

1991

A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System

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Georgia State University Law Review (1991) "A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System," *Georgia State University Law Review*: Vol. 8: Iss. 3, Article 1.
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GENDER AND JUSTICE IN THE COURTS:
A REPORT TO THE SUPREME COURT OF GEORGIA
BY THE COMMISSION ON GENDER BIAS IN THE
JUDICIAL SYSTEM†

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FORWARD

The Honorable Carol W. Hunstein†

If our courts are to dispense justice fairly and impartially, they must do so in an atmosphere that is free of prejudice. To eliminate bias based on gender, the judicial system must rid itself of old, preconceived ideas of the roles of men and women. In 1989, the Supreme Court of Georgia had the foresight to create the Georgia Commission on Gender Bias in the Judicial System. The Commission was charged with investigating and identifying gender bias within the justice system. It devoted more than two years to studying and analyzing the problem before presenting this report to the Supreme Court of Georgia.

The Commission found that although pervasive, gender bias may be hard to identify and, at times, unintentional. One of the most interesting conclusions drawn from our surveys of judges, attorneys, and court personnel was that where it was possible to note the gender of the respondents, females were more likely to perceive gender bias. Not only were females more aware of this prejudice in others, they were more likely to recognize it in themselves than were male respondents. These differences in perception were particularly significant in cases of domestic violence and rape.

Our study identified bias in many forms, some subtle and some not so subtle. For instance, assault is treated quite differently when it occurs in a domestic setting than when it is stranger upon stranger. Gender-biased stereotyping greatly reduces the reporting, prosecution, and conviction rate in the area of sexual offenses. Sexual offense statutes discriminate against male victims. Paternalistic or punitive attitudes toward women lead to inequitable sentencing practices. Statistics indicate that the juvenile justice system deals more harshly with females even though they are less likely to be involved in delinquent behavior.

In the area of domestic relations, fathers feel that they are at a great disadvantage when they seek custody and feel that judges think mothers make better parents. On the other hand, when custody is contested, mothers may be held to a different and higher standard than fathers. Inadequate child support awards and the difficulty of enforcing them places a great financial burden on the custodial parent who is often the mother. When the support obligor is a woman, she may be

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held to a lower standard than a man. Many women, particularly older women and homemakers, experience a greater drop in their standard of living after divorce than do men. Often their contribution as a homemaker is undervalued when making awards of alimony or dividing property.

Women are underrepresented in the judiciary, which may be attributed to gender bias in the appointment process. Many court employees complain of occupational segregation by gender. Gender-biased and inappropriate conduct in the courtroom by judges, attorneys, and court personnel toward litigants and witnesses and by attorneys toward attorneys is not uncommon. The types of conduct complained of range from sexist language to overt prejudice and harassment.

It is my hope that an implementation committee will be created to act upon and implement the recommendations of the Commission. Some of the problems identified can only be corrected through legislation, and I would like to see appropriate bills introduced. Perhaps the most effective weapon against gender bias is education. Continuing Judicial Education and Continuing Legal Education should include segments on recognizing and eliminating gender bias as should training programs for all personnel who work within or in close relationship to the justice system.

The Supreme Court of Georgia in its wisdom created the Commission to improve the quality of justice in Georgia. The purpose of the Commission was not to discredit the excellent existing system but to ascertain in which areas reform would make the system more just and gender-neutral. The Supreme Court's courage and vision in commissioning the study and implementing its recommendations will serve the citizens of Georgia well into the future.

INTRODUCTION

The Georgia Commission on Gender Bias in the Judicial System was created by Supreme Court Order on March 15, 1989, at the request of the Council of Superior Court Judges. The Honorable Thomas O. Marshall, Chief Justice of the Supreme Court of Georgia, charged the Commission with reviewing the court system to determine whether and to what extent gender bias exists, and to make recommendations to the Supreme Court as to what should be done to correct any problems found. In his address to the Commission upon their being sworn in, Chief Justice Marshall stated that the issue before the Commission was "fairness" and that the Commission should pursue its work to ensure that equal justice is available to all without regard to gender.

Membership on the Commission included judges from each level of the Georgia court system, attorneys, court personnel, academicians, and community leaders with various backgrounds. Judge Carol W. Hunstein of the Superior Court, DeKalb County, Stone Mountain Circuit, was appointed to serve as Chairperson of the Commission.

A concerned Georgia judiciary joined twenty-eight other states which have task forces or commissions that studied or are studying gender bias in the courts.¹ It was felt to be imperative that a study identifying issues and problems relating to Georgia be undertaken. To promote

1. See, e.g., ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS: DRAFT REPORT OF THE [CALIFORNIA] JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS (1990); GENDER & JUSTICE IN THE COLORADO COURTS: REPORT OF THE COLORADO SUPREME COURT TASK FORCE ON GENDER BIAS IN THE COURTS (1990); CONNECTICUT TASK FORCE ON GENDER, JUSTICE AND THE COURTS (1991); *Report of the Florida Gender Bias Study Commission*, 42 FLA. L. REV. 803 (1990); REPORT OF THE ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS (1990); REPORT OF THE KENTUCKY TASK FORCE ON GENDER FAIRNESS IN THE COURTS (1992); GENDER BIAS IN THE COURTS: REPORT OF THE MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS (1989); *Gender Bias Study of the Court System in Massachusetts: Report of the Massachusetts Supreme Judicial Court Gender Bias Study Committee*, 24 NEW ENGLAND L. REV. 745 (1990), and 23 SUFFOLK UNIV. L. REV. 576 (1989); *Minnesota Supreme Court Task Force for Gender Fairness in the Courts: Final Report*, 15 WM. MITCHELL L. REV. 829 (1989); JUSTICE FOR WOMEN: FIRST REPORT OF THE NEVADA SUPREME COURT GENDER BIAS TASK FORCE (1989); *The First Year Report of the New Jersey Supreme Court Task Force on Women in the Courts* (1984), 9 WOMEN'S RTS. L. REP. 129 (1986); THE SECOND REPORT OF THE NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS (1986); *Report of the New York Task Force on Women in the Courts*, 15 FORDHAM URB. L.J. 1 (1986-87); FINAL REPORT OF THE RHODE ISLAND COMMITTEE ON WOMEN IN THE COURTS (1987); REPORT OF THE UTAH TASK FORCE ON GENDER AND JUSTICE (1990); GENDER AND JUSTICE: REPORT OF THE VERMONT TASK FORCE ON GENDER BIAS IN THE LEGAL PROFESSION (1991); GENDER AND JUSTICE IN THE COURTS: FINAL REPORT OF THE WASHINGTON STATE TASK FORCE ON GENDER AND JUSTICE IN THE COURTS (1989); WISCONSIN EQUAL JUSTICE TASK FORCE FINAL REPORT (1991).

efficiency of effort, work done by other states was reviewed to help guide the direction of the investigation.

The first action of the Commission was to determine how to accomplish its mandate. After careful review and analysis of existing studies on gender bias, the Commission adopted a broad scope of inquiry which included:

1. Substantive Laws and Appellate Decisions—Is there gender bias in the law as written?
2. Application of the Law—Is the law applied in a fair and equal manner?
3. Rules of Court and the Code of Judicial Conduct—Do these ensure that activities within the courtroom are conducted in an unbiased manner?
4. Bias by Judges and Court Personnel Against Those Using the Court System (Court personnel is defined as clerks, bailiffs, law enforcement officers, court administrators, judicial secretaries, probation officers, jurors, and attorneys. Those using the system are defined as attorneys, litigants, witnesses, jurors, and others.)—Does bias exist against those who use the court system?
5. Bias by Judges and Court Personnel Against Those Within the Court System—Does bias exist in employment practices, including hiring, firing, and pay policies as well as treatment, conduct, and sexual harassment?
6. Court Facilities—Do the physical aspects of the courthouse support and respond to the needs of men and women adequately?
7. Selection of Judges—Does our system allow equal opportunity in both the election and appointment processes?
8. Formal Language of the Courts—Is gender-biased language found in jury charges, forms, correspondence, and other publications written or used by the judiciary?

The Commission was immediately confronted with how to investigate each topic and gather the information needed to support findings and recommendations in this area. One of the first considerations was the fact that there already existed the Special Committee of the Georgia State Bar on the Involvement of Women and Minorities in the Profession, which was looking at gender and racial bias within the legal profession. It was a concern of the Commission that its work not overlap but rather complement the work being done by that Committee.

It was the Commission's desire to survey those individuals who worked in and with the courts of Georgia to determine the areas and level of perceived gender bias within the court system. As resources were not available to formulate and test a survey, the Commission

examined surveys that had been used in other states to see if modifications could be made to an existing survey instrument which could be appropriate for use in Georgia. The Commission agreed upon and modified the Maryland Survey. A contract was made with the A.L. Burruss Institute of Public Service at Kennesaw State College to conduct several surveys and compile the results.² The Commission identified the populations of potential respondents to be included in the surveys with the exception of the sample of attorneys which was created by the State Bar of Georgia.

The surveys were sent to all trial court judges including the superior, state, juvenile, probate, and magistrate court judges. A second group of surveys was administered to the superior court and state court clerks, judicial secretaries, and official court reporters. Finally, surveys were sent to a sampling of 1000 attorneys. A total of 753 responses were received from all groups.

A large part of the Commission's data collecting efforts went into conducting a year-long series of public hearings around the State. Two public hearings were held within the Atlanta metropolitan area, which comprises two of the Judicial Administrative Districts in the State. Other public hearings were held in each of the eight remaining Judicial Administrative Districts—Columbus, Athens, Albany, Rome, Macon, Gainesville, Savannah, and Griffin. When requested, the Commission also held confidential hearings in conjunction with the public hearings. Prior to each hearing, extensive mailings were sent to persons residing within the judicial district in which the hearing was to be held inviting them to testify or notify others of the opportunity to express their concerns before the Commission. Members of the news media were contacted, and notices inviting the public to the hearing were posted in public places throughout the district.

The Commission heard from 127 persons at the public hearings held around the state. These included thirty-seven state, county, and city government officials; twenty-three spokespersons for shelters and counseling centers; twenty-one private attorneys; twenty-one individuals, including parents, spouses, and victims; twelve professors and doctors; seven police officers; and six people from special interest groups. Six persons requested and were given confidential hearings. Additional information and correspondence were received from numerous individuals who were unable or unwilling to attend the public and confidential hearings.

During the course of the hearings, the mandate of the Commission was read to all participants. The mandate stated that the Commission's goal was not to single out any individual agency or court for criticism or

2. See Carol Pierannunzi, *Overview Report of Survey Findings and Surveys (1991)* (unpublished manuscript).

praise but to document problems within the entire system. At no time did any Commission member ask questions about the personal conduct or propriety of particular judges, lawyers, or personnel. It should be noted that this report deals primarily with perceived instances of gender bias and that the Commission also heard unsolicited reports of praise about members of Georgia's judicial system.

Additionally, numerous studies, books, and articles were reviewed by the Commission and staff during the course of the investigation. On-site interviews were held at the Women's Correctional Institution in Hardwick, Georgia, and at Milan Women's Center in Milan, Georgia.

The original analysis of the collected data was accomplished by committees of the Commission. Each committee was assigned an area of study within the Commission's scope of inquiry. The committees produced reports in the following areas: Domestic Violence Involving Adults; Sexual Offenses; Adult Sentencing; Juvenile Justice System; Child Custody; Visitation; Child Support; Alimony and Equitable Distribution of Property; Treatment of Attorneys, Litigants, and Witnesses in the Courtroom; Treatment of Court Employees; Formal Language of the Courts; Judicial Ethics and Discipline; Judicial Selection; and Court Facilities.

Findings and recommendations were formulated by the committees in each of these areas and were reviewed by the Commission. While not every member agreed to every finding and recommendation, this report is a consensus of the entire Commission.

The Commission's final report contains an interpretation of conditions and practices having an impact on litigants, attorneys, court employees, witnesses, and judges due to gender bias or discriminatory stereotyping in the court system. It contains extensive data and testimony from the hearings on judicial behavior concerning cases of domestic violence, rape, alimony, equitable distribution of property, child support, and child custody.

In Georgia, as in other states, the Commission found that gender bias is perceived to affect the judicial system and those using it. The Commission concludes that while no widespread and overt gender bias was uncovered in Georgia's courts, there is evidence that gender bias does exist within Georgia's judicial system and that some citizens have consequently suffered injustice within that system. It is hoped that this report will contribute to the improvement of the judicial system. This Commission is confident that the judiciary, court personnel, and others affiliated with the judicial system will be sensitive to the concerns expressed in this report and that they will vigorously pursue gender fairness in the judicial system.

This Commission hopes that funding and staff resources, including judicial branch education, will be provided to implement the recommendations contained in this report. Moreover, the Commission

suggests that the Georgia Supreme Court, together with the State's Judicial Council, devise some means of reviewing this implementation effort. Any such mechanism would be charged with assuring that all of the existing councils, agencies, and departments in Georgia's judicial branch conscientiously undertake the steps within their domains of authority to eradicate gender bias and promote gender fairness in the courts.

DOMESTIC VIOLENCE INVOLVING ADULTS

The mandate given by the Commission to the committee studying domestic violence was to determine whether gender bias is present in the judicial system's response to domestic violence. Although men can be victims of domestic violence, the overwhelming majority of the victims of domestic violence are women.¹ Some of the most compelling testimony which the Commission received during the public hearings throughout the State concerned women seeking civil and criminal relief from batterers, but facing gender-biased barriers to relief throughout the judicial system—from police to prosecutors to judges. Gender-biased attitudes are pervasive in the judicial system's handling of both domestic violence and rape. Although women are six times more likely to be battered or raped by a husband, ex-husband, or boyfriend as opposed to a stranger,² the judicial system responds to assaults and rapes in domestic cases in a way distinctly different from assaults by a stranger. The Commission found that the difference in response is largely due to gender-biased myths and attitudes about domestic violence.

As used in this report, domestic violence, also called battering or spousal abuse, refers to assaultive behavior involving adults who are married, cohabiting, or having an ongoing or prior intimate relationship.

1. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, CRIME AND JUSTICE FACTS 1985, (1985); BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, NATIONAL CRIME SURVEY 1978-82, (1982) [hereinafter NATIONAL CRIME SURVEY 1978-82]; BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, SPECIAL REPORT: FAMILY VIOLENCE (1984); FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, UNIFORM CRIME REPORTS 1985 (1986); G.A. GOOLKASIAN, U.S. DEPT OF JUSTICE, CONFRONTING DOMESTIC VIOLENCE: THE ROLE OF CRIMINAL COURT JUDGES (1986); P.A. LANGAN & C.A. INNES, U.S. DEPT OF JUSTICE, SPECIAL REPORT: PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN (1986); OFFICE OF THE ATTORNEY GENERAL, U.S. DEPT OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE (1984); K. ROSE & J. GOSS, U.S. DEPT OF JUSTICE, DOMESTIC VIOLENCE STATISTICS (1989); LAWRENCE W. SHERMAN & RICHARD A. BERK, WASHINGTON, D.C., POLICE FOUNDATION, THE MINNEAPOLIS DOMESTIC VIOLENCE EXPERIMENT (1984); Jennifer Branch-Rooke et al., *Domestic Violence: An Analysis of Battered Women in Georgia*, 79 J. MED. ASS'N GA. 907 (1990); Murray A. Strauss & Richard J. Gelles, *Societal Change and Change in Family Violence from 1975 to 1985 as Revealed by Two National Surveys*, 48 J. MARRIAGE & FAM. 465 (1986).

2. See sources cited *supra* note 1.

I. Domestic violence in Georgia is widespread and often results in severe injury or death. Some studies report that 90% to 95% of the victims of domestic violence are women. Police, prosecutors, shelter workers, and domestic violence victims throughout Georgia repeatedly testified that the prevalence of domestic violence in Georgia is consistent with the national averages, if not even more prevalent.

A large percentage of domestic violence batteries are never reported in Georgia or nationally.³ National Crime Survey data indicate that nearly half of all incidents of domestic violence are not reported to police.⁴ Nonetheless, domestic violence remains the most reported crime in our nation. Although men are the victims of domestic violence in certain cases, the overwhelming majority of victims of domestic violence are women. Some studies report that 95% of the victims of domestic violence are women.⁵ Nationally, four to six million women are beaten in their homes each year. FBI statistics indicate that every fifteen seconds a man batters a woman in her home.⁶ Nationally, a married woman is six times more likely to be attacked by her husband, ex-husband, or boyfriend than by a stranger.

The FBI also reports that from 1980 to 1984, 12,582 women were killed in one-on-one homicide events. Of these women, 52% were killed by their husbands, ex-husbands, common-law husbands, or boyfriends.⁷ An even more in-depth national study of one-on-one murder and nonnegligent manslaughter cases from 1980 to 1984 found that more than one-half of female homicide victims are killed by male partners.⁸ The authors of the National Council of Juvenile and Family Court Judges' Probation/Parole Protocol cite statistics which attribute 50% of all murders of women to their male partners.⁹

The United States Surgeon General has said that domestic violence is the leading cause of injury to women in the United States.¹⁰ According to national statistics, more injuries occur to women from

3. See sources cited *supra* note 1.

4. See sources cited *supra* note 1.

5. See sources cited *supra* note 1.

6. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA (1983); BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE: THE DATA (1988).

7. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, UNIFORM CRIME REPORTS (1985); FEDERAL BUREAU OF INVESTIGATION, *supra* note 1.

8. A. Brown & K.R. Williams, Gender Specific Effects on Perpetration Patterns of Homicide, Address Before the Annual Meeting of the American Psychological Association (August 1987).

9. A.R. KLEIN, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, PROBATION/PAROLE SUPERVISION PROTOCOLS FOR SPOUSAL ABUSERS (1989).

10. See U.S. Surgeon General's Statement to the American College of Obstetricians and Gynecologists (Jan. 3, 1989).

domestic violence than muggings, auto accidents, and rape combined. A 1990 study by the Centers for Disease Control (CDC) pointed out that injury, as opposed to disease, is the leading cause of lost years of potential life in the United States.¹¹ According to the 1990 CDC study, violence between persons who are related, share a household, or are otherwise intimate with each other is a "widespread public health problem and a substantial contributor to the public health impact of injuries."¹²

Georgia has no centralized data base for collecting statistics on domestic violence cases in order to give precise figures. However, police, prosecutors, shelter workers, and domestic violence victims throughout this state repeatedly testified that the prevalence of domestic violence in Georgia is consistent with the national averages, if not even more prevalent. For example, witnesses testified that domestic violence against women in a certain middle-sized Georgia town from 1986 to 1989 was much higher than the national average.¹³ Nearly 80% of female homicide victims in that town from 1986 to 1989 were killed by people they knew in a domestic situation. Also, domestic violence was involved in 74% of the aggravated assaults against women, 92% of the aggravated batteries against women, and 72% of the rapes.¹⁴ In a larger south Georgia city, domestic homicides ranged from 27.5% of all homicides in 1985, to 37.9% of all homicides in 1986, and 21.1% of all homicides in 1988.¹⁵

Testimony from officials in various other Georgia cities also confirmed that at least 25%, and at times up to 50%, of all homicides in their communities involved domestic violence.¹⁶ Statistics kept by the Georgia Network on Domestic Violence give an indication of the number of crisis calls received at the battered women shelters throughout the state. Georgia's battered women shelters received 29,726 crisis calls from battered women seeking help and shelter in 1988, 38,714 crisis calls in 1989, and 20,449 crisis calls from January to June in 1990.¹⁷

11. CENTERS FOR DISEASE CONTROL, *Family and Other Intimate Assaults—Atlanta, 1984*, in MORBIDITY & MORTALITY WEEKLY REPORT (1984).

12. *Id.* at 526.

13. Letter from Dr. H.J. Phillips, Chairman, Criminal Justice Department, Albany State College, to the Georgia Commission on Gender Bias in the Judicial System (Jan. 25, 1990) (submitting statistical information).

14. *Id.*

15. Letter from William L.D. Lyght, Jr., City of Savannah Dep't of Police, Savannah, Ga., to the Georgia Commission on Gender Bias in the Judicial System (June 25, 1990) [hereinafter Lyght Letter].

16. Transcripts of 1990-1991 Public Hearings, Georgia Commission on Gender Bias in the Judicial System in Atlanta, Albany, Macon, Savannah, Rome, and Gainesville, Ga.

17. Branch-Rooke et al., *supra* note 1; Georgia Network on Domestic Violence, Atlanta, Ga. (statistics submitted as exhibits to testimony and written report to

In Atlanta during 1988, the Domestic Crisis Intervention Program estimated that there were 90,000 domestic calls received by the Atlanta Police Department.¹⁸ Other experts estimate at least 250,000 women are battered in Georgia each year.¹⁹ Available statistics clearly show the severity and potential lethality of domestic violence in Georgia.

II. Police, prosecutors, and judges often have gender-biased attitudes about domestic violence and lack understanding about and sensitivity to the dynamics of domestic violence.

A. Police, prosecutors, and judges often have the following gender-biased attitudes.

Unfortunately, in Georgia, the judicial system's traditional response to domestic violence has been nonintervention. The nonintervention policy is based on five main gender-biased myths or attitudes about domestic violence:

1. The belief that a man should be able to control his wife and punish her for behavior he does not like.

Under the law, a man has no right to beat his wife or intimate partner, but this long-held societal attitude still prevails.

2. The belief that domestic violence is a private family matter and not a serious crime.

Research indicates that the long-held societal attitude is that the sanctity of the family or nonintervention in private family matters is more important than the violent criminal behavior of domestic violence. However, under the law, one has no right to beat a spouse or intimate partner. Domestic violence is a crime, not a private family matter.

3. The belief that the victim somehow provoked or caused the domestic violence.

To those never involved in domestic violence, it is difficult to understand why a spouse would beat a partner. Therefore, the assumption is that the victim must have done something to provoke the batterer. This belief is also associated with the belief that a man should be able to control his wife and punish her for behavior he does not like.

Commission); M. Louise Bill, *Battered Women and the Legal System* (1989) (unpublished manuscript).

18. See sources cited *supra* note 17.

19. See sources cited *supra* note 17.

4. The belief that the victim must like the violence or the victim would leave.

Instead of focusing on the criminal behavior of the batterer, gender-biased attitudes focus on why the victim does not leave, without understanding the pressures the victim faces to stay. The first question a domestic violence victim is often asked is "Why don't you just leave?", or the first advice the victim is given is "You should just seek a divorce." Instead of focusing on the criminal behavior of the defendant, societal attitudes focus on why the victim does not leave. This totally ignores the great pressures victims face to remain in the relationship due to economic dependency, fear of increased violence, and pressure to keep the family together. The batterer usually promises it will never happen again, and the victim believes the batterer. Most victims just want the violence to end, not the marriage. Even if the victim leaves or divorces the batterer, the violence in many cases continues or escalates.

5. The belief that domestic violence cases are trivial and unimportant and that the testimony of the domestic violence victim is unbelievable or incredible.

Domestic violence is, and should be viewed as, a crime. But often those in the judicial system view domestic violence as an unimportant or trivial family problem to be resolved elsewhere and not a serious crime to be handled by police, prosecutors, and judges. The victim's testimony is often dismissed as incredible due to a lack of understanding about the dynamics of domestic violence.

Since 90% to 95% of the victims of domestic violence are women, the beliefs listed above primarily affect women resulting in a disparate impact on women. Thus, these beliefs become gender-biased attitudes.

Witnesses in every city where public hearings were held testified that these gender-biased attitudes and lack of understanding of police, prosecutors, and judges about the nature of domestic violence are the most pervasive and difficult problems facing victims of domestic violence in Georgia. Witnesses testified that participants in the judicial system often treat the cases as trivial and unimportant, blame the victim for not leaving the batterer, accuse the victim of lying about injuries, or deny or minimize the victim's experiences. Victims of domestic violence often experience the police and court system as an adversary rather than an ally. Victims fail to report domestic violence in large part because of these gender-biased attitudes in the judicial system.

B. Police, prosecutors, and judges lack education, training, sensitivity, and understanding of the cycle of violence, the "battered wife syndrome," and the overall complexity of domestic violence.

In addition to gender-biased attitudes, witnesses repeatedly testified, and research showed, that there is a lack of understanding of domestic violence throughout the judicial system, especially (a) that minor domestic violence, if not dealt with firmly by the judicial system, will assuredly escalate to more serious domestic violence; (b) that the battering will end only when the defendant batterer knows there will be punishment; (c) that the most successful form of treatment is some form of criminal punishment; and (d) that leaving the batterer is often unrealistic for an unemployed mother with children and often places the victim at greater risk of even more serious injury. Witnesses emphasized that for those whose lives have never been touched by domestic violence, it can be difficult to understand. Nonetheless, this does not excuse the gender-biased beliefs which have permeated the judicial system when dealing with domestic violence.

Emphasis was placed on understanding the cycle of violence and the "battered wife syndrome," and much research on these subjects was presented to the Commission.²⁰ Contrary to certain myths, the research shows that domestic violence occurs within all social, economic, ethnic, and religious groups. Certain professionals testified that battering is a socially learned behavior and is not the result of substance abuse or other outside stresses. Many batterers do not drink heavily, and many alcoholics do not beat their spouses.²¹

The first stage of the cycle of violence is the tension build-up period which varies in length of time. The second stage is the actual violence involving bodily force, weapons, or objects. The third stage of the violence cycle is referred to as the honeymoon period where the victim hears "it will never happen again." However, the violence does occur again. The research consistently showed, and expert witnesses testified, that domestic violence is rarely a single isolated event but generally escalates both in frequency and severity over time.²²

Victims of domestic violence generally stay with batterers because of fear of retaliation against themselves or their children, economic

20. GOOLKASIAN, *supra* note 1; Bill, *supra* note 17; Mary E. Conway, Written Submission to the Commission (Dec. 1, 1989) (unpublished manuscript); Council on Battered Women, Atlanta, Ga., Suggested Statistics, Myths, Dynamics of the Batterer and Theories Dominating the Field of Domestic Violence (1990); Men Stopping Violence, Inc., Men Stopping Violence: A Program for Change (1988); A.L. Vorreyer-Hedges, Statement of the Association for Prevention of Domestic Violence (1990).

21. See sources cited *supra* note 20.

22. See sources cited *supra* note 20.

dependence, fear of greater physical danger if they attempt to leave, fear of losing children, fear of involvement in court procedures, social isolation with no support system, and lack of information about alternatives or community resources for domestic violence victims. These victims are embarrassed, afraid, and usually lack financial resources to leave. They are afraid to report the crime because, even if arrested, the batterer often will be out of jail in a few hours and may be even more angry. They generally do not want a divorce, they just want the battering to end. A divorce will only escalate their economic problems and does not necessarily guarantee protection as the battering may continue after separation. Victims do not understand why they have to leave to stop the battering rather than the battering being recognized as criminal behavior and the batterer being arrested and prosecuted for the battering. In fact, most of the victims who are ultimately killed by their spouses are killed because they tried to leave or they left.²³ Lack of understanding of these dynamics of battering has resulted in the gender-biased attitude that because the victim does not leave, the battering is enjoyed or is somehow caused by the victim.

III. *Police Response to Domestic Violence*

- A. *Police routinely fail to arrest the batterer at the scene and later fail to take out an arrest warrant, even when visible injury and probable cause exist.*

The most common complaint heard in almost every city where the ten public hearings were held was that the police continually refuse to arrest the batterer at the scene in domestic violence calls, even when the batterer is still present and even though probable cause for the arrest exists. Georgia law expressly authorizes a police officer to make an arrest without a warrant if the officer has probable cause to believe that an act of family violence has occurred. Georgia law provides as follows:

An arrest for a crime may be made by a law enforcement officer either under a warrant or without a warrant if the offense is committed in his presence or within his immediate knowledge; if the offender is endeavoring to escape; or if the officer has probable cause to believe that an act of family violence, as defined in Code Section 19-13-1 has been committed²⁴

23. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CRIME SURVEY: REPORT TO THE NATION 3 (2d ed. 1988).

24. O.C.G.A. § 17-4-20(a) (Supp. 1991).

The Family Violence Act defines "family violence":

[T]he term "family violence" means the occurrence of one or more of the following acts between past or present spouses, parents and children, stepparents and stepchildren, foster parents and foster children, or other persons living in the same household:

- (1) Any felony; or
- (2) Commission of offenses of battery, assault, criminal damage to property, unlawful restraint, or criminal trespass.²⁵

Under Georgia law, family violence applies to anyone living together no matter what the relationship. The probable cause standard in family violence or domestic violence offenses is no different than the probable cause standard in other criminal offenses. For example, officers have probable cause to arrest when visible signs of injuries are present, or when there is an admission of guilt, or when the alleged batterer still has a weapon.

Georgia law thus provides that the police officer should make an arrest when the officer has probable cause that a crime of domestic violence has occurred. However, domestic violence victims, shelter workers, attorneys, and even police officials repeatedly testified before the Commission in almost every city where public hearings were held that police officers routinely do not make arrests in domestic violence cases even where probable cause exists due to one or more of the gender-biased attitudes discussed earlier.

A female police officer in south Georgia succinctly explained to the Commission that the sex of the victim plays a large part in the way police and the judicial system handle domestic violence.²⁶ The police officer gave an example of a male customer in a bar who becomes disorderly and police are notified. An arrest is almost always made at the scene, even though the offender may frequent the bar regularly, may be friends with the manager, may be likely to return to the bar, and may be involved in other disorderly conduct. In contrast, in domestic violence cases, officers often cite the high probability of the victim's getting back with the offender or not coming to court as the reason for not making an arrest. The police officer related this to gender bias in that the vast majority of domestic violence victims are women and children.

The police officer gave the Commission another example of gender bias. In an actual case, a man went to his estranged wife's apartment.

25. *Id.* § 19-13-1 (1991).

26. *Albany Public Hearing Before the Commission on Gender Bias in the Judicial System* 13 (Jan. 19, 1990).

He said that her mother was in the hospital and that she needed to go see her. The woman left with her husband, was beaten, bound, and repeatedly raped. A uniformed police officer and his supervisor told the victim that there was nothing they could do because she and her husband were still married. In other instances, victims who reside with the batterer are told by police that they are "common law" and thus, the police can not interfere with their marital relationship. However, under Georgia law, marital status is not a defense against rape and battery. In fact, Georgia law expressly provides for arrest in family violence cases.

At the Commission's public hearings, other witnesses reported that when police respond to a call for help in domestic violence situations, the officers "don't do anything." They not only fail to arrest, but further victimize the victim by asking what was done to cause it or by advising the victim to leave or get a divorce. Victims generally are not informed of their legal options or where they can get help. Victims frequently are not even told by the police that they can take out a warrant.

A police captain in a mid-sized Georgia city testified about the pro-arrest policy instituted in his jurisdiction in 1989.²⁷ As a result of the pro-arrest policy, domestic violence arrests increased from ten to fifteen per month to over sixty arrests per month. Even with that increase, the police captain recommended that Georgia law be amended from "may arrest" to "will arrest" as follows:

It's my personal belief, rather than say "may make an arrest," that "will make an arrest" in the legislation [would] be more effective. That "may" is really ambiguous, and it allows a lot of people a lot more discretion than they need because if there's probable cause there's no reason not to make an arrest in my estimation.²⁸

1. Police often require the victim to obtain a warrant at the warrant office rather than making an arrest on the scene where probable cause exists.

Shelter workers, domestic violence victims, and attorneys repeatedly testified that, rather than making arrests, police officers, at best, may tell the victims they must take out a warrant and even then rarely give the victim information about how or where to take out a warrant. The victim is rarely taken to the warrant office by the police. Domestic violence experts reported that victims are placed at higher risk of more

27. *Savannah Public Hearing Before the Commission on Gender Bias in the Judicial System* 71 (June 15, 1990).

28. *Id.* at 100.

violence when the police officers do not arrest and tell victims they must take out a warrant. The batterer blames the victim even more for his arrest and is more likely to injure the victim again. However, as outlined above, Georgia law clearly allows, if not imposes, a duty on a police officer to make an arrest in domestic violence cases upon probable cause, which witnesses testified often exists in domestic violence calls.

2. Police accept verbal assurances from the batterer that the batterer will not do it again or that the victim started it, even though research has documented the reoccurring and escalating cycle of violence and a high rate of recidivism in domestic violence cases.

Other witnesses had other theories or explanations why police officers do not make arrests. Police officers often accept verbal assurances from the batterer that the incident will not recur, even though statistics and research show domestic violence without intervention generally escalates in severity and frequency. Batterers also often claim that the victim provoked or perpetuated the violence. Police frequently accept the batterer's word over the victim's and do not arrest, or accept the frightened victim's "assurances" that the victim is "OK" when it should be clear that the victim is merely afraid of retaliation by the batterer for the victim's calling the police. Officers sometimes do not arrest the batterer but threaten arrest to the hysterical, emotional victim with visible signs of injury, or they arrest both the batterer and the victim. In contrast, in other crimes police rarely if ever fail to arrest where probable cause exists based upon the accused's claims that the victim caused the problem. Research data and witnesses before the Commission make it clear that the gender-biased belief that the victim must have done something to provoke the batterer contributes heavily to the failure of the police to arrest when the batterer claims the victim started the fight.

3. Police incorrectly tell the victim to leave or to get a divorce even though statistics show that the battering will continue after the separation or the divorce.

Police officers at times incorrectly tell the battered victim that the victim should just leave or get a divorce. While the advice is no doubt well intended, it does not address the conduct of the person responsible for the violence. A divorce often causes more problems for the victim from a batterer. Studies show that often the violence continues and even escalates after the divorce. A 1990 CDC study of domestic violence in fatal and nonfatal incidents in Atlanta concludes that at least one-fifth of the incidents involved partners who were estranged or whose

relationships had previously ended.²⁹ The CDC report recommended that "strategies for protecting women who have terminated abusive relationships but remain at risk for injury or death should be incorporated in existing efforts by police, health and social service agencies."³⁰

Witnesses repeatedly testified that battered victims want the battering, not the marriage, to end. The police advising the victim to leave or get a divorce implies some responsibility on the victim's part for causing the battering in the first place.

4. Police improperly shift to the victim the burden of deciding whether to prosecute when it is the job of the trained police to make the decision whether probable cause exists for an arrest.

In domestic violence cases, police officers on occasion are faced with a victim visibly injured who denies the abuse occurred or does not want the batterer arrested. Research shows that after calling the police battered victims frequently are threatened by the batterer with additional violence to them or their children if the police arrest.³¹ Frequently, by the time the police arrive, the victim is emotional, fears retaliation, and asks the officer not to arrest the batterer.

In other types of violent crime, when a victim calls the police and reports a crime where there is visible evidence of injury and the perpetrator is still at the scene, police officers usually make an arrest with or without the victim's consent. It is the responsibility of the officer, not the victim, to decide whether an arrest should be made. Any criminal action initiated by the officer is the action of the State of Georgia and not the action of the victim. However, gender-biased views about domestic violence and lack of understanding about why the victim may request no arrest after calling the police generally result in the police officer's not making an arrest even though visible signs of severe injury to the victim exist. In domestic violence cases, victims with visible injuries are generally in an overwrought emotional state or are threatened with retaliation by the batterer for having called the police. The arrest decision should not be that of the victim but that of the police.

29. See CENTERS FOR DISEASE CONTROL, *supra* note 11.

30. See *id.*

31. See *id.*; see also sources cited *supra* notes 1, 20.

B. Police frequently undercharge the batterer with a municipal ordinance violation of disorderly conduct or the misdemeanor offenses of simple battery or criminal trespass, while the facts often show the more serious misdemeanor offense of battery or the more serious felony offense of aggravated assault.

Even if the batterer is arrested on probable cause, many complaints were voiced to the Commission that the police would undercharge the defendant. The defendant would be charged with only a city ordinance offense of disorderly conduct, as opposed to the proper charge of simple battery or battery or even aggravated assault in certain cases. A municipal ordinance violation generally means that the defendant will be released from custody on recognizance bond immediately after arrest and that ultimately only a fine will be imposed.

Even in those jurisdictions where arrests or warrants for simple battery or criminal trespass are made, witnesses stressed that often the batterer should have been charged with battery or aggravated assault. Under Georgia law, simple battery and criminal trespass charges do not carry any mandatory sentence. Code section 16-5-23, entitled "Simple battery," provides:

- (a) A person commits the offense of simple battery when he either:
 - (1) Intentionally makes physical contact of an insulting or provoking nature with the person of another; or
 - (2) Intentionally causes physical harm to another.
- (b) . . . a person convicted of the offense of simple battery shall be punished as for a misdemeanor.³²

Code section 16-7-21, entitled "Criminal trespass," provides:

- (a) A person commits the offense of criminal trespass when he intentionally damages any property of another without his consent and the damage thereto is \$500.00 or less or knowingly and maliciously interferes with the possession or use of the property of another person without his consent.
- (b) A person commits the offense of criminal trespass when he knowingly and without authority:
 - (1) Enters upon the land or premises of another person . . . for an unlawful purpose;
 - (2) Enters upon the land or premises of another person . . . after receiving, prior to such entry, notice from the owner . . . that such entry is forbidden; or

32. O.C.G.A. § 16-5-23 (Supp. 1991).

(3) Remains upon the land or premises of another person . . . after receiving notice from the owner . . . to depart.

(c) A person who commits the offense of criminal trespass shall be guilty of a misdemeanor.³³

However, the criminal offense of battery carries mandatory sentences for second and third battery offenders. Code section 16-5-23.1, entitled "Battery," provides:

(a) A person commits the offense of battery when [he/she] intentionally causes substantial physical harm or visible bodily harm to another.

(b) As used in this Code section, the term "visible bodily harm" means bodily harm capable of being perceived by a person other than the victim and may include, but is not limited to, substantially blackened eyes, substantially swollen lips or other facial or body parts, or substantial bruises to body parts.

(c) Except as provided in subsections (c), (d), (e) and (f) of this Code section, a person who commits the offense of battery is guilty of a misdemeanor.

(d) Upon the second conviction for battery against the same victim, the defendant shall be punished by imprisonment for not less than ten days nor more than 12 months, by a fine not to exceed \$1,000.00, or both. The minimum sentence of ten days for a second offense shall not be suspended, probated, deferred, stayed, or withheld; provided, however, that it is within the authority and discretion of the sentencing judge to:

(1) Allow the sentence to be served on weekends by weekend confinement or during the nonworking hours of the defendant. A weekend shall commence and shall end in the discretion of the sentencing judge, and the nonworking hours of the defendant shall be determined in the discretion of the sentencing judge; or

(2) Suspend, probate, defer, stay, or withhold the minimum sentence where there exists clear and convincing evidence that imposition of the minimum sentence would either create an undue hardship upon the defendant or result in a failure of justice.

(3) Upon a third or subsequent conviction for battery against the same victim, the defendant shall be guilty of

33. *Id.* § 16-7-21.

a felony and shall be punished by imprisonment for not less than one nor more than five years. The minimum sentence provisions contained in subsection (d) of this Code section shall apply to sentences imposed pursuant to this subsection.³⁴

Witnesses testified that police in some jurisdictions often do not arrest batterers for the more appropriate offense of battery, and, in turn, prosecutors fail to modify the charge to battery, thus this mandatory jail sentence is infrequently imposed in domestic violence cases. A third battery is a felony. Failure to charge and prosecute the batterers with battery also allows them to avoid a felony charge for the third battery.

Another complaint in some cities was that police often undercharge batterers with the misdemeanor offense of simple battery or criminal trespass rather than the more serious and appropriate felony offense of aggravated assault. Code section 16-5-21, entitled "Aggravated assault," provides as follows:

- (a) A person commits the offense of aggravated assault when he assaults:
 - (1) with intent to murder, to rape, or to rob; or
 - (2) with a deadly weapon or with any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury.
- (b) . . . a person convicted of the offense of aggravated assault shall be punished by imprisonment for not less than one nor more than 20 years.³⁵

Testimony indicated that even if the police charge the batterer with aggravated assault because a weapon was involved in the domestic violence, prosecutors were likely to reduce the charges to simple battery. The misdemeanor offenses carry a maximum penalty of one year in jail, whereas the felony offense of aggravated assault may be punished by up to twenty years. Even in jurisdictions where police arrest on probable cause, witnesses testified that batterers are routinely undercharged with simple battery, as opposed to battery or aggravated assault, due to the police's gender-biased views that the victim must have done something to provoke the batterer or that this is more of a private family matter than criminal conduct for the courts. The undercharging by police was attributed to police officers generally treating domestic violence lightly and not as a serious crime.

34. *Id.* § 16-5-23.1.

35. *Id.* § 16-5-21.

Charging the defendant with a municipal ordinance violation or simple battery, rather than battery or aggravated assault, generally allows bond on defendant's own signature or at low cost. Victims, especially those who have to take out warrants before the defendant will be arrested by the police, complain about the batterer getting back home before the victim.

C. In most instances, statistics show that the police arrest approach is a more effective approach to preventing reoccurring domestic violence than the "cool down" or "get a divorce" approaches by police.

Surveys in police departments and other research regarding the "police arrest approach" show that the police arrest approach is the more effective approach for reducing repeat offenses of domestic violence than the "cool down" or "get a divorce" approaches by police.³⁶ Statistics show that the recidivism rate is lower when a police arrest is made versus no arrest, even where there is no prosecution or conviction after the arrest.³⁷

Some witnesses indicated that police view domestic disturbances as high risk and are reluctant to arrest the batterer for this reason. However, while domestic violence cases do pose certain risks, police arrest defendants routinely in far more hazardous assignments. Also, national statistics show that police injuries in domestic violence cases account for only a small percentage of police injuries.³⁸ Some witnesses indicated police concern for injury did not account for the lack of arrests in domestic violence cases, but that gender-biased attitudes did account for the failure to arrest.

1. Homicides in domestic violence cases occur after repeated calls to police fail to provide protection to victims.

Homicides occur in two ways in domestic violence cases: (1) the cycle of violence escalates and the batterer ultimately kills the victim, or (2) the battered victim resorts to homicide of the batterer after repeated calls to police result in no arrests or repeated arrests result in little or no jail time or protection.

36. SHERMAN & BERK, *supra* note 1; Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984) [hereinafter Sherman & Berk, *The Specific Deterrent Effects*].

37. NATIONAL CRIME SURVEY 1978-82, *supra* note 1; Sherman & Berk, *The Specific Deterrent Effects*, *supra* note 36.

38. FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, LAW OFFICERS KILLED AND ASSAULTED (1987).

Battered victims who resort to homicide often have tried repeatedly and unsuccessfully to obtain protection from the police or the courts. Various witnesses gave examples of domestic violence homicides in Georgia where the victim had repeatedly called the police but no arrests were made or no protection was obtained because the batterer got out on bond or received only probation. While there was no precise statistical evidence on this issue in Georgia, a Police Foundation Study in Detroit and Kansas City in 1977 found that in 85% to 90% of "partner" homicides, police had been called to the home at least once during the two years preceding the incident; in more than half of these cases, they had been called five times or more.³⁹ A Cook County (Illinois) Department of Corrections study of a Chicago women's prison found that 40% of inmates incarcerated for murder or manslaughter had killed partners who repeatedly assaulted them and had sought police protection at least five times before resorting to homicide.⁴⁰ Failure to arrest not only allows the battering of the victim to continue, but also increases the likelihood that the victim will resort to homicide.

2. Police generally do not recognize the serious potential civil liability for failure to arrest the batterer when probable cause exists in domestic violence cases.

Several witnesses stressed that police officials need to be informed about the potential civil liability they face for failure to act in family violence crimes. Claims have been recently made by families of domestic violence victims that police were negligent for failing to train their officers to handle domestic violence cases and for failing to act or arrest in response to domestic violence calls for help.⁴¹

3. Police do not recognize that they are the crucial link between the victim and the criminal justice system and community resource agencies in domestic violence cases.

Police are the crucial link between the victim and the point of entry or access to the criminal justice system and information about community services, especially shelters and battered women's counseling. The Department of Justice conducted several studies in 1986 and concluded that arrests should be made in domestic violence

39. WASHINGTON, D.C., POLICE FOUNDATION, DOMESTIC VIOLENCE AND THE POLICE: STUDIES IN DETROIT AND KANSAS CITY (1977).

40. C. McCormick, Cook County Dep't of Corrections, Battered Women (1977).

41. Three case examples of police liability to the victim are *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984); *Nearing v. Weaver*, 670 P.2d 137 (Or. 1983); *Lewis v. Dallas, Tex.* (consent decree).

cases.⁴² One of the most important steps Georgia took toward decreasing domestic violence was the Family Violence Act passed in 1982. That Georgia law clearly authorized police officers to make arrests in domestic violence incidents based on probable cause. However, the effectiveness of the Family Violence Act has been limited severely by the fact that many police officers frequently fail to make arrests even where probable cause and visible signs of injury exist.

D. Police often make gender-biased comments to victims.

Witnesses reported that police, as well as prosecutors and judges, often make inappropriate and sexist comments to victims of domestic violence. Examples of such comments include the following: "I'll guess you'll kiss and make up soon"; "Lady, why don't you just get a divorce?"; "Lady, why don't you get help?"; "What did you do to cause this to happen to you?"; "Were you drinking?"; "Maybe you went out on him"; "Shoot, I think she's abusing him"; or "She can abuse me all she wants."

E. Police officers frequently lack training in domestic violence, do not have written protocols for handling domestic violence cases, and do not have information about Georgia's Family Violence Act and the community resources for victims. Even if police have such information, police do not have an information card or a means for transmitting the information to the victim.

