⁸ The report concluded that women filled the majority of staff positions in the Eighth Circuit, but that most of management—and in particular, most of the judges—were men.⁵⁹ The task forces recommended that the Court “take identifiable steps to ensure equal opportunity for advancement by women into management and supervisory positions within the court units.”⁶⁰

Despite the task force’s recommendations, sixty-one judges have served on the Eighth Circuit bench (three before Congress officially established the Court) in its history but, as noted above, only one of these was a woman, or 1.6% of the total of appointments. Including the six senior judges, the current ratio of women to men serving on the Eighth Circuit is 1:17, or 5.8%.

V. WHY IS IT HARDER TO ACHIEVE DIVERSITY IN THE FEDERAL SYSTEM?

There is no clear explanation for the lack of gender diversity on the federal bench. Certainly, there is no lack of qualified women candidates. In recent decades, women have been graduating from the nation’s law schools at a rate equal to, or even greater than, men.⁶¹ There are at least 325,000 working women attorneys to fill a relatively small number of judicial vacancies.⁶²

It may be, however, that a number of factors work against women in the selection process. First, because an Article III judge often enjoys greater status and pay than a state court judge, as well as life tenure, there is more competition for seats on the federal bench.⁶³ Studies have demonstrated that women do far worse statistically when they compete against men for these highly desirable positions.⁶⁴

58. *See id.*

59. *Id.* at 19.

60. *Id.* at 170.

61. TORRES-PELLISCY ET AL., *supra* note 35, at 8.

62. *Id.*

63. There are also more state than federal judgeships. *See* PUBLIC CITIZEN, FEDERAL DISTRICT JUDGES ARE VASTLY OUTNUMBERED BY STATE JUDGES 1 (2005), available at <http://www.citizen.org/documents/FederalDistrictJudgesvastlyoutnumberedbystatejudges.pdf> (stating there are 9200 state court judges and 678 federal court judges).

64. *See, e.g.*, Traci V. Reid, *The Competitiveness of Female Candidates in Judicial Elections: An Analysis of the North Carolina Trial Court Races*, 67 ALB. L. REV. 829, 840 (2004) (finding that in North Carolina, men were more successful than women both at challenging an incumbent for a judicial seat, and at winning an open judicial seat); *see also* Lisa M. Holmes & Jolly A. Emrey, *Court Diversification: Staffing the State Courts of Last Resort Through Interim Appointments*, 27 JUST. SYS. J. 1, 7 (2006) (finding, in an eighteen-state study, that there was no significant difference between the percentage of female

Second, implicit bias is likely to impact the judicial selection process. Nearly all of us stereotype others subconsciously because “as perceivers, we may misperceive, even though we honestly believe we are fair and just.”⁶⁵ Justice Brennan observed in his opinion in *Price Waterhouse v. Hopkins* that “unwitting or ingrained bias is no less injurious or worthy of eradication than blatant or calculated discrimination.”⁶⁶ Implicit bias affects women in its activation of gender-based stereotypes.⁶⁷ These stereotypes can work against women who seek seats on the federal bench; those who are screening applicants may subconsciously reject women who seem “aggressive” or “ambitious.” This is particularly true if the appointing body is not itself diverse.⁶⁸

Third, the gender inequities that have kept women from achieving partnerships at large law firms at the same rate as men have had a rebound effect. When selection commissions compare the resumes of male and female applicants, the female applicants more often lack the kinds of experiences thought important by the commission members.⁶⁹ For example, many women candidates come from types of careers historically more open to them, such as public interest practice.⁷⁰ These career paths have sometimes been deemed “less worthy.”⁷¹ Similarly, female applicants are more likely to have taken a break in their practice as a result of having children, which means that they will have less experience than a male applicant of similar

elected judges (15%) and female appointed judges (16%)).

65. TORRES-SPELLISCY ET AL., *supra* note 35, at 11 (quoting Jerry Kang & Mahzarin R. Banaji, *Symposium on Behavior Realism: Fair Measures: A Behavioral Realist Revision of “Affirmative Action,”* 94 CAL. L. REV. 1063, 1090 (2006); Justin D. Levinson, *Forgotten Racial Equity: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 354 (2007)).

