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Women Shaping the Legal Process: Judicial Gender Bias as Grounds for Reversal

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On June 27, 1995, three male judges of the California Court of Appeal reversed a case called *Catchpole v. Brannon*[1] specifically because of the trial judge's gender bias.[2] The opinion is an embodiment of women's success in reshaping the law to reflect women's concerns and experiences, a goal the first suffragists considered second only to securing the vote. The *Declaration of Sentiments* adopted at the First Women's Rights Convention at Seneca Falls, New York in 1848 opens with these words:

> The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world.
>
> He has never permitted her to exercise her inalienable right to the elective franchise.
>
> He has compelled her to submit to laws, in the formation of which she had no voice.[3]

The reversal in *Catchpole* rests on a ground — gender bias in the courts — that did not exist until women lawyers, women judges, and women law professors created it. Even the underlying cause of action in this case — sexual harassment — did not exist until women lawyers and

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[1] 42 Cal. Rptr. 2d 440 (Ct. App. 1995), *review denied* (Cal. Sept. 14, 1995).

[2] *Id.* at 441.

[3] 1 ELIZABETH C. STANTON ET AL., HISTORY OF WOMAN SUFFRAGE 70 (2d ed. 1889) (containing the *Declaration of Sentiments* — Adopted by the First Women's Rights Convention, Seneca Falls, N.Y., July 19, 1848).

law professors made it a legal concept.[4] Until then, women just called it life.

Catchpole was a bench-tried sexual harassment case involving an alleged rape by a supervisor, and a plaintiff who did not physically resist. The trial judge was so convinced of the myth that a woman who is "truly" being raped will physically resist that, even though the supervisor admitted to the assault in a call monitored by the police, the judge could not get past his own preconceptions. His behavior and decision exemplify every negative attitude toward sexual harassment cases described by the state and federal task forces on gender bias in the courts — also the creation of women lawyers and judges — as well as how adherence to rape myths produces gender-biased decision making. The trial judge called sexual harassment cases "'detrimental to everyone concerned'"[5] and described this case as "nonsense."[6] He showed extreme irritation at having to listen to plaintiff's witnesses. He subjected the plaintiff alone, among all the witnesses, to a scathing interrogation that reads as if it were scripted by Lord Hale, author of the infamous jury charge that rape is a crime easy to charge and difficult to defend so the female complainant must be examined with extra caution. The judge asked the plaintiff whether she blamed herself for letting the assault happen,[7] whether her father blamed her;[8] and whether she had considered "just leaving without your clothes?"[9] He wrote in his Tentative Decision that the situation was unbelievable, she was at fault for not successfully resisting, and that it could be inferred that she pursued her supervisor.[10]

The case was appealed on the ground that the judge's gender bias required setting aside his judgment. The Court of Appeal held that "the allegations of gender bias are meritorious"[11] and reversed and remanded for a new trial before a different judge. The court wrote: "the phrase 'due process of law' . . . minimally contemplates the opportunity to be fully and fairly heard before an impartial decision-maker."[12] The court

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[4] CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 59-82 (1979).

[5] *Catchpole*, 42 Cal. Rptr. 2d at 446.

[6] *Id.* at 448.

[7] *Id.* at 451.

[8] *Id.* at 447.

[9] *Id.* at 450.

[10] *Id.* at 451.

[11] *Id.* at 441.

[12] *Id.* at 443.

concluded that "the judge's expressed hostility to sexual harassment cases and the . . . misconceptions he adopted provide a reasonable person ample basis upon which to doubt whether appellant received a fair trial."[13]

Gender bias in the courts is a concept that did not exist before the National Organization for Women Legal Defense and Education Fund ("NOW LDEF") created the National Judicial Education Program to Promote Equality for Women and Men in the Courts ("NJEP") in 1980.[14] When NOW LDEF itself was founded in 1970, lawyers on the new board were keenly aware of the difficulties they were experiencing in using the then-new Civil Rights Act of 1964 on behalf of women victims of employment discrimination. As board member Marilyn Patel, now a federal district court judge, later described it:

> I recall that when I was working on what were called "discrimination" cases, I believed that I knew what constituted the burden of proof. Congress appeared to have made that very clear. We all felt that we knew what was meant by a preponderance of the evidence. But I found that usually there was an additional burden of proof for women. Many of the male judges I knew were not aware or did not believe that certain things did or could happen to women, or that women were discriminated against or treated in an unjust fashion.[15]

These experiences led NOW LDEF's new board to propose a project that would go into judges' continuing education programs and teach about the ways gender bias affects judicial decision making and court interaction. The funding community's response was that this was a silly idea, totally unnecessary, because judges are impartial — that is their job description.