The police officer's decision as to probable cause is affected by whatever attitudes the officer has about domestic violence. Many police officers, just like many prosecutors and judges, do not understand the issues involved in violent relationships, do not understand the reason for the beatings, do not understand why the victim stays, and thus do not intervene, that is, fail to arrest. The State of Georgia does not have any mandatory training in domestic violence as a routine part of police training. Some believe the omission of this training further imparts the message to police that domestic violence cases are not crimes to be taken seriously.

One police chief of a mid-size Georgia town lamented before the Commission that even though police respond to more domestic violence calls than any other type of call, aspiring officers receive no instruction at all in basic training about how to handle those situations.⁴³ Despite the fact that numerous task force reports and research studies on domestic violence consistently emphasize that domestic violence be treated as the serious crime it is, many police often continue to treat it

42. LANGAN & INNES, *supra* note 1.

43. *Savannah Public Hearing, supra* note 27, at 88.

as a private family matter and continue not to arrest the batterer even where probable cause exists. In a few jurisdictions, police officers receive in-service training, but too often that training focuses on how to calm the scene and how to prevent injury to the police officer. While those subjects are appropriate to cover, the training also should include the provisions of the Family Violence Act and what is sufficient for probable cause to make an arrest.

Police officers often do not tell victims about their legal rights or the community resources available to them. Sometimes the reason is police officers themselves are not aware of, or do not fully understand, the Family Violence Act or the community resources. Sometimes they give erroneous information. The Commission found that several police departments are making efforts to remedy this problem.

Due to the high incidence of domestic violence in Albany from 1986 to 1989, the police department in Albany in 1990 adopted a new domestic violence protocol under which police give victims a card with information about warrant procedures, shelters, counseling, and other community resources.⁴⁴ In Warner Robins, police also adopted a new domestic violence protocol and give victims similar information. In Savannah, the Domestic Violence Committee of the Savannah-Chatham County area has developed a brochure entitled "Domestic Violence—Resource Handbook," which police can give to victims.⁴⁵ Unfortunately, in most jurisdictions, police officials, whether they make or do not make an arrest, do not advise domestic violence victims about their legal rights under the Family Violence Act or about community resources available for domestic violence victims.

IV. Often bonds are not required or are too low in domestic violence cases.

A familiar refrain from domestic violence victims was "Why should I have him arrested when he'll be right back out and beat me again?" or "He told me he would kill me if I had him arrested again." Most batterers have a home address and can obtain a bond from a bonding company in less than an hour. Georgia law allows a person to remain in jail up to forty-eight hours before making bond but this is rarely done in domestic violence cases. The typical charge is disorderly conduct with batterers being allowed to sign their own bonds or simple battery/criminal trespass with a \$300 to \$500 bond. A defendant may obtain a bond from a bonding company by paying 10% of the bond or \$30 to \$50 and be released. Even the bond schedule for aggravated

44. *Albany Public Hearing*, *supra* note 26, at 56.

45. *Savannah Public Hearing*, *supra* note 27, at 75.

assault is often as low as \$1000, which means the defendant can usually obtain a bond with \$100.

The bond schedule for domestic violence crimes thus does not take into account the undercharging by police, the fact that domestic violence victims usually live in the same place as the arrested batterer, or at a minimum, the reality that the batterer knows exactly where to find the victim again. One witness aptly summarized the bond reality as follows:

This [bond] problem was recently encountered during a domestic assault involving a personal friend of mine Back in June 1989, my friend was shot four times with a .357 Magnum pistol by her husband. Fortunately, she was not killed but suffered the loss of one kidney, her spleen, a shattered jaw After the incident, her husband . . . was arrested, charged with aggravated assault and was released from custody two hours later. Fortunately, my friend was in the intensive care unit of a local hospital, safe from further harm It is the realization that women can go unprotected that dissuades them from seeking relief through the system⁴⁶

Police officers also complained about the ease with which batterers in domestic violence cases are released from jail and recommended at least some "cooling off period" or higher bonds in domestic violence cases. Because the batterer is often released immediately even in cases involving injury, police officers often feel it is not worth the trouble and paper work to arrest them.

V. Prosecutors' Responses to Domestic Violence

A. Prosecutors often give low priority to domestic violence cases.

There was consistent testimony in the public hearings that prosecutors often have the same gender-biased attitudes about domestic violence as police and lack understanding about the cycle of violence and the battered wife syndrome. A few prosecutors simply do not want their offices handling misdemeanor domestic violence cases at all. Many prosecutors place a low priority on domestic violence cases.

It appears that prosecutors consistently prosecute for lethal domestic violence in Georgia. However, prosecution for less than lethal family violence is sporadic and problematic throughout Georgia. Most prosecution offices have a heavy load of criminal cases and the prosecutors must make some priority decisions regarding where to

46. Bill, *supra* note 17.

apply their resources. Violent crimes are generally given priority by prosecutors except in domestic violence cases. Although the degree of violence may be the same, prosecutors give higher priority to violence in stranger-on-stranger cases than in domestic violence cases, even though recidivism is higher in domestic violence cases. In many jurisdictions, theft and many other nonviolent crimes take priority over domestic violence cases.

One domestic violence victim's letter to a Victim Witness Assistance Program counselor typified the victim's view of prosecutors:

The purpose of the law is to deter crime I felt your office was more concerned than the assistant district attorney. I realize this crime was somewhat insignificant to him in relation to the other crimes he deals with but you and I know, domestic violence soon turns into the kind of crimes he is more interested in prosecuting Mr. [] seemed to think the situation rather unimportant and came across as such At the hearing Mr. [] did not even push for the counseling and it was the one thing that was important to me Mr. [] stood mute and I felt like I was being railroaded into having this swept under the rug. Only because of my very strong feelings concerning the continuing domestic problems did I speak up (nervous as I was) and let the judge know how I felt. Mr. [] rolled his eyes during my short statement and I did not appreciate the whole charade.⁴⁷

In short, the victims often distrust the prosecutors as much as the police.

B. Prosecutors often dismiss domestic violence cases when victims show any reluctance to cooperate.

Victims in domestic violence cases face heavy pressure from the defendant batterer to dismiss the case and often threats of worse violence if they do not dismiss the case. Witnesses testified that in some jurisdictions, if a victim asks to dismiss the case or even shows any hesitancy in prosecution, prosecutors dismiss the case immediately. The Commission found the practice of immediately dismissing prosecution in domestic violence cases was widespread in Georgia when the victim shows any reluctance to cooperate. Some witnesses indicated that prosecutors frequently encourage the victim not to go forward, but to seek counseling or mediation, which is often dangerous to the victim.

47. Letter from a Domestic Violence Victim to Karen Elaine Webster, Director, Victim-Witness Assistance Program, Office of Solicitor General, Fulton County, Ga.

In many other nondomestic cases involving violent injury, the State usually does not shift the burden of deciding whether to prosecute to the victim. Under Georgia law, the decision regarding whether to prosecute or dismiss a criminal case belongs to the State, not the victim. However, witnesses before the Commission complained that the State often shifts the burden of deciding whether or not to prosecute onto the victim in domestic violence cases. This response from prosecutors in domestic violence cases primarily stems from the gender-biased belief in society that domestic violence is more a private family matter than a crime and that it should be the victim's decision whether to prosecute.

The victim is usually the chief, if not only, witness in a domestic violence case. Obviously, a victim's refusal to cooperate or to testify can severely undermine a case. Georgia also has the marital privilege law which provides that a spouse can not be compelled to testify against his or her spouse:

- (a) Husband and wife shall be competent but shall not be compellable to give evidence in any criminal proceedings for or against each other.
- (b) The privilege . . . shall not apply in proceedings in which the husband or wife is charged with a crime against the person of a minor child, but such person shall be compellable to give evidence only on the specific act for which the defendant is charged.⁴⁸

However, two district attorneys, several Victim Assistance Program counselors, and many shelter workers in Georgia testified that an initially reluctant domestic violence victim or even a victim invoking the spousal privilege and requesting that the charge be dismissed often will immediately become very cooperative if the victim is simply advised that the case will not be dismissed and that the case is the State's case, not the victim's. According to many witnesses before the Commission, if the victim knows the prosecutor considers the case to be serious, the victim usually will cooperate and testify.

At Commission hearings, numerous experts recommended that Georgia's marital privilege law should be abolished for domestic violence crimes. Since there already is an exception in Georgia law for crimes against minor children, witnesses advocated that, at a minimum, another exception be made for crimes by one spouse against another spouse. Even if the spouse refuses to testify, others recommended that the police should take a written statement from, and

48. O.C.G.A. § 24-9-23 (Supp. 1991).

photographs of, the domestic violence victim at the scene, especially in cases of serious bodily injury, for later use by prosecutors.

C. Different prosecutors frequently work on the same victim's case.

Another problem is that several prosecutors may work on a victim's case. As a result, the battered victim must repeatedly discuss intimate details of the victim's life, and the victim may become less likely to cooperate. Very few prosecutors have victim advocates or victim witness assistance programs in their offices or even available to them. The battered victim is emotional and scared and will be reluctant to prosecute without some support through the criminal justice process. Even without a victim witness assistance program, prosecutors could establish a domestic violence unit within the prosecutor's office to provide consistency and more sensitivity to domestic violence victims.

Prosecutors' offices also rarely address the victim's fear of retaliation during the prosecution. In the vast majority of cases, the defendant batterer is out on a surety, property, or often only an own-recognizance bond during the prosecution process. Prosecutors rarely have time to help the victim understand the prosecution process and what the victim may expect next. This contributes to the victim's anxiety and uncertainty, and often leads to lack of cooperation, especially when the batterer is constantly pressing the victim to dismiss the charges. While this is often a problem in criminal cases, this problem is more acute in domestic violence cases because the defendant batterer knows where to find the victim and often will threaten injury against the victim if the victim does not dismiss the charge.

D. Georgia lacks an adequate number of victim witness advocates or assistance programs, which are crucial to the successful prosecution of domestic violence cases.

A major recurring complaint heard by the Commission was the lack of victim witness advocates or assistance programs in cases involving violence against women, especially in domestic violence and rape cases. In domestic violence cases, the batterer's continuing pressure on the victim to dismiss, despite repeated assaults, often results in the victim asking that the case be dismissed and the prosecutor readily agreeing to that request. The victim not only fears retaliation from the batterer but fears the police, the court and the courtroom, and actually meeting the batterer in court. The victim often has to repeat statements to different prosecuting attorneys rather than having a victim impact statement taken at the outset. The victim does not understand court procedure, the need for both a preliminary hearing and an arraignment before the case can be tried, and is generally anxious and emotional throughout the process.

Evidence was submitted that the victim assistance programs in Fulton and DeKalb Counties, coupled with a "no dismissal" policy by the solicitors in those counties, has significantly decreased the charges being dismissed by domestic violence victims.⁴⁹ Victim witness advocates in the solicitor's office obtain a victim impact statement from victims, explain the various hearings and court procedures, and often accompany them to court. Six months after disposition of the case, the victim is sent a questionnaire regarding the sentence the defendant batterer received and whether the defendant is complying with the court sentence.

Victim witness advocates testifying before the Commission described the hostile environment in which some victims must testify. These victim witness advocates frequently appear in court with victims and reported that gender-biased comments and questions are commonly made by judges. Some courts tolerate verbal abuse of the victim by the defendant and the defendant's relatives in court. Victim witness advocates also confirmed that defendants in domestic violence generally receive only probation and little, if any, jail time.

One district attorney from south Georgia succinctly stated the critical need for victim witness assistance in family violence cases:

The failure of the American family has led to multiple problems. Wives are suffering at the hands of brutal and sadistic husbands while little children wrongfully accept this behavior as correct from their parental role models. For many reasons, victims fail to cooperate with authorities We have additional and critical need for victim witness assistance. Over-burdened prosecutors cannot possibly notify these people of case status, which leaves everybody in a suspenseful and unsettled state. Virtually all these crimes impact on the victim's sense of security and self-worth. Counseling should be available to all.⁵⁰

E. Prosecutors often have no written guidelines, standard operating procedures, protocols, or specialized training for attorneys prosecuting domestic violence cases.

Few prosecutors' offices have any written protocol or instructions for dealing with domestic violence cases. Few provide victims with information about available community resources where the victim can get help, counseling, and support during the prosecution process.

49. *Atlanta Public Hearing Before the Commission on Gender Bias in the Judicial System* 154 (Aug. 3, 1990); *Atlanta Public Hearing Before the Commission on Gender Bias in the Judicial System* pt. 1, at 95 (Sept. 22-23, 1989).

50. Letter from District Attorney Douglas C. Pullen, Columbus, Ga. (Oct. 20, 1989).

F. Prosecutors' encouraging pretrial mediation or joint couple counseling for batterers and victims is often dangerous to the victim.

Prosecutors often inappropriately offer the pretrial diversion options of mediation or joint couple counseling to defendant batterers, even in serious felony cases, especially if the batterer has an attorney. This sends the entirely wrong message to both the victim and the batterer. Pretrial intervention through mediation or joint couple counseling allows the batterer not to view what the batterer did as a crime and reinforces the victim's perception that the criminal justice system will not help or protect the victim. Witnesses testified that there is common agreement among domestic violence experts that sending a case to pretrial mediation or joint couple counseling may be the most dangerous course of action a prosecutor could take.

G. Prosecutors often are not trained to recognize spousal abuse as indicative of child abuse to the bystander children.

Recent national research documents that anywhere from forty to eighty percent of children in violent homes are victims of violence themselves.⁵¹ Police should indicate on arrest reports whether children were present at the time of the spousal abuse and should inquire about prior violent conduct to the children. Even if the child is not abused, children who witness spousal abuse are also victimized. Bystanders to violence during childhood frequently become batterers in adulthood.

VI. Courts' Response to Domestic Violence.

The testimony and research presented to the Commission consistently revealed that along with police and prosecutors, many judges have similar gender-biased attitudes and lack understanding of the dynamics of domestic violence. Again, as with police and prosecutors, the problem is not with all judges, but is serious and widespread throughout the courts of Georgia.

A. Magistrate Court

The complaints about magistrate courts varied significantly from jurisdiction to jurisdiction. Here are examples of the complaints heard by the Commission:

51. MARIA ROY, CHILDREN IN THE CROSSFIRE (1988); NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, FAMILY VIOLENCE: IMPROVING COURT PRACTICE 34 (1990); M. HOFFORD & R. GABLE, SIGNIFICANT INTERVENTIONS: COORDINATED STRATEGIES TO DETER FAMILY VIOLENCE.

1. Instances were reported to the Commission where the batterer was arrested by the police based on probable cause but the charges were dismissed by the magistrate court, sometimes just because the judge views these cases as family matters, not crimes, or because the judge does not want these cases in the judge's court.

2. Many victims are often asked by magistrate court judges what they have done to make the batterer do this and other gender-biased questions, both in securing the warrant and at preliminary hearings.

3. In several jurisdictions, the Commission was told that women are often denied warrants by the magistrate court and told by the judge "to go get a divorce."

4. In one jurisdiction, the state court judge, who would handle simple battery/criminal trespass charges, selected those who served as magistrates and let the magistrates know that the state court did not want to handle domestic violence cases. Therefore, those magistrates were reluctant to issue domestic violence warrants for both police and victims.

5. Some witnesses complained that instead of allowing the police to recite the grounds for probable cause for an arrest warrant, as is done with other crimes, magistrate court judges would require domestic violence victims to testify personally about what had happened.

6. Some magistrate courts are reluctant to issue a warrant to a domestic violence victim to arrest a spouse or live-in lover, with or without the police, unless there are visible signs of injury or corroborating witnesses. (Neither one is required by Georgia law when the victim takes out the warrant.)

In short, while obtaining a warrant from the magistrate is an easy procedure in some jurisdictions, it is much more difficult, if not impossible, in other jurisdictions. No single problem was identified, but many different problems were suggested, depending on the location of the magistrate court. However, the one consistent theme was that the magistrate court judges often held gender-biased attitudes about domestic violence and lacked understanding of the dynamics of domestic violence.

B. State and Superior Courts

The most consistent complaints about the state and superior courts were the low priority given to domestic violence cases; gender-biased

comments to the victims in court; inappropriate referrals to mediation and counseling; and ineffective sentencing.

1. Courts often accord low priority to domestic violence cases.

Directors of battered women's shelters throughout the State told bitter tales of the poor treatment their clients had received by judges in courts, with the result that most domestic violence victims have no confidence that the criminal justice system will help them, further contributing to the under-reporting of domestic violence cases. Testimony was presented that judges in certain jurisdictions make it known that they do not want domestic violence cases in their court. This has a strong trickle-down effect on the attitudes of prosecutors and police who appear in that judge's court. Also, domestic violence cases are repeatedly continued and reset with the victim having to return to court many times. Judges frequently want the parties "to try to work it out," rather than recognizing the domestic violence as criminal conduct that should be prosecuted. Judges would never ask a victim of an assault to work it out with a stranger, but they treat domestic violence victims differently. The judges often do not want to try the domestic violence cases any more than the prosecutors.

In contrast, the Commission also heard that judges can have a positive impact by what they say in court. Often, the defendant will state that the victim wants to drop the case. The judge can point out to the defendant that this is the State's case, not the victim's, and that the court will not dismiss the case. Witnesses testified to the Commission that there is often a visible sigh of relief from the victim in court when the judge puts the role of prosecution on the State, where it belongs, and not on the victim by saying "Why don't you two make up?" One study found two ways that a judge's demeanor and language in court can help deter future domestic violence:

First, judicial warnings and/or lectures to defendants concerning the inappropriateness and seriousness of their violent behavior apparently improved the future conduct of some defendants. Second, judges occasionally counseled victims by telling them that they should not tolerate violent abuse, by suggesting counseling programs, or both. For some victims, this official affirmation that they did not deserve to be hit helped them to realize that the abuse was not something which they simply had to tolerate. It seems likely that the judges' conduct would be especially critical to those individuals, both victims and defendants, appearing in court for the first time.⁵²

52. See OFFICE OF THE ATTORNEY GENERAL, *supra* note 1; GOOLKASIAN, *supra*

The Attorney General's Task Force on Domestic Violence also noted that "[e]ven a stern admonition from the bench can help deter the defendant from future violence."⁵³ The National Institute of Justice's Report similarly commended one judge who told a defendant "I don't care if she's your wife or not. A marriage license is not a hitting license. If you think the courts can't punish you for assaulting your wife, you are sadly mistaken."⁵⁴

Witnesses consistently stressed that what the judge says in court and how the judge sentences can have a strong impact on the recidivism rate.

Treating domestic violence seriously in the early cycles of violence where the battery involves slight injury can help break the cycle of violence at an early stage. However, witnesses indicated the courts give low priority to domestic violence cases until a murder or serious aggravated assault occurs when intervention is often too late. Since extensive research shows domestic violence will predictably escalate without intervention, the courts should treat seriously the criminal trespass and simple battery cases in domestic violence regardless of how insignificant the injury may seem, such as, black eye, bruises, slapping, etc., since the early battering is only the first step in the serious offense to come.

2. Judges frequently make comments to and ask questions of the victim that are gender-biased.

The gender-biased comments made by judges tended to be the same type of comments made by police and prosecutors discussed previously. Judges more often, however, made these comments: "How will he support the children, if I put him in jail?"; "Can't you two straighten this thing out?"; "Why don't you take her out to buy her roses and make it up to her?"; "Why don't you kiss and make up?"; or "You may feel differently under the blanket when it gets cold outside." Judges more often lamented from the bench that this was "a family matter." These comments once again send the wrong message to the batterer—that even the court does not view this as a crime. The judge often indicates that the victim has some responsibility in causing the problem. The judge's demeanor and comments frequently do not reflect a serious attitude about domestic violence. Many witnesses reported that it was general knowledge in various communities that a particular judge does not like having domestic violence cases in that judge's court. Judges

note 1.

53. OFFICE OF THE ATTORNEY GENERAL, *supra* note 1; GOOLKASIAN, *supra* note 1.

54. OFFICE OF THE ATTORNEY GENERAL, *supra* note 1; GOOLKASIAN, *supra* note 1.

often treat domestic violence cases as a family matter rather than an issue of criminal conduct.

3. Judges' referring domestic violence cases to mediation is often dangerous to the victim.

Another significant problem presented by gender-biased attitudes and lack of understanding of domestic violence by judges was their referring domestic violence cases to mediation. Clinicians, victim advocates, shelter workers, attorneys, and others trained in domestic relationships universally agreed that mediation is inappropriate and even dangerous in domestic violence cases. Judges' persistence in sending domestic violence cases to mediation appears to stem from traditional views that domestic violence is a private family matter, not a crime, and that the victim somehow had a role in provoking the batterer. Mediation generally involves both sides making a compromise and both partners taking some responsibility for the violence. Supporting victim-blame is harmful because it allows the batterer to excuse the conduct, not to recognize it as a crime, and to continue it. Mediation centers' powers are very limited. The mediation center cannot supervise or monitor the batterer's conduct and has no enforcement power.

4. Georgia judges frequently impose too lenient sentencing in domestic violence cases.

Georgia judges frequently impose too lenient sentencing in domestic violence cases, especially in misdemeanor offenses. The most frequent conviction in domestic violence cases is a misdemeanor conviction for criminal trespass or simple battery. The most frequent sentence in these misdemeanors is twelve months probation or less, \$500 fine or less, or simply a twelve months or less suspended sentence, even for second and third offenses. A probation official revealed that probation officers supervising misdemeanor cases have from 300 to 752 cases depending on the jurisdiction.⁵⁵ This means that there is no meaningful probation supervision in domestic violence cases. Due to the heavy misdemeanor caseloads of probation officers, the probationer generally has to check in (usually just sign in a card at the office) once a month and pay a fine, without ever seeing a probation officer. Even if the judge has ordered counseling, the probation officer has such an enormous caseload that it is virtually impossible for the probation officer to monitor whether the defendant batterer complies with counseling.

55. Memorandum from Bobby Greer, Metro District Director, Community Corrections Divisions, Fulton County, Ga. (June 21, 1990).

Even if a new arrest for domestic violence occurs, courts and probation officers in some jurisdictions do not learn about the new arrest unless the victim reports it to the probation officer. In other jurisdictions, the prosecuting attorney or the jail sends a list of all new arrests to the probation department. Even then, some judges tell the probation department that they do not want the probation officer to issue a probation warrant until after the defendant batterer is convicted of the new crime. In other crimes, probation officers often issue warrants when a probationer has a new arrest, especially in violent crimes. However, this actual memo typifies a judge's gender-biased reluctance to hear domestic violence cases in general:

Judge [] has requested that probation violation warrants not be issued on probationers from his Court if the violation is for a simple battery involving domestic violence. He asks that you wait until the new case is disposed of prior to requesting a probation warrant.⁵⁶

One witness before the Commission summarized sentencing in domestic violence cases as follows: "Georgia judges give more time for stealing than stabbing."⁵⁷

There has been much less research on the effects of judges' sentencing than of arrests by police in preventing future domestic violence. Nonetheless, there is evidence that a judge can play a crucial role in shaping a community's overall response to domestic violence. The Commission found that a judge's reluctance or outright antipathy to domestic violence cases had a trickle-down effect, making the prosecutor more reluctant to prosecute and the police less likely to arrest. On the other hand, judges can send a strong signal that domestic violence is a crime and will be given serious attention in the judge's court. When judges handle domestic violence cases without complaint or even treat them like any other crime, prosecutors are less likely to dismiss prosecutions and police are more likely to arrest when they know the case will be prosecuted.

Some witnesses advocated short-term jail sentences for first offenders of domestic violence, especially when the victim had visible signs of injury and, at a minimum, mandatory short-term jail sentences for repeat offenders. Such sentencing would make it clear that domestic violence is a crime and would have a strong deterrent effect in domestic violence cases. Other witnesses stressed that if police and prosecutors would simply charge the defendant with the appropriate offense of battery and aggravated assault, as opposed to criminal trespass and

56. Memorandum from the State Court of Dougherty County, Ga. (Aug. 30, 1990).

57. *Albany Public Hearing*, *supra* note 26, at 38.

simple battery, then jail sentences would more likely occur for repeat or serious offenders.

VII. Probation in Georgia is often ineffective in domestic violence cases, especially due to staggering misdemeanor caseloads.

A. Probation officers' caseloads of 300 to 500 cases make it difficult for probation to be effective in domestic violence cases.

The most frequent sentence in domestic violence cases, even where injury to the victim occurs, involves twelve months probation in a misdemeanor sentence. As outlined earlier, probation officers often carry a caseload of 300 to 500 cases depending on the location of the probation officer in Georgia. Thus, no meaningful supervision can occur in domestic violence simple battery and criminal trespass cases. As long as the defendant pays the fine and signs in or reports monthly, the probation officer will not have to review the file. The defendant pays the fine to the cashier and signs in on a probation log and is often not even actively seen by the probation officer on his monthly visits to the probation office. There is no computer system or program in place in any jurisdiction in Georgia that automatically advises the probation officer of a new arrest of any defendant on probation. This is true not only for domestic violence cases but all other crimes in Georgia. The jails do not have access to the probation data or even the disposition of the defendant's prior simple battery arrests. In some jurisdictions, the probation department receives reports on new arrests at the jails. In other jurisdictions, the probation department does not receive any arrest reports and must rely on the victim to advise the probation officer of a new arrest of the probationer.

B. Reluctance to issue probation warrants for technical violations or even upon new domestic violence arrests often makes probation ineffective in domestic violence cases.

Testimony before the Commission revealed that even if the probation office is notified of a new arrest, some judges have advised the probation department not to issue a warrant for a probation violation until after the probationer is convicted of the new offense. As it will often take six to nine months at a minimum for the new case to come to trial, the probationer's twelve-month probation on a misdemeanor case would have expired anyway.

Under Georgia law, the probation officer can issue a warrant for violation of probation at the time of the new arrest instead of waiting until a conviction occurs on the new arrest. If there is cause for the new arrest, there is usually probable cause sufficient for the probation officer to issue a warrant for violation of probation. The probationer can

be held and brought to court on the probation warrant and a petition for revocation can be prepared by the probation officer based on the allegations in the new arrest. A nonjury hearing can then be held on the petition for revocation at which time the probation officer could present evidence of any probation violations, including the new arrest, and the probationer would have the opportunity to respond with any witnesses or evidence. In many cases, there is a "stay away condition" in the probation order, and the probation may be revoked for the batterer's coming to the victim's house without waiting for the trial on the new battery charge arising out of that prohibited visit.

After this nonjury hearing, the judge can decide whether a probation violation occurred or not. If indeed the victim has been battered again, this procedure clearly provides more protection to the victim as opposed to waiting until the new arrest is tried, which will provide little, if any, protection especially since the probation will often expire before the new arrest is tried. Furthermore, one of the standard conditions, and in fact the most important condition, of probation throughout Georgia is that the probationer not violate the law again. A new violation of the law is also the most common basis for revoking probation. In short, the effectiveness of probation in misdemeanor domestic violence cases is completely undermined if the probation officer waits until after the probationer is convicted of a new arrest before taking any action for the alleged probation violation.

C. Recent case study: A batterer on probation for prior domestic violence violates probation, but no warrant is taken for over seven months until after the batterer finally murders the victim.

Several witnesses testified about the ineffectiveness of probation in domestic violence cases, in large part due to reluctance to issue a probation warrant and rearrest the probationer in domestic violence cases, even when new violations of the law are committed by the probationer. The following actual case history presented by several witnesses exemplifies the probation problem as well as other problems throughout the judicial system. The defendant was on probation for prior domestic violence and violated his probation in numerous ways, but a probation warrant was not taken for over seven months. The defendant was arrested only after the murder of the victim and only after he was charged with that murder. Only after the murder charge was the batterer's probation finally revoked.

May 19, 1985—Police receive domestic call for aggravated assault. Police arrive but assailant had left and no arrest made. Although visible signs of injury to victim, police do not take out warrant.

June 14, 1985—Victim takes out aggravated assault warrant for May 19, 1985 incident.

August 27, 1985—Victim signs to dismiss warrant.

April 27, 1987 and September 26, 1987—Police receive calls for simple battery, but each time assailant has left and no arrest is made and no warrant for arrest is filed by police or victim.

September 18, 1988—Police receive call for domestic disturbance, victim is badly beaten and needs medical treatment for injuries. Assailant arrested on probable cause but makes bond immediately.

September 21, 1988—Police receive another call for domestic disturbance.

September 28, 1988—Assailant found guilty of weapons charge (ten inch knife strapped to leg) from September 18, 1988 beating, but aggravated assault charge is dismissed. Victim accompanied assailant to court and does not want assailant prosecuted for aggravated assault.

October 18, 1988—Police receive another call for domestic disturbance.

November 15, 1988—Assailant arrested on DUI, suspended license, and no insurance.

February 4, 1989—Assailant arrested for Habitual Violator charge which is dismissed in magistrate court on February 13, 1989.

May 12, 1989—Victim beaten severely again by assailant. Victim takes out two warrants for aggravated assault, one with a knife, and one for battery. Magistrate court requests criminal history before setting bond. Bond set with condition that assailant have no contact with victim.

May 12, 1989—At preliminary hearing in magistrate court, two aggravated assault charges are reduced to simple batteries and bound over to state court.

June 4, 1989—Assailant finally arrested on May 12, 1989, aggravated assault charges.

June 12, 1989—Assailant's probation is revoked and he is jailed until September 28, 1989, for probation violations.

June 20, 1989—Assailant arraigned in state court and pleads not guilty and on June 27, assailant is appointed counsel as an indigent.

August 30, 1989—Assailant withdraws plea of not guilty to May 12, 1989 charges, pleads nolo contendere and receives only twelve months probation consecutive to any probation sentence now being served. Conditions of probation are for assailant to consume no alcoholic beverages, to perform eighty hours of community service, and to go to Clayton Mental Health within ten days.

October 27, 1989—Victim calls Clayton County Association for Battered Women and advises that assailant is drunk and threatening to kill her. Shelter worker at association calls probation officer in charge of assailant's case and notifies probation officer who says victim, not shelter worker, must call and make report.

October 29, 1989—Police receive domestic violence call and arrest assailant for simple battery and charge victim with battery. Victim

asserts assailant came over and held knife to her throat. Neighbors called police. Victim calls Association for Battered Women, and they once again call assailant's probation officer about threats on October 27 and assaults on October 29. Probation officer advises that assailant's probation cannot be revoked until he is convicted of new offense. Shelter worker points out that assailant violated probation by coming to victim's apartment but probation officer says under probation order assailant is restrained from using alcohol but is not restrained from coming to victim's apartment.

October 29, 1989—Victim obtains \$500 appearance bond.

October 30, 1989—Assailant obtains \$500 appearance bond.

December 12, 1989—Victim pleads not guilty to battery charge in state court, accompanied by shelter worker. Assailant also pleads not guilty to simple battery charge.

January 22, 1990—After trial, both victim and assailant found not guilty of October 29, 1989, charges.

February 22, 1990—Victim calls Association for Battered Women and advises there have been several more assaults, but she has not called police because she too was arrested last time she did and assailant is threatening to kill her if she calls police again.

March 5, 1990—Warrant issued for assailant for violation of probation, for failure to perform community service, failure to go to and complete program prescribed by Clayton Mental Health. From September to October, the assailant had not complied with any of his terms of probation, but the probation officer waits for seven months to issue warrant, even after being advised of new October 1989 charge.

March 24, 1990—Police receive call for murder as victim has been shot to death. Assailant arrested, charged with murder, and is awaiting trial.⁵⁸

Among other things, officials involved conceded:

1. That breakdowns in communication and caseloads in the probation department allowed the assailant to stay out of jail for seven months despite evidence that he had violated the terms of his probation.

2. The solicitor's office "dropped the ball" by not scheduling the assailant to appear before the judge who originally put him on probation on August 30, 1989 for the May 12, 1989 battery charges when assailant was arrested October 29, 1989 for allegedly assaulting his wife.

58. Report to Commission from Betsey Ramsey, Executive Director of Association on Battered Women of Clayton County, Inc. (May 1990) (compiling facts involved in Judith Music's death).

3. A different judge tried the October 29, 1989 battery charges on December 12, 1989 and was not aware of any of assailant's history or any similar prior acts, and assailant was found not guilty on December 12, 1989.

This case history also exemplifies how the burden is often placed on the victim to take out the warrant herself in the early part of the domestic violence cycle, how the victim dismisses the charge or never reports the crime in the first place due to fear of retaliation by the assailant, and how the assailant is ultimately undercharged with the misdemeanor offense of simple battery even though the felony offense of aggravated assault occurs.

This case history also shows how lack of a special domestic violence unit allows different prosecutors and different judges to hear cases involving the same battery without knowledge of similar prior acts, how sentences generally involve probation and no jail, and the ineffectiveness of probation supervision due to very heavy case loads. In short, this case history presents a good example of the low priority given to female victims of domestic violence by police, prosecutors, judges, and probation officers due to gender-biased views that domestic violence is not a serious crime but a private family matter, that she must provoke it somehow, and that she must like it or she would leave. One veteran police officer concluded "Domestic violence crimes are treated less seriously because the victim is a female."⁵⁹

VIII. The Savannah, Georgia Task Force demonstrates that affirmatively seeking to eliminate gender bias in the criminal justice system not only will reduce domestic violence homicides but also will result in more prosecutions and better protection for domestic violence victims.

From 1985 to 1988, a significant percentage of homicides in Savannah were domestic related.⁶⁰

Table 1

	<u>Homicides</u>	<u>Number Domestic Related</u>	<u>Percentage Domestic Related</u>
1985	40	11	27.5
1986	29	11	37.9
1987	22	3	13.6
1988	19	4	21.1

59. *Albany Public Hearing*, *supra* note 26, at 14.

60. Lyght Letter, *supra* note 15.

As a result, a Savannah Domestic Violence Task Force was formed consisting of representatives of the police, prosecutors, courts, victim advocates, social service agencies, and safe shelters. The Task Force developed a protocol to handle domestic violence complaints. The goal of the protocol was to interrupt the cycle of violence in domestic cases and to develop a system or process where domestic violence complaints could be more effectively handled by police, prosecutors, and courts. These procedures were implemented in late 1988:

1. A pro-arrest policy was established because the law provides that the police may arrest when probable cause exists. The Savannah police protocol is even more stern in that the police department reviews all domestic violence calls or reports, and officers are questioned when an arrest is not made and the facts in the report indicate probable cause exists.

2. If the batterer has left and no arrest can be made, the police advise the victim about the warrant procedure and give the victim information about referral services available. Police do not transport the victim to the warrant office, but will transport a victim to the safe shelter if the victim has no transportation to get to the shelter.

3. Whether an arrest is made or not, the police give a referral form to the victim which shows different referral services available if the victim wants assistance.

4. Whether an arrest is made or not, the police make a copy of the incident report available to the safe shelter agency so that immediate outreach can be made. Safe shelter picks up these police reports every day. Safe shelter sends the victim a letter signed by the police chief and the shelter, which recognizes the domestic violence problem and explains options and services available.

5. The safe shelter provides these services:

- a) emergency shelter to domestic violence victims;
- b) contacts the victim when an arrest is made to advise the victim of safety options and procedures since safe shelter gets the police report and knows of the arrest and since most cases are misdemeanors and the defendant is released very quickly;
- c) legal assistance, counseling and referrals of victim to other agencies;
- d) nonresidential services that work with anyone in the community who has been a domestic violence victim;
- e) preventive education; and

f) educational classes for police officers regarding cycle of violence, what to look for in making arrest, how they can access the safe shelter programs, and how to make referrals.

6. All preliminary hearings in domestic violence cases are handled in the same courtroom in recorder's court one day a week (Thursday at 2:00 p.m.), so that officers subpoena all witnesses and appear one day a week. The recorder's court in Savannah not only conducts preliminary hearings but is authorized under law to have jurisdiction over certain misdemeanor offenses. Therefore, at this same hearing, the defendant can waive the preliminary hearing, be arraigned, and plead guilty to disorderly conduct or to misdemeanor offenses of simple battery and simple assault. If the defendant pleads not guilty, then the recorder's court judge can bind the case over to state court for trial.

7. An assistant district attorney presents the State's case at the preliminary hearing in recorder's court, rather than having the victim present the facts alone. This gives the victim support and helps reduce the victim's being further victimized in court. The district attorney's staff normally does not go to preliminary hearings for misdemeanors but is now handling domestic violence preliminary hearings in misdemeanor cases due to the serious nature and effects of the crime. The district attorney is able to ask questions of the victim and get to the heart of the matter more quickly. The preliminary hearing cases actually proceed faster with the assistant district attorney there.

8. Victim advocates work in the district attorney's office and meet or arrange for a safe shelter worker to meet with the victims in a private, comfortable waiting area about thirty minutes before the preliminary hearing. Volunteers usually accompany the victim into recorder's court.

9. Safe shelter representatives contact victims prior to court and advise what support services are available.

10. A counseling program was set up through a local agency, because in so many domestic violence cases the husband and wife want to stay together and the need is to interrupt the cycle of violence. A defendant may be sentenced to jail with probation to follow, or just probation, with the condition that the defendant complete sixteen weeks of counseling at this local agency. The defendants are referred to Family Counseling Center of Parent-Child Development Services, a private nonprofit agency in Savannah, which runs a sixteen-week Domestic Violence Prevention Program on a sliding scale fee.

The Savannah domestic violence protocol has been implemented without any supplemental funding. Prior to the new protocol, there were approximately 400 domestic violence calls per month in the Savannah area, but only ten to fifteen arrests were being made. There are eight different police jurisdictions in Savannah. When these few cases came to court, there was either no police officer or no victim present, or the victims came and dropped the charges due to financial problems or pressure from the batterer or lack of support for prosecution. The sentences were mainly fines.

Although there are eight different police jurisdictions in Savannah, the domestic violence protocol, to date, has been established by only one of the police jurisdictions, which is the City of Savannah Police Department. The domestic violence calls in the Savannah area now average 450 per month with over sixty arrests per month.⁶¹ A shelter worker summarized the effect of the new pro-arrest protocol as follows:

Many of the individuals we work with, they don't want necessarily the relationship to end; they just want the violence to stop . . . and the message is now being sent out from our community and our court system that domestic violence is a crime, that the police are going to respond to it, that there are going to be arrests made, and this is something that you would be sentenced to counseling if this is an appropriate option The other thing that is so important that this protocol has established is that it's a consistent approach.⁶²

After a year of implementing the new protocol, the City of Savannah had no domestic homicides in 1989 and 1990.

IX. Many complaints were voiced at ten public hearings about courts' use and nonuse of Temporary Protective Order (TPO) authorized by Georgia's Family Violence Act.

Georgia's Family Violence Act authorizes judges to issue ex parte TPOs to victims of domestic violence in search of protection from a batterer. Under the Family Violence Act, if a person files a verified petition alleging a substantial likelihood of immediate danger of family violence, the court may order such temporary relief ex parte as the court deems necessary.⁶³ After ten days, a hearing is held at which

61. *Savannah Public Hearing*, *supra* note 27, at 75.

62. *Id.* at 77.

63. O.C.G.A. § 19-13-3(a), (b) (1991).

time the petitioner must prove the allegations by a preponderance of the evidence, as a petitioner would have to do in any civil case.⁶⁴

Upon filing of the verified petition or after the ten-day hearing, the court may grant a protective order incorporating any of the following possible remedies necessary to protect the petitioner from family violence:

(a) The court may, upon the filing of a verified petition, grant any protective order or approve any consent agreement to bring about a cessation of acts of family violence. The orders or agreements may:

- (1) Direct a party to refrain from such acts;
- (2) Grant to a spouse possession of the residence or household of the parties and exclude the other spouse from the residence or household;
- (3) Require a party to provide suitable alternate housing for a spouse and his or her children;
- (4) Award temporary custody of minor children and establish temporary visitation rights;
- (5) Order the eviction of a party from the residence or household and order assistance to the victim in returning to it, or order assistance in retrieving personal property of the victim if the respondent's eviction has not been ordered;
- (6) Order either party to make payments for the support of a minor child as required by law;
- (7) Order either party to make payments for the support of a spouse as required by law;
- (8) Provide for possession of personal property of the parties;
- (9) Order a party to refrain from harassing or interfering with the other;
- (10) Award costs and attorney's fees to either party; and
- (11) Order either or all parties to receive appropriate psychiatric or psychological services as a further measure to prevent the recurrence of family violence.⁶⁵

Georgia law also directs that a copy of the order shall be given by the Clerk of the Superior Court to the Sheriff. The order may remain in effect for up to six months.⁶⁶

64. *Id.* § 19-13-3(c).

65. *Id.* § 19-13-4.

66. *Id.* § 19-13-4(b), (c).

The Department of Human Resources is charged under the Family Violence Act with the duty of assisting with the development and establishment of family violence shelters by establishing minimum standards for the shelters; by receiving, approving applications for, and then certifying, family violence shelters; and by distributing funds to certified shelters.⁶⁷ Family Violence Shelter or social service agency staff members designated by the court may explain to victims not represented by counsel the procedures for filling out and filing all forms and pleadings necessary for the preparation of the petition to the Court.⁶⁸ The Clerk of the Court may provide forms for petitions and pleadings to victims of family violence and to any other person designated by the superior court as authorized to advise victims on filling out and filing such petitions and pleadings.

The use or nonuse of the TPO procedure in domestic violence cases varied throughout the State. While the complaints heard likewise varied, the chief complaints fell into these three categories.

A. TPOs are not used or accepted in some jurisdictions.

In some jurisdictions, the superior court judges and court clerks have little, if any, familiarity with the TPO procedure in family violence cases. Some witnesses testified that the judges and clerks often considered it a new procedure that is not uniformly accepted, and thus they are reluctant to implement the procedure. This was found to be especially true in multicounty circuits where witnesses testified that the courts were reluctant both to hear these emergency *ex parte* requests and then to schedule the required ten-day hearing due to the press of other business. In effect, for whatever reason, shelter workers testified they could not get the judges to hear any TPO requests in certain jurisdictions, and thus the civil TPO remedy was simply unavailable to their clients.

In multicounty circuits, witnesses discussed the fact that many counties have no judge available to issue a TPO. The Family Violence Act assumes that the victim will have access to proper forms for requesting a TPO and access to a superior court judge. In many counties throughout Georgia such forms are not available. Testimony presented to the Commission indicated that most victims of domestic violence lack the resources to travel out of county to find a judge for an *ex parte* hearing. Similarly, judges, who must travel multicounty circuits, have real scheduling problems and often can not be available for emergency TPOs.

67. *Id.* § 19-13-21.

68. *Id.* § 19-13-3(d).

B. Judges have created barriers to the effectiveness of TPOs in other jurisdictions.

In other jurisdictions, the Commission found that some courts would entertain TPO requests or schedule TPO hearings, but had instituted one or more of the following procedures that created barriers and eliminated the effectiveness of the Family Violence Act:

- (1) A divorce must be filed by the parties involved before the judge will hear a TPO request. However, there is no requirement that a divorce be filed under the Family Violence Act;
- (2) The petitioner must have an attorney before the judge will hear a TPO request;
- (3) Visible signs of injury to the victim must exist before the court will entertain a TPO request;
- (4) Judge refused to remove the batterer from the home even with visible signs of injury but counseled the victim to sue for divorce;
- (5) Many clerks' offices do not have TPO forms, so a victim is forced to get an attorney. Most domestic violence victims do not have money to hire an attorney; thus, without the forms, there is no access to this remedy;
- (6) Victims in multicounty circuits often do not have access to a local judge who can sign a TPO on an emergency basis. This is due to real scheduling problems for those multicounty judges who travel and issue TPOs, as those judges simply are not in the same county again for several months. Some witnesses suggested magistrates should be empowered to issue TPOs in domestic violence cases to overcome this scheduling problem.
- (7) Some judges will not issue a TPO if the violence occurred over a week prior to the victim coming to court, interpreting the delay as "it couldn't be that bad." The judge, in effect, judges the time it takes the victim to get to the court.

C. Problems still exist even in jurisdictions where TPOs are frequently issued by judges.

- 1. Judges often automatically issue mutual TPOs, even if there is no evidence of violent conduct by the victim.*

In jurisdictions where the courts regularly entertain TPO requests, routinely set ten-day hearings, and provide forms in the clerk's office, complaints are heard. Judges too frequently enter mutual orders of protection even where there is no complaint and no evidence of any violent conduct by the victim. In some jurisdictions, the clerk of the court has a form TPO which automatically provides for a mutual order

of protection. Thus, even when there is no evidence or even claim of violence by the victim, the TPO restrains the victim equally with the batterer. Witnesses attributed this to the gender-biased belief that the victim must be doing something to provoke the action or that the victim must leave and stay away from the batterer if the victim wants protection.

There may be instances where the victim also engages in violence, but studies show that mutual, simultaneous aggression in domestic violence cases is infrequent. Certainly, in some relationships, the best solution may be a divorce and separation of the parties. However, most victims do not want a divorce but simply want the battering to end. Victims often stay with batterers due to economic dependence, fear of losing children, which is frequently threatened by the batterer, and fear of greater physical danger from attempting to leave. Statistics show that lethal domestic violence most often occurs as victims try to leave or after they have left. Victims do not understand why they have to leave their homes and get a divorce in order to stop the battering. Most victims know that filing for divorce will only enrage the batterer and escalate the violence. If the spouse is an alcoholic, the victims are not encouraged to divorce the alcoholic, but to help the spouse obtain counseling and treatment. Likewise, if the spouse is a batterer, the victim wants the spouse to get treatment and stop the violence, especially in the early stages, rather than requiring the victim to get a divorce to obtain protection.

Nonviolent victims do not understand why the court is restraining them and feel humiliated and stigmatized when such mutual orders of protection are issued against them. A mutual order of protection makes the nonviolent victim feel labeled as an abuser and equally blameworthy. The mutual order message to the batterer is that such behavior is excusable, was perhaps provoked by the victim, and that the batterer will not be held accountable.

