

ARTICLES

EXAMINING RACE AND GENDER BIAS IN THE COURTS: A LEGACY OF INDIFFERENCE OR OPPORTUNITY?

MYRA C. SELBY*

“The true worth of a race must be measured by the character of its womanhood.”¹

In his 1999 State of the Union address, President William Jefferson Clinton recognized a great heroine of the Civil Rights' movement, Rosa Parks.² Parks, in 1955, refused to give up her seat on the bus in Montgomery, Alabama, in violation of one of the restrictive Jim Crow laws.³ At the address, Parks sat in the House Chamber with First Lady, Hillary Rodham Clinton. When recognized, this quiet, diminutive eighty-six-year-old woman rose and nodded to thunderous applause from everyone in the Chamber. As we approach the millennium, it seems appropriate to look back on the pathways that led us to this point. Rosa Parks' brave act on that Alabama bus, and similar heroic acts by others, led to pinnacle Supreme Court civil rights cases that marked the end of Jim Crow laws.⁴

* Associate Justice, Indiana Supreme Court. B.A., 1977, Kalamazoo College; J.D., 1980, University of Michigan.

1. Mary McCleod Bethune, A Century of Progress of Negro Women, Address Delivered Before the Chicago Women's Federation (June 30, 1933), in MARY MCCLEOD BETHUNE, PAPERS 1923-1942 (Amistad Research Center, New Orleans).

2. President William Jefferson Clinton, State of the Union Address, Address at the United States Capitol (Jan. 19, 1999) <<http://www.dlcppi.org/speeches/99sotu.htm>>.

3. See *id.* Jim Crow laws first arose after the Civil War in the 1880s. 6 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 249 (1998) [hereinafter WEST'S ENCYCLOPEDIA]. These laws served to segregate the races in every respect. See *id.* at 249-50. One of these laws required blacks to sit in the back section of the bus, and to relinquish their seats to white passengers if all seats were filled. 8 *id.*, at 19.

4. See, e.g., *Brown v. Board of Educ.*, 347 U.S. 483, 494-95 (1954) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896), and finding unconstitutional the separate-but-equal educational facilities); *Sweatt v. Painter*, 339 U.S. 629, 635-36 (1950) (finding that the educational opportunities for black and white law students in Texas were not substantially equal and violated the Equal Protection Clause of the Fourteenth Amendment); *Shelley v. Kraemer*, 334 U.S. 1, 20-21 (1948) (holding that restrictive covenants precluding land ownership or occupancy on the basis of race were unenforceable); *Morgan v. Virginia*, 328 U.S. 373, 386 (1946) (ruling that interstate bus

While these successes should be celebrated, the larger goal of racial and gender equality remains a continuing struggle. The rich history of civil rights opinions in America teaches us that the judiciary plays an important role in the quest for equality. Americans look to the judiciary to vindicate their rights and protect their individual freedoms.

State supreme courts are well situated to foster race and gender fairness in the judicial system. Many state high courts have taken the opportunity to lead in this area and have organized formal mechanisms to discover and address bias and its related problems. Indiana remains in the small number of states lacking a systematic, formal approach to addressing race and gender bias in the courts. While our courts may recognize the evils of bias and acknowledge the existence of racist and sexist attitudes, there has been no statewide, coordinated effort to effect change.⁵ It is my belief that the lack of action grows out of an apparently benign notion—that of indifference. Indiana has not joined the ranks of states whose courts are working on these issues through the use of commissions, task forces, and the like, not because our judicial branch opposes such efforts, but because the issue of bias simply is not a priority. The danger of such indifference is that it breeds intolerance. Thus, we must ask ourselves as we approach the new millennium—do we leave for the next generation a legacy of indifference?

This Article briefly reviews the evolution of race and gender bias task forces in state courts, beginning with the resolution passed by the Conference of Chief Justices⁶ in 1988, the establishment of numerous state task forces, the general problems identified by these task forces, and the results of some of the work undertaken by them. Following this summary, the Article examines what has occurred in Indiana concerning the issue of bias in the courts.

In 1988, the Conference of Chief Justices⁷ signaled their commitment to

passengers are not required to adhere to segregation laws when traveling through the different states); *Smith v. Allwright*, 321 U.S. 649, 661-62 (1944) (holding that political parties could not ban voters from primary elections because of their race).

5. While Indiana courts have taken steps to improve civility among attorneys, I believe concerns about bias and discrimination are more properly addressed separate and apart from the rubric of civility and professionalism.

6. The Conference of Chief Justices is a semi-annual meeting where the chief justices of each state gather to exchange ideas, practices, and policies to improve all aspects of the states' judicial systems.

7. The mission of the Conference of Chief Justices, adopted in 1995, is to improve the administration of justice in the states, commonwealths and territories of the United States. The Conference accomplishes this mission by the effective mobilization of the collective resources of the highest judicial officers of the states, commonwealths and territories to:

- develop, exchange and disseminate information and knowledge of value to state judicial systems;
- educate, train, and develop leaders to become effective managers of state judicial systems;

fairness in the courts by adopting Resolution XVIII, entitled *Task Forces on Gender Bias and Minority Concerns*,⁸ encouraging all chief justices to establish task forces devoted to the study of gender bias and minority concerns as they relate to the judicial system. At the time, four states had already created task forces to address racial and ethnic bias including, New Jersey (1984), Michigan (1987), New York (1987) and Washington (1987).⁹ Eight states, including California (1986), Maryland (1986), Massachusetts (1987), Michigan (1987), Minnesota (1987), New Jersey (1982), New York (1984), and Utah (1986), also had formed gender task forces prior to this Resolution.¹⁰ In 1993, the Conference adopted another resolution “[u]rging [f]urther [e]fforts for [e]qual [t]reatment of [a]ll [p]ersons.”¹¹ Yet again in 1997, the Conference reaffirmed its commitment to Resolution XVIII and resolved that “the chief justices in those states that have not already done so . . . [should] establish task forces or commissions.”¹²

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- promote the vitality, independence and effectiveness of state judicial systems;
 - develop and advance policies in support of common interests and shared values of state judicial systems; and
 - support adequate funding and resources for the operations of the state courts.

