Gender Bias in Law Explored at Week-Long Symposium

On the heels of Utah's three-year study of gender bias in the judiciary, the Women's Law Forum at BYU devoted a week in November to discussion of an area of prejudice that is alive within, as well as outside, the legal system. The American Trial Lawyers Association (ATLA), the Society of Law and Government, and the Diversity Committee, joined the forum in sponsoring "Gender in Law Week," November 8–15

The Utah Task Force on Gender and Justice delivered its findings several days after Justice Christine Durham of the Supreme Court of Utah addressed faculty, students, and professional counselors. Reviewing the findings of the 1986 report of the New York Task Force on women and the court, Justice Durham noted that women attorneys, through their professionalism, can change things.

Durham said that 18 percent of those in the legal profession are women, and by the year 1995, women will make up one-third of the profession "Assuming that women gain access to decision-making positions in proportion to their entrance into the profession," she asked, "what kinds of changes will women make in the profession?"

Quoting Judge Pat Walt of the D C Circuit, Durham said that the growing number of women lawyers must decide whether it is enough to aim no higher than their male counterparts, "to advocate the same causes, [and] to blink at the same outrages." Echoing Judge Walt, she concluded, "Why should we be any more idealistic about our profession than men are? Perhaps," the judge answered, "because we are women."

"Now the work is there for us to do," challenged Justice Durham Presenting results of the New York Task Force Report on women and the court, she made it clear that there is a need for action "Gender bias in the law and legal system is a matter of national proportions," Durham said She then cited such problems as judges and lawyers being uninformed about the prevalence of domestic violence, the victim's inability to access the court to obtain protection, inequities in the distribution of a family's assets and income upon divorce, and inability of spouses to enforce awards for child support

The report found that some judges and lawyers hold to stereotypes, whether choosing mothers as the preferred custodial parent or relating to women lawyers Widespread problems result from some judges, male attorneys, and court personnel treating women dismissingly and with less tolerance and respect than men

Justice Durham noted that, in spite of stereotyping and favoritism, the "expressive capacities" relegated to women may provide the ethic of care needed to strengthen the quality of life for women, children, and families and create equal justice and social change She asked her audience, "Is this an unrealistic approach to the potential of women in our profession?" Describing "access to power" as a matter of ratio, she maintained that the larger the proportion of women in law, the greater their impact

"Because women compose half the population, any legal issue is a women's issue," noted Durham. She hoped that, as more women begin to have a voice, they will promote excellence and professionalism and make changes in the legal system to protect fairness, equity, and the quality of life for women, children, and families.

In line with Justice Durham's comments, members of the Utah Task Force on Gender and Justice spoke at the close of the week Aileen H. Clyde, Justice Michael Zimmerman, and Judge Pam Greenwood represented the 21 lawyers, judges, court personnel, and community leaders on the task force.

In 1986 Justice Gordon R. Hall, the chief justice of the Supreme Court of Utah, asked Aileen Clyde to chair a task force that would look into the nature and extent of gender bias within the Utah Court System and make recommendations for reform. Mrs. Clyde reported that the task force, after arduous debate, settled on the following definition of gender bias:

Gender bias encompasses society's perception of the value of work assigned to each sex, the myths and misconceptions about the social and economic realities of people's lives, and the stereotypes that society has assigned to the behavior of men and women

Under this definition, gender bias can operate to the detriment of both men and women, although the national and the Utah data show that women are disproportionately affected by gender bias.

"Many people, because of the way they were raised or because of their religious

beliefs, intentionally and unintentionally become involved in gender-biased conduct," Justice Zimmerman said "This tendency to stereotype is a universal human problem, but whatever personal beliefs are, the law must operate to give women and men equal treatment," he emphasized.