After ten years of effort, when NOW LDEF formally established NJEP and invited the then newly formed National Association of Women Judges to become NJEP's co-sponsor, many knowledgeable judges, lawyers, and journalists told NOW LDEF that this was an impossible project because no one would take it seriously; judges would not admit that there was such a problem as gender bias in the courts or accept it as

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[13] *Id.* at 446.

[14] Norma Juliet Wikler, *On the Judicial Agenda for the 80s: Equal Treatment for Men and Women in the Courts*, 64 JUDICATURE 202 (1980).

[15] Nat'l Judicial Educ. Program to Promote Equality for Women and Men in the Courts, Judicial Discretion: Does Sex Make a Difference?, Instructor's Manual 5 (1981).

a legitimate topic for judicial education and reform. How wrong they were is demonstrated by the appellate court's opinion in *Catchpole.*

NJEP's focus on developing state-specific information about gender bias in the courts to minimize denial of the problem in its judicial education programs became the catalyst for a series of high level state and federal task forces mandated to examine the nature and extent of gender bias in their respective jurisdictions and to recommend and implement reforms.[16] Many of these task forces adopted the three part definition of gender bias introduced by NJEP, and it is this definition that guided the California Court of Appeal in *Catchpole.* The court wrote,

> For purposes of this opinion, we accept the definition of "gender bias" developed by the [California] Judicial Council Advisory Committee on Gender Bias in the Courts, which provides that "gender bias includes behavior or decision making of participants in the justice system which is based on or reveals (l) stereotypical attitudes about the nature and roles of women and men; (2) cultural perceptions of their relative worth; and (3) myths and misconceptions about the social and economic realities encountered by both sexes."[17]

The appellate court also cited the findings of the California and Ninth Circuit task forces with respect to some judges' disdain for sexual harassment cases and the twenty-three gender bias task force reports that have discussed women's lack of credibility in the courts.[18] The Ninth Circuit Gender Bias Task Force report states: "In sexual harassment or discrimination cases before [many male and some female judges],

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[16] Lynn Hecht Schafran, *Documenting Gender Bias in the Courts: The Task Force Approach,* 70 JUDICATURE 280 (1987); Lynn Hecht Schafran, *Educating the Judiciary About Gender Bias: The National Judicial Education Program to Promote Equality for Women and Men in the Courts and the New Jersey Supreme Court Task Force on Women in the Courts,* 9 WOMEN'S RTS. L. REP. 109 (1986); Lynn Hecht Schafran, *Overwhelming Evidence: Reports on Gender Bias in the Courts,* 26 TRIAL 28 (1990).

[17] Catchpole v. Brannon, 42 Cal. Rptr. 2d 440, 442 n.2 (Ct. App. 1995) (quoting JUDICIAL COUNCIL OF CAL., ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS: THE DRAFT REPORT OF THE JUDICIAL COUNCIL ADVISORY COMM. ON GENDER BIAS IN THE COURTS 2 (1990)).

[18] *Id.* at 452 n.10. For a comprehensive discussion of this critical issue, see Lynn Hecht Schafran, *Credibility in the Courts: Why is There a Gender Gap?,* JUDGES' J., Winter 1995, at 5.

plaintiffs' lawyers report a minimization of their clients' trauma and 'an across the board lack of understanding' as to the female plaintiff's situation and point of view."[19] The task force observed that district court judges tend to refuse to permit expert witness testimony as to what constitutes sexual harassment, apparently assuming that they know, despite extensive and widely reported social science research showing that women and men have sharply contrasting views on this question.[20] One focus group participant summed up the task force's findings on the attitudes sexual harassment plaintiffs sometimes encounter in the courts: the judges "'don't get it; they don't try to get it; they don't know the law, and it's just an uphill battle all the way.'"[21] The *Catchpole* trial judge's attitude toward this case was certainly that of someone who didn't get it.