Mission Statement, Conf. of Chief Justices (1995) (on file with the author).

8. *Task Forces on Gender Bias and Minority Concerns*, Res. XVIII, Conf. of Chief Justices, Discrimination in the Courts Committee, 40th Ann. Meeting (1988) [hereinafter Resolution XVIII] (on file with the author).

9. See Appendix.

10. See *id.*

11. *Urging Further Efforts for Equal Treatment of All Persons*, Conf. of Chief Justices, 16th Mid-Year Meeting (1993) [hereinafter 1993 Resolution] (on file with the author). The 1993 Resolution, with its emphasis on all persons, is a clear recognition that bias in the courts is not confined to gender and minority concerns. References to race and gender bias throughout this Article are intended to embrace the language of the 1993 Resolution.

12. *Reaffirming the Commitment of Resolution XVIII: The Establishment of Task Forces and Commissions on Access and Fairness in the State Courts*, Res. XIII, Conf. of Chief Justices, Access and Fairness Committee, 49th Ann. Meeting (1997).

In May 1999, the Conference of Chief Justices, Conference of State Court Administrators, American Bar Association and League of Women Voters co-sponsored the National Conference of Public Trust and Confidence in the Justice System (“Conference”). See Joan Biskupic, *Justice O’Connor Calls for “Concrete Action” to Fight Bias*, WASH. POST, May 16, 1999, at A5. The Conference was charged with identifying circumstances that affect public trust and confidence in the state court systems and developing strategies to address them. See Memorandum, Backgrounder for the National Conference on Public Trust and Confidence in the Justice System (May 14, 1999). One notable survey finding was that 68% of blacks and 42% of Hispanics and non-Hispanic whites perceive that blacks are treated unfairly in the judicial system. See Biskupic, *supra*, at A5. In response to these and other findings, Justice Sandra Day O’Connor stated in her concluding remarks to the Conference: “‘Clearly this is a problem that has to be addressed[;] . . . [c]oncrete action must be taken’ to erase racial bias.” *Id.* (quoting Justice Sandra Day O’Connor). In light of the findings

Today, approximately twenty-seven state supreme courts have developed a task force to address racial and ethnic bias and thirty-nine state supreme courts have formed a task force to address gender bias in the judicial system.¹³ Indiana is not among either group of states. Not surprisingly, these task forces have identified many instances of institutional bias, with many of the same concerns being shared amongst the states. After many hours of investigation and study, these task forces compiled substantial data demonstrating the circumstances and extent of bias found in the judicial system. This data includes many anecdotes describing personal experiences or perceptions of race and gender bias. While the content of many of the stories is shocking, the fact that they occur is not. To illustrate that race and gender bias endures in state courts, the following are just some examples of bias found by the task forces in Connecticut, California, Delaware and Texas.

In Connecticut, instances of racial bias are well documented. The Connecticut Judicial Branch Task Force found bias in judicial attitudes. For example, one judge said: "Hiring is not a source of bias; the problem is to get minority people to take the positions."¹⁴ Another judge assumed that a black defendant was a drug dealer because the defendant was wearing a beeper even though he carried the beeper for legitimate business purposes.¹⁵ Another defendant wearing a bright jacket was asked: "'So what gang are you in?'"¹⁶ One person believed that

"[t]he minority kid is more likely to get high bail on a drug charge than a white kid whose parents come to court, bring report cards, and demonstrate roots in the community on the grounds that this provides more evidence to prove the kid is not a danger to the community. I feel that because the white teenager in fact had more economic and social opportunities, this should add to his crime, not excuse it."¹⁷

Connecticut formed focus groups as part of the investigatory process. These focus groups described many instances of disparate treatment, such as when Caucasian defendants are given accelerated rehabilitation for more serious crimes while minorities receive incarceration for less serious crimes.¹⁸ These focus groups also perceived that the race of both the defendant and the victim in criminal cases determined the severity of the sentence.¹⁹

of this very recent conference as well as the findings of at least 27 state court task forces on race bias, state high courts cannot ignore the growing body of evidence demonstrating that bias is a problem—perceived or real—within the justice system.

13. See Appendix.

14. STATE OF CONN. JUDICIAL BRANCH TASK FORCE ON MINORITY FAIRNESS, FULL REPORT 52 (1996) [hereinafter CONN. MINORITY FAIRNESS REP.].

15. See *id.* at 21.

16. *Id.*

17. *Id.* at 36.

