"NATURALLY" WITHOUT GENDER: WOMEN, JURISDICTION, AND THE FEDERAL COURTS

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For many years, women who work (or who have tried to work) with law and in courts have understood that their gender was relevant to that work. However, until recently, those who run the courts to which women have sought entry have not been interested in the effects of women on courts and of courts on women. Below, Professor Resnik explores the relationship between women and the federal courts and the role that gender plays in the allocation of work between state and federal courts.

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I am a participant in some of the events about which I write; I was an advisor to and testified before the Federal Courts Study Committee, and I am a member of the Ninth Circuit Task Force on Gender Bias.

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I

INTRODUCTION: JURISDICTION AND GENDER

A. The Emergence of Gender as a Topic for Courts

Women have long organized around their participation in legal institutions—in groups such as the National Association of Women Lawyers,[1] the National Conference of Women and the Law,[2] the National Conference of Women Bar Associations,[3] the National Association of Women Judges,[4] and the Section on Women in Legal Education of the

[1] In 1899, women formed the National Association of Women Lawyers. See National Association of Women Lawyers, 75 Year History of National Association of Women Lawyers, 1899-1974, at 7 (Mary H. Zimmerman ed. 1975). Exactly when women first began to practice law in the United States is not known. In 1869, Mary E. Magoon was described as an attorney in Iowa; in that same year, Arabella Babb Mansfield was admitted to the Iowa Bar. See Karen Berger Morello, The Invisible Bar: The Woman Lawyer in America, 1638 to the Present 11 (1986) (noting Mansfield officially recognized as first woman lawyer in United States).

[2] This organization, started in 1970, sponsors annual conferences. See Herma Hill Kay & Christine A. Littleton, Text Note: Feminist Jurisprudence: What Is It? When Did It Start? Who Does It?, in Herma Hill Kay, Text, Cases and Materials on Sex-Based Discrimination 884, 884 (3d ed. 1988).

[3] This organization, started in 1981, provides a "clearinghouse" on information about women's bar associations, which include some 10,000 lawyers. See Martha Middleton, Women's Bars Form Coalition, B. Leader, Sept.-Oct., at 6 (1981).

[4] Esther McGuigg Morris is described as the first woman to be a member of a judiciary; although not a lawyer, she was a justice of the peace in South Pass City, Wyoming in 1870. See K. Morello, supra note 1, at 219. By 1979, there were enough women judges to inspire the creation of the National Association of Women Judges (NAWJ), formed in response to the "very lonely, very isolated lives of those women judges who may be the only one on their

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American Association of Law Schools,[5] and by means of several journals that now exist at law schools around the United States.[6] In the 1960s and 1970s, as women litigated about their rights, they found that some of the pain of discrimination came from the very places to which they brought claims—courts.

In an effort to educate judges about the discrimination that was occurring under their aegis, the Legal Defense and Education Fund of the National Organization of Women founded the "National Judicial Education Project" (NJEP), which worked in cooperation with the National Association of Women Judges.[7] The shorthand for the issue became "Gender Bias in the Courts," and the primary vehicle of expression became the creation of "Gender Bias Task Forces."[8] New Jersey led the way in 1982 when Chief Justice Robert N. Wilentz of that state's Supreme Court created the first such Task Force.[9] By the spring of 1990, "task force activity at various stages of operation [was] underway in some 30 jurisdictions" in the United States.[10] These task forces review

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bench in that locale or state." Id. at 245 (quoting one of founders, Joan Dempsey Klein); see also Gladys Kessler, Foreword, 14 Golden Gate U. L. Rev. 473, 477-78 (1984) (Symposium Issue: National Association of Women Judges) (stating that purpose of Association includes formulating "solutions" to the "legal, educational, social and ethical problems mutually encountered by women judges").

[5] The Section on Women in Legal Education was founded in 1970. See Herma Hill Kay & Christine A. Littleton, Introductory Note: Women As Law Students and Professors, in H. Kay, supra note 2, at 879-880.

[6] These journals include: American University Journal of Gender and the Law (founded 1991), Berkeley Women's Law Journal (founded 1983), Columbia Journal of Gender and Law (founded 1990), Harvard Women's Law Journal (founded 1977), Law & Sexuality: A Review of Lesbian and Gay Legal Issues (Tulane University School of Law, founded 1990), Southern California Review of Law & Women Studies (founded 1990), Texas Journal of Women and the Law (founded 1990), UCLA Women's Law Journal (founded 1990), Wisconsin's Women's Law Journal (founded 1985), Women and Law (Hofstra Law School, founded 1978), Women's Law Forum of the Golden Gate Law Review (founded 1979), The Women's Rights Law Reporter (Rutgers Law School, founded 1971), and Yale Journal of Law and Feminism (founded 1987).

[7] See Norma J. Wikler, On the Judicial Agenda for the 80's: Equal Treatment for Men and Women in the Courts, 64 Judicature 202, 204-07 (1980) (founding director of NJEP, Dr. Wikler, summarizing evidence of gender-based stereotypes and describing a new project to educate judges); Norma J. Wikler, Water on Stone: A Perspective on the Movement to Eliminate Gender Bias in the Courts, 26 Ct. Rev. 6, 14-16 (Fall 1989) (giving history of founding of NJEP).

[8] See Lynn Hecht Schafran, Educating the Judiciary about Gender Bias, 9 Women's Rts. L. Rep. 109, 124 (1986) (current Director of NJEP describing its "dream" to establish a task force in every state).

[9] First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts 4 (June 1984) [hereinafter New Jersey Task Force Report]; see also Lynn Hecht Schafran, Documenting Gender Bias in the Courts: The Task Force Approach, 70 Judicature 280, 281 (1987) (advocating task force approaches as effective methods of eliminating gender bias in courts).

[10] Betty Weinberg Ellerin, Chair of the National Task Force on Gender Bias in the Courts

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an array of topics, including the application of substantive legal doctrine, courtroom interactions, and the role of the court as employer. The conclusions of the Report of the New York Task Force on Women in the Courts are illustrative:

> "[G]ender bias against women . . . is a pervasive problem with grave consequences. . . . Cultural stereotypes of women's role in marriage and in society daily distort courts' application of substantive law. Women uniquely, disproportionately and with unacceptable frequency must endure a climate of condescension, indifference and hostility."[11]

B. The Reluctant Federal Courts

From 1982 until 1990, these task forces on gender bias in the courts were exclusively the domain of *state* courts.[12] The federal courts (either acting circuit by circuit or as a whole by action of the Judicial Conference of the United States) neither took the lead nor followed suit in forming committees to ask questions about the interaction between gender and the federal court system.[13] The question of what role, if any, the federal courts as an institution might take in considering the effects of gender has come to the fore recently because of actions by Congress and

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of the National Association of Women Judges, Annual Report to the Board of Directors of the National Association of Women Judges (Sept. 4, 1990) (on file with author); see also Lynn Hecht Schafran, Gender Bias in the Courts: An Emerging Focus for Judicial Reform, 21 Ariz. St. L.J. 237, 271 (1989) (discussing continuing need to educate judiciary on issues of gender bias in courts).

[11] Report of the New York Task Force on Women in the Courts, 15 Fordham Urb. L.J. 11, 17-18 (1986-1987) [hereinafter New York Task Force Report]. Other state task force reports echo the New York Task Force's findings. One of the most recent is that of Connecticut, which concluded that "women are treated differently from men in the justice system and, because of it, many suffer from unfairness, embarrassment, emotional pain, professional deprivation and economic hardship." Report of the Connecticut Task Force, Gender, Justice and the Courts 12 (1991) [hereinafter Connecticut Task Force Report].

[12] See Schafran, supra note 10, at 247 (discussing efforts of several states' task forces on gender bias).

[13] A few programs relating to sex discrimination were conducted at federal judiciary conferences. For example, in 1987, the Eighth Circuit Judicial Conference organized a program on women and the Constitution. See Women and the Constitution: Presentations from the 1987 Eighth Circuit Judicial Conference (Colorado Springs, Colorado, July 17, 1987), 6 Law & Ineq. J. 1 (1988). In the Ninth Circuit, a workshop on sex discrimination and employment was conducted for federal district court judges. See Schafran, supra note 10, at 254 n.66. Programs on gender bias in the courts also have been conducted for bankruptcy judges. Telephone Conversation with Lynn Hecht Schafran, Director of the National Judicial Education Project (Aug. 16, 1991). Other evidence of federal awareness of gender comes from 1987 amendments to the Federal Rules of Procedure, which adopted gender-neutral language. See, e.g., Fed. R. Civ. P. 4, 1987 advisory committee's note (explaining that change in words from "shall notify him" to "shall notify the defendant" is "technical. No substantive change is intended.").

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by the federal judiciary.

In 1988, Congress created a specially chartered committee, empowered to provide a comprehensive overview of the federal judicial system. That group, the Federal Courts Study Committee (FCSC), with fifteen members appointed by the Chief Justice, included several federal judges; its charge was to think about the future of the federal courts.[14] Many individuals and organizations saw the FCSC as having the potential to make recommendations about how gender affects decisionmaking, employment, and work in the federal courts. The FCSC thus heard and received testimony—including many requests that the federal courts, like the state courts, convene gender bias task forces and begin other programs on gender bias.[15]

The April 1990 Report of the Federal Courts Study Committee concluded that "another study" was not needed, but that education was. In support of its recommendations, the FCSC stated:

> Studies in many state systems reflect the presence of bias—particularly gender bias—in state judicial proceedings. Although we have confidence that the quality of the federal bench and the nature of federal law keep such problems to a minimum, it is unlikely that the federal judiciary is totally exempt from instances of this general social problem.[16]

The FCSC Report did note that education about, awareness of, and vigi-

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[14] See Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, §§ 101-109, 102 Stat. 4642, 4644-46 (codified at 28 U.S.C. § 331 note (1988)) (creating committee to "examine problems and issues currently facing the courts of the United States" and to "develop a long-range plan for the future of the Federal judiciary").

[15] The FCSC has created a microfiche database of all the materials that it received and created. Included under the category "gender" are reports about task forces in New York, Maryland, California, and New Jersey. Testimony also was submitted by many individuals, including the Honorable Lisa Hill Fenning of the United States Bankruptcy Court in the Central District of California; Professor Myrna Raeder, on behalf of the National Association of Women Lawyers; Lynn Hecht Schafran, Director of the National Judicial Education Project; and myself, in part on behalf of members of the Executive Committee of the Section on Women in Education of the Association of American Law Schools (testimony and index of data on file with author). In addition, Professor Richard Marcus, an Associate Reporter for one of the FCSC subcommittees, prepared a memorandum, "Bias in the Federal Courts," which summarized the work about gender, racial, and ethnic bias that had been done or was underway in the state courts. Marcus Memorandum to Workload Subcommittee (Oct. 16, 1989) (on file with author) [hereinafter Marcus Memorandum]. My thanks to the office of the Honorable Joseph Weis, Chair of the FCSC, to Charles Summers at the Administrative Office, and to Professor Richard Marcus for providing me with data about the materials received by the FCSC.

[16] FCSC, Report of the Federal Courts Study Committee 169 (Apr. 2, 1990) [hereinafter FCSC Report]. In contrast, Professor Marcus's memorandum concluded that state courts had found gender bias and that "it seems likely that a [federal] study would reveal similar problems, and therefore it is probably not sensible for the committee to recommend one." Marcus Memorandum, supra note 15, at 1.

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lance against discrimination were always appropriate.[17]

The second congressional action that raised the "gender question" was proposed legislation, the Violence Against Women Act, now pending before Congress.[18] As described by its sponsors, the Act responds to the "national tragedy" that makes women the victims of violence in homes, workplaces, and on the streets.[19] The Act has several provisions (such as a National Commission on Violent Crime against Women, funding of state programs on violence, and promoting safer college campuses). But what has caught the attention of the federal judiciary are two jurisdictional sections. One would provide a federal civil rights remedy to a person who is the victim of a "crime of violence, motivated by gender."[20] Another section would create a federal crime when a person travels across state lines to injure, harass, or intimidate a spouse or intimate partner.[21]

In the fall of 1991, the Judicial Conference of the United States issued a resolution opposing the enactment of the civil rights provisions of the proposed act. As a report of the ad hoc committee appointed to study the proposed legislation described, the Judicial Conference would like to play a "constructive role in offering its assistance to Congress in the effort to fashion an appropriate response to violence directed against women."[22] However, according to the Conference, changing federal jurisdiction would be a mistake, for it would "embroil the federal courts in domestic relations disputes"[23] and "flood [the federal courts] with cases that have been traditionally within the province of the state courts."[24]

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[17] The Report explained, "Rather than another study, the committee proposes means of preventing and dealing with bias in federal court proceedings and operations." FCSC Report, supra note 16, at 169. The Report also called for education by the Federal Judicial Center and the circuit conferences "in this important field." Id. To address "bias in the judicial branch," the FCSC recommended the courts "[e]stablish informal internal grievance procedures; provide independent review of formal internal grievance procedures; provide education about bias and discrimination in courts and courtrooms; [s]elect qualified people with due regard for heterogeneity of American people as support personnel; [c]onsider establishing grievance procedures for complaints by public alleging racial, ethnic, or gender bias." Id. at 174.

[18] S. 15, 102d Cong., 1st Sess. (1991).

[19] See Committee on the Judiciary, The Violence Against Women Act of 1991, S. Rep. No. 197, 102d Cong., 1st Sess. 39 (1991). The bill, introduced by Senator Joseph Biden, had 41 Democratic and 8 Republican cosponsors as of January 22, 1992. Bill Tracking Report, S. 15, 102d Cong., 1st Sess. (Jan. 22, 1992). As of January 28, 1992, a parallel bill, H.R. 1502, The Violence Against Women Act of 1991, introduced by Representative Barbara Boxer, had 154 Democratic and 20 Republican cosponsors when it was introduced in the House. Bill Tracking Report, H.R. 1502, 102d Cong., 1st Sess. (Jan. 28, 1992).

[20] See S. 15, 102d Cong., 1st Sess. § 301.

[21] See id. § 2261.

[22] Report of the Judicial Conference Ad Hoc Committee on Gender-Based Violence 6 (Sept. 1991) (on file with author) [hereinafter Report on Gender-Based Violence].

[23] Id. at 1.

[24] Id. at 7. The Report on Gender-Based Violence also allied itself with the opposition

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In his 1991 "Year-End Report on the Federal Judiciary," the Chief Justice echoed these themes. Noting that the federal courts are a precious national resource, the Chief Justice insisted that their role should be "reserved for issues where important national interests predominate."[25] Within a few paragraphs, he urged that Congress attend to the Judicial Conference's opposition to the jurisdictional provisions of the Violence Against Women Act.[26] Nowhere did he or the Judicial Conference endorse the provisions of the Act that would support gender bias studies and education in the federal courts.

Atop these two legislative initiatives come two grants of certiorari that require elucidation of the relationship between federal jurisdiction, women, and families. In *NOW v. Operation Rescue*,[27] the Fourth Circuit held that women seeking access to health care facilities that provide abortions can invoke federal jurisdiction.[28] Joining in the request for Supreme Court review, the Department of Justice argued that the federal courts have no such power.[29] While this case has attracted sustained media attention as federal judges and Operation Rescue members face

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authored by the Conference of Chief Justices of the States, which argued that, were a federal cause of action available, litigants would "add a new count to many if not most divorce and other domestic relations cases." Letter from Vincent L. McKusick, President of the Conference of Chief Justices, to the Honorable Joseph R. Biden, Jr. (Feb. 22, 1991) (on file with author) (transmitting resolution of Chief Justices opposing creation of federal civil rights remedy in Violence Against Women Act). In response, Senator Biden wrote that such a view was "not only an improper reading of the statute, it also verges dangerously close to the kind of stereotypes we condemn. To put the collective force of the federal judiciary behind the assumption that women—unlike other groups—will file false and vindictive civil rights claims suggests the very gender-biased stereotypes that my legislation was intended, in part, to dispel." Letter from Senator Biden to the Honorable Thomas M. Reavely, Chairman of the Ad Hoc Committee on Gender-Based Violence of the the Judicial Conference (Sept. 20, 1991) (footnote omitted) (on file with author).

25 William H. Rehnquist, Chief Justice's 1991 Year-End Report on the Federal Judiciary, 24 The Third Branch 1, 2 (1992) [hereinafter all Chief Justice's Reports will be referred to as "Year-End Report" for the appropriate year].

26 See id. at 3 ("The broad definition of criminal conduct is so open-ended, and the new private right of action so sweeping, that the legislation could involve the federal courts in a whole host of domestic relations disputes."); see also Revised Judicial Impact Statement on Violence Against Women Act, S. 15 as Reported 2 (Jan. 8, 1992) (on file with author) [hereinafter Judicial Impact Statement, S. 15] (prepared by Office of Judicial Impact Assessment, and concluding that cost of Act would be "$62 million and 691 staff years").

27 914 F.2d 582 (4th Cir. 1990), cert. granted sub nom. Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991).

28 See id. at 585. One of the questions before the Supreme Court is whether "gender-based animus" suffices for the "purpose" element, required by 42 U.S.C. § 1985(3). The brief filed by the United States, as amicus curiae supporting petitioners' claims, asserted: "Treating women differently because they seek an abortion is not a form of invidious discrimination based on the basis of gender." Brief for the United States, as Amicus Curiae Supporting Petitioners, at 6, Bray v. Alexandria Women's Health Clinic, 111 S. Ct. 1070 (1991) (No. 90-985) [hereinafter Brief for the United States].

29 Brief for the United States, supra note 28, at 7-13.

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off,[30] the other case the Supreme Court will hear is distinguished by the absence of popular attention paid. In an unpublished opinion in *Ankenbrandt v. Richards*,[31] the Fifth Circuit affirmed a district judge's decision to decline to hear a child abuse diversity tort action.[32] The trial court had relied on the so-called "domestic relations exception"[33] and dismissed a complaint that alleged that Richards (whose parental rights had been terminated by a state court proceeding prior to the filing of the federal lawsuit) and his companion Kesler had abused Richards' former children.[34] While acknowledging that tort actions did not fit "squarely within the Domestic Relations Exception," the trial court noted that the state court judgment could be modified and the issue of parental relationship reexamined.[35] The trial court relied on the "state court interest in the ongoing welfare of the minor plaintiffs" to conclude that the "possibility of conflicting findings in this Court violates the basic principles of comity and compels this Court to apply its discretion declining the exercise of jurisdiction . . . ."[36] This district court reading parallels the Judicial Conference's opposition to a portion of the Violence Against Women Act. Both are premised on a view that the federal courts should decline jurisdiction over "domestic relations"—defined in *Ankenbrandt* as including violence against children as well as against women—in favor of state court authority.

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30 See Women's Health Care Services v. Operation Rescue, 773 F. Supp. 258, 260-61 (D. Kan. 1991) (reciting recent case law); Judge Threatens Wichita Abortion Protestors, N.Y. Times, Aug. 6, 1991, at A14 (describing efforts of a federal judge to end anti-abortion protesters' blockade of a health care clinic).

31 934 F.2d 1262 (5th Cir. 1991) (unpublished opinion), cert. granted, 112 S. Ct. 855 (1992).

32 See id., aff'g L.R. & S.R. Minors ex rel. Ankenbrandt v. Richards, 1990 U.S. Dist. LEXIS 17068 (E.D. La. Dec. 10, 1990). The trial court found that the case fell within the federal courts' diversity jurisdiction, in that the plaintiff children and their mother lived in Missouri, the defendants were from Louisiana, and more than nine million dollars in damages were sought. Id. at *1 n.1. After this essay was in press, the Supreme Court held in *Ankenbrandt* that, given the long history of the "domestic relations exception," it should remain as an interpretation of the diversity statute, 28 U.S.C. § 1332, and be limited to cases "involving the issuance of a divorce, alimony, or child custody decree." 60 U.S.L.W. 4532, 4537 (June 15, 1992). Finding that other forms of abstention were also inapplicable, the Court reversed the Fifth Circuit.

33 This "exception" has been used by federal courts to decline to decide cases jurisdictionally properly before them. See text accompanying notes 301-84 infra (discussing this exception and its ideological underpinnings).

34 See *Ankenbrandt*, 1990 U.S. Dist. LEXIS 17068, at *3-*5. The complaint was dismissed without prejudice. See id. at *4.

35 See id. at *4.

36 Id. at *6. The opinion does not address the impact of federal collateral estoppel rules. See Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-37 (1979) (authorizing use of nonmutual offensive collateral estoppel).

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C. The Underlying Premises

Return to the language chosen by and the conclusions of the Federal Courts Study Committee (FCSC) about gender bias in the federal courts:

> [T]he quality of the federal bench and the nature of federal law keep such problems to a minimum . . . .[37]

Given recent attention paid to "natural law," one might be tempted to tease the FCSC Report about its choice of words. Further, given the absence in the record before it of any empirical information to support such a conclusion and given testimony that argued the opposite, one might be tempted to quarrel.

But rather than tease or quarrel, I think there is much to learn from the words and assumptions imbedded therein. The phrases "the quality of the federal bench" and "the nature of federal law" are useful, for they provide insight into the rhetoric, ideology, doctrine, and workplaces of the federal courts. Those who governed the state courts developed a sense of urgency about the relationship of courts to women.[38] After inquiry, many state task forces concluded that women were "denied credibility" in courts and faced "a judiciary underinformed about matters integral to many women's welfare."[39] Yet that urgency to study bias against women was not shared by those who governed the federal courts.

The implicit premises of the FCSC conclusion are that the people who become federal judges and the work that they do somehow are shielded from engaging in or being swayed by discrimination based on gender.[40] What in the selection of federal judges and in the subject mat-

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[37] FCSC Report, supra note 16, at 169.

[38] In 1988, the Conference of Chief Justices enacted Resolution XVIII, "Task Forces on Gender Bias and Minority Concerns," which urged "positive action by every chief justice to address gender bias and minority concerns in the state courts; and . . . to establish separate task forces devoted to the study of 1) gender bias in the court system and 2) minority concerns as they relate to the judicial system." 26 S. Ct. Rev. 5 (Fall 1989); see also note 402 infra.

[39] See, e.g., Report of the Florida Supreme Court Gender Bias Study Commission 130, 197-99 (Mar. 1990) [hereinafter Florida Task Force Report]; Report of the Maryland Special Joint Committee on Gender Bias in the Courts 20, 127 (May 1989) [hereinafter Maryland Task Force Report]; New Jersey Task Force Report, supra note 9, at 12-13; New York Task Force Report, supra note 11, at 27; Utah Task Force on Gender and Justice: Report of the Utah Judicial Council 96-99 (Mar. 1990) [hereinafter Utah Task Force Report].

[40] An alternate explanation, suggested by Professor Marcus's Memorandum, supra note 15, is that federal courts, like state courts, would have similar problems of gender bias and that additional research was unnecessary; education would suffice. The difficulties with this explanation of the FCSC views are twofold. First, the federal courts so frequently distinguish themselves from state courts that it would be unusual for the federal judiciary to affiliate so completely with the state courts and assume sameness. Indeed, the FCSC report itself states that it believes that the federal courts do not share fully in the gender bias problems experienced by the states. FCSC Report, supra note 16, at 169. Second, if the federal judiciary believed that the manifestations of gender bias in the federal courts were as substantial as those in the state courts, then more than education and informed grievance procedures likely would

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ter and jurisdiction of the federal courts would help insulate that judicial system from the disturbing conclusions reached in state jurisdictions about the degree to which gender bias exists and affects adjudication and other court-based processes?[41] What is it about either "gender bias" or "the federal courts" that makes problems of discrimination against women less troubling ones in federal as contrasted to state adjudication?

Responding to these questions is not an inquiry into the "original intent" of the speakers but rather into the cultural and doctrinal milieu that shaped their conclusions. Answers require examination of both "gender" and "the federal courts." In this context, the word "gender" masks the issue, for "women" are the relevant category here, as they are in much of the work of Gender Bias Task Forces.[42] Officially, court-based task forces embrace concerns about discrimination against anyone based on gender.[43] In practice, "gender bias" task forces inquire princi-

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have been recommended.

[41] See, e.g., New York Task Force Report, supra note 11, at 15 (stating Task Force's conclusion that gender bias against women in courts is pervasive problem); see also Florida Task Force Report, supra note 39, at 2 ("Gender bias is a reality for far too many people involved in the legal system. . . . Gender bias is practiced to a disturbing degree . . . often in forms that have become highly institutionalized."); Final Report of the Michigan Supreme Court Task Force on Gender Issues in the Court 1 (Dec. 1989) [hereinafter Michigan Task Force Report] ("Perceptions of gender bias are rooted in reality. Gender bias adversely affects the interpretation and application of substantive laws, practices and procedures."); Final Report of the Rhode Island Committe on Women in the Courts 22 (June 1987) [hereinafter Rhode Island Task Force Report] (finding "substantial evidence that discrimination based on gender is a serious problem in the Rhode Island courts").

[42] Naming this work "gender bias" is itself a complex decision. During much of the 1970s, lawyers, legislators, and judges spoke about "sex" discrimination against women. Concern emerged with the use of that phrase. "Sex" could be used to explain differences identified between women and men, and men would be the baseline against which women were to be measured. See Barrie Thorne, Cheris Kramarae & Nancy Henley, Language, Gender, and Society: Opening a Second Decade of Research, in Language, Gender and Society 7, 12-15 (Barrie Thorne, Cheris Kramarae & Nancy Henley eds. 1983). During the 1980s, "gender" came to be used in lieu of "sex"—to underscore that "gender is not a unitary, or 'natural' fact, but takes shape in concrete, historically changing social relationships." Id. at 16; see also Joan Wallach Scott, Gender and the Politics of History 2 (1988) ("[G]ender . . . means knowledge about sexual difference . . . produced by cultures and societies of human relationships . . . ."). But "gender" also may shift attention away from the problems of women, and by its ambiguity, shelter discrimination from view. See generally Christine A. Littleton, Does It Still Make Sense to Talk About "Women"?, 1 UCLA Women's L.J. 15 (1991) (discussing problems of relying on gender-neutral language).

[43] See, e.g., Connecticut Task Force Report, supra note 11, at 6 ("the working definition of gender bias . . . is: any unjustified, differential treatment of a woman or a man based on that person's gender"); New Jersey Task Force Report, supra note 9, at 1 ("Gender bias is the predisposition or tendency to think about and behave toward people mainly on the basis of their sex."); New York Task Force Report, supra note 11, at 16 (quoting Chief Judge Lawrence H. Cooke, defining gender bias as "decisions . . . made or actions taken because of weight given to preconceived notions of sexual roles rather than upon a fair and unswayed appraisal of the merit as to each person or situation"); see also Lynn Hecht Schafran & Norma Juliet Wikler, Operating a Task Force On Gender Bias in the Courts: A Manual for Action 7 (1986)

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pally about and document discrimination against women in the legal system.[44] Once the words "gender bias" are translated as "discrimination against women," then the perception is that something about "the quality of the federal bench" and "in the nature of federal law" keeps problems of discrimination against *women* "to a minimum."

Different views might form the basis for this conclusion. A first is either that federal judges, when appointed, are screened for attentiveness to women's issues or that federal law is itself intrinsically egalitarian in statement and application and thus without discrimination against women. The argument might run that because of federal legislation like Title VII and constitutional antidiscrimination premises, federal judges are specially situated, already attuned to the problems women face and enforcing laws to prevent discrimination. Were it true that federal judges were so chosen or performed work that insulated them from bias, federal judges might well have welcomed gender bias task forces to confirm their inclusion of women and to alert them to any ways in which their in-

("Bias against men as well as bias against women undermines justice.").

[44] See generally L. Schafran & N. Wikler, supra note 43, at 7 ("There is overwhelming evidence, however, that the negative impact of gender bias operates much more frequently and seriously against women."); see also Connecticut Task Force Report, supra note 11, at 6-8 (reviewing history of discrimination against women); New York Task Force Report, supra note 11, at 16 (stating Task Force's "mandate" was to review all "aspects" of court system to learn if " 'there are statutes, rules, practices, or conduct that work unfairness or undue hardship on women in our courts' " (quoting Chief Judge Lawrence H. Cooke)).

While discrimination against women is at the core of all reports, fifteen task forces did address the question of discrimination against men. For example, the New York Report examined "stereotypes that disadvantage fathers," see New York Task Force Report, supra note 11, at 102-04, as well as "mothers." See id. at 105-11; see also Connecticut Task Force Report, supra note 11, at 8 (noting that stereotypic views of men may cause "judges unjustifiably to apply differential standards to men especially in areas of custody and sentencing"); Maryland Task Force Report, supra note 39, at iii ("committee carefully investigated allegations of bias from men and from women, and found that gender bias affects both sexes."); Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Gender Fairness Report, 15 Wm. Mitchell L. Rev. 825, 857 (1989) [hereinafter Minnesota Task Force Report] ("stereotypes [about caretaking of children] work to the disadvantage of both fathers and mothers"); Utah Task Force Report, supra note 39, at S-4 ("gender-based stereotypes about proper roles for men and women serve to disadvantage mothers in some situations and fathers in others").

The California Task Force stated that while recognizing "that bias based on gender includes bias against both men and women, virtually no testimony was received in the area of courtroom demeanor and civil litigation that reported bias against men." Achieving Equal Justice for Women and Men in the Courts, Draft Report of the Judicial Council Advisory Committee on Gender Bias in the Courts § 4, at 3 (1990) [hereinafter Draft California Task Force Report]. On November 16, 1990, the Judicial Council of California approved the recommendations, as modified by the Judicial Council Advisory Committee on Gender Bias in the Courts, of the California Task Force's Report. See Minutes of Judicial Council Meeting of Nov. 16, 1990 (on file with author). The publication of a final California report awaits additional funding. Conversation with staff of the Judicial Council, Mar. 26, 1992. For complaints about task forces' focus on women, see Fredric Hayward, Gender Bias has an Import on Men, Also, Nat'l L.J., Feb. 4, 1991, at 14.

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tended egalitarianism failed in practice. However, given the controversy over the Violence Against Women Act, sketched above, and the demographics and ideology of the federal judiciary, detailed below,[45] claims of deep egalitarianism are difficult to sustain. Similarly, while controversial recent appointments to the federal courts indicate that a candidate's attitudes towards women's rights have become relevant to appointment, there is little evidence that commitment to women's rights is a "litmus test" for nomination or confirmation.[46]

In my view, the diminished sense of "gender" comes not from the complete implementation of egalitarian principles, but rather from a perception that the world of the federal courts is populated by and is about men. The fact of women's invisibility (documented by the very possibility of seeing the federal courts as places with little to do with gender bias) provides the basis for this inquiry about how the federal courts as a system could be perceived as not having much to do with women and their problems. The questions are several. Are women absent in fact or present but paid no attention? Absent and present in what roles? Pursuant to what jurisdictional rules? Why is state law understood as the arena more relevant to women than federal law? Based on what normative and doctrinal claims about the appropriate divisions between state and federal courts of the tasks of dispute resolution, law enforcement, and law creation?

Happily, I am not alone in asking these questions. In addition to a growing body of law review literature considering the gendered nature of federal laws and rules, two federal circuits have expressed willingness to consider the impact of gender on their work.[47] In June of 1990, the governing body of the Court of Appeals for the District of Columbia Circuit created a committee to review court activities and consider racial and gender bias.[48] In August of 1990, the Judicial Conference of the Ninth Circuit approved a resolution calling for a study of gender bias in its courts.[49] This resolution will result in the first report of a task force

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45 See notes 85-145, 269-351 and accompanying text infra.

46 See generally Judith Resnik, Hearing Women, 65 S. Cal. L. Rev. 1333 (1992) (in Symposium: Gender, Race, and the Politics of Supreme Court Appointments: The Import of the Anita Hill/Clarence Thomas Hearings).

47 With the addition of these federal efforts, as of the summer of 1991, 33 states, the District of Columbia, and two federal circuit courts had put gender bias on their agendas. See Lynn Hecht Schafran, Update: Gender Bias in the Courts, Trial 112 (July 1991).

48 Conversation with Linda Finkelstein, Circuit Executive, United States Court of Appeals of the District of Columbia (Aug. 1991). Appointed as Chair was the Honorable Clarence Thomas; also appointed were Judges Ruth Bader Ginsburg, Joyce Hens Green, and Charles Richey. Id. After Justice Thomas's confirmation, Judge Joyce Green became the chair and Judge Jack Penn joined the Committee. Id.

49 Resolution No. 9 (Amended) states: "Create an Advisory Committee on Gender Bias in the Courts. Requests the Ninth Circuit to establish an Advisory Committee on Gender Bias in

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charged with addressing gender bias issues in the context of the federal courts.[50] As noted above, Congress is also considering legislation that would encourage circuits to study gender bias and would request that the Federal Judicial Center provide training and education.[51] Thus, from a variety of places and using a range of methods, including surveys, data collection, reviews of case law, reports on office policies, and focus group discussions, people are thinking about the extent to which gender affects the federal courts and the federal courts affect our understanding of gender distinctions.

These efforts are made especially complex by the subtleties of all the elements of the topic—gender, the federal courts, and the state courts. While it is both tempting and appropriate upon occasion to speak of "women" and of "men" as distinct categories, it is imperative to be sensitive to the limits of this distinction. One cannot assume that all women or men share the same experiences. Factors other than gender—such as class, race, religion, and sexual orientation—create important differences within the categories of "women" and "men."[52]

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the Courts to conduct hearings and prepare a written report with recommendations to eliminate gender bias in the courts." Mark Mendenhall, 1990 Ninth Circuit Judicial Conference Report, 132 F.R.D. 83, 115 (1990). The Resolution passed with 63 judges voting yes, 38 no, and 8 abstaining and with 61 attorneys voting yes, 16 no, and none abstaining. Id.