2. TPOs are often not monitored or enforced by courts or law enforcement bodies.

Even in jurisdictions where TPOs are issued frequently, the restraining orders are not monitored by the courts, law enforcement bodies, or anyone else. Also, there is no provision made for obtaining a TPO during a weekend. The victim of a Friday night assault would have to wait until Monday to seek a TPO.

Originally, the Family Violence Act made the violation of a TPO a civil offense, but the Family Violence Act has now been amended to change the violation of the TPO from a civil to a criminal misdemeanor. However, if a batterer under a "stay away" TPO comes to the victim's house, police are often reluctant to arrest batterers on misdemeanor charges but just generally encourage the batterer to leave unless there

is a new injury. Violation of the "stay away" portion of the TPO is a misdemeanor that frequently is not enforced by police.

Some witnesses complained that other relief under a TPO, such as child support, payment of medical bills, or other relief ordered, is not considered under the criminal classification. This sends the message that supporting your children as ordered by the court in the TPO is not important because one cannot be held criminally responsible. This requires the victim to start ancillary proceedings immediately to obtain child support. Unless a criminal sanction is available or possible, the child support, even under court order, goes unpaid more often than not.

3. TPOs usually do not provide for monetary support, even though authorized under the Family Violence Act.

Although the Family Violence Act provides for monetary relief during the "stay away" order, victims often find it difficult to obtain. Many domestic violence cases are not reported due to the victim's economic dependence on the batterer. The victim may not know how to stop the violence and obtain the funds to pay rent and buy food. Financial circumstances often make the victim very reluctant, if not unable, to demand that the batterer leave unless the batterer is ordered to provide support during the separation. Although the Family Violence Act expressly provides for this relief, it is infrequently awarded according to some witnesses.

The goal of most victims of domestic violence is not to separate from or divorce the batterer. Instead, the goal of most victims is to have the violence end. Also, most victims know that if they file for divorce, this will only enrage the batterer, whose main obsession often is to control the victim. Forcing the victim to seek a divorce to get support and not awarding support in TPOs may only escalate the violence.

X. Judges often totally disregard domestic violence when addressing alimony, child custody, and visitation in divorce proceedings.

Witnesses consistently testified that gender-biased beliefs result in judges consistently disregarding domestic violence when addressing issues of alimony, child custody, and visitation in divorce proceedings. For example, judges often have the gender-biased belief that the victim must have done something to provoke the violence and that once divorced, the violence will end. Judges, in effect, adopt the traditional societal attitude of blaming the female victim in part for the battering and incorrectly assume it will not recur. However, studies show that domestic violence frequently continues even after a divorce and that often the batterer's frustrations are vented upon the children once the victim is beyond reach. Witnesses gave examples where courts routinely

awarded "standard visitation" without giving any consideration to repeated spousal battering.

While judges may restrict visitation with minor children because of alcoholism, drug use, indiscreet relationships, or other criminal behavior, they are not likely to do so because of repeated spouse battering. Witnesses testified that judges disregard or minimize domestic violence in custody disputes and visitation due to the gender-biased belief that these are just "family squabbles." This is notwithstanding the evidence which indicates that battering is learned behavior, that eighty percent of batterers grew up in homes where battering was prevalent, and that children have learned to repeat this behavior by the time they reach the age of six. Studies show that by the age of six a male child has learned that he gets what he wants by using his fists and, at the same time, doesn't understand and is disgusted by his mother's inability to leave the situation. Witnesses also attributed the judges' disregarding domestic violence in visitation and custody disputes to the judges' minimizing the credibility of domestic violence victims.

Furthermore, in the divorce context, the judges' failure to hold the batterer accountable for the battering behavior in effect ratifies and gives the batterer carte blanche to repeat it in the next relationship. According to various attorneys, their clients' battering spouses have been accused of similar acts in prior divorces or relationships.

Perhaps even more important are the studies that demonstrate that while the batterer's violence has never extended to the children while the victim is present, in over forty-five percent of the cases it becomes a problem once the victim is removed and the batterer's frustrations are translated to the children. This, too, is disregarded in judicial proceedings primarily due to lack of education about the dynamics of domestic violence.

A frequent complaint to the Commission was the batterer's tactic in divorce proceedings of "going on the offensive" and attempting to demonstrate that the victim is unstable, is not self-sufficient, or is unable to care for their children. Judges who do not understand the syndrome often fulfill the batterer's threat and the victim's worst nightmare by awarding custody to the father, interpreting the victim's erratic behavior as neurotic.

Experts recommended that if domestic violence has occurred, the judge in a divorce proceeding should, at a minimum, order the offender to successfully complete treatment specifically for the violence before custody or unsupervised visitation is awarded. This is especially crucial due to the learned nature of domestic violence and the potential transference to the children. Without treatment, the propensity for domestic violence remains high even after the divorce or separation.

Several experts also testified that judges in divorce proceedings involving domestic violence should be sensitive to the dynamics of the battering. Batterers may attempt to continue harassment and abuse of their ex-spouse through the determination of the issues of custody and visitation of children. The battered spouse will frequently trade financial support or equitable distribution of marital assets for more limited visitation with the children. Battered spouses, as well as experts, reported the frequent financial trade-off most battered spouses make.

FINDINGS

1. Domestic violence is widespread and often results in severe injury or death in Georgia. Some studies report that ninety to ninety-five percent of the victims of domestic violence are women. Police, prosecutors, shelter workers, and domestic violence victims throughout Georgia repeatedly testified that the prevalence of domestic violence in Georgia is consistent with the national averages, if not more prevalent.
2. Police, prosecutors, and judges often have gender-biased attitudes about domestic violence and lack understanding about and sensitivity to the dynamics of domestic violence, for example:
 - a. The belief that a man should be able to control his wife and punish her for behavior he does not like;
 - b. The belief that domestic violence is a private family matter, and not a serious crime;
 - c. The belief that the victim somehow provoked or caused the domestic violence;
 - d. The belief that the victim must like it or the victim would leave (Instead of focusing on the criminal behavior of the batterer, gender-biased attitudes focus on why the victim does not leave, without understanding the pressures the victim faces to stay); and
 - e. The belief that domestic violence cases are trivial and unimportant and that the testimony of the domestic violence victim is unbelievable or incredible.

Since ninety to ninety-five percent of the victims of domestic violence are women, these beliefs primarily affect women and have a dramatic disparate impact on them. Thus, these attitudes are gender-biased attitudes.

3. Police, prosecutors, and judges lack education, training, sensitivity, and understanding of the cycle of violence, the "battered wife syndrome," and the overall complexity of domestic violence.

4. Police responses to domestic violence:

a. Police routinely fail to arrest the batterer at the scene and later fail to take out an arrest warrant, even when visible injury and probable cause exist.

- (1) Police often require the victim to obtain a warrant at the warrant office rather than making an arrest on the scene where probable cause exists.
- (2) Police accept verbal assurances from the batterer that the batterer will not do it again or that the victim started it, even though research has documented the reoccurring and escalating cycle of violence and a high rate of recidivism in domestic violence cases.
- (3) Police tell the victim to leave or to get a divorce, though statistics show that the battering will continue after a separation or divorce.
- (4) Police improperly shift to the victim the burden of deciding whether to prosecute or not, when it is the job of the trained police to make the decision whether or not probable cause exists for an arrest.

b. Police frequently undercharge the batterer with a municipal ordinance violation of disorderly conduct or the misdemeanor offenses of simple battery or criminal trespass, though the facts often show the more serious misdemeanor offense of battery or the more serious felony offense of aggravated assault.

c. In most instances, statistics show that the arrest approach is a more effective approach to prevent recurring domestic violence than "the cool down" or "get a divorce" approaches by police.

- (1) Homicides in domestic violence cases occur after repeated calls to police fail to provide protection to victims.
- (2) Police generally do not recognize the serious, potential civil liability for failure to arrest the batterer when probable cause exists in domestic violence cases.
- (3) Police do not recognize that they are the crucial link between the victim and the criminal justice system and community resource agencies in domestic violence cases.

d. Police often make gender-biased comments to victims.

e. Police officers frequently lack training in domestic violence, do not have written protocols for handling domestic violence cases, and do not have information about Georgia's Family Violence Act and the community resources for victims. Even if police have such information, police do not have an information card or a simple means for transmitting the information to the victim.

5. Often, bonds are not required or are too low in domestic violence cases.

6. Prosecutors' responses to domestic violence:

a. Prosecutors often give low priority to domestic violence cases;

b. Prosecutors often dismiss domestic violence cases when victims show any reluctance to cooperate;

c. Different prosecutors frequently work on the same victim's case;

d. Georgia lacks an adequate number of victim witness advocates or assistance programs which are crucial to successful prosecution of domestic violence cases;

e. Prosecutors often have no written guidelines, standard operating procedures, protocols, or specialized training for attorneys prosecuting domestic violence cases;

f. Prosecutors' encouraging pretrial mediation or joint couples' counseling for batterers and victims is often dangerous to victim; and

g. Prosecutors often are not trained to recognize spouse abuse as child abuse to the bystander children.

7. Courts' responses to domestic violence:

a. Magistrate courts—Complaints about magistrate courts varied significantly from jurisdiction to jurisdiction such as:

(1) Domestic violence charges are dismissed by a few magistrate court judges even after police arrest, even though probable cause exists, because the judges do not want to hear those types of cases in their courts;

(2) Gender-biased questions and comments are often made by magistrate court judges;

(3) Victims are frequently denied warrants by magistrate court judges and are told to get a divorce;

- (4) Magistrate court judges often require victims to appear and recite facts rather than have police officers do so; and
- (5) Magistrate court judges often require visible signs of injury before allowing a victim to obtain a warrant.

b. State and superior courts:

- (1) Courts often accord low priority to domestic violence cases;
- (2) Judges frequently make comments and ask questions of the victim that are gender biased;
- (3) Judges refer domestic violence cases to mediation, which is often dangerous to the victim; and
- (4) Georgia judges frequently impose sentencing that is too lenient in domestic violence cases.

8. Probation in Georgia is often ineffective in domestic violence cases, especially due to staggering misdemeanor caseloads:

a. Probation officers' caseloads of 300 to 500 cases make it difficult for probation to be effective in domestic violence cases;

b. Reluctance to issue probation warrants for technical violations or even upon new domestic violence arrests often makes probation ineffective in domestic violence cases; and

c. Recent case study: A batterer, on probation for prior domestic violence, violates probation but no warrant is taken for over seven months or until after batterer finally murders victim.

9. The Savannah domestic violence task force demonstrates that affirmatively seeking to eliminate gender bias in the criminal justice system not only will reduce domestic violence homicides but also will result in more prosecutions and better protection for domestic violence victims.

10. Complaints were voiced at all ten public hearings about the courts' use and nonuse of TPOs authorized by Georgia's Family Violence Act.

a. TPOs are not used or accepted in some jurisdictions.

b. Judges have created barriers to the effectiveness of the TPO in other jurisdictions such as:

- (1) Parties have to be divorced, although there is no such requirement in the Family Violence Act;
- (2) Petitioner has to have an attorney in a TPO request;
- (3) Visible signs of injury must exist;
- (4) Judges counsel victim to get a divorce;

- (5) Many clerks' offices do not have TPO forms;
- (6) Victims in multicounty circuits do not have access to a local judge due to real scheduling problems of judges who must travel the circuit; and
- (7) Judges won't issue the TPO if the violence occurred over a week ago.

c. Problems still exist even in jurisdictions where TPOs are frequently issued by judges:

- (1) Judges often automatically issue mutual TPOs, even if there is no evidence of violent conduct by the victim;
- (2) TPOs are often not monitored or enforced by courts or law enforcement; and
- (3) TPOs usually do not provide for monetary support, even though authorized under the Family Violence Act.

11. Judges often disregard domestic violence when addressing alimony, child custody, and visitation in divorce proceedings.

RECOMMENDATIONS

For Georgia Citizens

1. Public education about the criminal justice system's response to domestic violence is needed to encourage victims to report these substantially underreported crimes.
2. Citizens should be included in any task forces established to implement this report to ensure that the criminal justice system adequately responds to domestic violence.
3. Resource material should be developed for victims of domestic violence that encourages the use of the court system, rather than self-help, in an effort to prevent domestic violence.
4. Brochures should be prepared for domestic violence victims which explain the criminal justice system, the criminal procedures, the civil protective order procedures, what services are available, and what victims can expect from the court system.

For the Legislature

5. Establish a State Commission or Task Force on domestic violence to implement this Commission's recommendations pertaining to domestic violence.

6. Amend the Family Violence Act in Code section 19-13-1, to add Article 3, entitled Family Violence Coordinating Council or Task Force, to require each judicial circuit to establish a Family Violence Coordinating Council or Family Violence Task Force with representatives from police, prosecutors, judges, court administrators, probation officers, shelter workers, child protective services, and lay citizens to examine how the criminal justice system in that judicial circuit responds to domestic violence and to implement recommendations in this report. Representatives on the Council or Task Force would be appointed by the Chief Judge of the circuit for a period of two years. Since problems in domestic violence cases vary greatly among circuits, the Council or Task Force could identify the particular problem areas in the judicial circuit, implement changes in those areas, and take the lead in holding police, prosecutors, and judges accountable.

7. Legislate and fund mandatory training in domestic violence issues for new police officers at the police academy and in-service training for current police officers, including training in these subjects:

- a. Provisions of the Family Violence Act;
- b. Undercharging in domestic violence cases;
- c. Existence of the battery statute which carries mandatory penalties for repeat offenders;
- d. Dynamics of domestic violence;
- e. Cycle of violence;
- f. Battered wife syndrome;
- g. Impact of spouse abuse on children who are bystanders;
- h. Potential lethality of domestic violence cases;
- i. Risk of injury to police officers in domestic violence cases;
- j. Legal obligation of the police to provide protection; and
- k. Community resources available to victims.

This training should be coordinated by the State Commission (Recommendation 5) and the Police Officers Standards and Training Council. The findings and recommendations of this Commission should

be employed in that training.⁶⁹

8. Amend the criminal procedure law entitled Arrest by Law Enforcement Officers in Code section 17-4-20 to provide that police officers "shall exercise" arrest powers in domestic violence cases where probable cause exists, and that if no arrest is made, police officers shall file a written incident report explaining why no arrest was made. House Bill 449, effective July 1, 1991, begins to address this problem, but still falls short of requiring arrest.

9. Amend the criminal procedure law entitled Arrests by Law Enforcement Officers in Code section 17-4-20 to require written police incident reports in every domestic violence call, including an explanation where no arrest is made, with copies forwarded to local prosecutors and to local domestic violence safe shelters funded by the State.

10. Classify domestic violence as an Index Crime, analyze domestic violence in the annual GBI report on crime in Georgia, and include domestic violence in the statistics of the Georgia Statistical Analysis Bureau (SAB). Include in the statewide statistical data collection system (a) the number of incidents of domestic violence reported to police departments, (b) the number of domestic violence arrests, and (c) the type of offenses charged. House Bill 449, effective July 1, 1991, requires reporting to G.C.I.C., but should be amended to include this statistical analysis.

11. Require a statistical data collection system for the offices of the district attorney, county solicitor, and municipal prosecuting attorney. This would include (a) the number of indictments and accusations, (b) the type of offense, and (c) the disposition. These data should then be reported to the Georgia SAB.

12. Amend the Family Violence Act in Code section 19-13-4 to require law enforcement officers to enforce and carry out TPOs by accepting a certified copy of the TPO from the victim and by immediately serving the TPO upon a respondent batterer whose address is known.

69. Excellent training curriculums for law enforcement have been developed and are available. Three are The Law Enforcement Response to Family Violence—National Seminars on Policy Development for Law Enforcement Executives (available through the Victim Services Agency in New York City); Domestic Violence: A Training Curriculum for Law Enforcement by The Family Violence Project (available through the District Attorney's Office, San Francisco, California); Domestic Crisis Intervention Training Manual (available from Families First, Inc., under contract with the Atlanta Bureau of Police Services).

13. Amend the Family Violence Act in Code section 19-13-4 to provide state-wide validity of TPOs issued in any judicial district.
14. Add an Article 16 to the Criminal Procedure law entitled Victim Advocate, Code section 17-16-1, to require that a victim advocate or assistance program be established in each prosecutor's office.
15. Amend the Georgia Criminal Code to state that the criminal offenses of simple battery in Code section 16-5-23, battery in Code section 16-5-23.1, and aggravated assault in Code section 16-5-21 may be charged in family violence cases as defined in Code section 19-13-1.
16. Amend the Georgia Criminal Code in Code section 16-5-70, entitled Cruelty to Children, to recognize domestic violence as cruelty to children where children are present in the home and witness the domestic violence.
17. Eliminate the marital privilege in Code section 24-9-23(a) in all criminal cases involving domestic violence.
18. Amend the Georgia Criminal Code in Chapter 5, entitled Crimes Against Person, to add a new Code section 16-5-26 or amend the Family Violence Act in Code section 19-13-4 to provide that expert evidence of the battered woman syndrome is admissible in criminal and civil cases involving domestic violence.
19. Establish shelters in jurisdictions lacking such service for victims and their children and increase the level of support for the existing shelters.
20. Provide for additional probation officers trained in domestic violence issues in each judicial circuit to handle domestic violence cases and to monitor the batterer's compliance with probation conditions, especially any mandated counseling or treatment.
21. Amend the simple battery offense in Code section 16-5-23 and the aggravated assault offense in Code section 16-5-21 to provide mandatory sanctions, penalties, and jail time for repeat offenders in domestic violence cases.
22. Amend the Family Violence Act in Code section 19-13-4 to provide advance notice to the victim of a convicted defendant's release from jail in aggravated assault and simple battery cases.
23. Require training in domestic violence issues for court service workers, probation officers, victim advocates, judges, district attorneys, and solicitors.

For the Police

24. Each local law enforcement agency should have a written protocol or written policy for handling domestic violence cases.
25. Uniform law enforcement policies on domestic violence crimes in Georgia should be developed.
26. New police officers should receive initial training in domestic violence issues at the police academy. Thereafter, every police department should provide its own in-service training for all personnel on departmental policy/protocol and dynamics of domestic violence.
27. Written police incident reports should be required for every domestic violence call, including an explanation when no arrest is made, with copies made available without charge to any local shelters funded by the State. Police should note on the written report whether children were at home during the domestic violence and, if so, who and what age. Police should take photographs of any visible bodily injuries and a statement from the victim.
28. Police should furnish information cards which advise domestic violence victims of their rights and where to obtain assistance.
29. Police should offer to escort victims and children to safe houses or shelters.
30. Police should be educated on potential civil liability to the victim for police failure to arrest in repeated battery cases.
31. Local police departments should implement a statistical data collection system that would allow the department to know (a) the number of domestic violence calls, (b) the number of arrests, and (c) the type of offenses charged.
32. The GBI report should include a domestic violence category and add domestic violence as an Index Crime in its annual report.

For Prosecutors

33. Each district attorney, solicitor, and municipal prosecuting attorney should establish a specialized written protocol for handling of domestic violence cases.
34. Domestic violence prosecution units should be established in those jurisdictions with sufficient volume of domestic violence cases. In jurisdictions with fewer cases, all domestic violence prosecution should be directed to one assistant State's attorney.

35. Prosecutors should not refer domestic violence cases to mediation or pretrial couples' counseling unless there are exceptional circumstances.

36. State's attorneys handling domestic violence cases should receive training regarding the dynamics of domestic violence, the cycle of violence, why the battered victim tries to dismiss the charges, how the battered victim will usually cooperate if told that the charges will not be dismissed, the characteristics of domestic violence victims and offenders, and the impact of domestic violence on children in the home, as well as the topics below recommended for judges.

37. All prosecutors should adopt a policy against dismissing domestic violence prosecutions and not reducing felony offenses to misdemeanors, even when the victim is reluctant to cooperate.

38. Prosecutors should routinely rely on evidence other than the victim's statement, such as the call for help, neighbor or other family witnesses, history of medical treatment, law enforcement testimony, statements of victim at time of incident, and photographs of victim's injuries.

39. Each prosecuting official should have a victim advocate to assist in domestic violence cases by:

- a. Explaining the court processes and procedures to victims and assisting victims in their role as witnesses;
- b. Participating in training and data collection;
- c. Working with coordinating councils to suggest and implement system improvements;
- d. Evaluating and advocating for children in violent families;
- e. Advocating the need for additional resources;
- f. Promoting safety considerations and other needs of family violence victims; and
- g. Asserting victims' rights in the justice system.

40. When a defendant is convicted of a domestic violence offense, prosecutors should request sentences (a) that mandate counseling, (b) that include incarceration, even if brief, and (c) that provide specific protection for victim, such as a "stay away" order.

41. Prosecutors should mark domestic violence assaults/homicides with a "DV" prefix before the case number in order to collect data regarding the number of arrests, prosecutions, dismissals, and convictions, and to obtain an accurate picture of the prosecutor's response to domestic violence cases.

For the Courts

Criminal Procedure

42. A domestic violence task force should be formed in each judicial circuit to focus attention on problems and propose solutions.

43. A separate bail or bond schedule should be set for domestic violence cases of criminal trespass, simple battery, battery, and aggravated assault. This schedule should take into account the repetitive nature of the crime, that the cycle of violence predictably escalates, and that the accused knows where the victim is. Conditions to protect the victim should be placed on bonds. House Bill 449 attempts to address this issue, but falls far short of needed reform.

44. Judges should not mandate mediation in criminal or civil cases where domestic violence has occurred unless there are exceptional circumstances.

45. Judges in each class of court should be required to attend education courses on domestic violence including training in these subjects:

- a. Dynamics of family violence, including the potential lethality of domestic violence;
- b. Battered wife and child syndromes;
- c. Courtroom treatment of victims, offenders, and witnesses;
- d. Impact of personal attitudes, gender bias, and courtroom demeanor on victims and batterers;
- e. Available sanctions and treatment standards for batterers;
- f. The provisions of the Family Violence Act and the elements of a good TPO;
- g. Effectiveness of coordinating or consolidating civil, criminal, and domestic cases involving members of the same family;

- h. Available shelter and support services for victims;
 - i. Correlation between spouse abuse, child abuse, and juvenile delinquency and the impact of spouse abuse on children who are bystanders; and
 - j. Sentencing procedures and alternatives.
46. Judges should have available the following before sentencing batterers in domestic violence cases:
- a. Offender's criminal history;
 - b. Victim's presence in court to outline history of abusive behavior or at least a victim impact statement to this effect; and
 - c. Drug, alcohol, and mental health evaluations of the batterer where appropriate.
47. Every sentence in domestic violence cases should:
- a. Reflect the seriousness of domestic violence;
 - b. Include a "stay away" or "no contact" order where appropriate;
 - c. Order offender involvement in available counseling specifically designed to reduce future violence;
 - d. Require an alcohol and drug evaluation where appropriate, mandate successful completion of treatment, and provide for mandatory chemical testing; and
 - e. Provide for actual supervision and monitoring of compliance.
48. Docket priority should be given to criminal domestic violence cases, especially over nonviolent crimes, to prevent recurrence and serious harm to victims.
49. To the extent possible, preliminary hearing calendars for domestic cases should be held on the same day to help reduce the low prosecution rates in domestic violence cases. Victim advocates or shelter workers or prosecuting attorneys could more effectively focus their limited resources.

Civil Procedure

50. Courts should make the system for obtaining TPOs for domestic violence easier to understand and less intimidating by means of a booklet which includes the necessary forms and information and which is readily available to those who need it.

51. In multicounty circuits, superior court judges should be encouraged to enter orders empowering the magistrates in their circuits to act as superior court judges for purposes of hearing family violence petitions under the Family Violence Act in Code section 19-13-3, especially *ex parte* hearings, to order such temporary relief necessary to protect the petitioner or a minor of the household from violence, and then to transmit the temporary order to the superior court having jurisdiction to conduct the hearing provided for in Code section 19-13-3(c). If the superior court judge is still unavailable in multicounty circuits to conduct the Code section 19-13-3(c) hearing, then the superior court should be encouraged to empower the magistrate court judge to conduct the second ten-day hearing as well.

52. Courts should not require a victim to have an attorney in order to request a TPO, especially since this is not required under the law.

53. To encourage uniformity, the Georgia Supreme Court should promulgate standardized TPOs to be used statewide, so that law enforcement, prosecutors, and judges become familiar with the same type of order. The judge could include or delete standard portions of the form depending on the requirements of the cases but this would help require the judge to consider each of the elements which should be in the order.

54. On weekends and evenings during the week, a duty judge and clerk should be assigned to process requests for TPOs. Emergency TPOs should be available on a twenty-four hour basis.

55. At least one person in the clerk's office should be trained to assist persons with TPOs and domestic violence cases.

56. Judges should not issue mutual protective or restraining orders when there is no evidence or claim of violence by the victim or when the batterer has not requested protection. Judges need education about the inappropriateness of mutual protective orders and the problems they present for law enforcement in determining who needs to be arrested. If both parties are alleged offenders, there should be two separate applications for protective orders.

57. Courts should provide mechanisms for monitoring compliance with TPOs.

58. In granting a civil restraining order, judges should consider:
- a. Safety of victims at home, school, work, and other places where the victim is subject to harassment or potential violence;
 - b. Child custody and visitation;
 - c. Telephone threats or harassment;
 - d. Removal of the perpetrator from the home;
 - e. Financial support and maintenance for the victim and family members;
 - f. Weapons in the home or in the possession of the offender;
 - g. Physical description of the offender;
 - h. Expiration date;
 - i. Method of modification; and
 - j. Provision for service upon offender together with notice and an opportunity for a speedy hearing.
59. Judges should not disregard domestic violence when deciding issues of alimony, child custody, and visitation and should require that the batterer complete counseling or treatment before allowing unsupervised visitation.

For Probation Officers

60. Probation departments should classify domestic violence repeat offenders in maximum supervision category and closely monitor compliance.
61. Probation officers should maintain periodic private contact with the victim in domestic violence cases to monitor compliance with terms of probation.
62. Probation violations of any kind in domestic violence cases should be promptly returned to the court for consideration and adjudication.

63. Probation officers should be trained in handling domestic violence cases and in understanding the dynamics of domestic violence and the importance of requiring strict compliance with conditions of probation.

SEXUAL OFFENSES

In its examination of the effect of gender bias upon the handling of sexual offenses, the Commission reviewed statutory and case law and statistical data from various sources. Sexual offenses reviewed by the Commission include rape, child molestation, and enticing a child for indecent purposes, and sodomy. At public hearings, testimony was taken from victims, police, prosecutors, and attorneys. The study revealed that gender-biased stereotyping on the part of those working within the criminal justice system results in diminished credibility afforded rape victims, a reluctance to arrest "acquaintance" rapists, a tendency to ignore the trauma which may be perpetrated upon a male, especially a male under the age of fourteen, who has been forced to engage in sexual conduct, low rates of arrest and conviction, and reduced sentences for convicted sex offenders.

Because of the physiological nature of sexual offenses, they are more likely to be seen from a gender-biased perspective than other crimes. Rape, for instance, is viewed historically and, in Georgia, by statute as a crime perpetrated by men against women. However, on a national level, between 1973 and 1987, 197,000 male rapes were reported. The annual average was 13,200.¹ Testimony before the Commission indicated that men may be victims of sexual assault more often than is known, but do not come forward because it is more embarrassing for them and subjects them to social stigma. Our society expects men to take care of themselves.²

Female victims of sexual assault are often viewed as having "asked for it." They are questioned about "not resisting" and are accused of encouraging the rape by their dress or conduct. But rape is a violent act of physical aggression. It is not related to lust but rather to the need to dominate and abuse another. To assume a rape victim invited the rape because of her clothing or demeanor is no more logical than to assume a businessman deserved to be robbed because he was wearing expensive jewelry.

One speaker suggested that elevated testosterone levels cause men to commit sex crimes. He pointed out that some sex offenders have been successfully treated with a drug which reduces the male sex drive.³ However, although the experts are divided on the issue, most of them

1. BUREAU OF JUSTICE STATISTICS, U.S. DEPT OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME (1991).

2. *Columbus Public Hearing Before the Commission on Gender Bias in the Judicial System* 36 (Oct. 20, 1989).

3. *Griffin Public Hearing Before the Commission on Gender Bias in the Judicial System* 58-59 (July 13, 1990).

believe that the rapist is driven by a deep-seated rage toward women, not by out-of-control sexual passion.⁴

Like rape, statutory rape is defined as a crime committed by males against female victims. According to traditional stereotypes, even very young men are seen as more physically, emotionally, and mentally capable of dealing with forced or coerced sexual encounters than young women. However, all children, boys as well as girls, need to be protected from this criminal conduct.

I. Rape

A. Statutory Definitions

1. Rape Statute

Georgia law provides:

(a) A person commits the offense of rape when he has carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ.

(b) A person convicted of the offense of rape shall be punished by death, by imprisonment for life, or by imprisonment for not less than one nor more than 20 years.⁵

Although the Georgia rape statute continues to state the punishment of death, the U.S. Supreme Court has held it to be unconstitutional as a violation of the Eighth Amendment prohibiting cruel and unusual punishment.⁶ In Georgia, as in many jurisdictions,⁷ only a man can be charged with the crime of rape.⁸ The Georgia Supreme Court has held that this statute does not violate the Equal Protection Clause of the U.S. Constitution.⁹ The court upheld this classification by gender as

4. David Gelman et al., *The Mind of the Rapist*, NEWSWEEK, July 23, 1990, at 46-52.

5. O.C.G.A. § 16-6-1 (1988).

6. *Coker v. Georgia*, 433 U.S. 584 (1977).

7. See *State v. Kelly*, 526 P.2d 720 (Ariz. 1974), *cert. denied*, 420 U.S. 935 (1974); *People v. Gould*, 532 P.2d 953 (Colo. 1975); *People v. Medrano*, 321 N.E.2d 97 (Ill. App. Ct. 1974); *State v. Price*, 529 P.2d 85 (Kan. 1974); *State v. Fletcher*, 341 So. 2d 340 (La. 1976); *Brooks v. State*, 330 A.2d 670 (Md. Ct. Spec. App. 1975); *State v. Witt*, 245 N.W.2d 612 (Minn. 1976); *State v. Craig*, 545 P.2d 649 (Mont. 1976); *People v. Smith*, 411 N.Y.S.2d 146 (Albany County Ct. 1978); *Stewart v. State*, 534 S.W.2d 875 (Tenn. Crim. App. 1975); *State v. Young*, 523 P.2d 946 (Wash. Ct. App. 1974); *State v. Bush*, 255 S.E.2d 539 (W. Va. 1979); *State v. Ewald*, 216 N.W.2d 213 (Wis. 1974). *But see Washington v. State*, 302 So. 2d 401 (Fla. 1974), *cert. denied*, 421 U.S. 918 (1975); *Brinson v. State*, 278 So. 2d 317 (Fla. Dist. Ct. App. 1973) (males entitled to same protection as females).

8. O.C.G.A. § 16-6-1 (1988).

9. *Lamar v. State*, 243 Ga. 401, 254 S.E.2d 353 (1979), *appeal dismissed*, 444 U.S.

reasonable based upon physiological realities of the sex act. The objective of criminalizing this conduct was held to serve the State's interest in preventing sexual attacks upon women, with the resulting physical injury, psychological trauma, and possible pregnancy.¹⁰

This philosophy ignores the trauma which may be perpetrated upon a male, especially a male under fourteen years, who may have been forced to engage in sexual conduct. Although the physical trauma of sexual assault may differ for males and females, in both cases it may result in psychological trauma and social stigma to the victim. There is evidence that, compared to female rapes, sexual assaults on males are more likely to be committed by strangers. There is also more physical violence and often more than one assailant.¹¹

Georgia recognizes no implicit marital exclusion within the rape statute.¹² A recent Georgia case has resulted in the conviction of a man for the rape of his wife.¹³ The Georgia Supreme Court rejected the common law theories upon which such an exemption could be based.¹⁴ For example, Lord Hale's theory was that the wife had given up her right to refuse sex by entering into the marriage contract.¹⁵ A rapist could also avoid criminal prosecution by subsequently marrying the victim. A second theory suggested that because a wife was her husband's property, marital rape was nothing more than a man making use of his property.¹⁶ The last theory held that a woman's legal existence merged with her husband's; therefore, he could not be convicted of raping himself.¹⁷ Our supreme court rejected each of these contentions and acknowledged the rights of women in the State of Georgia to be free from acts of violence by their husbands.¹⁸

Yet testimony was given to the Commission that the police will not prosecute a husband for the rape of his wife. In one instance, an estranged husband lured his wife from her separate residence by telling her that her mother was ill and in the hospital. He bound her, physically abused her, and forced her to have sexual intercourse several times. Upon her release, she reported the incident to the police;

803 (1979).

10. *Id.*

11. Gillian Mezey & Michael King, *Male Victims of Sexual Assault*, 27 *MED., SCI. & L.* 122, 123 (1987).

12. *Warren v. State*, 255 Ga. 151, 336 S.E.2d 221 (1985).

13. *Childs v. State*, 257 Ga. 243, 357 S.E.2d 48 (1987).

14. *Warren*, 255 Ga. at 151, 336 S.E.2d at 221.

15. *Id.* at 153, 336 S.E.2d at 223.

16. *Id.*

17. *Id.*

18. *Id.*

however, she was told that there was nothing she could do because the perpetrator was her husband.¹⁹

Corroboration of the rape victim's allegations is no longer required by statute²⁰ or case law.²¹

2. *Statutory Rape Statute*

Like the rape statute, the language found within the statutory rape statute²² makes specific reference to males as perpetrators and females as victims:

(a) A person commits the offense of statutory rape when he engages in sexual intercourse with any female under the age of 14 years and not his spouse, provided that no conviction shall be had for this offense on the unsupported testimony of the female.

(b) A person convicted of the offense of statutory rape shall be punished by imprisonment for not less than one nor more than 20 years.²³

Again, such gender-based classifications have been held to be valid under the Equal Protection Clause.²⁴

Although it is reasonable to assume that a male under the age of fourteen is as capable of being victimized by a rapist as a female, the Georgia Supreme Court²⁵ has held the statutory rape statute to be substantially related to the state's objective of "protecting young girls from the unique physical and psychological change resulting from sexual intercourse with males"²⁶ and, therefore, capable of withstanding equal protection scrutiny. Additionally, it has been held that the statutory rape statute's gender-based distinction is further justified by the sufficiency of protection provided all children, male and female, under the statutory scheme of protection in the criminal statutes for rape,²⁷ child molestation,²⁸ and enticing a child for indecent purposes,²⁹ which are addressed separately in this section.

19. Albany Confidential Listening Session (Jan. 19, 1990).

20. O.C.G.A. § 16-6-1 (1988).

21. *Baker v. State*, 245 Ga. 657, 266 S.E.2d 477 (1980); *Hanvey v. State*, 186 Ga. App. 690, 368 S.E.2d 357 (1988).

22. O.C.G.A. § 16-6-3 (1988).

23. *Id.*

24. *Barnes v. State*, 244 Ga. 302, 260 S.E.2d 40 (1979).

25. *Id.* at 304, 260 S.E.2d at 42.

26. *Id.*

27. O.C.G.A. § 16-6-4 (1988).

28. *Id.*

29. *Id.* § 16-6-5.

Although modern society no longer places the same importance on the virginity of a young woman at the time of marriage as it did in the past, this change in social mores does not minimize the trauma suffered by all children during an act of coerced or forced sexual conduct or sexual violence. Also not to be overlooked is the very real threat of contracting Acquired Immune Deficiency Syndrome (AIDS) to which all such victims are subjected. Boys as well as girls should be entitled to protection under the statute.

Corroboration is also required in statutory rape cases.

3. *Rape Shield Statute*

Rape victims often face repeated questioning about their prior sexual history, which deters them from reporting the rape. In 1989 Georgia enacted its rape shield law which provides:

(a) In any prosecution for rape, evidence relating to the past sexual behavior of the complaining witness shall not be admissible, either as direct evidence or on cross-examination of the complaining witness or other witnesses, except as provided in this Code section. For the purposes of this Code section, evidence of past sexual behavior includes, but is not limited to, evidence of the complaining witness's marital history, mode of dress, general reputation for promiscuity, nonchastity, or sexual mores contrary to the community standards.

(b) In any prosecution for rape, evidence relating to the past sexual behavior of the complaining witness may be introduced if the court, following the procedure described in subsection (c) of this Code section, finds that the past sexual behavior directly involved the participation of the accused and finds that the evidence expected to be introduced supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution.³⁰

Originally enacted in 1976, Georgia's Rape Shield Statute reflects the General Assembly's effort to protect the victim in rape cases from improper attack in court by excluding evidence that might reflect on the character of the witness without contributing materially to the issue of guilt or innocence of the accused.³¹ Georgia courts have extended the use of the rape shield statute to other sexual offenses including statutory rape,³² sodomy,³³ child molestation,³⁴ and incest.³⁵ The

30. O.C.G.A. § 24-2-3 (Supp. 1991).

31. *Parks v. State*, 147 Ga. App. 617, 249 S.E.2d 672 (1978).

32. *Brown v. State*, 173 Ga. App. 640, 327 S.E.2d 515 (1985); *Hill v. State*, 159

statute prohibits evidence of a victim's past sexual behavior including, but not limited to, evidence of the victim's marital history,³⁶ nonchastity,³⁷ mode of dress,³⁸ general reputation for promiscuity,³⁹ or sexual mores⁴⁰ contrary to community standards.⁴¹ While the statute restricts a criminal defendant's ability to cross-examine the complainant or her witnesses on these issues,⁴² it has been held not to violate the Confrontation Clause of the Sixth Amendment of the U.S. Constitution.⁴³ By allowing for the introduction of such evidence under limited circumstances,⁴⁴ the statute has been determined to provide the requisite protection for the defendant.⁴⁵ There appears to be no affirmative duty of the trial judge to prevent the introduction of evidence of previous sexual conduct absent objection from counsel for the state.

Under the statute as enacted in 1976, there were two exceptions for admission of character evidence about the victim. Evidence of the past sexual behavior of the victim could be admitted only if the court made the following findings after an in camera hearing: the past sexual behavior directly involved the participation of the defendant or the evidence demonstrates that the defendant could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution.⁴⁶ In the 1989 amendment to the statute, the two exceptions are joined conjunctively,⁴⁷ suggesting that the threshold of admissibility of such evidence has been raised.

Ga. App. 489, 283 S.E.2d 703 (1981).

33. *Worth v. State*, 183 Ga. App. 68, 358 S.E.2d 251 (1987); *Roberts v. State*, 158 Ga. App. 309, 279 S.E.2d 753 (1981).

34. *Worth*, 183 Ga. App. at 68, 358 S.E.2d at 251; *Decker v. State*, 139 Ga. App. 707, 229 S.E.2d 520 (1976).

35. *Haynes v. State*, 180 Ga. App. 202, 349 S.E.2d 208 (1986); *Estes v. State*, 165 Ga. App. 453, 301 S.E.2d 504 (1983).

36. *Burley v. State*, 190 Ga. App. 75, 378 S.E.2d 328 (1989).

37. *Worth*, 183 Ga. App. at 68, 358 S.E.2d at 251. *But see Hardy v. State*, 159 Ga. App. 854, 285 S.E.2d 547 (1981).

38. *Ford v. State*, 189 Ga. App. 395, 376 S.E.2d 418 (1988). *But see Villafranco v. State*, 252 Ga. 188, 313 S.E.2d 469 (1984) (evidence admissible to impeach prosecution's witness as to the time of incident).

39. *Lockhart v. State*, 172 Ga. App. 170, 322 S.E.2d 503 (1984).

40. *But see Jimmerson v. State*, 190 Ga. App. 759, 380 S.E.2d 65 (1989) (conviction for rape, aggravated sodomy, and child molestation reversed based upon trial court's exclusion of evidence of sexual freedom in child's family).

41. O.C.G.A. § 24-2-3(a) (1989).

42. *Ellis v. State*, 181 Ga. App. 630, 353 S.E.2d 822 (1987).

43. *Harris v. State*, 257 Ga. 666, 362 S.E.2d 211 (1987).

44. O.C.G.A. § 24-2-3(c) (1989).

45. *Harris*, 257 Ga. at 666, 362 S.E.2d at 213.

46. 1976 Ga. Laws 741 § 1.

47. O.C.G.A. § 24-2-3(b) (Supp. 1991).

However, language added in the subsection guiding the court's inquiry broadens the exception. Evidence of the victim's sexual history may be found admissible where it is "so highly material that it will substantially support a conclusion that the accused reasonably believed that the complaining witness consented to the conduct complained of and that justice mandates the admission of such evidence."⁴⁸

This expansion of the court's discretion in determining the admissibility of evidence of prior sexual conduct of a complainant weakens the protections heretofore afforded a victim of sexual assault. While our appellate courts have not yet had an opportunity to review cases decided under the amended section, the unfortunate possibility exists that "despite the attempted reforms . . . a jury may still acquit or convict a defendant accused of rape upon spurious assessments of the complainant's character which are simply not relevant to present day [notions of] consent."⁴⁹

Further erosion of the rape shield statute's protection has occurred in a recent superior court decision allowing testimony regarding previous false allegations of sexual misconduct made by the victim. The Georgia Supreme Court has determined that evidence of prior false accusations is admissible to attack the credibility of the victim and as substantive evidence tending to prove that the instant offense did not occur.⁵⁰ If the trial court concludes, outside the presence of the jury, that a reasonable probability of falsity exists, such evidence may be admitted.⁵¹ "Since the victim is not the defendant, the court does not consider any prejudice to her that admission of sexual history evidence may allow as against its probative value; nor is she provided any right of appeal against a finding of admissibility."⁵² These exceptions to the rape shield statute may perpetuate the gender-biased myth that a woman who has previously consented to have sex with a particular man remains available to him and she forfeits any right to refuse future sexual activity with him.

B. Effect of Gender Bias on the Prosecution of Rape Cases

1. Reporting and Arrest

Expert research nationally indicates that over 50% of all rapes are never reported to police. In Georgia, it is estimated that only 10% to 15% of rapes are actually reported.⁵³ According to the U.S. Justice

48. *Id.* § 24-2-3(c)(2).

49. *Hardy v. State*, 159 Ga. App. 854, 858, 285 S.E.2d 547, 551 (1981).

50. *Smith v. State*, 259 Ga. 135, 377 S.E.2d 158 (1989).

51. *Id.*; accord *Shelton v. State*, 196 Ga. App. 163, 395 S.E.2d 168 (1990).

52. *Hardy*, 159 Ga. App. at 858, 285 S.E.2d at 551.

53. *Gainesville Public Hearing Before the Commission on Gender Bias in the*

Department, women are more likely to report a rape if it is perpetrated by a stranger, if a weapon is used, or if they have been injured. Of those who reported rapes, 60% did so to prevent additional rapes, 47% to punish the perpetrator, and 31% to stop the incident from happening again. Of those who did not report rapes, 25% considered it a private, personal matter, 23% were afraid of reprisal, and 23% doubted the effectiveness of the police.⁵⁴

While some lack of reporting is obviously attributable to the victim's embarrassment or fear of retaliation, witnesses testified to the Gender Bias Commission that crimes of rape are underreported primarily because of the victim's fear of unreasonable treatment by police, prosecutors, and judges. The manner in which rape cases are investigated and prosecuted has a profound influence on rape victims. To illustrate the belief that victims are intimidated by the judicial system, one person reported, "So I think society, even coming into the courtroom has a bias or a mindset about the crime and, therefore, against the victim . . . I wouldn't want my son put away for this . . . she must have done something [to deserve it]."⁵⁵ Also expressed was concern for victims of incest who may be forced to move away from the family home and prohibited from making contact with family members. A suggestion was made that a guardian ad litem or similar program be created to help with this situation.⁵⁶ Testimony was also given that even where rape crisis volunteers are available to assist victims in the courtroom, there are some courts where the volunteers may be required to leave or to have no contact with the victim during the trial.⁵⁷

Other testimony bears out the theory that women often do not report rape or go through with the prosecutorial process because they are afraid that they will not be believed or that they will be blamed for the crime.⁵⁸

Even when rape is reported by the victim, more than half of those cases never result in an arrest. Georgia criminal justice data published by the Georgia Bureau of Investigation indicate that there were 3237 reported forcible rapes in Georgia in 1989, but only 1200 arrests, for an arrest ratio of 37%.⁵⁹

Since most rapes are never reported and most reported rapists are never arrested, Georgia's criminal justice system never deals with the

Judicial System 18 (May 18, 1990).

54. BUREAU OF JUSTICE STATISTICS, *supra* note 1, at 9.

55. *Columbus Public Hearing*, *supra* note 2, at 28.

56. *Id.* at 5-7.

57. *Id.* at 30.

58. *Gainesville Public Hearing*, *supra* note 53, at 18-19; *Columbus Public Hearing*, *supra* note 2, at 31.

59. GEORGIA BUREAU OF INVESTIGATION, GEORGIA CRIMINAL JUSTICE DATA 1989, at 48 (July 1990).

vast majority of rapists or rape victims. The system handles only 1200 cases per year—less than 20% of the estimated actual rapes which occur in this state, both reported and unreported.⁶⁰ The Commission focused primarily on the relatively small percentage of rapes where a report is made, where the alleged rapist is arrested, and where the victim actually encounters the criminal justice system. However, in the process the Commission heard why most rape cases are never reported: victims fear gender-biased treatment by police, prosecutors, and judges.

