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Women Attorneys and the Judiciary

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WOMEN ATTORNEYS AND THE JUDICIARY

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INTRODUCTION

And during all those busy hours,
Filled with estates, wills, companies' powers
In closing deals—court work—now
A genuine lawyer thou.[1]

The purpose of this article is to explore the role of the female attorney vis-à-vis the judicial role. While it is clear that women involved in the practice of law have their days filled with much of the same kind of work as their male colleagues, including the items mentioned in the quotation above, the sociological concept of role includes more than the fulfilling of certain defined functions. Sociologically, a role is both a set of patterned behaviors and a set of expectations on the part of others about the appropriate activity the role should encompass.[2] Thus, the concept of role has to be viewed in a framework that takes into account both the reiterated, structured behavior of the person playing out his or her part in the social situation and the expectations of the others in that situation about how the part should be played and the success these others assign to an individual in meeting such expectations.

Unfortunately, however, the expectation component of role oftentimes contains more than simply what the role should encompass or how the role should be played. It may also include an expectation of who should play the role. If this expectation is not met at the outset, the role incumbent may then experience difficulty in being recognized as an adequate player even if the basic occupational or behavioral elements are in fact fulfilled and fulfilled well. Therefore, sociologically, it is not enough that women

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[1] Wigle, *Sisters in Law*, 5 CAN. B. REV. 419 (1927).

[2] M.L. DEFLEUR, W.V. D'ANTONIO, & L.B. DEFLEUR, SOCIOLOGY: MAN IN SOCIETY 41-2 (1971).

graduate from law school, pass the bar, and actually engage in the practice of law. A key question must also be the recognition that is given women attorneys as equal members of the bar. The answer to this question will in turn hinge on the expectations that others hold concerning the role of attorney including expectations about who should play the role.

Such a question is of more than academic interest since a lack of professional recognition can also mean a lack of professional success. If law school deans, professors, colleagues in practice, judges, and even clerks all hold the expectation that lawyering is essentially a man's occupation, the female practitioner can expect to have a much more difficult time than her male counterpart in achieving eminence and the income that attends it. The lack of professional recognition also has consequences beyond the immediate plight of the individual woman attorney. The recognition given or withheld from women attorneys by functionaries in the legal system can affect the decisions of judges, the decisions of juries, in short the fate of clients and the principles upon which our legal system is based. If a person's chances of obtaining justice are excessively influenced by the sex of that individual's counsel, the whole system of justice is seriously called into question.

This paper will concentrate primarily on the interactions of women attorneys with judges during the course of trial. Judges are, however, merely a part of the legal system and occupy only one role that has influence on the course of justice. Therefore, where appropriate, the treatment accorded women by other functionaries of the system will be described and commented upon.

I. REVIEW OF THE LITERATURE

A review of the literature dealing with judicial views of women generally and female attorneys specifically indicates a need to explore this issue. The literature suggests that such views are in a state of flux, with the earlier literature indicating a definite judicial bias against women, and the modern literature indicating a movement away from more blatant forms of sexism. Historically, the judiciary has not shown itself to be a champion of women's rights. In an article by Doris L. Sassower, the rather dismal record of the courts in this area is reviewed.[3] The case of

[3] Sassower, *Women and the Judiciary: Undoing "The Law of the Creator"*, 57 J. AM.

Bradwell v. Illinois[4] in 1873—where the Supreme Court sustained the denial of Bradwell's application to practice law in Illinois—set the tone for many of the future judicial views regarding the place of women. In a concurring opinion, Mr. Justice Bradley dismissed the contention that the fourteenth amendment conferred upon women the right to pursue any legitimate employment, including the practice of law. He said:

> The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator.[5]

This case is of special significance since it portended a rather rough going for women in general and female attorneys in particular as they pursued goals through the bar of justice.[6] Sassower goes on to describe a number of early judicial decisions through 1948 in which courts continued to base decisions on the "Law of the Creator," particularly in the area of restricting employment opportunities.[7]

Admittedly, presently the status of women in all aspects of American society is in a state of flux. However, while certain decisions may provide encouragement for those seeking legal equality for women, certain other cases leave room for doubt. As late as 1961 in *Hoyt v. Florida*,[8] the Court continued to view the place of women as belonging primarily in the home by upholding statutes limiting women's participation on juries. This decision was called into question only this summer.[9] The Court has only found two classification schemes based upon sex to be a violation

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JUD. SOC'Y 282 (1974).

[4] 83 U.S. (16 Wall.) 130 (1873).

[5] *Id.* at 141 (concurring opinion).

[6] A year after *Bradwell*, the Supreme Court in Minor v. Happersett, 88 U.S. (21 Wall.) 162 (1874), denied women the right to vote under the fourteenth amendment. A constitutional amendment was thus needed in order to obtain for women the franchise.

[7] In Muller v. Oregon, 208 U.S. 412 (1908), for example, a case heard by the Supreme Court in 1908, state statutes were upheld that restricted the number of hours a woman could work, how much she could lift, the payment of minimum wages, and so forth. Forty years later the Court was still attempting to restrict women in terms of employment as the case of Goesaert v. Cleary, 335 U.S. 464 (1948), shows. There the Court said that women could be denied licenses to be bartenders. Sassower, *supra* note 3, at 283.

[8] 368 U.S. 57 (1961).

[9] Taylor v. Louisiana, 95 S. Ct. 692 (1975). The Court distinguished *Hoyt* by stating that it had not involved the question of a defendant's sixth amendment right to a jury decision from a fair cross section of the community nor the prospect of a denial of that right by the systematic exclusion of women as a class.

of equal protection: statutes giving preferences to males for appointment as estate administrators[10] and regulations forcing only women armed services members to prove dependency of their spouse to collect housing allowances and medical benefits.[11] These cases appeared to suggest a "same situation, same treatment" test. However, other cases have allowed different treatment: property tax deductions only for widows,[12] longer time before a nonpromoted Navy female officer can be mandatorily discharged,[13] denial of unemployment compensation benefits for pregnancy leave,[14] and denial of the right of a married woman to have a driver's license issued in her maiden name.[15] As a result of the way the Court has dealt with the cases, there is disagreement among the courts and the commentators as to whether sex is a suspect category and thus entitled to the stricter new equal protection standards.[16]

The implication of some of these decisions is clear. Certain judges tend to place women in traditional roles. That is, they hold the expectation that women will or should stay in the home, or at least in those occupations suited to the unique talents they possess because they are women. This type of stereotypical response to women contains two elements, both of which constitute what has been termed the conservative or traditional view of women.[17] First, there is the notion that certain occupational roles are "woman" roles, and, second, the notion that women inherently possess certain job related skills because of gender. The tendency for some members of the judiciary to take this traditional view of woman's role is perhaps best illustrated in this quote from Chief Justice Burger during the oral argument before the Court in *Phillips v. Martin Marietta Corporation*:[18]

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[10] Reed v. Reed, 404 U.S. 71 (1971).