[50] See Christine E. Sherry, Ninth Circuit Undertakes Pioneering Study as Federal Courts Aim at Thwarting Gender Bias, 17 Litig. Sec. 11, 11 (1991). The Executive Committee of the Ninth Circuit appointed the Honorable John Coughenour of the United States District Court for the Eastern District of Washington (chair), the Honorable Proctor Hug of the Court of Appeals for the Ninth Circuit, the Honorable Marilyn Patel of the United States District Court of the Northern District of California, and lawyers Terry Bird (Los Angeles), Margaret McKeown (Seattle), Henry Shields (Los Angeles), and myself. The Task Force plans to present a report at the August 1992 Judicial Conference of the Ninth Circuit.

I cannot forecast what the Task Force's knowledge or conclusions will be. I speak here in no way on behalf of that group, but write as a law professor who teaches about feminism and about the law and jurisdiction of the federal courts—and as a New York University Law School graduate who is delighted to participate in this symposium in honor of "100 years of Women at NYU."

[51] See S. 15, 102d Cong., 1st Sess., §§ 521-523 (1991); notes 18-26 and accompanying text supra.

[52] See generally Adrienne Rich, Compulsory Heterosexuality and Lesbian Experience, in Blood, Bread, and Poetry: Selected Prose, 1979-1985, at 23 (1986) ("erasure of lesbian existence from so much of scholarly feminist literature"); Elizabeth V. Spelman, Inessential Woman: Problems of Exclusion in Feminist Thought (1988) (discussing interrelationship between gender and race and noting that attempts to isolate gender from other elements of identity such as race and class has helped preserve the white middle-class privilege in feminist theory); Kimberlé Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139, 140 (noting neither feminist theory nor antiracist theory "accurately reflect[s] the interaction of race and gender"); Angela P. Harris, Race and Essentialism in Feminist Legal Theory, 42 Stan. L. Rev. 581 (1990) (discussing failure of feminist legal theory to attend to different experiences of "women"); Judith A. Winston, Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights

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Similarly, "the federal courts" are not themselves fixed or easily described. Within the national system, the circuits provide substantial variation in custom, practice, and tone. Moreover, little attention is paid to many of those who sit as "federal judges" but lack life tenure, as well as to the lawyers and staff who also populate "the federal courts" and shape the culture. Some 750 individuals hold life-tenured article III judgeships.[53] Another 745 judges, named "magistrate judges" and "bankruptcy judges," do not have life tenure but do make first-tier adjudicatory decisions within the federal courts and are key participants in the interrelationship between trial court and litigants.[54] In the shadows are law clerks, court clerks, and staff attorneys who influence both decisionmaking and the working environment. Standing outside the federal courts are another set of federal judges—administrative law judges—who may be the "federal judge" for many litigants who experience the system and who make the records reviewed by judges inside the courts.[55]

State courts also are difficult to characterize. By definition each state system is insular, with its own judiciary, rules, doctrine, and ideology. The need to look at the specific context and to accept responsibility drives the request for state-by-state gender bias task forces. Yet, for certain purposes, all state courts stand in similar relationship to the federal courts. In short, although "essentialist" claims are made about women, the federal courts, and state courts (e.g., women are "essentially" wives and mothers; the experiences of heterosexual white middle class women

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Act of 1990, 79 Cal. L. Rev. 775 (1991) (describing civil rights law's inadequate consideration of distinct discrimination faced by women of color). For discussion of these issues in the context of the Violence Against Women Act, see Kimberlé Crenshaw, Race, Gender and Violence against Women of Color: The Intersections of Racism and Misogyny 36-39 (Nov. 10, 1991) (on file with author) (arguments in support of this proposed legislation often have subtext that "our"—i.e., white—women are affected and that problem of violence is not only one for " 'othered' women").

According to the National Center for State Courts (NCSC), eight states (Arizona, California, Florida, Massachusetts, Michigan, New Jersey, Oregon, and Washington) and the District of Columbia have established task forces on racial and ethnic bias in the courts. Conversation with NCSC staff (Feb. 26, 1992); Racial/Ethnic Bias in the Courts, Bibliography I, compiled by Jeremy Blank and Phillip Lattimore (NCSC, Jan. 16, 1991) (on file with author). In addition, the American Bar Association has passed a resolution calling for the study of race and gender in the federal court system. See ABA House of Delegates, Daily J., Report of Action Taken at 1991 Annual Meeting 1 (Aug. 12-13, 1991) ("Resolved that the American Bar Association supports enactment of federal legislation, or other authoritative measures, requiring a study of the existence, if any, of racial, ethnic and gender bias in the federal judicial system . . . ."); see also text accompanying note 402 infra (discussing whether state task forces address issues related to women of color).

[53] As of April 1, 1990, 753 people were article III trial judges. See note 88 infra.

[54] As of April 1, 1990, 743 people were magistrate and bankruptcy judges. See notes 114-16 and accompanying text infra.

[55] See generally Judith Resnik, Housekeeping: The Nature and Allocation of Work in the Federal Trial Courts, 24 Ga. L. Rev. 909 (1990).

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are "women's experiences"; there are "essential attributes" of judicial power; family law is governed "essentially" by the states), attention to the distinctions within all categories is crucial, even as one simultaneously invokes the generics of gender, states, and the federal courts.

D. Challenging the Assumptions

Below, I explore empirical information, doctrine, and the jurisprudential and ideological assumptions about women in the federal courts to understand how perceptions about "the quality of the federal bench" and "the nature of federal law," on the one hand, and how the nature of the legal problems presumably faced by women, on the other, work together to support a belief of women's relative absence from the federal courts. The examination of the interaction of women, the federal courts, and the state courts is a vast undertaking. Here, I begin by trying to explain the differing attitudes toward the topic of "gender bias." At first glance, the disinterest of the federal judiciary in gender bias is puzzling. Some of *the* most visible federal litigation of the past decade were "women's" cases,[56] involving reproductive freedom, sexual harassment, and injuries caused by the interuterine device, the Dalkon Shield.

What underlies both this lack of interest in and opposition to jurisdiction over gender-related injuries is the usually unstated and widely shared assumption that women are not relevant to the federal courts. This assumption, in turn, is fueled by an association of women with roles traditionally governed by state law (marriage, childbearing, and family care—oversimplified, a "private" world) and a corresponding association of the federal courts not with such "domestic" concerns but rather with commerce, constitutional law, federal statutory enforcement (oversimplified, a "public" world) in which men predominate. The 1873 decision in *Bradwell v. Illinois*[57] (which upheld a state law barring women from practicing law)[58] is a classic statement also invoking "nature," of these divisions. According to one of the concurring *Bradwell* justices, women need not be given the right to practice law, for the "paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. . . . In the nature of things it is not every citizen of every age, sex, and condition that is qualified for every calling and position."[59] The dichotomy drawn, between a commercial arena that in-

[56] See, e.g., Susan Gluck Mezey, In Pursuit of Equality: Women, Public Policy, and the Federal Courts vii (1992) (book's purpose is to "expand the literature on women and public policy by discussing the role of the federal courts, primarily the Supreme Court, in determining the status of women in America").

[57] 83 U.S. (16 Wall.) 130 (1872).

[58] See id. at 139.

[59] Id. at 141-42 (Bradley, J., concurring). There is irony in the Court's implicit depiction

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cludes law practice and the domestic scene in which women perform "the offices of wife and mother," roughly parallels assumptions about state and federal jurisdictional lines. Traditionally, family law (including the violence done to women in families) has been described as a topic for state law.

While *Bradwell* is well-known and often cited, there is another case deserving of equally close attention that, were it to be read, would undercut the assumption of state courts' dominion over family life. In 1859, in *Barber v. Barber*,[60] the United States Supreme Court *upheld* the claim of a woman, invoking federal court diversity jurisdiction and seeking to obtain payment of alimony from the husband from whom she was separated.[61] Finding a woman capable of having a separate domicile, *Barber* is an early juridicial recognition of women's rights and of federal court jurisdiction over interspousal disputes.[62] But *Barber* has been reinterpreted in subsequent cases,[63] both to narrow its legal scope and to align it with the ideological assumptions of *Bradwell*—that women's roles in the family are not much a part of the national issues to which federal court resources should be dedicated.

Below, I map the sources of this ideology of the absence of families and of women from the federal courts to examine how it is both true and false. First, women's presumed absence from the federal courts has a material basis. In several respects, we women are in the federal courts in smaller, less visible and less powerful roles than are men. The demographics of this workplace, detailed below,[64] demonstrate dense concentrations of women as staff, but few as judges and lawyers. As of the spring of 1990, four of the thirteen appellate courts and sixty of the ninety-four district courts had no article III judges who were women.[65] In contrast to the higher echelons of the federal court work force, a review of federal jurisdiction suggests that women are frequent litigants in

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of Myra Colby Bradwell as a homebody. During her efforts to be admitted, Bradwell was also the publisher of the *Chicago Legal News*, the first legal newspaper in the West, and a prominent member of the legal establishment. In 1890, the Illinois Supreme Court licensed her to practice law. K. Morello, supra note 1, at 14-21. For analysis of Bradwell's and other women's efforts to enter the bar, see Barbara Allen Babcock, Clara Shortridge Foltz: "First Woman," 30 Ariz. L. Rev. 673, 700-15 (1988); see also Martha Minow, "Forming Underneath Everything That Grows": Toward a History of Family Law, 1985 Wis. L. Rev. 819, 840-50 (discussing case and Bradwell's efforts "to challenge prevailing legal rules").

60 62 U.S. (21 How.) 582 (1858).

61 See id. at 599-600.

62 See Rogers Smith, "One United People": Second Class Female Citizenship and the American Quest for Community, 1 Yale J.L. & Human. 229, 254 (1989) ("[T]his relatively minor case remains the closest the Supreme Court came to enunciating a liberal egalitarian view of the status of women during the antebellum years.").

63 See text accompanying notes 314-17 infra.

64 See text accompanying notes 85-145 infra.

65 See text accompanying notes 92-93 infra.

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the federal courts. However, the dominance of the professionals, who are overwhelmingly male, coupled with the ways in which federal litigation is conducted, the low visibility of certain kinds of cases, and the imagined irrelevance of gender, reinforce the impression of an absence of women. Although actually present in the federal courts, women are paid little attention.

Second, this less visible relationship between women and the federal courts is supported by pervasive ideological, legal, and sociological assumptions and actions. Women, seen as actors in private rather than public life, are assumed primarily to interact with law as wives, mothers, and victims of violence, some of which occurs inside homes but does not deserve the gloss of the word "domestic." Family, in turn, is assumed *not* to be much a part of federal jurisdiction or a topic of federal jurisprudence. Federal judges repeatedly claim that family law is the "province of the state," and now disclaim a willingness to understand that claims of violence motivated by gender are "civil rights" cases appropriate for their jurisdiction.[66] The disowning of family law and of violence directed against women on the federal side is echoed by the visible presence of these topics on the state side. Much of the work on gender bias in state courts, thus far, has looked at women in families, as divorcing parents disputing custody, as mothers in search of child support awards, and as victims of violence.[67]

Both the equation of women with the family and the reduction of the law of the family to matters of marriage, divorce, and custody derive from nineteenth-century images.[68] These equations lead to another nineteenth-century claim about the relationship between federal and state court jurisdiction—that family life is governed by the law of the states, and that the federal courts "ought" not to get involved. But there is no intrinsic "ought" and nothing "natural" about this jurisdictional rela-

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[66] For discussion of how this public/private delineation is reproduced in the labor market and in unions' disinterest in organizing women, see Marian Crain, Feminizing Unions: Challenging the Gendered Structure of Wage Labor, 89 Mich. L. Rev. 1155, 1171-84 (1991). For discussion of feminist overrejection of public/private distinctions, see Ruth Gavison, Feminism and the Public/Private Distinction (Sept. 1991) (on file with author).

[67] Of the 19 state gender bias task force reports reviewed, all addressed family life and violence against women. See Appendix I (Topics Addressed by State Gender Bias Task Forces) and Appendix II (Portions of Reports Devoted to Specific Topics in State Gender Bias Task Forces). See also Joan Entmacher, Dissonant Discourses: Legal Ideology and Feminist Theory in the Work of Task Forces on Gender Bias in the Courts 3 (1990) (on file with author, cited with permission) (of 22 states reporting about "major areas of study" to National Center on State Courts, 21 "listed domestic violence and 20 listed family law" (footnote omitted)). As Entmacher comments, taking "the concerns of women—at least, the concerns of some women" is a "starting point" that is "feminist." Id.

[68] The role of the family in creating gender distinctions remains. See Susan Moller Okin, Justice, Gender, and the Family 170-71 (1989) ("The family is the linchpin of gender, reproducing it from one generation to the next . . . .).

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tionship; indeed, some federated systems place family law within the national sphere.[69]

Two elements are missing from this ideological construction: acknowledgement of the deliberate construction of jurisdictional rules and doctrine to exclude "domestic relations" from federal court authority[70] and acknowledgement of the wealth of federal law that implicitly and explicitly regulates many aspects of family life. These federal laws of the family come occassionally from the imposition of constitutional obligations on state lawmaking and more often from federal statutory regulations on reproduction, welfare, social security and pension benefits, tax laws, immigration, and bankruptcy, and by virtue of federal governance of some aspects of the lives of those in the military, in federal territories, and over Indian tribes.[71]

Court systems are workplaces, administrative bureaucracies, and buildings. Court systems are also ideas, constructed from jurisdictional grants, jurisprudence, histories, and self-made images. From the understanding, sketched above, about how state and federal courts see themselves in relation to women comes need for changes in practice, rhetoric, and ideology. Women must press harder to be a part of the federal courts because of the ideology of the federal courts as well as of the nation, which identifies women with domestic life and then ignores the needs of that life. The assumption that the federal courts are doing work central to the nation reiterates the marginalization of the lives and work of women in national culture. Because the federal courts claim to be and are understood as the place in which the national agenda is debated and enforced, women must insist that our presence be recorded and that we not be summarily sent elsewhere. The "law of the federal courts" needs to be rewritten to take our presence into account and to examine, critically, what kinds of family law decisions federal courts do and should make, how authority over family life is and should be shared among court systems, and whether both court systems should respond to violence against women. Simultaneously, federal law must disentangle women from the net of family life and recognize us as actors in the full

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[69] See, e.g., Martha A. Field, The Differing Federalisms of Canada and the United States, 55 Law & Contemp. Probs. —, — (1992) (forthcoming; 1991 manuscript on file with author) ("marriage and divorce and criminal law . . . are governed by the central government in Canada but by the state governments in the United States").

[70] See text accompanying notes 301-51 infra.

[71] Several facets of federal court work bring federal judges into family life. Federal courts are the equivalents of state courts in the lives of those who live in federal territories (a small percentage of the federal docket). More generally, federal law governs a host of economic relations that in turn affect family law and sometimes require federal definitions of the family itself. In addition, federal law sometimes enforces state law decisions on family life and other times preempts those judgments. See text accompanying notes 198-246 infra.

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range of disputes that are the bases for federal adjudication.

However, the sense of the federal courts as important places for women to inhabit should not be translated into a presumption that federal courts are to be preferred to state courts as institutions willing to attend to women's claims. Here is another place to reject the essentialist claim that in the very being of one or the other court system lies empathic understanding of women's injuries. Rather, it is the lesson of the thirty gender bias task forces already underway that bias knows no jurisdictional boundaries. The diminution of discrimination against women awaits commitment, conscious decisionmaking, appointment and selection of judges who have demonstrated concern about the existence of discrimination, ongoing education, and willingness to uncover new understandings of how endemic—in the "nature" of law as constituted in the United States—are injuries done to women.

II

WOMEN'S PLACES IN "THE FEDERAL COURTS"

Women could be in the federal courts as full-time and part-time employees, specially appointed members of auxiliary committees, witnesses, jurors, spectators, lawyers, and litigants. Women also can be discussed when the federal courts, as institutions, describe themselves and report to Congress. Further, women may be the focus of attention in federal courts' jurisprudence, as topics of opinions, treatises, and casebooks. It might seem that these statements are so obvious that the unpacking of the roles and spaces possibly occupied by women in the federal courts and their literature would be a bizarre and unnecessary undertaking. But the burden of proof seems to be on us—women—to document our presence, to justify the need for gender studies in the context of the federal courts, to reframe the domestic/nondomestic distinctions made along state/federal jurisdictional lines, and to challenge the reduction of women to their roles in families. As a consequence, below I sketch what is known about the roles women occupy in the federal courts. This section is devoted to understanding the contemporary contours of federal courts as institutions to learn about the material bases for women's invisibility. Thereafter, I turn to the conceptual predicates—the history, doctrine, and commentary—that hide our presence and provide arguments for further exclusion.

A. The Possible Roles

In many ways, courthouses belong to the people who come to them daily—as workers. Women might be article III life-tenured appellate and trial judges; hold term judgeships, such as those of bankruptcy and

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magistrate judges; serve as jurors; work as court interpreters, courtroom deputies, court reporters, court clerks, bailiffs, probation officers, marshals, law clerks, law librarians, staff attorneys, custodians, janitors, security guards, and in other staff positions; and be lawyers employed by federal offices, including the United States Attorneys' Office, the Federal Public Defenders' Office, and the federal agencies, all of which frequently litigate in the federal courts.

Not always working literally "in" the federal courts but working in affiliated roles are yet other individuals, some of whom might be women. These are individuals who are the specially appointed ad hoc masters, experts, and monitors;[72] who serve on special committees[73] or on the Criminal Justice Act panel of appointed lawyers for indigent defendants;[74] and who sit as arbitrators or as other providers of alternative dispute resolution.[75] Also connected, but yet further away, may be the administrative law judges, whose findings and conclusions are reviewed by judges in the federal courts. In addition, hundreds of thousands of lawyers go to the federal courts on behalf of their clients. Those lawyers, in turn, present witnesses, both lay and expert. Listening to those witnesses may also be women—either as jurors or as spectators who sit in the courtroom, as part of the press and the public audience.

Prompting all of this work are litigants. The role of litigant can be parsed to reveal several strands relevant to women. First, laws can address a category "women" and endow us with rights or disabilities, make assumptions about status and work, and create incentives for particular kinds of behavior. Second, law might not address women directly but instead the categories of activity that are exclusively or predominantly done by women or are historically associated with women—due to biology, political and social practices, or a combination thereof. Third, laws may neither address women nor women's issues but have a particular impact on women because, for example, women as a group live longer than men and have or are given more responsibilities for caretaking than men. Fourth, gender may not be relevant to the rights sought but may

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72 See Fed. R. Civ. P. 53 (special masters); Fed. R. Evid. 706 (court-appointed experts).

73 See, e.g., the Civil Justice Reform Act Advisory Groups created pursuant to 28 U.S.C.A. § 478 (West Supp. 1991).

74 See 18 U.S.C. § 3006A (1988).

75 As of 1988, Congress authorized arbitration in selected district courts. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, tit. IX, 102 Stat. 4642, 4659-64 (1988) (codified at 28 U.S.C. §§ 651-658 (1988)). In 1990, the first year in which data were kept, "3970 cases were referred to arbitration in the 10 participating districts." 1990 Annual Report of the Director of the Administrative Office of the United States Courts, at 9. Each annual report is printed as a second section to the Proceedings of the Judicial Conference of the United States. Hereinafter, each report will be referred to by its year, e.g., "1990 Annual Report."

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have impact on the remedies provided. On the civil side, for example, to the extent that damages are keyed to the capacity to earn wages outside the home, women as a group will be disadvantaged.[76] On the criminal side, if incarcerated women may face different conditions of confinement, some of them more punitive.[77] Women also may be litigants in cases in which gender plays less easily identified roles, such as in environmental and in antitrust cases.[78] Further, "women" itself may be an insufficient category to explore, because gender as it intersects with class, race, ethnicity, religion, and sexual orientation may bring distinct legal treatment and harms. All of these roles as litigants rely, in turn, on grants of jurisdiction to the federal courts.

Before reviewing the eligibility requirements for being a federal court litigant, one caveat about that status is needed. To be a litigant "in" the federal courts should not be taken at too literal a level. Some of women's invisibility in the federal court system may come from the fact that most litigants "in" the federal courts often are not "in" a building with that name. A substantial number of all federal cases (women's and men's, individual and institutional) end without any litigant ever being seen by any federal judge.[79] Decisions based on the papers may diminish

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[76] See 1990 Report of the Illinois Task Force on Gender Bias in the Courts 190 [hereinafter Illinois Task Force Report] ("Damage awards based on market notions of future income ignore the substantial amount of nonmarket labor which women perform in our economy"); Minnesota Task Force Report, supra note 44, at 914 ("There is a clear consensus . . . that homemakers receive less than the economic value of their services"); Gender and Justice, Report of the Vermont Task Force on Gender Bias in the Legal System 150-52 (Jan. 1991) [hereinafter Vermont Task Force Report] (evidence that economic experts use "outmoded statistics" to calculate lost earning capacity and worklife expectancy "which do not reflect the increase in the number of women in the paid labor force during the past two decades"). But see New York Task Force Report, supra note 11, at 81 (noting testimony that in recent years women and men receive comparable damage awards).

See also Steven H. Miles & Allison August, Courts, Gender, and "The Right to Die," 18 Geriatrics 85, 85 (1990) ("Judicial reasoning about profoundly ill, incompetent men accepts evidence of mens' treatment preferences to define . . . personal autonomy . . . . Judicial reasoning about women . . . reject[s] or fail[s] to consider evidence of womens' preferences with regard to life-sustaining treatment.").

[77] See, e.g., Canterino v. Wilson, 546 F. Supp. 174, 184 (W.D. Ky. 1982) (stating that many "privileges" for which prisoners at Kentucky Institution for Women were not eligible were "available as a matter of course, and in some instances as a matter of right, at all male institutions in the Kentucky penal system." Included was prohibition on some women's displaying pictures of family on walls of cells), vacated after opinion amended to include federal constitutional grounds, 869 F.2d 948 (6th Cir. 1989).

[78] See Anne E. Simon, Ecofeminism: Information and Activism, 13 Women's Rts. L. Rep. 35, 37 (1991) (providing feminist consideration of National Environmental Policy Act); see also Lin Nelson, The Place of Women in Polluted Places, in Reweaving the World: The Emergence of Ecofeminism 173 (Irene Diamond & Gloria Feman Orenstein eds., 1990) (discussing ecofeminist concerns, including impact of health policies on workplaces and communities).

[79] Almost 27% of federal civil litigation concludes with "no court action." 1990 Annual Report, supra note 75, at 157 (table C-5) (46,628 of 173,834 civil cases pending terminated with "no court action"). Note that these figures exclude "land condemnation, prisoner peti-

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a sense of the presence of litigants, in general, and of their gender in particular.[80] The low visibility of litigants in the visual landscape and in the consciousness of those who work in the federal courts may further diminish appreciation of the relationship between women and the federal courts.

Finally, women can be "in" the federal courts by being a topic of discussion in the written documents created by or written to describe the courts. While the federal courts have issued opinions since their inception, it was not until the second half of the nineteenth century that they became the object of scholarship and empiricism. Beginning shortly before the Civil War and blooming in this century, a burgeoning literature has grown that delineates this legal field, teaches students, and sets the boundaries of conversations about it. During the twentieth century, Congress created the Administrative Office of the United States Courts and with it has come reports on caseload and employees.[81] This literature also might record women's presence, might take the question of federal court jurisdiction over the "private" relations of family members as an interesting problem to be addressed, or might substantiate our

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tions and deportation reviews" as well as data on bankruptcy filings. Another 54% end before the "pretrial" conference. Id. (94,485 of 173,834 cases). In under 5% of the civil cases and some 20% of the criminal cases are trials held. Id. at 133 (table C) (in period ending June 30, 1990, 242,346 pending civil cases); id. at 161 (table C-7) (11,502 civil trials completed); id. at 174 (table D) (total criminal cases terminated 43,364); id. at 161 (table C-7) (8931 criminal jury and nonjury trials completed).

[80] Indeed, structurally the article III federal judiciary has created and is increasingly moving toward a system in which oral evidentiary hearings are not much a part of its system, and a good deal of adjudicatory work is delegated to magistrate judges and staff. See 28 U.S.C. §§ 631-639 (1988) (authorizing appointment of magistrates). See generally Carroll Seron, The Roles of Magistrates: Nine Case Studies (1985) (providing in-depth case studies on use of magistrates by nine districts); Lauren K. Robel, Caseload and Judging: Judicial Adaptations to Caseload, 1990 B.Y.U. L. Rev. 3 (critiquing procedural innovations and delegation techniques adopted by article III judges to deal with caseload pressure). Moreover, proposed amendments to the Federal Rules of Civil Procedure would permit direct testimony to be written, instead of orally presented. See Proposed Rules: Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure and the Federal Rules of Evidence, 137 F.R.D. 53, 135-36 (1991) (Proposed Amendment to Rule 43).

[81] See 28 U.S.C.A. §§ 601, 604 (West Supp. 1991) (duties of Director of Administrative Office of United States Courts include examining "the state of the dockets of the courts" and reporting on "business of the courts"). In addition, in 1967, the Federal Judicial Center was established; its charge includes research on the federal courts. See 28 U.S.C. § 620 (1988). Before the creation in 1939 of the Administrative Office, the Attorney General of the United States provided reports to Congress. See, e.g., 1935 Annual Report of the Attorney General of the United States for the Fiscal Year (1935); An Act to Provide for the Administration of the U.S. Courts and for Other Purposes, ch. 501, 53 Stat. 1223, 1223 (1939).

In addition to these governmental bodies, groups such as the American Law Institute, the Institute for Civil Justice (RAND), and the American Bar Research Foundation have sponsored research on the federal courts. See, e.g., ALI, Study of the Business of the Federal Courts (1934); Terence Dunworth, The Institute for Civil Justice, Statistical Overview of Civil Litigation in Federal Courts (RAND 1990).

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absence.

B. *The Workplace*

I turn now to fill in the picture by exploring the categories previewed above. Some of the most readily accessible data are statistics on employment, provided by a variety of sources.[82] Because comprehensive information about race, ethnicity, sexual orientation, and religion is not available, "women" and "men" become the categories for most of the jobs described below.[83] Further, the composition of the judiciary and its staff changes with each appointment, retirement, and death. What follows is a quick sketch, obsolete in its specifics as soon as it is written but

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[82] The United States Court Directory (Spring 1990), issued by the Administrative Office of the United States Courts, provides information on article III active and senior judges, judges in article I and article III specialized courts (except for the Foreign Intelligence Surveillance Act Court and the Court of Veterans Appeals), bankruptcy judges, and on full-time and part-time magistrates. Very limited information is given about nonjudicial employees. When gender neutral names appeared, those names were checked against other published sources about judges, or telephone calls were made.

Upon reaching a specific age or serving a specific time, article III judges may take "senior status" and continue to sit, but free an "authorized" judgeship for a new appointment. See 28 U.S.C. § 371(a),(d) (1988). Since many senior judges sit at both trial and appellate level and are a visible part of the decisionmaking, I include them in the numbers that follow. Thus, my numbers are those of sitting judges, which are not the same as the number of *authorized* federal article III judicial positions.

To obtain detailed information on court employees and some information on race, I used the Annual Report of the Judicial Equal Employment Opportunity Program Administrative Office of the United States Courts for the Twelve Month Period ending September 30, 1990 (preliminary ed.) [herinafter Preliminary EEO Report]. One problem with using two sources is that their databases do not cover the identical time periods. However, because the United States Court Directory data are current as of April 1, 1990, and the Preliminary EEO Report data are current as of September 30, 1990, the time periods are relatively close.

What follows does not include information on the composition, by gender, of juries. Insofar as I am aware, no such information is published.

[83] Gender (but not race, ethnicity, sexual orientation, or religion) can be inferred from the United States Court Directory, supra note 82. The Preliminary EEO Report does include statistics on minorities for court employees and for "all active appeals, district, and bankruptcy judges, and United States magistrates" but not for senior judges. Preliminary EEO Report, supra note 82, at 7 (the EEO *program* itself "does not cover judges."). However, no data identify the percentages of women within these categories. For example, as of September 30, 1990, there were 1481 "judicial officers," of whom 1357 (91.6%) were "white," 70 (4.7%) were "black," 43 (2.9%) were "Hispanic," 10 (0.7%) were "Asian," 1 (0.1%) was "American Indian," and 33 (2.2%) were "handicapped." Id. at 8 (table 1); see also id. at 9 (table 2) (comparing "the percentages of women and minorities" but providing no information on women who *are* minorities).

One can glean a bit of information on gender and race from other sources. For example, as of 1985, of 12,093 sitting state judges, 55 were black women. See Nina Burleigh, Black Women Lawyers: Coping with Dual Discrimination, 74 A.B.A. J. 64, 67 (1988). As of 1985, 5 black women (two on the appellate courts and three on the district courts) were article III judges. Id. Some federal judges have protested the provision of information about their hiring practices. See Garry Sturgess, Five Judges Won't Report on Clerks' Race, Gender: Affirmative-Action Rebellion in D.C. Circuit, Legal Times, Aug. 5, 1991, at 1.

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(absent radical changes in the appointment process) accurate in its contours.[84]

1. Employment Demographics

As of April 1, 1990, senior and active article III judges—on all levels of the federal courts—numbered 978.[85] Of the 9 who serve on the United States Supreme Court, 1 was a woman (11.1%). Of the 216 who served at the appellate level, 198 (91.7%) were men and 18 (8.3%) women.[86] All 69 of the senior appellate judges were men.[87] At the trial level, there were 753 article III judges, of whom 702 (93.2%) were men and 51 (6.8%) women.[88] Of the 223 senior trial judges, 219 (98.2%) were men and 4 (1.8%) women.[89] Twelve (92.3%) of the 13 judges who sit on the Court of International Trade were men; 1 (7.7%) was a woman.[90] Data from state courts may produce a helpful context in which to read these numbers. Women are estimated to be about 8% of all state court judges.[91]

The aggregate data show small percentages of women, but may ob-

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[84] Time may not alter these numbers substantially. See generally Carl Tobias, The Gender Gap on the Federal Bench, 19 Hofstra L. Rev. 171, 172-73 (1990) (examining current administration's record of appointing women to federal bench).

[85] United States Court Directory, supra note 82, at 3-42, 56-338. The data in the United States Court Directory are divided by circuit and by district. Each circuit section contains information on active circuit judges, senior circuit judges, circuit executives, clerks, senior staff attorneys, and librarians. Each district section contains information on active district judges, senior district judges, bankruptcy judges, magistrates, district court executives, district clerks, bankruptcy clerks, chief probation officers, chief pretrial services officers, and federal public defenders.

The data we were interested in were spread throughout the directory. Rather than list every page we used to compile our data, we footnote to the sections that contain all of the relevant circuit data or district data. The data for the special courts, which appear at limited pages, are referenced to specific page numbers.

Article III courts include the courts of appeals, district courts, and the Court of International Trade. Some of these judges also sit on special courts, such as the Multidistrict Litigation Panel. See notes 99-106 infra.

[86] United States Court Directory, supra note 82, at 3-42.

[87] Id.

[88] Id. at 56-338. This number includes active and senior status judges.

[89] Id.

[90] Id. at 48-49. See Appendix III (Gender and the Article III Judiciary).

[91] According to the National Center for State Courts, as of December, 1991, an "estimated 8.7% of the 28,713 state court judges (2,498) [were] women." Phillip A. Lattimore, III, Memorandum (Dec. 4, 1991) (on file with author). Gender Bias Task Force Reports provide specific information. For example, in 1990, the Florida judiciary was 10% women, but women were "concentrated disproportionately in two urban areas." Florida Task Force Report, supra note 39, at 211. As of 1989, 9% of Maryland's judges were women. Maryland Task Force Report, supra note 39, at 97. Five years earlier, in 1985, New York State had 1097 judges, of whom 9.7% were women—14.3% on the highest court, and 13.6% on the intermediate court were women. New York Task Force Report, supra note 11, at 151. See Appendix IV (Gender and the State Judiciary).

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scure that in some appellate and trial courts no women are on the bench. As of April 1, 1990, in the 13 appellate courts, 4 (30.8%) had no women;[92] of the 94 federal district courts, 60 (63.8%) had no women article III trial judges.[93] Twelve (92.3%) of the 13 chief judges of the appellate courts were men, and 1 was a woman.[94] At the district court level, 87 (95.6%)[95] chief judges were men, and 4 (4.4%) women.[96] The Judicial Conference of the United States is comprised of the Chief Justice of the Supreme Court, as convener, and the chief judge of each circuit, the chief judge of the Court of International Trade, and a district judge from each circuit.[97] As of March 13, 1990, this group numbered 27, 2 (7.4%) of whom were women.[98]

In addition to the layers set forth above, there are specialized courts, some of which consist of judges appointed specifically to that court and only to that court (the United States Claims Court,[99] the United States Tax Court,[100] the United States Court of Veterans Appeals,[101] and the United States Court of Military Appeals[102]) and others that consist of already appointed article III judges sitting by appointment on a special court (the Temporary Emergency Court of Appeals,[103] the Judicial Panel

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92 The First Circuit had 8 men, the Fourth Circuit 12 men, the Seventh Circuit 14 men, and the Eighth Circuit 14 men. United States Court Directory, supra note 82, at 5, 13, 23-24, 26-27.

93 Id. at 56-338. With the exception of the District of Columbia, which has a single district court within it, each of the other circuits has at least one district in which no women sit as article III trial judges.