18. See *id.* at 39.

19. See *id.* The Seventh Circuit Judicial Council created a Race and Gender Fairness

The Judicial Council of California Advisory Committee on Gender Bias in the Courts similarly identified many instances of race bias. One judge referred to Hispanics as "cute little tamales," "Taco Bell," "spic," and "bean" in conversations with court personnel.²⁰ The *Los Angeles Daily Journal* reported that African American citizens of California are seven times more likely to be arrested, nine times more likely to be sent to prison, and twelve times more likely to be sentenced to death than their Caucasian counterparts.²¹ The *San Jose Mercury News* criticized the California judiciary and its inability to provide competent court interpreters to serve the nation's largest immigrant state.²²

Instances of gender bias are equally prevalent. The Connecticut Task Force on Gender, Justice, and the Courts found many instances of gender bias in the judiciary. One female attorney reported that some judges repeatedly addressed them by their first names while male attorneys were addressed by their surnames or titles.²³ Another judge opens court by stating: "Good Morning Gentlemen."²⁴ Yet another judge questioned a victim who was assaulted by a former boyfriend: "You went where with him? What was your major in college? Psychology! Then why didn't you know better?"²⁵ Furthermore, an attorney reported that a judge told a female attorney at the courthouse that: "[She would] be as busy as a bride's ass on her wedding night."²⁶

The Connecticut Task Force also discovered gender bias in attorneys'

Committee in October 1993 to promote fairness in the federal judicial system. See Collins T. Fitzpatrick, *Seventh Circuit: Fairness in the Federal Courts*, 32 U. RICH. L. REV. 725, 726 (1998). However, in 1994 Congress declined to appropriate funds for such studies. See *id.* at 727. In response, the Judicial Council adopted a resolution requesting the courts within the circuit, including Indiana federal courts, to create their own task forces to assess racial and gender fairness in the circuit's court system. See *id.* at 728. While a few courts elected not to create committees, most courts maintain active committees that are conducting their own studies on the matter. See *id.* at 729.

20. JUDICIAL COUNCIL OF CAL. ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE CALIFORNIA COURTS, FINAL REPORT 424 (1996) [hereinafter ACHIEVING EQUAL JUSTICE IN CAL. COURTS] (quoting *In re Stevens*, 31 Cal. 3d 403, 405 (1982)).

21. See *id.* at 425 (citing *State Legal System Riddled with Racial Distinctions*, L.A. DAILY J., Mar. 9, 1988, at 6); see also Norval Morris, *Race and Crime: What Evidence Is There That Race Influences Results in the Criminal Justice System?*, 72 JUDICATURE 111, 113 (1988) (discussing racial discrimination in the criminal justice system).

22. See ACHIEVING EQUAL JUSTICE IN CAL. COURTS, *supra* note 20, at 431 (citing *How Court Interpreters Distort Justice*, SAN JOSE MERCURY NEWS, Dec. 17, 1989, at 1).

23. CONNECTICUT TASK FORCE ON GENDER, JUSTICE AND THE COURTS REPORT, REPORT TO THE CHIEF JUSTICE, 65 (1991) [hereinafter CONNECTICUT GENDER & JUSTICE REP.]. See also THE DELAWARE GENDER FAIRNESS TASK FORCE, FINAL REPORT 43 (1995) [hereinafter DELAWARE GENDER FAIRNESS REP.].

24. CONNECTICUT GENDER & JUSTICE REP., *supra* note 23, at 63.

25. *Id.* at 76.

26. *Id.* at 66.

conduct. For example, an attorney was reported to have hounded a fifteen-year-old girl on the witness stand by saying: "Come on, you can tell me. You're probably just worried that your boyfriend got you pregnant right? Isn't that why you're saying he raped you?"²⁷ A female attorney in Connecticut poignantly described her feelings about gender bias when she said: "Tell the judges we are not their wives, we are not their daughters, we are not their girlfriends, we are not their mothers. Whatever we may be outside the court is one thing. In the courtroom, in the courthouse, we are attorneys."²⁸

The Delaware Gender Task Force disclosed numerous incidents of gender bias in the judiciary and profession in its Final Report. One judge professed to have no reservations about commenting on a female attorney's attire during the course of a hearing.²⁹ Yet another judge was reported to have asked a female attorney, preceding a courtroom teleconference, whether she wanted to sit on his lap.³⁰ A female attorney recalled the time when a judge first asked her age and then stated: "[Your employer] only hires young, pretty girls."³¹ The Delaware Gender Task Force also found that attorneys exhibited biased behavior on many occasions. For example, a female attorney was asked by an older male attorney during a job interview whether it was her intention to pursue a career in law.³² The male attorney explained that while he did not similarly ask this question of male applicants, he did not wish to hire a woman interested in having a family in the near future.³³ Another female attorney had been asked during several different interviews about her husband's occupation and whether he approved of her choice of profession and its time requirements.³⁴ Yet another female attorney believed that when a prominent male attorney during an interview stated: "I like what I see," he was not referring to her résumé.³⁵ One female attorney was advised by a senior partner during an interview that "she . . . [should] wear dresses because it is a man's world and if a woman has looks she should use them to her advantage."³⁶ The same partner scheduled an interview with another female attorney simply to see what she looked like.³⁷

The Gender Bias Task Force of Texas reported many of the same types of gender bias found in the previous states. One Texan attorney reported that a judge not only asked her the color of her nipples, but also asked her in front of male attorneys.³⁸ Another female attorney in Texas stated that she had endured

27. *Id.* at 75.

28. *Id.* at 5.

29. See DELAWARE GENDER FAIRNESS REP., *supra* note 23, at 61.

30. See *id.* at 62.

31. *Id.* (alteration in original).

32. See *id.* at 105.

33. See *id.*

34. See *id.*

35. *Id.*

36. *Id.* at 105-06.