Having this definition to frame its inquiry, the task force then held and gathered data from statewide public hearings and confidential meetings. Key information came from a survey of 2,000 Utah attorneys and feedback from court personnel The task force also benefitted from appellate case law studies, personnel data, and studies conducted by other groups

The findings: in courtroom interaction, women lawyers reported that female lawyers, witnesses, and litigants were interrupted more frequently than men Women lawyers who were "helped" by the judge or received other deferential treatment felt their credibility with clients and other lawyers was undermined They also reported receiving fees lower than those paid to men for similar work. Men lawyers reported that there was no gender bias in the courtroom and that deferential treatment given to women gave them an advantage

Both men and women commonly reported that women tend to be addressed by first names or terms of endearment and subjected to comments about physical or sexual attributes or appearance. The report also showed that judges seldom intervened to remedy inappropriate gender-related conduct in the courtroom.

After reviewing the findings of courtroom conduct, the task force made recommendations that judges refrain from any gender-biased conduct and that the bar amend the rules of professional conduct to prohibit attorneys from engaging in inappropriate gender-biased behavior The task force also suggested gathering data to determine whether the gender of the attorney affects fee awards

Another major concern of the task force was the problem of domestic violence "We talk about family and family values in this state, but I'm convinced that we had better just watch it," Mrs. Clyde said, referring to the fact that Utah is right on par with the national average for occurrences of spouse and child abuse.

The task force reported that most victims of domestic violence are women. "Most women who go to the emergency room, go there as victims of domestic violence and more than 40 percent of the women killed in this country each year are killed by their husbands or partners," Justice Zimmerman said

He and Judge Greenwood emphasized that the problem of domestic violence is a complex problem that cannot be solved by the judiciary alone. Still, police and prosecutors serve as "gatekeepers to safety" and have a profound effect on whether victims get access to protection. "Domestic violence cases will never reach the courts unless police arrest and prosecutors charge offenders," Judge Greenwood said. Justice Zimmerman suggested that clergy and laypersons also might be gatekeepers to safety for abused persons "It is important that gatekeepers and [laypersons] do not respond to domestic violence as less serious than similar violence between strangers," he said.

Among the report's many recommendations for reform were: (1) that the state legislature repeal Utah Code Section 76-5-407(1), which prevents prosecution for rape and other violent sexual offenses between married parties, (2) that the community give domestic violence victims more support, (3) that the courts afford victims easier access to the judicial system, (4) that courts and law enforcement cease the practice of issuing mutual protective orders *sua sponte* or on mere oral request by the respondent, and (5) that law schools include information on domestic violence in their curriculum and encourage clinical placements for law students in organizations that help domestic violence victims

Concluding its report, the task force encouraged the audience to read the Utah Task Force on Gender and Justice report and to help educate the public and to reform the law. At the luncheon following the task force report, the panel made a final point—there is not only a need for mutual respect between the sexes but also a need for women to be empowered with choices that avoid exploitive situations.

—Rebecca Slater, Vice President of the Women's Law Forum

Justice Sandra Day O'Connor Chairs Moot Court Finals

The Seventeenth Annual J Reuben Clark Moot Court Finals on January 28, 1991, included some of America's most distinguished jurists The competition was chaired by Justice Sandra Day O'Connor of the United States Supreme Court Other members included the Honorable Judge Ruth Bader Ginsburg of the District of Columbia Court of Appeals, the Honorable Judge Frank X. Altimari of the Second Circuit Court of Appeals, the Honorable Judge Alvin B. Rubin of the Fifth Circuit Court of Appeals, and the Honorable Judge Frank H Easterbrook of the Seventh Circuit Court of Appeals Justice O'Connor stated that being able to assemble the fine panel of judges was a compliment to the school as these judges were among "the finest in the country."

Although their credentials are overwhelming, the jurists were approachable and kind Three of the judges, Ginsburg, Altimari, and Rubin, participated in a panel discussion and question and answer period before the competition. Judge Altimari started the discussion recounting his experience of the previous day watching the Super Bowl with 40 law students

He said that he was impressed with the devotion of the students who had a prayer before the meal However, he admitted that as the prayer continued and continued and continued, he began to worry that he

was going to miss the kickoff. But he didn't miss the kickoff, and since his team won, it made his stay here all the more pleasant. He also mentioned that being a judge was a very rewarding experience, given the collegiality of working with other judges and the ability to contribute to certain areas of the law However, he felt that the most rewarding aspect of being a judge was the relationship that he had with his law clerks

Judge Rubin began his remarks by clarifying that he was a "trial lawyer" and not a "litigator" A litigator he said, "is someone who takes depositions for five years and then settles." He also emphasized that being a judge is different from being a lawyer because judges' emotions do not go up and down with the wins and losses as much He also agreed with Judge Altimari that being a judge was a positive and rewarding career Judge Ginsburg said that she had been on the D.C. circuit for over 10 years and that she found the job both challenging and satisfying.