66. *Id.* at 12.

67. *Id.* at 11.

68. More diverse nominating commissions attract more diverse nominees and tend to recommend more diverse candidates. See KEVIN M. ESTERLING & SETH S. ANDERSEN, AMERICAN JUDICATURE SOCIETY, DIVERSITY AND THE JUDICIAL MERIT SELECTION PROCESS: A STATISTICAL REPORT 29 (1999), available at http://judicialselection.com/uploads/documents/Diversity_and_the_Judicial_Merit_Se_9C4863118945B.pdf (finding that “increasing the diversity of nominating commissions is likely to assist the goal of increasing the diversity of merit-selected benches”).

69. See, e.g., TORRES-SPELLISCY ET AL., *supra* note 35, at 7 (acknowledging that fewer women have become partners in large law firms, which is an experience desirable to some commissions).

70. Smith, *supra* note 27, at 186 (citing Thomas G. Waler & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 598–99 (1985)).

71. *Id.* at 186–87 (quoting Carl Tobias, *The Gender Gap on the Federal Bench*, 19 HOFSTRA L. REV. 171, 175 (1990)).

age.⁷²

Fourth, women fare poorly in appointment systems after the first “token” woman has already been appointed to the bench.⁷³ Studies have shown that once a modicum of gender diversity is achieved on a particular court, the political interest in appointing women to that court wanes.⁷⁴

Finally, women as a group may not have the requisite political connections to obtain appointment. Perhaps women have fewer political connections, tend not to make significant contributions to political campaigns, or are less likely to serve on party committees. Those involved in the process stress that politics play a “major role” in becoming a federal judge.⁷⁵ Michael J. Gerhardt, author of several books analyzing the constitutional and historical federal processes, urges those who seek appointment as follows: “Generally, you should try to get to know your Senator[s], and it helps if you end up working in the federal administration or with people who know people with close contacts to the White House.”⁷⁶ He also observes that, “[g]enerally, Democrats look for people with experience in Democratic politics or on behalf of causes, or cases, of importance to Democratic officials.”⁷⁷ Dr. Kenneth L. Manning, Associate Professor of Political Science at the University of Massachusetts-Dartmouth, agrees, noting that it is important to have significant political ties to one of the parties, particularly the one controlling the White House.⁷⁸

72. TORRES-PELLISCY ET AL., *supra* note 35, at 7.

73. See Kathleen A. Bratton & Rorie L. Spill, *Existing Diversity and Judicial Selection: The Role of the Appointment Method in Establishing Gender Diversity in State Supreme Courts*, 83 SOC. SCI. Q. 504, 515–16 (2002).

74. See, e.g., Rorie L. Spill Solberg & Kathleen A. Bratton, *Diversifying the Federal Bench: Presidential Patterns*, 26 JUST. SYS. J. 119, 130 (2005).

75. Anayat Durrani, *Careers: Federal Judge*, EMPLOYMENT CROSSING, <http://www.lawcrossing.com/article/861/Careers-Federal-Judge/> (last visited Mar. 10, 2010). See also Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153, 161 n.41 (2004) (citing “extensive” literature); Smith, *supra* note 27, at 181 (“The process by which federal judges are chosen has become highly politicized.”).

76. Durrani, *supra* note 75 (alteration in original). See generally MICHAEL J. GERHARDT, *THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (Univ. of Chicago Press ed. 2000); MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* (Duke University Press 2000).

77. *Id.*

78. *Id.* See also Alex Kozinski, *So You Want to Become a Federal Judge by 35?*, NAT’L L.J., Aug. 19, 1996, at C6 (recommending, *inter alia*, “[g]et into politics,” “[g]et a job in Washington,” and “[g]et to know your senators”).