37. See *id.* at 106.

38. See STATE BAR OF TEXAS GENDER BIAS TASK FORCE OF TEXAS, FINAL REPORT 31 (1994)

many condescending inquiries about “whether [she] was having a bad hair day, broken fingernail day or a run in my stockings” when her mood was tempered.³⁹ The Gender Bias Task Force of Texas also reported male attorneys’ perceptions of gender bias in the judicial system. One male attorney in Texas stated that “[w]omen get away with murder in court as well as everywhere else. Men suffer great discrimination in divorce cases.”⁴⁰ One attorney believed that “[t]he so-called “gender-gap” is vastly over-blown. If people who enter the arena will concentrate on their job and get the chip off their shoulders, forgetting their sex, they should do fine in today’s society.”⁴¹ To the point, another male attorney similarly stated: “This survey is a waste of time [and] money. Women should grow up and stop whining.”⁴² One attorney admitted that “[j]udges and lawyers that are male discriminate against women and women lawyers. I try not to do so, but I find myself doing so anyway quite often.”⁴³

The previous anecdotes serve to demonstrate that bias is alive and well across our country. As one Delaware attorney astutely commented:

“Any one of these kinds of experiences is perhaps not all that earth-shattering. But those who dismiss these incidents fail to appreciate the cumulative effect that incidents like these have when they happen on a frequent basis. Not only do such remarks and attitudes get tiresome but they require a considerable expenditure of energy worrying about how you are being perceived. They also tell you that you are seen first as a sexual/social being rather than respected as a professional colleague.”⁴⁴

The force of the evidence clearly suggested that these are not simply the utterances of a few “bad eggs,” but frequent occurrences at all levels of the judicial system that immeasurably harm the ability of courts to administer justice.⁴⁵ As a result, many states have chosen to address race and gender bias

[hereinafter TEXAS GENDER BIAS REP.].

39. *Id.*

40. *Id.* at 20.

41. *Id.* at 25.

42. *Id.*

43. *Id.* at 19.

44. DELAWARE GENDER FAIRNESS REP., *supra* note 23, at 52.

45. The problem of race bias in the legal profession as a whole was recently highlighted in the *American Bar Association Journal* in its special report entitled *Race and the Law*, jointly published by the American Bar Association and the National Bar Association. *Race and the Law*, A.B.A. J., Feb. 1999, at 44. Several articles touch on both race and gender bias in the courts. See Philip S. Anderson, *Striving for a Just Society*, A.B.A. J., Feb. 1999, at 66 (proposing that lawyers, through education and understanding, must lead Americans in the effort to eradicate bias); Debra Baker, *Waiting and Wondering*, A.B.A. J., Feb. 1999, at 52 (examining how politics expedites or hinders the judicial nomination process); Derek Bok & William G. Bowen, *Access to Success*, A.B.A. J., Feb. 1999, at 62 (suggesting that the educational benefits of diversity justify race-sensitive educational admission programs); Terry Carter, *Divided Justice*, A.B.A. J., Feb. 1999, at 42 (describing the differing perceptions of the extent of race bias in the justice system); John

by implementing the recommendations of their respective task forces. While some states have unique circumstances to address, many common themes can be gleaned from the task force recommendations. Some of the changes are described below.

Several task forces focused their attention on revising or amending rules that govern the conduct of judges, lawyers, and court employees. Some states now prohibit judges from engaging in any racially or sexually biased conduct or maintaining memberships with any organization that discriminates on the basis of race or sex.⁴⁶ The Rules of Professional Conduct similarly address lawyer behavior.⁴⁷ Some states have developed extensive court employee handbooks describing, for example, race and gender discrimination complaint procedures,

Gibeaut, *Marked for Humiliation*, A.B.A. J., Feb. 1999, at 46 (discussing the problems surrounding racial profiling); Mark Hansen, *And Still Miles To Go*, A.B.A. J., Feb. 1999, at 68 (describing the ABA Commission on Opportunities for Minorities in the Profession and its efforts); Arthur S. Hayes, *Color-Coded Hurdle*, A.B.A. J., Feb. 1999, at 56 (identifying the unique problems that women of color face in predominately white firms); Michael Higgins, *Accomplishing Equality*, A.B.A. J., Feb. 1999, at 69 (describing the work of the Council on Racial and Ethnic Justice); Michael Higgins, *Few Are Chosen*, A.B.A. J., Feb. 1999, at 50 (identifying the difficulties of obtaining a jury of one's peers); Cliff Hocker, *Making the Majors*, A.B.A. J., Feb. 1999, at 58 (describing the difficulties minority attorneys face when pursuing a career as corporate counsel); Cliff Hocker, *Powerhouse For Civil Rights*, A.B.A. J., Feb. 1999, at 70 (describing the focus and accomplishments of the National Bar Association); Steven Keeva, *Pursuing the Right to Breathe Easy*, A.B.A. J., Feb. 1999, at 48 (depicting the struggle to prohibit polluting facilities from locating operations in poor and minority neighborhoods); Wendell Lagrand, *Getting There, Staying There*, A.B.A. J., Feb. 1999, at 54 (discussing the hurdles and strategies for most African-American attorneys in achieving partner); Beverly McQueary Smith, *Uniting to Ensure Fairness*, A.B.A. J., Feb. 1999, at 67 (offering that lawyers in bar associations can join efforts to eliminate racial bias); Linn Washington, Jr., *Bringing More Blacks to Clerking*, A.B.A. J., Feb. 1999, at 60 (discussing the low number of minorities serving as judicial clerks); Gilda R. Williams, *Key Words for Equality*, A.B.A. J., Feb. 1999, at 64 (advocating that affirmative action programs are still needed to counteract years of discrimination).