The California Court of Appeal also found that the *Catchpole* trial judge violated Canon 3 of the Model Code of Judicial Conduct which directs that a judge "shall not . . . by words or conduct manifest bias or prejudice . . . based upon . . . sex."[22] This is a new canon promulgated in 1990 in the American Bar Association Model Code of Judicial Conduct, which is the model for the states' codes.[23] Prior to this, there was only Canon 2 which states: "A judge shall avoid impropriety and the appearance of impropriety in all of the judge's activities."[24] The decision of the ABA Standing Committee on Professional Responsibility to propose an amendment to the Model Code of Judicial Conduct that goes beyond the general directive of Canon 2 and states explicitly that judges may not manifest biased behavior based on sex or race is a direct response to the findings of the task forces on gender bias in the courts and the task forces on racial and ethnic bias in the courts to which the gender bias task forces gave rise.

Perhaps the most tangible expression in *Catchpole* of women's contribution to the legal process over the seventy-five years since suffrage is the appellate court's discussion of the trial judge's attitude toward rape.

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[19] Ninth Circuit Gender Bias Task Force, *The Effects of Gender in the Federal Courts*, 67 S. CAL. L. REV. 745, 887 (1994).

[20] *Id.* at 891.

[21] *Id.* at 887.

[22] MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1990).

[23] Lynn Hecht Schafran, *The Obligation to Intervene: New Direction from the American Bar Association Code of Judicial Conduct*, 4 GEO. J. LEGAL ETHICS 53 (1990).

[24] MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990).

Nowhere has the compelled submission of women to "laws, in the formation of which she had no voice"[25] had more brutal consequences than for the victims of rape, who are overwhelmingly women. At the time of suffrage and until the rape reform movement of the 1960s and 1970s, rape law was a codified expression of men's mistrust of women. Despite the advent of rape shield laws barring excavation of the complainant's prior sexual history, and the elimination of the requirements for earnest resistance and corroboration of every element of the crime, some judges are still locked into the stereotypes that have long made the prosecution of these cases a revictimization for the victim.[26]

The *Catchpole* trial judge's attitude toward the trauma of rape and his lack of understanding of how victims experience sexual assault were appalling. After the director of the North Coast Rape Crisis team testified about the symptoms of rape trauma syndrome and opined that the plaintiff exhibited them all, the judge suggested that "the witness 'should check and see if [rape victims] come in with a big 'R' stamped on their forehead in red letters, and then we'll all know.'"[27] The plaintiff's supervisor had gotten her to his home after work on the pretense of discussing personnel issues relating to her job performance. The trial judge could not comprehend why the plaintiff did not leave her supervisor's home or fight back. He questioned her as to why, as the night went on and her supervisor did not get to business, she did not act. "'But couldn't you have easily said, 'No, not tonight. I'm tired. I have got to go to school tomorrow. I'll talk about it later.' Why not? Why didn't you say that?'" Plaintiff responded, "'I didn't feel that I could'" and "'I didn't want to offend him.'"[28] This is a classic scenario in nonstranger rape cases because women are socialized not to offend.[29]

The court of appeals wrote,

> The court's disparagement of appellant's credibility on the grounds that she accepted Brannon's invitation to come to his house, remained alone

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[25] STANTON, *supra* note 3, at 70.

[26] Lynn Hecht Schafran, *Eve, Mary, Superwoman: How Stereotypes About Women Influence Judges*, JUDGE'S J., Winter 1985, at 12; Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979 (1993).

[27] Catchpole v. Brannon, 42 Cal. Rptr. 2d 440, 448 (Ct. App. 1995).

[28] *Id.* at 449.

[29] For a further discussion of this point and another court that did not "get it," see Lynn Hecht Schafran, *Criminal Law: What is Forcible Compulsion?*, JUDGES' J., Winter 1995, at 43.