2. *The Rape Exam*

One prevalent complaint to the Commission was that rape victims in certain Georgia jurisdictions are required to pay the doctor and hospital bills for the medical examination commonly called the “rape exam” to collect specimens, such as semen and hair samples, for evidence to support the State’s case.⁶¹ The rape exam primarily consists of collection of evidence at the hospital for the police to turn over to the district attorney’s office. The costs of the rape exam range from \$175 to \$660 depending on the location in Georgia. Over one million people in Georgia lack any medical health insurance, most of them women and children. Most victims lack health insurance to help pay for this rape exam.

Since the Georgia Supreme Court has ruled that expert testimony on DNA testing is admissible,⁶² the rape exam provides vital evidence in rape cases. If the woman cannot afford to pay for the rape exam at the hospital, her rapist may go free for lack of evidence.

Some Georgia counties defended their system of requiring rape victims to pay for the rape exam by stressing that people who are shot or stabbed pay for their own medical treatment. However, the Commission notes that the purpose of the rape exam is to collect evidence to prove the rape, not for any beneficial medical treatment for the rape victim. In other cities, the police defended their procedure by saying that they pay for the rape exam only after they have determined that the woman is sure she wants to press charges. Forcing the victim to make such decisions at the hospital in an emotional state appears to the Commission to be unnecessary and counterproductive.

There is no uniformity in payment policies for rape exams. For example, in the metro Atlanta area, rape victims in Cobb and Clayton Counties have to pay for the exam, but the police pay for the exam in

60. *Id.*

61. *Athens Public Hearing Before the Commission on Gender Bias in the Judicial System* 80-85 (Dec. 1, 1989).

62. *State v. Caldwell*, 260 Ga. 278, 393 S.E.2d 436 (1990).

Fulton, DeKalb, and Gwinnett Counties as a routine expenditure for collecting evidence in a rape case. A gynecologist quoted in a newspaper article on rape in Georgia described the issue as follows: "When someone comes out to your house to get fingerprints after a robbery, they don't send you a bill for it So why would you charge just because the evidence is being collected from their person?"⁶³

Rape victims now must face the added horror of AIDS. Rape victims are concerned about exposure to the AIDS virus, whether assailants may be tested, and who pays for the assailant's and victim's tests. While sexually transmitted diseases (STDs) have always been a possible risk in the case of sexual assault, previously known STDs have not been as fatal as AIDS.

3. *Gender-Biased Stereotypes About Rape*

Many false gender-biased stereotypes about rape victims still exist throughout society and the judicial system. As a result, victims receive treatment from police, prosecutors, and judges which is adversely affected by gender bias. Twenty-three percent of rape victims fail to report the crime. This is apparently because they feel law enforcement agencies would be inefficient, ineffective, or insensitive.⁶⁴

Witnesses who testified before the Commission have confirmed that rape victims are instantly viewed as suspect and as "damaged goods." Their credibility is significantly diminished from the outset only because of their status as the female victim of rape. Because of this suspicion that the victim may be lying, statutory rape requires corroboration, and, in the past, prior sexual activity of the victim was allowed as evidence.

Police and prosecutors often interrogate rape victims at length about the rape. Although rape is forcible intercourse, investigative emphasis is often placed on the victim's dress, whether she was "sexy" looking, whether she dated her assailant, or whether she encouraged him in any way. Even if she did any of these things, they are irrelevant because rape by definition is sex effected by force and without the victim's consent. The Gender Bias Commission heard testimony that gender-biased comments frequently occur during the police and prosecutor's interrogation about what the victim did, how she was dressed, and why she did not resist more. Although studies have concluded that rape victims are likely to be more seriously injured if they resist, intensive questions about resistance persist. Police and prosecutors usually do not interrogate an armed robbery or burglary victim about why they did not

63. Rebecca Perl, *The Economics of Rape*, ATLANTA J. & CONST., May 4, 1990, at D1, D8.

64. BUREAU OF JUSTICE STATISTICS, *supra* note 1, at 9.

resist, but rape victims are interrogated extensively due to the gender-biased view that "they were asking for it" or that "they enjoyed it." Rape victims are often not treated with respect and sensitivity.

Gender-biased stereotyping affects the attitudes of jurors. A rape crisis center coordinator testified:

I don't find as much bias as far as court personnel or the judges are concerned. I find it in the juries themselves. I have never been assaulted. If I am, I do not want a woman on my jury We find there's a sort of psychological protective system that starts up, and you can almost watch them. They're saying, oh, I have a son. I wouldn't want my son put away for this. Or you can hear them almost mentally say to themselves I'm a nice lady, I don't dress suggestively, I have nice friends, I go to church, and you can see their halos getting tighter and tighter and tighter. And then they transfer that. Since I am such a nice person, it's not going to happen to me. Therefore, she must have done something.⁶⁵

The testimony presented to the Gender Bias Commission confirms that rape victims justifiably fear that gender-biased attitudes in the judicial system will blame the victims for their own rape. There is a long-held societal history of blaming rape victims and doubting their credibility. Although some improvements have been made, these gender-biased beliefs still permeate the criminal justice system. The victim is often made to feel that she cannot blame anyone but herself, that the rape probably did not happen, or that she wanted it, deserved it, and made it happen.⁶⁶

Some police departments and prosecutors' offices have written protocols that outline procedures for handling rape cases, but many police departments and prosecutors' offices do not have such written protocols. From Savannah, the Gender Bias Commission received an example of an educated and thorough police department protocol for rape cases. The Savannah police department's written protocol aptly points out that an effective, supportive police protocol is crucial to rape cases for these reasons:

Without a cooperative, stable victim, there is not a case. A sympathetic, supportive attitude will instill trust in the victim, help overcome her feelings of embarrassment and facilitate the information gathering process. The officer should remain objective and nonjudgmental. It is the officer's

65. *Gainesville Public Hearing*, *supra* note 53, at 28.

66. Barbara Fromm, *Sexual Battery: Mixed-Signal Legislation Reveals Need for Further Reform*, 18 FLA. ST. U. L. REV. 579, 591-92 (1991).

responsibility to investigate the case thoroughly and to allow the courts to judge the guilt or innocence of the defendant.⁶⁷

4. Acquaintance Rape

Until recently, acquaintance rape was frequently not charged, much less prosecuted, in Georgia. Testimony was received that in one police department the first inquiry was whether this was a "real" rape case or did the victim know the alleged assailant.⁶⁸

Assailants are known to their victims in approximately one-half of the reported cases. These attacks tend to involve violence.⁶⁹ It was reported that

[i]f the victim knew her assailant, was at a bar or out late at night, etc., there is much discussion about whether or not it was a rape. This does not happen to male victims who report crimes under similar conditions. A male victim who may become intoxicated at a bar and then is assaulted and rob[bed] while leaving, is very seldom doubted as to the validity of his story. However, take the same scenario and have the victim female being sexually assaulted and the response by the police and judiciary is completely different.⁷⁰

Statistics now indicate that women are frequently raped by someone they know.⁷¹ Nonetheless, testimony was given to the Commission that police and prosecutors afford relatively low priority to acquaintance rape due to gender-biased stereotypes and attitudes about whether the conduct was consensual:

You don't hear of date rape One out of ten stranger rapes will be reported . . . one out of a hundred date rapes. If you had a colleague that you worked with and he raped you—or you went out to dinner and it was a very innocent thing, just a date, and he raped you—what is your defense? . . . It is very difficult. What were you doing? How long have you known [him]? And, I don't think people understand that, even if someone has had a relationship, that no means no and that the relationship can be stopped.⁷²

67. Savannah Police Department, Police Procedures: Rape Report/Case Procedure, sec. II.

68. Albany Public Hearing Before the Commission on Gender Bias in the Judicial System 16 (Jan. 19, 1990).

69. Fromm, *supra* note 66, at 579-80.

70. Albany Public Hearing, *supra* note 68.

71. BUREAU OF JUSTICE STATISTICS, *supra* note 1.

72. Columbus Public Hearing, *supra* note 2, at 33.

Acquaintance rape in the college setting is often in the form of gang rape. This is an example of male bonding which stems from a contempt for women.⁷³ Very few campus rapes end up in the courtroom because only ten percent of them are reported, and they are hard to prosecute if they involve alcohol or drugs.⁷⁴

Some witnesses stressed that police and prosecutors are reluctant to charge and prosecute cases of acquaintance rape because of the lower rate of conviction due to the possible reduction in available evidence. In any event, victims in acquaintance rape cases perceive there to be little, if any, help or protection in the criminal justice system. Acquaintance rape involves unique problems for both prosecutors and victims. Police, prosecutors, and judges often lack understanding of the unique dynamics of acquaintance rape.

Certainly, in every crime, there is always the possibility of false accusations. Because of the relative "privacy" in which rape occurs and because of the social stigma attached to the accused rapist, the idea that false accusations may be made in cases of rape has gained much historical acceptance. These are the only crimes in which the victims are often interrogated intensely, accused of lying, or blamed for their victimization. These gender-biased attitudes decrease the rape victim's credibility. The consequences of the myth that women frequently lie about rape are very serious.

II. *Child Molestation and Enticing a Child for Indecent Purposes*

Although male victims under the age of fourteen are excluded under the statutory rape statute, they are protected by the criminal code under child molestation and enticing a child for indecent purposes. Concern was expressed that both men and women do not suffer the same consequences for sexually assaulting a young male as they would for sexually assaulting a young female.

A. *Statutory Definitions*

1. *Child Molestation/Aggravated Child Molestation*

Georgia law provides:

(a) A person commits the offense of child molestation when he does any immoral or indecent act to or in the presence of or with any child under the age of 14 years with the intent to arouse or satisfy the sexual desires of either the child or the person.

73. Judy Keen, *Colleges "Degrade" Rape Victims*, USA TODAY, June 11, 1991, at 1-2.

74. Fromm, *supra* note 66, at 579-80.

(b) A person convicted of the offense of child molestation shall be punished by imprisonment for not less than one nor more than 20 years. Upon a first conviction of the offense of child molestation, the judge may probate the sentence; and such probation may be upon the special condition that the defendant undergo a mandatory period of counseling administered by a licensed psychiatrist or a licensed psychologist. However, if the judge finds that such probation should not be imposed, he shall sentence the defendant to imprisonment; provided, further, that upon a defendant being incarcerated on a conviction for a first offense, the Department of Corrections shall provide counseling to such defendant. Upon a second or third conviction of such offense, the defendant shall be punished by imprisonment for not less than five years. For a fourth or subsequent conviction of the offense of child molestation, the defendant shall be punished by imprisonment for 20 years. Adjudication of guilt or imposition of sentence for a conviction of a third, fourth, or subsequent offense of child molestation, including a plea of nolo contendere, shall not be suspended, probated, deferred, or withheld.

(c) A person commits the offense of aggravated child molestation when he commits an offense of child molestation which act physically injures the child or involves an act of sodomy.

(d) A person convicted of the offense of aggravated child molestation shall be punished by imprisonment for not less than two nor more than 30 years.⁷⁵

2. *Enticing a Child for Indecent Purposes*

Georgia law provides:

(a) A person commits the offense of enticing a child for indecent purposes when he solicits, entices, or takes any child under the age of 14 to any place whatsoever for the purposes of child molestation or indecent acts.

(b) A person convicted of the offense of enticing a child for indecent purposes shall be punished by imprisonment for not less than one nor more than 20 years. Upon a first conviction of the offense of enticing a child for indecent purposes, the judge may probate the sentence; and such probation may be upon the special condition that the defendant undergo a

75. O.C.G.A. § 16-6-4 (1988).

mandatory period of counseling administered by a licensed psychiatrist or a licensed psychologist. However, if the judge finds that such probation should not be imposed, he shall sentence the defendant to imprisonment. Upon a second or third conviction of such offense, the defendant shall be punished by imprisonment for not less than five years. For a fourth or subsequent conviction of the offense of enticing a child for indecent purposes, the defendant shall be punished by imprisonment for 20 years. Adjudication of guilt or imposition of sentence for a conviction of a third, fourth, or subsequent offense of child molestation, including a plea of *nolo contendere*, shall not be suspended, probated, deferred, or withheld.⁷⁶

The Georgia Supreme Court has held that "a woman engaging in sexual intercourse with a male child less than 14 years of age, while violating a different code section, is subject to the same penalties as a man who commits statutory rape."⁷⁷ Although the penalty to be imposed upon conviction under the statutory rape⁷⁸ and child molestation⁷⁹ statutes are identical, the imposition of these penalties can vary widely. Under the statutory rape statute, conviction mandates the penalty of imprisonment of "not less than one nor more than 20 years."⁸⁰ However, under the child molestation statute, a first offender may receive probation, provided "such probation may be upon the special condition that the defendant undergo a mandatory period of counseling administered by a licensed psychiatrist or a licensed psychologist."⁸¹ No such provision is included under the statutory rape statute. Application of the two statutes could result in disparate penalties based upon gender.

One speaker testified that he felt there was gender bias against men to prosecute them for sexual intercourse with a girl under fourteen years of age, but not to prosecute a woman for having sexual intercourse with a boy under fourteen. He told the story of a seventeen-year-old boy (not amenable to juvenile laws, yet had not reached his majority) who was telephoned by a twelve-year-old girl at 11:30 p.m. to let him know her parents were not home. He drove to her home where they had sexual intercourse. The girl's mother arrived before he left and took out a warrant for statutory rape, which carries a mandatory prison sentence. However, if the ages of the children were reversed, the girl

76. *Id.* § 16-6-5.

77. *Barnes v. State*, 244 Ga. 302, 260 S.E.2d 40 (1979).

78. O.C.G.A. § 16-6-3 (1988).

79. *Id.* § 16-6-4.

80. *Id.* § 16-6-3(b).

81. *Id.* § 16-6-4(b).

could only be charged with child molestation and could have been eligible for a probated sentence.⁸²

This disparity in sentencing reflects a gender bias against young males who are frequently the victims of forced oral and anal sexual acts of violence. Based upon the disparate treatment of male and female victims, Georgia should consider enacting a sexual battery statute that is gender neutral, similar to those found in Florida, Illinois, and other states, which allows for the imposition of equal punishment for sexual assault by or upon a male or female.

Neither rape,⁸³ incest,⁸⁴ sodomy,⁸⁵ nor child molestation⁸⁶ requires corroboration of the victim's testimony to secure a conviction. In contrast, the statutory rape statute specifically requires corroboration; it provides that "no conviction shall be had for this offense on the unsupported testimony of the female."⁸⁷ Corroboration "is usually had by testimony other than the victim's, which fairly tends to prove that the crime was committed and which connects the accused therewith."⁸⁸ Case law provides no explanation for the corroboration requirement under the statute. Its basis is almost certainly founded upon the gender-biased belief that females will lie about this conduct.

III. Sodomy

Georgia law provides:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. A person convicted of the offense of aggravated sodomy shall be punished by imprisonment for life or by imprisonment for not less than one nor more than 20 years.⁸⁹

82. *Griffin Public Hearing*, *supra* note 3, at 16-17.

83. *Hanvey v. State*, 186 Ga. App. 690, 368 S.E.2d 357 (1988).

84. *Scales v. State*, 171 Ga. App. 924, 321 S.E.2d 764 (1984).

85. *Id.*

86. *Id.*

87. O.C.G.A. § 16-6-3(a) (1988).

88. *Hill v. State*, 159 Ga. App. 489, 283 S.E.2d 703 (1981).

89. O.C.G.A. § 16-6-2 (1988).

As may be seen, the Georgia sodomy statute employs the ostensibly gender-neutral language "a person . . . he"⁹⁰ and may be applied to both participants in the act.⁹¹ Interpretation through case law suggests that the statute applies equally to acts performed and submitted to by both males and females.⁹² As with rape, no corroboration is required for conviction of sodomy.⁹³

There is no marital exclusion under the sodomy statute.⁹⁴ The Georgia Supreme Court has upheld a trial court's denial of a motion to dismiss an indictment for aggravated sodomy against a defendant husband brought on behalf of his victim wife.⁹⁵ However, a man convicted and imprisoned for acts of sodomy with his wife has been released on a habeas petition.⁹⁶ Based upon the consensual nature of the act as found by the trial jury, the habeas court found that the sodomy law, as applied to the petitioner husband, violated his constitutional right to marital and domestic privacy.⁹⁷ Furthermore, the State attorney general conceded that the law should not be applied to consenting partners in the context of a marriage.⁹⁸

IV. *Increasing Convictions*

A. *Lack of Victim Witness Assistance Programs Contributes to Underreporting*

One of the main reasons that convictions are not achieved in rape cases is the reluctance of victims to come forward and report the rape. In the U.S. Department of Justice report entitled "Female Victims of Violent Crime," it is stated that

[w]hen the police were not informed of a completed rape, victims gave three main reasons to the NCS: they considered the rape to be a private or personal matter or a matter that they wanted to resolve themselves (25%); they feared reprisal by the offender, his family, or friends (23%); and the police would be inefficient, ineffective, or insensitive (23%).⁹⁹

90. *Id.*

91. *Id.* § 16-6-2(a).

92. *See, e.g.,* Porter v. State, 168 Ga. App. 703, 309 S.E.2d 919 (1983); Carter v. State, 122 Ga. App. 21, 176 S.E.2d 238 (1970); Comer v. State, 21 Ga. App. 306, 94 S.E. 314 (1917) (conviction of woman for sodomy affirmed).

93. Scales v. State, 171 Ga. App. 924, 321 S.E.2d 764 (1984).

94. Warren v. State, 255 Ga. 151, 336 S.E.2d 221 (1985).

95. *Id.*

96. Moseley v. Esposito, No. 89-6897 (DeKalb Super. Ct. Sept. 6, 1989).

97. *Id.*

98. Bowers v. Hardwick, 478 U.S. 186, 218 n.10 (1986).

99. BUREAU OF JUSTICE STATISTICS, *supra* note 1, at 9.

Because of the importance of collecting physical evidence in order to effectively prosecute rape cases, police should pay for the rape exam. Convicted sex offenders should be subject to DNA fingerprinting due to high recidivism of rape offenders. DNA or genetic fingerprinting is not only an important investigative tool in pending rape cases, but can help collect data useful to solve future rape cases. National statistics show that serial rapists have the highest recidivism rate of any kind of criminal.¹⁰⁰

Many counties in Georgia lack victim witness assistance programs to help rape victims. Victims report being further victimized by their treatment in the criminal justice system. They have to reveal intimate, painful details to different prosecutors and different judges. Rape victims do not understand criminal procedure and the need for so many hearings. Trials are repeatedly continued and delayed with little concern for the stress and emotional anxiety caused to the rape victim. Lack of a victim witness assistance program leaves victims uncertain of court dates, confused over repeated continuances or procedural maneuvering, and in a suspenseful and unsettled state:

Without a victim rape crisis center or victim advocate, rape victims must face their offender in court alone and unprepared for what will happen. Many magistrate courtrooms are so small that a victim literally has to sit within a foot of the rapist, and some superior court courtrooms are so large that they are incredibly intimidating.¹⁰¹

One witness stated, "It is very embarrassing for many women, and it only makes it that much worse if the people she is talking to are very insensitive to all that."¹⁰²

One soft-spoken teenage rape victim, again in another northern county, was reprimanded by the judge for speaking so softly that the jury could not hear her. And so he said—he reprimanded her and said, "If you don't speak up, then we're not going to continue this trial."¹⁰³

The director of a rape crisis center testified that

[i]t takes only one negative incident to further victimize a victim and to give all women reasons not to report and prosecute a rape. The most conservative estimate that I have seen is that one in seven women will be raped in her lifetime,

100. Marshall et al., Quebec University, Treatment Outcome with Sex Offenders (1990).

101. *Gainesville Public Hearing*, *supra* note 53, at 21.

102. *Griffin Public Hearing*, *supra* note 3, at 44.

103. *Id.* at 22.

and that means that if there are forty-five thousand females in [] County that at least sixty-three hundred have been or will be sexually assaulted. So why is it that there were only twenty-eight rapes reported in [] County last year? Why is it that it is estimated that only 10 to 15 percent of rapes are reported? Why is it that every day women say to me, "If I were raped I would not report it"? The answer to these questions, I think, is clear to many women. The primary reason women do not report rape is because they are blamed for the crime. Rape is the only crime where the victim's actions and motives are called into question. We don't question a robbery victim about their reasons for giving up their money. We don't question a hostage on how he or she respond [sic] when they were [sic] kidnapped. A rape victim is blamed for her actions prior to, during and after the attack. She is blamed because of what she was wearing, where she went, what she was doing, what she said or did not say. She is blamed and shamed for not fighting back. In our criminal justice system an accused person is presumed innocent until proven guilty, but with rape the victim is presumed or assumed guilty until she is proven innocent.

When a woman does report a rape, almost everyone involved in the case makes a judgment, often out loud, about whether or not she was raped. Oftentimes our volunteers are greeted at the hospital with, "I don't really think—I don't think there was really a rape, but we called you anyway." If a nurse or doctor does not believe a woman was raped it can effect the thoroughness of the exam, which is crucial for the collection of legal evidence for court. If the detective, who's already overloaded with other cases, does not believe the victim was really raped, it can greatly affect the time and effort that is put into the investigation, thus having a major impact on the outcome of the court case. A tactic that has been used to question rape victims has been to threaten a rape victim with jail if they find out she is not telling the truth. Surely there are better, more effective ways to get the needed information from someone who is traumatized by the most devastating of crimes. So even before a reported rape case goes before a judge or jury, verdicts have been reached.

If we want justice in the judicial system, we need to challenge preconceived ideas and attitudes of those involved in the case, as well as the actions of those people when the rape is reported and prosecuted.

In legal terms, a person commits the offense of rape when he has carnal knowledge of a female forcibly and against her

will. If a girl or woman says no and sex is forced on her, that is rape. Against her will should be defined so that no does actually mean no. Forcibly, the word forcibly should include threats.

One detective investigating the rape of a fourteen-year-old girl told her mother during the investigation that her daughter said 'no' only once, so therefore perhaps it could not be considered a rape.

If a reported rape case does go to court, the attitudes of the judge can affect the case. I know a rape victim in a more northern county who was held hostage by her estranged husband and raped repeatedly. She chose not to prosecute for her own very real reasons, but during her divorce hearing the rapes were brought out. The judge in the case looked the woman squarely in the eye and said, "Lady, I don't see how a husband can rape his wife." This is the same judge that presides over rape cases.¹⁰⁴

Victim assistance programs and victim advocates help the victim withstand the ordeal of the criminal prosecution. According to one district attorney, "[t]he victim of the crime [has] to tell her story more times than necessary and certainly more times than appropriate, having to see more strangers, oftentimes male strangers, that she has to recount the events to."¹⁰⁵

When asked if he had similar experiences with male sexual assaults, he said there was prejudice against homosexuals and that not everyone within the system is equipped to deal with such sensitive issues.¹⁰⁶ One rape crisis center reported that it was more effective to have male volunteers to deal with these situations since a male victim would feel that a woman would have difficulty understanding his concerns.

B. Special Assault Units Needed to Aid Investigation and Prosecution of Sexual Assault Cases

Sex offenses pose unique problems not only for victims but also for the police who investigate them and the lawyers who argue the cases. Special sexual assault sections exist in only a few police and prosecutors' offices. Experts recommended to the Commission that prosecutors and police departments establish special sexual assault units or at least designate one or more employees to specialize in this area. Sex crime prosecution units should be created in district

104. *Id.* at 18-21.

105. *Atlanta Public Hearing Before the Commission on Gender Bias in the Judicial System* pt. 1, at 83 (Sept. 22-23, 1989) [hereinafter *Atlanta Public Hearing I*].

106. *Id.*

attorneys' offices to investigate and prosecute rape cases. Special training and special units not only improve low conviction ratios but also protect the victim from being further victimized by the criminal justice system.

The gender-biased attitude that the rape was consensual unless the victim resisted often affects rape cases. Rape cases generally fall into two categories: stranger and acquaintance assaults. The force used by the assailant is often measured by whether physical injury was inflicted on the victim. However, injury occurs in less than one-third of forcible rape cases because the victim often wisely submits to threats of violence, especially where the assailant is armed or is stronger than the victim.

The term "rape trauma syndrome" has been coined to describe both the acute phase and the long-term reorganization process a victim experiences after a sexual assault. Contact with the criminal justice system acts as a reminder of the sexual assault during the recovery process, and reliving the event can cause emotional turmoil for the victim. Thus, the rape victim's reluctance to prosecute is at least in part a natural consequence of the crime.¹⁰⁷

In some states, evidence of rape trauma syndrome is admissible as evidence. The admissibility of this evidence of rape trauma syndrome, however, is unclear in Georgia. Police, prosecutors, and judges are not currently trained to recognize and deal with this syndrome. To the Commission's knowledge, no district attorney's office has attempted to introduce the rape trauma syndrome to explain the victim's delay in reporting the crime or reluctance to prosecute. Legislation should directly provide for the admissibility of evidence of the rape trauma syndrome. In some cases, rape crisis centers can help prosecutors locate experts on this syndrome. Also, an evidentiary privilege for confidential disclosures by a victim to a rape counselor is advocated by some.

V. Sentencing

The Commission frequently heard complaints that sentences were too lenient for sex offenders. A central repository of information on sexual offenders should be established to aid in the investigation of rape cases. Most witnesses indicated that there was no hard statistical information on sentencing but that individuals consistently report reduced sentencing in rape cases.

107. See ANN W. BURGESS & LYNDA L. HOLMSTROM, RAPE CRISIS AND RECOVERY (1979); ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS, THE 1990 REPORT OF THE ILLINOIS TASK FORCE ON GENDER BIAS IN THE COURTS (1990); PRACTICAL ASPECTS OF RAPE INVESTIGATION: A MULTIDISCIPLINARY APPROACH 19-41 (Robert R. Hazelwood & Ann W. Burgess, eds., 1987); Carol Bohmer & Audrey Blumbert, *Twice Traumatized: The Rape Victim and the Court*, 58 JUDICATURE 391, 393 (1975).

Since Georgia has only 1200 rape arrests each year, a statistical study should be conducted of these cases: (1) compare the number of rape defendants arrested by police with the number of rape prosecutions to determine how many rape cases are not prosecuted and the reasons they are not; (2) compare what percentage of reported stranger rapists are arrested and prosecuted with what percentage of acquaintance rapists are arrested and prosecuted, to determine how acquaintance rape cases fare in the criminal justice system; (3) study the number of rape prosecutions and the number of convictions, to dispel or confirm the theory of low convictions; and (4) study the range of sentencing in rape sentences to determine the most prevalent sentence and to compare sentences in stranger rape versus acquaintance rape.

A more complicated issue is created by the imposition of jail sentences without treatment programs. Studies indicate that recidivism may be reduced by appropriate treatment, especially behavioral or cognitive programs.¹⁰⁸ Such treatment programs should be established within the prison system.

FINDINGS

1. Statutory law in Georgia is gender biased in its proscription of rape and statutory rape, both of which are defined as a crime perpetrated by a male against a female.
2. Only statutory rape requires corroboration.
3. The rape shield statute has reduced courtroom inquiry into the victim's personal lifestyle and prior sexual relationships, but it has not eliminated it entirely, leaving open the ability to attack a witness's credibility based on highly personal, sometimes embarrassing, and irrelevant information.
4. Crimes of rape are underreported in Georgia.
5. Most reported rapes never result in arrest.
6. Rape victims fear that gender-biased attitudes in the judicial system will cause them to be blamed for their own rapes.
7. After being raped, rape victims may have to pay doctor and hospital bills for medical examinations necessary to collect evidence for the state.
8. Testing of assailants and victims for AIDS is not routinely done.

108. Marshall et al., *supra* note 100.

9. False and gender-biased stereotypes about the act of rape and its victims are still common throughout society and even affect the criminal justice system.
10. Interrogations by the police and prosecutors frequently include gender-biased comments.
11. Some police departments and prosecutors' offices maintain written protocols for handling rape cases, but many do not.
12. Unlike most other crime victims, victims of rape are interrogated intensely, accused of lying, or blamed for their victimization.
13. Police are reluctant to charge and prosecute cases of acquaintance rape, and police rarely charge a husband with the rape of his wife.
14. Under Georgia law, a male cannot be a victim of rape. Since statutory rape carries a mandatory prison sentence and child molestation allows for a probated sentence, there is a gender-biased disparity in sentencing when a young male has been the victim of a sexual assault.
15. DNA or genetic fingerprinting, while an important investigative tool, is not available in many jurisdictions.
16. Many jurisdictions in Georgia lack victim witness assistance programs to assist rape victims.
17. Special sexual assault sections exist in only a few police and prosecutors' offices.
18. Law enforcement officials and prosecutors in Georgia are not taught about the "rape trauma syndrome."
19. There is a lack of information available to assess sentencing patterns in rape cases.
20. Often, counseling requirements are not made a part of sentencing of sex offenders.
21. There are no inexpensive treatment programs for sex offenders within the Georgia prison system.

RECOMMENDATIONS

1. Georgia should consider a sexual battery statute which is gender neutral and allows for the imposition of equal punishment for sexual assault by or upon a male or female.

2. The rape shield statute should be actively enforced and further erosion of its protections prevented.
3. The rape exam should be standardized throughout the state, paid from public funds, and victims should be advised of the purpose of the examination.
4. Mandatory education programs for judges, prosecutors, and law enforcement personnel should dispel myths and stereotypes about rape, increase effective investigation and prosecution of sexual offenses, and encourage victim assistance in recovering from sexual assault.
5. Law enforcement and prosecutors' offices should keep sexual assault victims informed and involved in the investigation and prosecution of cases.
6. The governing authorities should increase resources and programs for rape victim services and rape prevention education.
7. Written protocols for processing sexual assault cases should be developed by all law enforcement agencies and prosecutors.
8. Specialized units or investigators to handle sexual assaults should be established at larger law enforcement agencies. Smaller rural departments should identify one or two officers to specialize and receive appropriate training in sexual assault offenses.
9. Each prosecutor's office should designate special prosecutors or units to deal with sexual assault and battery cases. These units should receive specialized training and maintain regular contact with law enforcement and community agencies involved with rape victims.
10. Victims' advocates should be trained and assigned to victims of sexual assault. They should be permitted to attend all judicial hearings with the victim.
11. Convicted sex offenders should be subjected to DNA fingerprinting, and these records should be kept by the proper state agency.
12. The Administrative Office of the Courts and the District Court Administrators, through annual case counts, should maintain records and statistics on the filings and dispositions of all sexual assault cases.
13. A central depository of information regarding sexual offenses and perpetrator profiles should be developed to aid the investigation of rape cases statewide.
14. Sexual assailants should be required to undergo psychological treatment to prevent recidivism.

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15. Sexual offense statutes should provide for the imposition of the same maximum punishment whether the victim is male or female.
16. The requirement of corroboration for statutory rape should be removed.

ADULT SENTENCING

Presentations were made to the Commission by Elaine de Costanzo, Director of Evaluation and Statistics of the Georgia Department of Corrections; judges; assistant district attorneys; lawyers; and other professionals who work in the criminal justice system. Members of the Commission also spoke with Helen Scholes, State Supervisor, Transitional Centers, Female Offender Services; staff members; female inmates at the Georgia Women's Correctional Institute (GWCI) in Hardwick, Georgia; and female inmates at Milan Women's Center in Milan, Georgia.

In addition, statistical information was obtained from the Georgia Department of Corrections (GDC) and was utilized in this report. Caution must be exercised in the comparison of these statistics as the current GDC data processing program does not factor in prior criminal histories or the individual circumstances of the offense. The statistics on inmates incarcerated include only inmates sentenced directly to prison, excluding inmates imprisoned after violation of probation.¹

I. *A Comparison of Sentencing and Parole Policies by Gender*

Do women receive more favorable treatment in Georgia's courts than men when charged with a criminal offense? There is a belief that women are not receiving sentences comparable to those of men who have committed the same offenses. This preferential treatment afforded women is, according to some authors, based upon the paternalistic idea that women are not considered to be responsible adults and cannot be treated as such; thus, they are less culpable.² There is also the belief that a prison sentence which separates a woman from her husband and children is too disruptive of the family.³ Some judges commented to the Commission that some women deliberately bring their children to court for the sentencing hearing to play upon any paternalistic emotion of the sentencing judge.

Martha A. Myers, Ph.D., and Suzette Talarico, Ph.D., both of the Sociology Department of the University of Georgia, have written articles on sentencing disparity in the judicial system.⁴ Dr. Myers

1. Office of Evaluation and Statistics, Georgia Dep't of Corrections, Guide to Sentencing Practices Report.

2. RITA JAMES SIMON, WOMEN AND CRIME 49 (1975).

3. Matthew Zengraff & Randall Thompson, *Differential Sentencing of Women and Men in the U.S.A.*, 12 INT'L J. SOC. L. 401, 401-03 (1984).

4. MARTHA A. MYERS & SUZETTE M. TALARICO, THE SOCIAL CONTEXTS OF CRIMINAL SENTENCING (1987); Martha A. Myers, *The Social Background and the Sentencing Behavior of Judges*, 26 CRIMINOLOGY 649 (1988).

summarized the Georgia data in an article entitled "Gender Disparity in the Sentencing of Felons in Georgia, 1976-1985." This statistical study of 27,000 felons sentenced in Georgia found that, as a group, men were approximately eight percent more likely than females to be incarcerated rather than given a probated sentence. When a split sentence was ordered by the court, males tended to receive a slightly more severe sentence. Males tended to receive somewhat longer prison sentences than females, by approximately eighteen months. In this study, Dr. Myers concluded:

For each of the three . . . [sentence types] studied, there are significant differences in the way male and female offenders were punished. Females are at an advantage in that they received more lenient punishment than similar males. This is true even for those decisions (split sentence severity and prison sentence length) where the analysis held constant gender differences in prior arrest and incarceration.

We must emphasize that, with few exceptions, the lenience toward female offenders is not pronounced. Rather, gender appears to play a subordinate role in sentencing, being dwarfed by the impact of the offense of which the offender was convicted.

In selected courts, however, gender differences *are* noteworthy. [It was significantly pronounced in some courts with female judges.] The reasons for this are yet unclear. But as far as we can tell, pronounced gender disparities cannot be attributed to systematic differences in the kinds of cases judges must sentence. Though interesting, these pronounced disparities need to be placed against a broader background, one which is characterized by only slight differences in treatment. As exceptions to the rule, they suggest that gender disparities are only occasionally affected by the community and court where sentencing occurs.⁵

The study by Drs. Myers and Talarico took into consideration offender attributes such as race, age, class, marital and employment status, as well as county and court characteristics. Prior criminal history was not available for this study, nor was consideration given to the particular factual circumstances of the offense. The commission of prior offenses may well account for the statistical disparity in sentencing as illustrated by the end-of-year population for 1990 where 37% of male inmates and 21% of female inmates are shown to have been previously incarcerated.

5. Martha A. Myers, *Gender Disparity in the Sentencing of Felons in Georgia, 1976-1985*.

The Myers and Talarico study also found that there are offenses with similar legal characteristics for which a woman may be punished more harshly than a male offender. This punitive treatment may occur when the stereotype of a woman in our society has been violated by behavior which does not conform with gender expectations.⁶ If a woman engages in conduct which is perceived by the court to be masculine criminal behavior, such as armed robbery, she may receive a longer prison sentence than a male offender.

Interviews with female inmates by members of the Commission at the GWCI revealed generally held beliefs that women are sentenced more harshly than men and that women spend a greater percentage of their sentence incarcerated. While the validity of these beliefs was not verified due to the limitations of time and resources of the Commission, they do demonstrate a perception of the criminal justice system held by inmates.

One inmate related that she had been sentenced for her first criminal offense, armed robbery which was reduced to robbery, to ten years, five to serve in the prison system and the remainder on probation. She related that she is the mother of one child with whom she had not visited since her arrest. She had a self-reported history of cocaine abuse, and she had just been denied parole based on the seriousness of her crime. According to her account, her boyfriend was the instigator and main perpetrator of the crime. Even though he had a serious criminal history and had previously received a life sentence for murder (of which he served eight years), he received a sentence of six years to serve two years in the prison system. He was paroled after serving thirteen months (two weeks after he was sentenced).

In another case, an older female inmate with a husband and grown children was sentenced on her first offense of forgery in the first degree to ten years to serve two years in the prison system, even though full restitution had been made prior to sentencing. She was paroled from prison and served six years on probation, after which she committed her second forgery, having acquired possession of her neighbor's checkbook. She explained that forgery was a compulsion she could not control and that she had requested counseling. On her second offense, the balance of her probation was revoked and her second sentence ran concurrent with her first. Although mental health counseling was ordered as part of her second sentence to begin during the term of probation, she received none at the facility.

Another inmate complained that, due to overcrowding at GWCI, she had been held in the Orientation Complex for a long period of time, with substantial limitations on her privileges. The Orientation Complex

6. Zengraff & Thompson, *supra* note 3.

is designed for diagnostic testing and health screening of new inmates to determine the programs to which they will be assigned when entering the general prison population. Normally, an inmate will spend six to eight weeks in this complex, during which time the inmate is not allowed to participate in any of the programs.

The GDC's statistical comparison (Table I) of the average length of service by crime type, male and females, 1988 through 1990, indicates that women served, on the average, less time in prison.⁷

Table I

Crime Types	Average Time Served in Prison 1988		Average Time Served in Prison 1989		Average Time Served in Prison 1990	
	Males	Females	Males	Females	Males	Females
Violent						
Personal	3.0 yrs.	2.6 yrs.	3.1 yrs.	2.6 yrs.	2.7 yrs.	2.2 yrs.
Property	0.8 yrs.	0.6 yrs.	0.8 yrs.	0.5 yrs.	0.5 yrs.	0.4 yrs.
Drug Sales	0.7 yrs.	0.6 yrs.	0.8 yrs.	0.6 yrs.	0.6 yrs.	0.5 yrs.
Drug Possession	0.5 yrs.	0.5 yrs.	0.5 yrs.	0.4 yrs.	0.5 yrs.	0.4 yrs.
DUI/HTV	0.4 yrs.	0.3 yrs.	0.4 yrs.	0.3 yrs.	0.3 yrs.	0.2 yrs.
Sex Crimes	3.0 yrs.	0.6 yrs.	3.5 yrs.	1.7 yrs.	3.2 yrs.	1.0 yrs.
Statewide Averages	1.3 yrs.	1.0 yrs.	1.3 yrs.	1.0 yrs.	1.1 yrs.	0.8 yrs.

The length-of-stay statistics are based on the number of days spent in prison excluding county jail time for inmates originally sentenced to prison, and no consideration is given to prior criminal offenses. These statistics are not indicative of the actual sentence of the court, but only count the number of days inmates in a particular crime type spend in the Georgia prison system. The Georgia Board of Pardons and Paroles determines the release date for all prison inmates. Unfortunately, because of prison overcrowding, the date of release is frequently influenced by demand for inmate bed space.

The base information, as well as Drs. Myers and Talarico's study, would suggest that, for at least some offenses, there is a slight

7. Office of Evaluation and Statistics, Georgia Dep't of Corrections, Average Length of Service by Crime Type, Males and Females, 1988-1990.

differential in sentencing and parole release in favor of women. Yet as illustrated by individual examples set out above, there may also be a punitive component in the sentencing and parole of female offenders resulting in longer initial sentences or greater portions of the sentences being served in the prison system. This is particularly true for offenses traditionally perceived as "masculine offenses." Either bias, paternalistic or punitive, based on gender may result in inequality of treatment between males and females, thereby undermining the quality of Georgia's system of justice. Every agency within the criminal justice system—district attorneys, lawyers, public defenders, judges, GDC, and the Board of Pardons and Paroles—should treat males and females equally. Treatment should be based upon circumstances of the current offense and prior criminal history.

A thorough and accurate study should be conducted to determine what and why inequalities exist in both sentencing and in the average length of time served. Length of time spent incarcerated should be determined solely by the seriousness of the offense, need for punishment, protection of society, and the possibility of recidivism, not upon gender.

II. *Comparison of Male and Female Inmate Statistics*

The total number of prisoners incarcerated in Georgia's prison system has steadily continued to increase according to GDC's Year-End Prison Population data. Georgia's total prison population has increased 215% between 1976 and 1990. This compares to a 29% increase in the total population of Georgia during the same time period.⁸ The male inmate population increased during that time by 208% from 6088 male inmates in 1976 to 18,752 male inmates in 1990. During that same period, female inmate population increased 313% from 432 female inmates in 1976 to 1782 female inmates in 1990. In comparing data for 1990, there was a 62.7% increase over 1989 female inmate population and a 5% decrease in male inmate population for the same time period.

Women, because they comprise such a small percentage of the total prison population, 7% in 1976 and 9% in 1990, are confined in a system primarily designed, built, and run by men for men.⁹ More than half (55%) of the women who were incarcerated at the end of 1990 had been charged with nonviolent crimes (26% for property crimes; 29% for drug or alcohol crimes).¹⁰ By comparison, only 41% of the male inmates

8. Office of Planning and Budget, Bureau of Census, Annual Estimate of Population for the State of Georgia 1976 (1990).

9. George J. Church, *The View from Behind Bars*, TIME, Oct. 1, 1990, at 20.

10. Office of Evaluation and Statistics, Georgia Dep't of Corrections.

were incarcerated at the end of 1990 for nonviolent crimes (23% for property crimes; 18% for drug or alcohol crimes).¹¹

III. *Inadequate Alternatives to Incarceration for Women*

The GDC has requested that Georgia's trial judges use, where appropriate, a continuum of sentencing options for offenders with successively harsher sentencing for each failure of the probationer. This system was devised in response to Georgia's prison overcrowding which has reached and remains at crisis proportions. Theoretically, an offender would initially be placed on probation and, if necessary, proceed through the following progressively harsher sanctions:

(a) *Intensive Probation*: This is the strictest form of probation. There are five contacts per week and a curfew imposed except during working hours. Home confinement is an enhancement of intensive probation and requires a minimum of ninety days home restriction. This option is available equally for male and female offenders; however, it is only available in some circuits.

(b) *Diversion Centers*: As a condition of probation, a judge may require that a probationer be assigned to a diversion center which provides a variety of educational and counseling programs. The probationer lives at the center, but works at a regular job in the community, in addition to performing community service. The probationer's paycheck is turned in to the center, and room, board, fines, restitution, and family support are deducted.¹² Diversion center programs are less restrictive than prison facilities and offer opportunities for rehabilitation.¹³ Frequently, the diversion center is located within or close to an offender's hometown.

An offender spends approximately four months in a diversion program. Upon successful completion of the program, a person is transferred to regular probation for completion of sentence. This sentencing option is available for nonviolent felony offenders who have not previously been incarcerated in a prison facility.

11. *Atlanta Public Hearing Before the Commission on Gender Bias in the Judicial System* pt. 1, at 73 (Sept. 22-23, 1989) [hereinafter *Atlanta Public Hearing I*]. Property crimes are classified by the Georgia Department of Corrections as burglary, forgery, theft by taking, receiving stolen goods, bad checks, shoplifting, entering an auto, arson, and credit card theft and fraud.

12. Lisa W. Pratt, Assistant District Attorney, Rome Judicial Circuit 3 (Feb. 16, 1990) (unpublished report).

13. Georgia Dep't of Corrections, *Continuum of Sentencing of Female Prisoners in Georgia* 4.

(c) *Detention Centers*: A detention center is a community-based residential facility housing nonviolent offenders in a secure restrictive environment. Offenders work on unpaid community work details supervised by correctional officers.¹⁴ These facilities are generally located close to the inmates' residences.

(d) *Special Alternative Incarceration Programs*: This ninety-day program was designed specifically for young men, seventeen to twenty-five years old, who are convicted of nonviolent crimes. One of its main objectives is to deter future criminal conduct. Recently, it has been redesigned as Probation Boot Camp, one component of Georgia's Comprehensive Correctional Boot Camp Program.

(e) *Inmate Boot Camps*: Male inmates, who are seventeen to thirty years old, convicted of nonviolent offenses and serving a sentence of at least two years, but not more than ten years, will be selected by the Board of Pardons and Paroles for this alternative to prison. This program is based on military-style basic training with counseling in substance abuse, education, and life skills training required. Intensive parole and probation supervision will be required upon an inmate's release.

There is some evidence that women are being sentenced to serve time in prison due to a lack of programs for alternatives to incarceration. One assistant district attorney reported that "[w]omen having committed the same type of offense, with the same criminal history and being of the same nonviolent classification as a man, have no similar alternative to incarceration; thus, they are sent to Hardwick Women's Correctional Institute."

A comparison of the end-of-the-year prison population for 1990 indicates that 55% of the females were incarcerated for nonviolent crimes while only 41% of males were incarcerated for nonviolent crimes. Yet only 4% of the available female bed space and 9% of the available GDC male bed space is currently in alternatives to prison incarceration.

Currently, in Georgia there are only two diversion centers for women, one in Atlanta with twenty-three bed spaces and one in Albany with twenty-two bed spaces. GDC plans to build two additional women's diversion centers to be located in Gainesville and Macon, each housing approximately fifty offenders. Twenty-six new bed spaces are scheduled to be added to Atlanta's diversion center by June 1991. There are eighteen diversion centers available for male inmates with 880 available bed spaces.

14. Pratt, *supra* note 12.

In the recent past, if a woman offender was sentenced to a diversion center program, she faced the possibility of serving a substantial period of time in the county jail system waiting for an open bed space.¹⁵ Some women were incarcerated for seven months in the county jail before entering the diversion center program. Some judges would be reluctant to allow the offender to be released on regular probation pending available bed space if a diversion center program is deemed warranted. As a result, the nonviolent female offender may serve more time incarcerated in a jail-type facility than if she were sentenced to a straight prison term.

There are currently no detention center facilities available for women. The first Probation Detention Center for Women is scheduled to open in 1991 in Claxton, Georgia, with a space capacity of 150 beds. The lack of this alternative to incarceration for women offenders results in women being incarcerated in a prison facility while a male offender would be placed in a nearby detention facility.