46. Courts have cited state task force reports as authority for identifying inappropriate gender biased conduct. *See, e.g.,* Surratt v. Prince George's County, 578 A.2d 745, 757 (Md. 1990) ("We are aware that some judges are reported to 'make verbal or physical sexual advances in the course of the professional interaction.'" (quoting MARYLAND SPECIAL JOINT COMMITTEE, GENDER BIAS IN THE COURTS 125 (1989)); State v. Mascarella, No. 94AP100075, 1995 WL 495390, at *5 (Ohio Ct. App. July 6, 1995) (citing portion of Ohio Joint Task Force on Gender Fairness Final Report that recommends that courts address female court participants by their formal name); *In re* James L. Barr, No. 67, 1998 WL 58975, at *6 (Tex. Rev. Tribunal Feb. 13, 1998) (referencing the Gender Bias Task Force of Texas Final Report as support for removing judge from office for gender biased conduct). A growing body of case law is developing in the states that have adopted rules prohibiting judges, court personnel, and attorneys from engaging in gender-biased conduct. *See* LYNN HECHT SCHAFFRAN ET AL., NATIONAL JUD. EDUC. PROGRAM, GENDER FAIRNESS STRATEGIES PROJECT: IMPLEMENTATION RESOURCES DIRECTORY 12-16 (1998) [hereinafter IRD].

47. IRD, *supra* note 46, at 29-32.

diversity training requirements, flexible work schedules, standards for interviewing job applicants, gender-neutral language requirements, and sexual harassment policies.

Some states have developed comprehensive educational programs to train court personnel at all levels of the judicial system. For instance, educational programs have been created for court personnel, judges, judicial disciplinary commissions, judicial nominating commissions, and lawyers.⁴⁸ Other educational programs extend beyond the court system and target law enforcement agencies and the public.⁴⁹

Several states enacted legislation to address race and gender bias in substantive areas of the law. States often reviewed and amended statutes involving child abuse and neglect, child support, divorce, domestic violence, family law, guardians ad litem, rape and sexual assault, sentencing and prison, and spousal support to eliminate the possibility of biased results.⁵⁰ States also amended statutes and rules to reflect gender-neutral language.⁵¹

Even without the detailed self-examination of a task force or commission, it is fair to say that Indiana, in all likelihood, has the same or similar problems of race and gender bias in the courts as the many states that have engaged in formal study. This could prompt Indiana to look into bias in its judicial system, such as has been the case with other state court task forces over the last decade, or we can simply benefit from the growing body of data gleaned from the existing task forces and use it as a starting point to improve upon. Regardless of how we begin the discussion, the work of many state courts and other entities⁵² makes it clear that self-examination is imperative to the goal of ending bias in the courts. Committing to the hard work that is necessary for a meaningful task force effort is the first step.

Justice Ruth Bader Ginsburg described the benefits of a court's inward look:

Self-examination of the courts' facilities and practices . . . can yield significant gains. First, such projects enhance public understanding that gender equality is an important goal for a Nation concerned with full

48. *Id.* at 41, 54-80.

49. *Id.* at 76, 81-83.

50. *Id.* at 111-43.

51. *Id.* at 84-85.

52. The National Consortium of Task Forces and Commissions on Racial and Ethnic Bias in the Courts is a cooperative of task forces and other organizations that was formed "to provide participating groups an opportunity to discuss and share research and program activities relating to their common mandate to determine the existence of bias in the courts and to recommend and implement action to overcome it." NATIONAL CONSORTIUM OF TASK FORCES AND COMMISSIONS ON RACIAL AND ETHNIC BIAS IN THE COURTS 16 (1998). The National Association of Women Judges, the National Judicial College, the National Center on State Courts, the ABA Commission on Women in the Profession and the National Judicial Education Program have coordinated efforts to consolidate gender bias information through the Gender Fairness Strategies Project. See generally IRD, *supra* note 46.

utilization of the talents of all of its people. Second, self-examination enables an institution to identify, and devise means to eliminate, the harmful effects of gender bias. Third, close attention to the existence of unconscious prejudice can prompt and encourage those who work in the courts to listen to women's voices, and to accord women's proposals the respect customarily accorded ideas advanced by men. And finally, self-inspection heightens appreciation that progress does not occur automatically, but requires a concerted effort to change habitual modes of thinking and acting.⁵³

Justice Ginsburg rightly identifies the benefits of the self-examination process as fostering public understanding of the importance of equality, permitting the judiciary to identify bias and devise means to eliminate it, causing persons involved in the judicial system to pay attention to their behavior, and encouraging progress toward eradicating racial and gender discrimination.

It is essential that the judicial system convey to the public its appreciation for the goal of racial and gender fairness. Our nation has long been struggling with racial and gender discrimination and it may be that we will never see that perfect day when such attitudes do not exist. However, the judiciary, charged as it is with protecting individual rights, has a heightened level of responsibility to foster and promote equality. The judiciary must lead the effort to achieve unprecedented fairness in the judicial system and demonstrate to the public that these issues are not only real, but demand serious attention. Moreover, implementation of anti-discrimination policies and procedures requires judges, attorneys, bailiffs, clerks, and litigants to conform their behavior, if not their beliefs, to acceptable standards. The hope is that while racial and gender bias may linger in society at large,⁵⁴ the judicial system would be insulated from such devastating and counter-productive beliefs and perceptions. Furthermore, improved public perception of the judicial system as a whole may result from such efforts.

Conduct that causes women and persons of color to conclude that bias exists in the court system may be more systemic than individualized. While instances of overt bias certainly do occur, the larger problem stems from behaviors that, while not overtly biased, create the perception of bias. Examples of such inadvertent attitudes and behaviors include mistaking a lawyer for a secretary or

53. Ruth Bader Ginsburg, *Foreword to THE GENDER, RACE AND ETHNIC BIAS TASK FORCE PROJECT IN THE D.C. CIRCUIT* (1995), reprinted in 84 GEO. L.J. 1651, 1651-52 (1996). While this excerpt specifically addresses gender bias, its meaning applies equally to all bias.