> with him, and did not resist his assault more forcibly is based on an unrealistic and gender biased standard of reasonableness. Among other things, the court appears oblivious to appellant's dependence on the assailant for her job and scholarship and the need to placate him for those reasons. The court was equally indifferent to the intimidation a woman in appellant's position would likely experience.[30]

The appellate court observed that the trial judge's demand for physical resistance ignored both legislation and case law. In 1980 and 1982 the California Penal Law was amended to remove resistance requirements and make clear that failure to resist could not be used to show consent.[31] In 1986 the California Supreme Court, in the leading case of *People v. Barnes*,[32] rejected the notion that failure to resist equals consent and described the reasons women often do not resist, for example, they are frozen with fright, or fear even greater physical injury if they fight back.[33]

THE NEED FOR CONSTANT VIGILANCE

While the appellate court's decision in *Catchpole* is indeed cause for rejoicing, we must be constantly mindful that one decision does not a legal revolution make. The need for constant attention to educating the judiciary about the realities of women's lives is painfully reflected in the decision of another California appellate court in the year prior to *Catchpole*.

In *People v. Iniguez*[34] a woman was asleep at the home of a close family friend whom she thought of as her aunt when she awoke to find the "aunt's" boyfriend — a man about whom she knew only that he weighed one hundred pounds more than she and had drunk a lot at dinner — looming naked over her. Without a word the man pulled off her underwear and raped her. The appellate panel in that case reduced the man's rape conviction to "sexual battery" on the ground that evidence of force and fear of immediate and unlawful bodily injury was insufficient. The court wrote:

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[30] *Catchpole*, 42 Cal. Rptr. 2d at 452.
[31] *Id.* at 452-54.
[32] 721 P.2d 110 (Cal. 1986).
[33] *Id.* at 118-19.
[34] 872 P.2d 1183 (Cal. 1994).

> While the [defendant] was admittedly much larger than the small victim, he did nothing to suggest that he intended to injure her. No coarse or sexually suggestive conversation had taken place. Nothing of an abusive or threatening nature had occurred. The victim was sleeping in her aunt's house, in which screams presumably would have raised the aunt and interrupted the intercourse. Although the assailant was a stranger to the victim, she knew nothing about him which would suggest that he was violent.[35]

This last sentence is truly disturbing. A woman is awakened in the night by a naked man who is a virtual stranger to her hovering over her body. It seems intuitive that this situation spells DANGER, yet this court did not see it.[36] Fortunately the California Supreme Court reinstated the rape conviction with an opinion that includes an excellent discussion of frozen fright.[37]

WE ARE MAKING PROGRESS

The 75th anniversary of woman suffrage is one of those occasions when we ask the proverbial question: is the glass half empty or half full? For those of us working to realize the goals of the First Women's Rights Convention in their fullest sense, it often seems that the glass is filling all too slowly. But comparing how much has been achieved in the years since that 1848 convention sparked the 26th Amendment with the status quo of the preceding millennia is fortifying. In classical Athens, women's legal status was so degraded that not only were women legally incompetent, but so was a man acting under a woman's influence; by statute, any legal action initiated by a man that was conceived under a woman's influence was invalid.[38] By 1848 in the United States, women's status had progressed to the point that there was no such statute, but married women could still not bring a lawsuit in their own names.

When we consider that the concept of gender bias in the courts did not exist until 1980, the fact that a mere fifteen years later three male appellate judges would begin an opinion with the statement, "[t]his case presents the unusual question whether the alleged gender bias of the trial

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[35] *Id.* at 1186 (alteration in original).

[36] *See also* Schafran, *supra* note 29, at 45.

[37] *Id.* at 1188-90.

[38] EVA C. KEULS, THE REIGN OF THE PHALLUS 322 (1985).

judge requires us to set aside his judgment"[39] and clearly answer "yes," we know we are making progress at what historians would consider warp speed. The appellate court decision in *Catchpole v. Brannon* is a landmark in women's efforts to create laws and legal process that reflect the realities of women's lives.

[39] Catchpole v. Brannon, 42 Cal. Rptr. 2d 440, 441 (Ct. App. 1995).