There also is no Special Alternative Incarceration (SAI) or Probation Boot Camp program for women aged seventeen to twenty-five. Two hundred thirty-seven bed spaces are available for young male offenders. Currently, six percent of incarcerated female offenders are under the age of twenty-one. There is a possibility female offenders in the same age group would benefit from SAI programs specifically designed for young women. Programs are needed for young female offenders which will address their special needs, including self-esteem, adequate education, career training, parenting skills, birth control, and substance abuse. There also should be social programs available to them upon release.

No inmate boot camps are planned for women. Conversely, there are 1344 bed spaces planned in six different facilities for young male offenders qualifying for boot camp programs.

Even with the additional planned spaces available in diversion and detention centers, it is clear GDC cannot begin to accommodate the number of female offenders who could potentially qualify and be sentenced to an alternative to incarceration. The additional female bed spaces will bring the percentage of available alternatives up to approximately 18% even though approximately 55% of the female offenders are potentially qualified for such programs. Revocation of probation for failure to abide by the terms of the trial court's sentence accounts for a significant number of males (14%) and females (19%) entering the prison system each year. Courts are encouraged to use progressively harsher punishments for offenders who do not perform as directed by probation. Yet, due to a lack of female bed space available

15. *Atlanta Public Hearing I*, *supra* note 11, pt. 1, at 73.

in alternatives to incarceration, a female offender will be sent to a prison facility when a male offender will be sent to a diversion, detention, or SAI program. On the other hand, it is possible that a similar female offender will be placed or remain on probation due to the lack of facilities when a male will be required to go to the next harsher facility.

Imprisonment should be a last resort, reserved for clearly dangerous violent offenders and major drug offenders, for nonviolent offenders who have exhausted all alternative forms of punishment, and for recidivists. Alternative programs give men and women alike the opportunity to rehabilitate themselves while being in a less restrictive but structured program. Society benefits by reduced recidivism and substantially reduced monetary expense. Institutional confinement costs approximately \$13,450 per year per inmate.¹⁶ Detention Center Programs cost \$13,322 per year and the offender performs daily community service. Diversion programs cost \$3543 per year,¹⁷ but require the offender to maintain employment and pay room and board, which results in a reduction of actual yearly expense to the taxpayer. In addition, the offender is paying federal and state income taxes and may also be required to pay restitution, fines, and child support.

Women should have the same opportunity as men to serve their sentences in facilities which are less restrictive alternatives to prison incarceration.

IV. Health Care

Historically, the female inmate population has utilized more health services in almost every area of medical care than male inmates. At times, the need for medical services for females has been 50% higher than for the typical male inmate population. This increased need is true with respect to sick call, walk-in visits, and use of medication. Female inmates obviously require obstetrical and gynecological care which accounts for some of the increase. Each year a number of women prisoners give birth. In 1989 forty women delivered babies while incarcerated in Georgia's prison system.

Some jails and even state prison facilities do not adequately address female inmates' medical and nutritional problems. This is particularly true for pregnant inmates.¹⁸ Most female facilities do not have an obstetrician or gynecologist available to deal with reproductive

16. 1991 Session of the Georgia General Assembly, Legislative Impact Assessments, Bed Space and Per Diem Costs (Jan. 11, 1991).

17. Division of Probation, Georgia Dep't of Corrections, Probation's Role in a Balanced Approach to Corrections: Program Costs of Community Corrections.

18. Listening Session, Georgia Women's Correctional Institution, Hardwick, Georgia, (May 11, 1989); *Atlanta Public Hearing I*, *supra* note 11.

problems and prenatal care. This is particularly true in the county jail system.

Currently under construction in Hawkinsville, the Pulaski Correctional Institute will add 680 beds for female inmates. When it opens in the fall of 1992, it will house those females under the death sentence, maximum security inmates and inmates requiring special supervision, leaving mental health, diagnostics, and inmates with medical problems (plus a small number of medium and minimum security inmates) at GWCI with a total population of 912. The Milan Women's Center, with a population of 200, will continue to house medium and minimum security inmates.

V. *Prisoners as Parents*

Women remain the primary caregivers to children in our society. Eighty-five percent of female inmates have at least one child, while 66.6% of male inmates have at least one child. Seventy-one percent of female inmates are single, divorced, separated, or widowed, as compared to 65% of male inmates. Prisoners who are primary caregivers frequently lose custody of their children to other family members, to the other parent, or to the Department of Family and Children's Services. Because women generally have the primary responsibility for caring for minor children and most inmates are raising children in a single parent home, custody problems have a substantial adverse affect on women inmates and their children.

Community-based alternatives to incarceration have the benefit of placing the offender closer geographically to children and family. Thus, the offender sentenced to these alternatives is better able to maintain continuing relationships while serving her sentence. Because there are only two women's prisons in Georgia (located in Hardwick and Milan), it is frequently difficult for women to maintain any meaningful contact with their children.¹⁹

Project Reunite Each Child (REACH) is a program available at GWCI at Hardwick which enables a female inmate to spend an extended period of visitation with her child in a segregated, child-oriented setting once a month for eight hours.²⁰ Grant money has recently been expanded, under the existing Citizen's Advisory Board, to Milan's Women Center for a children's visitation program. This Milan program, titled New Hope Children's Center, was sponsored by Georgia Children's Trust. Due to space limitations, it is difficult for every female inmate to have such extended visits regularly. Also, because of the location of these facilities, transportation may prove to be a problem

19. *Atlanta Public Hearing I, supra* note 11, pt. 1, at 6.

20. *Id.* pt. 1, at 90.

for many children who could otherwise participate in the REACH Program or the New Hope Children's Center. Transportation for the children is provided by volunteers from the inmates' or children's communities.

According to Betty McClure, Assistant Warden at Milan Women's Center, the children of prison inmates have a fifty percent greater chance of being incarcerated during their lifetime than offspring of parents who have not been incarcerated. Child visitation programs are designed to break this cycle of generational criminal offenders. Although a child visitation program is not currently available to male inmates, a comparable program is being investigated for male inmates and should be provided for incarcerated fathers.

VI. Career Training

The GDC has academic, vocational, and on-the-job training programs for men and women at all of its facilities. The female vocational and on-the-job training courses are almost exclusively in traditional, low-paying women's jobs such as cosmetology, bookkeeping, janitorial service, food service, and clerical. The problem is that 71% of the female inmates are single parents who committed nonviolent crimes and the greatest percentage of these offenses were property crimes (29%), possibly resulting from poverty. At the Middle Georgia Complex, the GDC allows five female training positions in each of the male training programs, electrical wiring, plumbing, and masonry.²¹

Women inmates are often the sole support of their families and have a strong need to learn a skill which will improve their earning capacity upon release. Many of the women have been employed in jobs which pay wages below the poverty level. Within the prison system, women should have the same opportunities as men to develop well-paying job skills which are in market demand.

VII. Transitional Centers

Female offenders are more likely to attend a transitional program than male offenders. Transitional centers are developed to assist inmates in making the transition from prison back into the community. They provide offenders with important social and employment skills. The offender's mental and financial well-being are addressed as well as that of the inmate's family.

Although only 9% of the total inmate population is female, women constitute almost half (44%) of the total transitional center population.

21. Georgia Dep't of Corrections, Academic, Vocational and O.J.T. Programs (Mar. 1991).

At a given time, 22% of the female inmate population is assigned to transitional centers as compared to only 2% of the male population. At present there are five transitional centers located in various cities statewide. There is a total bed-space of 600, approximately 200 of which are female bed-spaces.

An offender who is assigned to a transitional center by the Board of Pardons and Paroles is initially placed in a thirty-day orientation phase where the inmate attends classes and other group activities, such as substance abuse counseling, and workshops on communication skills, job search, etc. When an offender has successfully completed the first phase, the inmates move into Phase II or "work release." Once employed, offenders are required to pay 30% of their gross salary for room and board, in addition to paying federal, state, and local taxes. Thus, the taxpayers of Georgia, as well as the offender, benefit from transitional centers.

Because approximately 31% of all female inmates attend transitional centers prior to release and must wait until bed-space is available, women may be spending a greater portion of their sentences in prison. On the other hand, not enough male inmates are being given this valuable opportunity to prepare for re-entry into society. More transitional center spaces should be available for both male and female inmates to acclimate the individual for return to society and the local community.

VIII. Substance Abuse

The number of inmates, male and female, incarcerated for drug offenses has increased substantially in recent years. Approximately 85% of the 1990 end-of-year inmates in Georgia's prisons self-report a history of drug abuse.

One female inmate interviewed at GWCI testified that, when she was on probation, she advised her probation officer that she was on drugs and needed treatment. She was told to report the following Monday, but she was arrested for a drug offense that weekend. As a result, the remainder of her probation was revoked. She complained of receiving insufficient drug counseling in prison. Inmates in any of the complexes at GWCI may voluntarily participate in Alcoholics Anonymous or Narcotics Anonymous, but she reported that only one complex has been established as the Drug Quad where the female inmates are required to participate in substance abuse counseling. Because of their expressed desire to stop using drugs, inmates in the Drug Quad may be subjected to bias by other inmates. To illustrate that many need counseling, she related that some of her fellow inmates have boasted they "are going to get high as soon as they are released."

A comparison of male and female inmate statistics for end-of-year prison population for 1989 and 1990 shows that in both of those years

the number of male inmates incarcerated for drug offenses remained unchanged at 18% of the total. The statistics for female inmates for those same years show a greater percentage of women are incarcerated for drug offenses (27% in 1989 and 26% in 1990) than the percentage of male inmates. Based upon these statistics, the lack of available substance abuse programs has a substantially greater impact upon women. Probation offices frequently must rely on private organizations to provide substance abuse evaluations and counseling. This puts individuals who are on the lower end of the pay scale, many of whom are single parents, in a posture where they cannot financially afford to comply with the terms of probation due to the costs of these services. Since mothers are typically the primary caregivers and are often employed in low-paying jobs, this problem has a greater adverse affect on women than on men.

Virtually all of the GDC facilities have Alcoholics Anonymous programs available to offenders. One diversion center for men, the DeKalb County Diversion Center, has a community-based, thirty-day treatment program. Only two prison facilities currently have intensive substance abuse community programs—Milan Women's Center (for females) and Lee Arrendale Correctional Institution (for young male offenders).

IX. Therapeutic Communities

A therapeutic community is designed to bring together individuals who have similar problems and lifestyles. The approach is to educate, to motivate, and to implement alternative lifestyles that help individuals advance upward from their problems to a positive alternative solution.²² Emphasis is placed on treating the inmates with basic human dignity and respect and giving them opportunities for education, on-the-job training, religious guidance, recreation, crisis intervention, and dynamic group and individual counseling.

A grant funded by the U.S. Bureau of Justice Assistance has been awarded to the Department of Corrections to develop two prison setting therapeutic communities. The first of these opened in September 1990 at the Milan Women's Center. This medium to minimum security women's facility accommodates 200 inmates. Thirty of these inmates are currently in the substance abuse program, which has the capacity to accommodate fifty inmates. All of the inmates work every day, either in support capacities within the facility, or in community service for Telfair County, Dodge County, or the City of Milan's governments.

22. Georgia Dep't of Corrections, Substance Abuse Programs—Female Offenders (Mar. 1991).

The substance abuse program is designed to address relevant issues such as substance abuse, family violence, dysfunctional families, parenting, sexual abuse, and self-esteem. This is a four phase program which is directed toward the mental health of the whole person.

Phase I: A Thirty-day orientation during which inmates learn about characteristics of addiction, drug classification, rationalization, empowerment, assertiveness, and coping skills.

Phase II: One hundred twenty days during which inmates participate in group counseling and confrontational groups and discuss issues, including stress management, life skills, anger management, family issues, and relationships (such as domestic violence and childhood physical and sexual abuse).

Phase III: Thirty to sixty days of community payback, where inmates teach within the community, practicing and demonstrating their new skills, and helping new inmates enter the program.

Phase IV: Introduces inmates to outside support systems which will help them avoid relapse.

A coordinated effort is being implemented to provide a continuum of services from initial entry through parole. The program includes an evaluation component. Male inmates should also have the benefits of these programs at their facilities to discourage recidivism. A similar program is being piloted at Lee Arrendale Correctional Institute for males with fifty bed spaces available for inmates seventeen to twenty-five years of age.

Commission members met with Warden Rose Renfroe and other staff members at Milan Women's Center and with Helen Cook, a counselor with the Telfair County School System. The school system utilizes the Milan inmates for all janitorial services, lawn care and improvement, clerical support, and building maintenance and repair. It was readily apparent that communities have received substantial benefit from Milan's on-the-job training program for women. More importantly, this type of creative program has resulted in a truly symbiotic relationship between the community and the Milan inmates. Not only was this facility an important and respected part of the community, but the inmates and participants were wanted and respected as contributing members of the community. The inmates, possibly for the first time in their lives, felt a sense of community and pride in their contribution to society. This program has only been in effect since September 1990, and no study of recidivism has been completed to date. The tour of this facility and the meeting with staff, inmates, and members of the community indicate that a true success story is unfolding.

One problem encountered by Milan inmates who work on outside details is a lack of proper clothing. For security reasons, participants in outside work details are required to wear uniforms different from the khaki shirt and pants worn within the facility. The only alternative provided to these women is the white and blue men's prison apparel, including men's work shoes. The shoes and clothing do not properly fit women. These women are involved in manual labor and the shoes in particular cause irritation and foot problems. Male inmates almost certainly would not be asked to wear a female uniform. This is a clear affirmation that women are confined in a system designed primarily for men. Appropriate work clothing should be provided for these women.

With the exception of fifty beds at Lee Arrendale, there currently is no comparable therapeutic community program available for male inmates within Georgia's prison system. We believe there are other communities in Georgia eager to benefit from an association similar to that found in Milan. Such programs would greatly benefit men.

FINDINGS

1. The existence of sentencing patterns influenced by paternalistic or punitive attitudes based on gender results in inequalities in our system of justice and creates a perception of unfairness.
2. Generally, male offenders are more likely to be incarcerated and are given longer sentences than female offenders, and the variation may be due to paternalistic attitudes based on gender. However, the reliability of this conclusion is questionable because the statistical data fail to include prior criminal histories and circumstances of the particular offense.
3. Female offenders may receive more severe sentences than male offenders for crimes which are perceived as "masculine crimes" because of punitive attitudes based on gender. Again, information on prior criminal activity would be helpful in validating this finding.
4. Because of the lack of sufficient alternatives to incarceration, women are more likely to be given inappropriate probation or prison sentences.
5. Because of a greater availability of women's prison space in relation to total inmate population, women sentenced to prison may serve a lengthier portion of their sentences in prison than men.
6. Female offenders have a need for medical care which is not being adequately met by our jails and prisons.

7. Because of a greater availability of women's transitional facilities in relation to total inmate population, women sentenced to prison have a higher probability of receiving effective transitional services prior to release than men.
8. Offenders who are sole caregivers of their children are frequently housed in facilities that are geographically too far from their residences to permit frequent visitation.
9. Male offenders have a greater opportunity within Georgia's prison system to acquire education, job skills, and on-the-job training in well-paid areas of employment.
10. There is a lack of appropriate clothing for women inmates to wear when on work detail outside the prison facility.

RECOMMENDATIONS

1. Male and female offenders should receive similar sentences for similar offenses when criminal history, circumstances of the offense, and community status are comparable. Both sentencing judges and the sentence review panel should be made aware of this issue.
2. Prior criminal history should be a factor in the statistical comparisons kept by the Georgia Department of Corrections.
3. Judges should attend, as mandatory continuing education, programs which include segments specifically addressing gender bias and the effect of paternalistic attitudes toward offenders on sentencing.
4. Alternatives to incarceration programs should be equally available to male and female offenders whose offenses are nonviolent, and the facilities should be located throughout the state so offenders may be near their children and families.
5. Innovative programs such as the one in Milan should be developed and expanded throughout the state to meet more equitably the practical needs of the prison population.
6. Diversion and detention centers should be available for women as well as men, and should include substance abuse counseling.
7. Educational programs and job training should be equally available to men and women offenders. Programs should include fields which are currently well-paying and in market demand, such as the dental lab technicians program at GWCI, and should not be limited to gender-stereotyped occupations.

8. The REACH program should be made available to men and women sole caregivers.
9. Transitional facilities and programs should be offered equitably for men and women inmates.
10. Alternatives to incarceration programs should be expanded throughout the state.
11. Women inmates should have their special nutritional and medical needs met by the GDC.
12. There should be intensive substance abuse programs provided by the GDC at all levels of supervision, from probation through incarceration at maximum security facilities.
13. Vendors should be identified and attire should be purchased (shirt, pants, shoes) that will be appropriate for female inmates to wear when assigned to work detail outside the facility.

JUVENILE JUSTICE SYSTEM

Information and testimony received by the Commission indicate that problems with gender bias conspicuously exist in the application of the law within the juvenile justice system in Georgia. This disparity generally involves two categories of cases processed by the system: delinquent acts and status offenses.

Delinquent acts¹ involve a violation of state criminal law, while status offenses or unruly children² primarily involve defiance or

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1. O.C.G.A. § 15-11-2(6) (1990) defines "Delinquent act":
 - (6)(A) An act designated a crime by the laws of this state, or by the laws of another state if the act occurred in that state, under federal laws, or by local ordinance, and the crime does not fall under subparagraph (C) of paragraph (12) of this Code section and is not a juvenile traffic offense as defined in Code Section 15-11-49;
 - (B) The act of disobeying the terms of supervision contained in a court order which has been directed to a child who has been adjudged to have committed a delinquent act; or
 - (C) Failing to appear as required by a citation issued with regard to a violation of Code Section 3-3-23.

Id.

2. O.C.G.A. § 15-11-2 (1990) defines a "Status offender" and an "Unruly child":
 - (11) "Status offender" means a juvenile who is charged with or adjudicated of an offense which would not be a crime if it were committed by an adult, in other words, an act which is only an offense because of the perpetrator's status as a juvenile. Such offenses shall include, but are not limited to, truancy, running away from home, incorrigibility, and unruly behavior.
 - (12) "Unruly child" means a child who:
 - (A) While subject to compulsory school attendance is habitually and without justification truant from school;
 - (B) Is habitually disobedient of the reasonable and lawful commands of his parent, guardian, or other custodian and is ungovernable;
 - (C) Has committed an offense applicable only to a child;
 - (D) Without just cause and without the consent of his parent or legal custodian deserts his home or place of abode;
 - (E) Wanders or loiters about the streets of any city, or in or about any highway or any public place, between the hours of 12:00 Midnight and 5:00 A.M.;
 - (F) Disobeys the terms of supervision contained in a court order which has been directed to such child, who has been adjudicated unruly; or
 - (G) Patronizes any bar where alcoholic beverages are being sold unaccompanied by such child's parents, guardian, or custodian, or possesses alcoholic beverages; and
 - (H) In any of the foregoing, is in need of supervision, treatment, or rehabilitation; or
 - (I) Has committed a delinquent act and is in need of supervision, but not of treatment or rehabilitation.

Id.

violations of parental authority. Children may be taken into custody for either type offense; however, the sex of the child influences both the decision to take the child into custody and the subsequent course of events. Succinctly stated, the national and Georgia trend is that female children receive harsher treatment than their male counterparts for benign criminal and noncriminal behavior in the juvenile justice system. However, statistics show that female children are less involved in all delinquent behavior and participate in fewer serious and violent crimes than do male children. Although both sexes are handled similarly in the processing of serious crimes, in the case of minor offenses, females are often dealt with more stringently.³

For calendar year 1988 in the state of Georgia, 23% of all of the females entering the juvenile justice system were processed for status offenses whereas only 9% of the males were processed for status offenses. For the same period, 56% of cases involving males were for delinquent acts while only 30% of cases involving females were being processed for such conduct, which is also similar to national statistics and trends. Dispositions or sentences imposed reflect a similar disparity between males and females: 38% of the cases involving female status offenders resulted in commitment to a state institution, whereas only 11% of the male status offenders were committed. Conversely, for delinquent acts, 83% of the males were committed as compared to only 57% of the females; however, this was not disproportionate considering the demographics of the children charged and ultimately found to have committed delinquent acts. In 1988 no cases were transferred from juvenile court to superior court involving male status offenders, whereas 18% of the female cases transferred to superior court involved status offenses.⁴ Statistics also reflect that proportionally more females are brought into the system for status offenses.

How can the disparity in the treatment of male and female children in Georgia's juvenile justice system be explained? There is no single answer; however, it has been suggested that the courts in this instance are merely a reflection of society, which has been perceived as having a "double standard" of morality in order to exert more control over females.⁵ Thus, society and the courts punish females because "they are not being good little girls," seemingly based upon some antiquated sexual stereotype. Sexual behavior has always been one of the primary reasons for involvement of females in the juvenile justice system.⁶

3. Christine Alder, *Gender Bias in Juvenile Diversion*, 30 CRIME & DELINQ. 400 (1984).

4. Georgia Council of Juvenile Court Judges.

5. Anthony R. Harris, *Sex Theories of Deviance: Toward a Functional Theory of Deviant Type-Scripts*, 42 AM. SOC. REV. 3, 13 (1977).

6. Rosemary C. Sarri, *Gender Issues in Juvenile Justice*, 29 CRIME & DELINQ. 381

Legal double standards with particular attention to status offenses and sexual behavior of girls have been well documented, as this report will show. The juvenile courts are sometimes seen as concerned less with the protection of female offenders and acting in their best interest than with the perpetuation of the sexual status quo and social expectations. Again, females are more likely than males to be referred to juvenile court for status offenses and once referred, they receive harsher treatment for those offenses than males receive for comparable offenses. In many cases, female status offenders are given harsher sentences than males charged with delinquent acts.

According to statistics published by the Federal Bureau of Investigation,⁷ status offenses accounted for 25.2% of all females arrested in 1986 with only 8.3% of males arrested being attributed to status offenses. Between 1982 and 1986, females' curfew arrests increased by 5.1% and runaway arrests increased by a striking 24.5%. The trend continues today as arrests of females for running away increased by 3% between 1985 and 1986 and arrests of females for curfew violation increased by another 12.4%. The courts, however, do not exist in a vacuum and reflect society at large. Society seems to expect females to act a certain way and when they do not, society expects the courts to "come down hard." The juvenile court judiciary in Georgia is still patriarchal in attitude, which may also account for this phenomenon. Things are changing but slowly. The old sexually stereotyped codes of behavior are no longer categorical imperatives, per se, yet females are still being treated more harshly for less serious offenses than their male counterparts.

From its earliest days when the first juvenile court was founded in 1899, the juvenile justice system has always been concerned with sexual behavior of females and many have hypothesized that concerns about females' immoral conduct were really the basis of the so-called "childsaving movement" that eventually served as the foundation for the implementation of a separate justice system for children. The early juvenile justice movement was concerned about "social evils," and many experts in the field feel that most youthful female misbehavior has traditionally been subject to scrutiny for evidence of sexual misconduct in some form or another. There seemed to be in the beginning, and some remnants still exist today, almost an obsession about precocious female sexuality; the fear that these young girls will stray from the "straight and narrow."⁸ This, of course, is reinforced by long ingrained social patterns and the tremendous weight of tradition and custom in

(1983).

7. FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 1986 (1987).

8. Meda Chesney-Lind, *Girl's Crime and Woman's Place: Toward a Feminist Model of Female Delinquency*, 35 CRIME & DELINQ. 5 (1989).

this country. We may even have more of a problem in this regard in the southern states due to the historic chivalrous attitude maintained toward women.

Although there have been numerous attempts at juvenile justice reform, it was not until 1974 that the federal government took on substantial responsibility for effecting major policy and program reform. Passage of the Juvenile Justice and Delinquency Prevention Act of 1974⁹ (JJJPA) required the federal government to provide resources to the various states for deinstitutionalization of certain classes of offenders, for avoidance of the use of adult jails and secure detention as placement alternatives for those offenders, and for the development of community-based programs. The statute was amended in 1977 and in 1980 and strengthened the concept of community-based intervention.¹⁰ A major priority was established for the removal of all status offenders from secure confinement, for the reduction of detention, and for the elimination of jailing of juveniles. This major piece of legislation contained many commendable approaches for innovation in juvenile delinquency prevention and control; but unfortunately, relatively insignificant amounts of money were made available to the states considering the lofty goals that were set. Nevertheless, Georgia has made significant progress in removing status offenders from secure confinement, reducing detention, and completely eliminating the jailing of juvenile offenders.

Analysis of gender differences in secure detention before and after the passage of the JJJPA provides an opportunity to evaluate several important elements of the Act. For purposes of this report, it is worthy to note that a substantial drop in female admissions to juvenile detention facilities occurred between 1971 and 1979. Overall, the percentage change for males between the same period of time increased 6.4%. Likewise, admission to youth development centers and training schools on a national basis showed similar patterns to those observed for detention.¹¹ However, these efforts to deinstitutionalize status offenders ran into many problems in Georgia and nationally because an attitude, which still exists today to some extent, existed within certain segments of the juvenile justice system that the system should involve itself in the noncriminal behavior of female children in order to "save" them from a variety of perceived social ills.

Many juvenile justice professionals attempted, and still attempt, to justify continued profound intervention into the lives of status offenders by suggesting that without such intervention the behavior of the youth would "escalate" to criminal behavior. There is little evidence, however,

9. 42 U.S.C.A. §§ 5601-5780 (1983 & Supp. 1991).

10. *Id.*

11. Sarri, *supra* note 6.

that status offenders escalate to serious criminal offenders, and the evidence is particularly weak when considering female delinquent children.¹² If escalation is in fact occurring, it is likely the product of the juvenile justice system's own insistence on enforcing status offense laws, sometimes inappropriately, thereby forcing some female youths in crisis to literally live lives as escaped criminals. That sounds like a harsh statement; however, young female status offenders, a large number of whom are on the run from homes characterized by abuse and parental neglect, are forced by the very statutes designed to protect them to live in such a manner. Unable to enroll in school or take a job to support themselves because they fear detection, young female offenders are often forced into the streets where they engage in panhandling, petty theft, and prostitution in order to survive. Therefore, young females in conflict with their parents, sometimes for very legitimate reasons, may actually be forced by these laws into petty criminal activity, prostitution, and criminal behavior.

Studies reviewed and testimony considered during the course of this inquiry reveal that there is no persuasive proof of biological, physiological, or psychological gender-related factors to incidents or modalities of juvenile delinquency. Differences between male and female delinquency appear to be based rather on differences in perpetuated definitions of "masculine" and "feminine" conduct. These differences in conduct have evolved not as a result of an innate biological, physiological, or psychological phenomenon, but rather as the consequences of the barriers socially constructed between the sexes by society in general.¹³

For example, many in our society perceive that males need to have a few fights and "mix it up" with their fists now and then, with male aggression being perceived as a natural and socially viable part of the male coping mechanism.¹⁴ Females, on the other hand, are perceived by many as having primarily a mission of procreation and nurturance of the human species and any variations between the two social models is considered deviant behavior. Judges reflect these societal views, which helps explain, in part, why once a female is brought into the juvenile justice system, she is less likely to be immediately released and more likely to be institutionalized than a male for noncriminal conduct.¹⁵ Females are still more likely to be punished for non-obedience to the double standard sexual codes imposed by society and

12. Chesney-Lind, *supra* note 8.

13. Liba Duraj, *The Concept of Female Juvenile Delinquency: A Feminist or Non-Feminist Approach?*, JUV. & FAM. CT. J., May 1982, at 25.

14. Rodney Stark & James McEvoy III, *Middle-Class Violence*, PSYCHOL. TODAY, Nov. 1970, at 52.

15. Duraj, *supra* note 13.

nonconformance with established local moral conduct than males in the same circumstances.

Currently our juvenile courts and institutions have few programs or resources to offer the female offender. The movement to remove status offenders from juvenile court authority has been, at least partially, a result of consummate frustration born of the lack of appropriate treatment for these offenders. The question this movement asks is do we really need to involve the juvenile courts of this state in heroic and massive intervention regarding relatively nonserious behavior? Is it possible that the cure is worse than the disease? It has long been understood that a major reason for a female's presence in juvenile court was the fact that her parents insisted upon her apprehension. Should it be the juvenile court's role to "raise someone's child"? These questions are outside the scope of this inquiry; however, they point out and clearly emphasize the utter frustration felt by judges and career professionals in the juvenile justice field in dealing with status offenses. It is necessary to have other techniques and approaches to deal with these troublesome issues. It may be necessary to do away with status offenses. It may be necessary to have "more teeth" in what the courts can do with status offenders and their families. Hopefully, these issues will be addressed at some future time by some other body. The social problems behind the large number of runaway teenage girls, including physical and sexual abuse in the home, teenage pregnancy, lack of sex education and birth control, prostitution, and homelessness, are not easily addressed, but we must try.

The ultimate conclusion must be that our court system cannot turn its back on the tragic circumstances of these teenage girls. Our juvenile justice system must begin to embrace and address, rather than reject and ignore, the problems facing teenage girls. Instead of punishing girls for precocious sexuality and violation of the double standard, the juvenile court system should give them the understanding they deserve and the specialized services and treatment needed to bring them back into the mainstream of our society.

FINDINGS

1. In Georgia, girls receive harsher treatment than boys for benign criminal and noncriminal behavior in the juvenile justice system.
2. In the juvenile justice system in Georgia, girls are more likely than boys to be institutionalized for status offenses such as running away from home, being ungovernable, or truancy. More boys are detained for criminal offenses.

3. Runaway children are the single largest group of status offenders in the juvenile justice system, with the majority being girls; yet these children usually run from physical and sexual abuse in their own homes.
4. The Georgia juvenile justice system lacks alternatives for individual placement and treatment after adjudication. Specialized programs serving the special needs of girls are virtually nonexistent.
5. The court system in Georgia must provide a range of options as alternatives to unnecessary detention of children of both sexes.
6. Boys and girls are treated differently in Georgia's juvenile justice system primarily because of societal attitudes based on outdated sexual stereotypes.

RECOMMENDATIONS

1. The Georgia court system should make it a priority to establish effective local child abuse protocols in every county or circuit as mandated by Code section 19-1-2. Greater attention to the enormous problem of physical, mental, emotional, and sexual abuse of children would give greater protection to children of both sexes and could prevent future runaways and status offenders.
2. State funding is needed for special programs to address the problems of female status offenders. All state-run juvenile facilities should have services available to girls such as: counseling for victims of sexual abuse, sex education, teenage parenting classes, self-esteem groups, and information on AIDS and other sexually transmitted diseases.
3. State funding is needed to provide residential and other treatment facilities for female status offenders. Courts need options other than detention or returning a girl to an abusive home.
4. Facilities and alternative treatment programs should be equally available to males and females.
5. Judicial education courses should be created to sensitize judges to the special problems and needs of female status offenders.
6. Judicial education courses should be created which stress the behavior, attitudes, traits, differences, and characteristics of children who come into contact with the juvenile justice system and how to formulate individualized treatment plans for each particular case.

CHILD CUSTODY

Of all the issues brought before the Commission, none elicited more emotional response than the problem of child custody, a complex issue that does not lend itself to simple solutions. Testimony and information presented to the Commission alleged bias against women in some situations and against men in others. As most of those providing information to the Commission were litigants who had been personally involved in custody or visitation disputes, the Commission's work was made even more difficult in assessing the information given it. Georgia statutory and case law is gender neutral as far as custody is concerned, and any gender bias in custody awards or any perceived bias must find its genesis elsewhere. Any bias or perceived bias has to be rooted, not in the law itself, but in the application of the law by the judges who have the sole authority to make custody decisions in Georgia.

It is the Commission's priority that the trial court resolve issues of custody in conformity with the child-oriented approach in which gender plays no substantial part. Even one incident of gender bias is unacceptable. Such bias in the award of custody is of importance, not only to the parents and the child, but also to the bench, the bar, and the state. When, in any instance, gender bias affects to any degree the outcome of a custody case, a decision which is vital to the upbringing of a child has been made on an improper basis.

I. Determinations of child custody are among the most perplexing and difficult aspects of the judicial function. These determinations are often perceived to be gender biased.

The rising incidence of divorce, evolving notions about the role of men and women in society, and the increase in economic opportunities for women in the past century have dramatically altered issues of family law. Unfortunately, the law and the judicial system have not always kept pace with the need for change required by these evolutions. Innovations in the way society and the courts approach these problems have been attempted—some have worked and others have been discarded. New ideas and new resources are still needed.

The issue of child custody was clearly the most emotionally charged issue on which the Commission received testimony. Parents expressed over and over again the horror of experiencing what they perceived to be gender-biased treatment in the resolution of disputes over child custody in the context of a divorce and sometimes for years after. Many judges reported that they also experienced the difficulties of resolving custody disputes between two "fit" parents as extremely demanding and stressful. Attorneys, grandparents, and other bystanders repeated their concern about the problems of gender bias in this area.

The ultimate and profound conflict inherent in a child custody dispute raises issues which are fundamental to us as human beings and which are literally as old as Solomon.¹ It is therefore understandable that the level and intensity of emotion in this area are immense. The assertions that gender bias was the cause of unfair or improper results in child custody disputes were raised as often, and as sympathetically, by men as by women. The pain and tragedy associated with such results are undeniable. The solution, however, is far less clear.

To the extent that the law, the legal process, the attorneys, or the judges rely upon stereotyped notions about the "proper" roles of men and women in society to resolve any dispute, much less a decision as critical to the lives of a family as the issue of child custody, gender bias is present. Those litigants, and society at large, have a paramount interest in the elimination of gender bias from the judicial system. The importance of a system that is free of gender bias and that is perceived to be free of gender bias by the community in general and by the parties to the litigation is emphasized in this area as perhaps in no other.

It is inevitable that an able and loving parent necessarily separated from daily contact with a beloved child by reason of divorce will feel that the decision was "wrong," and perhaps there is no "right" decision in such a circumstance. Thus, the Commission urges that the judicial system work to ensure that the process and the decision makers be fair and without bias.

II. Guided by the standard of the best interest of the child and what will best promote the child's welfare and happiness, judges have broad discretion to determine the factors to consider when making custody decisions in disputes between parents.

In a custody dispute between parents there is no prima facie right to custody in either the father or mother.² Furthermore, Georgia case law has for many years recognized that the law favors neither party in custody disputes.³ The law imposes upon the court the duty of making an award of custody in accordance with "the best interest of the child."⁴ The duty of the court in all such cases is to exercise its discretion to look to and determine solely what is in the best interest of the child or children and what will best promote their welfare and happiness. This is the only consideration that the court may use, and it must control the judgment that the court makes.⁵ In all custody cases in which the

1. *See 1 Kings 3:16-28.*

2. O.C.G.A. § 19-9-3 (1991).

3. *Hill v. Rivers*, 200 Ga. 354, 37 S.E.2d 386 (1946).

4. O.C.G.A. § 19-9-3 (1991).

5. *Pruitt v. Butterfield*, 189 Ga. 593, 6 S.E.2d 786 (1940).

child has reached the age of fourteen years, the child shall have the right to select the parent with whom the child desires to live.⁶ This selection shall be controlling unless the parent chosen is determined to be unfit to have custody.

This standard leaves broad discretion in the trial judge in custody disputes. Unless it appears that this discretion has been manifestly abused, a decision by the trial judge awarding custody of a minor child will not be changed by an appellate court.⁷

Testimony received at the public hearings expressed concern about the vague nature of the legal standard and its appropriateness.⁸ One speaker testified that the standard should be "children first" with a presumption in favor of the primary caregiver.⁹ Another said that judges should not be trying to apply a standard of best interest of the child because they do not have the necessary training or time to make appropriate decisions.¹⁰ Several speakers suggested that there should be more control over the judge's exercise of discretion in deciding custody matters.

It was noted that when awarding custody between the biological parent and a person who is not a biological parent, the standard is whether or not the biological parent is fit, not the best interest of the child. It was suggested that, by analogy, custody should be given to the more fit parent when the dispute is between parents.¹¹

III. In most cases, mothers receive sole physical custody of children following divorce. In general, this does not reflect gender bias but the agreement of the parties and the fact that in most families mothers are the primary caretakers for children.

The vast majority of divorces are resolved by agreement of the parties and not by a trial. Thus, almost all custody decisions are made by the child's parents and not by a judge. These agreements place custody of the child or children in the mother in the overwhelming number of cases. This tends to follow past societal patterns that still persist today. Notwithstanding the increasing incidence of families

6. O.C.G.A. §§ 19-9-1, -3 (1991).

7. *Lynn v. Lynn*, 202 Ga. 776, 44 S.E.2d 769 (1947).

8. *Atlanta Public Hearing Before the Commission on Gender Bias in the Judicial System* pt. 1, at 159 (Sept. 22-23, 1989) [hereinafter *Atlanta Public Hearing I*].

9. *Rome Public Hearing Before the Commission on Gender Bias in the Judicial System* (Jan. 16, 1990).

10. *Athens Public Hearing Before the Commission on Gender Bias in the Judicial System* 62 (Dec. 1, 1989).

11. *Macon Public Hearing Before the Commission on Gender Bias in the Judicial System* 23 (Mar. 16, 1990).

where both parents work outside the home, mothers tend to remain the primary caretaker for children, especially for small children.

While agreements regarding custody are subject to judicial review considering the "best interest of the child," these agreements are invariably accepted by the court absent extraordinary circumstances. Thus, one might reasonably conclude that this pattern merely "reflects" society's preferences and does not indicate the influence of gender bias. While judicial bias certainly is not the precipitating factor in this phenomenon, witnesses testified that the preconceived notions held by attorneys about how custody "should be resolved" and the perception that judges will tend not to award custody of small children to fathers has had an impact on the willingness of fathers to litigate issues of custody.¹²

It should be noted that even in "difficult cases" where both parents offered strong resources for child rearing, judges and attorneys tended to strongly favor resolution of custody disputes by agreement reached between the parents over the rigors of trial and judicial determination. Although the issue of child custody is vested solely in the trial judge and is never submitted to a jury for resolution, the consequences of the trial process were consistently reported to be stressful, difficult, and potentially damaging to the child and to the parents. The parent who does not "win" custody tended to be dissatisfied with the outcome, and the prospects for long term harmony in the divorced family were diminished.

Cobb County has pioneered a program in recent years to educate and sensitize parents about the interests of their children during litigated custody disputes. The program counsels parents about the dangers of using child custody as a bargaining tool in divorce or separate maintenance cases, the need to provide special support to children through this emotionally difficult process, and the value of using mediation to resolve peacefully intractable issues, rather than relying on the rigors of the advocacy process where children tend to be the "losers."¹³ DeKalb County has for many years required mediation in all contested custody cases.

IV. Culturally based gender-biased beliefs that influence some judges and disadvantage fathers include:

A. The belief that a mother is a better parent than a father.

Historically, American society has tended to assume that mothers, rather than fathers, should and do have primary responsibility for

12. See *infra* pt. IV.

13. Lila Moore, *Seminars Decreasing Custody Battles*, MARIETTA DAILY J., Aug. 9, 1990, at B4.

raising children. While changes in family planning, economic opportunities for women, the distribution of labor in society, normative views about the "proper" roles of men and women, research findings on child development, and a myriad of other issues have all evolved, the idea that women rear children is very deeply ingrained in our culture. As society struggles to give new meaning and definition to the roles and responsibilities of parents irrespective of gender, the judicial system is rarely found in the vanguard. Certainly, the legal system is most "comfortable" when it reflects community values rather than trying to change or shape those values.

Testimony suggesting that judges believe mothers are better parents than fathers includes that of one Atlanta attorney who stated that there is a strong presumption that the best interest of the child is to be in the custody of the mother.¹⁴ A father testified that his attorney told him that in effect a good father has a fifty percent chance of winning a custody battle, while a good mother has a one hundred percent chance of winning.¹⁵ An attorney in North Georgia agreed that in custody cases there is a bias toward giving custody to the mother,¹⁶ while another asserted that there is some preference for mothers but it is more a matter of whose lawyer wins the argument about what is in the best interest of the children.¹⁷ One judge is reported to have stated that all other factors being equal, custody should be awarded to the mother.¹⁸ An Atlanta father testified that the system is so biased in favor of mothers in custody matters that it allows them to use the preference as leverage in getting increased support.¹⁹ An Atlanta attorney attributes the maternal preference to the judge's desire to avoid trial if at all possible.²⁰ A mother noted that just because the experience of a judge dictates that a child usually belongs with the mother does not make awarding custody to the mother wrong most of the time.²¹ To the contrary, another attorney stated that although custody decisions were once biased in favor of the mother, that is no longer the case.²²

14. *Gainesville Public Hearing Before the Commission on Gender Bias in the Judicial System* 24 (May 18, 1990).

15. *Macon Public Hearing*, *supra* note 11, at 19; *Griffin Public Hearing Before the Commission on Gender Bias in the Judicial System* 56 (July 13, 1990).

16. *Macon Public Hearing*, *supra* note 11, at 56.

17. *Athens Public Hearing*, *supra* note 10, at 16.

18. Written Statement of a Gwinnett County Case; *Athens Public Hearing*, *supra* note 10, at 3-4.

19. *Atlanta Public Hearing Before the Commission on Gender Bias in the Judicial System* 85, 214 (Aug. 3, 1990) [hereinafter *Atlanta Public Hearing II*].

20. *Gainesville Public Hearing*, *supra* note 14, at 26.

21. *Atlanta Public Hearing II*, *supra* note 19, at 54.

22. *Albany Public Hearing Before the Commission on Gender Bias in the Judicial System* 6 (Jan. 19, 1990).

B. The belief that children, especially young children, need to be with their mothers.

One father testified that after the court was told by a mental health professional that his very young child should stay with the father, the court decided that custody should go to the mother because "there is no substitute for a mother."²³ An Atlanta father testified that he heard the judge ask an attorney in a custody matter, "How many times have you seen a judge award custody of a five-year-old to the father?" thereby confirming to the speaker that the "tender years" presumption is alive and well in Georgia courts.²⁴ An Atlanta father testified that the judge's statement that young children belong with their mothers had not been included in the transcript that was prepared for his appeal. He attributed the omission to the fact that the reporter is an employee of the judge and not of the court.²⁵ A written summary of a case recited that custody had been changed from the father to the mother when the father remarried because the court believed that a child should be raised by the natural mother;²⁶ another report asserted that the reason for the judge's awarding custody to the mother was that young children belong with their mothers.²⁷ One judge was reported to have said that he always awarded custody to the mothers because he had never seen calves follow bulls.²⁸

C. The belief that a father cannot work outside the home and be a nurturing parent.

D. The belief that because a mother is presumed to be a better parent, fathers must prove the mother is "unfit" in order to gain custody.

An attorney from south Georgia testified that in her experience the test is not what is in the best interest of the child, but rather whether or not the mother is fit. If the mother is fit then the father will not be awarded custody, and this is gender bias against fathers.²⁹ Several fathers and attorneys from other areas of the state also testified that they believed judges to be trying the fitness of the mother and that a fit mother would not lose custody no matter how much more appropriate it

23. Nathaniel Archer Moore, Written Statement to the Georgia Commission on Gender Bias in the Judicial System.

24. *Atlanta Public Hearing II*, *supra* note 19, at 88-89.

25. *Gainesville Public Hearing*, *supra* note 14, at 26-27.

26. *St. Clair v. Dokka*, No. 89-3137-5 (DeKalb Super. Ct. Aug. 15, 1990).

27. *LeCroy v. Collins*, No. D41996 (Fulton Super. Ct. Apr. 13, 1988).

28. *Fathers Are Parents, Too, Inc., Destroying the Myths with Facts* (July 1989).

29. *Columbus Public Hearing Before the Commission on Gender Bias in the Judicial System* 99 (Oct. 20, 1989).

might be to give custody to the father.³⁰ A father in Athens testified that although the social worker recommended that custody be given to him because of the potential for abuse of the children by his wife, the court awarded her custody. He felt that the judge had not paid attention to the evidence and was asking that the mother be proven unfit.³¹ An Atlanta attorney stated that he has been told by judges in pretrial conference that he will not get anywhere in the custody battle unless he has some "dirt" on the mother.³²

E. The belief that if a court grants custody to a father, it brands the mother as "unfit" and "unworthy."

A grandmother testified that the judge had stated in chambers that it "does something to a mother" to lose her children and had then awarded custody to the mother despite extensive evidence that she was psychologically unstable and that it would not be in the best interest of the children to remain with her.³³

V. Perceptions of judicial gender bias discourage fathers from seeking custody by creating a "chilling effect" on the exercise of the right to have custody determined by the court.

In Atlanta, a noncustodial father testified that he has lost custody even though he is the more fit parent and that the legal system has a chilling effect on the desire of fathers to seek custody.³⁴ An Atlanta attorney believes that by making it known that litigation is useless, fathers will not tend to pursue custody, that is, that the chilling effect is the desired outcome of the judicial policy.³⁵ A speaker in Griffin stated that about 30% of all men desire custody, but when they are told their chances of winning are not good, about 60% of them drop the issue.³⁶ Another testified that he lost custody even though the mother had abandoned him and the child when the child was eleven months old and had returned only to qualify for AFDC payments. He further stated that his attorney told him he would lose in litigation and he has not had the funds to litigate further.³⁷ Another noncustodial Atlanta father testified that although he had temporary custody, his deserting wife, whose affair had broken up the marriage, was given permanent

30. *Id.* at 112.

31. *Athens Public Hearing*, *supra* note 10, at 60-61.

32. *Gainesville Public Hearing*, *supra* note 14, at 36-37.

33. Daphne Collins, Written Statement to the Commission (Aug. 3, 1990).

34. *Atlanta Public Hearing I*, *supra* note 8, pt. 1, at 158-59.

