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## Picking Judges: An Introduction

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## INTRODUCTION

# PICKING JUDGES: AN INTRODUCTION

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“[P]rogress does not occur automatically, but requires a concerted effort to change habitual modes of thinking and acting.”<sup>1</sup>

The Infinity Project gratefully accepted the invitation to co-sponsor the symposium “Who Decides? Picking Judges in the 21st Century.” A diverse group of scholars, advocates, politicians, judges, and lawyers provided opinions and insights on big picture issues and examined important nuances related to judicial selection—nuances that are not always visible to the public at large. While debates ensued, a consensus emerged around the aim of ensuring uncompromising quality, so citizens are best served by the administration of justice. The pages that follow highlight these diverse perspectives and shared goals at both the state and federal level. The Infinity Project continues to benefit from the ongoing and robust community dialogue about judicial selection, as it seeks to advance its mission of increasing the gender diversity of the bench.

### I. THE INFINITY PROJECT: A PRIMER

The Infinity Project came to fruition thirteen years after Chief Judge Richard S. Arnold asked District Judge Diana Murphy to organize and appoint a gender task force in the Eighth Circuit “to study effects of gender on both processes and people in the Eighth Circuit judicial system.”<sup>2</sup> Similar efforts were cropping up across the country after the New Jersey Supreme

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1. Ruth Bader Ginsburg, *Foreword*, 84 GEO. L.J. 1651, 1652 (1996).

2. Lyle E. Strom, *Eighth Circuit: Gender Fairness Task Force*, 32 U. RICH. L. REV. 731, 732 (1998).

Court task force<sup>3</sup> surfaced pervasive gender bias in the judicial system. Those findings triggered a national movement to understand the push and pull of gender influences.<sup>4</sup> As Judge Murphy's task force was examining gender in the Eighth Circuit, she became the first woman in its then 103-year history to be appointed to the bench. That was in 1994. The task force published its 172-page report in 1997.

Writing about the report, Judge Lyle Strom, chair of the Eighth Circuit task force, opined, "[T]his study will result in policies in this circuit that will address issues of gender and improve the administration of justice in our courts."<sup>5</sup> And it did in many areas. But long-term, sustainable progress requires a more in-depth evaluation of the systems that drive judicial selections. Systems provide free housing for implicit bias.

Some find it ironic that the woman credited as the driving force behind the task force, its organization, its monumental effort, its findings, and its implementation remained the only woman on the Eighth Circuit for two decades. The Honorable Jane Kelly joined Judge Murphy on the bench in 2014; unfortunately, the hope of a budding critical mass faded with Judge Murphy's passing in 2018, leaving Judge Kelly to assume Judge Murphy's longstanding role as "the one and only."

Federal task force findings related to gender bias and inequality were not new to Minnesota. In fact, similar findings were already spelled out following Minnesota's comprehensive effort to examine the role of gender in the courts a decade earlier. In 1987, Chief Justice Douglas Amdahl appointed the Honorable Rosalie Wahl, associate justice for the Minnesota Supreme Court, to chair the Gender Fairness Task Force in the Courts, and thirty lawyers and judges were named to the committee. The mandate of the task force was to explore the extent to which gender bias exists in the Minnesota state court system, to identify and document gender bias where found, and to recommend methods for its elimination. After an exhaustive review, the task force identified four areas that remained the most challenging, conclusive, and compelling. Those four areas were family law, domestic violence,<sup>6</sup> criminal and civil justice, and courtroom environment.<sup>7</sup> The section on courtroom environment includes an evaluation of the gender

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3. NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS, THE SECOND REPORT OF THE TASK FORCE ON WOMEN IN THE COURTS (1986). Forty states followed suit.

4. Molly Treadway Johnson, FED. JUD. CTR., STUDYING THE ROLE OF GENDER IN THE FEDERAL COURTS: A RESEARCH GUIDE (1995). The Federal Courts Study Committee initially concluded that these studies in the federal courts were unnecessary, but the Ninth Circuit led the charge, the D.C. Circuit soon followed, and the Eighth Circuit launched its effort in 1993.

5. See Strom, *supra* note 2, at 733.

6. MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, FINAL REPORT 36 (1989). Domestic violence became a top priority for the implementation committee.

7. GENDER FAIRNESS IMPLEMENTATION COMMITTEE, PROGRESS REPORT TO THE MINNESOTA SUPREME COURT (1994). An implementation committee was established following the work of the task force, and a progress report was issued in 1994.

composition of the courts. At that time, less than 10 percent of all Minnesota judges were women, and some judicial districts did not have a single woman judge.<sup>8</sup> Noticeably absent in its 2020 reading is any discussion or evaluation related to women of color.<sup>9</sup>

My introduction to gender disparity on the bench occurred in 2006 when I served as Judge Murphy’s oral historian for the American Bar Association’s Women Trailblazers in the Law Project.<sup>10</sup> During one of the nineteen oral history sessions, I asked Judge Murphy about becoming the first woman to sit on the Eighth Circuit. She paused. She told me she was surprised to be the first, but she was even more baffled that she was still the only one. Since her appointment, nine other judges joined the Eighth Circuit—all men. This fact was distracting to me for the remainder of our oral history session. On my way back to the office, I called then appellate attorney and litigator, Mary Vasaly, and asked her if she wanted to do something about the lack of gender diversity on the Eighth Circuit Court of Appeals.

In the coming months, we joined Professor Marie Failing and Professor Sally Kenney in a conference room at Maslon, Edelman, Borman, and Brand, and the Infinity Project was on its way.<sup>11</sup> In the years that followed, the Infinity Project became a multistate collaborative and included a diverse network of judges, lawyers, and scholars interested in improving justice by diversifying the state and federal bench. Minnesota continues to serve as the “headquarters” for the effort.