[11] Frontiero v. Richardson, 411 U.S. 671 (1973).

[12] Kahn v. Shevin, 416 U.S. 351 (1974).

[13] Schlesinger v. Ballard, 95 S. Ct. 572 (1975).

[14] Geduldig v. Aiello, 417 U.S. 484 (1974).

[15] Forbush v. Wallace, 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd*, 405 U.S. 970 (1972).

[16] Comment, *Geduldig v. Aiello: Pregnancy Classification and the Definition of Sex Discrimination*, 75 COLUM. L. REV. 441 (1975); Annot., 27 L. Ed. 2d 935 (1971); Annot., 17 A.L.R. Fed. 768 (1973).

[17] A. COLLINS, THE ATTITUDES TOWARD WOMEN SCALE: VALIDITY, RELIABILITY AND SUBSCORE DIFFERENTIATION (unpublished Ph.D. dissertation in the University of Maryland Library) (Aug. 3, 1973).

[18] 400 U.S. 542 (1971) (oral arguments), *cited in* L. KANOWITZ, SEX ROLES IN LAW AND SOCIETY, CASES AND MATERIALS 54 (1973).

> Burger: Well I have to assume up to this time, Mr. Senterfitt, that the reason you have 75 or 80 percent women is that again something that I would take judicial notice of, from many years of contact with industry, that women are manually much more adept than men and they do this kind of work better than men do it, and that's why you hire women. . . .

After some discussion of this point, the Chief Justice went on to state:

> Burger: The Department of Justice, I am sure, doesn't have any male secretaries. This is an indication of it. They hire women secretaries because they are better and you hire women assembly people because they are better and you make the distinction between women who have small children and women who don't; so it appears on the record.[19]

A question arises as to the effect on female attorneys of the holding of such views by members of the judiciary. Do judges who have a traditional outlook concerning the role of women negatively sanction female counsel, since at the outset she does not meet the judge's expectation about the appropriate role for women? At this point, the answer to the question is at best hypothetical. However, it is evident that some female practitioners feel judges do discriminate against them because of gender. Thus judges are seen as exhibiting a conservative male bias toward women not only in the decisions they render, but also in the job related interactions they have with women lawyers. This was the concern of women attending the Fifth Annual National Conference on Women and the Law held in Austin, Texas in 1974. Those women attorneys involved in the litigation of Title VII actions "charged that judges, who must award 'prevailing' fees to an

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[19] *Id.* The case arose under Title VII of the Civil Rights Act of 1964. The Court held the company could not refuse to hire women with preschool children if it continued to hire men with children that age. However, the Court remanded with the suggestion that this hiring policy could be salvaged if the company could prove conflicting family obligations could be demonstrated to be more relevant to job performance for a woman than for a man.

More recently, *Time Magazine* has reported an exchange in a state court in much the same vein as the above remarks.

"You're getting a divorce?"
"No, my client is."
"You're the secretary?"
"No, I'm the lawyer."
"You're the *lawyer*?"

TIME, May 26, 1975, at 40.

attorney winning a Title VII case, consistently award lower fees to women attorneys."[20]

Some women attorneys feel, therefore, that their sex is definitely taken into account by judges and that their gender does affect the process of judicial decision making. This perception on the part of some women practitioners that their sex is an issue in the fulfilling of their occupational role also extends to the profession at large. An article in the *New York Times* reporting on another national conference on the place of women in law held at Stanford in March 1975 summarized this view, by saying that

> professors still make jokes about women, male judges still treat women—even women judges—differently than they treat men, and women still feel less than welcome, if welcome at all, in the legal profession.[21]

The most thorough study done of women attorneys is White's classic study, *Women in the Law*[22] which was published in 1967. More recent articles on women attorneys generally refer to the White study and give updated figures on law school enrollments and percentages of attorneys in the United States who are women.[23] Even though it is dated, White's results are still valid as indicating trends in the profession. The study indicated that women law graduates are discriminated against in terms of the types of jobs available to them, and the financial remuneration they receive from the practice of law. Concerning income, White found that during the first year of practice there was an average differential of $1,500 in the income of male attorneys as opposed to female attorneys, and that the differential between the two groups increased each year until the difference was some $8,300.[24] The women in White's sample also showed a heavy concentration in federal, state, or local government work as compared to men.[25] This fact, together with White's finding that 57 out of 63 placement directors questioned reported that discrimination against female law graduates in hiring is significant or extensive, suggests that women have been restricted regarding the types of jobs avail-

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[20] Stein, *Women and Law Conferences '74*, TRIAL, July/August 1974, at 32.
[21] N.Y. Times, Mar. 25, 1975, at 28, col. 1.
[22] White, *Women in the Law*, 65 MICH. L. REV. 1051 (1967).
[23] TIME, May 26, 1975, at 40-41.
[24] White, *supra* note 22, at 1057.
[25] *Id.* at 1075.

able to them.[26] This interpretation is strengthened by noting the findings of other researchers in this area. Dorothy W. Nelson, quoting an item in the October 1970 issue of the *American Bar News*, states that 9 out of 10 large law firms refuse to interview women lawyers.[27] Discrimination in hiring is also noted by Janette Barnes in the *Journal of Legal Education*.[28] Finally, White's study indicates that well over half of his female respondents (N=1148) felt that they had been discriminated against in seeking employment within the legal profession. His sample of female attorneys reported 1,963 separate occasions of potential employers' actually stating to a female respondent that there was a policy against the hiring of female attorneys.[29]

The view of the legal profession toward women participants can also be ascertained by noting the place of women in law school. A review of this data leaves some room for encouragement, although the historical perspective is rather negative. In 1967, 4.3 percent of the people entering law school were women; in 1970, 7.8 percent; in 1972, 16 percent;[30] and, in 1974, 20 percent of the incoming students were women.[31] While this indicates a lessening bias on the part of law school admissions committees, it is unclear as to whether this lessening bias came about because of changed views or because of legislation against both racial and sexual discrimination.

In 1972, women constituted 38 percent of the work force, but they were only 3.5 percent of all lawyers, a proportion that had undergone little change since 1910. In 1910 they were 1.0 percent of the legal profession, but the progress to 3.5 percent in 1972 had not kept pace with women's increased attendance at college and in the general work force.[32] Data from 1974, however, clearly shows that in the last 2 years more change has taken place in this regard than during the preceding 62 years. The American Bar

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[26] *Id.* at 1085.

[27] Address by Dorothy W. Nelson, University of Oklahoma College of Law Enrichment Program, Apr. 6, 1973, in 26 OKLA. L. REV. 375 (1973).