35. *Gainesville Public Hearing*, *supra* note 14, at 37.

36. *Griffin Public Hearing*, *supra* note 15, at 18.

37. *Atlanta Public Hearing I*, *supra* note 8, pt. 2, at 33, 36.

custody of two young daughters. His attorney had told him that he would be "wasting his time" to try to get custody.³⁸

Witnesses testified that fathers "win" a disproportionate number of contested custody cases. An Atlanta woman testified, "Although 90% of the time mothers receive custody, when fathers decide to fight for custody, several recent studies indicate that they win the majority of cases."³⁹ A mother testified that fathers ask for custody less than 5% of the time, but they win 70 to 80% of those contests,⁴⁰ while a father testified that 15% of custody cases are contested nationally with those splitting about fifty-fifty.⁴¹ A study of all 204 reported custody cases decided by appellate courts in 1982 found that custody went to fathers 51% of the time. In this same study, mothers won reversals of 19% of awards to fathers; fathers won reversals of 5% of awards to mothers.⁴²

Actual but limited data in the Atlanta area indicate that fathers do not "win" a majority of contested cases. They do indicate that fathers "win" a significant portion. In a sample of thirty cases mediated at the Neighborhood Justice Center in Atlanta, five resulted in joint custody, eleven in sole custody to the father, and fourteen in sole custody to the mother.⁴³ The Marietta Daily Journal reported that "out of 106 [Cobb County] custody cases filed in 1989, only nine cases were contested. Of those, joint custody was awarded in two cases, permanent custody to the mother in four cases, and permanent custody to the father in three cases."⁴⁴

VI. When fathers contest custody, mothers may be held to a different and higher standard than fathers.

Testimony revealed that in some circumstances society's traditional preference for mothers to retain custody of children was a double-edged sword. The "traditional" preference for mothers as custodial parents over fathers seems sometimes to reflect a strong preference to enforce tradition itself, rather than a preference for a female custodial parent over the male seeking custody. For example, society's historical "double standard" with regard to the permissible sexual activities of men and women seemed to generate testimony on several occasions that when a

38. *Id.* pt. 2, at 43; see also *infra* Finding no.3.

39. *Atlanta Public Hearing I*, *supra* note 8, pt. 2, at 24.

40. *Atlanta Public Hearing II*, *supra* note 19, at 47.

41. *Gainesville Public Hearing*, *supra* note 14, at 140-41.

42. Jeff Atkinson, *Criteria for Deciding Child Custody in the Trial and Appellate Courts*, 18 FAM. L.Q. 1 (1984).

43. *More Single Fathers on the "Daddy Track,"* ATLANTA J. & CONST., June 17, 1990, at A14.

44. Jeff Gill, *Crusader or Sour Grapes Merchant?*, MARIETTA DAILY J., July 8, 1990, at A8.

woman violated traditional notions of sexual propriety she would lose custody in a dispute with the father. Adultery in females was "punished" by withdrawal of custody, while similar conduct by males was not. Other examples were given by witnesses urging that women were expected to be neat, attentive, sweet-tempered, and docile, and that the absence of these attributes in females led to loss of custody, while similar flaws in fathers were deemed irrelevant or trivial.⁴⁵

VII. Culturally based gender-biased beliefs that influence some judges and that disadvantage mothers include:

A. The belief that an older boy needs to be with his father.

One mother testified that the court awarded custody of her sons to their father because of his ability to play sports with the boys and his greater financial resources.⁴⁶

B. The belief that a father who exhibits any involvement in parenting should be rewarded with custody despite years of primary caretaking by the mothers.

An Atlanta mother testified that she had been the primary caretaker of her two daughters during her marriage of seven years. After the mother announced her intention to seek a divorce, the husband immediately took over care of the children and refused to allow her to participate in their care. On the basis of being the more involved parent, he was awarded custody.⁴⁷

C. The belief that a mother who works outside the home, whether because of ambition or economic necessity, is less fit to be awarded custody than a man who places a similar emphasis on his career because these women are not "good mothers."

A witness noted that it may be assumed that fathers will work outside the home while a mother's outside work is evidence that she is not a "good mother."⁴⁸ An Atlanta woman testified that judges often discriminate against mothers who work outside the home in applying the best interest standard, while a father is expected to work outside the home. Fathers are also more freely allowed to change jobs and remarry.⁴⁹

45. *Columbus Public Hearing*, *supra* note 29, at 47, 49; *Atlanta Public Hearing I*, *supra* note 8, at 18 (noting that in speaker's experience a father who is a 50-50 parent is such a "good father" that he will probably get custody).

46. *Atlanta Public Hearing II*, *supra* note 19, at 67-68.

47. *Id.* at 57-60.

48. *Atlanta Public Hearing I*, *supra* note 8, pt. 2, at 25.

49. *Id.*

D. The belief that a woman's extramarital and postdivorce social relationships should be above reproach while finding the same behavior in men to be acceptable.

A legal services attorney testified that some judges have a "madonna complex"⁵⁰ which results in removing the children from the custody of mothers who fall short of perfection. One speaker testified that custodial mothers are in a no-win situation because the level of support available to the custodial parent affects that parent's ability to be a proper custodian and when there is a lack of resources, cohabitation by the custodial parent may be just a way of assuring a roof over the family's head and should not be held against the parent in making the custody determination.⁵¹ An article was introduced to show that judges take into account the sexual lifestyle of the custodial parent and tend to deny custody to gay women regardless of parenting skills or that they had been the primary caregiver for the child.⁵²

E. The belief that a woman who leaves the home because of domestic violence may be viewed as unstable, abandoning the children, and less fit to receive custody.

F. The belief that the relative financial status of the parents means the more affluent parent should have custody. This belief disadvantages mothers seeking custody because they generally have a lower postdivorce financial status than do fathers.

A mother testified that fathers are allowed to use financial and physical intimidation and harassment to maintain control and thereby keep the mother from obtaining custody and the support which the family needs.⁵³ Another mother testified that she had agreed to the father's having custody because she was financially unable to care for them. When she subsequently sought to gain custody the only concern of the court was why she had given them up in the first place, that is, why had she been a "bad mother"?⁵⁴

G. The belief that women manufacture false allegations of child sexual abuse.

One speaker summarized the concern this way: "[There is an] assumption that women are vindictive and make false allegations of

50. *Atlanta Public Hearing II*, *supra* note 19, at 180.

51. *Columbus Public Hearing*, *supra* note 29, at 122-23.

52. Elizabeth Coady, *Judge: Gay Mom Can't Keep Boy*, *ATLANTA J. & CONST.*, Feb. 16, 1990, at C5.

53. *Atlanta Public Hearing II*, *supra* note 19, at 47-50; *see also* Report of Guardian Ad Litem, *Hutchinson v. Hutchinson*, No. 88-4442 (Douglas Super. Ct. Aug. 25, 1988).

54. *Atlanta Public Hearing II*, *supra* note 19, at 196.

child sexual abuse. I can tell you that there's some interesting data out on that says these cases are small in number and false allegations—truly false, deliberately false allegations—are equally small in number.⁵⁵

VIII. Some judges give insufficient weight in custody decisions to men's violence toward women and its harmful impact on the children.

An attorney stated that women are able to use allegations of molestation and abuse as weapons in the fight for custody.⁵⁶ An attorney from the central part of the state testified that the increased use of alleged abuse as a weapon allows for temporary custody determinations on an ex parte basis, thereby disallowing the fathers an opportunity to be heard.⁵⁷ A central Georgia father testified that even though he is the more involved parent, he has been denied temporary custody because of false allegations of abuse.⁵⁸

To the contrary, a mother testified that judges do not respect a mother's claim of abuse when awarding custody.⁵⁹ One speaker stated that batterers should never be given custody.⁶⁰

IX. Joint custody is now an option under Georgia law. The gender impact of this remains to be studied after there has been substantial experience with the law. However, some judges still have a maternal preference and a preference for sole custody, refusing to consider joint custody as an option.

A recent amendment to the Georgia Code explicitly allows a court to grant sole custody, joint custody, joint legal custody, or joint physical custody where appropriate. However, many attorneys and judges are believed to continue to harbor misgivings about the value and workability of joint custodial arrangements.

Testimony asserted that joint custody arrangements may be advantageous for children, since both parents remain active and vital members of the child's life.⁶¹ It is also true that some measure of harmony and cooperation (probably a relatively high level) is necessary for such arrangements to work. However, studies reveal that such harmony and cooperation tend to increase child well-being whether

55. Lynn Hecht Shafran, Speech to the Commission (June 2, 1989).

56. *Athens Public Hearing*, *supra* note 10, at 19-20.

57. *Griffin Public Hearing*, *supra* note 15, at 6.

58. *Gainesville Public Hearing*, *supra* note 14, at 143-46.

59. *Atlanta Public Hearing II*, *supra* note 19, at 54.

60. *Columbus Public Hearing*, *supra* note 29, at 124; *see also* section of this report on Domestic Violence, *supra* p. 546.

61. *Athens Public Hearing*, *supra* note 10, at 18; Report of Committee on Custody and Visitation to the Georgia Commission on Child Support (Sept. 4, 1985).

inside or outside of a joint custody arrangement and are thus to be sought. Finally, witnesses expressed that joint custody arrangements are more responsive to the realities of modern life and allow parents to arrange primary caretaking responsibilities on a more flexible basis responsive to their and their children's financial, personal, and work needs. These needs evolve and change over time and sometimes may more easily be accommodated by a joint custody arrangement, avoiding the turmoil associated with a legal proceeding to change custody.⁶²

As used in the statute, the term joint custody means "joint legal custody, joint physical custody, or both joint legal custody and joint physical custody. In making an order for joint custody, the court may order joint legal custody without ordering joint physical custody."⁶³

Joint legal custody means that

both parents have equal rights and responsibilities for major decisions concerning the child, including the child's education, health care, and religious training; provided, however, that the court may designate one parent to have sole power to make certain decisions while both parents retain equal rights and responsibilities for other decisions.⁶⁴

Several people testified that joint custody should be used more frequently, some requesting that the statute create a presumption in its favor.⁶⁵ A father rejected requiring parental agreement, arguing that joint custody will be ordered only where the parties agree, then it will not happen unless the mother wants it, because she knows that the court will give her sole custody if no agreement is reached. The same proponent of joint custody testified that anything less than an equal interest in both parents is no better than sole custody and went on to say that with joint custody neither parent wins or loses and so it is clearly a better system.⁶⁶ Other proponents have said that it will provide stability and continuity for the child, as well as increasing the actual payment of support orders.

A father testified that the court in his case was so against joint custody that even though the parties had agreed to it, the court entered an order of sole custody (it was not clear from the record when the order was entered, that is, before or after the statutory authorization of joint custody).⁶⁷ One noncustodial father asserted that sole custody is

62. *Atlanta Public Hearing I*, *supra* note 8, pt. 2, at 8-14, 56, 90-92.

63. O.C.G.A. § 19-9-6(1) (1991).

64. *Id.* § 19-9-6(2).

65. *Atlanta Public Hearing I*, *supra* note 8, pt. 2, at 56, 59.

66. *Id.* pt. 2, at 59.

67. *Gainesville Public Hearing*, *supra* note 14, at 25-26.

in the best interest of lawyers in that it assures that the loser will be back for another round as soon as the money is available.⁶⁸

A writer asserted that with counseling and mediation even hostile parents can make joint custody work.⁶⁹ Another author stated that joint custody is fine for wealthier families that want it, understand it, and are prepared to live with it.⁷⁰ One witness testified that in Los Angeles 31% of sole custody awards involved further litigation, while only 16% of joint custody awards did.⁷¹

On the other side, a mother testified that awarding joint custody makes it almost impossible for the former spouses to create new lives.⁷² She testified that it is impossible for the law to create responsible parents and that the reality is that the child no longer has two parents. Other mothers throughout the state agreed that joint custody makes things more difficult for the primary physical custodian. An attorney testified that in her experience joint custody is not good for children.⁷³ One writer, citing a California study, concluded that imposed joint custody is the worst solution for children.⁷⁴

A speaker noted that joint custody is not appropriate where there has been domestic violence.⁷⁵

Joint custody allows judges to avoid difficult decisions which really need to be made. An attorney testified that joint custody only clogs the courts.⁷⁶

One person testified that child snatching is the direct result of the sole custody system.⁷⁷

The debate about the desirability of joint custody continues in the academic journals. Much of the debate also looks at the issues of the desirability of joint legal custody where there is sole physical custody with a right of visitation in the noncustodial parent. None of the witnesses addressed this aspect of the problem.⁷⁸

68. *Atlanta Public Hearing I*, *supra* note 8, pt. 2, at 4.

69. Stanley S. Clawar, *One House, Two Cars, Three Kids* (unpublished manuscript).

70. Jessica Pearson & Nancy Thoennes, *Supporting Children After Divorce: The Influence of Custody on Support Levels and Payments*, 22 *FAM. L.Q.* 319, 338 (1988).

71. *Gainesville Public Hearing*, *supra* note 14, at 130.

72. *Rome Public Hearing*, *supra* note 9.

73. *Macon Public Hearing*, *supra* note 11, at 57.

74. Scarbrough, *Written Submission to the Commission* (Apr. 25, 1990).

75. *Atlanta Public Hearing I*, *supra* note 8, pt. 2, at 25.

76. Scarbrough, *supra* note 74; *see also* Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 *MD. L. REV.* 497 (1988); *Atlanta Public Hearing II*, *supra* note 19, at 179.

77. *Atlanta Public Hearing I*, *supra* note 8, pt. 2, at 13 (statement by William Hasslock).

78. *See, e.g.*, Daniel R. Mummery, Note, *Whose Child Is It Anyway?*, 15 *FORDHAM URB. L.J.* 625 (1987); Andrew Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 *TEX. L. REV.* 687 (1985); Susan Steinman, *Joint*

X. *Some men file proceedings to contest custody not because they want custody but as a strategic maneuver.*

One writer stated that men often seek joint custody as a bargaining tool to lower financial obligations for alimony and child support.⁷⁹ Another urged that fathers' efforts to share custody are used by men to blackmail women into lower support orders or to maintain dominance and control over women.⁸⁰ Testimony in Atlanta suggested that fathers seek custody as a way of not having to pay support to the ex-wife.⁸¹

XI. *Resolving custody disputes through the adversarial process is cumbersome, expensive, and damaging to the psychological well-being of the parties and the children.*

A suggestion made in Atlanta was that networking among lawyers makes it very difficult to get adequate representation in a contested custody matter.⁸² One mother characterized her attorney as "expensive and remote."⁸³ There were also repeated expressions of concern about the cost involved in litigating custody and the perceived lack of attention by the decision maker to the testimony and other evidence presented in the proceeding.⁸⁴

A number of noncustodial parents objected to being called "visitors" and asserted that children need to have a relationship with both parents. They thought that satisfying this need was hampered by the way in which the custody decisions were made.⁸⁵

Several speakers complained of the fact that neither attorneys nor judges have any special training in matters of the family, thereby allowing them to bring their gender bias and incompetence into the process more easily.⁸⁶

A father wrote that he felt that older children should not have to select their custodian because the psychological cost of being required to choose one parent and reject the other is too high. The father further

Custody: What We Know, What We Have Yet to Learn, and the Judicial and Legislative Implications, 16 U.C. DAVIS L. REV. 739 (1983).

79. See JOINT CUSTODY AND SHARED PARENTING (Jay Folberg ed., 1984); H. Jay Folberg & Marva Graham, *Joint Custody of Children Following Divorce*, 12 U.C. DAVIS L. REV. 523 (1979).

80. See Scarbrough, *supra* note 74 (citing a California study); see also *Atlanta Public Hearing II*, *supra* note 19, at 48 (citing PHYLLIS CHESLER, *MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY* (1986)).

81. *Atlanta Public Hearing II*, *supra* note 19, at 55.

82. *Id.* at 69.

83. *Gainesville Public Hearing*, *supra* note 14, at 59.

84. *Id.* at 57-60; *Atlanta Public Hearing I*, *supra* note 8, pt. 2, at 42.

85. *Columbus Public Hearing*, *supra* note 29, at 116.

86. *Atlanta Public Hearing I*, *supra* note 8, pt. 2, at 6.

wrote that his abusive wife was given custody because she had bribed the child to state that she preferred to live with the mother.⁸⁷ Citing the unfairness of the process, a central Georgia father testified that even though he is the more involved parent, he has been denied temporary custody because of false allegations of abuse.⁸⁸ Another testified that false allegations in the custody trial do real harm to the children and the relationships they have with the parents. An extreme example was reported in a newspaper story about a court which gave the custody of the children to the state while the parents battled over which parent was better able to protect the best interest of the children.⁸⁹

XII. Custody decisions are subject to modification. Thus, the problem of hostility between the parents sometimes continues for years, to the detriment of the children.

An award of custody is meant to be permanent; therefore, to change a custody award, the law requires a showing that the custodial parent is no longer fit or that there has been a change in any material condition or circumstance of the party or the minor such that the best interest of the child lies with the other parent.⁹⁰ Nonetheless, a case summary was submitted stating that custody was changed to the mother from the father without the prerequisite finding that there had been a substantial change of circumstances, though the case was affirmed on appeal.⁹¹

One mother testified that calling her ex-husband to enforce her support award was labeled harassment by the court and then used as a basis to change custody to the father.⁹²

XIII. Summary of Recommendations Made to the Commission by Members of the Public.

The following is a composite summary of recommendations made by members of the public that were received by the Commission and do not necessarily reflect the views of the Commission:

- 1) The "best interest" standard should be interpreted to prefer an award to the primary caregiver;

87. Letter from Eugene B. Phillips to the Commission (July 30, 1989).

88. *Gainesville Public Hearing*, *supra* note 14, at 146.

89. Duane Riner, *While Parents Battle, Judge Gives Custody of Boys to State*, *ATLANTA J. & CONST.*, Sept. 6, 1989, at D1.

90. O.C.G.A. § 19-9-1 (1991).

91. *Gilmore v. Siegelman*, No. 85-7717 (DeKalb Super. Ct. May 11, 1987).

92. *Columbus Public Hearing*, *supra* note 29, at 130-32.

- 2) Custody should be tried separately from other issues, for example, divorce and support;
- 3) Mediate custody disputes outside the courts;
- 4) Have mandatory seminars for divorcing couples about the effects of divorce on children;
- 5) Educate judges more fully about the complexities of the custody decision;
- 6) Fit mothers should be given a preference in custody awards;
- 7) If both parents are fit, then require joint custody;
- 8) Responsibility for parenting should be shared so that both parents stay in the child's life;
- 9) Joint custody should be limited to cases where both parties want joint custody;
- 10) Children should not be required to choose the custodial parent;
- 11) Allow a child to choose the custodial parent at age twelve instead of fourteen;
- 12) Authorize representation of the child so that the child's best interests are directly protected;
- 13) Use a friend of the court;
- 14) Use a jury to avoid judicial prejudice;
- 15) When a custodian leaves the state, it should trigger an automatic review of custody;
- 16) Expedite review of custody in cases in which abuse is alleged;
- 17) Create a family court;
- 18) Use arbitration rather than the courts;
- 19) Require that legal fees be paid by spouse incurring them;
- 20) Keep records of custody outcomes on a judge-by-judge basis so that the public will know the record of each judge;
- 21) Charge a parent who fails to return a child from a visit with kidnapping; and
- 22) Have an affirmative action plan for fathers.

FINDINGS

1. Determinations of child custody are among the most perplexing and difficult aspects of the judicial function. These are often perceived to be gender-biased.

2. Guided by the standard of the best interest of the child and what will best promote the child's welfare and happiness, judges are given broad discretion to determine the factors which should be considered when making custody decisions in disputes between parents.
3. In most cases, mothers receive sole physical custody of children following divorce. In general, this does not reflect gender bias, but rather the agreement of the parties and the fact that, in most families, mothers are the primary caretakers for children.
4. Culturally based gender-biased beliefs that influence some judges and disadvantage fathers include:
 - a. The belief that a mother is always a better parent than a father;
 - b. The belief that children, especially young children, need to be with their mothers;
 - c. The belief that a father cannot work outside the home and be a nurturing parent;
 - d. The belief that because a mother is presumed to be a better parent, fathers must prove the mother is "unfit" in order to gain custody; and
 - e. The belief that if a court grants custody to a father, it brands the mother as being "unfit" and "unworthy."
5. Perceptions of judicial gender bias discourage fathers from seeking custody.
6. When fathers contest custody, mothers may be held to different and higher standards than fathers.
7. Culturally based gender-biased beliefs that influence some judges and disadvantage mothers include:
 - a. The belief that an older boy needs to be with his father;
 - b. The belief that a father who exhibits any involvement in parenting should be rewarded with custody despite years of primary caretaking by the mother;
 - c. The belief that a mother who works outside the home, whether because of ambition or economic necessity, is less fit to be awarded custody than a man who places a similar emphasis on his career because these women are not "good mothers";
 - d. The belief that a woman's extramarital and postdivorce social relationships should be above reproach while tolerating the same behavior in a man;
 - e. The belief that a woman who leaves the home because of domestic violence may be viewed as unstable, abandoning the children, and less fit to receive custody;

f. The belief that the relative financial status of the parents means that the more affluent parent should have custody. This practice disadvantages mothers seeking custody because they generally have a lower postdivorce financial status than do fathers; and

g. The belief that women will manufacture false allegations of child sexual abuse.

8. Some judges give insufficient weight in custody decisions to men's violence toward women and its harmful impact on the children.

9. Joint custody is now an option under Georgia law. The gender impact of this change remains to be studied after there has been substantial experience with the new law. However, some judges still use a maternal preference or a preference for sole custody, refusing to consider joint custody as an option.

10. Some men file proceedings to contest custody, not because they want custody, but as a strategic maneuver.

11. Resolving custody disputes through the adversarial process is cumbersome, expensive, and damaging to the psychological well-being of the parties and the children.

12. Custody decisions are subject to modification. Thus, the problem of hostility between the parents sometimes continues for years, to the detriment of the children.

RECOMMENDATIONS

For the Judiciary

1. Educate judges to avoid using inappropriate, culturally based, gender-biased beliefs such as those previously identified which may influence decisions in child custody cases.

2. Make specific findings of fact and conclusions of law, setting forth the particular factors that constitute the "best interest of the child," where appropriate, when awarding custody.

3. Consider, as a factor when awarding custody, past acts of physical violence and mental abuse.

4. Educate judges about the benefits and limitations of joint custody, including other states' experiences with the use of joint custody orders.

5. Educate judges that joint custody is inappropriate if one parent is abusive to the other parent or children, is unfit, or has abandoned the child.
6. Require divorcing parents to attend classes on the impact of divorce trauma on their children, as well as problems they are going to encounter as they divorce and what is expected of them. Failure to participate in these classes would be a factor for the court to consider in awarding custody and visitation.
7. Educate judges about the need to facilitate active parenting on the part of the noncustodial parent by making tailor-made awards for each case rather than having a standard order of visitation.
8. Provide appropriate educational information to those applying for marriage licenses concerning their responsibility as parents for support of children, and inform them of the adverse psychological impact of divorce on children.
9. Require mandatory mediation for disputes involving custody and visitation except when domestic violence is reported to exist in the family. The primary focus of mediation should be to encourage parents to formulate a parenting plan.
10. Require a review of custody when the child is removed from the jurisdiction of the court without the consent of the noncustodial parent.

For the Legislature

11. Provide funding for guardians ad litem, investigators, and psychologists to provide judges with the information needed to make informed custody decisions.
12. Study revision of the law of custody with a view toward eliminating the problems rooted in gender bias, specifically considering appropriate ways in which to account for domestic violence when making custody decisions.

For Bar Associations

13. Continue to support committees engaged in the analysis of the problems in the law of custody with a view toward eliminating the problems rooted in gender bias.
14. Encourage local bar associations to create pro bono guardian ad litem projects and divorcing parent seminars.

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15. Educate attorneys about the full impact of custody decisions, including the social and emotional repercussions of their advice and actions.

16. Educate attorneys in alternative dispute resolution methods in custody disputes.

17. Educate attorneys about the need to facilitate active parenting on the part of the noncustodial parent by seeking awards tailor-made to each case rather than settling for standard orders of visitation.

For Law Schools

18. Include information in the law school curriculum about the psychological consequences of divorce for children, the impact of spousal abuse on children, and the ways in which gender bias against both women and men may influence custody decisions.

VISITATION

In Georgia, exercising court-directed access to one's child is a right and a responsibility of a divorced parent. If parents do not agree on a visitation schedule, the court will set times, dates, and conditions of visitation. Visitation may be denied in the best interest of the child, but this should occur only in exceptional circumstances. Visitation will not hinge on the payment of child support as both visitation and support are rights belonging to the child. In 1976, Georgia began allowing for visitation by grandparents where it is in the best interest of the child and the grandparent has requested it. Visitation may be modified once every two years at the discretion of the court and does not require the showing of a substantial change of circumstance.

In general terms, some of the concerns that were expressed about visitation included the recognition that for fathers to be able to establish a meaningful relationship with a child more than a visit every other weekend is required.¹ It is important for children to have a female and male parent role model in their lives and, therefore, it is important for the courts to create orders that achieve that end. A noncustodial parent testified that being a visitor in the life of your own child gives feelings of low self-esteem to the noncustodial parent.² Several speakers wanted the term "visitation" to be changed to something more positive and meaningful.³

Custodial parents agreed on the importance of the continuing relationships of the child and a fit noncustodial parent. Visitation should be treated as a serious obligation owed to the child, rather than as an option to be exercised by the noncustodial parent when it suits the noncustodial parent to do so.⁴

I. Some courts use a standardized visitation schedule regardless of the personal circumstances of the parties, which may result in discrimination against men who are usually the noncustodial parents.

One noncustodial father testified that the use of standard visitation orders defeats the attempt to do what is best for the children. He

1. *Macon Public Hearing Before the Commission on Gender Bias in the Judicial System* 58 (Mar. 16, 1990).

2. *Atlanta Public Hearing Before the Commission on Gender Bias in the Judicial System* 207-208, 225 (Aug. 3, 1990) [hereinafter *Atlanta Public Hearing II*].

3. *Columbus Public Hearing Before the Commission on Gender Bias in the Judicial System* 115 (Oct. 20, 1989).

4. See Jessica Pearson & Nancy Thoennes, *Supporting Children After Divorce: The Influence of Custody on Support Levels and Payments*, 22 FAM. L.Q. 319, 338 (1988); Report of Georgia Commission on Custody and Visitation to Georgia Commission on Child Support (Sept. 4, 1985).

recommended that the court make individualized orders appropriate to the particular case.

Attorneys reported that standard practice for some attorneys and judges included the routine award of visitation on alternate weekends, school holidays, with two to four weeks in the summer. The reluctance or inability of the court to fashion a more tailored arrangement was attributed to the exigencies of time and limited legal and judicial resources to craft a more tailored arrangement. However, testimony also made clear that it is difficult to create a visitation schedule that is satisfactory for a lifetime. The limitations of visitation orders most often reflected the inability of the parents to reach accord.⁵

II. Noncustodial parents, primarily fathers, are sometimes disadvantaged in the allotment of visitation.

Some testimony revealed that culturally based notions about men and women sometimes result in disadvantage to fathers who desire to exercise more liberal visitation privileges than those granted by the court.

For example, a summary of a Fayette County court proceeding states that the court would not allow overnight visitation for a very young child because "who would change the diapers?"⁶ In a similar case, a Cobb County judge ordered that the visitation be under the supervision of the mother.⁷

On the other hand, a custodial mother testified that generous visitation rights interfere with the ability of the custodian to form a new family for the child.⁸

III. Men's violence toward women and children is sometimes given insufficient weight in visitation decisions.

Witnesses before the Commission urged that allegations of spousal or child abuse should receive adequate weight in consideration by the court in awarding visitation privileges.⁹ Prejudice against the validity of accusations of violence and abuse, and assumptions that such charges were false, were reported. This led to visitation awards which disregarded these accusations and endangered the custodial parent and possibly the child.¹⁰

5. *Atlanta Public Hearing Before the Commission on Gender Bias in the Judicial System* pt. 1, 8-9 (Sept. 22-23, 1989) [hereinafter *Atlanta Public Hearing I*].

6. Written Summary of Case from Fayette Co. (Apr. 1990).

7. *Gilson v. Gilson*, No. 89-14029-18 (Cobb Super. Ct. Feb. 13, 1991).

8. *Rome Public Hearing Before the Commission on Gender Bias in the Judicial System* (Feb. 16, 1990).

9. *Atlanta Public Hearing II*, *supra* note 2, at 27.

10. *Atlanta Public Hearing I*, *supra* note 5, pt. 2, at 26; *see supra*, section on

A custodial mother wrote that the judicial system sends mixed messages to abusing fathers in that the criminal system may be prosecuting him for abuse of the children while the civil system is threatening the mother with contempt for refusal to comply with the court's order to allow visitation.¹¹ Concern was also expressed that judges did not give sufficient weight to the alcohol consumption or drug usage of noncustodial parents. It was suggested that visitation be supervised where either drugs or alcohol has been a problem.¹²

IV. Visitation rights have not been as vigorously enforced by courts as child support orders.

The Commission received testimony alleging gender bias in some courts' reluctance to enforce visitation orders vigorously. Some parents asserted that their child's right to receive visitation did not reflect the protection accorded to the child's right to receive child support.¹³ Others alleged that visitation was used as a weapon to effect concessions or compliance.¹⁴ Finally, some parents complained that the court did not force noncustodial parents to exercise visitation. Concerns were expressed that attorneys were not assertive enough in advising their clients in this area and that a more responsible role by the attorneys would preclude the necessity for judicial intervention.¹⁵

In an article by a Texas father, the writer argued that the system is not gender neutral in that it will enforce support awards (usually held by mothers) by the use of the contempt power, frequently to include incarceration, but will not enforce visitation rights (usually held by fathers) with the same severity.¹⁶ This theme of no sanction for interfering with visitation was repeated a number of times at the hearings, including in a case summary from a Gwinnett court,¹⁷ and a statement from an attorney that she had never seen a contempt order for violating visitation rights.¹⁸ An Atlanta noncustodial father

Domestic Violence, p. 546.

11. Letter from Dara Page of Douglasville, Georgia, to the Georgia Commission on Gender Bias in the Judicial System (Jan. 10, 1990).

12. *Rome Public Hearing*, *supra* note 8.

13. *Athens Public Hearing Before the Commission on Gender Bias in the Judicial System* 19 (Dec. 1, 1990); *Atlanta Public Hearing I*, *supra* note 5, pt. 1, at 161; *Atlanta Public Hearing II*, *supra* note 2, at 89-90.

14. Letter from Patricia Dabbs to the Commission (Feb. 8, 1990).

15. *Id.*

16. Michael Diehl, *A Texas Father Speaks Out for Equal Rights: A Survey of Discrimination*, TEX. ST. BAR SEC. REP. (Tex. St. Bar Ass'n Fam. L. Sec.), Spring 1982.

17. *Quinones v. Shaffer*, Nos. 90-1551, -1552, -1553 (Gwinnett Juv. Ct. May 3, 1991).

18. *Columbus Public Hearing*, *supra* note 3, at 109.

asserted that at most, mothers get slapped on the wrist for interfering with visitation.¹⁹ A grandmother testified that in her experience courts were not willing to enforce rights of visitation of grandparents.²⁰

In contrast, one custodial parent wrote that the threat of contempt was used by the noncustodial parent to harass her,²¹ and an Atlanta attorney testified that he had heard a judge tell the custodial mother that if she did not honor the father's right of visitation, the judge would consider that refusal a substantial change of circumstance sufficient to award a change of custody.²²

Several custodial parents testified that their concern was with the failure of the noncustodial parent to exercise the rights of visitation. These speakers felt that the noncustodial parent had a duty to the child to visit and that the failure to discharge the duty should be sanctioned.²³

V. One of the leading factors cited to explain nonpayment of child support is the interference with the noncustodial parent's visitation rights by the custodial parent.

A report of the Texas Children's Rights Coalition stated that noncustodial parents make a deliberate choice not to pay support in only 1.9% of those cases in which visitation rights are honored by the custodial parent. One father testified that support payments are linked positively to those fathers who exercise their rights of visitation.²⁴

VI. Absent agreement of the parties, the custodial parent may remove the child from the community or state without prior approval of the court or noncustodial parent.

In Georgia, absent special provision in the custody order, the removal of the children from the jurisdiction of the court does not trigger a review of the visitation order. A number of other states have amended their laws in recent years to require such review when the custodial parent seeks to move away without the noncustodial parent's consent.

Many attorneys fail to craft custody and visitation agreements which anticipate the contingency of parents moving to different locales. While it is impossible to anticipate every contingency, an agreement may avoid such problems if it anticipates the parents living in the same

19. *Id.* at 115, 116.

20. Daphne Collins, Written Statement to the Commission (Aug. 3, 1990).

21. Letter from Patricia Dabbs, *supra* note 14.

22. *Gainesville Public Hearing Before the Commission on Gender Bias in the Judicial System* 22 (May 18, 1990).

23. Letter from Patricia Dabbs, *supra* note 14.

24. *Atlanta Public Hearing I*, *supra* note 5, pt. 1, at 37-38.

community and a different arrangement if the noncustodial parent resides too far away to visit on alternate weekends.

A father testified that his visitation effectively ended when his former wife removed the children from the state. He recommends that the custodial parent be required to obtain court consent before moving the children from the area.²⁵

FINDINGS

1. Noncustodial parents, primarily fathers, are sometimes disadvantaged in the allotment of visitation.
2. Some courts use a standardized visitation schedule regardless of the personal circumstances of the parties, which may result in discrimination against men who are usually the noncustodial parents.
3. Men's violence toward women and children is sometimes given insufficient weight in visitation decisions.
4. Visitation rights have not been as vigorously enforced by courts as child support orders.
5. One of the leading factors cited to explain nonpayment of child support is the interference with the noncustodial parent's visitation rights by the custodial parent.
6. Absent an agreement of the parties, the custodial parent may remove the child from the community or state without prior approval of the court or noncustodial parent.

RECOMMENDATIONS

For Judges and Attorneys

1. Encourage visitation by the noncustodial parent, specifically by using visitation orders which consider individual circumstances, by vigorously enforcing visitation orders, and by requiring prior consent for moving the children a substantial distance from the noncustodial parent.
2. Understand that abuse of one's spouse or substance abuse can be a basis for termination of visitation or for a requirement of supervised visitation.

25. *Gainesville Public Hearing*, *supra* note 22, at 158.

For the Judiciary

3. Give equal dignity to the enforcement of visitation and support orders. Courts use contempt orders to enforce child support orders and they should likewise hold in contempt those who violate a visitation schedule.
4. Require a review of visitation when a child is removed from the jurisdiction of the court without the consent of the noncustodial parent.
5. Educate the judiciary to the continuing need of children for frequent meaningful contact with the noncustodial parent.
6. Provide for frequent meaningful visitation which allows and encourages the noncustodial parent to maintain a responsible parenting role.

For the Legislature

7. Change Georgia law to provide for review of visitation when the custodial parent relocates the child outside the jurisdiction of the court or the state.
8. Provide parenting classes or information to all divorcing parents to educate them as to the effect of divorce on children, the continuing responsibility of the parents, and the necessity of establishing a parenting plan which places the best interest of the children first.

CHILD SUPPORT

In Georgia, both parents have the duty to support their children until the children reach the age of eighteen or marry. This duty is unaffected by the remarriage of either parent or any earnings of the child. Either parent, custodial or noncustodial, may be ordered to pay child support. In Georgia, child support is viewed as a right of the child and not of the custodial parent; therefore, it may not be waived or contracted away by the custodial parent. The duty of the parent to support the child does not continue after the death of the parent.

In south Georgia, one woman sought to give an overview of the problems surrounding child support when she testified that children of divorce are often in poverty over the long term. This is because support awards, which are marginally adequate at the time of entry, do not get modified to reflect the changing costs of raising a child. Also, the cost to litigate is high. These factors make credit less available to the custodial parent, who tends to have lower wages than the noncustodial parent. Thus, the finances of the family are stable only at low levels. If the custodian is working to make ends meet, then the opportunity for further education and advancement may also be limited.¹ As most custodial parents are mothers, the effect of these problems impacts more heavily on women and is therefore gender-biased. A number of studies were provided that show that the postdivorce economic status of men tends to increase while that of women and children tends to decrease.²

I. Child support awards are often inequitable to the custodial parent, usually the child's mother, because they do not reflect a fair assessment of the child's needs and a division of the financial responsibility to the child that is proportional to the parents' income.

One theme that recurred throughout the hearings was that the amount of the support orders is simply too low to provide the support necessary for the children. A writer put it this way:

It is relevant to note that although the bulk of the federal and state efforts are directed at improved enforcement measures, it has been estimated that the amount of money lost as a result of inadequate orders is five times as great as

1. *Columbus Public Hearing Before the Commission on Gender Bias in the Judicial System* 45 (Oct. 20, 1989).

2. See, e.g., LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 262-98 (1985).

the amount of money lost as a result of the failure to collect ordered support.³

An attorney testified that some mothers are in poverty because the middle-class fathers of their children have refused to pay the child support.⁴ Several people testified that they would make the payments ordered if they were satisfied that the funds were being expended for the benefit of the children and not the custodial parent.⁵ One mother wrote that her former husband engaged in self-help in this regard when he purchased a coat for the child and then deducted the cost from the support check that month.⁶ This practice is not allowed under Georgia law.

An Atlanta father testified that there is also gender bias present when the custodial parent is a male. The state will not provide aid to families with dependent children even if the father is unable to adequately provide for the children financially.⁷

II. Awards frequently are inadequate and appear to be based on what the noncustodial parent can comfortably afford rather than on the appropriate standard of living of the children and their needs.

In Georgia, the court considers both parents' ability to pay, taking into account future earnings, and the needs of the child.

One attorney stated that society tolerates men walking away from the financial responsibility to children as evidenced by understaffing of child support recovery units, inadequate initial awards, and lax enforcement.⁸ Two different attorneys testified that even if the support award is not adequate to support the child, it is important to bear in mind that if the award is unreasonably high in light of the ability of the noncustodian to pay, then the award will not be paid.⁹ A custodial mother said that the most important thing is the standard of living of the child after the divorce, not the standard of living of the noncustodial parent.¹⁰

3. Jessica Pearson & Nancy Thoennes, *Supporting Children After Divorce: The Influence of Custody on Support Levels and Payments*, 22 FAM. L.Q. 319, 338 (1988).

4. *Atlanta Public Hearing Before the Commission on Gender Bias in the Judicial System* 179 (Aug. 3, 1990) [hereinafter *Atlanta Public Hearing II*].

5. Daphne Collins, *Written Statement to the Georgia Commission on Gender Bias in the Judicial System* (Aug. 3, 1990); *Atlanta Public Hearing Before the Commission on Gender Bias in the Judicial System* pt. 2 (Sept. 22-23, 1989) [hereinafter *Atlanta Public Hearing I*].

6. Letter from Patricia Dabbs to the Commission (Feb. 8, 1990).

7. *Atlanta Public Hearing I*, *supra* note 5, pt. 1, at 162.

8. *Columbus Public Hearing*, *supra* note 1, at 106, 107.

9. *Atlanta Public Hearing I*, *supra* note 5, pt. 1, at 10; *Macon Public Hearing Before the Commission on Gender Bias in the Judicial System* 54 (Mar. 16, 1990).

10. *Atlanta Public Hearing II*, *supra* note 4, at 105.

III. There is inconsistency in child support awards, even among cases involving similar facts. The 1989 child support guidelines appear to have led to increases in the amount of child support orders and greater uniformity in awards, though inconsistencies still exist.

Evidence was introduced about Georgia's recent adoption of child support guidelines. One father testified that the gross income model used by the statute is not as desirable as the shared income model used in most other states.¹¹ One individual stated that she would prefer that the guidelines apply to net rather than gross income.¹² An attorney testified that the model adopted has the virtue of simplicity and will be reviewed in 1991.¹³ These impressions were echoed by a judge who had participated in the creation of the statute. He stated that, although not specifically stated, the guidelines do require that both parents continue to support the children as they did during the marriage, and that the goal of the statute was to keep the child's postdivorce support level the same as that enjoyed during the marriage.¹⁴

While the statutory guidelines clearly authorize use of factors in addition to gross income of the predivorce family unit, such as income of the custodial parent or special needs of the child, it was reported that some judges seem reluctant to allow consideration of these other factors, apparently out of concern for the time it would take.

A child support recovery attorney testified that the guidelines have resulted in uniformity in awards.¹⁵ It was also noted that the guidelines have at least furnished judges unacquainted with the contemporary cost of raising children with a more realistic basis for making their support judgments. Another attorney testified that the guidelines do not work well where the supporting party has more than one family to support; she asserted that courts are unwilling to require the absent parent to get a second job even when the custodial parent is holding down two jobs in an attempt to make ends meet.¹⁶

IV. Women support obligors are held to a lower standard than men, paying less than men would be ordered to pay in similar circumstances.

One noncustodial father testified that there is gender bias in not requiring that noncustodial mothers make child support payments,

11. *Gainesville Public Hearing Before the Commission on Gender Bias in the Judicial System* 133 (May 18, 1990).

12. Collins, *supra* note 5.

13. *Atlanta Public Hearing I*, *supra* note 5, pt. 1, at 174-76.

14. *Gainesville Public Hearing*, *supra* note 11, at 80.

15. *Albany Public Hearing Before the Commission on Gender Bias in the Judicial System* 9 (Jan. 19, 1990).

16. *Atlanta Public Hearing II*, *supra* note 4, at 232-35.

stating that while 99% of noncustodial fathers are required to make support payments, only 37% of noncustodial mothers are required to do so.¹⁷ There was no evidence introduced as to the relative ability to pay of male and female noncustodial parents, but an attorney in north Georgia testified that, in her experience, courts were reluctant to order noncustodial mothers to pay support in situations where a father would have been subject to an order.¹⁸ Another attorney in central Georgia agreed that noncustodial women are not required to pay support equally.¹⁹

V. A plethora of agencies and courts—the Child Support Recovery Unit (CSRU) of the Georgia Department of Human Resources, court-created offices of child support receivers, district attorneys' offices, solicitors' offices and private attorneys—provide child support enforcement services. In some locations, these offices operate well. More often, they operate poorly. The impact of these uncoordinated enforcement mechanisms on custodial parents, mostly women, is often disastrous.

A number of agencies and courts provide child support enforcement services. Theoretically, an action can be prosecuted in any of the following methods, some of them simultaneously:

- A. Child Support Recovery Unit, a division of the Department of Human Resources of the State of Georgia (the custodial parent must assign the case to this agency. Once assigned, any funds collected must be sent to this agency);
- B. CSRUs established by local governments under Code section 15-15-2²⁰;
- C. Solicitors' offices—after the custodial parent has taken out an abandonment warrant pursuant to Code section 19-10-1²¹ (these cases are decided by the state court);
- D. Garnishment petition filed in state court; and
- E. Contempt petitions filed in the superior court.

One attorney testified that the problem for private plaintiffs who opt to use a CSRU is that the attorneys in the unit might settle the claim for back support with the defendant without ever checking with the custodian to see if the settlement is satisfactory. In the experience of the speaker, CSRU personnel were sometimes duped by the obligor and

17. *Atlanta Public Hearing I*, *supra* note 5, pt. 1, at 162.

18. *Atlanta Public Hearing II*, *supra* note 4, at 236.

19. *Griffin Public Hearing Before the Commission on Gender Bias in the Judicial System* 7 (July 13, 1990).

20. O.C.G.A. § 15-15-2 (1990).

21. O.C.G.A. § 19-10-1 (1991).

therefore settled too low on the basis of the erroneous information provided.²²

The Commission was given information about the Michigan Friends of the Court System, in which hearings are limited to the issue of child support enforcement and visitation. Pro se representation and simple procedures with prompt hearing dates are essential. The determinations of the hearing officers have the full effect of law, and the appeal is to a superior court. The Michigan Friends of the Court Council reports an 80% success rate at resolving complaints, and according to the Michigan Department of Health and Human Services, Michigan collects \$8.33 in support for each dollar spent in collection. The majority of the enforcement efforts initiated by the Michigan Friends of the Court were in the form of warning letters and telephone calls.

VI. The CSRU has insufficient staff to collect and enforce support orders in a timely manner. Administrative problems within the CSRU may cause delays of a month or more in collected payments being processed and paid to the custodial parent.

A number of speakers around the state noted that there is a substantial delay between the time money is tendered to the state under the support order and the time at which it is made available to the custodial parent. On occasion, the delay can be months. The speakers' estimates of the length of the delay varied greatly. One speaker stated that the system has recently improved in that payments are now made to custodians four times each month rather than once a month.²³ Another speaker noted that no matter how long the state keeps the money before paying it to the custodian, no interest is paid to the recipient.²⁴ For the CSRU, part of the problem is that it is understaffed. The unit handles more than 250,000 cases a year.²⁵

VII. Some courts are reluctant to enforce child support orders. Others are not uniform in their use of available tools to enforce support.