Because of the cordiality and frankness of the panel, the judges were able to field only a few questions. Judge Ginsburg responded to the first question concerning her views on abortion The judge began by putting *Roe v. Wade* in perspective. She noted that, though generally the U.S Supreme Court moves in small steps, the *Roe* decision was a giant step in one direction and it pushed the political machinery of the states in the opposite direction. In other words, if the Supreme Court would have left the state and local governments alone the women's rights movement would have pushed more liberal abortion laws through the legislatures, but since the Supreme Court took such a big step in that direction, it took a lot of momentum out of the pro-choice movement. Nevertheless, the judge predicted that eventually abortion legislation would follow the trend of no-fault divorce and that the majority of states would adopt a more liberal position

The second main question pertained to the concept of original intent in constitutional decisions and how the original intent theory applied in cases of ambiguity Judge Altimari proposed that there were two schools of thought One espouses original intent and the other considers the U S. Constitution a living document subject to change as unforeseen circumstances arise. For Judge Altimari, denying the latter would be to deny the genius of the Constitution.

Judge Rubin divided the schools into three categories. The first would interpret the Constitution according to the literal meaning of its words, like a *statute* The second category would look to the intent of the creators of the Constitution if the wording is unclear. The third category is a more liberal view, which goes beyond the first two Judge Rubin left the question of original intent with questions of his own. He queried as to whose intent would clarify the Constitution: Madison's secret notes, the colonial citizens at that time, or perhaps the legislators who ratified it? Judge Ginsburg added that certain parts of the Constitution are easily understood, like the requirements of a senator, but other areas are vague and are meant to be interpreted broadly. She also added that the original Constitution was short-sighted, allowing a significant minority, white male landowners, the majority of the rights

The panel discussion was followed later in the afternoon by the moot court finals. Second-year members of the Board of Advocates had participated in preliminary rounds of competition with the six finalists chosen to compete in the finals. Jill Covington, Kelly Dunaway, and John Pinkney were counsel for the petitioner. The counsel for the respondent were David Cole, John C. Hyer, Andrew S. Williams. The topic of the moot court competition this year involved current Fourth and Sixth Amendment problems The fact pattern involved two issues: (1) the use of a parabolic microphone to record the petitioner's conversations, and (2) the use of an invited informer to record the petitioner's statements after the petitioner had retained counsel for a prior arrest.

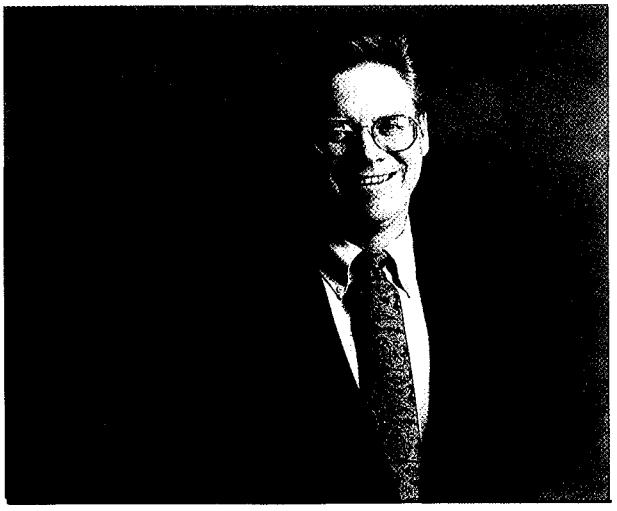
At the close of the competition each of the judges commented on the competition Judge Ginsburg called the competition "a truly great show" and all the other panelists agreed Judge Ginsburg also pointed out that the experience closely mirrored that of her court, including lots of questions from the judges Judge Rubin noted that the participants were better than most lawyers who argue before his court Judge Easterbrook added that although, as a student, he had been skeptical of comments like Judge Rubin's, now that he has become a judge in

the court of appeals, he must confess that Judge Rubin is right Judge Altimari also left some parting advice with the participants: "Don't ever let them see you sweat."