[28] Barnes, *Women and Entrance to the Legal Profession*, 23 J. LEGAL ED. 276 (1970).

[29] White, *supra* note 22, at 1085-86.

[30] Bysiewicz, *1972 AALS Questionnaire on Women in Legal Education*, 25 J. LEGAL ED. 503 (1973).

[31] TIME, May 26, 1975, at 41.

[32] *Id.*; Jacobs, *Women in Law School: Structural Constraint and Personal Choice in the Formation of Professional Identity*, 24 J. LEGAL ED. 462, 465-66 (1972).

Association's most recent report indicates that women now comprise between 5 and 7 percent of the nation's 400,000 practicing attorneys.[33]

Clearly, then, certain strides have been made by women in the profession of law. Not only have their numbers increased in both admissions to law schools and in participation at the bar, but the traditionally male structures of the legal profession are undergoing slow but sure modification. Many schools have added special courses on women's legal rights and a few even use a desexified casebook written by two Harvard professors.[34] Yet, on the whole, female law students are still faced with structures that reinforce the traditional view of women held by some members of the legal profession. An example from a typical property textbook illustrates the stereotyped character women students are sometimes faced with: "for, after all, land, like woman, was meant to be possessed. . . ."[35]

In reviewing the literature on women and the law, then, certain points stand out. Historically, the judicial view of women has tended to place them in traditional roles. Although this is changing somewhat, there are still indications that a number of judges are reluctant to abandon this perspective. Whether or not this expectation affects judicial views of women attorneys is at this juncture an open question,[36] although again there are clear indications in the literature that some female practitioners perceive that this is in fact the case.[37]

Given the above discussion, it is rather surprising to find that little research has been done regarding the specific role interactions of female attorneys and judicial functionaries. This lack of specific research is a surprise for a number of reasons. First, the available literature seems to indicate that there may be some

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[33] TIME, May 26, 1975, at 41.

[34] *Id.*

[35] C. BERGER, LAND OWNERSHIP AND USE, *cited in* Ginsburg, *Treatment of Women by the Law: Awakening Consciousness in the Law Schools*, 5 VAL. U.L. REV. 480 (1971).

[36] In summarizing what seems to be the historical attitude of judges toward women colleagues, an observation from the autobiography of Florence E. Allen appears apt. In 1934 she was appointed to the federal bench and she states that her fellow judges so disapproved of her appointment that they would not even look at her during the working sessions of the court, let alone talk to her cordially. Sassower, *supra* note 3, *citing* F. ALLEN, TO DO JUSTLY (1965).

[37] *See* text accompanying notes 20 & 21 *supra*.

cause for concern that the sex of the attorney does influence judicial action. Second, it is apparent that this issue is perceived by some female practitioners as an important one and one that needs investigation. Third, the situation is apparently fluid and in some state of change. Since this seems to be the case, the topic should be of current interest to both researchers and the public at large. Yet no specific studies of judicial actions or attitudes toward female attorneys were uncovered. Because of the lack of such specific research, then, this study is of the nature of an exploratory effort. That is, it merely hopes to indicate some areas for future investigation, and at the same time offer some tentative data on the nature of judicial interaction with female attorneys. Such an exploration can accomplish two things. It can pinpoint some of the problems women might encounter as they go about the practice of law. More importantly, perhaps, it can also lead the way to a further understanding of the judicial role in the context of how justice is administered. It is this understanding that can help insure the equal treatment of all groups before the bar of justice.

II. METHODOLOGY

The question this research addresses is whether judges, by their words and actions during courtroom proceedings, recognize and attribute to women full professional standing as members of the bar; *i.e.*, are the expectations they portray regarding the role of attorney the same regardless of the sex of the role incumbent. In attempting to answer this question, this study utilizes as its primary methodology participant observation. This approach is particularly apt since the field being explored is relatively unstudied. Although numerous studies have been done on the process of judicial decision making, including the relevance of background factors, political party affiliation, and so forth,[38] no data exists on the judicial view of women in the court and how or whether such views affect judges in conducting trials where clients are represented by women lawyers.

Since this is, therefore, a new area of exploration, a questionnaire approach is at this stage an inappropriate tool to use in

[38] *See, e.g.*, Nagel, *Judicial Background and Criminal Cases*, 53 J. CRIM. L. 333 (1962) and sources cited in Danelski, *Toward Explanation of Judicial Behavior*, 42 U. CIN. L. REV. 659 (1973).

investigating the issue under consideration. A necessary first step in exploring an uncharted domain of social life is the gaining of an overall sense of the scene in which the interactions one is interested in take place. If this step is left out and one immediately attempts the invasion of the scene with questionnaires and elegant statistical analysis, there is a very real danger that the resultant data will reveal nothing but the author's adeptness at statistical abstraction. A questionnaire, in order to be both valid and reliable, must have some relationship to the actual situation the respondent is a part of, or risk a number of problems. Hence, questionnaire items relating to judicial attitudes towards women may in fact be nonsensical if the researcher has no idea of the context in which the attitude may be portrayed. Another difficulty may arise because of a respondent's reluctance to answer certain kinds of questions. There have been indications from past research on judicial decisionmaking that some judges are hesitant to answer certain kinds of questions, and, indeed, take affront at the investigation of various facets of their decisionmaking process. This reluctance was experienced in certain instances when an attempt was made to research judicial sentencing behavior in cases of selective service violators.[39] Such a problem could well be exacerbated if the items were not related to the types of situations judges would encounter relevant to the issue. Another area of difficulty a researcher may encounter, if he skips the first step of observational research, is wasted time, money, and effort. Only after the broad framework of judicial behavior has been described and analyzed can one ascertain those areas relevant and important for future research efforts. All of these reasons for using participant observation as an exploratory research strategy are best summarized by David J. Danelski in his article "Toward Explanation of Judicial Behavior":

> The most fruitful way of conducting exploratory research, in my opinion, is direct observation of judges at work—in court, in chambers, in conference, and so forth. Similar studies have been done of congressmen, but they are yet to be done for judges. Exploratory studies based on direct observation will lay foundations for future research by protraying accurately the contexts of judicial behavior, by describing the dynamics of decision processes, and by indicating variables likely to have greatest explanatory power.[40]

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[39] Frankel, *Comments of an Independent, Variable Sentence*, 42 U. CIN. L. REV. 667, 671 n.8 (1973).

[40] Danelski, *supra* note 38, at 659-60.