VI. WHAT WE ARE DOING ABOUT IT

In 2007, a group of law professors, lawyers, and others who were keenly interested in changing the gender balance of the judges sitting on the Eighth Circuit bench formed the Infinity Project.⁷⁹ Although its efforts are concentrated on the Eighth Circuit, the Infinity Project seeks to increase the number of women who serve on the federal district court bench as magistrate judges⁸⁰ and district judges to increase the number of qualified candidates available for appointment to the Eighth Circuit bench.⁸¹

The Infinity Project founding committee met during 2007 to 2008 to develop the framework for the project and identify liaisons in each of the states comprising the Eighth Circuit to carry out its mission. The founding committee identified leaders in each state in the Eighth Circuit who were committed to forming an Infinity subcommittee. During the year, the founding committee also developed a case statement and talking points document, identified key areas for further action within the entire circuit and within each state, and began planning for a circuit-wide meeting. That meeting was held on October 17, 2008. Recently, the Infinity Project has formalized its structure by naming officers and a governing board of directors and adopting bylaws.

The Infinity Project works to increase diversity within the judicial appointment processes, and develop a sustainable mobilization mechanism by:

- Creating public awareness for the importance of gender equity on the bench and the availability of qualified women candidates;
- Educating public leaders on the issues of gender diversity and the need for appointment of female Eighth Circuit judges.
- Serving to support candidates who have an interest in serving on the Eighth Circuit bench.

It is hoped that these efforts will result in the appointment of

79. Infinity Project, Hubert H. Humphrey Inst. of Pub. Affairs, Home Page, www.hhh.umn.edu/centers/wpp/infinity/ (last visited Apr. 14, 2010) (listing the Infinity Project's Mission Statement and providing a brief overview of the Project).

80. The position of magistrate judge is an important path to the Article III bench. Graham, *supra* note 75, at 167 (stating that "many district court judges previously served as magistrates"). There is a significant lack of gender diversity on this bench as well. *Id.* at 168.

81. See Barbara L. Jones, *An Appeal for More Women on the 8th Circuit Bench*, MINN. LAW., Aug. 18, 2008 at 1, 10.

more women to the federal district courts and the Eighth Circuit bench in the near future, and that lawyers in other circuits will take action to address this problem, which persists throughout the federal judiciary (see Table 1). As many efforts to achieve gender diversity that began in the 1970s have begun to trail off, or seem frozen in time, the Infinity Project seeks to foster continued progress and self-reflection regarding judicial appointments in all of the circuits. All who participate in or have an impact on the federal judiciary need to accept responsibility to address issues of gender differences and bring continuous improvement to the judicial system.

VII. CONCLUSION

The Honorable Judith S. Kaye, who was the first woman to serve on New York's highest court and subsequently became its chief judge, has said: "It [is] clear . . . that women's advancement in the profession requires 'conspicuous, vocal vigilance.'"⁸² The members of the Infinity Project intend to maintain their conspicuous vigilance until the federal courts in the Eighth Circuit achieve true gender diversity.

82. Judith S. Kaye & Anne C. Reddy, *The Progress of Women Lawyers at Big Firms: Steadied or Simply Studied?*, 76 *FORDHAM L. REV.* 1941, 1942 (2008) (quoting Judith S. Kaye, *Moving Mountains: A Comment on the Glass Ceilings and Open Doors Report*, 65 *FORDHAM L. REV.* 573, 575 (1996)).

Table 1.

First Circuit⁸³	<u>Female Appointments</u>	<u>Male Appointments</u>
1995-2000	1	1
2001-2006	0	1
2007-present	1	0
Total Appointments	2	2

Second Circuit⁸⁴	<u>Female Appointments</u>	<u>Male Appointments</u>
1995-2000	2	3
2001-2006	2	3
2007-present	1	1
Total Appointments	5	7

Third Circuit⁸⁵	<u>Female Appointments</u>	<u>Male Appointments</u>
1995-2000	2	2
2001-2006	0	6
2007-present	0	2
Total Appointments	11	10

Fourth Circuit⁸⁶	<u>Female Appointments</u>	<u>Male Appointments</u>
1995-2000	0	3
2001-2006	1	2
2007-present	1	2
Total Appointments	2	7

83. United States Court of Appeals for the First Circuit, Judges, <http://www.fjc.gov/servlet/nGetCourt?cid=19&order=c&ctype=ac&instate=01> (last visited Apr. 1, 2010).