94 A woman was the Chief Judge of the District of Columbia Circuit. Id. at 3.

95 The districts of Guam, Virgin Islands, and Northern Mariana Islands did not have chief judges.

96 The districts with women chief judges were the District of Connecticut, the Western District of Wisconsin, the Western District of Washington, and the Middle District of Florida. United States Court Directory, supra note 82, at 97, 107, 325, 335.

97 28 U.S.C. § 331 (1988).

98 See 1990 Report of the Proceedings of the Judicial Conference of the United States 1 [hereinafter 1990 Judicial Conference Report]. Seniority plays a role in appointment.

99 After the Supreme Court interpreted the Claims Court as having article III status, see Gliddon Co. v. Zdanok, 370 U.S. 530, 584 (1962), Congress amended its legislation to provide for an article I court with 16 judges, nominated by the President with "advice and consent of the Senate," and serving for 15-year terms. See 28 U.S.C. §§ 171, 172 (1988).

100 See 26 U.S.C. §§ 7441, 7443(a),(b),(e) (1988) (article I court with 19 judges, nominated by the President with the "advice and consent of the Senate" and serving 15-year terms).

101 See 38 U.S.C. § 4053 (1988) (one chief judge, and from two to six associate judges, holding presidential appointments with "advice and consent" of Senate, sit for 15-year terms).

102 See 10 U.S.C. §§ 941, 942 (Supp. II 1990) (President appoints, with "advice and consent of Senate," from "civilian life" five judges who hold 15-year terms.) Article III judges may sit by designation as well. See 10 U.S.C. § 942(f) (Supp. I 1989).

103 See Economic Stabilization Act Amendments of 1971, Pub. L. No. 92-210, § 211(b)(1), 85 Stat. 743, 749 (creating Temporary Emergency Court of Appeals to be selected by Chief Justice of United States Supreme Court "from the judges of the United States district courts and the circuit courts of appeals").

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on Multidistrict Litigation,[104] the Foreign Intelligence Surveillance Act Court,[105] and the Special Court Regional Rail Reorganization Act[106]). As of April 1, 1990, the United States Claims Court had 16 (94.1%) men judges and 1 (5.9%) woman judge.[107] Of the 41 judges who served on the United States Tax Court, 35 (85.4%) were men and 6 (14.6%) were women.[108] No women served on either the United States Court of Veterans Appeals or the United States Court of Military Appeals.[109] All of the judges who sat on 2 of the special courts comprised of already appointed article III judges—the Temporary Emergency Court of Appeals and the Judicial Panel on Multidistrict Litigation—were men.[110] One woman was on the Special Court for the Regional Rail Reorganization Act[111] and, as of March of 1992, one woman was on the Foreign Intelligence Surveillance Act court.[112]

Turning to those who sit within the article III judiciary as designees or "units," the percentage of women increases, although unevenly.[113] As of April 1, 1990, the 286 bankruptcy judges included 248 (86.7%) men and 38 (13.3%) women.[114] Full-time magistrate judges numbered 301,

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104 See 28 U.S.C. § 1407 (1988) (Chief Justice designates "seven circuit and district judges" to sit on panel, which determines whether to transfer "civil actions involving one or more common questions of fact" pending in different districts to single judge for "pretrial proceedings").

105 See 50 U.S.C. § 1803 (1988) (Chief Justice designates seven district judges to "hear applications for . . . electronic surveillance;" three district or appellate judges act as "court of review").

106 See Rules of the Special Court, Regional Rail Reorganization Act of 1973, Rule 4 (codified at 45 U.S.C. § 719 (1988)). The Judicial Panel on Multidistrict Litigation appoints two panels, comprised of six judges, three on a "General Panel" and three on the "Northeast Rail Service Act of 1981 Panel" (also called the § 1152 panel).

107 United States Court Directory, supra note 82, at 46-47.

108 Id. at 54-55.

109 Id. at 53; Telephone Conversation with staff at the Court of Veteran Appeals Administrative Office (Sept. 10, 1991).

110 United States Court Directory, supra note 82, at 44-45, 51.

111 Id. at 50.

112 Unlike the other special article III panels, this court's membership is not listed in the United States Court Directory. Six men and one woman sit at the trial level; the court of review is comprised of three men. Telephone Conversation with court personnel (Mar. 4, 1992).

113 Another issue—not explored here—is whether and how gender affects the allocation of work among bankruptcy judges, administrative law judges, arbitrators, magistrates, article III trial judges, and appellate judges. Are cases that involve women disproportionately assigned to "lower echelon" decisionmakers? Such a concern was raised by the National Association of Women Lawyers that criticized a draft proposal of the FCSC, which had suggested sending Title VII wrongful discharge cases to arbitration (as "fact specific and seldom implicat[ing] broader issues of federal law") while not suggesting that black-lung litigation similarly be sent to arbitration. NAWL testimony, presented by Myrna Raeder, Hearings on the FCSC, San Diego, Cal. (Jan. 29, 1990) (on file with author).

114 United States Court Directory, supra note 82, at 56-338. With the caveat that the EEO data are as of September 30, 1990 and have minor variations in numbers, according to the

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of whom 49 (16.2%) were women;[115] part-time magistrates numbered 156, of whom 12 (7.7%) were women.[116] Again, the picture looks different in the aggregate than it does when individual district courts are considered. For example, the District of Maine, the Northern District of New York, the Southern District of Illinois, and the Eastern District of Washington had no women in any judicial position.[117] Hawaii and the Eastern District of North Carolina each had one woman—serving as a part-time magistrate.[118]

In contrast to those non-article III judges employed directly by the judiciary, administrative law judges are governed by civil service rules. As of April 1991, 1090 people were administrative law judges (ALJs) in the Social Security Administration; 59 (5.4%) were women.[119] Here, the use of the "veteran's preference," approved by the Supreme Court in the context of a state system,[120] by which veterans are given preferences in appointment, explains in part the small number of women.[121] Since

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Preliminary EEO Report, the 296 bankruptcy judges included 282 (95.3%) whites, 9 (3.0%) blacks, 4 (1.4%) Hispanics, 1 (0.3%) Asian, and no one who was an American Indian or handicapped. Preliminary EEO Report, supra note 82, at 8 (table I).

115 United States Court Directory, supra note 82, at 56-338. Of the 309 full-time magistrates, 285 (92.2%) were white, 16 (5.2%) black, 6 (1.9%) Hispanic, 2 (0.6%) Asian, 0 American Indian, and 8 (2.6%) handicapped. Preliminary EEO Report, supra note 82, at 8 (table I).

116 United States Court Directory, supra note 82, at 56-338. According to the Preliminary EEO Report, whites numbered 152 (96.8%). There were no blacks or American Indians; 3 (1.9%) were Hispanic, 2 (1.3%) were Asian, and 2 (1.3%) were handicapped. Preliminary EEO Report, supra note 82, at 8 (table I).

117 United States Court Directory, supra note 82, at 138-39, 170-71, 220-21, 323.

118 Id. at 125-26, 236-37.

119 Joan Schaffner Memorandum (Apr. 30, 1991) (on file with author). Compare the data provided by the Honorable John C. Holmes, ALJ Update, A Review of the Current Role, Status, and Demographics of the Corps of Administrative Law Judges, 38 Fed. B. News & J. 202, 203 (1991) ("Only 5.2 percent of the federal ALJ's are women." While applications of women are rising, and "women score higher than men on the exam, the Veteran's preference which adds five or ten points to the applicant's final score . . . causes men to be ranked higher overall."). Other judges also are based in administrative agencies. For example, there are 95 authorized Immigration Law Judges, with 3 vacancies as of April, 1991; of that group, 76 were men and 16 were women. Telephone Conversation with staff at Executive Office of Immigration Review (Apr. 26, 1991).

120 See Personnel Adm'r v. Feeney, 442 U.S. 256, 280-81 (1979).

121 5 U.S.C. § 3105 (1988) authorizes agencies to appoint ALJs. 5 C.F.R. § 930.201 to .216 (1991) sets forth the procedures. Tests are given, and then, under § 930.203(d), "[a]s many of the applicants with the highest basic ratings, augmented by veteran preference if applicable" are to participate in additional hiring processes. "For applicants entitled thereto, the final passing score will include 5 or 10 veteran preference points." Id. Apparently, before 1984, a person had to first pass the test, and then received the preference points. Thereafter, the section has been interpreted to permit individuals who have not passed the test to pass—via the veterans' preference—but, as of February 1991, passing the test first once again was required. See 56 Fed. Reg. 6208-09 (Feb. 14, 1991); Joan Schaffner Memorandum (Mar. 19, 1991) (on file with author). Layoffs and tenure are also affected by the preference. See 5 C.F.R. § 351.501 (1991).

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1984, some 300 ALJs have been appointed, of whom 215 (71.9%) have had the veteran's preference, and 2(0.9%) were women veterans.[122]

Returning to federal court employees, as of September 30, 1990, 19,188 "full-time permanent and full-time temporary indefinite employees" served in the federal courts.[123] Of those almost 20,000 workers, men were 31.2% of the workforce and women 68.8%.[124] Employees are listed under six classifications.[125] The first, professional (legal), included all staff attorneys, law clerks, federal public defenders, and research assistants. Of some 3200 people in this category, 53.5% were men and 46.5% women.[126] The next three professional categories (general, administrative, and technical) include probation officers, librarians, court executives, and systems managers. Some 7,550 workers fell into these classifications, of whom 45.9% were men and 54.1% women.[127] Another group, legal secretaries, numbered about 2,100, of whom almost 99% were women.[128] A final grouping, office/clerical, has some 6,300 workers, of whom 87.6% were women.[129] No information was provided about custodial, janitorial, and security staff.

These demographic data enable a first understanding of the roles women play. Many members of the article III judiciary could sit on panels with other judges, visit with other judges at lunch, ride judges' elevators and never or rarely see a woman judge. Such "acute occupational segregation"[130] may engender a sense that "women's issues" do not have much to do with article III courts. The absence of women at

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122 See Schaffner Memorandum, supra note 119.

123 Preliminary EEO Report, supra note 82, at 9. What role "worklife policies" play in the number of women and men in the federal courts is not clear. According to an April 30, 1991 memorandum from the Administrative Office of the United States Courts, entitled, "Basic Administrative Work Schedule for Court Employees," employees are expected to work 40-hour weeks. Special provisions are made for military and court leave, but no mention is made of any provisions for child birth or parental leaves or for accomodation of work schedules because of caretaking obligations. Memorandum from Administrative Office of the United States Courts (Apr. 30, 1991) (on file with author).

124 Preliminary EEO Report, supra note 82, at 10. Of these workers, 76.5% were white, 12.7% black, 8.1% Hispanic, 2.3% Asian, 0.4% American Indian, and 1.0% handicapped. Id.

125 Id. at 11.

126 Id. at 12 (table 4). Of these, 2930 (91.2%) were white, 122 (3.8%) black, 95 (3.0%) Hispanic, 58 (1.8%) Asian, 6 (0.2%) American Indian, and 18 (0.6%) handicapped. Id.

127 Id. at 13 (table 5). Of these 7550, 5842 (77.4%) were white, 863 (11.4%) black, 666 (8.8%) Hispanic, 146 (1.9%) Asian, 34 (0.5%) American Indian, and 84 (1.1%) handicapped. Id.

128 Id. at 14. Of these, 1,793 (83.7%) were white, 193 (9.0%) black, 109 (5.1%) Hispanic, 44 (2.1%) Asian, 4 (0.2%) American Indian, and 16 (0.7%) handicapped. Id. at 14 (table 6).

129 Id. at 15 (table 7). Whites were 4,108 (65.4%), blacks 1,267 (20.2%), Hispanics 693 (11.0%), Asians 187 (3.0%), American Indian 25 (0.4%), and handicapped 76 (1.2%).

130 This phrase is borrowed from the New York Task Force Report, supra note 11, at 155-59 (finding "unequal opportunity for women in the court personnel system" in New York).

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high levels of the federal judiciary also may distinguish it from other public work forces. Recent summaries on women employees of state and local agencies noted that women "held *only* 31.3 percent of high-level state and local government jobs nationwide in 1990, while women in lower-level jobs acounted for 43.5 percent of the work force."[131] The "only" in the press report suggests an expectation that women should by now have received greater parity. In contrast to the "only 31%" in such jobs, women in the article III judiciary numbered under 8%.[132]

2. *Affiliated Workers*

Federal courts also appoint individuals to do work for and with them. Exemplary of such appointments are individuals who serve as special masters to the United States Supreme Court, as members of advisory groups at the district court level, and as members of Committees of the Judicial Conference of the United States. These examples skim the surface of the many affiliations that individuals can have with the federal courts.[133]

During a sixty-year period from 1930 to 1990, the United States Supreme Court appointed special masters (who sit as ad hoc adjudicators in particular cases and whose findings are then reviewed by the Court) in sixty-one published cases for which eighty-two special masters were designated.[134] All were men.[135] By virtue of the Civil Justice Reform Act of

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131 Few Women Found in Top Public Jobs, N.Y. Times, Jan. 3, 1992, at A12 (emphasis added). The underlying information comes from Women Face Barriers in Top Management, Women in Public Service, Winter 1991-92, at 1, 1. The data are provided by race and gender; white men are 60.4% of the officials and administrators; black men 5.1%, Hispanic men 2.1%, Asian men 0.8%, native American men, 0.2%; white women 24.4%, black women 5.1%, Hispanic women 1.2%, Asian women 0.4%, and native American women 0.1%. Id.; see also Report Finds Women Lag in Senate Roles, N.Y. Times, Dec. 10, 1991, at A29 (citing study which found that women were 62% of Senate's personal office staff, were "31 percent of the four highest-paying jobs among Senate aides," but, on average, were "paid 78 percent as much as male Senate aides were, largely because they remained under-represented in higher-paying jobs and over-represented in lower-paying jobs").

132 As of April 1, 1990, 8% of the article III appellate judges were women; 7% at the trial level. See text accompanying notes 86, 88-90 supra, and Appendix III (Gender and the Article III Judiciary).

133 See, e.g., 28 U.S.C. §§ 651-58 (1988) (appointment of arbitrators in 10 districts in which court-annexed arbitrations occur); 1990 Annual Report, supra note 75, at 22 (Office of Special Masters of United States Court of Claims, which decides cases under National Vaccine Injury Compensation Program); id. at 22 (noting 71,853 appointments of indigent defense counsel pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A (1988)).

134 A LEXIS search was done using the Supreme Court file and the search terms "special master" and date ("aft 1979"); "special master" or "special monitor" and date ("aft 1979"); "special master" and date ("aft 1929 and bef 1980"); and "special master" or "special monitor" and date ("aft 1929 and bef 1980"). These searches located hundreds of cases, 61 of which were relevant. The gender of the special masters was determined by that person's names, found in the orders appointing the special masters or in the text of the cases themselves.

135 Lee Seltman Memorandum, with the assistance of William Davisson (Feb. 11, 1992) (on

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1990,[136] chief judges of all of the district courts appointed "Advisory Groups" to assist in the creation of district-by-district delay and expense reduction plans; these new committees were formed by March 1, 1991. Of the 1,721 people appointed nationwide, 277 (16.1%) were women.[137] The Advisory Groups ranged in size from five to fifty-four members. While women on the average constituted 16% of the members, there were four districts in which no women were appointed,[138] and only seven in which women comprised 30% of the membership or more.[139] When the appointments were made, women were the chief judges of five district courts.[140] In those five districts, the average percentage of women on Advisory Groups was 28.6%. The group with the largest percentage of women in the country—40%—was appointed by a woman chief judge.[141]

The committees of the Judicial Conference provide a final example. As of the spring of 1991, the Judicial Conference had twenty-nine committees, including standing committees on issues such as federal rulemaking and ad hoc committees about concerns such as asbestos and "cameras in the courts." While some of these committees included only judges, several had lawyers, administrators, and law professors as well. Twelve of those committees had no women.[142] Only one committee, that for the International Appellate Judges Conference, had a membership of more than 40% women, and on the remaining sixteen committees, women on average were under 13% of the membership.[143]

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file with author). While 82 appointments were made, several were of "repeat players." As a consequence, 67 men have served as masters in the Supreme Court.

136 28 U.S.C.A. § 478 (West Supp. 1991).

137 Veronica Gentilli Memorandum (Feb. 10, 1992) (on file with author) [hereinafter Advisory Group Membership]. These numbers are derived from lists of the Administrative Office of the United States Courts and of the American Bar Association (all on file with author).

138 The courts were the Western District of Arkansas, the Southern District of Georgia, the District of Oregon, and the District of the Northern Mariana Islands. Advisory Group Membership, supra note 137.

139 The courts were the District of Connecticut, the Central District of Illinois, the District of Louisiana, the District of New Hampshire, the Southern District of New York, the Western District of Washington, and the Western District of Wisconsin. Id.

140 Those courts were the Southern District of California (women as 20% of Advisory Group), the District of Connecticut (women as 30%), the Middle District of Florida (women as 23%), the Western District of Washington (women as 40%), and the Western District of Wisconsin (women as 30%). Id.

141 Advisory Group from the Western District of Washington. Id.

142 Those committees were: the Committee on the Administrative Office, the Committee on the Administration of the Bankruptcy System, the Committee on the Budget, the Committee on Courtroom Security, the Committee on Federal-State Jurisdiction, the Committee on Intercircuit Assignments, the Committee on Long Range Planning, the Committee to Review Circuit Council Conduct & Disability Orders, the Advisory Committee on Criminal Rules, the Committee on Space and Facilities, the Ad Hoc Committee on Cameras in the Courtroom, and the National State-Federal Judicial Council (lists on file with author).

143 The Committees were: the Executive Committee (6 men, 1 woman), the Committee on Automation and Technology (13 men, 1 woman), the Committee on the Bicentennial of the

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Of course, were one to want to use these numbers to evaluate the question of discrimination in selection, a host of additional data would be needed.[144] My purpose here is not to undertake such an evaluation but to use these data to glimpse the working spaces of "the federal courts." The many Advisory Groups with small percentages of women correspond to the impression, reported anecdotally, that there are fewer women lawyers in the federal courts than in the state courts.[145] In committee work and in the pretrial process (including alternative dispute resolution, judicial case management, and settlement conferences), as well as during trial, judges may interact with relatively few women lawyers.

C. Federal Jurisdictional Boundaries

The small number of article III judges who are women and the relative absence of women lawyers in the federal courts enable an atmos-

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Constitution (11 men, 1 woman), the Committee on the Codes of Conduct (14 men, 1 woman), the Committee on Court Administration and Case Management (12 men, 3 women), the Committee on Criminal and Probation Administration (10 men, 3 women), the Committee on Defender Services (9 men, 1 woman), the Committee on the Judicial Branch (11 men, 2 women), the Committee on Judicial Ethics (13 men, 1 woman), the Committee on Judicial Resources (13 men, 3 women), the Committee on the Administration of the Magistrate System (11 men, 4 women), the Committee on Rules of Practice and Procedure (11 men, 2 women), the Advisory Committee on Appellate Rules (8 men, 1 woman), the Advisory Committee on Bankruptcy Rules (14 men, 1 woman), the Advisory Committee on Civil Rules (11 men, 2 women), and the Ad Hoc Committee on Asbestos (6 men, 1 woman). Id.

144 Relevant to this discussion is information about criteria for selection, the age of those selected, the role played by law firms and the private sector in putting forth names, the number of women in the relevant pools, and the like. For example, women as a percentage of law school classes has grown over the past decades, from 23.5% in 1975, to 34% in 1980, to 42% in 1989. Section of Legal Education and Admissions to the Bar, A Review of Legal Education in the United States, Law Schools and Bar Admissions Requirements (ABA, 1990; 1981; 1976). But percentages of law students are insufficient for the analysis. See Vicki Schultz, Telling Stories about Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument, 103 Harv. L. Rev. 1750, 1816-39 (1990) (discussing way in which "pools" are constructed and influenced by understanding of jobs as belonging to men or women).

145 In September of 1991, the California Bar announced a survey of the profession: women comprised 26% of the state's bar. Susan H. Russell & Cynthia L. Williamson, Demographic Study of the State Bar of California (Aug. 1991). In addition, 26% of all the White bar members were women; 31% of Hispanics, 41% of Blacks, and 37% of Asian bar members were women. Id. at 9. See also Philip Hager, Minority Mix Expanding in Legal Profession, L.A. Times, Sept. 14, 1991, at A21. To my knowledge, no comparable data are yet available for federal courts. Some evidence of either the absence of women or the absence of attention to the fact of women's presence comes from a recent report of the Seventh Circuit. See Interim Report of the Committee on Civility of the Seventh Federal Judicial Circuit [hereinafter Interim Report on Civility of the Seventh Circuit] (Apr. 1991) (on file with author). While detailing and decrying the absence of civility, no discussion is provided about whether women's experience of incivility (including gender bias) is different from that of men. See Catherine Clarke, Missed Manners in Courtroom Decorum, 50 Md. L. Rev. 945 (1991); Karen Czapanskiy, Gender Bias in the Courts: Social Change Strategies, 4 Geo. J. Legal Ethics 1 (1990).

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phere in which little attention may be paid to the impact of gender on the federal courts.[146] But the absence of women in the higher echelons of the work force could be offset by the presence of women as litigants. The possible roles for women litigants are bounded by interpretation and application of jurisdictional rules that delineate the federal courts from other adjudicatory bodies, and particularly from the state court systems. Thus, the next step is to examine federal jurisdiction to learn whether any assumptions about women's presence or absence might flow from the grants of authority and their exercise. Below, I detail what current federal court jurisdiction rules are and what, as a consequence, the federal caseload looks like. Given pending legislation to alter jurisdiction and the contemporary controversy about a claimed caseload "crisis," many commentators and legislators have urged restructuring federal court jurisdiction. Understanding the jurisdictional structures is a necessary predicate to considering where women as litigants might fit, in theory, and how federal courts ideology might either reaffirm our presence or anticipate our absence.

Article III of the United States Constitution sets the boundaries of the federal courts' authority. As is more than familiar, under the Constitution, federal courts can hear a range of matters, including all cases "arising under" the Constitution and federal law; all cases "affecting Ambassadors, other public Ministers and Consuls;" all cases "of admiralty and maritime jurisdiction;" and "controversies" to which the United States is a party, between two or more states, between a state and citizens of another state, between citizens of different states, between citizens and foreigners, and between citizens claiming land in other states.[147]

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[146] Should one want to know whether employees experience gender bias, information available provides little insight. In 1980, Congress enacted the Judicial Disability and Discipline Act, which permits complaints to be filed against judges who act in a manner "prejudicial to the effective and expeditious administration" of justice. See 28 U.S.C. § 372(c)(1) (1988). Litigants as well as employees may file such complaints. In 1990, 310 complaints were filed nationwide, 94 of which were for "prejudice/bias." See 1990 Annual Report, supra note 75, at 34 (table 23). However, no information is available recording whether gender bias was alleged. Employees and prospective employees also may file complaints against the judiciary as an employer. According to public data, for the year ending in September of 1990, 20 complaints were filed, 8 of which alleged sex discrimination. See Preliminary EEO Report, supra note 82, at 24-25. While the fact of resolution is reported, no information about either the nature of the problem or the response is provided.

[147] U.S. Const. art. III, § 2. Extensive literature exists about both the meaning of these phrases and of congressional control over federal court jurisdiction. See generally Akhil R. Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. Rev. 205 (1985) (interpreting article III); Lawrence G. Sager, Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts, 95 Harv. L. Rev. 17 (1981) (analyzing constitutional limits on Congress's attempts to restrict federal court jurisdiction).

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Congressional statutes have flowed from these jurisdictional fonts,[148] and, on occasion, federal judges decline to exercise some of the jurisdiction that they are permitted by the Constitution and Congress.

Both the volume and the type of case are relevant to the search for women litigants and the implications of their presence. The largest set of filings are in bankruptcy; in 1990, 725,484 bankruptcies were filed.[149] While bankruptcy filings far outstrip the rest of the federal civil docket (roughly 220,000 cases annually[150]), bankruptcy cases occupy a special place in the docket—dominant yet discrete, sometimes considered not fully "cases," and adjudicated, at the first instance, by specialized bankruptcy judges. Looking at the rest of the civil filings, cases filed by "private" parties who raised federal questions, including claims of violation of constitutional rights or of federal statutory rights such as those protected by federal environmental, tax, social security, patent, and copyright laws, were 48% of the docket.[151] In some 57,000 cases (about 26% of the civil cases), the jurisdictional basis was diversity jurisdiction.[152] The United States was a party to another 56,300 cases.[153] On the criminal side, some 50,000 filings represented a growing criminal caseload, as the federal government prosecuted more drug-related activity.[154]

Juxtaposed against the current caseload are proposals from those who urge revision, including reallocating work to state courts[155] and to

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148 As many have pointed out, some of the jurisdictional grants relate to the nature of the case (e.g., admiralty, federal question cases), while other jurisdictional grants depend upon the identity of a party (e.g., ambassadors, citizens of different states). See Amar, supra note 147, at 229. For discussion of the history of article III, see Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. Pa. L. Rev. 741 (1984); Wythe Holt, "To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 Duke L.J. 1421.

149 1990 Annual Report, supra note 75, at 22.

150 1990 Judicial Conference Report, supra note 98, at 5 (number of civil filings in 1989 was 223,112, declining 7% overall from the year before); 1990 Annual Report, supra note 75, at 6 (217,879 cases in 1990).

151 1990 Annual Report, supra note 75, at 8 (table 6) (103,938 federal question "private" cases out of 217,879 total filings.) These cases can be filed under 28 U.S.C. § 1331 (1988) (federal question jurisdictional grant) or under special jurisdictional statutes provided for certain kinds of cases. See, e.g., 28 U.S.C. § 1343 (1988) (civil rights claims).

152 1990 Annual Report, supra note 75, at 8 (table 6) (57,183 (26%) of 217,879 civil filings); see 28 U.S.C. § 1332 (1988) (requiring citizens from different states and amount in controversy in excess of $50,000).

153 1990 Annual Report, supra note 75, at 8 (table 6) (United States, or sub-entities thereof, was a plaintiff in 31,763 cases, a defendant in 24,537 cases).

154 1990 Annual Report, supra note 75, at 10-11 (table 8) (48,904 cases filed in 1990; prosecutions of drug offenses increased 6% in 1990, and 15% in 1989).

155 See, e.g., FCSC Report, supra note 16, at 35-54 ("Reallocating Business Between the State and the Federal Systems"). A central issue of federal courts jurisprudence is what should be the respective roles of the federal and state courts. See, e.g., Akhil Reed Amar, Law Story: Book Review of Hart and Wechsler's The Federal Courts and the Federal System, 102 Harv. L. Rev. 688 (1989); Richard H. Fallon, Jr., The Ideologies of Federal Courts Law, 74 Va. L.

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non-article III judges.[156] I take from a large literature two proposals as exemplary of the efforts to draw lines between court systems. The first, by Richard Posner, seeks to create "a theory of federalism"[157] from which to determine state/federal jurisdictional lines. According to his view, "optimal" allocations recognize both the desirability and limits of decentralization.[158] Federal power is needed to take into account both the need for substantive lawmaking by the federal courts and the lack of structural independence of the state judges, who are elected and thus may be more dependent on popular approval than those federal judges who have life tenure.[159] On the other hand, state authority is desirable to enable "political competition" and to avoid the threat of "monopoly."[160] Attentive to what he labels "costs," "benefits," and "externalities,"[161] Posner seeks both to explain current jurisdictional lines and to advocate others. Key to his line-drawing is the determination of whether federal law imposes "interstate externalities"[162] that Posner believes state judges will interpret narrowly to avoid harms to their own states.[163] In his view, federal jurisdiction is needed, for example, when one state can impose an externality on another by permitting misbehavior that causes harm outside its borders, or by failing to protect against political corruption in states,[164] or when "economies of standardization" exist.[165] Unrelated to externalities, Posner also would give his presumptively independent federal judges "responsibility for enforcing such federal rights as are likely

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Rev. 1141 (1988). In contrast, relatively little attention is paid to the relationship among federal courts, tribal courts, and state courts. See, e.g., Judith Resnik, Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U. Chi. L. Rev. 671 (1989).

156 See, e.g., FCSC Report, supra note 16, at 55-69 ("Creating Non-Judicial Branch Forums for Business Currently in the Federal Courts").

157 Richard A. Posner, The Federal Courts: Crisis and Reform 172 (1985).

158 See id. at 175-81.

159 See id. at 172-75. Posner, who assumes that judges "act in accordance with their rational self-interest," id. at 172, argues not only that life tenure protects judges from "retribution" but also that its guarantee of employment-until-death makes other jobs less attractive. See id. Posner's analysis of the incentives of federal judges does not include the impact of magistrate and bankruptcy judges, neither of which have life tenure, on federal adjudication.

160 Id. at 173.

161 Id. at 174-75.

162 Id. at 175.

163 For example, Posner would constrict but not eliminate diversity jurisdiction. He argues that when local residents are tied economically to nonresidents, state court protection of its own residents will result in equal law application to nonresidents but, when tort victims are nonresidents and the "parties were strangers before the accident, the theory predicts that the resident will receive favored treatment from the courts of his state." Id. at 176. Posner argues that the local identification of state judges also may justify retaining federal court authority over cases in which the United States is a defendant under the Federal Torts Claims Act. See id. at 177.

164 See id. at 177-78 ("federal authorities will be less corruptible").

165 Id. at 178 (using admiralty as example).

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to be asserted by people who are politically disfavored in state courts . . . because they lack effective political power in the state."[166]

Erwin Chemerinsky and Larry Kramer offer a different approach—what they have called "a minimal model" of federal court jurisdiction, crafted to respond to those who call for narrowing federal jurisdictional lines.[167] Chemerinsky and Kramer identify the "six major functions" of the federal courts to include the enforcement of the United States Constitution, "protecting the interests of the federal government as a sovereign," umpiring "interstate disputes," "assuring uniform interpretation and application of federal law," "developing federal common law," and overseeing federal administrative adjudication.[168] Unlike Posner, who links most federal jurisdictional needs to economic analyses about the imposition of externalities, Chemerinsky and Kramer start with an assumption of "value choices" and of the needs of the federal government to pursue its agenda through its courts.[169]

Given the current and proposed federal jurisdictional lines, I return again to the central question: is there anything in the quality of adjudicators or in the "nature" of the cases presented to them—either in the current federal docket or in proposed dockets—that would lead one to conclude that bias against women is kept to a minimum in the federal judicial system? The first obvious answer is that nothing in these lines a priori either screens women out or protects against bias operating against women. Indeed, within these jurisdictional parameters have come major cases involving women—including constitutionally-claimed reproductive freedom, statutorily-based antidiscrimination claims, and the massive Dalkon Shield bankruptcy. Further, these cases could remain federal cases were either Posner's or Chemerinsky's and Kramer's proposals to become law. Moreover, under both theories, some of the jurisdictional provisions of the Violence Against Women Act might be welcome, either to enforce federal law or to provide protection for those with less polit-

166 Id. at 180.

167 See Erwin Chemerinsky & Larry Kramer, Defining the Role of the Federal Courts, 1990 B.Y.U. L.Rev. 67, 77-94; see also Daniel J. Meltzer, The Judiciary's Bicentennial, 56 U. Chi. L. Rev. 423, 433 (1989) ("What this small portion of adjudicators [article III judges] should do is a painful but critical question."); Lauren K. Robel, The Politics of Crisis in the Federal Courts, 7 Ohio St. J. on Disp. Resol. 115, 134 (1991) (discussing FCSC's "controversial argument" of "disfavoring increasing the number of judges in the future as a long-term solution in favor of reducing the number of cases allowed in federal court").

168 See Chemerinsky & Kramer, supra note 167, at 77-87.

169 See id. at 74-77; 93-95. According to Kramer, "Posner's analysis suggests leaving most civil rights cases to state courts." Larry Kramer (Reporter), A Minimal Model and Some Priorities for Federal Jurisdiction, in 1 Federal Courts Study Committee, Working Papers and Subcommitee Reports 134 (July 1, 1990).

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ical power.[170] Below, I amplify the areas in which women are litigants in the federal courts.

D. Women as the Category

Women qua women (in the essentialist sense) are a topic of federal law, thus bringing women within the "federal question" jurisdictional grants, either in the Posnerian sense, in need of federal rights protection, or á la Chemerinsky and Kramer, falling within the interests of the federal courts in uniform federal law interpretation. Federal statutes mention the category "women" in hundreds of instances,[171] including banning discrimination against women, delineating behaviors for women, protecting women against violence, and monitoring women who are convicted of crimes.

Women have struggled to obtain recognition as holders of federal constitutional rights, and they have achieved some, but by no means comprehensive, constitutional protection from discrimination based on sex.[172] In addition to the constitutional regime, many federal statutes specifically outlaw discrimination against "women."[173] Examples include prohibitions on discrimination in employment,[174] in immigra-

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170 How Posner would decide the costs and benefits is not clear. If a man crossed a state line to do harm to a former spouse and then returned to his home state, the home state might have little incentive (and no jurisdiction) to pursue him. The state in which the injury occurred has Posnerian incentives but may lack resources or be subject to corruption, described by Posner as conditions that prompt the need for federal jurisdiction. See R. Posner, supra note 157, at 177-78.

171 A LEXIS search using the U.S. Code file and the words woman/women/girl/mother/wife/wives/sister/widow/pregnant/pregnancy/daughter/female/sex/sexual/gender located more than 500 documents. Narrowing the search to ask only for these words in the headings of statutes provided a list of 239 statutes, some of which were duplications. Note that this search does not provide any information on the relative frequency of women in federal law, since I have counted neither the number of federal statutes nor the time those statutes refer to men/boys/father/sons/brother/widowers. The purpose of the search was to consider whether women were present at all, in their capacity as "women," in federal law.