54. Instances of racism and sexism in society surface virtually on a daily basis. Recently, an Illinois character and fitness panel found Matthew Hale unfit to practice law because of his outwardly racist views. See Pam Belluck, *Avowed Racist Barred From Practicing Law*, N.Y. TIMES, Feb. 10, 1999, at A12. The panel concluded that Mr. Hale is "free, as the First Amendment allows, to incite as much racial hatred as he desires and to attempt to carry out his life's mission of depriving those he dislikes of their legal rights. But in our view he cannot do this as an officer of the court." *Id.* Mr. Hale is challenging the panel's decision. See *id.*

staff person, stereotyping criminal defendants by their type and manner of dress and generally regarding members of a particular minority or ethnic group as defendants. Individual instances such as these probably will not warrant a full scale investigation and discipline, but will result in unchecked behavior leading to the perception of bias.

Some may resist the creation of task forces due to the belief that complaints of racial or gender bias are adequately managed by the lawyer and judge disciplinary commissions. Assuredly, these bodies certainly do see such complaints, but disposing of racial or gender bias complaints in this manner is an "after-the-fact" approach to the problem. It simply will not work if the goal is institutionalized fairness.

After identifying biased practices and policies within the judicial system, the judiciary must then publish its findings. Disseminating information about the character and manifestations of bias is an important mechanism for addressing racial and gender bias. By calling the public's attention to the existence of bias and expressing a willingness to sanction such bias, the judiciary forces court participants, court employees, lawyers, and judges to modify their behavior. Thereafter, disciplinary measures and sanctions may be used to ensure conformance.

In the end, changing habitual modes of biased thinking and behavior requires an active and concerted effort. While state and local bar associations have made substantial in-roads toward addressing race and gender bias in the legal profession, to achieve a judicial system free of race and gender bias, it is axiomatic that the effort begin at the highest level. State supreme court sponsored race, gender or fairness task forces are the starting point. The overall purpose of these high court sponsored task forces and committees is to institutionalize systems and behaviors that are free of bias.

Institutionalization occurs as new informal norms of behavior with respect to gender [and race] bias become formally incorporated into judicial codes of conduct, rules of professional conduct and other written codes of conduct established by the state or court system. Through such prescriptions and proscriptions, usually sanctionable, the behavior of group members is shaped and maintained.⁵⁵

The impact of institutional reform through these state supreme court-sponsored task forces can be found in any of the states that are now enjoying the benefits of their work.

Each state's highest court is the best entity to shape the judicial system. States' high courts are ultimately responsible for the conduct of participants within the judicial system. Through rules governing court proceedings as well as lawyer and judge conduct, the high courts establish the boundaries of permissible conduct.

The establishment and maintenance of a task force is an involved process and requires the high court to play an active role. For example, the Chief Justice of

55. IRD, *supra* note 46, at 22.

the Connecticut Supreme Court appointed racially and ethnically diverse members to serve on the State of Connecticut Judicial Branch Task Force on Minority Fairness (the "Connecticut Task Force").⁵⁶ The Chief Justice selected twenty-eight members, including a Justice of the Connecticut Supreme Court, judges, a state's attorney, other attorneys, academics, legislators, a police representative and representatives from community-based programs.⁵⁷

Once appointed, the Connecticut Task Force's first objective was to determine the scope of research by selecting those parts of the judicial process most likely to exhibit race and ethnic bias. The members of the Connecticut Task Force began by reviewing task force reports published by other states and other state studies to identify likely problem areas.⁵⁸ The Connecticut Task Force then divided into seven subcommittees to address each identified area of importance.⁵⁹

The Connecticut Task Force held four public hearings where forty-five speakers, including four city mayors, presented information. Other participants included the "NAACP, Urban League, ACLU/[Connecticut Civil Liberties Union], Community Justice Coalition, [Connecticut Council Against Domestic Violence], La Casa de Puerto Rico, Chief State's Attorney's office, Public Defender's office, Attorney General, [Connecticut Alcohol and Drug Abuse Council], and public officials from the municipalities and representatives of academia including law schools, local bar associations, and the clergy."⁶⁰ In addition, twenty individuals who "held a unique position in the legal system, or who had a depth of experience that made their perspective important" were selected for in-depth individual interviews.⁶¹ The Connecticut Task Force organized focus group discussions of four to eight people to discuss their experiences with the Connecticut judicial system and to identify those parts of the judicial process that seemed biased. Finally, the Connecticut Task Force developed questionnaire surveys for judges, attorneys and court employees to identify attitudes regarding certain substantive subjects and personal experiences of race and ethnic bias.⁶² After four years of study, the Connecticut Task Force submitted its final report to the high court identifying problem areas in the judicial system and recommending solutions to prevent further race or gender bias.

Although the Indiana Supreme Court has not initiated any statewide gender and race bias investigations to date, some statewide efforts on the subject of gender have occurred. The Indiana State Bar Association created a Commission on Women in the Profession to examine the existence of gender bias in the profession and to make recommendations to correct any problems found. Indiana

56. See CONN. MINORITY FAIRNESS REPORT, *supra* note 14, at 1.

57. See *id.*

58. See *id.*

59. See *id.* at 2.

60. *Id.* at 3.

61. *Id.* at 4.