A CSRU attorney noted that there are many reasons for decisions by fathers not to pay child support, for example, the father has abandoned the child; the father does not have adequate resources or simply does not want to pay; or the custodial mother has interfered with his visitation with the child. Because there are different reasons for not paying, the solutions needed to obtain payment are not the same in all

22. Gainesville Public Hearing, *supra* note 11, at 167.

23. Atlanta Public Hearing II, *supra* note 4, at 79.

24. Gainesville Public Hearing, *supra* note 11, at 165-66.

25. Atlanta Public Hearing I, *supra* note 5, pt. 1, at 167.

cases.²⁶ Several attorneys noted that when the custodial parent is poor, judges sometimes do not appear to take seriously the need to enforce support orders.²⁷ An assistant district attorney testified that, in fact, the state does not place a high priority on enforcing support awards and contempt orders in domestic cases and, therefore, the system discriminates against custodial parents, usually women, by promising that help is available and then not providing it.²⁸

A mother wrote that she had difficulty finding a court that would even take jurisdiction of the issue of support enforcement because she had obtained her divorce and initial order in another state and the attorneys with whom she consulted had all told her that the other state was the one with jurisdiction of the issue.²⁹

VIII. Procedures used by the courts to enforce child support orders sometimes are ineffective or less than optimally efficient.

One attorney testified that, at least for the child support recovery program, the availability of deductions from wages has helped collections.³⁰ Examples of ineffective or inefficient procedures include:

- A. In enforcement proceedings, repeated adjournments granted to nonpaying parents can compromise the custodial parent's employment because of the necessity of numerous court appearances;
- B. Actions for contempt are time-consuming, labor-intensive, and expensive means to enforce support, and they are not always effective and often create additional difficulties for custodial mothers seeking support;³¹
- C. In an effective enforcement system, jailing must be used to punish those who do not respond to other sanctions, but some courts are reluctant to use jailing as a sanction;³²
- D. Court child support receiver offices, created under Code section 15-15-2, can provide an efficient, cost-effective mechanism for enforcing child support orders:³³ the recipient is represented by the receiver, who keeps an

26. *Id.*

27. *Atlanta Public Hearing II*, *supra* note 4, at 232-42; *Columbus Public Hearing*, *supra* note 1, at 95-111; *Athens Public Hearing Before the Commission on Gender Bias in the Judicial System* 39-55 (Dec. 1, 1989).

28. *Athens Public Hearing*, *supra* note 27, at 40.

29. Letter from Joy Holcomb to the Commission (Mar. 18, 1990).

30. *Albany Public Hearing*, *supra* note 15, at 9-10.

31. *Macon Public Hearing*, *supra* note 9, at 63.

32. *Atlanta Public Hearing I*, *supra* note 5, pt. 1, at 170.

33. *Albany Public Hearing*, *supra* note 15, at 8.

accurate record for arrearage, and the financially strained custodial parent does not have to hire a lawyer to enforce the child support; and

- E. Income deduction is an effective means of enforcing support orders, but Georgia courts are authorized to order income deduction when there is no arrearage only in CSRU cases. In 1994, federal law will require that all orders for child support be subject to immediate income deduction whether an arrearage exists and that all child support payments be paid through CSRU.

IX. While the CSRU may intercept tax refunds, there is no statutory authorization for a court to order the interception of tax refunds.

X. Visitation problems are improperly considered by some courts as justification for not enforcing child support.

One speaker argued that the most effective way to assure that support orders are paid is to enforce visitation rights strictly. Reports were sent to the Commission asserting that in cases in which visitation was not interfered with by the custodial parent the payment of support was superior to that in other cases. One speaker suggested that there is gender bias present when the state is willing to enforce support orders, generally payable to women, but not willing to enforce rights of visitation, which are generally held by men.³⁴

XI. Child support awards rarely are designed to keep up with inflation or with normal changes that occur over time.

Child support may be modified upon a showing of a change in income and financial status or a change in the needs of the child. A parent may not waive the child's right to increased support.

One writer noted that to go to court to get an inflation adjustment for an award may cost more than the adjustment, making the request for the adjustment self-defeating. A suggested remedy is to index awards to the Consumer Price Index with the payor having the obligation to prove that the automatic increase should not apply in a particular time period.³⁵

34. See section on Visitation, *supra* p. 673.

35. Letter from Sandy Jewell to the Commission (May 29, 1990).

XII. In some courts, delays in awarding child support, denial of retroactive support awards, and denial of adequate attorney's fees contribute to the impoverishment of custodial parents, usually mothers.

Some judges often decline to impose fees, costs, and interest in contempt hearings, causing attorneys to be reluctant to handle child support enforcement cases. Georgia law provides for an award of attorney's fees if a party is found to be in contempt of an order, but these awards are not frequently made or are insufficient to compensate the custodial parent's lawyer, making it difficult to obtain counsel. Preparation for a contempt hearing can be time consuming for the lawyer, who may never be paid for valuable services. Some bar associations have created pro bono programs to address this problem.

XIII. Custodial parents often have inadequate resources to retain counsel to assist in enforcing child support awards.

A person not in poverty may be unable to hire an attorney even though the purpose of the hiring is to obtain money necessary to support the family.³⁶ Lack of funds or credit often preclude the hiring of competent counsel. If the court does not award temporary attorney's fees to the spouse seeking child support, continued prosecution of the claim may be difficult, if not impossible.

Several people testified that the expense of going to court to enforce the awards that have been entered makes the awards meaningless. Some court systems have addressed this issue by requiring that child support payments be paid through a county-created child support receiver unit, which keeps accurate payment records and initiates enforcement proceedings at no cost to the recipient. Child support payments are usually processed and sent to the custodial parent within twenty-four hours. Not only have these units resulted in Georgia children being adequately supported but also have resulted in fewer and more efficient contempt hearings and in greater judicial efficiency in an overburdened judicial system.

XIV. Noncustodial parents who suffer a reduction in their income often have inadequate resources to retain counsel to obtain modification of awards.

There appear to be few, if any, programs which offer free or reduced fees to noncustodial parents who can no longer pay the ordered child support. The arrearage on the amounts awarded continues to accrue until modified by court order even if the payor is not in willful

36. Letter from Sandy Jewell to the Commission (Mar. 14, 1990).

contempt and if immediate payment is ordered. This puts some parents into tremendous debt which may require years to pay off.

XV. Some children are not supported by their fathers because the fathers are not known.

A CSRU staff person testified that major problems in obtaining support for clients of the CSRU is that the father of an illegitimate child may be unknown. Another major problem is trying to enforce support when the father has abandoned the child and his whereabouts are unknown.³⁷ State and federal agencies should establish a system for finding wage earners who owe a duty to support their children.

XVI. Support awards end when the child achieves majority at the age of eighteen even though this may be while the child is still in high school and remains economically dependent on the parents.

There was testimony that awarding support only when the child is a minor is not adequate if the child becomes an adult while still in high school and remains dependent on parents for economic support. This inadequacy also is evident in families in which the child goes to college or vocational training after reaching the age of majority. The payor parent can agree to contribute to higher education or training, but the court currently cannot order those payments. When that happens, the cost falls on the custodial parent, who is often the mother. One suggested solution for this problem was that alimony be awarded to continue until the child graduates from high school. Although the legal obligation of both parents to support ends with majority, the reality is that the custodial parent continues to support the child until the child becomes economically independent.³⁸ A child of a divorced family is not given the same opportunities to attain higher education or training as a child whose parents remain married.

FINDINGS

1. Child support awards are often inequitable to the custodial parent, usually the child's mother, because they do not reflect a fair assessment of the child's needs and a division of the financial responsibility to the child which is proportional to the parents' income.
2. Awards frequently are inadequate and appear to be based on what the noncustodial parent can comfortably afford rather than the standard of living of the children and their needs.

37. *Atlanta Public Hearing II*, *supra* note 4, at 74.

38. *Atlanta Public Hearing I*, *supra* note 5, pt. 1, at 14-16.

3. There is inconsistency in child support awards, even among cases involving similar facts. The 1989 child support guidelines appear to have led to increases in the amount of child support orders and greater uniformity in awards, though inconsistencies still exist.
4. Women support obligors, if ordered to pay child support at all, are held to a lower standard than men, paying less than men would be ordered to pay in similar circumstances.
5. A plethora of agencies and courts—the Child Support Recovery Unit of the Georgia Department of Human Resources, court created offices of child support receivers, district attorneys' offices, solicitors' offices, and private attorneys—provide child support enforcement services. In some locations these offices operate well. More often, they operate poorly. The impact of these uncoordinated enforcement mechanisms on custodial parents, mostly women, is often detrimental.
6. The CSRU has insufficient staff to collect and enforce support orders in a timely manner. Administrative problems within the CSRU may cause delays of a month or more in collected payments being processed and paid to the custodial parent.
7. Some courts are reluctant to enforce child support orders. Others are not uniform in their use of available remedies to enforce support.
8. Procedures used by the courts to enforce child support orders are ineffective or less than optimally efficient.
9. While the CSRU may intercept tax refunds, there is no statutory authorization for a court to order the interception of tax refunds.
10. Visitation problems are improperly considered by some courts as justification for not enforcing child support.
11. Child support awards are virtually never designed to keep up with inflation or with normal changes that occur over time.
13. Custodial parents often have inadequate resources to retain counsel to assist in enforcing child support awards.
14. Noncustodial parents who suffer a reduction in their income often have inadequate resources to retain counsel to obtain modification of awards.
15. Some judges often decline to impose fees, costs, and interest in contempt hearings, causing attorneys to be reluctant to handle child support enforcement cases.
16. Some children are not supported by their fathers because the fathers are not known.

17. Support awards end when the child achieves majority at the age of eighteen even though this may be while the child is still in high school and remains economically dependent on the parents.

18. A payor of child support cannot be ordered to contribute to the child's college education, possibly depriving the child of opportunities available to children of intact families.

RECOMMENDATIONS

For the Judiciary

1. Take necessary steps to assure that judges are familiar with:
 - a. Current, accurate information about the costs of child rearing, the costs and availability of child care, and other statistical and social data essential in making realistic child support awards;
 - b. The economic consequences of divorce from the standpoint of ensuring that parents' financial contributions to child support are proportional to each party's economic resources; and
 - c. All available enforcement systems.
2. Develop and maintain a uniform system for rapid determination and enforcement of temporary awards of child support.
3. Make child support awards retroactive to the date of the filing of the motion for support in the absence of a compelling reason to do otherwise.
4. Conduct a study of child support cases to determine:
 - a. The percentage of cases in which the custodial parent has difficulty enforcing the child support order;
 - b. Enforcement systems and their effectiveness; and
 - c. The reasons other available enforcement systems were not pursued.
5. Study whether or not each court would benefit from the services of a court child support receiver's office as authorized by Code section 15-15-2.
6. Meet non-payment of child support orders with predictable sanctions including jail when appropriate.

7. Continue to be aware of the difficulty economically dependent parents have in obtaining legal representation and the need to award to the economically dependent parent attorney's fees that accurately reflect the value of the work of the attorney.

For the Legislature

8. Enact legislation that makes child support available until graduation from high school even though the child may be eighteen years old.

9. Enact legislation that allows court-ordered payment of tuition for scholastic or vocational training past high school as an award of child support.

10. Enact legislation that makes child support awards retroactive to the date of the filing of the motion, unless it results in an injustice to the payor.

11. Appoint a study committee to investigate and recommend an effective statewide mechanism for enforcing child support awards. Some suggestions the Commission should consider include:

a. Coordinate the array of child support enforcement systems so that custodial parents have access to inexpensive, rapid enforcement and noncustodial parents are not harassed by multiple proceedings;

b. Investigate the procedures used by the CSRU for the collection of money with a goal of eliminating delays within CSRU;

c. Require the CSRU to pay interest on child support monies to the recipients;

d. Make child support awards subject to annual cost-of-living adjustments to keep up with inflation and normal changes that occur over time;

e. Make income-deduction orders automatic at the time the support order is entered;

f. Authorize state tax refund intercepts by the courts in all child support cases;

g. Provide counsel for indigent parents in child support modification and enforcement proceedings;

h. Institute an administrative hearing system modeled on the Michigan Friends of the Court System; and

i. Enact legislation which allows courts to order wage assignments, continuing garnishments, and interception of tax refund checks.

For Bar Associations (including state, local and specialty bar associations)

11. Provide, through continuing legal education programs, information similar to that recommended for judges:

a. About the award and enforcement of child support;

b. About the hardship to children and custodial parents when child support awards are insufficient and unenforced; and

c. About the need for pro bono representation in domestic relations cases.

12. Consider sponsoring pro bono projects to provide counsel for both parents in child support modifications and enforcement proceedings.

For Law Schools

13. Include in family law courses information about the award and enforcement of child support, the hardship to children and custodial parents when child support awards are insufficient and unenforced, and the detrimental effect on our society when we do not adequately provide for our children.

ALIMONY AND EQUITABLE DISTRIBUTION OF PROPERTY

Georgia statutes set forth eight factors to be considered in awarding alimony: the standard of living during the marriage; the duration of the marriage; the age of the parties; the financial resources of the parties; the time needed to train for and obtain a job; the contribution of each spouse to the marriage (including homemaking); the condition of the parties, including earning capacity and fixed liabilities; and any factors deemed relevant by the court.¹ This list includes factors that are designed to assist the court in determining the amount that will be necessary to make a dependent spouse independent; factors that will assure that the dependent spouse is financially secure, that is, that the needs of the spouse are met; and factors that affect the ability of the obligor spouse to pay.

In any given factual setting, it may be that the court cannot rehabilitate a dependent spouse while at the same time meeting the needs of the dependent spouse within the ability of the obligor spouse to pay. This set of competing goals makes it difficult for the users of the legal system to predict with any certainty what amount of alimony will be awarded in a given case. Alimony may be denied to a spouse where the reason for the divorce is that party's adultery.² Any alimony that is awarded ends with the remarriage of the recipient spouse, unless otherwise stated in the decree. If the recipient is cohabiting with a third party in a meretricious relationship, the court may terminate the alimony at any time.³ Periodic alimony also ends if the payor dies, but lump-sum alimony may be collected from the estate. Modification of alimony may occur no sooner than two years after the initial award. Thereafter, modification is made only where there is a change in the financial status of either party.

Equitable distribution was adopted in Georgia by the supreme court in the case of *Stokes v. Stokes*⁴ and is applicable in divorce but not death (a surviving spouse may obtain one year's support from the estate if it has adequate assets). Basically, the property received or acquired by the parties during their marriage is subject to equitable division. The separate property of either spouse (for example, the property each brought into the marriage and the property acquired by gift or inheritance during the marriage) is not subject to equitable division though it may be taken into account in determining what division of the property acquired during the marriage is equitable. In property

1. O.C.G.A. § 19-6-5 (1991).

2. *Id.* § 19-6-1(b).

3. *Id.*

4. 246 Ga. 765, 273 S.E.2d 169 (1980).

division, the jury may consider the estate of each party, prior marriages (and presumably obligations), and the contributions of each spouse to the family unit. The conduct of the parties during the marriage is also relevant. The parties may agree on the property division, but the court can nevertheless check for fairness, complete disclosure, and a fair valuation of assets.

I. Women generally experience a much larger decrease in their standard of living after a divorce than do men. Men often leave the marriage with an enhanced earning capacity, while women leave with a severely diminished and declining earning capacity.

A number of studies have been conducted which show that women of divorce experience a decline in their standard of living while men experience an increase in theirs. A number of factors contribute to the changes, including the increasing costs of raising children without a commensurate increase in child support, the low wages of women who are generally custodial parents, and the failure of noncustodial parents to make court-ordered payments. Many of these assessments assume that women retain custody of children following divorce. As a consequence of this phenomenon, studies demonstrate that postdivorce families headed by women are one of the fastest growing segments of those living in poverty.⁵

II. Older women whose marriages end in divorce are more likely either to have abandoned their own aspirations or to have devoted their lives to furthering their spouses' careers. Women who forego careers to become homemakers often have limited opportunities to develop their full potential in the paid labor force. They sometimes are not adequately compensated by application of the present system of alimony and equitable distribution of marital assets.

Two attorneys testified that where one spouse agrees to pay the debts of the marriage as part of the division of property or is obligated to pay the attorney's fees of the other spouse, bankruptcy can intervene to make the value of the order inequitable. When the obligor goes into bankruptcy, the effect is that the debt to the third party is discharged as to that debtor, but not as to the former spouse. This means that the creditor spouse must now pay the third party creditor the debt that the other spouse was ordered to pay. The law is unclear about the ability of the debtor spouse to discharge the obligations owed directly to the other spouse under the decree of divorce as "property settlement."⁶ Another

5. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* (1985); *Atlanta Public Hearing Before the Commission on Gender Bias in the Judicial System* pt. 2, at 20 (Sept. 22-23, 1989) [hereinafter *Atlanta Public Hearing I*].

6. *Macon Public Hearing Before the Commission on Gender Bias in the Judicial*

attorney stated that some courts exhibit gender bias by having the attitude that the property acquired during the marriage "belongs" to the husband and the wife who is seeking a share of the property is trying to take away "his" property.⁷

An ex-wife testified that refusing to award permanent alimony to a wife after a long marriage in which she has not acquired marketable skills promotes the "throw-away society" model which, in her judgment, is detrimental to all family relationships.⁸ Another witness testified that at her divorce trial the judge opened by saying, "I don't know my feelings about child support, but alimony is like feeding hay to a dead horse." In this case, the wife's attorney withdrew rather than continue to represent her in the court because zealous representation might prejudice his future practice.⁹

The evidence demonstrated that few women presently receive alimony of a permanent nature. The majority of alimony currently awarded is rehabilitative alimony which terminates after a few years. This assumes that the former spouse, almost certainly the wife, will acquire a job which will compensate for the lost support of her former spouse. Economic realities tend to disprove this assumption.

III. Some judges and juries minimize or do not recognize the homemaker spouse's contributions to the marital economic partnership by:

A. Awarding minimal, short-term alimony, or no alimony at all to older, long-term, full-time, or part-time homemakers who have little or no chance of becoming self-supporting at a standard of living commensurate with that enjoyed during the marriage.

One attorney testified that rehabilitative alimony should continue for the specified time whether or not the receiving spouse remarries during the stated time. This same attorney testified that the law of alimony has not changed to reflect the real world in the way that the law of equitable distribution has done for property rights.¹⁰

B. Awarding homemaker-wives inequitably small shares of income-generating or business property.

An attorney stated that even where wives have helped in the creation and maintenance of the family business, they are unlikely to

System 54 (Mar. 16, 1990); Gainesville Public Hearing Before the Commission on Gender Bias in the Judicial System 168-69 (May 18, 1990).

7. *Macon Public Hearing, supra* note 6, at 55.

8. *Atlanta Public Hearing Before the Commission on Gender Bias in the Judicial System 112-13 (Aug. 3, 1990) [hereinafter Atlanta Public Hearing II].*

9. *Id.* at 167.

10. *Atlanta Public Hearing I, supra* note 5, pt. 1, at 19, 23.

receive a share of the business because the courts often act as if there is a presumption that the house goes to the wife and the business to the husband.¹¹

C. Awarding spouses no share or an inequitably small share of the value of educational degrees earned during the marriage.

D. Ignoring or undervaluing pension and retirement rights.

One attorney testified that it is almost impossible to get a jury to treat a pension as marital property.¹²

IV. Some trial courts distribute marital assets as property or alimony with a lack of certainty and consistency. This may lead to inequitable property settlements between the parties.

One attorney asserted that settlement in cases reflects the lack of meaningful access to the system and is discriminatory against women because men generally have higher earnings and larger estates than women and so compromise works to their advantage. In addition, men can "wait out" the women because they have the financial ability to support themselves during the pendency of the case.¹³

V. The alimony statute provides that when the spouses' separation is caused by one party's adultery or desertion, alimony shall not be awarded to that party. Because women historically are the ones who must seek alimony, they have been disproportionately affected by findings of fault.

There is no similar provision for the payor spouse, usually the husband, which would require payment of an increased amount of alimony if adultery caused the separation of the parties, although Code section 19-6-1(b) requires the court to receive evidence as to the factual cause of the divorce.¹⁴

VI. Before the adoption of no-fault divorce and equitable distribution, courts often allowed the custodial parent and children to occupy the family home after divorce in addition to receiving support. Today, however, some courts order sale of the family home so that a cash settlement can be made for equitable distribution purposes.

Even with funds from the marital home, the lower pay scale for women impairs their ability to obtain financing for a house subsequent to divorce.

11. *Gainesville Public Hearing*, *supra* note 6, at 169.

12. *Atlanta Public Hearing I*, *supra* note 5, pt. 1, at 22.

13. Letter from Warren Davis to the Georgia Commission on Gender Bias in the Judicial System (Apr. 23, 1990).

14. O.C.G.A. § 19-6-1 (1991).

VII. It is often appropriate for the court to use provisional remedies which ensure assets are not diverted or dissipated.

A woman wrote that she was held in contempt for putting a second mortgage on the house—the equity in which was to be split with her former husband upon sale—and then going into bankruptcy. She felt forced to proceed in this way because her share of the equity was the only asset she had. Further, she stated that the contempt was the result of a personal bias against her because she had questioned the competence of the judge before the Judicial Qualifications Commission.¹⁵

An attorney wrote that some judges will not issue temporary support orders unless there are children involved, thereby discriminating against childless or “empty-nest” long-term homemakers, who are mostly women.¹⁶

VIII. According to U.S. Census Bureau data, the rate of compliance with alimony orders is very low. Enforcing alimony orders can help to insure the future financial security of the alimony recipient.

Alimony recipients are in financial distress and it may be difficult for them to obtain counsel to prosecute their award of alimony. Some counties have required collection and enforcement through a receiver unit established under Code section 15-15-1.¹⁷

IX. Many lawyers will not represent women in divorce cases because women generally have fewer economic resources and, therefore, cannot afford their fees. Without competent counsel, women are disadvantaged in enforcing their rights to alimony, equitable distribution of marital assets, and child support.

X. Economically dependent wives are put at an additional disadvantage because they do not have the resources to pay for experts to value the marital assets.

XI. As a consequence of limited finances, many women are virtually foreclosed from appellate review of trial court decisions. Frequently they cannot afford the trial transcripts or appellate counsel necessary for an appeal.

15. Letter from Lynn R. Oliver to the Commission (Feb. 28, 1990).

16. Letter from Warren Davis, *supra* note 13.

17. O.C.G.A. § 15-15-1 (1990).

FINDINGS

1. Women generally experience a much larger decrease in their standard of living after a divorce than do men. Men often leave the marriage with an enhanced earning capacity, while women leave with a severely diminished and declining earning capacity.
2. Older women whose marriages end in divorce are more likely either to have abandoned their own aspirations or to have devoted their lives to furthering their spouses' careers. Women who forego careers to become homemakers often have limited opportunities to develop their full potential in the paid labor force. They sometimes may not be adequately compensated by application of the present system of alimony and equitable distribution of marital assets.
3. Some judges and juries minimize or do not recognize the homemaker spouse's contributions to the marital economic partnership by:
 - a. Awarding minimal, short-term alimony or no alimony at all to older, long-term, full-time or part-time homemakers who have little or no chance of becoming self-supporting at a standard of living commensurate with that enjoyed during the marriage;
 - b. Awarding homemaker-wives inequitably small shares of income-generating or business property;
 - c. Awarding spouses no share or an inequitably small share of the value of educational degrees earned during the marriage; and
 - d. Ignoring or undervaluing pension and retirement rights.
4. Some trial courts distribute marital assets as property or alimony with a lack of certainty and consistency. This may lead to inequitable property settlements between the parties.
5. The alimony statute provides that when the spouses' separation is caused by one party's adultery or desertion, alimony shall not be awarded to that party. Because women historically are the ones who must seek alimony, they have been disproportionately affected by findings of fault.
6. Before the adoption of no-fault divorce and equitable distribution, courts often allowed the custodial parent and children to occupy the family home after divorce in addition to receiving support. Today, however, some courts order sale of the family home so that a cash settlement can be made for equitable distribution purposes.

7. It is often appropriate for the court to use provisional remedies which ensure assets are not diverted or dissipated.
8. According to U.S. Census Bureau data, the rate of compliance with alimony orders is very low.
9. Many lawyers will not represent women in divorce cases because women generally have fewer economic resources and therefore cannot afford their fees. Without competent counsel, women are disadvantaged in enforcing their right to alimony, equitable distribution of marital assets and child support.
10. Economically dependent wives are put at an additional disadvantage because they do not have the resources to pay for experts to value the marital assets.
11. As a consequence of limited finances, many women are virtually foreclosed from appellate review of trial court decisions. Frequently they cannot afford the trial transcripts or appellate counsel necessary for an appeal.

RECOMMENDATIONS

For the Legislature

1. Study options including but not limited to:
 - a. Providing that the standard of living of the parties during the marriage together with the reasonable needs of the party seeking alimony should be considered when making alimony awards. A reduction in living standards should be shared by both parties;
 - b. Providing that a rebuttable presumption in favor of permanent periodic alimony in long term marriages is appropriate;
 - c. Providing that alimony awards should be retroactive to the filing date of the Rule Nisi unless it results in an injustice to the paying spouse;
 - d. Providing that equitable distribution awards should have findings of fact which include a valuation of the marital assets;
 - e. Providing that a spouse's indirect contribution to non-marital property which causes an appreciation in the value of the property should be considered marital property to the extent of the appreciation;

- f. Providing that attorney's fees and other expenses of litigation should be awarded to the disadvantaged litigant in complex and lengthy litigation;
- g. Establishing alimony guidelines to be used by judges and juries in deciding alimony awards; and
- h. Establishing a standard that temporary alimony and child support should maintain the status quo of the parties to the extent feasible.

For the Judiciary

- 2. Conduct a statewide study to assess and report on how marital assets are divided and the circumstances under which courts award rehabilitative and permanent alimony.
- 3. Ensure that judges are familiar with the statutory provisions governing, and materials relating to, the social and economic considerations relevant to equitable distribution and alimony awards. These materials include studies, statistics, and scholarly commentary on the economic consequences of divorce, women's employment opportunities and pay potential, and the cost of child rearing.
- 4. Provide education on issues concerning the wage-earning potential of middle-aged people who have been economically dependent during a long marriage.
- 5. Provide mandatory training for judges about the job and salary opportunities available to people who are returning to the labor force without recent work experience.
- 6. Ensure speedier awards of temporary alimony.
- 7. Defer the sale of a home pending children's majority, if at all possible, because an order to sell the family home has a particularly strong negative impact on minor children and the custodial parent.
- 8. Use enforcement provisions, such as security interests, bonds, and wage assignments, in financial orders. In addition, judges are urged to impose appropriate civil and criminal penalties for noncompliance with court orders concerning alimony and property division.
- 9. Consider benefits that might result from creating a family law division in circuits with more than five superior court judges sitting in a single county.

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For Bar Associations

10. Develop informational materials about the social and economic considerations relevant to equitable distribution, alimony, and litigation expense awards. These materials should include studies, statistics, and scholarly commentary on the economic consequences of divorce, women's employment opportunities and pay potential, and the costs of child rearing. These materials should be made available to lawyers for use in submissions to courts considering petitions for equitable distribution and maintenance awards.

TREATMENT OF ATTORNEYS, LITIGANTS, AND WITNESSES IN THE COURTROOM

I. *Sexism in the Courtroom*

The court is unique in the extent of power it may legitimately exercise over the lives and livelihood of citizens. Going to court for most people is serious business and often a traumatic experience. Court, with its mysterious procedures and strange language, may be a frightening and intimidating environment. The confidence of witnesses and litigants in and respect for the court is determined in large part by the absence or presence of decorum and professionalism in the courtroom. The treatment accorded attorneys by judges, other attorneys, and court personnel obviously plays a significant role in an attorney's success or failure in the courtroom and affects clients' confidence in an attorney's abilities. The integrity of the judicial system rests in part on the perception that the judiciary exercises its duties with fairness, impartiality, and compassion.

Numerous studies show that courtrooms are not immune to gender bias.¹ Reported discrimination by opposing counsel, judges, and court personnel includes "unwanted attention, demeaning comments of a sexual nature, studiously ignoring a female attorney, and refusal to negotiate because the lawyer was female."² The *ABA Journal* reports that gender bias in the courtroom is not limited to women lawyers. The report concludes that women litigants "have limited access to the courts, are denied credibility, and face a judiciary uninformed about matters integral to many women's welfare."³

To determine whether gender-biased behavior in the courtroom, similar to that found in other jurisdictions, exists in Georgia was one area of inquiry for the Commission. This report examines the accumulated data on the behavior of judges, attorneys, and court personnel toward witnesses and litigants, and attorneys' behavior toward other attorneys in the courtroom setting.

Information on the role of gender bias in Georgia courtrooms came to the Commission from a number of sources: from public hearings held throughout the state, where testimony was presented by attorneys, court personnel, citizens who had been in court, and representatives of

1. Marialisa Calta, *Gender Bias in the Courts*, JUD. CONDUCT REP., Spring 1985, at 1, 5.

2. *Id.*

3. Nancy Blodgett, *I Don't Think Ladies Should Be Lawyers*, A.B.A. J., Dec. 1986, at 48.

public and private organizations regularly having business with the courts; from responses to survey questionnaires sent by the Commission to judges, lawyers, and court personnel; and from reports and letters to the Commission. Hesitancy on the part of some persons to testify in open hearings was accommodated by the Commission in private "listening" sessions. Anecdotal reports, survey responses, and other reports support and buttress each other in the picture of gender bias in Georgia courtrooms.

The Commission's inquiry into gender bias in the courtroom focused on two separate but related areas: the relationship between gender and credibility, and the existence of inappropriate and demeaning conduct in the courtroom. Examination of the data shows that, while gender-biased behaviors are not found in all Georgia courts or in any court all of the time, at times, gender is a determinant of credibility in the courtroom. In addition, gender-biased inappropriate and demeaning conduct is sometimes used by judges, attorneys, and court personnel toward litigants and witnesses and by attorneys toward other attorneys. As a rule the treatment favors males over females, but there are times when males are victims of biased treatment.⁴ Any and all biased treatment which occurs in the court is of concern to the Commission because such treatment is unfair and unacceptable in a judicial system that demands actual as well as perceived impartiality.

II. *Credibility*

Decisions made by courts are based on both the facts and the law which is applicable to the particular matter before the court. In the fact-finding process, credibility of a participant is crucial in determining success or failure or even serious consideration of claims before the court. Whether a person is viewed as believable and as one who should be taken seriously should not be influenced or determined by stereotypic views of gender roles or behaviors. A fact-finding process based on gender considerations is not consistent with a model of justice that requires due process and equal protection of the law for all persons who appear before the court. To the extent that any judge or attorney accords less credibility to the claims of litigants and witnesses because of their gender, the fact-finding process becomes a biased one.

Credibility defined in its fullest sense means whether a person is "believable, capable, convincing, someone to be taken seriously."⁵ While credibility is a concern for both males and females, social science

4. Males as victims of gender-biased treatment by the court is treated more fully in the section of the Commission's report on child custody. See section on Child Custody, *supra* p. 653.

5. *Report of the New York Task Force on Women in the Courts*, 26 FORDHAM URB. L.J. 11, 113-26 (1986-1987) [hereinafter *New York Task Force Report*].

research shows that in a variety of contexts, both males and females perceive females as being less credible than males in all senses of the term, and that recent years have by no means eliminated these attitudes.⁶

Given the fact of women's lesser credibility in society, judges and other court personnel must be sensitive to how little it takes to undermine a woman's authority and status in the courtroom.

In the past five years, task forces, commissions, and committees on gender bias in the judiciary in a number of states and the District of Columbia have found that some judges and attorneys accord less credibility to the claims of females because they are females.⁷ In the report from the New York Task Force, an assemblywoman described stereotypes about females' credibility that she said made reform of sexual assault laws difficult to accomplish.

[W]omen and child victims of sexual offenses have historically not been perceived as people whose testimony is reliable or credible and worthy of belief It has been assumed . . . that children will lie about incest at the urging of mothers seeking to gain advantage in matrimonial action. It has been assumed that women and children have a tendency to fantasize about sexual contact⁸

In the same report a family court judge, responding to the New York Attorneys' Survey, expressed particular concern about the impact of sexual behavior on credibility in paternity cases:

In [f]amily [c]ourt, women are often petitioners, who have the burden of proof, which varies (support, paternity, family offenses). Bias could be present but extremely subtle. I am concerned about attempts to discredit the credibility of women, particularly in paternity cases, based on sexual promiscuity.⁹

The Maryland Committee on Gender Bias in the Courts reported hearing testimony that

6. Michele A. Paludi & Lisa A. Strayer, *What's In an Author's Name? Different Evaluations of Performance as a Function of Author's Name*, 12 *SEX ROLES* 353 (1985); Lynn H. Schafran, *Eve, Mary, Superwoman: How Stereotypes About Women Influence Judges*, *JUDGES' J.*, Winter 1985, at 12.

7. See, e.g., Arizona Coalition of Minorities and Women in the Law; Colorado Gender Bias Task Force; Florida Gender Bias Task Force; Maryland Special Joint Committee on Gender Bias in the Courts; Michigan Task Force in Gender Issues in the Court; New Jersey Supreme Court Task Force on Women in the Courts (partial list).

8. *New York Task Force Report*, *supra* note 5, at 116 (citation omitted).

9. *Id.* (statement of thirty-nine year old rural male family court judge).

Often female parties and witnesses are treated disparagingly and their credibility is undermined by trivializing or sexually oriented forms of address. On some occasions their testimony is given little weight solely because of gender.

. . . women parties and witnesses too often have to hear judges talk about their gender when it has no pertinence to the proceedings.¹⁰

Examples from the Maryland Report give specifics of such behaviors:

A criminal defendant reported that a judge accused her of promiscuity when the issue before the court was whether to suspend the balance of her sentence because she had been found HIV positive. The custodial parent in a child support case reported that the judge accused her of being unfit to have custody of her older children because she had given birth to an illegitimate child. In a divorce case not involving adultery, the wife is asked if she had been "chaste."¹¹

The Maryland Committee also reported that some witnesses felt the testimony of female witnesses and experts was not believed and that judges imposed a higher burden of proof on women than on men.¹² From survey responses and testimony at open forums, the Committee reported hearing about numerous incidents indicating that some judges still treat female lawyers differently from their male counterparts, and that the differences make the job of representing clients more difficult for females than males.

The Maryland Report also noted judges' perceptions of the extent of gender-biased courtroom behavior differed from most other persons who gave information. The Committee concluded that

Despite the consistent denials by judges in response to the Committee's survey, it is clear that many observers, both male and female, agree that women litigants and witnesses too often receive different and worse treatment than men. This differential treatment does not go unnoticed; it undermines respect for the law and convinces people that they can be deprived of a fair and impartial hearing because of their sex.¹³

10. REPORT OF THE MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS 111 (1989) (citation omitted) [hereinafter MARYLAND REPORT].

11. *Id.*

12. *Id.* at 114.

13. *Id.*

The situation in Georgia courts appears to differ little from that reported in other states. Responses to the Georgia Commission's questionnaire as well as public hearing testimony revealed the existence of a gender-biased credibility gap in Georgia courts, one that is perceived somewhat differently by judges, attorneys, and court personnel. Judges were more likely to reject the suggestion that there is gender-based inequity in the courtroom. Other court personnel, court clerks and court reporters, while indicating that such bias is not extensive, did report courts in which credibility bias exists. Attorneys, as a group, perceived such bias as widespread and as having a significant impact on court proceedings. There was also a significant difference between how males and females perceived the credibility issue. Females were significantly more likely to perceive such a bias than their male counterparts.

Despite some differences found in perceptions on the credibility issues, a majority of the responding attorneys and judges answered either "always," "sometimes," or "rarely" to the following statements on the Commission's survey questionnaires: "Judges appear to believe domestic violence is not a crime," and "Assault charges are not treated seriously when domestic relations cases are pending." Less than half the judges and attorneys answered "never." Similar responses were found to a question on the credibility of rape victims. These responses reveal a strong perception by both the bar and the judiciary that, at least in rape and in domestic violence cases, a female comes to court in Georgia bearing a credibility burden, a burden based on a stereotypic view of gender that does not affect males in the same way. The effect of such undue skepticism frequently places female litigants in a position where they must offer more evidence than do male litigants. In cases involving domestic violence and rape, female victims must often defend themselves against suggestions and accusations that they themselves provoked the act or are exaggerating the extent of the violence. Both rape and domestic violence are treated more extensively in other sections of this report.

A credibility gap also exists when less weight is given to female expert witnesses' testimony, than to that of male expert witnesses, and when judges give less weight to the argument of female attorneys than to their male counterparts.¹⁴ An explanation for these behaviors might be found in the fact that many male judges and lawyers have gone through law school and have practiced or practice law with no or few

14. Georgia Commission on Gender Bias in the Judicial System Survey, *infra* Appendix A (statements "judges appear to give less weight to the testimony of female experts than to that of male experts" and "judges appear to require more evidence for a female litigant to prove her case than for a male litigant" asked of all sampled populations).

women as colleagues. They often only know working women as support staff and have difficulty accepting women as attorneys, expert witnesses, and judges.¹⁵ A woman's looks and demeanor may not match what a lawyer or expert is supposed to be. However, any treatment of women professionals by judges and attorneys that does not reflect their status and expertise in the same manner in which male professionals are treated has no place in the courtroom.

The following comments made in the Commission's open hearings and in written responses to the survey questionnaire illustrate differences in perceptions as well as stereotypic views of gender and gender roles:

The particular case facts are irrelevant. Older male judges go along with arguments of male counsel 90% of the time—especially when the opposing attorney is older. (white female attorney)

A father, if he is really a man, ought to be the one leading that family and he ought to be the one making the decisions about what his wife does and what his child does. (white male attorney reporting a judge's statement)

Judges seem to help or be more favorable to female attorneys. (white male attorney)

Almost any divorce/custody action can be stereotyped. (white male attorney)

I would identify the case specifically, but I'm afraid to be personally identified. (white female attorney)

As an attorney, I have to be twice as good to get half the credit my male counterparts get. (white female attorney)

Judges do not like domestic disputes; they tend to prejudge based on improper assertions which are to some degree gender-related. (white female magistrate)

Many female attorneys are inexperienced. Troubles with the judge arise from this problem, not gender; although I'm sure they arrive at a different conclusion. (superior court judge)

[Female attorneys display] a 'chip on the shoulder' approach which shows she expects to prevail because she is a female, and denial of her expectation is simply chauvinistic reaction of the court. (superior court judge)

Female attorneys are overly sensitive about gender. (superior court judge)

I see no [gender bias] in my circuit. (superior court judge)

15. Schafran, *supra* note 6.

I suspect that much of the alleged gender bias is a product of the investigation of some unusually sensitive women. (superior court judge)

Female victims having to testify, especially in sex cases, seem to be victimized over again. (court clerk)

Things are just fine in my courtroom. Thank you. (female court reporter)

There is an overwhelming presumption in custody suits that children, particularly of tender years, are better off in the custody of the mother. (male magistrate)

The reception women lawyers receive is better now than it ever has been; however, I still believe prejudice exists, so in the minds of a jury, women lawyers do a disservice to their clients representing them. (female court reporter)

A different problem in courtroom credibility was brought before the Commission by fathers and father advocates who believe fathers are denied custody of their children because of gender-biased stereotypic views of parenting. Fathers testifying before the Commission believe some judges see the father's role only in terms of providing money and mothers as the only logical custodians of minor children. Consequently, a maternal preference is manifested in the courts of Georgia, according to the fathers, that is almost impossible to overcome. The Commission's survey included two statements on predisposition in child custody cases: "Custody awards to mothers are apparently based on the assumption that children belong with their mothers," and "The Courts give fair and serious consideration to fathers who actively seek custody." Responses to the first statement show more lawyers than judges perceive there is never an assumption favoring the mother (judges 27.8% and lawyers 0.6% "never"). Judges, to a far greater extent than lawyers, believe fair consideration is always given to the father (judges 69.5% and lawyers 0.0% "always"). Female attorneys more than male attorneys believe mothers receive fair consideration. The perception on the part of many attorneys of maternal preference by the court, according to witnesses before the Commission, leads attorneys to discourage fathers from seeking custody of their children. No data is available on how many fathers, in fact, seek custody of their children; the number is considered to be small. If, however, there is a chilling effect on a father's right to seek custody of his children in Georgia because of a perceived reliance by some judges on stereotypic attitudes about parenting roles which place fathers at a disadvantage, the impartial treatment every citizen has a right to expect from the courts is being denied because of gender-biased discrimination.

III. *Inappropriate and Demeaning Conduct*

As pointed out in the Maryland Report, “[w]hen the appearance and sexual activity of a female litigant, witness, or attorney becomes the focus of the court’s attention, whether by comments from the judge or the lawyer, the impartiality of the court must come into question.”¹⁶

Focusing inappropriate attention on a woman’s body and sexuality is only one way that women in the courtroom are treated differently than men. They may also be addressed more informally; as a result, they are made to feel less important. Terms, at times applied to females in court, such as “young lady,” “hon,” “sweetie,” “pretty little lady,” and “babe,” support the stereotype of females as properly belonging only in the “domestic sphere” and lessen women’s credibility in the public sphere. Sexist jokes and hostile remarks directed to women attorneys or made in their presence may undermine both their credibility and professionalism, behavior which in turn may reflect on how well their client is represented. Such remarks, therefore, are much more than personal insults causing embarrassment and humiliation and should be deemed an affront to the dignity of the court. It should be noted that the Commission uncovered at least one incident in which a female judge, while in court, referred to a male attorney as “baby.”

That the presence or absence of decorum and professionalism influences confidence and respect for the court is obvious. The general manner of conduct, the attitude, and receptiveness of judges and other court personnel to those persons who appear before the court play an important role in the creation of an environment in which fairness and equity is the norm.

Although overt, sexist treatment is no longer viewed as acceptable behavior in the courts of Georgia, the Commission received numerous reports of inappropriate and demeaning conduct directed toward females in the courts. Testimony given in public hearings, survey responses, and other information furnished to the Commission gave specifics of offensive incidents in which female litigants, witnesses, and attorneys were derided, belittled, and demeaned. The Commission also heard testimony from fathers who reported being belittled and demeaned by judges when they attempted to gain custody of their children.

Eight questions were asked on the Georgia Commission’s survey relating to inappropriate courtroom conduct. The questions were whether

- 1) women are asked if they are attorneys when men are not asked by judges, by counsel, or by court personnel;

16. MARYLAND REPORT, *supra* note 10, at 113.

- 2) women employees (attorneys) are addressed by first names or terms of endearment while men employees (attorneys) are addressed by surnames or titles by judges, by counsel, or by personnel;
- 3) women litigants or witnesses are addressed by first names or terms of endearment when men are addressed by surnames or titles by judges, by counsel, or by personnel;
- 4) comments are made about the personal appearance of women employees (attorneys) in the court system when no such comments are made about men by judges, by counsel, or by personnel;
- 5) comments are made about the personal appearance of women litigants when no such comments are made about men by judges, by counsel, or by personnel;
- 6) sexist remarks or jokes are made in court or in chambers by judges, by counsel, or by personnel;
- 7) judges appear to give less weight to the testimony of female attorneys' arguments than to those of male attorneys; and
- 8) judges appear to give less weight to the testimony of female experts than to that of male experts.

Responses to the questions show that the prevalence and impact of inappropriate and demeaning conduct toward females in the courtroom are perceived very differently by judges, attorneys, and other court personnel, and by males and females. The differences are similar to those found in responses to the questions on credibility discussed in the preceding section. Judges were less likely to be aware of inappropriate and demeaning conduct toward females; attorneys, and female attorneys in particular, were the most likely to be aware of such behavior. Inappropriate conduct and comments were attributed more often to male attorneys than to judges or court personnel.

A comparison of mean scores for these eight questions¹⁷ shows female attorneys and female court employees consistently having the highest mean scores, indicating a much higher perception of gender-biased behaviors in the courtroom. In no instance did the mean scores of female attorneys fall below 2.12 for these questions. Responses by the female respondents in general reflect an acute awareness of differences in the manner in which they are treated. On the other hand, low scores on these questions are noted in the responses by judges, especially

17. To calculate the mean score, responses were ranked from 1 to 5: "never," "rarely," "sometimes," "often," "always," respectively. The total score for a population was calculated by dividing the sum of the rankings by the number of responses for each population. The category "don't know" was eliminated from the calculation of mean scores.

superior court judges, who maintain a high degree of uniformity in their responses and consistently reject the idea of gender bias in their courts more strongly than do other sampled populations. The narrow range of mean scores for superior court judges is illustrative of their general agreement. The mean scores for superior court judges ranged from 1.02 (for the question on less weight given to female attorney's arguments) to 1.67 (on the question of sexist remarks). Other low comparative mean scores are found in juvenile court judges (ranging from 1.02 to 1.87), male magistrate judges (ranging from 1.03 to 1.66), female magistrate judges (ranging from 1.04 to 2.16), and male and female probate judges (ranging from 1.13 to 1.69 and 1.13 to 1.76, respectively). This comparison of mean scores shows female attorneys with the highest scores, followed by female court employees. Judges have lower scores, especially superior court judges, who have the lowest mean scores of all populations surveyed. This disparity of perception of courtroom behavior is not unique to Georgia as similar results were noted in reports from other jurisdictions.

Another aspect of inappropriate behavior, that of verbal and physical advances by judges, attorneys, and court personnel toward litigants, witnesses, and attorneys was addressed in two survey questions. Mean scores are relatively low for both questions, indicating that such behavior was not perceived as being widespread, especially by judges. However, three male attorneys indicated judges make advances toward female litigants in more than rare circumstances. Responses of court reporters also show some awareness of inappropriate judicial conduct. When there was a perception of improper advances, attorneys were more likely than others to be seen as exhibiting the behavior. In general, attorneys and female attorneys in particular had the highest mean scores, which once again indicates that females are likely to perceive courtroom behavior differently than their male counterparts.