172 See Symposium, Women and the Constitution, 6 Law & Ineq. J. 1 (1988); H. Kay, supra note 2, at 20-49. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (holding federal statute denying comparable benefits to women and men in violation of fifth amendment); Reed v. Reed, 404 U.S. 71, 75 (1971) (finding preferential treatment of men by state probate code unconstitutional). But see Personnel Adm'r v. Feeney, 442 U.S. 256, 271-81 (1979) (upholding veterans' preference despite disparate impact on women).

173 Again trying to scan to get a sense of the volume, a LEXIS search of the U.S. Code file and the words woman/women/female/gender/sex/sexual within 25 words of discriminate/discrimination retrieved 222 sections. Some of the statutes address other groups as well; none currently, to my knowledge, attempt to respond to the specific forms of discrimination suffered by women of color.

174 See Civil Rights Act of 1964, 42 U.S.C. § 2000(e)-16 (1988) (Title VII); see also 5 U.S.C. § 2302(b)(1)(A) (1988) (prohibiting government employees from discriminating in civil service employment on basis of "race, color, religion, sex, or national origin"); 29 U.S.C. § 206 (d)(1) (1988) (prohibiting discrimination "between employees on the basis of sex by paying

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tion,[175] in educational programs receiving federal funds,[176] in the development of energy programs,[177] in the composition of the boards of directors of the Federal Reserve System,[178] and in the provision of credit.[179]

Federal statutes not only ban discrimination against women. Some federal legislation explicitly recognizes groups of women, including "The National Society of the Daughters of the American Revolution,"[180] and the "Blue Star Mothers of America."[181] While many of these statutes provide only federal acknowledgment for such groups, a few describe roles for women. The statute recognizing the Girl Scouts of America states that girls will learn "the qualities of truth, loyalty, helpfulness, friendliness, courtesy, purity, kindness, obedience, cheerfulness, thrifti-

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wages" unequally). One aspect of employment discrimination law that has received a good deal of public attention is prohibitions on sexual harassment and the need to understand this problem from the perspective of the person harassed. See, e.g., Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991) (relying on "reasonable woman" standard); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1502-10 (M.D. Fla. 1991), appeal pending (viewing harassment from vantage point of woman).

175 See Immigration and Naturalization Act, 8 U.S.C. § 1152(a) (1988 & West Supp. 1991) (issuing of visas, with some exceptions, not to be based on "race, sex, nationality, place of birth, or place of residence, except as specifically provided" elsewhere). For an example of an immigration rule that granted citizenship to "foreign-born offspring of male American citizens but denied citizenship to the foreign-born offspring of female American citizens," see Wauchope v. Department of State, 756 F. Supp. 1277, 1279 (N.D. Cal. 1991).

176 See Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681(a)(1988) ("No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."); Women's Educational Equity Act, 20 U.S.C. § 3041(b) (1988) ("The Congress finds . . . that educational programs . . . are frequently inequitable as such programs relate to women . . . ."). Title IX was amended by the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 102 Stat. 28, 28-29 (codified at 20 U.S.C. § 1687 (1988)), to define programs more broadly than the Supreme Court had in Grove City College v. Bell, 465 U.S. 555, 570-74 (1984) (limiting Title IX coverage to programs receiving funds rather than to institutions receiving funds). See also Franklin v. Gwinnett County Pub. Schools, 112 S. Ct. 1028, 1034 (1992) (allowing damages); Cannon v. University of Chicago, 441 U.S. 677, 703 (1979) (finding implied cause of action under Title IX).

177 See Energy Reorganization Act of 1974, 42 U.S.C. § 5801 (1988) (stating congressional policy to coordinate development of energy programs and use); id. § 5891 ("No person shall on the ground of sex be excluded from participation in, be denied a license under, be denied the benefits of, or be subjected to discrimination under any program or activity carried on or receiving Federal assistance . . . .").

178 See Federal Reserve Act, 12 U.S.C. § 302 (1988) (directors shall be chosen "without discrimination on the basis of race, creed, color, sex, or national origin").

179 See Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1) (1988) (prohibiting discrimination on "basis of race, color, religion, national origin, sex or marital status, or age").

180 36 U.S.C. § 18 (1988) (recognizing organization "for patriotic, historical, and educational purposes").

181 36 U.S.C. §§ 941-958 (1988) (creating and organizing corporation); see also 36 U.S.C. §§ 91-105 (1988) (American War Mothers); 36 U.S.C. §§ 2401-2415 (1988) (American Gold Star Mothers); 36 U.S.C. §§ 2801-2815 (1988) (Navy Wives Clubs of America); 36 U.S.C. §§ 2901-2916 (1988) (National Society, Daughters of the American Colonists).

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ness, and kindred virtues . . . as a preparation for their responsibilities in the home and for service to the community."[182] Women are not only treated as a category by federal law in their work in such voluntary associations. Federal military law also makes distinctions on the basis of sex and sexual orientation, thereby constructing and enforcing certain gendered roles for both women and men.[183]

Other federal legislation is directed at protecting women from economic or physical violence or at controlling women who are themselves the perpetrators of such violence. Since 1910, federal law has prohibited the interstate transportation of women for "any immoral purpose."[184] In governance of both Indian tribal territories[185] and the federal military enclaves, federal law proscribes violent crime, including rape,[186] although such protection does *not* extend to women who are victims of but married to persons governed by military law.[187] The Federal Rules

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182 36 U.S.C. § 33 (1988). The statute about the Boy Scouts of America prescribes different attributes for men-to-be—specifically to "do things for themselves and others, . . . [and to learn] patriotism, courage, self-reliance, and kindred virtues." 36 U.S.C. § 23 (1988).

183 See Kenneth L. Karst, The Pursuit of Manhood and the Desegregation of the Armed Forces, 38 UCLA L. Rev. 499 (1991); see also Michelle M. Benecke & Kirstin S. Dodge, Military Women in Nontraditional Job Fields: Casualties of the Armed Forces' War on Homosexuals, 13 Harv. Women's L.J. 215, 220 (1990) (discussing how women and lesbians were "special targets for discharge" in 1980s).

184 White Slave Traffic Act ch. 395, §§ 1, 2, 36 Stat. 825 (1910) (codified at 18 U.S.C. § 2421 (1988)) ("any person who shall knowingly transport or cause to be transported . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose . . . shall be deemed guilty of a felony"). In 1986, Congress amended the section to substitute the word "individual" rather than "woman or girl," or "female." Child Sexual Abuse and Pornography Act of 1986, Pub. L. No. 99-628, § 5, 100 Stat. 3510, 3511 (1986). For earlier federal regulation of sexuality and reproduction, see Comstock Act of 1873, 17 U.S. Stat. 598 (felony offense to transport "obscene, lewd, or lascivious book . . . designed or intended for the prevention of conception or procuring of abortion").

185 Prior to the 1986 amendments, 18 U.S.C. § 1153 provided: "Any Indian who commits against the person . . . rape, carnal knowledge of any female, not his wife, who has not attained the age of sixteen years, . . . shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153 (1982). Section 1153 was amended in 1986 to incorporate provisions of the Sexual Abuse Act of 1986. See Pub. L. 99-646, § 87, 100 Stat. 3620 and Pub. L. 99-654, 100 Stat. 438, codified at 18 U.S.C. § 2241-2245 (1988). 18 U.S.C. § 2241 now states that "[w]hoever, in the special maritime and territorial jurisdiction of the United States . . . knowingly causes another person to engage in a sexual act . . . by force . . . or by threatening" shall be guilty of an offense." See also Pub. L. No. 99-654, § 3(a)(5), 100 Stat. 3660, 3663. 18 U.S.C. § 1153 (1988) ("Any Indian who commits against the person . . . a felony under chapter 109A . . . shall be subject to the same laws and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States").

186 According to the Judicial Impact Statement, S. 15, supra note 26, at 5, in 1990, there were some 48,000 criminal cases filed: "562 involved assault, 433 involved sex offenses, . . . and 65 involved kidnapping."

187 10 U.S.C. § 920(a) (1988) provides: "Any person subject to this chapter who commits an act of sexual intercourse with a female not his wife, by force and without her consent, is guilty of rape . . . ." See United States v. Wilhite, 28 M.J. 884, 885 (A.F.C.M.R. 1989) ("Car-

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of Evidence regulate the inquiry during trial about a victim's prior sexual history.[188] Federal sentencing guidelines provide punishments for both "rape" and "aggravated rape."[189] Federal legislation directs the National Center for the Prevention and Control of Sex Offenses to study and investigate "the effectiveness of existing Federal, State, and local laws dealing with sex offenses."[190] The regulation of pornography is also a topic of federal adjudication; federal constitutional law has been used to preempt local legislation aimed at protecting women subjected to pornography.[191]

Federal statutes address women as convicted criminals. While federal Sentencing Guidelines state that the sex of a defendant is "not relevant in the determination of a sentence,"[192] case law currently debates the relevance of women's childcare responsibilities to sentencing,[193] as well as what role gender plays in prosecutorial charges and as a mitigat-

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nal knowledge under . . . 10 U.S.C. § 920, requires, as an essential element, proof that the victim is not the accused's wife."); United States v. Carver, 12 M.J. 581, 583 (A.F.C.M.R. 1981) ("The non-marital status between the victim and the accused at the time of the act is an essential element of rape.") (citation omitted).

188 Fed. R. Evid. 412 ("Sex Offense Cases: Relevance of Victim's Past Behavior"). The Violence Against Women Act would modify this rule. See S. 15, 102d Cong., 1st Sess., § 151 (1991) ("Sexual History in All Criminal Cases"); see also Kit Kinports, Evidence Engendered, 1991 U. Ill. L. Rev. 413 (discussing relationship between gender and Federal Rules of Evidence).

189 Some women's advocacy groups criticize the guidelines for punishing rape relatively less harshly than other offenses, and then providing for "enhancements" if an "abduction" is included. See United States Sentencing Commission's Guidelines Manual §§ 2A3.1, 1B1.1 (Nov. 1990) [hereinafter U.S. Sentencing Guidelines]; Analysis of Federal Rape Sentences, by the Violence Against Women Act Task Force, convened by the NOW Legal Defense and Education Fund (on file with author).

190 42 U.S.C. § 9511(a)(1)(A) (1988).

191 See American Booksellers Ass'n. v. Hudnut, 771 F.2d 323, 330-32 (7th Cir. 1985) (invalidating Indianapolis antipornography ordinance on first amendment grounds), aff'd 475 U.S. 1001 (1986).

192 U.S. Sentencing Guidelines, supra note 189, § 5H1.10.

193 Compare id. § 5H1.4 (permitting sentencing court to take into account "extraordinary physical impairment") with United States v. Pozzy, 902 F.2d 133, 136-39 (1st Cir. 1990) (reversing district court that, relying on "defendant's relationship with her husband . . . and her present physical condition" of pregnancy, had granted downward departure from prescribed guideline range; "pregnancy of convicted female felons is neither atypical nor unusual"), cert. denied, 111 S. Ct. 353 (1990). Compare U.S. Sentencing Guidelines, supra note 189, § 5H1.6 (stating that family responsibilities are not "ordinarily relevant" to application of guidelines) with United States v. Brand, 907 F.2d 31, 33 (4th Cir. 1990) (holding that district court decision to consider defendant's young children was error; "Mrs. Brand's situation [two children ages seven and one and a half, one to be sent to foster care, the other to her grandmother], though unfortunate, is simply not out of the ordinary"—at least not for women), cert. denied, 111 S. Ct. 585 (1990); United States v. Pokuaa, 782 F. Supp. 747, 748 (E.D.N.Y. 1992) (allowing departure from guidelines for risk of loss of child custody grounds); and United States v. Gerard, 782 F. Supp. 913, 914-15 (S.D.N.Y. 1992) (noting that "aggravating or mitigating circumstances," such as defendant being "sole care provider for her two teenage children" and defendant's voluntary efforts at restitution and cooperation justify departure from guidelines).

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ing factor in sentencing.[194] Once incarcerated, women are sent to one of nine federal prisons that house approximately five thousand women prisoners in the federal system;[195] these women constitute 7.6% of the federal prison population.[196] A special "Board of Advisors" provides assistance to the director of the Federal Prison System on how to "recommend ways and means for the discipline and training" of women prisoners.[197]

E. Federal Laws of the Family

In addition to addressing women as a class, many federal statutes relate to women in family settings as mothers, as caregivers, as pregnant or possibly pregnant, as individuals seeking abortions, as users or aspiring users of reproductive technology, as dependents, and as heads of households.[198] Supreme Court case law has spread a layer of federal constitutional requirements atop state family laws[199] and resulted in discussion of the "constitutionalization" of family law. Less emphasis has been placed on identifying the extensive federal statutory regime that addresses family issues. While federal law thus far has not regulated directly either the marriage, divorce, or custodial relations of divorcing parents, federal law does govern a host of legal and economic relations that do affect and sometimes define family life.

Several federal statutes speak specifically to family life, and some of these statutes involve the federal courts in enforcement and implementa-

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194 See, e.g., United States v. Redondo-Lemos, 955 F.2d 1296 (9th Cir. 1992) (concluding that district court's observation that male defendant charged more harshly than female defendant established prima facie showing of prosecutorial gender-based discrimination and remanding for fact-finding); United States v. Johnson, 1992 U.S. App. LEXIS 1510, at *4-*27 (9th Cir. Feb. 11, 1992) (holding that battered woman's fears may be grounds for reduction of sentence).

195 U.S. Dep't of Justice, Facilities 1990, Federal Bureau of Prisons, at 7, 16, 19, 32, 37, 54, 55, 57, 71. In addition, there are four federal facilities that house women pretrial detainees.

196 Bureau of Prisons, BOP Research, 10/11/91 (data as of August, 1991) (on file with author).

197 See 18 U.S.C. § 4321 (1988); see also 18 U.S.C. § 3621 (1988) (providing for custody of convicted persons).

198 Once again, technology provides a window into the number of times federal statutes mention the words abortion, reproduction, pregnancy, childbearing, and parenting. A LEXIS search stopped after it retrieved more than 500 documents. When narrowed to look only for the word pregnant/pregnancy, 135 sections were found.

199 See, e.g., Mills v. Habluetzel, 456 U.S. 91, 92 (1982) (declaring a year-from-birth statute of limitations on paternity suits unconstitutional); Santosky v. Kramer, 455 U.S. 745, 755 (1982) (holding New York standard of proof in termination of parental rights unconstitutional under due process clause); Orr v. Orr, 440 U.S. 268, 274-84 (1979) (holding sex-specific alimony statute unconstitutional); Zablocki v. Redhail, 434 U.S. 374, 380 (1978) (striking down Wisconsin statute restricting marriages of people with child support obligations under equal protection clause); Loving v. Virginia, 388 U.S. 1, 7-12 (1967) (ruling that equal protection and due process prohibit state from banning interracial marriage).

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tion of the policies set forth. For example, Congress has regulated relations among parents and children in legislation such as Aid to Families with Dependent Children (AFDC),[200] the Child Protection Act of 1984,[201] the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978,[202] the Federal Child Support Enforcement Act,[203] the Parental Kidnaping Prevention Act of 1980,[204] and the Sexual Abuse Act of 1986.[205] Other statutes, such as the Pregnancy Discrimination Act,[206] regulate issues unique to women.

Federal law also provides particular definitions and regulation of families by its rules on taxation, pensions, bankruptcy, and social welfare programs, as well as when members of those families are in the military, in Indian tribes, or subject to immigration law. Federal tax and social welfare laws define households, how many people can "head" them, and who can be "dependents."[207] The literature on federal taxation has long

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200 Social Security Act, ch. 531, §§ 401-406, 49 Stat. 620, 627 (1935) (codified as amended at 42 U.S.C. §§ 601-617 (1988 & West Supp. 1989) ("encouraging the care of dependent children in their own homes or in the homes of relatives").

201 Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified at 18 U.S.C. §§ 2251-2255, 2516 (1988)). Section 2251 states, "[A]ny person who employs . . . any minor to engage in . . . any sexually explicit conduct . . . shall be punished."

202 Pub. L. No. 95-266, 92 Stat. 205 (1978) (codified at 42 U.S.C. §§ 5101-5105 (1988 & Supp. I 1989). Section 5202, repealed Pub. L. No. 100-707, tit. I, § 108(c), 102 Stat. 4708 (1988), called for the Secretary of Health and Human Services to establish a National Center on Child Abuse and Neglect; § 5111 calls for federal development of "model adoption legislation" and of a "national adoption and foster care information data gathering and analysis system."

203 42 U.S.C. §§ 651-669 (1988 & West Supp. 1989) (developing federal standards to assist states in obtaining parental support from absent parents).

204 Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3566, 3568-73 (1980).

205 Pub. L. No. 99-654, § 2, 100 Stat. 3660, 3660-64 (1986) (codified at 18 U.S.C. §§ 2241-2245 (1988)).

206 Pub. L. No. 95-555, 92 Stat. 2076, 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (1988)) (defining discrimination "because of sex" to include but not be limited to "because of or on the basis of pregnancy, childbirth, or related medical conditions"); see also California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 286-87 (1987) (referring interchangeably to both "pregnant women" and "pregnant workers").

207 See Druker v. Commissioner, 697 F.2d 46, 49-51 (2d Cir. 1982) (upholding "marriage penalty" on two-wage earning married couple and relying on "wide latitude" of Congress to regulate taxes in manner that affects family), cert. denied, 461 U.S. 947 (1983); Deborah H. Schenk, Simplification for Individual Taxpayers: Problems and Proposals, 45 Tax L. Rev. 121, 130-35 (1989) (describing federal Tax Code rules for individuals—specifically with respect to dependency exemptions and urging revised simplified tests); id. at 135-39 (describing federal Tax Code rule on marital status and on "abandoned spouse"); id. at 139 (discussing "head of household" test); see also Lyng v. International Union, 485 U.S. 360, 374 (1988) (upholding 1981 amendment to Food Stamp Act that prohibited any household in which member was on strike from becoming eligible for food stamps or receiving increase in allotment for stamps); Bowen v. Gilliard, 483 U.S. 587, 608-09 (1987) (upholding statutory scheme that linked Aid to Families of Dependent Children to the number of members of a household); Lyng v. Castillo, 477 U.S. 635, 642-43 (1986) (upholding eligibility for food stamps based on "household" unit against equal protection challenge); Margaret M. Mahoney, Stepfamilies in the Federal Law,

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debated how tax law affects families and how families affect tax law; as Boris Bittker put it, the Internal Revenue Code is full of answers about the "status of marriage and the family."[208] Federal law regulates pensions, and many of those regulations "preempt state law divorce divisions."[209] State courts also have concluded that federal social security benefits are similarly beyond the reach of state law when determining property divisions in divorce.[210] The 1984 amendments to the Employee Retirement Income Security Act (ERISA) give surviving spouses a forced share of pension rights.[211] Federal law governs the division of

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48 U. Pitt. L. Rev. 491, 492-94, 534-37 (1987) (discussing eligibility of "stepchildren" for federal benefits under Immigration and Nationality Act and Old-Age Survivors and Disability Insurance Program under Social Security Act and that some, but not all, federal definitions of stepfamilies expressly refer to state law). Federal constitutional law also affects state regulations of these issues. See, e.g., Moore v. City of E. Cleveland, 431 U.S. 494, 506 (1977) (holding unconstitutional city ordinance limiting occupancy of dwelling to family members).

208 Boris I. Bittker, Federal Income Taxation and the Family, 27 Stan. L. Rev. 1389, 1392 (1975); see also Grace G. Blumberg, Cohabitation Without Marriage: A Different Perspective, 28 UCLA L. Rev. 1125, 1157-59 (1981) (discussing taxation of unmarried cohabitants); Grace Blumberg, Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers, 21 Buff. L. Rev. 49 (1972) (comparing United States tax policy on working wives and mothers with those of other nations); Pamela B. Gann, Abandoning Marital Status as a Factor in Allocating Income Tax Burdens, 59 Tex. L. Rev. 1 (1980) (arguing for marriage-neutral tax system); James A. Nitsche, Income Taxation of the Family After the Tax Reform Act of 1986, 26 J. Fam. L. 715 (1987-88) (criticizing provisions of 1986 Act relating to family income tax planning); Schenck, supra note 207, at 143-49 (outlining child care deductions); id. at 159-66 (discussing deductibility of child support and alimony payments); Laura A. Davis, Note, A Feminist Justification for the Adoption of an Individual Filing System, 62 S. Cal. L. Rev. 197 (1988) (examining problems raised by Tax Code's aggregation of working wife's income with that of her husband); Edward J. McCaffery, Taxation and the Family: A Fresh Look (Feb. 1, 1992) (examining incentives of Tax Code that affect working parents) (on file with author).

209 Mary E. Becker, Obscuring the Struggle: Sex Discrimination, Social Security, and Stone, Seidman, Sunstein & Tushnet's *Constitutional Law*, 89 Colum. L. Rev. 264, 288 & n.125 (1989) (citing Hisquierdo v. Hisquierdo, 439 U.S. 572, 581-91 (1979)). In *Hisquierdo*, the Court described the states' "guiding hand" in the " 'whole subject of the domestic relations of husband and wife, parent and child. . . .' " See *Hisquierdo*, 439 U.S. at 581 (quoting In re Burrus, 136 U.S. 586, 593-94 (1890)), but relying on prior case law that had invalidated state property divisions of Railroad Retirement Act funds to "forestall . . . injury to federal rights") Id. at 582. Concluding that Congress, and not the state courts, was to decide whether the divorced worker benefitted "alone" or whether the benefits accrued to the former spouse as well, the Court overruled the state division of property. See id. at 589-91.

210 See Becker, supra note 209, at 288 n.125 (citing, inter alia, Wisner v. Wisner, 631 P.2d 115, 120-21 (Ariz. 1981)).

211 Congress amended the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461 (1988), to "provide for greater equity . . . for workers and their spouses and dependents." The Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426, 1426, is codified in scattered sections of 26 U.S.C. and 29 U.S.C. While the 1984 amendments also provided that "qualified domestic relations orders" (QDRA) are exempt from general ERISA preemption rules, some federal preemption remains. See, e.g., Ablamis v. Roper, 937 F.2d 1450, 1452 (9th Cir. 1991) (holding that ERISA preempts "any state community property law which arguably provides a predeceasing nonemployee spouse with a testamentary interest in a fully vested surviving employee spouse's pension benefits"); John H. Langbein & Bruce A.

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assets of those in the military.[212] In addition, federal law structures some of the family relationships within Indian tribes in the United States.[213]

Federal benefits law provides an additional example of federal statutes that not only structure family life but also have distinct effects on women.[214] Given that women live longer than men and a greater percentage of the poor are women,[215] they comprise a majority of the pool of social security claimants,[216] are possible recipients of targeted aid programs to families, and are among those with disabilities.[217] According to Mary Becker, in "every category, whether collecting as independent covered workers or as dependents of male workers, women received, on average, less than male workers."[218] Becker concludes that the system

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Wolk, Pension and Employee Benefit Law 33-443 (1990) (reviewing federal pension laws).

212 In McCarty v. McCarty, 453 U.S. 210 (1981), the Supreme Court held that military retirement pay, governed by federal law, could not be treated by states as community property. See id. at 232-36. While once again stating that the " 'whole subject of the domestic relations of husband and wife' " belongs to the states, see id. at 220 (citation omitted), the Court held that federal law created a "personal entitlement" and that state community property laws were preempted. See id. at 224-32. Justice Rehnquist's dissent, joined by Justices Brennan and Stewart, argued for finding federal preemption in cases involving issues of marriage law only when expressly provided by Congress. See id. at 246 (Rehnquist, J., dissenting). Congress responded by enacting the Uniform Services Former Spouses' Protection Act to permit such designation by states. Pub. L. No. 97-252, §§ 1001-1006, 96 Stat. 718, 730-38 (1982) (codified as amended in scattered sections of 10 U.S.C. (1988)).

213 For example, in 1897, Congress legislated that the children of women who are members of federally defined Indian tribes and who marry "white" men are given the same rights and privileges as that of other members of the mother's tribe. See Act of June 7, 1897, ch. 3, § 1, 30 Stat. 90 (codified at 25 U.S.C. § 184 (1988)). More recently, the Indian Child Welfare Act of 1978 (ICWA), Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1903, 1911-1923, 1931-1934, 1951-1952 (1988)), has "federalized to a large extent the law of adoption, guardianship, and foster care of Indian children." Letter from Professor Barbara Atwood to author (June 14, 1991) (on file with author); see, e.g., Choctaw Indians v. Holyfield, 490 U.S. 30, 36 (1989) (holding that "domicile" of child under ICWA is question of federal law). See generally Barbara A. Atwood, Fighting Over Indian Children: The Uses and Abuses of Jurisdictional Ambiguity, 36 UCLA L. Rev. 1051 (1989) (exploring jurisdictional complexities of custody disputes involving Indian children).

214 See William H. Rodgers, Jr. & Linda A. Rodgers, The Disparity Between Due Process and Full Faith and Credit: The Problem of the Somewhere Wife, 67 Colum. L. Rev. 1363, 1385 (1967) ("The Social Security Act, indeed, sets up the federal courts as 'domestic relations tribunals.' ") (quoting Estate of Borax v. Commissioner, 349 F.2d 666, 676 (2d Cir. 1965) (Friendly, J., dissenting), cert. denied, 383 U.S. 935 (1966)).

215 According to Mary Becker, in 1986, elderly women had a poverty rate of 15.2%, as contrasted with an overall poverty rate of 12.4% for those 65 and over. Becker, supra note 209, at 277. Because "women live longer than men, 60% of elderly social security beneficiaries are women . . . [but] elderly women . . . receive less . . . than elderly men." Becker, supra note 209, at 277-78.

216 "Women receive about 52% of social security benefits paid to the elderly." Id. at 277.

217 See Deborah Maranville, Welfare and Federalism, 36 Loy. L. Rev. 1, 10-27 (1990) (summarizing historical development of AFDC program).

218 Becker, supra note 209, at 278. On the other hand, "[w]omen make only about 28% of contributions to the social security system, yet they collect about 54% of benefits." Id. at 278. Becker argues that this figure should not be the basis for a conclusion that women are greater

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exerts pressure on homemakers to remain dependent on their husbands until old age and also discredits the work of maintaining a home.[219] Nancy Morawetz observes that women are "disadvantaged (1) because they are less likely to meet the wage work criteria, (2) because they have lower earnings even when they have engaged in sufficient wage work, and (3) because the conditions for receipt of benefits as the dependent of a wage earner are very strict."[220]

The different effects of social welfare laws on women are not limited to those who turn to social security in old age. Mary Becker also describes unemployment benefits as more generous safety nets than AFDC benefits—reflecting a lower evaluation of "women's work" in the home.[221] Further, work requirements in welfare statutes apply only to one-parent families; two-parent families with one at work are not subject to those requirements.[222] As a consequence, the law creates an incentive for two adults to divide work so that one works outside the home and the other (typically the female) works in the home. Moreover, federal law also may focus on the needs of disabled men more than on those of

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beneficiaries. "[O]n an individual basis, men receive more than women, despite the greater need women have due to their greater longevity." Id. at 279. Several aspects of the Social Security system's structure disadvantage women. For example, married homemaker claims for social security, which are based on living with a wage earner, may not be used in combination with the homemaker's own wage-labor credits. See id. at 279.

Women who have done some wage work and also work at home must choose between claiming as a wage earner or claiming as a dependent—thus losing either the benefits that accrued directly through their wage work contributions or the benefits that accrued because of their work in the home. See id. at 280-81. Further, a wage earner at 65 can have one "full draw" (or the 100% Primary Insurance Amount), while a spouse at age 65 gets 50% of the full draw during the lifetime of the wage earner and a 100% after the wage earner dies. See id. at 281. If a homemaker/dependent remarries before the age of 50, the claim is lost absent another divorce and renewed dependency upon the first wage earner. See id. at 281-83. Homemakers' claims vest only if the marriage lasts 10 years; the homemaker must also wait until both she *and* the wage earner reach retirement age before obtaining the benefit. See id. at 281-83.

219 See id. at 280-83. See Alice Kessler-Harris, Women Have Always Worked: A Historical Overview (1981). Yet another issue in obtaining benefits is how one's testimony is credited. Many women have some history of interrupted work in the wage market and many women's work history includes uninterrupted household work, neither of which may be given the weight of a man's wage market work. For discussion of how gender and racial stereotypes affect women who give testimony, see Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G, 38 Buff. L. Rev. 1, 6-19 (1990).

220 Letter from Professor Nancy Morawetz to author (Apr. 29, 1991) (on file with author). "For example, a woman who has spent much of her life working in the home, and then works outside the home for ten years before becoming disabled might not be given the same presumption of being a hard worker as someone who has done wage work for the entire time period." Letter from Professor Nancy Morawetz to author (Oct. 14, 1992) (on file with author).

221 Letter from Mary Becker to author (Apr. 30, 1991) (on file with author).

222 See, e.g., 45 C.F.R. § 250.33 (1991) (state AFDC implementation plans must require at least one parent in AFDC family, where principle earner is unemployed, to participate in work program).

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women.[223] As Sylvia Law put it, "present federal labor and welfare policy 'resolve' the conflict between the traditional assumption that women cannot and should not work outside the home and the reality that they do, in ways that are systematically injurious to women and families."[224] Growing awareness of the distinct problems facing women in the Social Security System has led to the recent creation of an Internal Social Security Administration Task Force on Women,[225] but not to the inclusion of women on a recently chartered task force to review the administrative judiciary.[226]

Several scholars, lawyers, and judges have begun to explore the relationship between federal bankruptcy law and women.[227] One of the most

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223 Applicants for disability benefits obtain them more readily when their "disability" is listed in applicable federal regulations. See 20 C.F.R. §§ 416.931-416.934 (1990) (listing impairments that may create presumption of disability). These regulations, in turn, are based on diseases, listed by the Federal Center for Disease Control. Included are illnesses caused by AIDS and by HIV-infection. Id. § 416.934(k). The definitions were developed on the assumption that those primarily afflicted were gay men. For ten years, gynecological disorders often associated with AIDS and HIV-infection were not listed impairments. In December of 1991, after lawsuits were filed in Philadelphia and New York, the Health and Human Services Agency revised the list to take women into account. See Mireya Navarro, Dated AIDS Definition Keeps Benefits from Many Patients, N.Y. Times, July 8, 1991, at A1.

224 Sylvia A. Law, Women, Work, Welfare, and the Preservation of the Patriarchy, 131 U. Pa. L. Rev. 1249, 1249 (1983); see also Michael J. Boskin & Douglas J. Puffert, Social Security and the American Family, in 1 Tax Policy and the Economy 139, 140 (Lawrence H. Summers ed., 1987) (discussing how, as of 1983 Social Security amendments, Social Security offered "very different ex ante 'deals' and marginal returns for incremental taxes paid to persons of different income, family status, age, sex, and income").

225 See Joan Schaffner Memorandum (June 19, 1991) (on file with author).

226 In 1991, the Office of Personnel Management (OPM) requested that the Administrative Conference of the United States provide a report reviewing the administrative judiciary. The Administrative Conference selected a five person panel to prepare a report, The Federal Administrative Judiciary: Problems and Prospects (scheduled for release in May 1992). The chair, the three law professor members, and the one staff member are all men. See Conference Materials, Issues in Administrative Adjudication, UCLA Law School (Nov. 1, 1991) (on file with author).

227 According to Bankruptcy Judge Lisa Hill Fenning's April 30th memo, "scratch the surface" of bankruptcy law and a "variety of potential issues" relating to bankruptcy and gender appear. Fenning Memorandum of Apr. 30, 1991 (on file with author); see also Teresa A. Sullivan, Elizabeth Warren & Jay Lawrence Westbrook, As We Forgive Our Debtors: Bankruptcy and Consumer Credit in America 147-65 (1989) (discussing women in bankruptcy); Karen Gross, Re-Vision of the Bankruptcy System: New Images of Individual Debtors, 88 Mich. L. Rev. 1506 (1990) (evaluating impact of bankruptcy laws on women); Zipporah B. Wiseman, Women in Bankruptcy and Beyond, 65 Ind. L.J. 107 (1989) (examining economic marginalization of women debtors as delineated in As We Forgive Our Debtors, supra); Jana B. Singer, Divorce, Obligations and Bankruptcy Discharge: Rethinking the Support/Property Distinction (analysis of Bankruptcy Code distinction between dischargeable spousal awards and nondischargeable property divisions) (on file with author). Professor Gross's essay considers whether bankruptcy law not only "mirrors" the conditions of women outside of bankruptcy but also "contributes" to that condition. See Gross, supra, at 1533 ("If the bankruptcy laws are premised on a male model, then the Bankruptcy Code may reinforce the condition in which women debtors find themselves."). Further, she notes the limited definitions of "fam-

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ambitious and complex recent bankruptcies involved A.H. Robins Co., the manufacturer of the Dalkon Shield, an interuterine device that injured hundreds of thousands of women.[228] Robins sought federal protection by claiming that tort damage suits would overwhelm its assets.[229] Almost 200,000 women who used that interuterine device are now claimants, seeking some of the 2.3 billion dollars set aside in a trust fund.[230] In addition to that vivid case, women may be creditors or debtors in bankruptcy filings in which injuries to women's bodies are less directly at issue. According to survey research on consumer bankruptcies, 74% of the cases sampled involved a woman debtor,[231] either filing jointly with a husband or filing singly.[232]

Bankruptcy intersects with family law in a variety of ways. For example, if one spouse files for bankruptcy without the other, the assets (including community assets) come under the exclusive control of either the debtor in possession or the bankruptcy trustee.[233] In contrast, under some state laws, community assets are either under the joint control of both spouses or both partners have equal access to them. Thus, filing bankruptcy can be a technique for ousting a spouse from control. Further, whichever spouse files first may claim the one and only homestead exemption.[234] Yet another issue, obliquely addressed recently by the Supreme Court, is whether a debtor spouse can avoid a judicial lien when that lien is intended to finance the division of property under a divorce decree.[235] Federal law forbids spousal and child support from being dis-

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ily" under federal bankruptcy law: one either has a spouse or is the head of a household, but a variety of other householding arrangements do not fall within these confines. See id. at 1512-23, 1554-56.