With these statements as guides, the following research was based on approximately 6 months of observation by law students of judges as they interacted with women attorneys in courtroom situations. Approximately 17 observations were recorded and analyzed.[41] These 17 observations were conducted of 15 separate proceedings. In two cases, two observers were used to record the interactions of one trial. Most of the courtroom appearances involved both a male and a female attorney, although in one instance two female attorneys were adversaries. By observing proceedings in which both a male and female counselor were present, observers could compare the treatment of one or the other by the same judge. Observers were asked to record judicial facial expressions, hand motions, language, and all other items that might relate to the tone set by judges during a trial or courtroom proceeding where a woman attorney was present.[42] They were asked to be particularly aware of and record any differences in treatment of the male attorney from the female attorney by the judge. This reference was, however, the only one made to the purpose of the study. Observers were *not* told to look for discriminatory behavior, or behavior reflective of anti-feminine bias on the part of the bench. Neither were observers exposed to the literature discussed previously. Instructions were given in a general way, and observers were told not to draw conclusions or express opinions, but merely state what went on during the time they were in court.

As indicated, this was an exploratory effort, and, therefore, no attempt was made to have a random selection of judges. Whether a particular judge was picked for observation depended on whether he was to be faced with a female attorney. Nevertheless, different levels of the judiciary were in fact observed, includ-

[41] Our goal was to have as many observations as possible, but, as anyone connected with trial work would be aware, the following factors served to limit the number of observations which could be accomplished: the limited number of women attorneys actively involved in trial work; the limited number of cases in which a female attorney opposed a male attorney; routine postponement of trial dates and times; variable schedules of student observers; and the inability to ascertain in advance the names of attorneys presenting cases at certain court levels.

[42] Trial lawyers have for a long time been aware that those items can affect the outcome of trials. Conner, *The Trial Judge, His Facial Expressions, Gestures and General Demeanor—Their Effect on the Administration of Justice*, 1965 TRIAL LAWYER'S GUIDE 251.

ing appellate courts, trial courts, and juvenile proceedings. Included in the appellate court and trial court categories were observations at both the state and federal levels.

Participant observation can yield a rich and detailed picture of a social scene. However, when a researcher uses this method, two cautions must be kept in mind. First, people see and record different things. Thus, all observations are filtered through the idiosyncratic eye of the beholder. To control this phenomenon, all recorded observations were compared for points of similarity. If a group of observations conducted by different persons contain similar descriptions of the same kinds of behavior, the researcher is on safe ground in assuming that the pictures presented are essentially accurate. Therefore, in this report, the commonalities present in all 17 observations are described and commented upon. Second, researchers in analyzing the data from participant observation may perceive different elements and hence draw conclusions at variance with one another. In short, bias can also enter into the data at the level of analysis. To guard against this, after the observations were concluded, ten interviews were conducted with women attorneys in order to have some check on both the observations and their analysis. The inclusion of the interview technique in this effort was to check the reliability of the observations and to see whether the perceptions of these attorneys matched the analysis of the researchers. Both techniques, then, taken together, formed a powerful methodology for an exploratory examination of judicial behavior toward women lawyers, and, hopefully, this combination checked the bias likely to occur if participant observation was used exclusively.

Since the study was, however, largely participant observation, its major focus is on the area of judicial discrimination and behavior, not attitudes. Again, this focus is deemed to be a necessary first step in understanding the process of judicial decision-making. The relationship between attitudes and behavior is by no means a simple one, and it is only after behavior is recorded and analyzed that questionnaires measuring attitudes can be constructed. Once this initial step is completed, and only then, can meaningful questions be asked and attitudes interpreted in the context of ongoing behavior.

III. THE DATA

St. Francis of Assisi must have had a bit of the trial lawyer

and the social psychologist in him, as this story quoted from Leslie L. Conner's article, "The Trial Judge, His Facial Expressions, Gestures and General Demeanor—Their Effect on the Administration of Justice," indicates:

> St. Francis asked a novice one day to accompany him down to the city where he was going to preach to the people. The two walked about the streets of the city for several hours in complete silence and then started back to the monastery. The surprised novice asked him: "I thought you were going to preach to the people?" St. Francis answered, "We were preaching all the time while we were walking by the way we walked, by the way we looked and conducted ourselves, and, without saying a single word, the people got our message."[43]

Apparently saints, social psychologists, and trial lawyers are all well aware that it is not only what a person says, but how he says it in the silent language of gestures, demeanor, and facial expressions that determines the real message a person is communicating. Thus, by examining the language, both spoken and unspoken, of trial judges during a courtroom proceeding some insight can be gained concerning the message certain judges get across about their own role and the perceptions they hold regarding female attorneys. Concerning their own role, judges in this research seemed to be presenting at least one dominant message. Judges seemed to present themselves as disinterested observers, thus conveying to those around them the impression that they had no vested interest in the outcome of the proceedings. The following excerpts from the field notes of the observers illustrate this point.

> Notes from an Appeals Court Session—Three judges presiding.
> Scene I: Male attorney presenting arguments: Judge A playing with nose, B and C are writing.
> C is looking at papers.
> B asks a question, A is still playing with his nose, C looks asleep.
> B has his face on his hand.
> A is looking away, looking around the room.
> C has hand on chin, still looks asleep.
> Scene II: Female attorney presenting arguments:
> Judge A and C are writing, B is leaning over arm of chair.
> C is still writing. A has his fingers on face.
> B is looking down, maybe writing.

[43] *Id.* at 251-52.

A is looking away and scratching his ear.
C is still writing.

And from a State Court—one judge presiding—case involves second degree burglary and conspiracy charges.

Scene I: Witness being questioned by D.A.—male.
Judge: Face leaning against hand, elbow on desk.
Looking at witness and head down writing a little.
Now just looking down. Picks up papers, reading.
Doesn't seem to be listening. Still reading.

Scene II: People's Exhibit A—D.A. points out large diagram.
Judge: Is watching exhibit.
Judge is still watching, witness is pointing things out. Judge is attentive.
Judge is rubbing eye. He picks up more papers.
Reading. Witness is still at exhibit.

Scene III: Cross examination—Public Defender—female. Public defender is at exhibit asking questions. Judge is watching. Public defender walks back to podium asking questions at the same time. Judge is watching the witness, not the public defender. The public defender dismisses the witness.

Scene IV: Next witness called by D.A.
Judge staring into space while waiting.
He is scratching his neck.
Judge is reading. He puts book back and begins writing. Judge has his hands on his face; continues writing. Judge glances up when the witness identifies defendant, then goes back to writing. Judge glances up and looks at witness's hands. Public defender objects to description of defendant's cuts by witness. Judge sustains objection—smiles and goes back to writing.