62. See *id.*

Court of Appeals Judge Betty Barteau⁶³ has examined the history of women in the Indiana judiciary.⁶⁴ Both of these efforts underscore that Indiana is not exempt from the gender biases found in other states. The following is a general sketch of the findings of the Indiana State Bar Association and Judge Barteau.

In 1988, the Indiana State Bar Association formed the Indiana Commission on Women in the Profession (the "Commission") to:

- (1) assess the current status of women in the legal profession and to identify the career paths of women lawyers and their goals with respect to practice in the organized Bar;
- (2) identify barriers that prevent women lawyers from full participation in the work, the responsibilities and the rewards of the profession;
- (3) develop a program of education to address discrimination against women in the justice system and the unique problems encountered by women lawyers in pursuing their professional careers;
- (4) make recommendations to the Indiana State Bar Association for action to address problems the Commission identifies.⁶⁵

After conducting a survey from a sample of Indiana bar members, the Commission concluded that "gender bias, both overt and subtle, exists which limits women's participation and advancement in the legal profession in Indiana."⁶⁶ Moreover, the Commission concluded that its findings were consistent with the findings of the ABA's Commission on Women in the Profession report and the reports of other state bar associations.⁶⁷ As a result of its findings, the Commission recommended that the Indiana State Bar Association petition the Indiana Supreme Court to adopt a Rule of Professional Conduct "that would create a duty for all attorneys not to manifest gender bias in any professional setting."⁶⁸ The Commission also recommended that the Bar Association petition the Indiana Supreme Court to amend the Code of Judicial Conduct to reflect this position.⁶⁹ As a third recommendation, the Commission

63. Judge Betty Barteau served on the Indiana Court of Appeals from 1991 to 1997. After retiring from the bench, Judge Barteau secured sponsorship from the National Judicial College and a grant from the State Department to serve as Chief of Mission in Russia. She is charged with assisting the Russian judiciary in establishing judicial educational programs, facilitating the judicial appointments process and creating a judicial disciplinary mechanism.

64. The Honorable Betty Barteau, *Thirty Years of the Journey of Indiana's Women Judges 1964-1994*, 30 IND. L. REV. 43 (1997).

65. INDIANA STATE BAR ASS'N, REPORT OF THE COMMISSION ON WOMEN IN THE PROFESSION 2 (1991).

66. *Id.*

67. *Id.* at 2-3.

68. *Id.* at 5.

69. *Id.* at 6.

suggested that the Bar Association and the Indiana Judicial Conference combine forces to create a permanent joint committee of the bench and bar to implement these and other recommendations put forth by the Commission.⁷⁰

In 1993, the Indiana Supreme Court amended the Code of Judicial Conduct to prohibit biased conduct or the appearance of bias. The court added Canon 2C of the Code of Judicial Conduct that reads: "A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion or national origin."⁷¹ The court also amended Canon 3, which states in relevant part:

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, personal characteristics or status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.

(6) A judge shall refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and shall require the same standard of conduct of others subject to the judge's direction and control.⁷²

The court amended the Code following the Commission's report. As of early 1999, the Indiana Rules of Professional Conduct have not been amended to reflect a similar admonishment.

Pursuant to the Commission's recommendations, the Indiana State Bar Association and the Indiana Judicial Center created a joint committee to implement the Commission's suggestions.⁷³ However, this joint committee was dissolved in 1995, with a request that the Indiana Judicial Center form a separate committee to continue the work.⁷⁴ No Judicial Center Committee was formed thereafter. The Indiana State Bar Association does maintain a Women in the Law Committee, which has continued to pursue the Commission's recommendations. For example, the Women in the Law Committee offers educational programs at each state bar association meeting, reports the number and percentage of women in leadership roles to the House of Delegates each year, develops sexual harassment and alternative work arrangement policies, and reviews the character and fitness interview standards for admission to the profession.⁷⁵ While these efforts are invaluable, a state-wide investigation of the

70. *Id.*

71. IND. CODE OF JUD. CONDUCT Canon 2C.

72. IND. CODE OF JUD. CONDUCT Canons 3B(5)-(6).

73. See Telephone Interview with Indiana Court of Appeals Judge Patricia A. Riley, Member, The Joint Committee (May 3, 1999).

74. See *id.*

75. See WOMEN IN THE LAW COMM., INDIANA STATE BAR ASS'N, REPORT TO THE ISBA HOUSE OF DELEGATES (1996) (copy on file with the *Indiana Law Review*).

entire judicial system followed by the implementation of sound bias-eradicating practices and policies must occur to achieve the broader goal of a judicial system free of bias.

Judge Barteau's 1997 article, *Thirty Years of the Journey of Indiana's Women Judges*,⁷⁶ provides another look into the status of women in the profession. Barteau chronicles the history of women serving in the judiciary and the obstacles women faced along the way. In 1869, Arabelle A. Mansfield of Iowa was the first woman admitted to the practice of law.⁷⁷ The Indiana Supreme Court first admitted women to the practice of law in 1893⁷⁸ though other Indiana courts admitted women to practice in all state courts as early as 1875.⁷⁹ Although not the first state to admit women to the legal profession, Indiana ranked eighth behind Illinois, Missouri, Michigan, Maine, Utah, Ohio, and Wisconsin.⁸⁰ As Judge Barteau points out in her article, while Indiana may have been one of the pioneer states to admit women to the practice of law, the state has been much less motivated to cultivate women to serve in the judiciary.⁸¹ Indiana's history plainly illustrates this point. V. Sue Shields was the first female judge in Indiana in 1964,⁸² some ninety years after women were admitted to Indiana practice.⁸³ In 1975, more than ten years later, Betty Barteau was the next woman elected to the Indiana judiciary.⁸⁴ Both Shields and Barteau served as superior court judges in different counties.⁸⁵ After Shields' term as a superior court judge, she was appointed and served as the first female judge on the Indiana Court of Appeals in 1978.⁸⁶ Z. Mae Jimison entered the judiciary as the first female African American to serve as judge in 1988.⁸⁷