228 See In re A.H. Robins Co., 88 Bankr. 742, 747 (E.D. Va. 1988), aff'd, 880 F.2d 694 (4th Cir.), cert. denied, 493 U.S. 959 (1989).

229 See id.

230 See Richard B. Sobol, Bending the Law: The Story of the Dalkon Shield Bankruptcy ix (1991). For further description of the Dalkon litigation, see In re A.H. Robins, Inc., 880 F.2d 694, 697-700 (4th Cir. 1989); In re A. H. Robins, 862 F.2d 1092, 1093-94 (4th Cir. 1988), cert. denied sub nom. Menard-Sanford v. A.H. Robins, 110 S. Ct. 331, 376 (1989).

231 See T. Sullivan, E. Warren, & J. Westbrook, supra note 227, at 149-51. The sample included a total of 2359 petitioners (some whom filed jointly, some singly). Of the 2359, 53% were men and 47% were women. Id.

232 Id. Single-filing women debtors are "predominately unmarried," with incomes lower than those of single filing males ($10,600 as compared to $18,000). See Gross, supra note 227, at 1526-28. "Single-filing women had a higher ratio of medical debts to income than any other category of debtor." Id. at 1528.

233 See Bankruptcy Reform Act of 1978, 11 U.S.C. §§ 541(a)(2), 542(a)-(b) (1988).

234 See id. § 522(b). "[A] particularly ruthless spouse (usually the husband) who buys a fancy new condominium with separate assets before the divorce is final, can claim the full $75,000 homestead in his bankruptcy filing, leaving the family home available for forced sale to satisfy debts . . . ." Fenning Memorandum, supra note 227, at 1.

235 See Farrey v. Sanderfoot, 111 S. Ct. 1825, 1827-31 (1991). A former husband, Gerald Sanderfoot, was awarded the house in a divorce decree; the former wife, Jeanne Farrey, was

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charged in bankruptcy. Federal statutes do not dictate, however, the order in which spouses and children, in contrast to other creditors, are to be paid during bankruptcy.[236]

Federal law also affects family life by way of immigration laws, which define family units.[237] Categories of "children" recognized for immigration include stepchildren, legitimated children, and adopted children, but only if they have achieved such status by a certain age.[238] Being a member of a family unit has relevance for reunification, amnesty, refugee status, asylum, visas, and suspension of deportation.[239] For example, aliens who wish to obtain visas because they have married citizens or residents of the United States are given two years as conditional residents.[240] Before the two years end, the spouses must file a joint petition to end the conditional status and make it permanent. The Immigration Service may waive the required "jointness" of that petition if alien spouses or children are battered.[241] Federal law thus determines when one spouse has imposed "extreme mental cruelty" on another, has "battered," or has "psychological[ly] or sexual[ly] abuse[d]" another, so as to

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supposed to receive proceeds from the sale of marital property ($29,208.44) and was supposed to be paid from her former husband in two installments. Id. at 1827. The divorce decree awarded her a lien on the property as security. Id. Gerald Sanderfood neither paid nor complied with the court order, but instead filed for bankruptcy and listed the house as his homestead exemption. Id. at 1827-28. He sought to have her lien voided as impairing his homestead exemption under the bankruptcy law. Id. The Court held that section 522(f) of the Bankruptcy Code could not be used to void the lien because the debtor was deemed to have obtained the property interest before the lien attached. See id. at 1831. This holding did not address the question of how bankruptcy law should apply when property divisions are mandated by divorce decrees; as Justice Kennedy's dissent, joined by Justice Souter noted, "the Bankruptcy Code may be used in some . . . case[s] to allow a spouse to avoid otherwise valid obligations under a divorce court decree." Id. at 1832 (Kennedy, J., dissenting).

236 The issue is one of "unfair discrimination" against creditors in chapter 13 cases. See 11 U.S.C. § 1325(a)(3) (1988). Good faith involves, inter alia, equitable distribution to creditors. See, e.g., In re Pacana, 125 Bankr. 19, 25 (Bankr. 9th Cir. 1991) ("Obligations relating to support and alimony, intractable though they may be, are insulated from mandatory-inclusion in a Chapter 13 plan . . . ."); In re Warner, 115 Bankr. 233, 244-45 (Bankr. C.D. Cal. 1989) (denying confirmation of debtor's plan in which he proposed to pay child support arrearages before other unsecured creditors); Michaela M. White, Spousal and Child Support Payment Provisions in Chapter 13 Plans, 16 Cap. U.L. Rev. 369, 388-97 (1987) (arguing that federal courts have common-law authority to include provisions for past due spousal and child support payments in Chapter 13).

237 Special thanks to Myrna Raeder, Abby Liebman, and Evangiline Abrile for their insight into this area.

238 8 U.S.C. § 1101(b)(1)(A)-(C), (E) (1988).

239 See, e.g., The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (to be codified as amended in scattered sections of 8 U.S.C.); 8 U.S.C. § 1157(c)(2) (1988) (granting refugee status to spouse or child of refugee); id. § 1158(c) (granting asylum status to spouse or child of alien); id. § 1153(a) (detailing categories of preference for receiving visas).

240 See 8 U.S.C. § 1186(a).

241 See 8 U.S.C. § 1186(c)-(d); 56 Fed. Reg. 22,637 (1991) (to be codified at 8 C.F.R. § 216.5).

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decide whether to release the alien spouse from needing the other spouse's signature.[242]

While state law retains enormous power over the status of individuals as married, divorced, parent, and child, federal law sometimes allocates authority among states[243] and interacts with that authority in a variety of ways. The results can be described fairly as a regime of joint governance, with varying degrees of jointness depending on the issue.[244] Legislation over the course of this century, and particularly since the New Deal, has brought federal courts into an array of family life issues. Yet despite this federal involvement, federal courts have been reluctant to acknowledge their place in shaping family life.[245] The above review of federal regulations that affect and sometimes define families is a necessary antidote to ideology and to case law, summarized below,[246] that claim that the federal courts have no role in shaping the world of families.

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242 Id. Interim Rule, Conditional Basis of Lawful Permanent Residence for Certain Alien Spouses and Sons and Daugthers, 56 Fed. Reg. 22,635 (1991) (to be codified at 8 C.F.R. § 216.5) ("Waiver of requirement to file petition to remove conditions"); Martha F. Davis & Janet M. Calvo, INS Interim Rule Diminishes Protection for Abused Spouses and Children, 68 Interpreter Releases 665, 668-70 (1991) (arguing that INS interim rule imposes too high burden of proof).

243 This allocation occurs: through rulings on what "full faith and credit" is to be awarded to decisions in state courts, see, e.g., May v. Anderson, 345 U.S. 528, 534 (1953); Sherrer v. Sherrer, 334 U.S. 343, 355-56 (1948); and under federal legislation, see, e.g., the Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1988); the Indian Child Welfare Act, 25 U.S.C. § 1901-1963 (1988) (establishing federal standards for removal of Indian children from their families, for placement of such children in foster or adoptive homes, and for provision of assistance to Indian tribes in operation of child and family service programs). Interstate compacts also allocate authority among states. See, e.g., Unif. Child Custody Jurisdiction Act, 9 U.L.A. 116 (1988) (adopted in all states and District of Columbia).

Some have urged a greater role for the federal government in enforcing interstate child support orders. See A Bill to Impose Criminal Penalty for Flight to Avoid Payment of Arrearages in Child Support, S. 1002, 102d Cong., 1st Sess. (1991) (introduced by Senator Shelby); A Bill to Impose Criminal Penalty for Flight to Avoid Payment of Arrearages in Child Support, H.R. 1241, 102d Cong., 1st Sess. (1991) (introduced by Representative Hyde); William L. Reynolds, Conflicts and Child Support: A Working Paper for the Commission on Interstate Child Support 12-13 (1990) (on file with author) (proposing to "make the federal government responsible for the interstate enforcement of child-support orders" and predicting that relatively few cases would be added to federal court docket).

244 For example, while state law sets terms of divorce, federal law prohibits states from conditioning divorce on the capacity to pay filing fees. See Boddie v. Connecticut, 401 U.S. 371, 382-83 (1971).

245 For a review of the breadth of the claim that federal courts decline "domestic relations" jurisdiction and a refutation of it, see Spindel v. Spindel, 283 F. Supp. 797, 800-12 (E.D.N.Y. 1968) (Weinstein, J.); see text accompanying notes 302-350 infra. For discussion of the rhetoric of "nonintervention" by states in the idealized "private family" and the fact of state intervention, see Frances E. Olsen, The Myth of State Intervention in the Family, 18 U. Mich. J.L. Ref. 835 (1985).

246 See text accompanying notes 316-17, 327-35 infra.

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III

PRESENT YET ABSENT

Given the many places—both outside and in families—in which women form the subject of discussion of federal law, return again to the puzzling statement that "the quality of the federal bench and the nature of federal law" render gender bias problems minimal.[247] Consider also the lobbying against the jurisdictional provisions of the Violence Against Women Act. Proponents of the Act seek the creation of a federal civil rights remedy; opponents claim that federal jurisdiction would enmesh federal judges in a domestic world foreign to them.[248] With all of this documentation of the presence of women and of the plentiful involvement by the federal courts with family life, how can the argument in opposition to the Violence Against Women Act be framed in terms of the absence of family life issues from the federal courts? Why is the refusal to propose gender bias studies linked to the "nature of the federal law" and the "quality of the federal bench"?

In general, women suffer discrimination and the issues that concern us are ignored or trivialized.[249] In addition to these general attitudes, the answers lie in the ideology of federal courts jurisprudence, to which I now turn. Before beginning that discussion, I must pause to consider the methodological problems of embarking on such an inquiry. The difficulties are, obviously, about sources and assessment of "ideology." Trying to trace women's presence and absence in the materials about the federal courts is a daunting task, at the end of which one cannot claim to have found definite "proof." The "federal courts" have been a discrete topic for legal inquiry—at least insofar as contemporary law libraries reveal—from shortly before the Civil War, when practitioners and scholars began to write books, treatises, and eventually teaching materials on the subject. Looking for women in this body of literature demands that one explore what is said, what is not said, and the contemporary cultural meanings of both speech and silence.[250]

Below, I use three approaches (in no way claimed to be comprehensive) as a window into what those who delineated the canon of federal courts jurisprudence took to be the place of women. First, I examine the

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247 FCSC Report, supra note 16, at 169.

248 See text accompanying notes 18-26 supra.

249 See generally Deborah L. Rhode, The "No-Problem" Problem: Feminist Challenges and Cultural Change, 100 Yale L.J. 1731, 1734-35 (1991) ("sex-based disparities have often appeared natural, functional, and in large measure, unalterable" and thus lead to "[d]enials of a 'woman problem' ").

250 Silence "is a presence/it has a history a form Do not confuse it with any kind of absence." Adrienne Rich, Cartographies of Silence, in The Dream of a Common Language, Poems, 1974-77, at 17 (1978).

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official reports provided by the Director of the Administrative Office of the United States Courts—looking at if, how, and when women appear. Second, I review early treatises and casebooks as well as contemporary casebooks about the federal courts to see when women are a topic of discussion. Third, I consider the rules by which federal courts have declined to exercise jurisdiction over "domestic relations." These last two approaches are interrelated as the domestic relations exception is sometimes the place in which women (in their capacity as wives or aspiring ex-wives) are mentioned in books about the federal courts.

A. The Chronicles of the Courts

Listening to self-description is an important method of feminist inquiry. Law professors and political scientists write *about* the federal courts. Judges write *for* the federal courts. But the federal courts also describe themselves through reports authored either by employees of the federal courts or by those affiliated with the federal courts. Since 1940,[251] the Director of the Administrative Office of the United States Courts has filed an "Annual Report" which describes the "business" of the courts.[252] More recently, as a result of the Civil Justice Reform Act

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[251] Prior to 1940, the Attorney General provided such reports. Because these reports were from the Department of Justice rather than the judiciary, those materials are not a part of the description provided here.

[252] See 28 U.S.C. § 604(a)(3) (1988) (creating duty of director to submit report prior to annual meeting). Reports are not available in law libraries for 1943 and 1944; apparently, publication was suspended during the Second World War. Conversation with the staff of the Administrative Office of the United States Courts (Feb. 27, 1992).

In addition to the Annual Reports, Chief Justice Warren Burger began a practice of giving annual "State of the Judiciary" addresses. A review of the speeches from 1970 to 1985 finds women or family law mentioned in six of the 15 speeches. One speech, that given in 1983, noted that women's litigation was a part of the challenge posed by new and complex cases on the federal docket. See Warren E. Burger, Annual Report on the State of the Judiciary, 69 A.B.A. J. 442, 443 (1983) ("difficult and complex cases arising out of long overdue recognition of the rights of women and of minorities"). His 1982 speech argued that alternative methods of dispute resolution were needed; "[d]ivorce, child custody, adoptions, personal injury, landlord-and-tenant cases, and probate of estates are prime candidates for some form of administrative or arbitration processes." Warren E. Burger, Isn't There a Better Way?, 68 A.B.A. J. 274, 276 (1982). In two other speeches, women were linked to their role as crime victims. See Warren E. Burger, Annual Report to the American Bar Association by the Chief Justice of the United States, 67 A.B.A. J. 290, 290 (1981) (discussing survey results that "46 percent of women and 48 percent of blacks are 'significiantly frightened' by pervasive crime"); Warren E. Burger, Annual Report on the State of the Judiciary—1980, 66 A.B.A. J. 295, 299 (1980) (discussing commission of murder of woman allegedly by two men on bail). In another speech, women were the addressees; "[r]easonable men and women can disagree" about proposed changes in the intermediate appellate structure. See Warren E. Burger, Report on the Federal Judicial Branch—1973, 59 A.B.A. J. 1125, 1129 (1973). That same issue—the intermediate appellate court—brought another reference to women, this time as a wife aspiring for prestige for her husband. Attempting to assuage concerns about the impact of a new intermediate appellate court, the Chief Justice described a conversation in which a judge complains

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of 1990,[253] individual district courts have begun to issue their own reports about the state of their dockets and their plans for civil justice reform. These documents are impressive in their silences. Women are sometimes utterly absent and only on rare occasion implicitly or explicitly present. Ironically, from the vantage point of a reader of Annual Reports, women as members of judges' families are the most visible set of women in the federal courts.

The Administrative Office's Annual Reports are comprised of both descriptive information and detailed statistical tables. From 1940 until 1990, women were not frequently a topic directly addressed.[254] One can imply women's presence from some of the categories of litigation listed. For example, from 1942 until 1960, "divorce and maintenance" was a reported classification of cases under the "local jurisdiction" of the district courts.[255] Beginning in 1961 and continuing to the present, "domestic relations" has become the categorization and accounted for a tiny percentage of the federal civil docket.[256]

Turning to criminal litigation, women appeared sporadically as probationers. During the first year of reporting, probation tables classified

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that his wife, active in volunteer work, wanted to describe him as on the "second highest court" in the nation. See Warren E. Burger, The Time Is Now for the Intercircuit Panel, 71 A.B.A. J. 86, 91 (1985). None of the speeches addresses issues of gender bias, equal employment efforts by the federal judiciary, or the small number of women judges on the federal bench.

Chief Justice Rehnquist also provided "year-end" reports from 1986 to 1991. These reports mention women in only a few instances, the most important being in 1991, when the Chief Justice questioned congressional proposals to confer federal jurisdiction in the Violence Against Women Act. See notes 18-26 and accompanying text supra. Women are not mentioned in the 1987, 1988, and 1989 Reports. In 1990, the Chief Justice singled out Judge Cynthia Holcomb Hall of the Ninth Circuit as the chair of a special committee that organized the "Fifth International Appellate Judges Conference." See 1990 Year-End Report at 8. In 1991, the Chief Justice also referred twice to the "men and women" who comprise the judicial branch. See 1991 Year-End Report, supra note 25, at introduction; see also 1986 Year-End Report at 12 (stating "men and women available to fill vacancies").

253 Pub. L. No. 101-650, 104 Stat. 5089 (codified at 28 U.S.C. §§ 471-482 (1990)). Plans are required by 28 U.S.C. § 472 (1990).

254 See Memorandum of Sheri Porath (as amended Feb. 11, 1992) (on file with author). I have been told that the Office does not keep data on civil litigants by gender and race. Conversation with staff of the Statistic Analysis Divison of the Administrative Office of the United States Courts (Jan. 21, 1992).

255 See, e.g., 1960 Annual Report at 233; 1955 Annual Report at 161; 1950 Annual Report at 143; 1945 Annual Report at 83; 1942 Annual Report at appendix, table 3; all Annual Reports, supra note 75.

256 See, e.g., 1990 Annual Report at 140; 1986 Annual Report at 177; 1981 Annual Report at 368; 1976 Annual Report at 295; 1971 Annual Report at 265; 1966 Annual Report at 173; 1961 Annual Report at 239. All Annual Reports, supra note 75. In 1970, federal courts stopped being the "local" courts for the District of Columbia. See District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 475 (codified at D.C. Code Ann. §§ 11-101-2501 (1989).

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probationers by sex;[257] during the second year of reporting, classifications also included "race and nativity."[258] The sex and race delineations were resumed from 1955 to 1962, and then disappeared.[259] Women do appear, implicitly, as victims of crime; rape is one of the offenses found in most of the lists of crimes, although it has been categorized differently over the years.[260] From a research point of view, the absence of specific information on women is regrettable. For example, while women make their way into the pictorial graphics (black and white silhouettes of those selected and challenged for jury service), neither text nor table provides a breakdown by race and gender of those who served.[261]

No mention is made of women as article III judges. While data are provided on vacancies, appointments, and authorized positions, the demographics of the judiciary are not. Women *are* implicitly present as wives, widows, and daughters of federal judges. Beginning in 1955, each Annual Report contains a discussion, sometimes relatively lengthy, of the Judicial Survivors' Annuity Fund.[262] In light of the workplace demographics, women are heavily represented in this group. Our presence is recorded by the only use of the pronoun "she" found in the text of the Annual Reports.[263]

Women as workers in non-article III positions do come into focus, temporarily, in the 1980s. In 1980, the Judicial Conference established

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257 See 1940 Annual Report, supra note 75, at 130.

258 See 1941 Annual Report, supra note 75, at 157.

259 See 1961 Annual Report at 250; 1960 Annual Report at 322; 1959 Annual Report at 298; 1958 Annual Report at 218; 1957 Annual Report at 230; 1956 Annual Report at 266; 1955 Annual Report at 218; all Annual Reports, supra note 75. In addition, the text of the 1956 Annual Report discussed women as 11% of the probationer population. See 1956 Annual Report, supra note 75, at 151.

260 From 1940 through 1960, "rape" was listed as a separate category. See 1960 Annual Report at 279; 1940 Annual Report at 130. In 1961, rape appeared under the general heading of "sex offenses," grouping it with "white slave traffic" and "other sex offenses." See 1961 Annual Report at 273. This categorization continues through 1978 when "white slave traffic" was dropped. See 1978 Annual Report at 370. In 1988, "rape" was deleted and replaced with the current category, "sexual abuse." See 1988 Annual Report at 256. In the text of the Reports from 1960 to 1991, no mention of "rape" was made; when changes in the number of such cases occurred, the discussion was about changes in cases involving "sexual offenses." See, e.g., 1989 Annual Report at 257-61 ("sex offenses" delineated into two subcategories, "sexual abuse" and "others"); 1988 Annual Report at 14; 1984 Annual Report at 170; 1977 Annual Report at 251; all Annual Reports, supra note 75.

261 See, e.g., 1990 Annual Report, supra note 75, at 18; 1985 Annual Report, supra note 75, at 13; 1982 Annual Report, supra note 75, at 8; 1979 Annual Report, supra note 75, at 132.

262 The 1955 Annual Report had a brief description of the introduction of legislation to provide benefits to judges' survivors. See 1955 Annual Report at 23. In 1956, the Annual Report detailed the program, and thereafter, each report contains textual discussion of the fund. See, e.g., 1990 Annual Report at 43; 1986 Annual Report at 74; 1981 Annual Report at 153; 1976 Annual Report at 112; 1971 Annual Report at 209; 1966 Annual Report at 114; 1961 Annual Report at 193; 1956 Annual Report at 75; all Annual Reports, supra note 75.

263 See 1956 Annual Report, supra note 75, at 76.

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the Equal Employment Opportunity Program (EEOP), aimed at developing programs for more inclusive hiring (save judicial appointments).[264] From 1981 to 1983, each Annual Report included a description of the mandate of EEOP and referred the reader to a separately published report.[265] From 1984 to 1986, such data moved into the report itself, and lists of the numbers of women and minorities (but not of the intersecting categories of women who are also members of other minorities) appeared.[266] In 1987, these data collections disappear; and in 1988, the explanation provided is that the Judicial Conference changed the requirements so that the EEOP information no longer had to appear in the Annual Reports.[267]

Another possible source of discussions about women is the newly issued Civil Justice Delay Reduction Plans, written by district court committees and promulgated by district courts by virtue of the Civil Justice Reform Act. In the thirty-three lengthy documents (available as of this writing) from districts in twenty-four states and the Virgin Islands, no mention is made of any distinct issues or problems that women, as litigants, lawyers, employees, judges, or jurors, have in the federal courts.[268]

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[264] Report of the Proceedings of the Judicial Conference of the United States 5 (Mar. 5-6, 1980).

[265] See 1983 Annual Report, supra note 75, at 86; 1982 Annual Report, supra note 75, at 63; 1981 Annual Report, supra note 75, at 180.

[266] See 1986 Annual Report, supra note 75, at 97; 1985 Annual Report, supra note 75, at 103 (women not included); 1984 Annual Report, supra note 75, at 98.

[267] See 1988 Annual Report, supra note 75, at 86. The Director of the Administrative Office was still required to report such findings to the Judicial Conference yearly and to publish, under separate cover, information on the EEOP. See note 82 supra. Since 1988, the Annual Reports make no mention of the EEOP. According to the staff at the Administrative Office (AO), Special Projects Division, as of March 24, 1992, the AO has never published a final report on EEOP data.

[268] Out of the 33 plans and reports reviewed, women appeared only by way of an occasional pronoun. A few use the alternative "his/her" or "s/he" terminology when discussing the judiciary. See Cost and Delay Reduction Plans for: Southern District of Texas 3 (Oct. 24, 1991); Southern District of Illinois 3 (Dec. 27, 1991) (however, uses "he" and "his" in discussion of expert witness); Southern District of Indiana 10 (Dec. 31, 1991); Southern District of California 2 (Oct. 7, 1991); District of Kansas 2 (Dec. 16, 1991); Southern District of New York 52 (Dec. 12, 1991); Northern District of West Virginia 21 (Dec. 18, 1991). See also the Report of the Advisory Group for the Western District of Michigan 122, 213 (Dec. 18, 1991).

Most reports and plans do not use pronouns at all. See Reports of the Advisory Group and Cost and Delay Reduction Plans for: the Eastern District of Arkansas (Report: Nov. 20, 1991; Plan: Dec. 30, 1991); Eastern District of California (Report: Nov. 21, 1991; Plan: Dec. 31, 1991); Northern District of California (Report and Plan: Dec. 31, 1991); District of Delaware (Report: Oct. 1, 1991; Plan: Dec. 31, 1991); Southern District of Florida (Report and Plan: Nov. 21, 1991); Northern District of Georgia (Report: Dec. 17, 1991; Plan: Dec. 30, 1991); District of Idaho (Report: Dec. 1, 1991; Plan: Dec. 19, 1991); Northern District of Indiana (Report and Plan: Dec. 31, 1991); District of Massachusetts (Report and Plan: Nov. 18, 1991); District of Montana (Report: Oct. 1991; Plan: Dec. 1991); District of New Jersey (Report and Plan: Dec. 19, 1991); Eastern District of New York (Report: Dec. 9, 1991; Plan:

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B. *The Jurisprudence of the Federal Courts*

Other sources to explore are books written by those who describe the federal courts from the perspectives of scholarship and education. Several of us who teach and write about the federal courts have tried to uncover some of the underlying assumptions of that discipline.[269] Some scholars tell a story of the federal courts as a nationalizing force, with key events being the Civil War and the civil rights activity of the 1960s;[270] others rely on the role of state courts at the founding of the nation and seek to describe those institutions as central.[271] The jurisdictional analyses of Posner, Chemerinsky, and Kramer provide other windows into federal court ideology.[272] The federal courts are claimed to be the means by which to create uniform interpretation of federal law,[273] to minimize "diseconomies" of difference,[274] to lessen the imposition by self-interested states of externalities on other states,[275] and to protect the vulnerable.[276] All theories and descriptions of "the federal courts" take as part of their subject matter the division of responsibilities between state and federal court systems.

What role do women, in and out of families, play in these ideological constructions and jurisdictional descriptions? Contemporary literature, such as the Report of the Federal Courts Study Committee,[277] does not much discuss women as a topic. In contrast, some of the early federal courts literature did mention women, often when reviewing women's dis-

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Dec. 17, 1991); Northern District of New York (preliminary Oct. 20, 1991); Southern District of New York (Report: Dec. 2, 1991; Plan: Dec. 12, 1991); Northern District of Ohio (Report and Plan: Nov. 27, 1991); Western District of Oklahoma (Report: Oct. 31, 1991; Plan: Dec. 31, 1991); District of Oregon (Report and Plan: Dec. 20, 1991); District Court of the Virgin Islands (Report and Plan: Dec. 23, 1991); Southern District of West Virginia (Report: Aug. 29, 1991; Plan: Dec. 30, 1991); Eastern District of Wisconsin (Report: Dec. 23, 1991; Plan: Jan. 2, 1992); Western District of Wisconsin (Report: Nov. 15, 1991; Plan: Dec. 31, 1991); District of Wyoming (Report and Plan: Dec. 31, 1991).

Only one report refers to judges exclusively with male pronouns. See Report of the Advisory Group for the District of Utah 36 (Dec. 1991). The Cost and Delay Reduction Plan for the Eastern District of Pennsylvania 15, 20, 21 (Dec. 31, 1991) alternates between using "his or her," or "he/she" including for arbitrators and mediators except that only "he" or "his" is used when referring to judges. Id. at 31, 37. (All reports on file with author); see also, The Interim Report on Civility of the Seventh Circuit, supra note 145 (making no mention of role in civility of gender or differing experiences of persons of color or white women).

269 See, e.g., Amar, supra note 155; Fallon, supra note 155; Resnik, supra note 155.

270 See Fallon, supra note 155, at 1144-45.

271 See id. at 1143-44.

272 See text accompanying notes 157-69 supra.

273 See Chemerinsky & Kramer, supra note 167, at 83-85.

274 See R. Posner, supra note 157, at 178-79.

275 See id. at 175-77.

276 See id. at 179-81.

277 See note 16 supra.

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abilities as juridical actors.[278] When early casebook writers considered the topic of the relationship between federal and state courts, some of them used "domestic relations" and "probate" as illustrations of jurisdiction reserved to the states.

As women's legal disabilities diminished and we gained recognition as officially eligible to participate in the federal courts,[279] women became less visibly a category to consider in books about the federal courts. Moreover, despite the role of federal courts in enforcing statutory and constitutional equality rights and the growth of federal court authority over family life, contemporary casebook authors have not returned to the topic of the powers of state and federal courts over family life. Gains in official legal recognition as participants have obscured interest in the continuing effects of being a part of the category "women."[280]

1. Women as Citizens and Litigants

Those who took as their task to explain federal court jurisdiction[281] sometimes paid attention to the legal disabilities that constrained women[282] who sought to be juridical actors, as citizens, witnesses, jurors,

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278 See text accompanying notes 282-300 infra.

279 For example, women were once not able to practice law before the United States Supreme Court. See 2 A.H. Garland & Robert Ralston, A Treatise on the Constitution and Jurisdiction of the United States Courts Vol. II 1280 (1898) (stating that "women may be admitted to practice" in the Supreme Court). It is not clear that the standards for admission to the Court were the same for men and women. See Samuel T. Spear, The Law of the Federal Judiciary: A Treatise 344-45 (1883). Spear stated that the general rule for admission to the Supreme Court was that "attorneys . . . have been such for three years past in the Supreme Courts of the States to which they respectively belong, and that their private and professional character shall appear to be fair." Id. at 344 (Rule No. 2 "Attorneys"). A separate rule, entitled "Admission of Women," stated that, by the Act of February 15th, 1879 ("An Act to Relieve Certain Legal Disabilities of Women," 20 Stat. 292), women who have been attorneys in the highest courts of "any State or Territory, or of the Supreme Court of the District of Columbia [for three years], and . . . have maintained a good standing before such court, and who [are] . . . of good moral character shall, on motion and the production of such record be admitted." Id. at 345 (Rule No. 2.3 "Admission of Women"); see Revised Statutes of the United States 1874-1891, 217 chap. 81 (1891). According to Spear, any "gentleman of the bar" could use the Court's library. See S. Spear, supra, at 347.

The Act of February 15th, 1879 was codified at 28 U.S.C. § 353 (1928). By 1925, when Supreme Court rules were revised, Rule 2 ("Attorneys and Counsellors") made no mention of women as having any distinct admission rules. See Revised Rules of the Supreme Court of the United States, 266 U.S. 653, 653 (1925). However, not until the 1948 recodification of Title 28 was § 353 omitted. See Act of June 25, 1948, ch. 4646, 62 Stat. 869.

280 See Minow, supra note 59, at 822-23 (suggesting that legal reforms could disempower women "by removing an external focal point for political action, and making remaining inequalities seem attributable to the fault of individual women").

281 See, e.g., A.J. Peeler, A Treatise on Law and Equity as Distinguished and Enforced in the Courts of the United States iv (1883) (aspirating to treat "with more than ordinary fullness of the relations of the Federal and State courts to each other").

282 Women appear as a category for law itself by the late nineteenth century. For example, the first Index of Legal Periodicals, which was published in 1888, included "women," see

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and lawyers. For example, some early commentators discuss that married women were deemed citizens and residents of the states in which their husbands were domiciled.[283] Others address the limited authority of married women to sue on their own behalf,[284] the roles of guardians ad litem,[285] and the mode of examining married women who attempted to convey property.[286] Yet others discuss the impact of such disabilities.[287] By dipping into "old" books on the federal courts, one can sometimes find "women" as a group among the specially disabled.[288]

Leonard A. Jones, An Index to Legal Periodicals Literature 588 (1888), along with "married women," id. at 578, "wives," id. at 587, "woman convicts," id. at 587, the "woman question," id. at 588, "woman's law," id. at 588, "woman's right," id. at 588, "woman suffrage," id. at 588, "woman suffrage convention," id. at 588, "women jurors," id. at 589, "women lawyers," id. at 589, "women ratepayers," id. at 589, "women's rights," id. at 589, "women voters," id. at 589, "wife-whipping," id. at 578, and "wife-beating." Id. at 578.

283 See, e.g., C.L. Bates, Federal Procedure at Law: A Treatise on the Procedure in Suits at Common Law in the Circuit Courts of the United States 210-11 (1908); John W. Dwyer, The Law and Procedure of the United States Courts 205-06 (1901); Robert M. Hughes, Handbook of Jurisdiction and Procedure in United States Courts 246 (1913); Alfred John Schweppe, Simkins Federal Practice 337-38 (rev. ed. 1934).

The general caveat was that, if "abandoned," a married woman gained her own domicile. See A. Schweppe, supra, § 416, at 338; see also MacKenzie v. Hare, 239 U.S. 299, 307, 311 (1915) (applying language of Act of March 2, 1907, c. 2534, 34 Stat. 1228—that "any American woman who marries a foreigner shall take the nationality of her husband" and "ancient principle of our jurisprudence" that equated women's domicile with her husband's—to require that California woman who married British subject lost both franchise and citizenship); Cheely v. Clayton, 110 U.S. 701, 705 (1884) ("if a wife is living apart from her husband without sufficient cause, his domicil is in law her domicil").

284 See, e.g., 1 Roger Foster, Federal Practice in Civil Cases 91-92 (1892) ("In the courts of the United States, . . . the rule [in equity] was early laid down as follows: 'Where the wife complains of the husband and asks relief against him she must use the name of some other person in prosecuting the suit; but where the acts of the husband are not complained of, he would seem to be the most suitable person to unite with her in the suit. This is a matter of practice within the discretion of the court.' " (quoting Bein v. Heath, 47 U.S. (6 How.) 228, 240 (1848)). According to Schweppe, at "law" federal courts followed state practice, while in equity, federal courts relied on their own rules. A. Schweppe, supra note 283, § 510, at 471.

285 See, e.g., Howard M. Carter, The Jurisdiction of Federal Courts 132-33 (1899) (noting that in these cases citizenship of married woman and of infant, not of next friend, governs).

286 See, e.g., A. Schweppe, supra note 283, § 340, at 247 (federal courts to follow "form and manner of the examination of married women . . . as prescribed by State law").

287 See, e.g., John C. Rose, Jurisdiction and Procedure of the Federal Courts 180 (3d ed. 1926) ("Suits against the United States must be brought within six years after the cause of action arose. [But] [m]arried women and infants . . . idiots, lunatics, insane persons and persons beyond the seas at the time the claim accrued, may bring suit within three years after the disability has ceased.").