An analysis of these brief excerpts points to what appears to be a dominant ritual adopted by most judges observed during this study. Their actions might best be termed a ritual of noninvolvement. *Ritual as used here refers to a set of actions habitually practiced as a part of a defined role.* Judges in our system of justice are expected to take a rather limited part in the actual trial proceedings. The model of third-party disinterest is held up as an ideal role judges are expected to play. This is opposed to the role model judges are instructed to emulate in civil law countries, where they take a much more activist role in the conducting of the trial.[44] Thus, in our study it appears that judges do indeed attempt to play the role of a disinterested third party and thereby

[44] *See* Reiss, *Lessons in Judicial Administration from European Countries*, 37 J. AM. JUD. SOC. 102 (1953).

meet the role expectations appropriate to an American interpretation of the judicial function. This attempt to meet one's role expectations is engaged in by practicing a ritual. The notion of ritual fits well with a dramaturgical model of society.[45] This sociological model views participants in a social situation as actors. People are seen as playing out parts or roles in such a way as to convince both others and themselves that the performance is credible, *i.e.*, meets the expectations appropriate to the role being played. Hence, an individual in a role seeks to give a meaning to that role which is logical, coherent, and credible from both his own perspective and the perspective of other actors or the audience viewing the performance.

For practicing trial attorneys, the dramaturgical model may not at first blush appear startling or new. Most trial lawyers are probably well aware of the theatrical aspects of their court appearances and the procedures publicly engaged in by others, including judges, during such appearances. However, this model underscores what many may overlook; namely, that much of the public ritual is designed to give the appearance of justice and is not necessarily engaged in to achieve an actual state or outcome of justice. Appearance rather than fact becomes paramount. Thus, judges may seek to appear impartial whether they are in fact so, and their public performances or rituals may disguise attitudes and opinions that are less than impartial.

The dramaturgical model as applied to judges can be further exemplified by noting some of the elements of the scenes described above. Certain striking features stand out: the apparent effort to avoid eye contact with participants, the hands regularly near the face to hide or disguise facial expressions, and the tone of disinterest that judges attempt to set by reading, writing, or engaging in activity seemingly unrelated to the scene taking place. All of these things seem designed to convince others that judges are in fact impartial, disinterested observers.[46]

However, our system of justice has written an extremely dif-

[45] For a further discussion of the dramaturgical model, see E. GOFFMAN, THE PRESENTATION OF SELF IN EVERYDAY LIFE (1959).

[46] Obviously, the courtroom itself is designed to assist this management of impressions. The judge is seated apart from the attorneys and the jury upon a raised dias. He wears special clothing to set him apart from the other participants, who wear street clothing.

ficult script for judicial actors. The part of judge calls for a person to act as a disinterested third party during proceedings in which in reality he is interested and has a central role to play. It appears, then, that in order to pull off this rather demanding role, certain judges adopt an exaggerated ritual which preaches to those present a message of third party disinterest. The ritual is exaggerated since judges end up trying to balance the message of disinterest with one of concern and attention. They periodically show interest at what they might consider to be appropriate or crucial moments of the proceeding. But, once having gone over to the side of interest and involvement, they must then try to retip the scales to the side of impartiality and disinterest. Thus, during less crucial moments, a ritual of noninvolvement is enacted, an exaggerated portrayal to convince others of a credible performance, a performance that retrieves and maintains the message of impartiality. Since this is such a difficult role, though, less than perfect performances can be expected to occur on occasion. When actors catch themselves not following the script, they will probably try to assume the ritual of noninvolvement in order to salvage the performance. The following excerpt illustrates this dynamic:

> Notes from a federal court civil proceeding:
> Judge smiles very broadly several times in succession as the attorney talked. However, judge covered face most of the time. Judge will sit back in chair, sort of moving it back and forth and half smile, then raise hand to cover the lower half of face so that expression cannot be seen by anyone.

The judge in this sequence was apparently having a difficult time staying in character. But again, when this lapse was realized, an attempt was made to salvage the performance by adopting some of the mannerisms contained in the portrayal of noninvolvement given by other judges in the sample.

Not all of the judges observed used this same acting technique to get across a message of impartiality. A second technique that was observed might be termed a ritual of active interest. Here, the judge portrays impartiality by involving himself with the participants in the proceedings, but interacting with all of them in the same way. A judge might be rude, for example, but if he is rude or feisty with all participants in the situation the end result is a message of impartiality as the following sequence points out:

Notes from a state appellate court hearing, four justices present:

Scene I: Male attorney for appellant spoke first and Judge I interrupts asking in a rude manner, "Are you aware of our decision on the constitutionality of other state's statutes?" Male attorney continues argument only to be interrupted by Judge I again who in a curt tone asks, "They said he shot and killed him during a robbery, didn't they? How could he shoot him if he wasn't armed?"

Scene II: Male attorney representing the State begins presenting his answering argument, when Judge I cuts him off abruptly indicating there is no need to go into the issue he was addressing.

Scene III: Female attorney representing appellant in a different case begins her argument when Judge I interrupts her in the same manner as the previous two attorneys were interrupted. "Are you saying probable cause for extradition is the same as probable cause for a search warrant?" Female attorney begins to respond only to be interrupted again by Judge I asking if she were aware of their decisions saying all that was required for extradition was something approaching probable cause. She answered that she was aware of those decisions but did not think the case at bar showed anything approaching probable cause.

When the two prior male attorneys were arguing the other justices sat quietly (one asked one question) and sometimes wrote but otherwise did nothing. At this point in the woman attorney's argument, two of the justices wrote notes to each other. Otherwise, they wrote on pads in front of them or sat quietly.

This example shows that impartiality can be portrayed either by adopting a ritual of noninvolvement or a ritual of active interest. The former method seems to be the one used by three of the justices. The latter is clearly the style of Justice I, although again, since all were treated similarly by this actor, the end result is a message of impartiality.

By using one or the other of these rituals, judges who were observed as a part of this study generally set a tone of impartiality during the public proceedings. Therefore, little evidence emerged that would indicate judges treat female attorneys differently from their male colleagues during public performances. In fact, in only one instance was the sex of the attorney alluded to by a judge. This instance is from a municipal court proceeding in a Denver suburb. The female defense attorney is explaining to the jurors the purpose of the voir dire.

Attorney: The purpose of the voir dire is to ask you questions to obtain a jury as fair and impartial to the city as to the defendant. Does anyone have a quarrel with this idea? Tell us.

Judge: I should have asked, Miss X, if they have any quarrel with a female attorney.
All laughed.
Attorney: It's too late now.
She then proceeded with her questioning of the jury.

It would appear that this episode describes more an attempt at humor, rather than a clear indication of a negative judicial bias. Granted, the attempt at humor may have been in poor taste; nevertheless, the attorney did not appear in this instance to take offense at the reference to her sex. The experiences recounted by the women attorneys interviewed corroborated the data reported by the participant observers. Only one respondent mentioned a current example of obvious, public judicial bias. This example involved a judge who would always let her go first in presenting her case, no matter how many other attorneys were waiting.

To summarize the results of the observational part of the study, it appeared that judges did not generally show any difference in treatment of female adversaries during courtroom proceedings. In order to further test the validity of this impression, ten women attorneys were interviewed to see whether they had experienced differences in treatment by judges, or whether their impressions matched those gleaned from our observations.