As of 1994, women comprised only 12.3% of the Indiana judiciary.⁸⁸ While the percentage of female attorneys in 1994 is unknown, in 1991, 16.4% of the attorneys were women.⁸⁹ Indiana's history clearly demonstrates that the number

76. Barteau, *supra* note 64.

77. *See id.*

78. *See id.* at 55. In Indiana, Antoinette Dakin Leach was the first woman admitted to the bar by order of the supreme court. *See id.*

79. *See id.* at 55-56, 62.

80. *See id.* at 62. The District of Columbia also admitted women to practice to law prior to Indiana. *See id.*

81. *See id.* at 65.

82. *See id.*

83. *See id.*

84. *See id.* at 66.

85. *See id.*

86. *See id.*

87. *See id.* at 67. Phyllis Senegal, who is African American, was appointed as Judge Pro Tempore in 1975 and 1976. *See id.* at 67-68. Justice Myra C. Selby shattered two glass ceilings when she became the first female African American to serve on the Indiana Supreme Court in 1995, about 120 years after women began to practice law. *See id.* at 69.

88. *Id.*

89. *See id.* The Indiana Supreme Court Clerk's Roll of Attorneys currently is being updated

of women serving as judges is simply not keeping pace with the number of female attorneys entering the profession. Judge Barteau attributed women's noticeably slow entry into the judiciary to a combination of factors including the prohibition or discouragement of women's enrollment in law schools, the deterrence of women pursuing careers as litigation attorneys (typically among the best judicial candidates), and the view that women lacked sufficient political credentials to be viable candidates.⁹⁰ Undoubtedly, these and other factors play a role in the underrepresentation of women in the judiciary.

While the Commission's findings and Judge Barteau's work shed some light on the status of women in our state's judicial system, no similar effort has focused on the status of Indiana minorities as lawyers or judges. There is no doubt, however, that issues of race bias are equally as compelling and deserving of critical scrutiny. The paucity of data regarding race and gender bias in the State of Indiana underscores the need for careful investigation and study.

CONCLUSION

We must decide whether we will leave for the next generation a legacy of indifference or opportunity. Remaining indifferent toward problems of race and gender bias is the comfortable path; yet walking the comfortable path may trample on individual rights and lead to diminished public confidence in the judicial system. Now is the time for Indiana to seize the opportunity to embrace self examination and embark upon the hard work of creating a judicial system that promotes the goal of fairness.

to reflect the gender of each registered attorney. It will not, however, reflect the attorney's race.

90. *See id.* at 70-73.

APPENDIX*

STATES GENDER TASK FORCE RACE TASK FORCE

Alabama	None	None
Alaska	1993 - teamed with federal judiciary	1995
Arizona	None	None
Arkansas	None	None
California	1986 - Special Committee of Judicial Council members 1987 - Advisory Committee	1991
Colorado	1988	1996
Connecticut	1990	1994
Delaware	1993 - teamed with state bar	1995 - teamed with state bar
District of Columbia	1990	1990
Florida	1988	1989
Georgia	1989	1993
Hawaii	1987	1987
Idaho	1994	1994
Illinois	None	None
Indiana	None	None
Iowa	1990	1990
Kansas	None	None
Kentucky	1989	1997
Louisiana	1989	1993
Maine	1993	None
Maryland	1986 - teamed with state bar	None

Massachusetts	1987 - originally teamed with state bar	1990 - today, Massachusetts does not employ a race/ethnic bias commission
Michigan	1987	1987
Minnesota	1987	1989
Mississippi	1998	None
Missouri	1990	None
Montana	1990	None
Nebraska	1991	Currently establishing a race/ethnic bias task force
Nevada	1987	None
New Hampshire	None	None
New Jersey	1982	1984
New Mexico	None	1997
New York	1984	1988
North Carolina	None	None
North Dakota	1987	None
Oklahoma	None	None
Ohio	1991 - teamed with state bar	1993
Oregon	1995 - teamed with state bar	1992
Pennsylvania	1994 - teamed with state bar	None
Rhode Island	1984	None - but employs a task force for limited English-speaking litigants

South Carolina	1992 or 1993 - the task force was unable to complete its charge	None
South Dakota	1995	1995
Tennessee	1994	1994
Texas	1991	None
Utah	1986	1996
Vermont	1988	1995
Virginia	None	None
Washington	1987	1987
West Virginia	1993	None - The Commission of the Future of the West Virginia Judiciary tangentially addresses race and ethnic issues
Wisconsin	1989 - created by state bar and approved by supreme court	None
Wyoming	None	None

*The author obtained the preceding information by calling all 50 states in January and February 1999 to ascertain whether or not the state's highest court had created a gender or race task force. This inquiry was designed to identify high court efforts to eradicate bias in the courts and therefore does reflect the efforts of task forces or commissions established through bar associations and other entities. Also, because this Article focuses on the movement to form race and gender bias task forces in this country, the Appendix reflects the date of the task force formation only. Many of these task forces continue to thrive in their efforts to eradicate race and gender bias in the courts, however, a few have encountered difficulties related to funding, lack of interest or other obstacles. It was beyond the scope of this Article to trace the history of each task force from its inception until the present.