288 For example, in Benjamin Vaughan Abbott's A Treatise upon the United States Courts, and Their Practice (1871) (two volumes), women were not in its index but were present in at least three quiet instances. First, in equity, the Supreme Court recognized a "bill of revivor." Such bills provided that, when suits abated because of a party's death "or by any other event," that suit could be "revived" under certain circumstances, if the underlying cause of action survives the death/change in circumstances. The rules on revivorship applied "where the *marriage* of a female complainant intervenes pending her action." 2 B. Abbott, supra, at 69-70 (emphasis in original). Second, federal jurisdiction over some issues that today might be called

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Moving from treatises to the early casebooks, women appear as they struggle for recognition as citizens and thus raise the question of who is a "natural person" for purposes of diversity of citizenship.[289] For example, George W. Rightmire's *Cases and Readings on the Jurisdiction and Procedure of the Federal Courts*, published in 1917, was one of the first casebooks designed specifically to teach students about the federal courts and included the case of *Minor v. Happersett*.[290] The issue in *Minor* was whether a Missouri law, providing only men with the right to vote, violated the then recently adopted fourteenth amendment of the United States Constitution.[291] The Court's opinion, written by Chief Justice Morrison Waite, concluded that there was "no doubt that women may be citizens"[292] and that that possibility predated the fourteenth amendment, for such right adhered in being part of "the people"—either by birth or naturalization.[293] As the case reasoned, because "females are included" as part of "the people," women were also to be included as part of "all children" who can gain citizenship by virtue of being born in a country in which the parents are citizens.[294] Support for its conclusion of women as

"family law" is a topic of discussion. As part of federal jurisdiction over "crimes," Abbott described the crime of "bigamy," a federal crime delineated in the Act of July 1, 1862, to apply to "every person having a husband or wife living, and marrying any other, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy." 1 B. Abbott, supra, at 427. Third, in the description of habeas corpus jurisdiction, Abbott invoked the language of the 1867 statute, which provided that a federal judge could not award a writ of habeas corpus unless, from the petition itself, it appeared that the party was deprived of "his or her liberty in contravention of the Constitution or laws of the United States." Id. at 94.

289 See, e.g., George W. Rightmire, Cases and Readings on the Jurisdiction and Procedure of the Federal Courts 265-77 (1917) (discussing diversity jurisdiction as part of subsection B, "Original Jurisdiction" of federal courts).

290 88 U.S. (21 Wall.) 162 (1874).

291 See G. Rightmire, supra note 289, at 266.

292 *Minor*, 88 U.S. (21 Wall.) at 165. The opinion is not actually addressed to all "women" but only to a subset. According to the syllabus of the case, "Mrs. Virginia Minor, a native born, free, white citizen of the United States, and of the State of Missouri, and over the age of twenty-one years," wished to vote in the federal presidential election. Id. at 163; see also Act of Feb. 10, 1855, 10 Stat. 604 ("any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen").

293 See *Minor*, 88 U.S. (21 Wall.) at 169. For an explanation of the political ideology that enabled United States leaders to oppose women's full citizenship, see Smith, supra note 62. For discussion of the complexity of the question of citizenship, see Peter H. Schuck & Rogers M. Smith, Citizenship Without Consent: Illegal Aliens in the American Polity 9-41 (1985) (contrasting "ascriptive" citizenship arising from circumstances such as birth to "consensual" citizenship founded on agreement); Judith N. Shklar, American Citizenship: The Quest for Inclusion 49-61 (1991) (discussing movements to include those without property, slaves, women, and persons of young age under the rubric of "citizens"); Peter H. Schuck, Membership in the Liberal Polity: The Devaluation of American Citizenship, 3 Geo. Immigr. L.J. 1 (1989) (discussing the effects of equality and due process principles on the meaning of United States citizenship).

294 See *Minor*, 88 U.S. (21 Wall.) at 168.

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citizens was drawn from court records, which were "full of cases in which the [diversity] jurisdiction depends upon the citizenship of women .... Certainly none can be found in which it has been held that women could not sue or be sued in the courts of the United States."[295] From there, the Court reasoned that, as citizens, women were "entitled to all the privileges and immunities of citizens"[296] and thus the question was whether voting was such a right. Recognition as citizens, however, did not lead to the right to vote as the Court held that not all citizens were "necessarily" voters nor all voters necessarily citizens.[297]

Rogers Smith has described *Minor* as "reinforcing the privatistic orientation of American political thought."[298] The opinion continued the relegation of women to a separate, legally disabled sphere. Under its aegis, women were in a familiar double bind—told we were citizens but citizens of a special sort, possessing not all of the attributes of citizenship that men had. Contemporary legal scholars have compared the right to litigate with the right to vote.[299] Women were disabled in both respects. While constitutional amendment has been able to overturn the rule of *Minor*,[300] its intellectual premises—women as suspect participants in full political citizenship—remain.

2. *Domestic Relations Excepted*

Rightmire's initial inclusion of the debate about women's citizenship is not followed by subsequent writers of books for students of the federal courts. While "citizenship" in the context of diversity litigation remains a subject of inquiry,[301] women's citizenship was and is not much explored.[302] However, in one arena, women (in their capacity as wives, struggling to exit one version of the family) persist in federal courts jurisprudence. Several contemporary casebooks refer to the series of cases in

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295 Id. at 169.

296 Id. at 174.

297 See id. at 177-78 ("the Constitution of the United States does not confer the right of suffrage upon any one").

298 Smith, supra note 62, at 262.

299 See, e.g., Frank I. Michelman, The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights—Part II, 1974 Duke L.J. 527, 534-40.

300 See U.S. Const. amend. XIX.

301 See, e.g., Armistead M. Dobie & Mason Ladd, Cases and Materials on Federal Jurisdiction and Procedure 163-70 (1940); Howard P. Fink & Mark V. Tushnet, Federal Jurisdiction: Policy and Practice 436-41 (2d ed. 1987); Felix Frankfurter & Wilber G. Katz, Cases and Other Authorities on Federal Jurisdiction and Procedure 240-48 (1931); Henry M. Hart, Jr. & Herbert Wechsler, The Federal Courts and the Federal System 891-907 (1953); Charles T. McCormick & James H. Chadbourn, Cases and Materials on Federal Courts 130-46 (1946); Harold R. Medina, Cases on Federal Jurisdiction and Procedure 262-90 (1926).

302 None of the books set forth in note 301 supra mention *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874), or women's struggles to be counted as "citizens."

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which the federal courts decline to exercise jurisdiction on the basis of what has become known as the "domestic relations" exception[303] to federal court jurisdiction.[304] While often explained as an exception to diversity jurisdiction,[305] the domestic relations exception also has been used to oust the federal courts of jurisdiction in domestic relations cases involving foreign officials and to prevent federal courts from hearing tort cases.[306]

The "domestic relations" exception is traced to dictum in an 1859 case, *Barber v. Barber*,[307] in which Justice Wayne for the majority "disclaim[ed] altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony."[308] Dissenters in *Barber* linked that jurisdictional disclaimer to English equity jurisdiction, described as similarly lacking power over "the subjects of divorce and alimony."[309] The English limitation on jurisdiction over di-

303 See generally Barbara Ann Atwood, Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction, 35 Hastings L.J. 571 (1984).

304 In addition to a domestic relations exception, some probate cases, otherwise jurisdictionally proper, may not be heard by the federal courts. Like the domestic relations exception, line drawing is an issue. While lacking jurisdiction to "probate a will" or to interfere with "property in the custody of a state court," federal courts do have jurisdiction to consider suits between parties to an estate when they seek to establish rights to share in that estate or debts from that estate. See Markham v. Allen, 326 U.S. 490, 494 (1946); see also Allan D. Vestal & David L. Foster, Implied Limitations on the Diversity Jurisdiction of Federal Courts, 41 Minn. L. Rev. 1, 13-23 (1956) (discussing probate); id. at 23-31 (discussing domestic relations cases). As a consequence, "[a]lthough it is true that a federal court may not directly probate a will or undertake the administration of an estate, the statement that federal courts have no probate jurisdiction is much too broad." 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3610, at 480-82 (2d ed. 1984) (footnotes omitted).

305 See Ingram v. Hayes, 866 F.2d 368, 370-72 (11th Cir. 1988).

306 See Popovici v. Agler, 280 U.S. 379, 383 (1930), discussed at notes 327-37 and accompanying text infra. "Domestic relations" also are offered to explain jurisdictional lines between the federal courts and Indian tribes. However, in the 1992 Supreme Court ruling on Ankenbrandt v. Richards, 60 U.S.L.W. 4532 (June 15, 1992), the exception was limited to diversity cases. Compare Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59-61 (1978) ("matters involving commercial and domestic relations" are essential to tribal self-governance and federal courts should not interpret Indian Civil Rights Act of 1968 to grant jurisdiction to federal courts to determine such issues); cf. Duro v. Reina, 110 S. Ct. 2053, 2059-66 (1990) (refusing to recognize tribal criminal jurisdiction over nonmember Indians); Brendale v. Confederated Tribes & Bands of Yakima Indian Nation, 109 S. Ct. 2994, 2999 (1989) (limiting tribal powers to control reservation land owned by nonmembers); note 32 supra.

307 62 U.S. (21 How.) 582 (1859).

308 See id. at 584. Hiram Barber and Huldah Adeline Barber had been married in 1840 in New York. A New York court found that he had abandoned and harmed her and ordered separation and support. Id. at 584-85. Thereafter, he moved to Wisconsin. After additional litigation in New York, she (via a "next friend") filed in the federal territorial court in Wisconsin for past alimony. He defended on the grounds that as a "feme sole" she could not sue by a "next friend" and that the equity court lacked authority to grant relief. Id. at 587.

309 Id. at 605 (Daniel, J., dissenting).

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vorce (to the extent it existed)[310] was in turn tied to religious practices under which marriage was not subject to dissolution. From the words of the majority and dissent came the conclusion that federal courts have no authority over cases, otherwise jurisdictionally proper, in which the subject of dispute is divorce, alimony, or child custody.[311]

The actual holding in *Barber* was that the federal court, in a diversity jurisdiction case, *could hear* the claim of a husband's failure to pay alimony awarded by a state court.[312] In this sense, the case was a stunning victory for the relatively small number of wives who could first obtain recognition of their separate legal status and who also had the resources to pursue enforcement of obligations of support.[313] Subsequent readings of *Barber* have recast it by using the disclaimer of jurisdiction over divorce itself and by distinguishing the powers of federal territorial (as contrasted with article III) courts in family law.[314] The holding,

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310 See Spindel v. Spindel, 283 F. Supp. 797, 802 (E.D.N.Y. 1968) (discussing Supreme Court's "constructive view of history" and citing examples of both English and colonial courts granting divorces); see also Atwood, supra note 303, at 585-87.

311 See, e.g., Gliddon Co. v. Zdanok, 370 U.S. 530, 545 n.14 (1962) (Harlan, J.) (invoking *Barber* for proposition that "the federal courts in the States were incompetent to render divorces; but in the territories, where the legislative power of the United States of necessity extended to all local matters, the territorial courts took cognizance" over divorces) (citations omitted).

312 The Supreme Court held that federal courts did have equity jurisdiction, "derived from the Constitution, and from legislation in conformity to it," to enforce judgments of states and that the existence of "a remedy under the local law" does not preclude federal court remedies. See *Barber*, 62 U.S. (21 How.) at 591-92. Turning then to the question of whether diversity jurisdiction had been established, the Court concluded that a husband's misconduct could result in the law's recognition of a wife's right (in this case, divorced *"a mensa et thoro"*—legally separated but not free to marry again) to have a separate domicile. See id. at 593-96. "[A] wife under a judicial sentence of separation from bed and board is entitled to make a domicil for herself, different from that of her husband, and that she may by her next friend sue her husband for alimony, which he had been decreed to pay as an incident to such divorce . . . ." Id. at 597-98. Finally, while she could have gone to a state equity court, federal district courts also had jurisdiction to hear the case. See id. at 599-600. The dissent, written by Justice Daniel and joined by Justice Campbell and Chief Justice Taney, argued that Huldah Adeline Barber's rights flowed as a "wife" and that a "married woman cannot during the existence of the matrimonial relation, and during the life of the husband . . . become a citizen of a State or community different from that of which her husband is a member." Id. at 600-02 (Daniel, J., dissenting).

313 Resources here included a "next friend"—George Cronkhite, in Huldah Barber's case—who brought suit on her behalf. See id. at 583.

314 It is possible that quick readers of *Barber* viewed it (erroneously) as a territorial case. In 1836, Congress created the Territory of Wisconsin. See An Act Establishing the Territorial Government of Wisconsin, ch. 54, § 1, 5 Stat. 10, 11-11 (1836). On May 29, 1848, Wisconsin was admitted to the Union. See An Act for the Admission of the State of Wisconsin into the Union, ch. 50, § 1, 9 Stat. 233, 233 (1848). Apparently, Huldah Barber also unsuccessfully sought redress at law in the state courts in 1849. See *Barber v. Barber*, 2 Reports of the Cases Argued and Determined in the Supreme Court of the Territory of Wisconsin and of the State of Wisconsin 297, 300 (1874) (holding that decree for alimony "belongs to that numerous class of decrees which, from their very nature, cannot be enforced in any other than a court of

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which concluded that "[a]limony decreed to a wife in a divorce of separation from bed and board is as much a debt of record, until the decree has been recalled, as any other judgment for money is,"[315] has been ignored. By 1890 in *In re Burrus*,[316] the Court claimed that the "whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."[317]

The explanation, provided by the dissenters in *Barber*, of why the federal courts lacked jurisdiction provides insight into nineteenth century views about the respective spheres of the state and federal governments:

> It is not in accordance with the design and operation of a Government having its origin in causes and necessities, political, general, and external, that it should assume to regulate the domestic relations of society. . . . If such functions are to be exercised by the Federal tribunals, it is important to inquire by what rule or system of proceeding . . . they are to be enforced. . . . The Federal tribunals can have no power to control the duties or the habits of the different members of private families in their domestic intercourse.[318]

The question, of course, is whether this explanation remains vital at the end of the twentieth century.

The assumption of lack of federal judicial power over personal relations has been eroded by litigation over the course of this century about reproduction and federal benefits, both of which structure relations among "different members of private families in their domestic inter-

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chancery, where one exists."). Huldah Barber thereafter, by her next friend, George Cronkhite filed her bill against Hiram Barber in the District Court of the United States for the district of Wisconsin. See *Barber*, 62 U.S. (21 How.) at 583.

Subsequent cases, in which jurisdiction over divorce itself was permitted, relied on drawing lines between territorial federal courts and Article III federal courts, and many cited *Barber*. See, e.g., De La Rama v. De La Rama, 201 U.S. 303, 307-08 (1906) (noting that no diversity jurisdiction existed because "husband and wife cannot usually be citizens of different States . . . [and] a suit for divorce in itself involves no pecuniary value," but that federal territorial court of the Philippines does have jurisdiction because the general rule that courts of United States have no jurisdiction upon subject of divorce has no application); Simms v. Simms, 175 U.S. 162, 168 (1899) (describing that, in the territories, Congress has "full legislative power over all subjects upon which the legislature of a State might legislate"); Cheely v. Clayton, 110 U.S. 701, 705 (1884) (discussing court for Territory of Colorado's grant of divorce).

315 *Barber*, 62 U.S. (21 How.) at 595.

316 136 U.S. 586 (1890).

317 Id. at 593-94 (discussing Barry v. Mercein, 46 U.S. (5 How.) 103 (1847)); see also A. Peeler, supra note 281, at 205-06 (stating in chapter devoted to "source and rule of decision of legal and equitable rights" for "domestics relations," that "[t]he authority rests with the several States to regulate the domestic relations, and to say who may and who may not marry within their respective limits").

318 *Barber*, 62 U.S. (21 How.) at 602 (Daniel, J., dissenting).

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course." Further, that assertion ignored nineteenth century federal efforts to control polygamy and sexual relations, which in turn affect family relations, albeit nontraditional ones. In 1862, 1882, and 1887, Congress outlawed polygamy.[319] Fragments of these laws still remain.[320] While this legislation was directed at federal governance of the territories and was implemented by the federal courts in their capacity as "territorial courts" (thus acting as "state courts" for these purposes[321]), other federal legislation did bring the federal courts into the governance of multiple marriages in the states. The "Mann Act"—involving federal regulation of sexual activity[322]—was used in prosecutions of individuals

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319 See Act of July 1, 1862, ch. 126, 12 Stat. 501, 501 (outlawing bigamy in territories "or other place over which the United States have exclusive jurisdiction"); Act of March 22, 1882, ch. 47, 22 Stat. 30 (outlawing polygamy "in a Territory or other place over which the United States have exclusive jurisdiction" and prohibiting polygamists from voting in territorial or other elections), amended by Act of March 3, 1887, ch. 397, 24 Stat. 635 (providing for competency of witnesses of spouses "but [spouses] shall not be compelled to testify . . . without the consent of either husband or wife, as the case may be . . . "; prohibiting "adultery"—when "act is committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty . . . ; and when such act is committed between a married man and a woman unmarried, the man shall be deemed guilty . . . "; and providing for marriage ceremonies to be certified as such); see also Reynolds v. United States, 98 U.S. 145, 166-68 (1878) (upholding constitutionality of 1862 Act and declining to find religious exception); Carol Weisbrod, Family, Church and State: An Essay on Constitutionalism and Religious Authority, 26 J. Fam. L. 741, 754-59 (1987-1988) (analyzing absence of religious exemption for Mormons of laws barring polygamy). For discussion of how this federal regulation of families blocked the legal recognition of "alternative forms of marriage," see Carol Weisbrod & Pamela Sheingorn, *Reynolds v. United States*: Nineteenth-Century Forms of Marriage and the Status of Women, 10 Conn. L. Rev. 828, 857-58 (1978).

320 Section 9 of the 1882 Act was repealed by Pub. L. No. 89-554, 80 Stat. 634 (1966); Section 8 of that Act was codified originally at 48 U.S.C. § 1461 but was then repealed by Pub. L. No. 98-213, 97 Stat. 1463 (1983). Insofar as I can tell, the 1862 antipolygamy statute has not been repealed. Further, federal law prohibits the "contracting of polygamous or plural marriages" in the Virgin Islands. 48 U.S.C. § 1561 (1988).

321 See American Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 544 (1828). *Reynolds* involves federal governance of a territory in which federal power to regulate family relations is less debatable than in the context of states. Regulation of family relations within Indian tribes was addressed in United States v. Quiver, 241 U.S. 602 (1916). In *Quiver*, South Dakota had prosecuted a Sioux for adultery; the Court held that a state could not regulate the "domestic relations of the Indians with each other." Id. at 604. Further, absent express congressional authorization, "the relations of the Indians, among themselves—the conduct of one toward another—is to be controlled by the customs and laws of the tribe." Id. at 605-06. See also G.W. Bartholomew, Recognition of Polygamous Marriages in America, 13 Int'l & Comp. L.Q. 1022, 1033-68 (1964) (noting that federal law was more accepting of polygamous marriages among tribal members). Federal deference to tribal decisions might stem from respect for tribal sovereignty; an alternative view, suggested by Weisbrod & Sheingorn, supra note 319, at 857 n.152, is that federal law regulated non-Christians less than Christians. See John Stuart Mill, On Liberty, in the Essential Works of John Stuart Mill 249, 338 (Max Lerner ed., 1965) (polygamy "though permitted to Mohammedans, and Hindus, and Chinese, seems to excite unquenchable animosity when practiced by persons who speak English and profess to be a kind of Christians").

322 18 U.S.C. § 2421 (1988).

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who transported women in "interstate commerce."[323] In one of the cases prosecuted under the Mann Act, the Court expressly endorsed Congress's authority to "defeat what are deemed to be immoral practices; the fact that the means used may have the 'quality of police regulations' is not consequential."[324] Despite a claim of noninvolvement in interpersonal relations (some of which might bear the title "family"), federal law and federal courts have, on selected occasions, taken on these issues.

The *Barber* majority did not fashion an opinion that had to be read as disclaiming power over relations among former family members. The opinion discussed at length the capacity of a legally separated wife to have a separate domicile,[325] qualifying her as a diversity litigant capable of enforcing a debt, and the dissent objected to the exercise of that power.[326] Since *Barber*, the article III federal judiciary has from time to time exercised its jurisdiction in certain spheres of "family life"—taken by virtue of constitutional interpretation, congressional enactment, and federal common-law interpretation. Acknowledgement of this jurisdiction is necessary for accurate description of the respective spheres of federal and state governmental control over interpersonal relations. While federal jurisdiction is by no means comprehensive, it has been a force in family governance.

But the power (and appeal?) of the rhetoric of federal noninvolvement has been so strong that the presumption of disengagement persuaded the Supreme Court to disavow jurisdiction of article III federal courts even in cases of arguably exclusive federal court jurisdiction. The prime example, *Ohio ex rel. Popovici v. Agler*,[327] is a case involving a foreign official living in the United States. In *Popovici*, federal court jurisdiction was asserted on the grounds that one of the litigants, John C. Popovici, who was stationed in Cleveland, Ohio, was a "vice-consul" for the "Kingdom of Roumania,"[328] and as such, a party over whom the federal courts had jurisdiction "exclusive" of the states.[329] When Helen Popovici sued him in state court for "divorce and alimony,"[330] he

323 See Cleveland v. United States, 329 U.S. 14, 17 (1946); Caminetti v. United States, 242 U.S. 470, 486-89 (1917).

324 *Cleveland*, 329 U.S. at 19 (quoting Hoke v. United States, 227 U.S. 308, 323 (1913) and upholding the prosecution, under the Mann Act, of Mormons who practiced polygamy).

325 See Barber v. Barber, 62 U.S. (21 How.) 582, 597-98 (1859).

326 See id. at 600-02.

327 280 U.S. 379 (1930). *Popovici* has recently been narrowed by the Court's ruling in *Ankenbrandt*. See note 32 supra.

328 See *Popovici*, 280 U.S. at 382.

329 Id. at 382-83 (citing U.S. Const. art. III, § 2 ("The Judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls . . . .") and Act of March 3, 1911, ch. 231, §§ 24, 233, 256, 36 Stat. 1093, 1156, 1160 (current version at 28 U.S.C. §§ 1251, 1351 (1988)).

330 Id. at 379.

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claimed immunity from suit on the grounds that the federal courts had exclusive jurisdiction.[331] Writing for the Court, Justice Oliver Wendell Holmes stated that, even when meeting the requirements for federal jurisdiction, "domestic" disputes were not to be heard by the federal courts.[332] While noting the possible foreign relations implications, Holmes relied on Helen Popovici's "position" as a United States citizen,[333] and thus invoked the court-made rule that the federal courts did not speak to the issue of the termination of marriage.[334]

Holmes's view might be understood as rejecting claims of immunity from suit by foreign officials, and thereby as enabling women (assumed to be the spouses of a male corps of "ambassadors, other public ministers . . . counsuls or vice-counsuls") to have access to state courts, and thus as a victory for women. But he also blocked women from access to the federal courts. Holmes had another option. Had he acknowledged even their limited role as territorial courts in domestic relations, Holmes could have permitted federal courts to consider divorce actions when foreign officials were parties.[335] This struggle about jurisdictional boundaries in family law cases used to be a part of the literature of federal courts. *Popovici*, like *Happersett*, was available to prior generations of federal

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331 Id. at 380.

332 See id. at 383 (citing *Ex parte* Burrus, 136 U.S. 586, 593, 594 (1890); Barber v. Barber, 62 U.S. (21 How.) 582, 597-98 (1859); Simms v. Simms, 175 U.S. 162, 167 (1899); and De La Rama v. De La Rama, 201 U.S. 303, 307 (1906)). Justice Holmes read the congressional statute, that granted exclusive jurisdiction to the federal courts "[o]f all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls" in light of "the tacit assumptions upon which it is reasonable to suppose that the language was used"—that it is "true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce." Id. at 383.

333 Id. at 384.

334 See id. For another instance in which domestic relations concerns were invoked to limit federal jurisdiction in a case involving international law, see Huynh Thi Anh v. Levi, 586 F.2d 625, 632-34 (6th Cir. 1978) (refusing jurisdiction over case filed, under international law, federal treaties and constitutional and statutory provisions, by relatives of Vietnamese children who had been brought to the United States on a "babylift").

335 See, e.g., 3 Joseph Story, Commentaries on the Constitution of the United States § 1652, at 519-21 (Boston 1833) ("[I]t is obvious that every question in which these rights, powers, duties, and privileges [of public ministers and counsuls] is so intimately connected with the public peace, and policy, and diplomacy of the nation, and touches the dignity and interest of the sovereigns of the ministers concerned so deeply, that it would be unsafe that they should be submitted to any other, than the highest judicature of the nation.").

A "standard" federal courts question is whether Holmes had the option of finding concurrent jurisdiction and leaving the plaintiff with the initial choice of forum. See, e.g., Wyoming v. Oklahoma, 112 S. Ct. 789, 798 (1992) (finding original Supreme Court jurisdiction appropriate, but cautioning that grant of original jurisdiction under 28 U.S.C. § 1251(a)(1) is "obligatory only in appropriate cases," defined by reference to the " 'seriousness and dignity of the claim . . . [and] the availability of another forum' ") (quoting Illinois v. City of Milwaukee, 406 U.S. 91, 93 (1972)).

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courts students. In a 1931 publication, *Cases and Other Authorities on Federal Jurisdiction and Procedure*[336] Felix Frankfurter and Wilber Katz entitled a section "Limitations on Federal Jurisdiction in Probate and Domestic Relations," and included the text of *Popovici*.[337]

The point here is *not* that federal law in fact governs all aspects of family life. Reviewing the occasions upon which the federal courts have exercised jurisdiction over family relations, one does not unearth a comprehensive federal law of domestic relations. Rather, one finds a pattern of interaction between the national government and individuals, some but by no means all of whom reside in federal territories, about discrete issues relating to family life, marriage, sexuality, and economic relations. When this history of sporadic federal intervention is coupled with the many contemporary federal laws that affect and regulate family life, the

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336 F. Frankfurter & W. Katz, supra note 301.

337 Id. at 469-70; see also A. Dobie & M. Ladd, supra note 301, at 855-57 (reproducing *Popovici* in chapter entitled, The Relations of State and Federal Courts); Felix Frankfurter & Harry Shulman, Cases and Other Authorities on Federal Jurisdiction and Procedure 477-78 (rev. ed. 1937) (reproducing *Popovici*). Neither Medina's 1926 casebook, see note 301 supra, nor McCormick & Chadbourn's 1946 casebook, see note 301 supra, include the case or discuss the domestic relations exception. Frankfurter, when a Justice, described a "most important aspect of our federalism" to be that " 'the domestic relations of husband and wife . . . were matters reserved to the States' . . . and do not belong to the United States." Williams v. North Carolina, 325 U.S. 226, 333 (1945) (quoting *Popovici* and citing *Burrus*).

Like the conclusion in *Popovici*, another line of federal cases disclaims power over child custody, brought to their attention through habeas corpus jurisdiction. Some of these federal "family law" cases provide jurisprudential statements about the "special solicitude" for states' interests in this area. See, e.g., Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502, 508-16 (1982) (declining habeas corpus jurisdiction to challenge state court termination of parental rights); In re Burrus, 136 U.S. 586, 596 (1890) (stating that "the relations of the father and child are not matters governed by the laws of the United States, and that the writ of *habeas corpus* is not to be used"); In re Barry, 42 F. 113 (C.C.S.D.N.Y. 1844) (denying federal courts' habeas corpus jurisdiction in child custody dispute between New York resident mother and Nova Scotia father), appeal dismissed sub nom. Barry v. Mercein, 46 U.S. (5 How.) 103, 120 (1847) (noting lack of appellate jurisdiction because its appellate rights rested on statutory amounts in controversy). Justices decline to disturb what they repeatedly describe as the parens patriae role of states in the lives of their citizens.

Federal courts also have declined to decide child custody disputes, in part on the grounds that even were parents diverse, no amount in controversy could be established because the dispute cannot be "reduced to monetary value." John W. Dwyer, The Law and Procedure of the United States Courts 193 (1901) ("in such a case there is no pecuniary standard of value, as it rises superior to money considerations"); see also Charles P. Williams, Jurisdiction and Practice of Federal Courts: A Handbook for Practitioners and Students 100 (1917) ("the inestimable privilege of civil liberty, the value of the custody of a child, or of a severance of the marriage relation, are too imponderable to be weighed and calculated in the ordinary method of business transactions. . . . A jurisdiction over such matters, in so far as dependent upon the amount in controversy, must be declined, in order to protect the limited jurisdiction of the federal courts."). According to more recent commentary, the child custody disputes raise a constitutional question: "If in fact the states alone have the power to act as *parens patriae*, then the problem may be one not of statutory interpretation, but rather of the Constitution itself." Vestal & Foster, supra note 304, at 36 (footnote omitted).

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idea that family law belongs to the states becomes problematic.

On some occasions, federal courts have deferred to state courts and declined to hear "domestic relations" claims. In other cases, federal courts take "domestic" issues to be part of their jurisdiction. In federal family law, one finds a series of abstention doctrines,[338] akin to the many other abstention and comity doctrines that form the bases for a vast literature on federal and state jurisdictional lines.[339] Indeed, the whole of the *Barber* opinion is an exegesis on roles—of state and federal courts, of communities and the nation, of women as wives and men as husbands. The majority opinion is an early (1859) statement of national courts' powers, as well as of women's rights. The subsequent construction of that case as about the disavowal of federal court authority, and the overlay of congressional regulation of family life might be a basis for teachers and theorists of the federal courts to discuss the appropriate allocation of authority between state and federal court systems, a centerpiece of federal courts' scholarship and teaching.

But instead of the presence of this issue, one finds silence. Only one contemporary casebook of which I am aware reproduces a case that is about the "domestic relations" exception.[340] The rest,[341] like many of the earlier casebooks,[342] either mention the issue in textual comments,[343]

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338 These family law deference doctrines are labeled as such. See Paul M. Bator, Daniel J. Meltzer, Paul J. Mishkin & David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 1460-64 (3d ed. 1988) (discussing abstention domestic relations).

339 See, e.g., Martha A. Field, Abstention in Constitutional Cases: The Scope of the *Pullman* Abstention Doctrine, 122 U. Pa. L. Rev. 1071 (1974); Linda S. Mullenix, A Branch Too Far: Pruning the Abstention Doctrine, 75 Geo. L.J. 99 (1986); Donald H. Zeigler, A Reassessment of the *Younger* Doctrine in Light of the Legislative History of Reconstruction, 1983 Duke L.J. 987; see also Vicki C. Jackson, The Supreme Court, The Eleventh Amendment, and State Sovereign Immunity, 98 Yale L.J. 1, 72-88 (1988).

340 See Martin H. Redish, Federal Courts: Cases, Comments and Questions 589-93 (2d ed. 1989). Redish reproduced a 1973 opinion by Judge Friendly, Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509 (2d Cir. 1973), in which a law firm brought a diversity action against a client for fees on divorce work. One issue was whether *Barber*, as interpreted, barred the lawsuit. While holding that the domestic relations exception had been "narrowly confined" and did not apply, Judge Friendly used the occasion to decry diversity jurisdiction over the issue that involved New York contract law. See *Rosentiel*, 490 F.2d at 514-16. Professor Redish also describes the probate exception and questions whether special jurisdictional rules for probate and domestic cases are appropriate. See M. Redish, supra, at 594-95. His questions do not link the domestic relations exception with any attitudes towards women.

341 The contemporary casebooks, of which the most recent editions were reviewed, include: P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, supra note 338; David P. Currie, Federal Court Cases and Materials (4th ed. 1990); H. Fink & M. Tushnet, supra note 301, Ray Forrester & John E. Moye, Federal Jurisdiction and Procedure: Cases and Materials (3d ed. 1977); Peter W. Low & John Calvin Jeffries, Jr., Federal Courts and the Law of Federal-State Relations (2d ed. 1989); Charles T. McCormick, James H. Chadbourn & Charles Alan Wright, Cases and Materials on Federal Courts (8th ed. 1988).

342 See, e.g., A. Dobie & M. Ladd, supra note 301, at 857 n.44 (quoting from *Barber* after their reproduction of *Popovici*; C. McCormick & J. Chadbourn, supra note 301, at 399 n.26

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in notes,[344] or not at all.[345] Further only one other teaching book notes the history of married women's domicile as linked to that of their husbands and questions the constitutionality of that rule in light of recent cases on women's rights.[346]

Of course, only in 1992 has the Supreme Court raised the doctrinal

(referring to *Burrus*); H. Medina, supra note 301, at 15-19 (first chapter, called "Nature, Source, and Extent of the Federal Judicial Power," included In re Barry, noted In re Burrus, and included footnote reference with brief excerpts from majority and dissent in Barber v. Barber).

343 See, e.g., P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, supra note 338, which includes a "Note on Federal Jurisdiction in Matters of Domestic Relations" with a few quotes from *Barber* and *Burrus*, and describing *Popovici*. The litigants in *Barber* are described as a "wandering husband" and a "home-staying wife." Id. at 1460.

The authors then explain that the "domestic relations exception is firmly established in the lower courts, but its boundaries are unsettled." Id. The authors locate the roots of the doctrine in the role of the state as parens patriae, see id. at 1461, and then review criticism of the doctrine and suggest that it may be understood less as an absence of power and more as a doctrine of "discretionary abstention." Id. at 1463. The authors also cite to Lehman v. Lycoming Cty. Children's Servs. Agency, 458 U.S. 502 (1982). See P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, supra note 338, at 1464. In addition, the authors note the existence of the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1988) and the Court's refusal to find federal court jurisdiction thereunder. See id. The authors also address the "probate" exception. See id. at 1454-59. In the first edition, published in 1953, the authors questioned the domestic relations disclaimer. H. Hart & H. Wechsler, supra note 301, at 1017 (noting that *Burrus* raised more narrow question of whether, via federal courts' habeas corpus jurisdiction, child custody could be decided).