The ten attorneys interviewed ranged in age from 25 to 57 years, with an average age of around 32 years. There was a wide variation in the time each had practiced, the range being from 9 months to 29 years. All but one was involved in either state or local government work, the exception being a legal aid attorney. Three, however, had experience in private practice. All ten were asked the following question: "Have you found the behavior of judges toward you any different than their behavior toward male attorneys?" The responses to this question are noted below. Persons answering are only identified by a number for two reasons. First, since many answers are similar, biographical data on the respondent did not seem critical. More importantly, identifying biographical data is omitted from the responses to protect the anonymity of the individual answering the question. Thus, the rather sketchy background data presented above will have to suffice, although, again, given the similarity of certain of the answers, the omission does not appear critical.

QUESTION: Have you found the behavior of judges toward you any different than their behavior toward male attorneys?

Respondent I: No. Not really. I'm trying to think if I've ever run into a courtroom problem. I think judges for the most part are much more gracious and generally very willing to talk with women attorneys and listen to their arguments than most other attorneys, male attorneys. I've found that the judges once you appear before them and if you're prepared and know what you're doing, they're just as willing to listen to you, probably more so. In fact, if anything I think they probably lean over backwards and sometimes I suppose that could be patronizing, but I haven't had any real problem with a judge patronizing me. I've had a lot of problems with other attorneys patronizing, but not judges.

Respondent II: I never detected it and that may be my own insensitivity. But, I have never in this state or any state I've practiced in detected what I felt was any difference in treatment by reason of my being female rather than male. I'm speaking now solely of the bench of judges.

Respondent III: I think outside of the courtroom there definitely is. The judges are more friendly with the male attorneys and their attitudes with the women attorneys are more obviously male-female type of encounters. They don't know quite how to respond to—they're not quite willing to accept you as just, I think, a lawyer or just someone they can come in and chat with in their chambers. Generally speaking this seems to be true. In the courtroom I would say again the older judges are more polite than they are with the men. They go out of their way to make sure that you're not feeling offended, I think—or left out. I think that's just a superficial thing.

Respondent IV: No difference, and if anything it's an advantage as opposed to a disadvantage, but I would say I'm treated just like anybody else who goes up there.[47] It's terrific.

Respondent V: No. Not really.

Respondent VI: No. There may be a difference but it is not an offensive difference. It is a difference which comes, I think, from a theatrical function of the courtroom and the fact that the judge feels and even I feel that if they're gonna scream at me, they should do it in a different way than they do it with a male lawyer. In other words, if they find something that I have done objectionable, they tend to handle it more softly, somewhat more tactfully than they do with a male lawyer, but I think that's a jury trial function. I think they don't—in chambers the reverse is almost true, but I think really it's the, it's they don't, they want to seem like gentlemen in front of the jury. And indeed they always are in front of a jury. It is different but I don't find it offensive. It fits the theatrical moment. I don't think it would be appropriate for them given the acculturation of the jury and the lawyers, not to deal with it somewhat more softly. If I

[47] This respondent had just done appeals work.

keep going after this don't object. I keep trying to rephrase the question. There tends to be somewhat more exasperation and less anger, but I think that's a theatrical thing. It never struck me until you asked the question. That's the way they deal with it. They get exasperated with me but it's a gentler—they just blow [up] at males right in front of the jury. They don't to me, but I think it's because of their own function with the jury. I have discovered, and I suspect most of the judges know this, that defense counsel—when I was doing a lot of county court prosecution—whose ordinary trial tactic is to chew up the prosecutor and scream and yell and holler, you know, if they did that with me I always won no matter how lousy the case was because a jury will overreact to that. They wonder why is that nasty man picking on that nice lady and I think judges are almost afraid of the same reaction so that they do—if they think I've done something that they just disapprove of—they tend to squash me less abruptly, no less firmly but less abruptly and I think really it may be a function of how they view their role with the jury—that they had best be gentlemen and if that involves being a little more tactful, a little more gentle because they are dealing with a female, then it is, in fact, appropriate. And I'm not sure it isn't because I, you know, a judge can't turn the jury off either because if he does who's going to follow his instructions? So, I suspect, although there is a difference, it is not as much in trial that you see it. It's almost like you see a different face than you do in chambers.

Respondent VII: Purely on the basis of male-female, no. With one possible exception. A little bit of paternal attitude I can think of on one, about one judge, a little bit of this—not anything serious at all. A little bit of a young, here we have this young girl in here to try a case.

Respondent VIII: Well, I just haven't noticed adverse behavior. I think there may be a little more paternalism. It's like they would come down on and yell at more the average male lawyer.

Respondent IX: Sure, I mean there are differences. Judges don't like to yell at women. A lot of them can't bring themselves to do that. It's kind of, I don't feel that there's a prejudice.

Respondent X: No.

An analysis of the above answers pinpoints a number of interesting items. First, it is apparent that none of the female attorneys interviewed felt that judges during their public performances generally acted in a negative way towards them or as a rule preached a message that these practitioners were less competent than their male colleagues. Thus, the perceptions of these respondents did not seem to indicate that judges regularly play out their

public role in a manner that would indicate they hold different expectations regarding these practitioners.

Six of the respondents did note that some judges tend to be more polite or paternalistic. However, the overall tone of the responses was to view this as a positive factor, or at least as a factor called for by the script for the judicial role. Hence, it appears that at certain points in a courtroom proceeding, as for example when a mistake is consistently being made by counsel, certain judges drop the ritual of noninvolvement and engage in a ritual of chastisement. This ritual is different from the one of active interest. Clearly, in the chastisement ritual, attorneys are not treated in the same manner. The one who regularly makes a mistake or irritates the bench is singled out for a special type of interaction. It is within the context of this ritual, however, that judges also appear to discriminate (meaning simply that they treat differently) between male and female attorneys. In fact, it is this difference in treatment that underscores the ritualistic aspects of chastisement. There is a regularity of response on the part of judges that is triggered by attorney error, but is not shaped simply by the error. Male attorneys seem to be subject to the full brunt of judicial wrath. Female attorneys, on the other hand, are less likely to be the receivers of the full chastisement ritual, but are instead treated in a more "gentlemanly" manner.

Again, the dramaturgical model can perhaps offer some insight into this phenomenon. As one attorney stated (Respondent VI), this differential treatment may in fact be just an extension of the theatrical role of judge. She noted that by treating the female attorney less harshly, the judge does maintain a role whereby he avoids influencing the jury. If she is correct in her observations, the judicial attempt at maintaining impartiality is a more complex phenomenon than first appeared. Judges, in order to show others that they are impartial, in order to convince others that their performance is a credible one, have to play out their part in accordance with the expectations the audience has regarding what is a legitimate performance. Thus, the game has to be played according to how these others define what is impartial. In our culture it has not been a generally acceptable sign of impartiality to "yell" at women or to engage in the ritual of chastisement with women in precisely the same way as one engages in it with men. Therefore, it seems that some judges do

treat women differently in the chasetisement ritual, in order to give the appearance of impartiality.