## II. THE INFINITY PROJECT: IN ACTION

Since its inception, the Infinity Project has focused its resources around three strategic initiatives to advance its mission:

- (1) raising awareness about the importance of and lack of women on the state and federal benches;
- (2) informing and working with judicial selection decision-makers to improve processes; and
- (3) helping women who are interested in serving on the state and federal bench navigate selection processes.

Much has been written about the importance of a diverse bench,<sup>12</sup> but those writings do not represent the full spectrum of opinions on the issue.

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8. *Id.* at 11. When the progress report was issued in 1994, the report noted that forty-six women served on the bench, and there was a woman judge in every judicial district except the Eighth and the Ninth.

9. See generally GENDER FAIRNESS IMPLEMENTATION COMMITTEE, *supra* note 7.

10. Stanford Digital Repository, *Oral History of Diana Murphy*, STANFORD LIBRARIES (last visited Dec. 3, 2019), <http://purl.stanford.edu/dr113dd9587>.

11. See Mary Vasaly, *Men in Black: Gender Diversity and the Eighth Circuit Bench*, 36 WM. MITCHELL L. REV. 1703 (2010) (detailing the early history of the Infinity Project).

12. See Vasaly, *supra* note 11; see also Sally J. Kenney, *Infinity Project Seeks to Increase Gender Diversity of the Eighth Circuit Court of Appeals*, 92 JUDICATURE 131 (2008); see also Celeste F. Bremer, *The Eighth Circuit Gender Fairness Task Force: A Master Class from Judge*

Even Judge Murphy recognized the diverse reactions to a discussion about bias in the judiciary when the Eighth Circuit task force issued its report in 1997. Not much has been written about why diversity is *irrelevant* to the concept of equal justice for all, but this conclusion is alive and well and mostly silent in our social frameworks. This contradictory conclusion often lives buried in the unconscious thought process, invisible to sight (and sometimes leads to a wolf in sheep's clothing). Challenging implicit bias requires action steps that challenge our buried thought processes.

The Infinity Project continues to engage its three strategic priorities on a fulcrum of action and most recently has invested significant time and resources in the Infinity Project Collaborative Bootcamp. These four-hour programs, developed in deep collaboration with affinity bar organizations in Minnesota, Iowa, and North Dakota, include tracks for people at different stages of their legal careers: lawyers interested in serving as a judge in the future (typically lawyers with less than ten years' experience); lawyers interested and ready to apply for an opening (typically lawyers with more than ten years' experience); and lawyers and sitting judges interested and ready to apply for state appellate or federal courts.

The Collaborative Bootcamp model uses personal outreach to attract potential participants and develop relationships with decision-makers. The personal outreach model recognizes the important role of recruitment in changing the perceptions of who is qualified to sit on the bench. The "by invitation" approach of these workshops served as a powerful validator for those involved, especially the lawyers with less than ten years' experience. Most of the participants were honored to be part of the workshop. The model encourages individuals and organizations to think carefully and outside the box about future judicial talent and seeks to change the perceptions of underrepresented women lawyers about their ability to serve the public as a judge.

Involving judicial decision-makers as session leaders in the bootcamp model expands the consideration and understanding of the talent pipeline. Even in Minnesota, where 85 percent of the population is white, bootcamp leaders can see in a powerful, visual way the depth of legal talent ready and able to serve in judicial positions from communities of color. This process further disrupts implicit bias in the system when bootcamp leaders even from the affinity bar associations see and experience something very different from the common conclusion—that there just aren't qualified people in their communities—about the diversity of the pipeline to the bench. Influencers connected to the state and national judicial selection process often complain that no one is applying from communities of color; serving as a bootcamp leader changes that narrative. Moreover, women lawyers of color

typically represent half or more of the participants. In this bootcamp model, women of color can feel the collective power of being in a space with so many other people like themselves—a big change from often being the one and only in the room.

Through the bootcamp format, underrepresented individuals receive coaching and mentoring from individuals that influence selection processes directly or indirectly. After years of feeling left out and marginalized, a reality affirmed by many of the judges of color who served as facilitators, participants felt like they were finally getting the same kind of information that white men had always been privy to through association with the types of “power brokers” leading the workshops. Around half of the facilitators were white men and women who showed up on a Saturday to openly share an insider perspective.

As part of the Collaborative Bootcamp model, the Infinity Project has developed the “My Journey to the Bench” planning tool. The planning tool walks an applicant through important procedural points of discernment and strategy, such as relationship building; developing application materials, a personal narrative/story and a professional brand; and information gathering.

### III. THE INFINITY PROJECT: A CONTINUED COMMITMENT

The story and continuing work of the Infinity Project speaks to an investment in our communities for a limitless period of time. Given what we know about implicit bias and given that the pathway to the bench engages various systems, the idea that our judiciary can and should be reflective of the people it serves will forever require strategy and intent. The process that delivers “equal justice under law” will determine whether participants in the administration of the system believe in and accept its mandate. Unless that process includes a diverse bench, the fabric of our democracy will have tears.

Judge Murphy’s legacy continues to inspire the efforts of the Infinity Project. Volunteers will continue to work tirelessly to educate about the importance of a diverse bench, influence decision makers about selection processes, and help build and advance a deep and robust pipeline of judicial candidates. In my lifetime, I hope to see the Eighth Circuit bench reflect the diversity of the communities it serves. Judge Murphy would be so proud.