344 See D. Currie, supra note 341, at 324 n.6 (quoting *Popovici* and at 567, describing *Barber* and *Spindel*, and examining the "probate" exception to federal court jurisdiction); R. Forrester & J. Moye, supra note 341, at 194 (describing "doctrine that federal courts lack competence in domestic relations" and citing to *Barber* and its critique by Judge Weinstein in Spindel v. Spindel, 283 F. Supp. 797 (E.D.N.Y. 1968)); C. McCormick, J. Chadbourn & C. Wright, supra note 341, at 150 n.2 (reviewing *Rosensteil*, 490 F.2d 509 (2d Cir. 1973)).

345 See, e.g., H. Fink & M. Tushnet, supra note 301; P. Low & J. Jeffries, supra note 341. Some but not all of the contemporary *treatises* discuss the issue. See, e.g., Erwin Chemerinsky, Federal Jurisdiction 253-54 (1989 & Supp. 1991) (discussing domestic relations doctrine, difficulty of line-drawing, and criticism of doctrine); 1 Moore's Federal Practice ¶ 0.71[5.-5], at 749-50 (1992) (explaining exceptions as evidencing "concern for comity, forcing the federal courts to stay out of important matters of local concern," and noting importance of not overstating domestic relations exception, as "federal courts certainly do hear cases involving family disputes"); Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 129-30 (2d ed. 1990) (describing doctrine); Charles Alan Wright, Law of Federal Courts 143-45 (4th ed. 1983) ("Today the [domestic relations and probate] exceptions may more rationally be defended on the ground that these are areas of the law in which the states have an especially strong interest and a well-developed competence for dealing with them."); id. at 147 (noting that "a married woman traditionally has acquired the domicile of her husband"); 13B C. Wright, A. Miller & E. Cooper, supra note 304, § 3609, at 459-80 (Jurisdiction and Related Matters) (giving detailed discussion of doctrine, its overstatement, and limits).

346 See D. Currie, supra note 341, at 240 n.5; see also 13B C. Wright, A. Miller & E. Cooper, supra note 304, § 3614, at 555-58 ("Citizenship of Particular Persons—Married Women" notes that while the rule remains that a married woman's domicile is that of her husband, "small amount of time saved by having only one domicile to determine when a husband and wife are parties to the same action is not sufficient to justify what essentially is a sex-biased rule that certainly will fall eventually").

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issue again by granting review in the *Ankerbrandt* case. Moreover, over the course of a century, interest in the legal questions posed by domicile and diversity jurisdiction has declined, as commentators urge the abolition of diversity jurisdiction and as other issues take center stage. The relative silence exemplifies the view that the issues of domestic relations and married women as domiciliaries in their own right are simply not high on the list of items to be "covered" when teaching about the already-too-vast materials within the "federal courts canon."[347]

But there is something deeper at work than simply too many topics to discuss in a semester of "federal courts" and too many examples of abstention to use. Women and the families they sometimes inhabit are not only assumed to be outside the federal courts, they also are assumed not to be related to the "national issues" to which the federal judiciary is to devote its interests.[348] Jurisdictional lines have not been drawn according to the laws of nature but by men, who today are seeking to confirm their prestige as members of the most important judiciary in the country. Individual problems move lower on the federal courts' agenda.[349] Dealing with women—in and out of families, arguing about federal statutory rights of relatively small value—is not how they want to frame their job.[350] As a consequence, while present—in federal statutory, administrative, common, and constitutional law—the interaction between federal courts and women is not a subject of discussion.[351] And,

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[347] That absence from teaching materials and commentaries about the national courts fits with Sylvia Law's comprehensive review of the founding of the United States. After reading the debates and papers at the framing of the Constitution, Law concludes, "Virtually nothing in the original constitutional debates directly addresses the situation of women and families . . . ." Sylvia A. Law, The Founders on Families, 39 U. Fla. L. Rev. 583, 586 (1987).

[348] Cf. DeShaney v. Winnegabo Cty. Dep't. Soc. Serv., 489 U.S. 189, 202-03 (1989) (holding fourteenth amendment does not protect child from being beaten by his father after state social services department returned him to his father's custody because compassion not compensated by due process clause).

[349] See generally Judith Resnik, From "Cases" to "Litigation," 54 Law & Contemp. Probs. 5 (1991) (discussing increasing interest in large scale litigation and concomitant movement of "small" cases to alternative dispute resolution and agency adjudication).

[350] See, e.g., Robert Bork, Dealing with the Overload in Article III Courts, 70 F.R.D. 231, 238-39 (1976) (address delivered at National Conference on Causes of Popular Dissatisfaction with Administration of Justice, Pound Conference) ("someone far less qualified than a judge" can decide cases arising under social security, food stamps, federal employers' liability, consumer products, and other federal legislation); FCSC Report, supra note 16, at 55-60 (proposals to create article I disability courts); id. at 60-62 (proposal to authorize, with consent of the parties, test program to send employment discrimination cases to arbitration).

[351] The rhetorical overlay is sufficiently confusing that a scholar, writing "from a feminist perspective," was unable to pierce the incoherency of the claimed division of jurisdiction, even as she focused on federal adjudication of women's rights. See S. Mezey, supra note 56, at 3, 5 ("Because the powers reserved to the state for regulation of health, safety, and public welfare, matters of divorce, marriage, rape, battery and surrogacy are controlled by state law, . . . they are for the most part outside the province of federal law and are omitted here except when they conflict with federal statutes or constitutional protections.").

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when possible, federal courts divest themselves of "family issues."

C. *The Image Created*

To summarize, some of the early casebooks and treatises about the federal courts mentioned women, as disabled litigants, without juridical voice. In early teaching materials, court decisions, about whether women were "citizens" and court-made limitations on federal jurisdiction over domestic relations, were topics of discussion. "Early" Annual Reports about the federal courts also made note of women in a few instances. More recently, women have become less visible in writings about the federal courts. An assumption of egalitarian treatment operates as a justification for an unwillingness to inquire into how gender affects adjudication. Given the construction of domestic relations as out of the jurisdiction and concerns of the national courts, it is not surprising that women, so often identified in their roles in families, were similarly understood to be only obliquely related to the federal courts. These court-made jurisdictional rules and a limited scholarly interest in them support an impression that there is something in "the nature of federal law" that keeps "gender bias problems to a minimum." Such rules also enable the current unembarrassed efforts by federal judges to resist jurisdiction over civil rights claims motivated by gender. Reports about the federal courts also do nothing to point to women as litigants and workers; equal employment data are not placed in the principle Annual Reports but in a separate unpublished document, circulated upon request.

Instead of proving the actual absence of gender bias, reviewing the materials of the federal courts supports the opposite conclusion. These court-made rules and reports, coupled with a scholarly jurisprudence that does not challenge the assumptions of the exclusion of family concerns from the federal docket, demonstrate that in the very "nature of federal law" are lines of jurisdiction, doctrine, and scholarship that marginalize the "domestic" sphere, linked in this culture to women.

IV

CONCLUSION: THE IMPLICATIONS OF PRESENCE

A. *Sharing the Field*

Pointing out links between federal law and families raises a question, traditional for federal courts scholars. While not discussed by federal courts jurisprudence, a complex mosaic of federal regulation of economic and social relations now overlays state laws on divorce, alimony, and child support. What is to be made of this fact of joint governance of the field? Because I hope scholars of federal courts will take seriously the topic of federal family law, it is appropriate to consider how doctrinal

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developments—shaped by different images of what is on the national agenda that federal courts implement and adjudicate—might take federal courts' authority over family life into account. The central question is what "business is the federal business,"[352] and it is time to answer this question by recognizing that there already is joint federal and state governance of an array of issues, from land use and torts to families. Once understood as a joint endeavor, the next issue is how to allocate authority.

A first possibility is that federal court involvement in family life is bad, per se, at a structural level. This claim takes seriously the arguments made in the many cases espousing (slight pun intended) state control over family life and fearing that the federal courts would become hopelessly "enmeshed" in family disputes.[353] Under this vision, the states (and Indian tribes) as smaller units of government are closer to "the people" and thus a more appropriate level of government to determine matters affecting intimate life.

Possible justifications for this view exist. Contemporary invocations of the domestic relations exception discard arguments based on ecclesiastical authority, the alleged lack of jurisdictional diversity between married couples, and the claim that divorces lack monetary value—all in favor of a "*modern* view that state courts have historically decided these matters and have developed both a well-known expertise in these cases and a strong interest in disposing of them."[354] Whether based in nineteenth-century or twentieth-century conceptions,[355] the claims of affiliation and expertise require consideration. "Communitarianism" has strong adherents in contemporary debates on political theory; respecting groups' self-constitution may entail state governance of the family.[356]

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352 Gliddon Co. v. Zdanok, 370 U.S. 530, 552 (1962).

353 See, e.g., Flood v. Braaten, 727 F.2d 303, 308 (3d Cir. 1984) (holding that federal court can decide enforcement of state domestic relations judgment without becoming "enmeshed in the factual details of the underlying dispute") (citing Williams v. North Carolina, 325 U.S. 226, 232-33 (1945)). A related claim is that, as a matter of constitutional law, federal courts lack "parens patriae" authority. But see Atwood, supra note 303, at 595-98 (disputing this theory).

354 Solomon v. Solomon, 516 F.2d 1018, 1025 (3d Cir. 1975) (emphasis added) (diversity suit attempted for nonpayment of alimony). But see id. at 1030 (Gibbons, J., dissenting) (arguing that there was "nothing 'domestic' about the financial dispute").

355 It is not clear how "modern" to call this position. According to Michael Grossberg, state "judicial dominance of domestic relations grew out of an abiding commitment to local control that lay at the heart of nineteenth-century American family law . . . [and] stemmed from the deep-seated republican aversion to centralized government in general . . . ." Michael Grossberg, Covering the Hearth: Law and the Family in Nineteenth-Century America 295 (1985).

356 Federal court refusal to entertain a claim, brought under the Indian Civil Rights Act of 1968, that Santa Clara Pueblo illegally refused to recognize as tribal members the children of a Santa Claran woman who married a Navajo, was based on a similar view that "intratribal

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Further, the existence of some form of an exception to federal court jurisdiction based on probate[357] reveals another justification for state control—an implicit sense of marriage as a status existing within the state's borders and an ongoing link between sovereign authority and territorial borders.[358] Holding aside the ever-present question of boundaries,[359] doctrine might shift in a variety of ways when ideological claims about the relationship between federal courts and family are revised.

First, one could insist that, despite recognition of federal laws of the family, the claim of deference to state governance remains strong and, as a matter of doctrine, complete abstention (a form of reverse preemption) is desirable.[360] To the extent recent federal law in bankruptcy, pensions, and benefits law points in the other direction, that erosion should be stopped—by legislation or judicial interpretation. But were one to really press this claim—that states are specially situated and should be controlling family life—one would not seek only to cabin the federal courts. This position would also require urging Congress and agencies to avoid defining families by rewriting statutes and regulations to incorporate state law, so as to permit state governance of interpersonal relations. An array of federal statutes would have to incorporate state definitions of families, and what would be lost in uniformity and national norms would be gained in recognition of the special relationship of states in defining

disputes" were particularly appropriate for self-governance. See Santa Clara Pueblo v. Martinez, 436 U.S. 49, 59-61 (1978). But see Resnik, supra note 155, at 702-29 (arguing that interaction between cultures of United States and tribes shapes membership rules).

357 See note 304 supra.

358 This justification is supported by the recent Supreme Court decision upholding jurisdiction based on the fleeting presence of a person within a state's borders. See Burnham v. Superior Court, 495 U.S. 604, 622 (1990). *Burnham*, like Kulko v. Superior Court, 436 U.S. 84 (1978), involved an interpersonal family dispute that prompted federal adjudication on the permissible reaches of state court jurisdiction.

359 For example, does state or federal law govern abortion rights? Note that the current domestic relations exception is invoked in an array of situations, in which courts have accepted jurisdiction and others in which courts have not. See, e.g., Ingram v. Hayes, 866 F.2d 368, 372 (11th Cir. 1988) (exercising jurisdiction over declaratory relief action on claim that state had denied due process in support proceedings); Peterson v. Babbitt, 708 F.2d 465, 466 (9th Cir. 1983) (declining jurisdiction in prisoner's effort to obtain right to have his child visit him in prison); Mauro v. Mauro, 762 F. Supp. 173, 175, 177 (E.D. Mich. 1991) (finding that cause of action depended on "marital relationship" and declining to find jurisdiction); McCullough by Jordan v. McCullough, 760 F. Supp. 613, 616 (E.D. Mich. 1991) (making effort to "determine the true character of this litigation"). See generally Barbara Freedman Wand, A Call for the Repudiation of the Domestic Relations Exception to Federal Jurisdiction, 30 Vill. L. Rev. 307, 335-56 (1985).

360 For exploration of the application of current abstention doctrine to this area, see Atwood, supra note 303, 605-27; Rebecca E. Swenson, Note, Application of the Federal Abstention Doctrines to the Domestic Relations Exception to Federal Diversity Jurisdiction, 1983 Duke L.J. 1095, 1105-20; see also Congleton v. Holy Cross Child Placement Agency, 919 F.2d 1077, 1078-79 (5th Cir. 1990) (discussing abstention and whether claim need only have family "overtones" rather than be centrally about domestic relations).

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family life.

Alternatively, one might instruct the federal courts to adopt a somewhat weaker form of deference, reminiscent of eleventh amendment doctrine[361] and conscious of the many instances of congressional silence. Under such a rule, it would be for the Congress and not the federal courts to decide when state governance is exclusive. Absent express congressional legislation preempting state authority, federal courts would permit state rules to govern whenever issues relating to family life are raised.[362] The cases involving federal pension and benefits laws, in which federal courts have acknowledged states' roles yet held that congressional intervention overrides the presumption of state governance, could be read as exemplifying this approach.[363] One thus might have a "domestic relations" exception to *diversity* jurisdiction, in which no federal claim is presented, and ask in all federal question cases: what law has Congress instructed the federal courts to apply?

Yet a third alternative is to have selective federal court interpretation of congressional silence as a basis for federal law to override state law. For example, federal courts could construe silence as permitting state laws to govern except when special federal interests (such as mili-

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361 The rule is that congressional alteration of states' immunity needs to be clearly stated in the statute. See Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985); see also Dellmuth v. Muth, 491 U.S. 223, 230 (1989) (citing *Atascadero* for proposition that congressional intent must be "unmistakably clear"); Pennsylvania v. Union Gas Co., 491 U.S. 1, 10 (1989) (same).

362 See, e.g., Ablamis v. Roper, 937 F.2d 1450, 1464 (9th Cir. 1991) (Fletcher, J., dissenting) ("[The] 'Supreme Court has instructed us that when courts face a potential conflict between state domestic relations law and federal law, the strong presumption is that the state domestic relations law is not preempted'. . . .") (quoting Saving & Profit Sharing Fund of Sears Employees v. Gago, 717 F.2d 1038, 1041-43 (7th Cir. 1983)). As illustrated by the dispute about the reach of ERISA's preemption between majority and dissent in *Ablamis*, this test still results in questions of interpretation. See also Mansell v. Mansell, 490 U.S. 581, 587 (1989) (ruling Court will find preemption in domestic relations only when " 'positively required by direct enactment' ") (quoting Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979)); Williams v. North Carolina, 317 U.S. 287, 305-06 (1942) (Frankfurther, J., concurring) (stating that if appropriate to have "national authority over marriage and divorce," Congress, not the courts, should create it; only appropriate role "within its traditional authority and professional competence" for federal courts is in decisions on full faith and credit).

363 See, e.g., Hisquierdo v. Hisquierdo, 439 U.S. 572, 590 & n.24 (1979) (holding that retirement benefits under Railroad Retirement Act of 1974 may not be divided under California community property law, but noting that "different considerations might well apply where Congress has remained silent"). The Court, however, sometimes has declined to find federal jurisdiction over federal statutory rights. See, e.g., Thompson v. Thompson, 484 U.S. 174, 187 (1988) (holding that Parental Kidnapping Protection Act creates federal law of interstate enforcement of custody decrees but not jurisdiction). However, some lower courts take jurisdiction over torts of interference with custodial arrangements, and the 1988 Convention on International Child Abduction does provide for federal jurisdiction. See also Letter from Professor Atwood to author (June 14, 1991) (on file with author).

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tary benefits) are at issue.[364] All of these doctrinal positions rely on the view that states are situated differently from the federal government in family life; as a consequence, federal courts should prefer state-based adjudication and defer to the political legitimacy of state decisions in this sphere.

A different conception rejects a view that the states are the embodiment of communities that legitimate state governance of intimate life. While a few states may be relatively homogeneous, the vast majority have no special claim to a communitarian vision. Therefore, federal court involvement in family life is not bad, per se, as a matter of federalism. Nonetheless, federal court jurisdiction might still be undesirable, given federal judicial history—either of noninvolvement or of disclaimers of such involvement with domestic life. Here the question of the "quality of the federal bench," as well as that of the "nature of federal law," reemerges.[365] Arguments in support of this approach could be tied to two other strains in the case law claiming a "domestic relations" exception to federal court jurisdiction. First, in light of this "time-honored boundary,"[366] the federal courts lack the requisite knowledge and "are not, as a matter of fact, competent tribunals to handle" typical domestic relations cases.[367] Translated, the claim is that federal judges are neither selected on the basis of knowledge of family law nor trained, once judges, to become knowledgeable and also lack support staff who might mitigate these problems. Moreover, given the composition of the docket, federal courts would be unlikely to gain expertise because their involvement would be sporadic. Second, the federal courts are too important or the issues of family law too unappealing, trivial, and "non-national" for federal court decisionmaking.[368]

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364 See, e.g., Rose v. Rose, 481 U.S. 619, 625 (1987) ("Before a state law governing domestic relations will be overridden, it must do 'major damage' to 'clear and substantial' federal interests.") (citations omitted).

365 See FCSC Report, supra note 16, at 169.

366 Csibi v. Fustos, 670 F.2d 134, 138 (9th Cir. 1982).

367 See, e.g., Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir. 1982) (Posner, J.) (upholding diversity jurisdiction in case involving tortious interference with child custody, but stating that "alimony, custody, visitation, and child support—often entail continuing judicial supervision of a volatile family situation. The federal courts are not well suited to this task. They are not local institutions, they do not have staffs of social workers, and there is too little commonality between family law adjudication and the normal responsibilities of federal judges to give them the experience that they would need to be able to resolve domestic disputes with skill and sensitivity."); see also Ruffalo v. Civiletti, 702 F.2d 710, 718 (8th Cir. 1983) (noting that federal courts are "ill-equipped" to make child custody determinations); Cherry v. Cherry, 438 F. Supp. 88, 90 (D. Md. 1977) (discussing state court development of "a proficiency and expertise in the area that is almost completely absent in the federal courts") (citing Solomon v. Solomon, 516 F.2d 1018, 1025 (3d Cir. 1975)).

368 See, e.g., Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 516 (2d Cir. 1973) (Friendly, J.) ("[W]e do not believe that the Supreme Court today would demand

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The competency claim, at least in the subset of family law dealing with interpersonal familial relations, has some appeal.[369] In the words of one federal court, some questions are:

> too hard and too remote from the experience of federal judges . . . . Our experience and sense of fairness teach us that this is not a case where the application of a federal *rule* . . . is likely to provide the best answer. We must rely on a judge in a court of family law—with its more flexible standards . . .—to balance the equities and seek compromises that best accommodate the interests of the parties.[370]

Feminism similarly counsels attention to experience, to the knowledge gained by first-hand understanding of problems. But the imagined state competence is undermined to some extent by the many state gender bias task forces that found state judges were biased in this very area of the assumed expertise—family law cases.[371] Further, some of those reports

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that federal judges waste their time exploring a thicket of state decisional law . . . ."); Thrower v. Cox, 425 F. Supp. 570, 573 (D.S.C. 1976) (domestic relations "vexatious;" federal courts should allow state courts that "dubious honor exclusively"); cases reviewed in Wand, supra note 359, at 385-86 (section entitled "The Hidden Reason—Distaste for Domestic Relations Disputes").

This strand is often coupled with concern about docket congestion. See, e.g., Jagiella v. Jagiella, 647 F.2d 561, 564-65 (5th Cir. 1981) (upholding diversity jurisdiction over failure to pay alimony arrears but not over counterclaims for alienation of children's affection). "Judicial economy" is also an explanation given for the probate exception. See, e.g., Dragan v. Miller, 679 F.2d 712, 714 (7th Cir. 1982) (Posner, J.).

369 But see Crouch v. Crouch, 566 F.2d 486, 487-88 (5th Cir. 1978) (case involving "little more than a private contract to pay money to persons long since divorced" raises no problems of competence other than those always found in diversity litigation).

370 Huynh Thi Anh v. Levi, 586 F.2d 625, 634 (6th Cir. 1978) (citing generally Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685 (1976)) (emphasis in original). Note the two elements of this claim; the first that judges lack experience, and the second that federal law is intrinsically less flexible that state law. As to the first, once federal laws of the family are acknowledged as such, then federal judges also will have to acknowledge that they have had some experience with some aspects of family law. As to the second claim, federal constitutional remedies, including structural injunctions, make it difficult to believe that federal judges could not, should they choose, develop the "flexible standards" required for a particular area. Indeed many of the federal justiciability doctrines are criticized precisely because of their malleability. See Gerald Gunther, The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review, 64 Colum. L. Rev. 1, 15-20 (1964) (critiquing Alexander M. Bickel's The Least Dangerous Branch—The Supreme Court at the Bar of Politics (1961)).

371 See, e.g., Maryland Task Force Report, supra note 39, at v-viii (noting victims of domestic violence discredited, blamed, and badgered; many judges "lack understanding" of domestic violence); id. at xiv (noting gender bias in custody decisions); Utah Task Force Report, supra note 39, at S-4 ("women and men do not have equal access to the courts . . . ; [g]ender-based stereotypes about proper roles for men and women serve to disadvantage mothers in some situations and fathers in others"). For an argument that the federal courts' experience in family issues as they arise in tax and immigration law gives those courts sufficient knowledge, see Wand, supra note 359, at 363-66.

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also detail a parallel devaluation of family law.[372] Trivialization of family life is a problem that defies jurisdictional boundaries. While the federal courts may lack the experience, the lesson from state bias studies is that experience alone is insufficient.

This disheartening news from state courts does not, however, end the discussion. To the extent federal judges think family law beneath them or not interesting, they either will not or cannot do it wisely.[373] But that problem goes beyond the question of whether the federal courts might take on new areas of jurisdiction and rewrite the "domestic relations" exception. Many federal statutes already involve federal judges in family life. The express disinterest or claimed incompetence in domestic relations may spill over to disdainful or uninformed decisionmaking in cases pending under current doctrinal parameters. To the extent that such federal judicial disinterest is widespread, one might urge Congress to rewrite statutes—to locate enforcement of some of its legislation that involves family life in the state courts, which (according to federal judges) are better equipped to handle them.

Yet a problem remains. The current hierarchy stipulates the federal courts as most powerful; the supremacy clause confirms that sense of authority. Further, federal courts theorists might affirmatively argue that federal courts are needed in this area—either because of their special capacity to protect the politically disfavored[374] or because federal

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372 See Draft California Task Force Report, supra note 44, at 55 ("Judges rate the family law assignment as their lowest preference by a wide margin"); Florida Task Force Report, supra note 39, at 77 (noting strong "dislike" by judges of family law assignments); see also Connecticut Task Force Report, supra note 11, at 39 ("Some attorneys felt that because women attorneys . . . practiced juvenile or domestic law," they were less likely to be selected by Judicial Selection Commission for judgeships); Maryland Task Force Report, supra note 39, at 100 (noting that when applying for judgeships, experience with domestic relations law not likely to be valued as highly as experience with jury trials and criminal prosecutions).

373 For concern about bias in judicial judgments and discretion in this area in general, see Barbara Stark, Divorce Law, Feminism, and Psychoanalysis: In Dreams Begin Responsibilities, 38 UCLA L. Rev. 1483, 1518-20 (1991).

Thus, proposals for outright abolition of the domestic relations exception so as to treat such cases like any other federal case ignore the problems of transition and the potential short shrift that federal judges may give to such cases. See, e.g., Mark Stephen Poker, A Proposal for the Abolition of the Domestic Relations Exception, 71 Marq. L. Rev. 141, 162-64 (1987); Wand, supra note 359, at 385-401.

374 See R. Posner, supra note 157, at 180. Posner's concerns also would mandate that federal judges and not state judges make decisions in cases in which politically unpopular family ties are sought. See id. Unfortunately, many article III judges have not been protective of such relations. See, e.g., Bowers v. Hardwick, 478 U.S. 186, 190-96 (1986) (upholding Georgia sodomy statute in face of argument that it violated federal constitutional rights of gays and lesbians). But cf. Watkins v. U.S. Army, 875 F.2d 699, 705-11 (9th Cir. 1989) (finding army estopped from denying reenlistment to Watkins on the basis of his acknowledged homesexuality).

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sovereign and administrative interests are at stake.[375] While neither the appeal to the community envisioned by the claim of closeness of the state to the family nor the concern about attitudes and knowledge of federal judges should be discounted, the "inevitability of federal involvement"[376] in family life remains, as does a sense that the rejection of that role by federal courts reconfirms the marginalization of women and families from national life.

Federal involvement emerges here, as it does in torts, land use, health regulation, criminal law, and other areas, because of the wealth of interactions that make the imagined coherence of the very categories "federal" and "state" themselves problematic. Whether looking at the problem from the top down, and seeing "joint governance" or considering the issue from the perspective of individuals and speaking of "membership in multiple communities," the point is the same: an interlocking, enmeshed regulatory structure covers the host of human activity in the United States. There is no a priori line one can invoke to separate legal regulation into two bounded boxes "state" and "federal."[377] Uniform state laws demonstrate the limits of state court borders and the need for regulatory structures that bridge them. State and federal court interpretations of "family" are unavoidable.

Thus, a third model of federal/state relations, one named by Robert M. Cover and T. Alexander Alienkoff as "dialectical federalism," becomes appropriate to explore.[378] Their context was joint federal/state governance of criminal law, by virtue of federal courts' occasional involvement in habeas corpus petitions filed by state prisoners.[379] Cover and Alienkoff's aspiration was for a dialogue in which state and federal judges, working on the same problems from differing perspectives, might

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375 See Chemerinsky & Kramer, supra note 167, at 80-85.

376 Harry D. Krause, Family Law: Cases, Comments, and Questions (3d ed. 1990), at 299 ("question thus is not whether the tax, welfare, or family law *should* be the vehicle for social policy, they *are* that simply by their existence") (emphasis in original); see also Vestal & Foster, supra note 304, at 31 ("The federal courts should refuse to exercise jurisdiction in domestic relations cases only where a problem of status arises. Where only property rights are involved, jurisdiction should be taken.") (footnote omitted).

377 Another way to put this is to ask whether there are any constitutional limits on congressional authority to regulate family life. See, e.g., Lewis Mayers, Ex Parte Divorce: A Proposed Federal Remedy, 54 Colum. L. Rev. 54, 59-64 (1954) (arguing for federal regulation of "ex parte divorces").

378 See Robert M. Cover & T. Alexander Alienkoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035 (1977); see also Robert M. Cover, The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation, 22 Wm. & Mary L. Rev. 639 (1981) (analyzing utility of concurrent jurisdiction and of the conflict that sometimes emerges). Because the Supreme Court has just limited the exception to diversity cases involving divorce, alimony, or child custody decrees (see *Ankenbrandt*, note 32 supra), the federal and state courts may well have the opportunity to engage in such interrelated work.

379 See Cover & Alienkoff, supra note 378, at 1035-36.

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enhance the development of norms and obtain new understandings by watching parallel systems generate legal rules.[380] In this context, overlapping issues—of defining families, of how many heads of households may exist, of whether to support co-parenting obligations, of how savings and pensions are to be allocated among the workers who comprise the family unit, of what remedies should be available for violence occurring in the home—provide occasions for overlapping decisionmaking. To the extent that two court systems are populated by judges empowered by different institutional arrangements (life tenure, appointment, and election) and working in contexts with differing ideologies, their simultaneous and, to some extent, redundant exploration of issues of family life provide opportunities for confirmation of shared norms, as well as for dialogue about the disjunctions that emerge.

Yet a fourth option is to imagine a world of literal joint work and pooled resources. Rather than choosing either federal or state court as the dominant jurisdiction or having them work sequentially in conversation, why not have them work together, simultaneously? In some large-scale tort cases, in which state and federal courts have overlapping jurisdiction, federal and state judges have literally shared jurisdiction—sitting together and issuing joint orders.[381] Proposals for "pooling resources" and sharing information, as well as for joint governance, have been put forth in the criminal context as well.[382] Transferring these insights to the family law arena, one might imagine a federal trial judge (aware of state court decisionmaking about particular litigants in a "family" case in which federal issues also arise) seeking the kind of intercourt cooperation used in some of the mass torts cases. But to devise either such informal or formal coordination[383] requires first that both state and federal judges acknowledge the legitimacy of their exercise of jurisdiction and second that they perceive the issues at stake as worth the effort and time.

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[380] See id. at 1036.

[381] Two well-known examples are the New York asbestos litigation in which Judge Helen E. Freedman, of the Supreme Court of New York, and Judge Jack Weinstein, of the United States District Court for the Eastern District of New York, sat together, see In re Joint E. & S. Dists. Asbestos Litigation, No. 40000, 1990 U.S. Dist. LEXIS 7578 (E.D.N.Y. 1990) (documents on file with author), and the work of federal and state judges in the collapse of a building in Bridgeport, Connecticut, see Lucy Katz, The L'Ambiance Plaza Mediation: A Case Study in Judicial Settlement of Mass Torts, 5 Ohio St. J. Disp. Resol. 277 (1990) (describing efforts of Judges Robert C. Zampano of United States District Court for District of Connecticut and Frank S. Meadow of Connecticut Superior Court to resolve L'Ambiance Plaza tort litigation).

[382] See Chief Justice McKusick, Combining Resources, Nat'l L.J., Nov. 19, 1990, at 13 (describing creation of National Federal-State Judicial Council by Conference of Chief Justices and Judicial Conference of United States, and suggesting that "war on drugs" and mass-tort cases might be arenas in which to work cooperatively).

[383] See Resnik, From "Cases" to "Litigation," supra note 349, at 36-39 (discussing judicial and lawyer innovations that permit informal aggregate processing of cases).

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These are some of the doctrinal possibilities, but potentially creative opportunities cannot be taken under current circumstances. Given the history of federal judicial disdain for family law issues, federal judges have been reluctant to acknowledge their capacity to work in this area. While some who believe that the federal judiciary is now hostile to civil rights enforcement might be eager to hide behind any label that divests federal courts of jurisdiction, for me the "domestic relations" exception no longer suffices to code activity as outside federal court authority. The burden of reasoning (imposed in other areas when federal courts decline, in the name of comity and "our federalism," the exercise of jurisdiction[384]) is required.

B. A State-Federal Dialogue on Gender

Doctrinal shifts cannot happen without a concomitant documentation of women's presence as federal litigants, of women's presence as federal workers, mostly at the lower echelons of the courts, and of women's absence from contemporary materials about the federal courts, all of which might result in sustained inquiry about discrimination against women in federal courts. While state court gender bias studies have assumed women's presence and moved on to explore the implications, studies in the federal system will have to trace women's presences and absences to understand the operation of gender in the federal courts. Federal courts will have to confront not only the data about workplaces, courtroom interaction, and substantive law, but also the very nature of their jurisdictional rules and the separate spheres ideology to which those rules are wedded.

Federal court inquiry into gender bias may take the courts deeper into an understanding of their own limits, for part of that inquiry requires asking about the past disinterest in raising such questions. I began by considering why states moved ahead of the federal courts in gender bias studies, but thus far I have answered only by explaining why the federal courts were behind. I can only suggest paths of inquiry about what, in the "nature" of state law, jurisdiction, and ideology or in the

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384 One approach, explored to some extent in the Court's decision in *Ankenbrandt*, 60 U.S.L.W. at 4537, and in Justice Blackmun's concurrence, 60 U.S.L.W. at 4537, 4539-40, would be to consider whether to abstain under the current doctrinal parameters of Younger v. Harris, 401 U.S. 37, 44-45 (1971) (used when there are pending state court or administrative proceedings that are "judicial in nature"); or New Orleans Pub. Serv. v. Council of the City of New Orleans, 491 U.S. 350, 364 (1989) and Louisiana Power & Light Co. v. City of Thibodaux, 360 U.S. 25, 30-31 (1959) (invoked as so-called "administrative abstention" in which areas of particular interest to the states—like eminent domain or natural resources—might form a predicate for federal court inaction); or Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974) (relied upon in a diversity litigation in which state legal rules were hard to foresee).

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selection of state judges, enabled those judiciaries to be more responsive to concerns of discrimination. Perhaps state judges are more open to perceiving themselves as in need of education (in general) than are article III judges. Perhaps state judges, many of whom are elected, are more concerned about the administration of justice and the perceptions of justice in their courts. Perhaps state judges are more committed to equality norms. Perhaps the activity of ruling on events so vividly bound up with gender construction generated interest. Perhaps the work did not initiate with the judiciary but from outside it. Because state and local governments include more women and men of color and white women, those voices might have been heard more easily. Perhaps law firms, public sector lawyers, law professors, and litigants have played critical roles. Perhaps the women and men who organized to oppose discrimination in and by courts thought state judiciaries more accessible than the federal courts.