The perceptions of the respondents corresponded to the data reported by the participant observers in that neither group perceived judges as acting in a more negative way toward female as opposed to male attorneys. Differences that were noted in the area of politeness appeared to be situationally anchored, so that judges did use a different chastisement ritual when lawyers made mistakes in their own performances. While some respondents mentioned paternalistic behavior on the part of certain judicial functionaries, this did not appear to be a predominant problem, and in some instances it was interpreted as merely being an extension of the theatrical role judges play for the sake of credibility with the jury. A review of these data also seems to indicate that in some instances paternalism is a function of the age of the judge and also the age of the advocate, and is therefore not related in all cases simply to the sex of the attorney.

A second interesting point that emerges from these interviews is the concern shown about the negative paternalism of other attorneys. This concern about other attorneys is more clearly elucidated in the following comments.

> I don't think it's the judges. I think it's attorneys mostly at a trial (Respondent X).
>
> I've had a lot of problems with other attorneys patronizing, but not judges (Respondent I).
>
> When I moved to Denver, for the first time I encountered what I had read about and never believed. That there was I felt a discrimination. It wasn't uniform but it was certainly far more widespread. But it was at the level of fellow lawyers, not the bench, not the judges (Respondent II).

It seems, then, that some respondents are more concerned with paternalism among fellow practitioners, and that further this paternalism is perceived in a more negative way than that noted about judges.

Thirdly, some concern was also expressed about the role judges play when they are offstage (*i.e.*, in chambers). As noted previously, the dramaturgical model focuses attention on the fact that public performances may not be indicative of what is actually occurring or of the true state of participants in a social scene. Thus, judges who portray a nonbiased, impartial attitude toward female practitioners, if they are simply play acting, will

present a different face away from the audience. Relating to judges offstage, these comments taken from the interviews previously quoted are instructive.

> It's almost like you see a different face than you do in chambers (comment by Respondent VI on the politeness of judges *in court*).
>
> They're not quite willing to accept you as just, I think, a lawyer or just someone they can come in and chat with in their chambers (Respondent III).

These comments suggest that women practitioners face a more difficult task in being accepted in the informal settings of the legal profession than the task they confront in being accepted and treated as professionals in the formal setting of the court. Informally, there may well be an atmosphere of male camaraderie that is threatened by female intrusion. Thus, either resentment or negative paternalism is experienced by women in these backstage interactions. The data suggest, then, that a crucial area of examination is the acceptance of women in the "clubhouse" even after admission has been gained and status recognized in the arena of play. This acceptance is crucial because many pretrial conferences, which can be viewed as backstage rehearsals, make public presentations a foregone conclusion. Furthermore, other elements of legal work, such as negotiations with other attorneys or with judges, take place behind the scenes, in the offices and chambers hidden from public view. Failure to be recognized as an equal in these settings can have the same adverse consequences for the individual attorney and the course of justice as the same failure in a public setting. This fact is well demonstrated in the following observation by one of the respondents.

> Just straight drunk driving, petty theft. I'm the only D.A. I know whom the judge tried to browbeat into disposing of the cases that were on his docket and that's a judge whom I—I think if I had been a male he would have tried but we would not have gotten to the point where I had to say to him, all right, you can take the plea if you want to, but you do it over the objection of the district attorney and he finished it. I think there's a tendency in judges who by and large are nice middle class, aggressive males, to try to push females more in settlement. I found this true on the civil side with civil cases that I handled because I used to handle civil cases for the firm I was with right up to trial. I felt—maybe I felt more pushed but I also thought that when . . . my [male] partner came in, boy, did they then back down, you know, and they—judges like to keep their docket clean, somehow they think that's part of their judicial function. I don't think it is (Respondent VI).

This comment not only hints at the importance of being accepted as an equal offstage and the apparent difficulty some women may encounter in this regard, but it also points at another element contained in the administration of justice and the judicial system. This system in part shares the characteristics of any bureaucracy in our society. Most notable is the tendency for bureaucracies to rationally coordinate their activities in order to maximize efficient production. The courts, too, are involved in a quest for efficient production, though in this instance the product is the number of cases which are disposed of. Some judges, then, try to clear their docket, and an efficient way of doing this is to attempt to avoid the cost, both in terms of time and money, of a trial. Negotiations, therefore, and acceptance in the negotiating milieu are crucial.

Finally, because the court is in part a bureaucracy, it also has within it actors who play the role of bureaucrats—that is, managers of schedules, files and so forth. Just as acceptance, then, is important in the actual settings of negotiation, so too, acceptance and recognition by the bureaucratic functionaries of the judicial system are also important. Four of the respondents in our study indicated that the role of the bureaucrat, and the acceptance these functionaries exhibit toward women attorneys, may also constitute a problem area for further investigation.

> I notice particularly when I go into a clerk's office in court, they immediately assume I'm there to look at a file or get some forms or file something. . . . Most of the clerks in the court, clerk's offices are women and they, I don't think they want to accept the fact that there are women attorneys (Respondent III).
>
> Sometimes the clerks in the courts are just very snotty and I think it's because I'm a woman, especially if they're women clerks, you know, they just snap at you or just kind of treat you—they don't give you any respect that, say, they give to the male attorneys (Respondent V).
>
> Sure you run into your problems, but they are not with judges, but more with the people in his office (Respondent IX).

These responses suggest that clerks can present problems to female attorneys, and often more problems than judges present in terms of role recognition. Respondent I further describes these problems, the serious effects they can have, and one strategy that seems to have worked for her in overcoming them.

> The real difference has been the clerks. And now all the clerks who were sort of abrupt are just as sweet and gracious as they can possibly be. And I think one of the important things to remember is that in dealing with the court system, the clerks can do a lot for you. There are many women clerks who are older who work for judges and they can control the access to the judge's calendar and if they're rude to you or treat you very abruptly, it's difficult to do anything. And all those clerks who used to be so rude and snippy are now very nice, if you come in with some official title. It's funny.

IV. Summary and Conclusions

One of the key areas this research sought to explore was the interaction between judges and women attorneys during the course of trial. By examining a small select group of judicial functionaries, in an exploratory fashion, it was hoped that some of their behaviors could be categorized, so that future research efforts could pinpoint whether the behaviors noted were related to expectations judges held concerning the role of attorney and who should play that role. The results of this exploratory research seem to indicate that judges do in fact regularly engage in certain kinds of behavior. However, the behaviors categorized did not generally relate to the sex of the attorney. Thus, judges did not generally seem to indicate by their public behavior that female practitioners were considered in a secondary role to their male counterparts.

