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Judging With A Difference

The Honorable Mary M. Schroeder*

My text for this essay is a paraphrase of the words of Mary Robinson, the first woman to serve as President of Ireland and until recently United Nations High Commissioner for Human Rights. Her words have been the credo of the National Association of Women Judges. Mary Robinson said that "the role of women judges is not to feminize the courts but to humanize them."

In looking at what women have already achieved in advancing Mary Robinson's charge to humanize justice, we must bear in mind that, with the notable exception of the Supreme Court of Minnesota a couple of years ago, women are still a small minority of judges in the courts of this country. We have at least advanced from a tiny minority to a small one, but that is all. Whatever changes we wish to effect can only be accomplished with the support of our male colleagues. One of my favorite examples is an opinion of the Ninth Circuit's a few years ago that coined the phrase "the reasonable woman standard" in employment discrimination cases. The author of the opinion was a man, but I don't think he would have used a woman-oriented standard in a court that was all male. The Supreme Court later changed the phrase to "the reasonable person standard," and I think they rather missed the point.

Women's actual power in the federal courts is small. Let's not forget that in the federal judiciary, only three of the thirteen Circuit Courts have women chief judges. Only five women sit on the Judicial Conference of the United States, which has twenty-seven members and is chaired by the Chief Justice.

Because we have such different backgrounds and experiences, I believe women are less accepting than men of the traditional ways of running courts. Some of the changes we have wrought may seem superficial, but they make a difference. For example, Judge Dorothy Nelson holds a luncheon in her chambers in Pasadena every month during court week for all the judges and their staff. The guests bring their own brown bags, but there is always tea available in a silver tea service. When Judge Roslyn Silver became the first woman district judge in Phoenix, she revolutionized the Wednesday brown bag judges' lunch meetings by bringing home baked cookies—baked by her

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husband, of course. Judge Cynthia Hall has made the grounds of our Pasadena Courthouse a gardener's delight, with flowers for every season.

These are small things. At the same time, many of the changes that "judging with a difference" has brought are profound. I shall point out some of the more important things women judges have done and are doing to humanize the law and the courts. First is the gender fairness movement; second is the work of the National Association of Women Judges and International Association of Women Judges; third is the effort to improve the administration of justice for aliens found near the Mexican border; and finally is a project in the Ninth Circuit to try to provide some assistance for judges with difficulties who are without recourse to knowledgeable, sufficiently confidential, assistance. Spearheaded by women, these developments all exemplify the spirit of "judging with a difference."

The atmospheres of our courtrooms have been changed by the gender fairness and gender bias task forces. They were pioneered by members of the National Association of Women Judges, and particularly Judge Marilyn Loftus, who always credits the support of her male chief judge in New Jersey, Bob Wilentz. Lynn Hecht Schafran's efforts cannot be praised enough. I know that lawyers and judges have recently been concerned about a lack of civility in courtrooms, and that much of the conduct that takes place in depositions is disgraceful. But I doubt that we would be so worried about these problems if it had not been for the work of pioneering judges in studying and remedying overt discrimination in the treatment of women lawyers, litigants, and witnesses inside the courtrooms. We are still working on the more subtle forms of bias that affect advancement opportunities, self-confidence, and career/family management.

In the Ninth Circuit, we had a very successful study on gender fairness in our courts that unearthed real discrepancies, particularly in the area of hiring. That report was thanks in large part to the efforts of Judith Resnik and her friends from the Rand Corporation, particularly Deborah Hensler. But our efforts at implementing changes were not as successful as we would have liked. Judge Marilyn Huff, now Chief Judge of the Southern District of California, was the heroine in the West. She worked indefatigably to design strategies to increase awareness of the problems. She even designed a game of EEO Jeopardy at one of our conferences, to educate judges about the subject in an entertaining way that avoided the sin of "patronizing" that women know all too well. Yet our court was never willing even to let an expert on dealing with discrimination in the workplace come in and discuss the issues with our judges. There is still work to be done.

Our concerns must now also move beyond the borders of our own country to the international sphere. The difficulties that professional women in this country face are minuscule when compared with the difficulties that confront

women judges in other countries, where attitudes may be shaped and reinforced by cultural histories of female repression unknown to most of us. We have much to learn from women who have fought courageously for human rights in systems that do not recognize the judicial independence that we too often take for granted. I recently returned from the International Association of Women Judges Biennial Conference in Dublin and attended the previous conference in 2000 in Buenos Aires. Some attending had spent time in prison for exposing their views and were from countries where women have only recently obtained the right to vote.