Federal court investigation of gender permits not only self-reflection and structural comparisons with state court systems but also an opportunity to decide what aspects of gender to consider. Once the troubling equation of "women" with "families" and the accompanying assumption of the absence of family matters from the federal courts are underscored, the question of what stance to take about the linkage of women and family life emerges. Women, by law, have been specially disabled when in families; until relatively recently, with marriage came the loss of a woman's juridical voice. Thus, linking women to their roles in families is fair when seeking to understand the impact of many laws on women.

However, families are by no means the totality of women's existence nor of their relationship to law. Moreover, the world of "domestic relations," equated in jurisdictional rules with issues of heterosexual marriage, support, and child custody, and framed by implicit assumptions about class and race, is itself too narrow. Domestic relations encompass much more, including the interaction between federal and state economic and constitutional regulation of the relations among current and former family members.[385] Those coming from the perspective of family law as an academic discipline recognize that federal law now "mandate[s] *nationally uniform, federal* answers to many basic policy issues in family

[385] See, e.g., Homer H. Clark, Jr. & Carol Glowinsky, Cases and Problems on Domestic Relations (4th ed. 1990) (including discussions of law of procreative choice, child abuse, legal status of married women, and impact of federal taxation on divorce); Krause, supra note 375 (discussing tort and criminal law in context of family relations, bankruptcy, "the inevitability of federal involvement" in federal policy, and legal rights of women); Walter Wadlington, Cases and Other Materials on Domestic Relations (2d ed. 1990) (including discussions on procreation, abuse, bankruptcy, social security benefits, and tax laws).

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law."[386] However, federal courts jurisprudence has not yet seen through the nineteenth-century layers (women in families, families constituted narrowly, state courts' governance of families) that continue to obscure twentieth-century federal court involvement with the family.[387]

But the federal courts do not alone shoulder the responsibility for having failed to see the changing governance of family life. Not only have federal judges and federal courts scholars assumed the absence of federal laws of the family, state courts have claimed a corresponding special relationship to family life, and that claim is grounded in both practice and ideology. While I have spent many pages emphasizing the ways in which state and federal courts share control over family life, the purpose was not to conflate the two. Federal judges do not regularly decide the custodial relations of children of divorcing parents; federal judges do not see many of the problems common in juvenile detention; and federal judges do not determine adoption or the rules, at first instance, of the allocation of property at divorce.

Moreover, gender bias studies in state courts themselves have assumed and underscored the special relationship between state law and families. Although gender bias studies are relatively new, a "tradition" has emerged, in large measure guided by a 1986 Manual for operating gender bias task forces.[388] One aspect of that effort is heroic. All of these task forces break with the conventional understanding of the administration of justice in the United States, which has been reluctant to consider discrimination by the legal system against categories of individuals and its effect on individual cases.[389] While invoking the aspirations

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386 H. Krause, supra note 376, at 294 (emphasis in original).

387 See generally M. Grossberg, supra note 355, at x, 289-307 (tracing role of 19th-century state appellate judges in creating body of law and policies "spacious enough to accommodate the diversity of interests . . . yet cohesive enough to establish a national standard of domestic governance."). Today's "buzz" word "diversity" may have special meaning within debates about the breadth and role of "diversity jurisdiction" in that excluding cases in which domestic relations issues are raised is a way to make "diversity jurisdiction" less "diverse."

That federal courts jurisprudence clings to earlier images is not surprising, nor unique to this context. This critique of federal courts jurisprudence, with its difficulty in taking into account the altered role of the federal government, parallels the history of the contemporary course, as described by Akhil Amar, who, in his review of the 1988 edition of the Hart and Wechsler casebook described the first edition's 1953 framework and its 1973 revision for failing to take into account the transformations of first the New Deal and then the federalism of the post-Brown v. Board of Education era. See Amar, supra note 155, at 702-11.

388 L. Schafran & N. Wikler, supra note 43. The manual provides a wealth of suggestions about how to enlist support, collect data, disseminate findings, and set up a structure for ongoing distribution of information, for implementation of reform, and for monitoring of changes. See id. at 5-8 (summarizing the suggestions). For commentary on its approach, see generally J. Entmacher, supra note 67.

389 See McClesky v. Kemp, 481 U.S. 279, 292-97 (1987) (refusing to recognize systemic racial prejudice in sentencing and insisting on proof of discrimination in individual cases).

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of impartial justice, gender bias task forces challenge that assumption and obtain admissions by senior court officials of partial justice.[390]

But, at the same time and perhaps in part because of the nature of the challenge made, state task forces have kept a limited focus; much of the work is about women *in* families. That Manual highlights topics to be addressed by several state task forces; in addition to courtroom interaction and the court as employer, the substantive legal issues proposed are "domestic abuse," "alimony," and "juvenile justice."[391] State task force reports echo that emphasis. All of the chapters of Maryland's report (other than those dealing with courtroom interaction, selection of judges, and treatment of employees) address issues of domestic life and violence.[392] Connecticut's Task Force created subcommittees on courtroom interaction, women attorneys, public hearings, and court administration; the areas of law addressed were "family law" and "domestic violence."[393] Utah's and Nevada's Task Forces have taken similar approaches.[394] While several state reports (particularly the more recently published ones) have pushed beyond these parameters, to consider civil damage awards,[395] employment law,[396] prostitution,[397] sentencing,[398]

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390 See, e.g., Sol Wachtler, The Lady in the Harbor and the Lady in Albany—Two Symbols of Freedom, 15 Fordham Urb. L.J., 3, 3 (1986-1987) (Chief Judge of New York Court of Appeals analogizing between legal reforms and Statute of Liberty in their common aspirations to "eradicate ethnic prejudice," and their common inability to remove all bias).

391 L. Schafran & N. Wikler, supra note 43, at 24-25.

392 See Maryland Task Force Report, supra note 39. Table of Contents ("Chapter I. Domestic Violence; Chapter II. Child Custody and Visitation; Chapter III. Child Support; Chapter IV. Alimony; Property Disposition and Litigation Expenses").

393 See Connecticut Task Force Report, supra note 11 (List of Task Force Subcommittees on unnumbered prefacatory page).

394 Justice for Women, Nevada Supreme Court Gender Bias Task Force i-ii (1988) [hereinafter Nevada Task Force Report] (addressing divorce, domestic violence and courtroom interaction); Utah Task Force Report, supra note 39, at iii (addressing courtroom interaction and employment).

395 Gender and Justice in the Colorado Courts, Colorado Supreme Court Task Force on Gender Bias in the Courts 104-05 (1990) [hereinafter Colorado Task Force Report]; Illinois Task Force Report, supra note 76, at 177-97; Equal Justice for Women and Men, Kentucky Task Force on Gender Fairness in the Courts 40-41 (1992) [hereinafter Kentucky Task Force Report]; Report of the Gender Bias Study of the Supreme Judicial Court, Commonwealth of Massachusetts 135-39 (1989) [hereinafter Massachussetts Task Force Report]; Minnesota Task Force Report, supra note 44, at 913-17; New Jersey Task Force Report, supra note 9, 25; New York Report, supra note 11, at 81-83; Rhode Island Task Force Report, supra note 41, at 31; Vermont Task Force Report, supra note 76, at 148-54; Final Report of the Washington State Task Force on Gender and Justice in the Courts 83-107 (1989) [hereinafter Washington Task Force Report]; Wisconsin Equal Justice Task Force Final Report 25-28 (1991) [hereinafter Wisconsin Task Force Report].

396 See Minnesota Task Force Report, supra note 44, at 917-22; Wisconsin Task Force Report, supra note 395, at 34-39.

397 See Florida Task Force Report, supra note 39, at 162-82; Kentucky Task Force Report, supra note 395, at 36; Wisconsin Task Force Report, supra note 395, at 89.

398 Draft California Task Force Report, supra note 44, § 7; Florida Task Force Report,

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correctional facilities,[399] and court awarded attorneys' fees,[400] even in those reports the bulk of the discussion remains on domestic and criminal law.[401] While federal judges might have seen the obviously shared concerns about courtroom interaction, treatment of women lawyers, and employment, both the Manual's topics and reports from many states may reinforce the federal judiciary's sense that the substantive law covered as "women's problems" are not ones relevant to the federal courts.

Thinking about gender bias in the federal system may help the state court task forces to move beyond their emphases on families, criminal justice, and violence. While laudable to start with issues central to the daily experiences of women, state task forces have sometimes stopped with the placement of women in families and have not explored bias much beyond those parameters. The social construction of gender and the intersections of race and gender are not uniformly pursued; most data are provided about "women" rather than about groups of women identified by race,[402] class, and sexual orientation.[403] Families themselves are

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supra note 39, at 91; Gender and Justice in the Courts: A Report to the Supreme Court of Georgia 133-45 (1991) [hereinafter Georgia Task Force Report]; Kentucky Task Force Report, supra note 395, at 34; Massachussetts Task Force Report, supra note 395, at 117-21; Minnesota Task Force Report, supra note 44, at 906-07.

399 Draft California Task Force Report, supra note 44, § 1, at 20; Florida Task Force Report, supra note 39, at 209; Massachussetts Task Force Report, supra note 395, at 153; Michigan Task Force Report, supra note 41, at 88; Minnesota Task Force Report, supra note 44, at 920; New Jersey Task Force Report, supra note 9, at 18-19; New York Task Force Report, supra note 11, at 150; Utah Task Force Report, supra note 39, at 101; Washington Task Force Report, supra note 395, at 99-104.

400 See Washington Task Force Report, supra note 395, at 99-102.

401 See Appendix I (Topics Addressed by State Gender Bias Task Forces) and Appendix V (Topics Addressed by Race and Ethnic Bias Task Forces).

402 The National Conference of Chief Justices urged that states create two task forces, one devoted to gender and the other devoted to race/ethnic bias. See Resolution XVIII, supra note 38. This proposal conforms to the Manual for Action, see L. Schafran & N. Wikler, supra note 43, at 6-7, which urged gender task forces to be sensitive to issues of race and ethnicity, and the like, but not to dilute their focus by studying too many kinds of discrimination at once.

Task forces have responded in a variety of ways. Only the California Task Force Report has a section devoted specifically to the distinct issues of women of color. Draft California Task Force Report, supra note 44, § 10. A few other reports also discuss the topic. For example, the Kentucky Task Force Report found that "minority women law professors encounter even greater barriers to advancement [than white women professors]," "black women were less likely to receive alimony than white women" and describing one study that found that while 42% of black women apprehended for shoplifting were officially charged, only 8.8% of white women so apprehended were charged. Kentucky Task Force Report, supra note 395, at 8, 22, 35. The Connecticut Task Force Report examined sentencing to determine whether gender and race had any impact and found that "holding constant the relevant control variables, black and latin defendants were more likely than whites to receive a fair sentence" and "black women's average sentence length was 10.5 months longer than white women's." Connecticut Task Force Report, supra note 11, at 82-83.

Other reports, while not exploring the issues of women of color, make note of the prob-

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understood in only traditional terms. Thus far, state task force reports have not taken on the interdependency of gender bias and of discrimination based on sexual orientation, which often cabins women and men in

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lem. See, e.g., Illinois Task Force Report, supra note 76, at 224 (noting testimony received that "this problem [derogatory comments by judges] is even more severe for African-American women, who suffer from the double burden of race and gender bias."); New York Task Force Report, supra note 11, at 121 (noting anecdotal evidence that race and economic status negatively affect credibility and respect in the courtroom); Maryland Task Force Report, supra note 39, at 1 ("While the Committee's mandate was to investigate gender bias, evidence of racial bias also came to the attention of the Committee."). In both the Draft California Task Force Report and the Massachusetts Task Force Report, the gender bias task forces proposed creation of race/ethnic bias task forces. See Draft California Task Force Report, supra note 44, § 10, at 3-4; Massachusetts Task Force Report, supra note 395, at 166. The California report stressed its concerns with the "limitations" of its focus. See Draft California Task Force Report, supra note 44, § 10, at 3.

Michigan and Washington had Task Forces, operating at the same time, on gender bias and on race/ethnic bias. See Michigan Task Force Report, supra note 41, at 1; Washington Task Force Report, supra note 395, at 3.

As of this writing, five state task forces on race have published reports: Florida Racial and Ethnic Bias Study Commission Report (Part I, Dec. 11, 1990; Part II, Dec. 11, 1991); Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts (Dec. 1991); New Jersey Supreme Court Task Force on Minority Concerns (Interim Report, Aug. 1989), Report of the New York State Judicial Commission on Minorities (in four volumes, Apr., 1991); Washington State Minority and Justice Task Force Report (Dec. 1990). Of these, three identify the problems of women of color. See, e.g., Florida, Part I at 8-9 (identifying topic for future reporting); Part II at 49-60 (report on status of minority women attorneys in Florida in relation to male and white female attorneys); Michigan, at 22-30 (dual burden of minority female attorneys in comparison to minority male and white female attorneys); Washington, at 65-67 (bar graphs and charts illustrate distinct burdens of minority women). See generally Appendix V (Topics Addressed by State Race and Ethnic Task Forces).

403 Five reports mention lesbians and gays. See Draft California Task Force Report, supra note 44, § 4, at 33, 62 (proposed rules of judicial conduct to prevent discrimination based on sexual orientation, as well as race, gender, and ethnicity); Georgia Task Force Report, supra note 398, at 185 (citing newspaper article that judges took "sexual lifestyle of custodial parent" into account and tended to deny custody to gay women regardless of parenting skills . . . ."); Massachusetts Task Force Report, supra note 395, at 65, 76 n.56 (sexual activity of women less relevant in child custody than it used to be but one fifth of lawyers answering questions reported that judges discriminated against "lesbian or gay parents"), id. at 81, 90, 98 (finding that victims of domestic violence "are still confronted with treatment reflecting racial and ethnic bias, as well as bias against homosexuals" and recommending education against such stereotyping); Vermont Task Force Report, supra note 76, at 45 (recommending that the Code of Judicial Conduct be amended to prohibit judges from discriminating based on "race, sex, religion, national origin, disability, age, sexual orientation, or socio-economic status" and noting that House of Delegates of American Bar Association adopted model code with these provisions); Wisconsin Task Force Report, supra note 395, at 156 (Domestic Abuse Subcommittee Report stated: "Care must be taken to treat [litigants] who are gay or lesbian with the same courtesy and professionalism as other parties. Wisconsin statutes do not differentiate between opposite-gender and same-gender parties."); see also Susan H. Russell & Cynthia L. Williamson, Demographic Survey of the State Bar of California 6-7 (Aug. 1991) (membership survey, undertaken by the California Bar in spring of 1991, which asked: "Do you consider yourself to be a member of the gay, lesbian, or bisexual community?"; 3% of respondents answered affirmatively).

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stereotypical roles.[404]

The decisions to approach gender bias by focusing on women in traditional roles have been founded not only on the import of legal control over families to women's lives but also on the relative ease of studying such issues.[405] Keeping women in families remains politically safe and sometimes palatable.[406] The task forces have not chosen the "oppression of women" or the "patriarchy" as their topics. Rather, the focus has been on courtroom interaction, the court as employer, and on the substantive laws of the family and criminal justice.[407] Given the family orientation of state gender bias task forces, work on gender bias in the federal context—seen to be far away from family life—may provide an opportunity to locate women in many settings, of which the family is

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[404] See generally Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 Wis. L. Rev. 187 (roots of discrimination against lesbians and gays are based on patriarchal attitudes towards women and insistence on gender-specific roles). The ongoing practice of gender and class stereotyping by dress codes that prohibit women lawyers from wearing pants (or "pant suits") also has not been discussed much by state reports. While one might debate the importance of ceremonial dress in courts, it is difficult to make a claim that women must remain in nineteenth-century garb to be appropriately dressed "for" court. In 1991, the Committee on Professional Ethics of the New York County Lawyers' Association concluded that a woman who wears "an appropriately tailored pants suit" has not violated the Code of Professional Responsibility. See Martin Fox, Bar Panel Tackles Sticky Issue of Appropriate Garb for Women, N.Y.L.J., Dec. 23, 1991, at 1. In the 1970s, Florynce Kennedy, expelled by a judge because she wore a pants suit to court, is claimed to have said: "What makes that man in drag think he can tell me what to wear?"

[405] Access to information plays a central role in agenda-setting. The study of the impact of litigation is very difficult in a world of many variables and poor record-keeping. Getting information on alimony awards and custody arrangements may be easier than finding sets of cases less obviously gendered and attempting to understand the impact of gender roles on outcomes or process. See, e.g., Minnesota Supreme Court Task Force Report, supra note 44, at 838 ("In several areas of civil justice, suspected issues proved almost impossible to document. Information about gender disparities in civil damage awards, based on undervaluation of women's economic contributions or potential, either is not regularly compiled or is held by inaccessible private sources."). This is not to say that any gender bias task force has an "easy" time; as Lynn Hecht Schafran reports, alimony and custody records are often "non-existent or sealed or both." Letter to author (Jan. 7, 1992) (on file with author). The lack of interest (until recently) about gender bias has resulted in the absence of data collected in a manner that permits ready access, even in those areas in which the possibility of gender-based discrimination is obvious.

[406] The Manual for Action, see L. Schafran & N. Wikler, supra note 43, at 5, stressed the importance of obtaining official judicial support for the effort. Chief justices of state courts might not have readily embraced more explicitly radical approaches. Compare, for example, the reception accorded to feminist theories sometimes labeled "cultural feminism" that consider women's "differences," see, e.g., Carol Gilligan, Moral Orientation and Moral Development, in Woman and Moral Theory (Eva Feder Kittay & Diana T. Meyers eds., 1987), with those theories labeled "radical feminism" and challenging male "domination." See, e.g., Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law 32-45 (1987).

[407] See J. Entmacher, supra note 67, at 12-14; Appendix I (Topics Addressed by State Gender Bias Task Forces); Appendix II (Portions of Reports Devoted to Specific Topics in State Gender Bias Task Forces).

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only one. Further, given the centrality of civil rights litigation to the federal court persona, federal gender bias work might be able to focus attention on the interaction between race and gender.

To the extent such an opportunity exists, impressing the federal courts that they, like the states, deal with family law may prove to be a diversion. Federal gender bias task forces might be led to mimic state efforts and document women's worlds as family worlds, rather than expand both the range of topics addressed (to look at women as litigants in environmental cases, as consumers, as creditors and debtors in bankruptcy, as tort victims and alleged harmdoers, and as plaintiffs and defendants throughout the civil and criminal docket) and the women considered (to understand the distinctive and the shared experiences of straight women, lesbian women, and women of color).

This acknowledgement of the full range of women's lives (and the disputes that result) must include public and private worlds. Federal jurisprudence's rejection of jurisdiction on the domestic side limits its willingness to inquire about the effects of federal law on women in all aspects of life. That ideology haunts contemporary debates, once again framed in jurisdictional terms, about women and the federal courts. Today's leaders of the federal courts reaffirm their commitment to a legal system in which they have no obligation for "domestic relations." In 1991 and 1992, spokespersons for the federal judiciary are lobbying hard against the federal jurisdictional provisions of the Violence Against Women Act[408] that would give parties "federal questions" and thus presumptive access to the federal courts.[409] These same spokepersons stand silent about the Act's provisions to educate them about gender bias.

It is not happenstance that these disputes are about federal courts, women, and jurisdiction. Women's unexamined presence in the law and jurisprudence of the federal courts bespeaks hostility to seeing women as legitimate participants in the national world—in this context represented by the federal courts. The debate about the pending legislation and the arguments about the pending cases will be affected by disclaimers from federal judges of knowledge, expertise, experience, and competency in making decisions that affect family life. Federal courts' jurisprudence helps hide both federal court jurisdiction over families and the role the federal judiciary has played in limiting access to federal courts. While

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[408] See note 18 supra; see also Rorie Sherman, Fears Expressed on Proposed Bill to Aid Women, Nat'l L.J., June 3, 1991, at 3 (noting lobbying against legislation by Department of Justice as well). As of February of 1992, the American Bar Association had not taken a position on the Violence Against Women Act. See Letter from Talbot D'Alemberte, President of the ABA, to Senator Joseph Biden (Feb. 5, 1992) (on file with author).

[409] See Meltzer, supra note 167, at 431 ("parties with federal questions belong in federal court.").

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contemporary federal judicial distress about congressional efforts to enlarge federal courts' jurisdiction is in no way limited to women's rights,[410] no such "gender-neutral" explanation is available for the failure of the federal judiciary to endorse the provisions of pending legislation that fund judicial studies of and education about gender.[411]

Attitudes of the federal judiciary towards family law and towards women's roles in the federal courts will not shift without self-conscious decisions to reconsider both past and present. The federal judiciary and its commentators must reclaim the history heretofore denied about the ongoing relations of the federal courts with family life. Federal judges need to turn to state courts for guidance and insight in exploring both family issues and the bias that surrounds them. Federal judges will also need support, from scholars of the federal courts, in development of theories of jurisdiction that incorporate and delineate roles for state and federal legislatures and courts as they work simultaneously on family life. We need to take up the question of how federal and state courts share jurisdiction over the family, just as these courts share jurisdiction over civil rights, criminal law, land use, and other substantive areas.

Exploration of the "nature of federal law" thus illuminates the multitude of roles for women in federal courts and the many roles of the federal courts in women's lives. The imagined stability of state jurisdictional control over family law is thus shaken. What remains is the difficult task of exploring the myriad ways in which the "nature of federal law" is itself a source of bias against women and the ways in which the "quality of the federal bench" fails to cushion that bias. The shared work of clarifying how such bias works, in both state and federal courts, awaits.

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410 See Gwen Ifill, Rehnquist Opposes Bill to Replace Local Prosecution of Gun Crimes, N.Y. Times, Sept. 21, 1991, at A8 (Chief Justice informed Congress that such measures "would provide for Federal jurisdiction over offenses traditionally reserved for state prosecution"; accompanying that letter was Judicial Conference statement, complaining that so-called "D'Amato legislation" would "swamp the Federal courts with routine cases that states are better equipped to handle"); see also 1991 Year-End Report, supra note 25, at 3 (opposing this legislation and stating that "additions [to federal jurisdiction] should not be made unless critical to meeting important national interests which cannot be satisfactorily addressed through non-judicial forums, alternative dispute resolution techniques, or the state courts").

411 The Judicial Conference officially opposes Title III of the Violence Against Women Act, which is the section devoted to new federal civil rights jurisdiction. See notes 22-26 and accompanying text supra. As of this writing, the National Association of Women Judges is considering taking a position on the Violence Against Women Act, and to my knowledge, Title V, which funds education on gender bias, has received no endorsements from any official judicial organization or lobbying group that has commented on the act.

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APPENDIX I

APPENDIX I
TOPICS ADDRESSED BY STATE GENDER BIAS TASK FORCES

Dates of Reports	TOTAL	CA	CO	CON	FL	GE	ILL	KY	MAR	MAS	MI	MIN	NEV	NJ	NY	RI	UT	VT	WAS	WIS
TOPICS		1986	1990	1991	1990	1991	1990	1992	1989	1989	1989	1989	1988	1986	1986	1987	1990	1991	1989	1991
I. Access to the Legal System	13	X			X		X	X	X	X		X	X		X		X	X	X	X
II. Gender Neutral Language																				
A. Jury Instructions	10	X		X		X	X		X						X	X		X	X	X
B. Court Documents	15	X		X	X	X	X	X	X		X	X		X	X	X	X	X	X	X
C. Laws	7	X		X	X									X		X		X	X	X
III. Family Law																				
A. Child Custody	19	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
B. Child Support	19	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
C. Alimony	19	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
D. Devaluation of Family Law	5	X		X	X					X				X						
IV. Criminal Law																				
A. Domestic Violence	19	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
1. Battered Wife Syndrome	7			X	X	X	X		X	X					X					
B. Sexual Abuse	15		X	X	X	X	X	X		X	X	X		X	X		X	X	X	X
C. Juvenile Offenders	9	X		X	X	X		X		X		X		X						
D. Sentencing and Probation	15	X	X	X	X	X	X	X	X	X	X	X		X		X		X		X
E. Correctional Facilities	6	X			X	X		X		X		X								
F. Post Incarceration	3	X			X	X														
G. Prostitution	3				X			X												X
V. Civil Law																				
A. Damage Awards	12		X				X	X		X		X		X	X	X		X	X	X
B. Employment Law	3											X						X	X	X
VI. Courtroom Interaction																				
A. Gender of Attorney	19	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
B. Gender of Witness	16	X		X	X	X	X		X	X	X	X	X	X	X	X	X	X	X	X
C. Court Awarded Attorney Fees	10	X			X						X	X	X	X	X	X	X		X	
D. Court Appointed Positions	8	X			X					X	X	X		X	X	X				
VII. Judges																				
A. Selection	13	X	X	X	X		X	X	X	X		X		X	X		X	X		
B Membership in Male Only Clubs	7	X	X	X	X						X							X	X	
VIII. Court Employment																				
A. Job Segregation/Economic Disc.	14	X	X			X		X	X	X	X	X		X	X	X	X	X	X	
B Sexual Harassment	12	X	X						X	X	X	X		X	X	X	X	X		X
IX. Bias Categories In Addition to Women																				
A Men	15	X	X	X	X	X	X	X	X	X		X			X		X	X	X	X
B Racial Bias	8	X		X			X	X	X	X	X				X					
C Gays and Lesbians	5	X				X				X								X		X
X. Other Aspects of Legal Practice																				
A Private Law Firms	6	X			X			X			X			X		X				
B Law Schools	7	X		X	X			X			X			X		X				

Source: Individual State Gender Bias Task Force Reports Referenced in Footnotes Date: All State Gender Bias Reports Published as of March 31, 1992

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APPENDIX II
PORTIONS OF REPORTS DEVOTED TO SPECIFIC TOPICS IN STATE GENDER BIAS TASK FORCES

	CA		CO		CON		FL		GE		ILL	
	#p.	%	#p.	%	#p.	%	#p.	%	#p.	%	#p.	%
Family Law and Domestic Violence	198	40 %	84	57%	56	45%	91	45%	136	43%	93	43%
Criminal Law	91	18%	15	10%	40	32%	60	30%	86	27%	49	23%
Courtroom Interaction & Employment	173	35 %	39	27 %	28	23%	14	7%	34	11%	37	17%
Misc.	30	7%	9	6%	0	0%	37	18%	60	19%	37	17%
TOTAL	492	100%	147	100%	124	100%	202	100%	316	100%	216	100%

	KY		MAR		MASS		MICH		MINN		NEV	
	#p.	%	#p.	%	#p.	%	#p.	%	#p.	%	#p.	%
Family Law and Domestic Violence	17	49%	74	57%	85	46%	50	44%	5	9%	71	92%
Criminal Law	3	9%	0	0%	31	17%	4	4%	14	26%	0	0%
Courtroom Interaction & Employment	5	14%	56	43%	62	34%	31	27%	23	43%	6	8%
Misc.	10	28%	0	0%	6	3%	29	25%	11	22%	0	0%
TOTAL	35	100%	130	100%	184	100%	114	100%	53	100 %	77	100%

	NJ		NY		RI		UT		VT		WAS	
	#p.	%	#p.	%	#p.	%	#p.	%	#p.	%	#p.	%
Family Law and Domestic Violence	50	65%	69	52%	14	36%	44	46%	56	32%	58	47%
Criminal Law	4	5%	14	11%	1	3%	14	15%	10	6%	10	8%
Courtroom Interaction & Employment	14	18%	40	30%	20	51%	38	39%	44	26%	30	24%
Misc.	9	12%	10	7%	4	10%	0	0%	62	36%	26	21%
TOTAL	77	100%	133	100%	39	100%	96	100%	172	100%	124	100%

	WIS	
	#p.	%
Family Law and Domestic Violence	121	53%
Criminal Law	54	24%
Courtroom Interaction & Employment	0	0%
Misc.	52	23%
TOTAL	227	100%

Source: Individual State Gender Bias Task Force Reports Referenced in Footnotes

Date: All State Gender Bias Reports Published as of March 31, 1992

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APPENDIX III
GENDER AND THE ARTICLE III JUDICIARY
AS OF MAY, 1991

	1st Circuit	2nd Circuit	3rd Circuit	4th Circuit	5th Circuit	6th Circuit	7th Circuit	8th Circuit	9th Circuit	10th Circuit	11th Circuit	Federal Circuit	D.C. Ct. of App.	Total
U.S. COURT OF APPEALS														
ACTIVE AND SENIOR JUDGES AS OF MAY 1991														
Men	8	17	15	13	19	21	14	15	33	11	18	16	11	211
Women	0	1	2	0	2	1	0	0	5	2	1	2	3	19
% Women	0%	6%	13%	0%	11%	5%	0%	0%	15%	18%	6%	13%	27%	9%
ACTIVE JUDGES														
Men	5	11	8	11	11	12	11	10	22	8	10	9	9	137
Women	0	1	2	0	2	1	0	0	5	2	1	2	3	19
% Women	0%	9%	25%	0%	18%	8%	0%	0%	23%	25%	20%	22%	33%	14%
SENIOR JUDGES														
Men	3	6	7	2	8	9	3	5	11	3	8	7	2	74
Women	0	0	0	0	0	0	0	0	0	0	0	0	0	0
% Women	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%	0%
U.S. DISTRICT COURTS														
ACTIVE AND SENIOR JUDGES AS OF MAY 1991														
Men	27	67	65	58	72	63	50	57	110	50	64		19	702
Women	2	7	5	3	3	5	5	3	9	1	5		3	51
% Women	7%	9%	7%	5%	4%	7%	9%	5%	8%	2%	7%		14%	7%
ACTIVE JUDGES														
Men	22	40	40	40	57	48	38	37	69	32	48		12	483
Women	2	6	5	3	3	5	5	1	9	1	5		2	47
% Women	8%	13%	11%	7%	5%	9%	12%	3%	12%	3%	9%		14%	9%
SENIOR JUDGES														
Men	5	27	25	18	15	15	12	20	41	18	16		7	219
Women	0	1	0	0	0	0	0	2	0	0	0		1	4
% Women	0%	4%	0%	0%	0%	0%	0%	9%	0%	0%	0%		12%	2%

Source: United States Court Directory (Spring 1991)

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APPENDIX IV

APPENDIX IV
GENDER AND THE STATE JUDICIARIES

	CO	CONN	KY	MD	MASS	MICH	MINN	NY	UT
Date	Feb-90	*	*	Jan-91	Nov-88	*-88	Jun-89	Fall-85	*
Highest Court									
Men	6	6	*	19	52	5	5	6	4
Women	1	1	0	1	8	2	2	1	1
% Women	14%	14%		5%	13%	29%	29%	14%	20%
Intermediary Court									
Men	13	8	*	100	136	19	10	39	5
Women	3	1	1	10	10	5	3	5	2
% Women	19%	11%		9%	7%	21%	23%	11%	29%
Trial Court									
Men	175	223	*	84	47	492	206	946	74
Women	29	60	13	8	12	64	24	100	4
% Women	14%	21%		9%	20%	12%	10%	10%	5%
Total Men	194	237	217	203	235	508	221	991	83
Total Women	33	62	17	19	30	73	29	106	7
Total % Women	15%	21%	7%	9%	11%	13%	12%	10%	8%
* Information not provided in report									

Source: Some of the 19 state gender bias task force reports provide data on the percentage of women and men in their courts. A summary of that data is in the above table, compiled from the state gender bias reports of the respective states.

Date: All State Gender Bias Reports Published as of March 31, 1992

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APPENDIX V

APPENDIX V
TOPICS ADDRESSED BY STATE RACE AND ETHNIC TASK FORCES

	TOTAL	FLORIDA 1*	FLORIDA 2*	MICHIGAN	NEW JERSEY	NEW YORK	WASHINGTON
I. Access to Legal System							
A. Interpreter Problem	5	X	X		X	X	X
B. Police Discrimination	2	X					X
II. Criminal Law							
A. Language Barriers	2		X			X	
B. Juvenile Offenders	2	X			X		
C. Bail	6	X	X	X	X	X	X
D. Sentencing and Probation	6	X	X	X	X	X	X
E. Victims	1						X
F. Cross Racial Eyewitness Identification	1				X		
III. Civil Law							
A. Damage Awards	2					X	X
B. Settlements	3			X		X	X
IV. Courtroom Interaction							
A. Race/Ethnicity of Attorney	6	X	X	X	X	X	X
B. Race/Ethnicity of Witness	6	X	X	X	X	X	X
C. Court Awards Fees	0						
D. Court Appointed Positions	5		X	X	X	X	X
V. Judges							
A. Selection	6	X	X	X	X	X	X
B. Clerks	4		X	X	X		X
C. Membership in Clubs that Discriminate	1			X			
VI. Court Employment	6	X	X	X	X	X	X
VII. Bias: Categories In Addition to Women							
A. Gays and Lesbians	2			X		X	
B. Women	4	X	X	X			X
VIII. Other Aspects of Legal Practice							
A. Private Law Firms	4		X	X		X	X
B Law Schools	6	X	X	X	X	X	X
IX. Jury Selection	6	X	X	X	X	X	X
X. Professional Development	5		X	X	X	X	X

* Florida has issued two reports. The first report focused on juvenile offenders, courtroom interaction and law enforcement and was published 12/90. The second report was published 12/91 and focused on women minorities, adult criminal offenders and minority lawyers

Source: Individual State Race and Ethnic Task Force Reports Referenced in Footnotes

Date: All State Race and Ethnic Reports Published as of March 31, 1992

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