In the dramaturgical view of society, judges adopted strategies that would portray to their audience (juries and observers) that their performances were credible and in keeping with the script society had provided them. The data collected seem to pinpoint certain rituals used by judges when they are on stage. One ritual that stood out was the ritual of noninvolvement, used to portray a stance of third party disinterest or impartiality. Certain judicial role players, however, portrayed impartiality by a ritual involvement in the proceedings called a ritual of active interest. It appeared ritualistic becase neither the individual confronting the judge, his or her utterances, nor the subject at hand changed the judge's interaction patterns.

Finally, ritual chastisement seems to be another strategy utilized by judges. Here, a difference in treatment is perceived between male and female lawyers. But this difference, too, seems aimed at impressing the jury or audience with the judge's third party impartiality. It is expected by all participants that women

will not be "yelled at" nor chastised in the same way as men. If, in fact, both were chastised in the same manner the viewers might well interpret this as judicial bias against women.

As noted in the beginning of this paper, the role of the woman attorney is in a state of flux. She may be moving from a situation where public nonacceptance was the rule, to a situation where it is now an exception. At least these data suggest this is the case. Judges may presently be more conscious of their public presentations regarding the area of attorneys' sexual identity. Therefore, to convince others of the credibility of their performance they seldom present themselves as anything but unbiased observers when playing the role of trial judge.

V. SUGGESTIONS FOR FUTURE RESEARCH

The notion of ritual as discussed above can be particularly fruitful in further attempts at examining judicial role players. As Irving Crespi notes in his article on attitudes and their utility in predicting behavior, measures must be based on situations in which the attitude is likely to be portrayed.[48] Attitudes are described by him as a combination of belief, performance, and intention, and to measure this variable one must construct questionnaire items based on the typical reality in which the respondent is involved. Therefore, a measure of judicial attitudes toward women attorneys should include items on how judges might vary their typical ritual behavior in response to the sexual identity of counsel. This and other areas of future research are discussed below.

This research suggests a number of other areas for future research efforts. There was a clear indication in our data that women may experience a more difficult time in penetrating and being accepted into the *informal* structure of the legal profession than they experience currently in the formal arena of play. While the data suggests that judges do not publicly indicate they have different expectations concerning male or female practitioners, the expectations that seemed dominant in even some of the recent literature may be expressed more openly in behind-the-scenes interactions of the legal profession. Thus, studies are needed of attorneys and judges offstage, in the informal, less

[48] Crespi, *What Kinds of Attitude Measures Are Predictive of Behavior*, 35 PUB. OPIN. Q. 327, 333 (1971).

public areas of interaction. Such studies could still be based on a participant observation methodology. Although there may be difficulty in researchers penetrating this inner sanctum, such penetration is by no means impossible. It has been done with juvenile gangs,[49] problem families,[50] police officers,[51] and, as indicated previously, with congressmen.[52] Caution should be exercised, however, in making sure trained observers are utilized, a problem to be discussed more thoroughly below. Only after a firm groundwork of this type of exploratory research has been laid, can we proceed to the more empirical kinds of studies dealing with attitudes and their relationship to the process of decision making within the legal realm.

The data also point to the need for studies of bureaucratic functionaries within the legal system, *i.e.*, court clerks, and their relationship with women attorneys. As noted, studies involving the informal structure and the bureaucratic nature of the profession are important, because, just as failure to be recognized as a professional in the formal arena can adversely affect career aspirations, so too, failure to be recognized as a colleague in the clubhouse or the office can spell difficulty and doom. The observation of one respondent reiterates this point:

> I think one of the important things to remember is that in dealing with the court system, the clerk can do a lot for you . . . if they're rude to you or treat you very abruptly, it's difficult to do anything.

Much more work needs to be done observing judges during the course of trial. Such observations can lead to a fuller understanding of the ritualistic behavior of all participants and the meaning of these rituals for the course of justice. However, observations can be a tricky undertaking and the need for trained, sensitive observers cannot be overemphasized. This study used law students as observers, and, generally, it was found that they did an excellent job. In some instances, though, the observers became over-interested in the legal issues, and, thus, behavioral issues may have been missed. It is not clear that the answer to

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[49] See most notably THRASHER, THE GANG (1963).

[50] Here, the most recent well publicized example is the Public Broadcasting Service telecast of the Loud family, "An American Family."

[51] J. SKOLNICK, JUSTICE WITHOUT TRIAL (1966) and, more recently, J. GILSINAN, THE MAKING OF A POLICEMAN: SOCIAL WORLD CONSTRUCTIONS IN A POLICE ACADEMY (unpublished Ph.D. dissertation in the University of Colorado Library).

[52] *See* note 41 *supra*.

this problem is to be found in the use of social science students. They may not be up to the task required, since they may much more likely be overwhelmed by the mystery of legal jargon and proceedings. It would appear that people with a background in both the social sciences and the legal profession would be ideal candidates for such observations.

Another quality observers need to possess is sensitivity. People who are attuned to the subtleties of social interactions and the meanings such interactions can reveal should be considered a key to success. This study relied primarily on women observers,[53] and as the excerpt below indicates, this strategy may be the best when the issue being considered is similar.

> Interviewer: By and large, you would say that anyone in the courtroom observing the courtroom appearances would not really be able to detect that much difference and would not be able to detect anything unfavorable?
>
> Respondent: I think the women might. I don't think men could.
>
> Interviewer: It's just very subtle?
>
> Respondent: It's a very subtle thing. I have talked to other women who regularly try cases. None of us I think articulate it very well. You can feel it, but it's very difficult to articulate it. I suspect that some of the same patronizing tones, some of the same sloppiness of behavior occurs with any minority group in the courtroom, because I've seen the same thing, the same tones used with black lawyers as a trial lawyer. The same there-there dear, everything is going to be all right. Only that's the way I translate it. I don't know how they translate it, but I've seen it.

It should be noted that this respondent is the same one who interpreted the paternalism of judges as merely an extension of their theatrical role. Nevertheless, this portion of the interview underscores two very important factors. First, that sensitive observers are needed to conduct this type of research. Second, the ideas expressed in the above statement point to a justification for this and other research efforts in the field of legal-judicial practice. The purpose of this research and future research in the area should be to translate and articulate the dynamics of the interac-

[53] A problem with using women observers for this type of project might be an oversensitivity or reverse bias on their part. One would expect, therefore, that, if errors were made in observations, such errors would be slanted towards a negative view of judicial behavior. The fact that our observational data did not contain extremely negative descriptions strengthens the findings.

tions that occur between and among participants in the system, whether they be attorneys, judges, defendants, or bureaucrats. It is only with an understanding of these issues that the system can be improved so that all the actors can play their parts in a drama that ends with justice.