At meetings of judges, especially in this country, federal judges often feature a kind of arrogance that would be totally out of place in that gathering of international women judges. While our judges like to brag to each other about having the best judicial system in the world, I came away from the International Association of Women Judges conferences deeply troubled. I am troubled by the open disdain that judges from many other countries have for our system of justice because of our penchant for imposing the death penalty and our failure to ratify treaties recognizing rights of women and children.

A recent project to improve the administration of justice at our Mexican border is not unrelated to these international concerns. A couple of years ago, led by Chief Judge Carolyn King of the Fifth Circuit, the judges of all the federal jurisdictions having borders with Mexico met to try to find solutions to the problems generated by the overwhelming numbers of immigration and drug cases being filed in those districts. More than one-third of all federal prosecutions in this country are filed in the districts bordering Mexico, which are far from the most populous. Hundreds of thousands of aliens are sent back annually without being prosecuted. The point of Judge King's meeting was not merely to get judges and prosecutors and be more efficient in turning people away or putting them in jail. The conference dealt with people issues, such as finding housing, transportation, and security for detainees, providing facilities where the attorneys and defendants can meet, and finding qualified interpreters. These are giant problems, but I am confident they are being addressed in humane terms. Not only is there a woman Chief Judge of the Fifth Circuit (which includes the Texas border), Carolyn King, but there was also a woman Chief Judge of the Tenth Circuit (bordering New Mexico), Stephanie Seymour—who has, in an historic succession, been followed by another woman, Deanell Tacha. There is also a woman Chief Judge of the Southern District of California, Marilyn Huff, whose district includes the busiest border crossing in the United States, if not the world. I have now joined them as Chief Judge of the Ninth Circuit, which includes both the California and the Arizona borders with Mexico.

All of these developments strive for gender, social and ethnic fairness through our courts. The efforts of the IAWJ to educate judges about concerns

common to humanity and the effort in this country to deal in a civilized way with the problem at our Mexican border have the potential to benefit millions of people.

We in the Ninth Circuit are also working to humanize our justice system in the west. We are trying to assist judges and their families. For many years I have been aware of the problems experienced by the lawyers and litigants in the courtrooms of judges who have suffered from some kind of disability, whether it be advancing age and mental deterioration, substance abuse, or a temporary emotional crisis that impinges on the ability to do the work. As a Phoenix lawyer, I heard constant titters about the tipping of a certain federal judge whose penchant for martinis at lunch and whose inattention in the afternoon were obvious to all except, of course, the judge. As I traveled to other locations for depositions or trials, I learned that in just about every jurisdiction there was at least one judge with such a problem. When I became an appellate judge, it was my task to read the transcripts of trials in dozens of courtrooms; I was appalled at the rudeness exhibited by some judges. I recall one case in which the lawyers were arguing with the judge about whether they could have a tape recorder in the courtroom because it was the only way they could make a record for the appellate court on how loud the judge's voice was when he yelled at them.

I knew the way that I occasionally lost my temper at home with my own children, and knew that it happened when I was under particular stress. Yet I discovered that nowhere in the federal system was there any specialized counseling, referral, or consultation service or even a leave policy designed to assist judges under stress, judges with substance abuse problems, or judges suffering from any other kind of physical, mental, or emotional problem.

I resolved that it would be my goal before I became chief judge of the Circuit to get a system in place. My predecessor, Chief Judge Proctor Hug of Nevada, was extremely sympathetic to the project. Under Judge Hug's leadership, our Circuit Judicial Council established a "Judicial Disability Task Force." The chair of the task force was Judge Judith Keep of San Diego.

What the Disability Task Force found was not only that there is no help targeted for judges in the federal system, but that there are very few services for judges in any jurisdiction. In fact, the most comprehensive model that they found was a system in Canada. The only organization in the Ninth Circuit making any real effort to serve stressed-out judges is the State Bar of California.

After talking to experts in many, many fields (I sat in on a sobering session with an expert on dementia and Alzheimer's), Judge Keep's Task Force learned some rather astonishing facts. For example, at the end of 1999, more than a third of the judges in the Ninth Circuit were aged 70 or older, and 49 percent were over 65. Seventy-nine percent of persons who are over 70 have at least

one of the following chronic conditions: arthritis, hypertension, heart disease, diabetes, respiratory disease, stroke or cancer. More than 20 percent of persons between 45 and 64 have such conditions. Clearly, the statistics imply that some of our judges are grappling with such conditions. Unless a judge wishes to retire voluntarily, the only procedure presently available in the federal system to deal with the disabled judge is to file a formal complaint with the Circuit Judicial Council claiming misconduct or disability. The measures the Council provides for dealing with a judge who is disabled or who has misbehaved is to censure the judge or take away the judge's cases. It is a process that is designed not for therapy but for punishment.