84. United States Court of Appeals for the Second Circuit, Second Circuit Judges, <http://www.ca2.uscourts.gov/judgesmain.htm> (last visited Mar. 24, 2010).

85. United States Court of Appeals for the Third Circuit, Judges, <http://www.fjc.gov/servlet/nGetCourt?cid=26&order=c&ctype=ac&instate=03> (last visited Apr. 1, 2010).

86. U.S. Court of Appeals for the Fourth Circuit, Judges, http://www.fjc.gov/history/home.nsf/usca_04_frm?OpenFrameSet (last visited Mar. 24, 2010).

2010]

MEN IN BLACK

1719

Fifth Circuit ⁸⁷	<u>Female Appointments</u>	<u>Male Appointments</u>
1995-2000	0	1
2001-2006	2	2
2007-present	2	1
Total Appointments	4	4

Sixth Circuit ⁸⁸	<u>Female Appointments</u>	<u>Male Appointments</u>
1995-2009	1	3
2001-2006	3	4
2007-present	1	1
Total Appointments	5	8

Seventh Circuit ⁸⁹	<u>Female Appointments</u>	<u>Male Appointments</u>
1995-2000	2	1
2001-2006	1	0
2007-present	0	2
Total Appointments	3	3

Eighth Circuit ⁹⁰	<u>Female Appointments</u>	<u>Male Appointments</u>
1995-2000	0	2
2001-2006	0	7
2007-present	0	0
Total Appointments	0	9

87. United States Court of Appeals for the Fifth Circuit, Judges, <http://www.fjc.gov/servlet/nGetCourt?cid=18&order=c&ctype=ac&inststate=05> (last visited Apr. 1, 2010).

88. U.S. Court of Appeals for the Sixth Circuit, Court of Appeals—Judges, http://www.ca6.uscourts.gov/Internet/court_of_appeals/courtappeals_judges.htm (last visited Mar. 24, 2010).

89. United States Court of Appeals for the Seventh Circuit, Judges, <http://www.fjc.gov/servlet/nGetCourt?cid=23&order=c&ctype=ac&inststate=07> (last visited Apr. 1, 2010).

90. Eighth Circuit Court of Appeals Judges, <http://www.ca8.uscourts.gov/newcoa/judge.htm> (last visited Mar. 24, 2010).

Ninth Circuit ⁹¹	<u>Female Appointments</u>	<u>Male Appointments</u>
1995-2000	4	9
2001-2006	2	4
2007-present	0	1
Total Appointments	6	14

Tenth Circuit ⁹²	<u>Female Appointments</u>	<u>Male Appointments</u>
1995-2000	1	2
2001-2006	0	4
2007-present	0	0
Total Appointments	1	6

Eleventh Circuit ⁹³	<u>Female Appointments</u>	<u>Male Appointments</u>
1995-2000	0	3
2001-2006	0	1
2007-present	1	0
Total Appointments	1	4

District of Columbia Circuit ⁹⁴	<u>Female Appointments</u>	<u>Male Appointments</u>
1995-2000	0	2
2001-2006	1	1
2007-present	1	0
Total Appointments	2	3

91. United States Court of Appeals for the Ninth Circuit, Judges, <http://www.fjc.gov/servlet/nGetCourt?cid=21&order=c&ctype=ac&instate=09> (last visited Apr. 1, 2010).

92. The United States Court of Appeals for the Tenth Circuit, Tenth Circuit Judges, <http://www.ck10.uscourts.gov/chambers/index.php> (last visited Mar. 24, 2010).

93. United States Court of Appeals for the Eleventh Circuit, Judges, <http://www.fjc.gov/servlet/nGetCourt?cid=16&order=c&ctype=ac&instate=11> (last visited Apr. 1, 2010).

94. DC Court of Appeals, Judges of the District of Columbia Court of Appeals, <http://www.dcappeals.gov/dccourts/appeals/judges.jsp> (last visited Mar. 24, 2010).