Justice O'Connor began her closing remarks by thanking BYU for allowing the panelists to visit She complimented the school for its beautiful setting and high quality of education. Before extolling the virtues of the moot court system, Justice O'Connor noted that one of the finest oral advocates in the United States works at BYU. She said that Rex E. Lee is among the best in the country.

The justice pointed out that the problems involved in this moot court competition were well-chosen. Both issues were legitimate and neither had clear answers She went on to say that moot court was an important part of legal education. She emphasized that in this day of legal practice it is critical to be able to write well and that oral skills are useful in many settings besides the courtroom.

Finally, Justice O'Connor announced the winners and handed out the awards Andrew Williams received the Dean's Cup for best oral argument. He and his teammates, Hyer and Cole, won the competition and David Cole was awarded a trophy for writing the best brief. The other team received an honorable mention award and all the finalists will have their names inscribed on a plaque that hangs outside the Guy Anderson Moot Court Room.



Former Librarian David Thomas Focuses on Teaching, Research

Walking into the office of David Thomas, one could easily mistake him for a photography instructor Prized photos line the walls, distractions from the laden bookshelves and piled desk The scenes are artistic pauses in the academic pace of Law Professor Thomas

Director of the law library for the past 16 years, David has now shifted his efforts to his teaching and writing. He passed the directorship to Constance Lundberg in the summer of 1990 after building "one of the most automated law libraries in the world. I started to get the feeling my time could be even more productive, and there was more I wanted to do," David said.

A person who thinks in terms of "growth curves" and "mileage," Professor Thomas is bound to exceed his own hard-to-follow act. A prolific scholar, he has a personal record filled with chapters of experience as well as productivity.

By the time he was 26 years old, David had served a mission to Germany, married and had two children, graduated cum laude from BYU, and served in Vietnam After earning a law degree from Duke University in 1972, he returned to his alma mater, where he joined Peter Mueller and others in organizing the law library in the new J. Reuben Clark Law School Within two years David was the director of the law library and a law professor. By 1977 he had added a master of library science degree from BYU to his credentials

Though the law library was "first in some areas of automation," David did not forget the "traditional mission" of law "There are all kinds of people who are experts on computers, but they haven't grasped that they have to draft their documents and think about things." He admits, however, that with the aid of computers his "scholarly productivity has increased about fourfold"

David's knowledge of real property and legal history, besides that of legal research tools, is evident in a list of his publications. Topics ranging from "Access to Foreign Legal Databases" to "The Disappearance of Roman Law from Dark Age Britain" fill his vita. A respected author, he is also in demand as an editor, presently writing three of the 15 revised volumes of Michie Company's *Thompson on Real Property.*

He has lectured from podiums throughout the United States and in other countries such as Israel and Great Britain. The U S. representative to the British Law Library Association for eight years, David sees the life-time membership awarded him this past year as "probably the nicest honor I have received"

He is actively involved with many professional and academic groups and has served, for example, as a president of the American Association of Law Libraries. In the Law School he chairs or sits on numerous committees, focusing on the student level of legal preparation David, an educator who has practiced law privately and publicly, also drafts questions for bar exams in four states.

Professor Thomas finds more time to submerse himself in research now that Dean Lundberg oversees the library and its large staff. When he is not writing about real property and legal history, he is teaching it Among his various legal courses, David finds his class in advanced legal writing particularly gratifying, discovering that with each new semester he has "gotten better prepared students"

David carries his enthusiasm home, where his wife, Paula, and their eight children share his nonstop,

absorbing approach to learning. Revealing one source of his motivation, he notes with delight that for several successive years the entire family has accompanied him to Europe while he researched legal history