The problems are not hypothetical. One of my most cherished colleagues developed blindness from diabetes and yet worked on cases until he passed away a few years ago. Another of my colleagues is presently in a wheelchair due to a degenerative neurological disease. The Chief Judge of one of our District Courts (a woman) called me a few years ago in utter despair about her inability to deal with a colleague who continued to sit on cases despite seriously disabling Alzheimer's Disease.

Our Disability Task Force found that the programs presently available for lawyers and judges in the states, and the programs available for federal employees generally, were not developed specifically for judges and "not designed to handle the diverse disability such as the consequences of strokes or Alzheimer's disease, that the federal judiciary may face because it is composed of older members." The Task Force Report also noted that confidentiality is an absolute must, and a program set up especially for judges is most likely to be perceived as having more confidentiality and be viewed with greater trust than other similar but generalized programs. I like the tone the Task Force Report uses when it notes that

because the current programs were developed for a broader range of participants than judges, they do not take into account the unique position of federal judges, e.g. that federal judges, particularly Article III judges, cannot readily be removed from office, and the unique character traits of judges, e.g. that federal judges are accustomed to being in control.

So true.

The report summarized its findings about specific disabling conditions, including addiction, dementia, depression and stress. The discussion of stress is perfect. "Classic signs of stress include isolation, disregarding social needs and disregarding the needs of the family. Efficiency and capacity for empathy begin to decrease as isolation, irritability, arrogance and forgetfulness increase." Bingo! When judges are in trouble, the system is in trouble.

The report made two central proposals now being implemented, spearheaded by Judge Susan Graber of Oregon. The first is the creation of a 24-hour hotline with a counselor available on the other side for

communications by judges, their families and staff, and with, of course, absolute assurances of confidentiality. The second is education and training for all the Chief Judges in the circuit, or their delegates if they don't want to take on this role themselves. Someone must be able to spot signs of problems in judges, understand intervention techniques, and know the resources available in their communities. Among the issues surfacing early in the implementation process was the need to help judges prepare for retirement. The first conference on this subject is scheduled for the fall of 2002.

This is a big undertaking. It is extremely important. I doubt if there is a single corporation the size of the federal judiciary that does not have some kind of program available to help stressed out or otherwise disabled executives and middle management. That the judiciary, in whom we must trust for decisions about people's lives and freedom, operates without recourse to such services is shocking. And yet I am not entirely optimistic that this report will be implemented and accepted without a struggle. Judges are human and tend to perceive changes in the system as threatening. The more stressed and in need of help that judges are (as the Task Force Report documents), the more arrogant, irritable, isolated and threatened they are going to feel.

Yet I am hopeful, if not unrealistically optimistic, that these proposals will find widespread acceptance. I hope as well that other courts will follow our lead and attempt programs with similar aims. I do not think that it is at all coincidental that women judges have taken the lead in moving us forward in this area. This is not simply because of the traditional notion that women are the caregivers who worry about other people. I think it is because many of the problems judges have relate to stress and isolation, and these are problems to which women judges have been more sensitive than their male colleagues: Women judges' isolation has been greater. I believe, perhaps, in the spirit of "every cloud must have a silver lining," that this negative aspect of "judging with a difference," will turn out in the long run to contribute a positive benefit for all the participants in our legal system. If we are to humanize the courts and the law as Mary Robinson tells us we must, then we must recognize that judges have their share of human disappointment, stress and frailties. We must help them cope.

Let me add a personal note. I am very sensitive to changes that have occurred both in the substance and the administration of the law as they affect women, because of the unusual time in the history of our country when I attended law school. I began law school in 1962, before the Civil Rights Act of 1964 was passed. When I looked for jobs after my first and second year of law school, I found virtually nothing available to me. But by the time that I was looking for a permanent job in the fall of my third year, the Civil Rights Act of 1964 had been passed and President Johnson had issued Executive Orders that were compelling the federal government to hire women. The federal agencies

were beating a path to the doors of the major law schools looking for women and minorities, of which there were, naturally, almost none. As a result, I had the pick of the best of the government jobs, and I owe my career to the enactment and the enforcement of Title VII. I thus learned firsthand what an important role laws *and their enforcement* can have in people's lives and in making our making society fair or unfair. That is why I have been so committed to organizations like NAWJ and the IAWJ, with members committed to trying to open up the system for women to advance professionally. That is why I am happy to have contributed to this symposium.