David Campbell Enjoys Sabbatical at BYU

One of the high points of the first semester of law school for the entering class of 1990 was the opportunity to study civil procedure with visiting professor David Campbell. David was on a four-month sabbatical from his practice with Meyer, Hendricks, Victor, Osborn & Maledon in Phoenix On the last day of the semester, David's students honored him with a citation for his superior teaching. They commented on his interest in them, the care he took in preparing and presenting the material, and his ability to convey difficult concepts

David has had a diverse legal career After graduating from the University of Utah College of Law in 1979, David clerked for Judge J. Clifford Wallace of the 9th Circuit Court of Appeals He then worked as an associate in the New York and Los Angeles offices of O'Melveny & Meyers for one year before serving as a law clerk for Justice William Renquist of the U.S. Supreme Court. He has been a litigator with Meyer, Hendricks since his clerkship.

It is not often that a trial attorney can take four months away from a full litigation calendar and teach civil procedure, but then it is not every firm that takes a flexible approach to the practice of law. David explains that he accepted a position with Meyer, Hendricks just to be able to have this type of flexibility

For every year of partnership at Meyer, Hendricks a partner accrues one month paid sabbatical. The sabbatical can be from two to nine months long. The firm places no restrictions on what a partner does during his or her sabbatical The partner collects a full salary while he or she is away. David makes a convincing argument that Meyer, Hendricks' flexible policy has strengthened the firm and increased the loyalty of associates and partners He maintains that it contributes to the mental and physical health of the lawyers and makes for a more interesting and diverse firm. The benefit to the firm, according to David, is that the clients are of necessity clients of the firm. With a lawyer periodically taking a sabbatical, his or her clients are of necessity handed to others in the firm, fostering a spirit of cooperation.

When asked to comment on his experience at the Law School, David was quick to point out that as an alumnus of the University of Utah and the University of Utah College of Law, he was pleased to find out that he could thoroughly enjoy BYU, and he was impressed with the quality of the students He thought that Civil Procedure would be a difficult course to teach because it is not intuitive, but he was impressed by how quickly the students grasped complicated ideas and how hard they worked to thoroughly understand them His bottom line assessment: teaching is a lot of fun. "The students have great senses of humor They were interested; they asked good questions; and I enjoyed the give and take," he stated. He especially liked the one-on-one time with the students. "I spent a lot of time talking to the students about where they are going with their careers and about their lives as well as legal issues," David commented "I have gotten to know many of the students well, and they are wonderful people"

The life of a scholar was attractive to David He enjoyed having the freedom and flexibility to really learn a subject he wanted to learn. Contrasting his experience as a litigator, David noted, "as a lawyer you have to be concerned about your client's interests, as a law professor you can be curious about any facet of the subject you choose"

When asked how his firm benefitted from his experience at the Law School, David replied, "by my understanding of *International Shoe*" David states that he knows civil procedure better now than ever before even though he has practiced for a number of years as a litigator. He feels he is going back to his practice well rested and enthused about the law and the issues he faces. While David *believes* he will return as a better lawyer, he *knows* he is a better father and husband because he has had four months to spend half of his time with his family

David said that when he graduated from the University of Utah College of Law in 1979 and contemplated a judicial clerkship he asked himself, "Will this be a valuable way to spend my time?" He decided then that this is a far superior question to "Will this experience be a stepping stone in my career?" or even "Will I be a better lawyer for having this experience?" David also indicated that if a student is marginally interested in a federal clerkship he or she should consider it "As a federal clerk you get to see the world from the mountain top," according to Campbell "For one year you get to question what is right or wrong in these particular cases. From then on in the practice, the right answer will be your client's answer unless you become a judge. So there is an objectivity you get to bring into it and a creativity that most lawyers will never get the opportunity to experience I found that to be very stimulating"

When asked if he had some final advice for the students who had become his friends, David said he would encourage them not to lose their "moral compasses" He indicated that in an interview after Watergate, Jeb Magruder said that somewhere along the way he had lost his "moral compass" David said, "In the practice of law I perceive that many lawyers are losing their moral compasses and forgetting what is most important in life. It is an easy thing when you get caught up in your client's cause for that to be the governing principle of your life I do not believe that your client's cause should ever divert you from what you know is right."