Written responses taken from the survey questionnaires clearly illustrate these differences in perceptions as well as differences in types of behaviors deemed inappropriate:

The judge was a senior judge During the hearing he told racist jokes and jokes about sex (our clients were black but were not in the chambers). I was shocked and offended by the whole situation. The judge even asked me if I was married. When I said no he asked, "Well, who is taking care of you then?" (white female attorney)

[Female attorneys are] overly sensitive about gender . . . and overly aggressive to compensate for gender differences. (superior court judge)

Rarely, now, there is a comment about a woman's attire or appearance but there are also comments about the attire or appearance of men, by both sexes. (superior court judge)

I get 'darling' and 'honeyed' out the door. (white female attorney)

Men have frequently made remarks and gestures that were sexually suggestive. If my response was not at least tolerant of their behavior, I would not be considered as a team player . . . any remarks about their behavior to any superior I feel would endanger my employment security, again considered not being a team player. (minority female court reporter)

Some judges make sexual advances and the county commissioners won't even touch the situation because they are elected officials. (court employee)

I would comment that it is disappointing how I must identify myself as an attorney or otherwise, the other attorney thinks I am a secretary. (female attorney)

I have talked to three women who claim to have been sexually harassed by their attorney Mr. [], who offered services for sex and threatened to give less service if sex were not given. I have additionally heard rumors of at least four other incidents involving the same attorney. In two cases complaints were filed and to my knowledge no action was taken by the State Bar Corrections. (white male attorney)

I don't agree, however, that all perceived slights are meritorious, or that all actual slights are the product of an insidious gender bias. If all lawyers worked harder at being better lawyers it would improve the system faster and more significantly. (white male attorney)

A female victim of repeated, substantial domestic violence went before a superior court judge to ask for an extension of a TPO. The judge mocked her, ridiculed and humiliated her, and led the courtroom in laughter as the woman left the courtroom. The woman was subsequently killed by her estranged husband. (state court judge)

[Male attorneys] refer to female attorneys in diminutive or patronizing terms, disparaging to the point of slander a female attorney who represents her client zealously, particularly if her client happens to be female. (state court judge)

Some—but not all male attorneys have a very familiar and somewhat condescending attitude towards female judges/counsel. (state court judge)

Some lady attorneys attempt to use the fact that they are physically attractive to gain favors with the court. They don't mind flirting if they think it will help their case. (state court judge)

Additional insight into gender-based behaviors is gained from a report furnished to the Commission by Dr. Karen O'Connor, which focuses on the interaction of lawyers and judges in the courtroom. The report, authored by Dr. O'Connor and Amy L. Weinhaus,¹⁸ presents the results of a court-watching project in a number of Georgia counties over a four month period in early 1990. The court watching report reinforces the findings from the anecdotal accounts heard in public hearings and responses from the Commission's survey questionnaires that gender bias is at times clearly present in some Georgia courts.

The focus of the O'Connor study was on gender bias exhibited in courtrooms by judges toward female attorneys and an exploration of factors that might explain why this bias continues to exist.

Three questions were addressed in the O'Connor study: (1) Does gender bias exist in the courtroom?; (2) If gender bias is present, what form does it take?; and (3) Can particular socio-cultural factors explain gender-biased behaviors in the courtroom? Of particular interest to the Commission's work are questions one and two. Participant observation (court watching) was the method used to examine the first two questions. Six different forms of bias were measured. Both verbal and nonverbal cues were used to measure differential treatment between male and female attorneys. Verbal cues were modes of address by the court that were different for male and female attorneys, courtroom remarks about a female attorney's dress or personal appearance, and sexist remarks or jokes by the judge. Nonverbal cues were manifested in differences in attentiveness by the judge and were considered as dismissive treatment. Such cues were given by a judge's shuffling papers or dozing during a female attorney's argument; by negligent conduct toward female attorneys, including the toleration of certain behaviors from male attorneys but not from females; and by the judge's use of an aggravated tone to female attorneys while employing a straightforward, patient tone toward male counterparts. The research took into consideration the professional background of the attorneys to prevent the false assumptions that negligent or dismissive treatment had occurred when actually the judge was displaying frustration at the inexperience of the novice attorney.¹⁹

The O'Connor study found gender bias to be "clearly present in Georgia Courts."²⁰ Various forms of gender bias were observed. According to the report, 44.7% of the male judges who were observed manifested some sort of gender-biased behavior. While both male and female judges were observed, all judges who engaged in differential

18. Karen O'Connor & Amy L. Weinhaus, *Gender Bias in Georgia Courts: A Report to the Georgia Commission on Gender Bias in the Judicial System* (1991).

19. *Id.*

20. *Id.* at 4-5.

treatment of female attorneys were males, constituting 55.3% of the male sample. No female judges were reported as exhibiting gender bias. Twenty-three percent (23%) of the judges who displayed biased behavior engaged in more than one kind of differential treatment. Nonprofessional modes of address to women attorneys, including terms of endearment, were clearly evidenced. Judges were observed referring to a female attorney as a "lawyerette," a female public defender as "Missy" or "Honey," and instructing her client to "thank the little lady for doing such a fine job."²¹ Four male judges were reported as attentive to the male attorney only, one napping during a female attorney's closing argument and another gazing out a window and appearing to be daydreaming.²² Comments were made by male judges on the personal appearances of female attorneys. Although the comments were not derogatory, such comments were considered gender-biased because they tend to undermine a female's professionalism. Reaction by the female attorneys who were subject to biased treatment varied according to the report. While some felt that different treatment was advantageous, many others believed that disparate treatment was "appalling, inexcusable, and made them feel inferior to their male competitors." According to the report, there is a considerable amount of frustration felt by female attorneys over the discrimination these attorneys routinely experience while simply trying to do their jobs, and many believe there is little they can do to combat such treatment.²³

The findings of the O'Connor study indicate that no single sociological factor or combination of factors is significantly related to gender-biased behavior—not place of birth, education, age, prior military service, urbanization, or case type. However, the type of case and whether or not a jury was present were found to make a difference. Of the observations that documented gender bias, 30.8% were found in jury trials and 69.2% occurred in nonjury trials.²⁴ O'Connor suggests that judges "unconsciously or not, . . . are aware when they are exhibiting gender-biased behavior and take steps to curtail its expression in the presence of the public eye."²⁵ The report also noted that younger female attorneys were the victims of gender-biased behaviors far more often than their older counterparts. Older women attorneys were seen as commanding more respect from male judges.²⁶ A final observation from the report is that gender bias is more likely to

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

be exhibited when female attorneys are not accompanied by male co-counsel.²⁷

O'Connor concludes that the study reveals a significant incidence of gender bias in nearly half of all Georgia courtrooms, and "while the findings may be useful as a benchmark, they may not even reflect the true incidence of gender bias permeating the judiciary."²⁸

FINDINGS

1. Stereotypic views of gender are a factor which affects the credibility of litigants, witnesses, and attorneys. When judges and attorneys deny a person credibility based on gender, professionalism is breached and substantive rights can be undermined. The absence or presence of decorum and professionalism in the courtroom environment influences litigants' and witnesses' confidence in and respect for the courts.
2. At times, male judges, male attorneys and court personnel:
 - a. Address women litigants, witnesses, and attorneys by first names or terms of endearment when men are addressed by surnames or titles;
 - b. Make inappropriate comments about the personal appearance of female litigants, witnesses, and attorneys when no such comments are made about their male counterparts; or
 - c. Make sexist remarks or jokes in open court and in the judge's chambers before female litigants, witnesses, and attorneys that demean females.
3. Frequently, female attorneys are asked if they are attorneys when male attorneys are not.
4. Some judges treat female attorneys less attentively and with less tolerance than their male counterparts.
5. Not frequently, but on occasion, male judges, male attorneys, and male court personnel subject female litigants, attorneys, and court personnel to verbal or physical advances.
6. Some judges make demeaning remarks to male litigants who are attempting to gain custody and/or visitation rights to their children.

27. *Id.*

28. *Id.*

RECOMMENDATIONS

It is clear that no single directive or report alone will be successful in eradicating from the courtroom behaviors based on gender-biased perceptions of appropriate roles for males and females. However, it is imperative that judges, attorneys, and all other court personnel be made aware of what is considered to be gender-biased behavior and the detrimental effects of such behavior on the Georgia justice system.

The Georgia Commission joins with commissions in other states, who have reported similar biased behaviors occurring in the court room in the following recommendations.

For Court Administration

1. Develop and conduct regular training for sitting and newly elected and appointed judges, domestic relations masters, and court employees designed to make them more sensitive to the subtle and overt manifestations of gender bias directed against women attorneys, witnesses, and litigants and the possible due process consequences.
2. Establish, in conjunction with the appropriate bar associations, a confidential reporting and investigation process for those who feel they have a gender bias complaint involving a member of the judiciary, master, courthouse employee, or attorney.
3. Educate court personnel to treat male and female attorneys similarly and to avoid the assumption that only men are attorneys and that females are not.
4. Inform court employees not to refer to female attorneys, litigants, or witnesses by their first names, nicknames, or "terms of endearment" in situations in which they would not so address men.

For Judges

5. Conduct oneself at all times in a manner which will not give the appearance of impropriety.
6. Monitor behavior in courtrooms and chambers and swiftly intervene to correct lawyers, witnesses, and court personnel who engage in gender-biased conduct.
7. Ensure that official court correspondence, decisions, jury instructions, and oral communications employ gender neutral language and are no less formal when referring to women litigants, witnesses, and lawyers than to men litigants, witnesses, and lawyers.

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For Bar Associations (including state, local, and specialty bar associations)

8. Develop and conduct informational campaigns designed to make members aware of the incidence and consequences of gender-biased conduct toward women litigants, lawyers, and witnesses on the part of judges, lawyers, and court personnel.

For Law Schools

9. Educate law faculties and law students about the subtle and overt manipulations of gender bias directed against litigants, witnesses, and attorneys.

TREATMENT OF COURT EMPLOYEES

An examination of gender bias in the judicial system includes not only behavior in the courtroom but also behavior in the work place that are outside the courtroom itself. These behaviors are an essential part of the court environment. Regularly involved in this group are judges, attorneys, and court employees. For the purpose of this Report, the term "court employees" includes both elected and appointed personnel: court administrators, court clerks, judicial secretaries, court reporters, and probation officers. Court employees work primarily in office settings in the courthouse. In these locations, they are likely to have more personal and less formal contact with judges, attorneys and each other than in the courtroom. Data examined by the Commission for this Report includes testimony by court employees at public hearings and in private "listening sessions" held around the state, responses to the Commission's survey, and letters and reports submitted to the Commission.

Two areas of concern brought to the attention of the Georgia Commission by court employees were occupational segregation and gender-biased conduct. A review of the reports of Gender Bias commissions and task forces in other states reveals the same two areas of concern.¹ It is obvious that court employees might be very reluctant to testify in open meetings about gender discrimination in the courts in which they work. However, the Georgia Commission did hear some testimony in the public hearings, more in the private "listening sessions," and decidedly more in the survey responses that clearly indicate that in some courts in Georgia, at some times, gender bias is perceived to be a problem by some court employees.

I. Occupational Segregation

Information furnished the Georgia Commission reveals patterns of occupational segregation in court employment similar to those found in other states. Although court employees are primarily females, males are over-represented in and dominate the higher salary/higher status positions. The plethora of job titles for court employees² and the lack of uniformity in job descriptions among the 159 counties in Georgia make

1. See, e.g., Arizona Coalition of Minorities and Women in The Law; Colorado Gender Bias Task Force; Florida Gender Bias Task Force; Maryland Special Joint Committee on Gender Bias in the Courts; Michigan Task Force on Gender Issues in the Court; New York Task Force on Women in the Courts; New Jersey Supreme Court Task Force on Women in the Courts.

2. Georgia Commission on Gender Bias in the Judicial System: Court Employees Survey Results, Job Title, at 34, 66 [hereinafter Court Employees Survey Results].

a comparison difficult; yet, some conclusions can be drawn. For example, the highest paid position with a seemingly higher status title is court administrator; all ten district court administrators and two-thirds of the circuit trial and juvenile court administrators are male. While 60% of superior court clerks are female, 56.3% of the clerks whose salary is over \$35,000 are males.³

Concern was expressed by female court employees that the job titles themselves carried connotations of inferior and lower level positions. Some of the comments heard by the Commission were

I feel that the title "clerk" does not carry the weight of responsibility of the position; therefore, superior court clerks are sometimes not given the respect or credibility they deserve.

The term "secretary" is subject to "pink collar" bias. I feel a different title would command more respect for the jobs we perform.

Job names need to be changed from secretary to "legal assistant." We get no respect from the public.

The term [secretary] carries with it a fragmented image of someone who is capable of typing only, nothing more, especially thinking. A more respectful title would be appropriate.

We need a name change from "secretary" as it is a stigma that connotes a dumb broad.

While it is true that some of the concerns raised by court employees have negative consequences for both males and females, they are of concern in a study of gender bias because they tend to weigh most heavily on the lowest level employees, and females disproportionately are the lowest level employees. Additionally, the title stigma does not appear to have the same consequences for males as it does for females, as pointed out by the following statements:

The general public view a male clerk differently to (sic) female clerks. It's easier for a male clerk to be an administrator in smaller counties whereas the female clerk is expected to do the actual paperwork.

Additional insight into the concerns Georgia court employees have about occupational segregation and the effect of gender in the work place is gained from reviewing some of the responses to the survey questionnaire sent by the Commission. There were decided differences, and at times statistically significant differences, in responses of male

3. Georgia Statistics from Administrative Office of the Courts.

and female employees to many of the questions. Female court employees were more likely than males to indicate that their gender was responsible for increases in their job duties.⁴ Seventy-five percent of the male respondents but only slightly less than 47% of the females said they were "never" asked to perform duties not asked of a person of the opposite sex.⁵ Females, more than males, believed that their opinions were given less weight due to their gender.⁶ Female court employees also believed, more than did male employees, that they were limited in career opportunities by their gender.⁷ Differences in perceptions of level of support and information needed to do their job also were different for male and female employees. Sixty-four percent of males indicated they always received such support and information, compared to 47.4% of females.⁸ Concerning the issue of salaries, while males were more likely than females to indicate they believed salaries for court employees were too low (72% and 66.9% respectively), females were more likely to perceive that their salaries were lower than the opposite gender.⁹

Overall, female respondents consistently responded that they were more likely to be held back in their career opportunities and less likely to be informed or encouraged to apply for promotions because of their gender. Perceptions by female court employees that it is their gender which circumscribes their employment, including their salary level, often have a deleterious effect upon motivation, morale, and production.

Reports from other states, as well as an ABA study, concluded that men dominate the higher grade positions among court personnel, whereas women dominate lower level court personnel positions.¹⁰ According to the New York Report, women are disproportionately found in the lowest salary grades and minority women are at an even greater disadvantage than are white women.¹¹ There was also some indication in New York that lower grade titles dominated by men paid more for jobs with lesser responsibilities than did lower grade titles dominated by women.¹² In Maryland, the Committee found that "(1) female employees are paid less overall, despite having backgrounds similar to those of male employees; (2) female employees are not promoted in

4. Court Employees Survey Results, *supra* note 2, at 39.

5. *Id.* at 44.

6. *Id.* at 21.

7. *Id.* at 51.

8. *Id.* at 49.

9. *Id.* at 60.

10. Nancy Blodgett, *I Don't Think Ladies Should Be Lawyers*, A.B.A. J., Dec. 1986, at 48, 52-53; *Report of the New York Task Force on Women in the Courts*, 26 *FORDHAM URB. L.J.* 11, 156 (1986-1987) [hereinafter *New York Task Force Report*].

11. *New York Task Force Report*, *supra* note 10, at 155.

12. *Id.*

proportion to their numbers; and (3) certain low paying job classifications within the court system are categorized as 'female jobs.'¹³ The fact that males are distributed more evenly through the ranks of court employees and dominate the higher salary grades of employment while females are vastly overrepresented at the lower level, places women in a structurally disadvantageous position in the employment hierarchy.

The New York Report concludes that the considerable differences in the employment status of women "can further influence several aspects of their career, including promotion, transfer and training opportunities, work-related stress, and sexual harassment."¹⁴ The Maryland Committee reports that "female employees remain in lower salaried positions for longer periods of time than male employees; that is, only male employees survived the 'thinning of the ranks.'¹⁵ The Report concludes that "female employees' lack of advancement and over-representation in lowest salary brackets are indicative of a philosophy that entry level, low paying non-managerial positions are 'female positions.'¹⁶

II. *Gender-Biased Conduct*

In Georgia, as in other states¹⁷, some female court employees reported being required to make coffee, run personal errands outside the office and purchase personal items for their supervisors, including judges. Most of the female employees found these tasks demeaning and would have preferred not to do them. They believed, however, that since it was their "boss" who was making such requests of them, they would be ill-advised to refuse. They expressed the fear that refusal would make their work lives more difficult, or, in the extreme, that they would be fired. One woman commented: "You still have the old theory around here that women are housewives (to the office)."¹⁸

The issue of personal errands and chores is addressed, in part, in the preceding section of this Report discussing occupational segregation. As was noted earlier, survey data revealed that many female court employees attributed increases in their job duties to their gender. Many females believed that they were asked to perform duties that their male counterparts were not.

13. REPORT OF THE MARYLAND SPECIAL JOINT COMMITTEE ON GENDER BIAS IN THE COURTS 76-77 (1989) [hereinafter MARYLAND REPORT].

14. *New York Task Force Report*, *supra* note 10, at 156.

15. MARYLAND REPORT, *supra* note 13, at 78.

16. *Id.*

17. *New York Task Force Report*, *supra* note 10, at 159-60.

18. *Id.* at 149.

In work environments where one gender is dominant, the stereotypes concerning that gender are difficult to overcome. In the case of court employees, most are female and, in some courts, all are female, as indicated by the following comment: "The court system in our county is very small and, aside from judges and attorneys, there are no males."¹⁹ It is, therefore, particularly important that the traditional, but out-dated, distinctions between men's work and women's work be repudiated, not perpetuated, in the court work environment. There may be some people who find no harm in having an employee perform what might be considered minor tasks for a supervisor. For the employee, however, such expectations and demands, especially when based on gender, are both insulting and demeaning and are evidence of an inferior status that is not work related. A recurring theme of court employees is that they are not accorded the respect that they believe to be due them. The propriety of personal chores and errands is perceived by many court employees as a serious gender-related issue in some Georgia courts.

The second concern, sexual harassment, is not viewed as a widespread problem in the court work place. Sexual harassment is considered in this Report and in those of other states because incidents of sexual harassment are reported by female court employees.

According to the United States Supreme Court, two types of conduct are categorized as sexual harassment under Title VII of the Civil Rights Act of 1964:²⁰ (1) quid pro quo harassment where unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature is directly linked to the grant or denial of economic benefits; and (2) nonquid pro quo or "hostile environment" harassment which has the purpose or effect of unreasonably interfering with an individual's work performance or the creation of an intimidating or offensive working environment.²¹ Both survey responses and anecdotal statements from public and private hearings confirm that, while not perceived as widespread behavior in Georgia courts, in some courts and on some occasions, female court employees have been subjected to both types of sexual harassment.

While only 1.6% or three survey respondents reported that they had experienced sexual advances in exchange for employment security or opportunity, 27.6% reported having heard about such sexual advances being made to co-workers.²² Requests for sexual activity were reported by 3.8% of the respondents with 20% saying they had heard about such

19. Court Employees Survey Results, *supra* note 2, at 64.

20. 42 U.S.C.A. §§ 2000e to 2000e-17 (1981).

21. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

22. Court Employees Survey Results, *supra* note 2, at 38 tbl. 18.

requests of others.²³ Physical touching of a sexual nature had been experienced by 8.1% of the respondents and 23.2% had heard about its happening to others.²⁴ Again, male and female court employees perceive sexual activity in the work place differently. When asked to evaluate whether women employees in the court system are subjected to verbal or physical sexual advances, 82.9% of the males but 54.3% of the females said “never.”²⁵ Attorneys were perceived to be more likely to make such advances than were judges (73% of respondents indicated that judges and 52.9% indicated that attorneys “never” made such advances).²⁶

Employees also reported “hostile work environment” harassment. While the accounts of requests for sex for employment security or opportunity, physical touching of a sexual nature, and requests for sexual activity reported in the preceding section do not represent large numbers of persons who had actually experienced such behaviors, the figures increase considerably for those persons who reported having “heard” about such behaviors being demanded of co-workers—close to one-fourth of the respondents. Thus, the perceptions of harassment and the existence of a hostile work environment are very real for these respondents.

Responses to other survey questions regarding the work place support the finding that for some court employees the work place is perceived as a hostile work environment. Both judges and attorneys were reported as making comments about the appearance of female court employees. As might be expected, co-workers were the group reported most likely to make such comments, followed by attorneys; judges were last.²⁷ As in the responses earlier reported, male and female court employees’ perceptions of the existence and frequency of comments is quite different. While 45.8% of the male respondents reported lawyers as “never” making such comments, only 23% of the females did; 52% of the males and only 37.1% of female respondents reported that judges “never” make such comments; and 47.8% of males but 21.7% of females marked “never” for co-workers.

Another indicator of an offensive work environment for many women is the prevalence of sexist jokes and remarks. When responding to questions on this issue, male employees were more likely to note that judges made sexist remarks than were female employees; in fact, male mean scores were higher for this question than for other questions.²⁸

23. *Id.*

24. *Id.*

25. *Id.* at 31 tbl. 15.

26. *Id.* at 30.

27. *Id.* at 20 tbls. 9, 10, 21.

28. *Id.* at 26 tbl. 13.

An appropriate observation might be one of "good-news/bad-news." The "good news" is that judges are careful not to make remarks that may be perceived as sexist in the presence of female court employees; the "bad news" is that some judges continue to make sexist comments when in the presence of "the boys." Attorneys were perceived by both male and female employees as the group most likely to make sexist remarks or jokes (mean scores for judges, males 1.95 and females 1.64; for attorneys, males 2.04 and females 2.12; and for coworkers, males 1.82 and females 1.88).

Although overt sexist behaviors—sexist remarks and jokes and demands for sexual favors—are not tolerated in most courts in Georgia, sexual harassment in the work place continues to be a fact of life for some employees. Treating an employee or co-worker as a sexual object rather than as a professional, even to a small degree or only occasionally, cannot be tolerated in the Georgia court system. Not only may such treatment damage a person's self-esteem, but an employee's job commitment may also be adversely affected.

In the words of the Maryland Committee, "day-to-day discriminatory treatment solely because of gender creates a hostile work environment which affects work place productivity and morale as well as the psychological well-being of the employees, both male and females."²⁹ A work environment in which female employees are constantly reminded of their different and subordinate status is not acceptable in Georgia or in any other state. The despair felt by many court employees is evidenced in these comments:

I really do not understand what good this will do. When you work in the Superior Courts for a judge, you work at his pleasure. There is no policy on sick leave or vacation, only his policy at the moment. It is one of the most unfair situations I have ever seen.

Judicial secretaries are state employees, but the job is considered nonmerit system. Therefore we work at the discretion of our judges. There is no sick leave, maternity leave, or vacation. We depend solely upon the judge's discretion as to time off from our job.³⁰

As pointed out, some issues raised by court employees might be considered to be gender-neutral, simply job-related issues. However, it must be remembered that most of the employees are female, especially in the lower-status positions; most of the "bosses" are male, especially the judges and court administrators. Even those persons who have not experienced much bias themselves seem to believe in its prevalence in

29. MARYLAND REPORT, *supra* note 13, at 83.

30. Court Employees Survey Results, *supra* note 2, at 68.

the system, as indicated in the following statement by a female court employee: "I work for a woman judge and don't see a lot of bias as perhaps if I worked for a male judge."³¹

A final indicator of the existence of gender-biased discrimination in the work place is found in responses to the survey question, "In the past two years, have you filed a complaint involving gender bias on the job?" and the follow up question, "Was it resolved to your satisfaction?" Forty-one (22.2%) respondents indicated that they had filed a complaint involving gender bias on the job. Of these persons, thirty-one (75.6%) were females, and ten (24.4%) were males. Only four of the females and none of the males indicated that their complaint had been resolved to their satisfaction.³² While these figures are dramatically high, it should be noted that employees who have filed such grievances are more likely to respond to the survey. Even so, a 22% rate of filed employee grievances involving gender bias on the job is quite unusual. This high number of employee complaints filed indicates the need for analysis of these grievances and their outcomes. A 22.2% rate of employee grievances is startling enough to warrant further investigation of gender bias in the treatment of court personnel.

III. *Fair Employment Practices Act of 1978 (FEPA)*

The general purposes of this law are set out in Code section 45-19-21. These include, among others:

- (a)(1) To provide for execution within public employment in the state of the policies embodied in Title VII of the federal Civil Rights Act of 1964 (78 Stat. 241), as amended by the Equal Employment Opportunity Act of 1972 (86 Stat. 103), as from time to time amended, the federal Age Discrimination in Employment Act of 1967 (81 Stat. 602), as from time to time amended, and the federal Rehabilitation Act of 1973 (87 Stat. 355), as from time to time amended;
- (2) To safeguard all individuals in public employment from discrimination in employment; and
- (3) To promote the elimination of discrimination against all individuals in public employment because of such individuals' race, color, religion, national origin, sex, handicap, or age thereby to promote the protection of their interest in personal dignity and freedom from humiliation; to make available to the state their full productive capacities; to secure the state against domestic strife and unrest which would menace its

31. *Id.*

32. *Id.* at 58.

democratic institutions; to preserve the public safety, health, and general welfare; and to further the interests, rights, and privileges of individuals within the state.³³

On its face, the Act covers employees of state government but not of local government.³⁴ Yet the 1983 Constitution of the State of Georgia, adopted after the passage of FEPA, states in the Bill of Rights: "Protection to person and property is the paramount duty of government and shall be impartial and complete. No person shall be denied the equal protection of the laws."³⁵

According to the Administrator of the Office of Fair Employment Practices in Atlanta, between 1986 and November 30, 1990, only two complaints involving Georgia courts were filed with that office, and neither involved an allegation of sex discrimination. In the four years preceding November 30, 1990, over 1200 complaints had been received, and there were very few inquiries from state court employees.

FINDINGS

1. Occupational segregation in court employment is found in Georgia courts. Although court employees are primarily females, males dominate the higher salary, higher status positions.
2. Female court employees believe the job titles themselves carry connotations of inferior and lower level positions.
3. Female court employees believe they are more likely to be held back in career opportunities and less likely to be informed or encouraged to apply for promotions because of their gender.
4. Some female court employees are required to perform personal chores and errands for their "bosses."
5. Many female court employees attribute increases in their job duties to their gender and believe they are asked to perform menial and demeaning tasks that their male counterparts are not.
6. While sexual harassment is not perceived to be widespread in the workplace, instances of sexual harassment were reported to the Commission.

33. O.C.G.A. § 45-19-21 (1990) (emphasis added).

34. With respect to distinctions that have been made in other contexts, see *Georgia Dep't of Human Resources v. Demory*, 138 Ga. App. 888, 227 S.E.2d 788 (1976); *Lewis v. DeKalb Co.*, 34 FEP Cas. 914 (1983). See also 1978 Op. Att'y Gen. 78-75; 1978 Op. Att'y Gen. 78-62; 1978 Op. Att'y Gen. 78-59; 1978 Op. Att'y Gen. 78-22; 1977 Op. Att'y Gen. U77-54; 1974 Op. Att'y Gen. 74-89.

35. GA. CONST. art. I, § 1.

7. Some employees also reported "hostile work environment" harassment.
8. Some female employees reported being subjected to comments about their appearance, as well as to sexist jokes and remarks.
9. Court employees are vulnerable to discrimination due to the lack of uniformity in job titles and policies for sick leave or vacation leave.
10. The large number of gender-biased discrimination complaints filed in the past two years is cause for concern.
11. It is doubtful that the Fair Employment Practices Act covers court employees who are not state employees, so that it likely does not protect non-state employees in Georgia's courts from sex discrimination in their employment, as that is broadly defined in Code section 45-19-22(3).³⁶ Yet the general statement is made that it is the public policy of the State to protect "all individuals in public employment" from discrimination.³⁷ Equal protection is guaranteed by the state constitution.

RECOMMENDATIONS

The Judicial Council, all classes of constitutional and non-constitutional courts, and all hiring authorities of court-related personnel should:

1. Implement the broadest possible recruitment efforts for all positions on a continuing basis.
2. Review job descriptions to ascertain if job categories accurately reflect the skills and training needed to perform the job.
3. Provide gender-neutral job descriptions and enforce job requirements without regard to gender.
4. Review qualification requirements and salary grades of all non-judicial titles to eliminate gender discrimination.
5. Implement specific efforts designed to increase women holding higher paid, higher status jobs.
6. Issue a policy statement to support and require fair pay, fair employment practices, equal access to training, and promotion opportunities for the court employees.

36. O.C.G.A. § 45-19-22(3) (1990).

37. O.C.G.A. § 45-19-21(a)(2) (1990).

7. Increase opportunities for continual training of court personnel, and monitor training programs to insure equal access to male and female employees.
8. Establish and publish policies regarding sexual harassment and a grievance procedure to address complaints.
9. Issue a directive defining the various types of sexual harassment, stating that this type of behavior is illegal, unacceptable, and grounds for termination, and impose upon supervisors the affirmative duty to monitor.
10. Establish an informal complaint resolution process which would assist parties in working out problems and which would also function for formal grievance procedures.
11. Instruct attorneys that personnel cannot provide clerical services to them unless so directed by the supervisor.
12. Develop educational programs for judges, court personnel, and lawyers which address gender bias issues and sexual harassment.
13. Develop a program which would provide job security and support for employees who are temporarily unable to work as a result of pregnancy and childbirth.
14. Amend the Fair Employment Practices Act to include local government so that all government in Georgia is obligated to abide by the statutorily-stated public policy and so that the constitutional mandate for equal protection is carried out. (Although the scope of this Commission is confined to sex discrimination, it could not limit this recommendation to cover only this type of discrimination without violating the spirit of the state constitution. Thus, it does not so limit its recommendation.)
15. Amend the Code of Judicial Conduct to include as Canon 3(B)(5) the following Canon from the 1990 ABA Model Code of Judicial Conduct:

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, disability, age, sexual orientation or socioeconomic status, and shall not permit staff, court officials and others subject to the judge's direction and control to do so.³⁸

38. MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(5) (1990).

FORMAL LANGUAGE OF THE COURTS

I. Basis and Scope

If it is the task of the Gender Bias Commission to recommend the elimination of gender bias in the judiciary, the remedies must challenge underlying beliefs that the systematic use of traditionally stereotyped language is acceptable, that is, that fairness and objectivity are assumed regardless of the use of sexist pronouns in rules or annotations forms and any other type of documents or written or spoken communication. The use of proper language by the courts can help dispel a perception of gender bias.

Instances of gender bias in the courtroom, exhibited by judges orally, were reported in numerous hearings and in communications from the public and female attorneys.¹ While the survey conducted by the Burruss Institute of Public Service did not specifically address the formal language of the court, some respondents did comment on personal incidents involving verbal gender bias in the context of courtroom interaction. However, no instances of reporting of such behavior to the Judicial Qualifications Commission, the agency which deals with judicial ethics and conduct in Georgia, were noted.

Therefore, the Commission examined the formal language of the courts in the following areas: jury charges; benchbooks; forms, including employment applications, small claims petitions, etc.; correspondence, orders, and judgments; manuals for judges, clerks, and other court personnel.

II. Materials Surveyed from Other States

The Committee reviewed studies of gender bias in the judicial system which were conducted in Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, and New York. The Maryland report is the most comprehensive and thought-provoking. Other materials reviewed were law review articles, continuing legal education materials, and information provided by private organizations.

The issue of gender bias in pattern jury instructions, court forms, court documents, correspondence, rules, and manuals was typically addressed as part of the larger issue of conduct and attitudes exhibited by judges, attorneys, and court personnel in courtrooms and chambers.

1. See Section on Treatment of Attorneys, Witnesses, and Litigants in the Courtroom, *supra* p. 701; see also Karen O'Connor & Amy L. Weinhaus, *Gender Bias in the Georgia Courts—A Report to the Georgia Commission on Gender Bias in the Judicial System* (1991).

Insofar as Georgia is concerned, this is treated in another section of the report.

III. *Materials Surveyed from Georgia*

A. *Pattern Jury Instructions*

The 1984 *Suggested Pattern Jury Instructions* for civil and criminal cases were distributed by the Council of Superior Court Judges.² Efforts to employ both feminine and masculine forms of address are found only in the section on divorce and alimony.

The manual did include a disclaimer in the preface recognizing that the charges may not be gender-neutral and recommending that judges make changes accordingly: "No attempt has been made to use all possible applicable pronouns in these suggested charges. We leave it to the individual judge to select the proper pronoun. That is to use "she" if a female is involved even though the book uses he."³

As part of the current revision to the jury instructions, which will be completed in July 1991, the Council of Superior Court Judges' Committee on Pattern Jury Instructions is altering the language in the charges to make it gender-neutral. A paragraph in the new preface will state: "The language contained in these instructions is intended to be gender neutral. In those instances where there is an option to use the male or female pronoun, the individual judge should select the appropriate pronoun."

In changing the language, the Committee's objective is to use nouns as often as possible, rather than employing pronouns indicating gender. It recognizes in the preface, however, that it may sometimes be awkward or stilted to use nouns, so it counsels that whenever pronouns are used, the gender of the party actually being referred to should dictate the language used in charging the jury. This should be stated to apply as well to charges crafted by the judge or submitted by counsel.

The following is an example of the committee's language changes:

A person commits the offense of interference with custody when, without lawful authority to do so, ~~he~~ *that person*:

a. Knowingly or recklessly takes or entices any child or committed person away from the individual who has lawful custody of such child or committed person when ~~he~~ *that person* is not privileged to do so . . .

Aside from the pattern book, one judge found a way of addressing the problem by instructing as follows:

2. COUNCIL OF SUPERIOR COURT JUDGES, SUGGESTED PATTERN JURY INSTRUCTIONS, (1984).

3. *Id.* Preface, p. xii (emphasis in original).

The verdict must be signed by one of your number as foreman, meaning a man or a woman, and dated and returned into open court . . . one of your first duties in the jury room will be to select one of your number to act as the foreman, meaning again a man or a woman, who will preside over your deliberations

B. Benchbooks

The Superior Court Criminal Benchbook, published in July 1981, is currently being revised a section at a time. No gender language changes were made in the first two updated sections distributed to superior and state court judges in January 1991.

The Superior Court Civil Benchbook was published in March 1984. In the foreword it refers to a judge as "he" but in the body of the book it uses "he or she" in referring to others. Most often the noun is used. This Benchbook was revised in a minor way in 1986.

The Probate Benchbook was last revised in 1991. No policy was adopted by the revision committee regarding the use of gender-neutral language. Some gender-biased language appears throughout.

The Magistrate Benchbook was originally published in January 1989. A policy of using gender-neutral language was adopted at that time and has been followed through two revisions, in June 1989 and June 1990.

The Juvenile Court Benchbook was published in 1982 and apparently is not scheduled for revision. "Child," "juvenile," "parent," "mother," and "father" seemed to be used prevalently throughout, rather than a purportedly generic pronoun, except when citing specific appellate decisions. In these instances, of course, a particular male or female is being referred to and the use of the pronoun is appropriate.

C. Court Forms and Documents

Samples of court forms which are in rather widespread use throughout the state were examined. They are generally free of gender-biased language. However, it was noted that this is not always true of job application forms. One such form was recently changed so as to be gender-neutral. The above suggestions regarding the use of pronouns in jury instructions apply equally well to such documents.

D. Judicial Opinions, Orders, and Correspondence

Random samples of pertinent court orders and judgments from the various levels of courts were supplied by committee members. These were documents in which the opportunity for gender bias arose. Use of such language was noted, although it is not widespread. The documents are reflective of what may be individual biases on the part of particular

judges, rather than representing actual or system-wide bias. Improvement thus requires not just a change in language usage but also in attitude.

E. Court Rules

The issue of revision of the official rules of the courts is an extremely important consideration due to the significance of weight in using stereotypical pronouns. Currently, Rule 2.6 of the Uniform Superior Court Rules and Rule 2.5 of the Uniform Probate Court Rules state: "Non-sexist Pronouns. For the sake of brevity only, the pronoun 'he' shall include 'she' and vice versa, unless the context clearly indicates otherwise; the pronoun 'her' shall include 'him' and vice versa, unless the context clearly indicates otherwise."⁴

Using the pronoun "he" is not arguably the same as "she." If such were the case, the suggestion to change, if applied to Rule 22(C), for example, would be to change "The judge, in his discretion" to "The judge, in her discretion." What would suffice instead would be: "Using discretion, the judge may."

The following are examples of rules that contain possessive pronouns which may imply ownership ("his deputy clerks"), origin ("if he wishes"), or character ("because he has no parents") by a construction that imposes a burden or bias on another in a judicial proceeding. Next follows a suggested revision of each rule.

1. Uniform Superior Court Rules

a. Rule 26

"(B) Inform the accused that *he* has a right to remain silent, that any statement made may be used against *him* and that *he* has the right to the presence and advice . . ."

Gender-neutral:

"(B) Inform the accused of the right to remain silent, that any statement made may be used against the accused and that the accused has the right to the presence and advice . . ."

"(D) Inform the accused of *his* right to a pre-indictment probable cause . . ."

Gender-neutral:

"(D) Inform the accused of the right to a pre-indictment probable cause hearing . . ."

4. UNIF. SUPER. CT. R. 2.6; UNIF. P. CT. R. 2.5.

“(F) Inform the accused that *he* has the right to grand jury indictment and the right to . . .”

Gender-neutral:

(F) Inform the accused of the right to grand jury indictment in felony cases and the right to . . .

“(G) Inform the accused if *he* desires to waive these rights and plead guilty, *he* shall so notify the judge or . . .”

Gender-neutral:

(G) Inform the accused that if these rights are waived and if the accused intends to plead guilty, that the accused shall so notify the judge or . . .

b. Rule 30.2

“Upon the call of a case for arraignment, unless continued for good cause, the accused, or *his* attorney, shall answer . . .”

Gender-neutral:

Upon the call of a case for arraignment, unless continued for good cause, the accused or the attorney of the accused, shall answer . . .

New and amended rules approved by the Superior Court Uniform Rules Committee and the Supreme Court in 1990 included gender-neutral language. The Administrative Office of the Courts anticipates that future rules changes will incorporate neutral language. However, the committee has not considered any action regarding biased language in existing rules.

2. Uniform Juvenile Court Rules

Order for Detention

“In the interest of . . .

“() because *he* has no parent, guardian or custodian or other person able to provide supervision and care for *him* and return *him* to the court when required;”

Gender-neutral:

() because the child has no parent, guardian, or custodian or other person able to provide supervision and care and return the child to the court when required;

3. *Local Rules of the U.S. District Court for the Northern District of Georgia*

a. *Rule 100-4*

“(f) The word “Clerk” refers to the Clerk of the District Court and *his* deputy clerks.”

Gender-neutral:

(f) *The word “Clerk” refers to the Clerk and the deputy clerks of the District Court.*

“(g) The words “Bankruptcy Clerk” refer to the Clerk of the United States Bankruptcy Court and *his* deputy clerks.”

Gender-neutral:

(g) *The words “Bankruptcy Clerk” refer to the Clerk and the deputy clerks of the United States Bankruptcy Court.*

b. *Rule 110-1*

“(a) *Eligibility* attorney’s maintaining *his* active status in good standing with”

Gender-neutral:

(a) *Eligibility* attorney’s maintaining active status in good standing with

c. *Rule 745-1*

“When an attorney has another action in which *he* is lead counsel”

Gender-neutral:

When an attorney is lead counsel in another action

4. *Local Rules of the U.S. District Court for the Southern District of Georgia*

V. *Appendix D: Excuses on Individual Request*

“(3) Any person who has served as a grand or petit juror in a federal court during the two years immediately preceding *his* call to serve;”

Gender-neutral:

(3) *Any person who has served as a grand or petit juror in a federal court during the two years immediately preceding the call to serve.*

5. *Georgia Supreme Court Rules*

Rule 49

"The request shall be filed as a separate document, shall be directed to the Clerk, and shall certify that the opposite party or *his* attorney has been notified of the intention to argue the case orally and that inquiry has been made of *his* opponent whether *he* intends also to argue orally. The request shall certify further that *his* opponent stated that *he* does or does not desire to argue orally"

Gender-neutral:

The request shall be filed as a separate document, shall be directed to the Clerk, and shall certify that the opposite party or the opposing party's attorney has been notified of the intention to argue the case orally and that inquiry as to whether the opposing attorney also intends to argue orally has been made. The request shall certify further that the opposing party's attorney desires or does not desire to argue orally.

No systematic examination or survey was conducted with respect to correspondence, appellate opinions, and court manuals, due to lack of personnel and finances to undertake such research. The subcommittee urges that resources be spent on promoting education and awareness so as to prevent gender bias in these "formal language" areas, rather than on discovering instances where it has occurred.

RECOMMENDATIONS

The State Bar of Georgia Special Committee on the Involvement of Women and Minorities in the Profession stated as one of its eighteen recommendations to the Bar: "Revise all official State Bar rules, by-laws, regulations, and so forth, to reflect only gender-neutral language." The same recommendation is apt for the judicial system.

Pattern Jury Instructions, Benchbooks, and Court Rules

1. The Pattern Jury Instructions Committee should incorporate a statement into the Preface to cover nonpattern instructions, that is, those formulated by judge or counsel, so as to assure their freedom from gender bias.
2. A letter should be sent to all judges who deal with juries to beware of gender bias in instructions, whether submitted by attorneys or developed by the judge.
3. The benchbooks should be revised by their respective committees to eliminate any gender bias.

4. The Rules of Court should be revised to eliminate gender-specific pronouns.

Court Orders, Correspondence, Forms, and Opinions

5. Court manuals, benchbooks, and personnel guidelines should advise that gender-neutral language be used in all court documents. The council of each class of court should establish a standing committee on gender bias. To begin with, each such committee should report to the supreme court by a date certain that the existing forms and publications of that council have been reviewed and modified where necessary to comply with the above rule. Thereafter, each committee should periodically review the future forms and publications of that class of court for gender bias.

Spoken Language in the Courtroom

6. Masculine pronouns should not be universally employed as if they were neutral. Nor should a new word, "hizerhur," be incorporated into the English language. Superfluous gender-specific references and language should be excised. Form letters should have appropriate substitutes for "Dear Sir" and "Gentlemen" in the salutation.

7. The Georgia Supreme Court should adopt a uniform rule for each class of court requiring that gender-neutral language be used in all forms and publications of the various court councils. Specifically, the use of the male pronoun to include the female and the use of general disclaimers or instructions at the beginning or end of a document should be prohibited.

Legal Education

8. Include in law school materials for courses in professional responsibility information designed to create awareness of potential gender bias in the practice of law and to teach law students that bias, whether gender, racial, religious, or cultural, must be avoided and prevented. Incorporate similar data into continuing legal education programs.

Judges and Court Personnel Training

9. Include such training in the seminars of all levels of judges and court personnel, clerks, administrators, reporters, the Judicial Section of the Atlanta Bar Association, and other court-connected groups. Include teaching that perception of gender bias, as well as actual bias, must be avoided. The annual education for judges and clerks should

include a segment on the issue of gender bias until it is no more, including a segment on the effect the demeanor and language of the judge and court employees have upon attorneys, parties, and witnesses, as well as judges and court employees. Hypotheticals such as those used in the Maryland survey demonstrate the utility of this teaching device. Another excellent teaching device is the videotape entitled "Gender Equity," a program developed by Donna Hackett and produced by the Canadian Judicial Centre for the Canadian Judicial Council Education Committee.

Awareness Campaign

10. Include articles periodically in the Georgia Courts Journal, the State Bar News, and other publications which teach and highlight the need to be aware of and to eliminate gender bias in court language (as well as in any court activity related to litigants, lawyers, witnesses, jurors, court personnel, and so forth). It is noted that the magistrates' newsletter contained an article focusing on the Commission and ended with the statement: "The President of the Council of Magistrate Court Judges encourages the Magistrate Court Judges to support this endeavor [of the Commission]."

Complaint Procedure

11. Publicize that complaints of gender bias practiced by any judge should be reported to the Judicial Qualifications Commission. Publicize the procedure for doing so. If the complaint relates to any formal language of the court, such as anything from the bench or in written orders or letters or forms, copies should be required, including transcripts when appropriate. Confidentiality should be provided. If current procedure does not accommodate such complaints, the Supreme Court should request the Judicial Qualifications Commission to establish an effective grievance procedure for persons who perceive gender bias in the language or conduct of clerks and court employees, as well as of judges.

12. The Code, especially those sections setting out forms, should be examined for gender bias and an act passed comprehensively changing such language in each instance where it occurs. For example, Code sections 17-4-45 and 17-4-46 should be amended to provide for the use of "the accused" instead of the masculine pronoun.⁵ Whether the Code is amended or not, the standard warrant form should be amended accordingly.

13. Code section 28-9-5(a)⁶ should be amended by adding:

“(16) Correct the language of any code section to provide for gender-specific or gender-neutral language.”

14. A letter from the Commission should be sent to each person or office, including legislative counsel, throughout the court system in Georgia that is responsible for the preparation and updating of forms, documents, rules, manuals, and repetitively-used language, to encourage examination of these forms for gender bias in language and to revise where necessary. Examples, such as the guilty plea litany, can be appended. The Office of Legislative Counsel should be requested to establish procedures to assure that the language of each bill proposed to the legislature be either gender specific or gender neutral. A similar letter should go to publishers of legal forms used in Georgia.

15. The Chief Justice should commission a guidebook publication that states what language is appropriate in letter salutations, jury instructions, and so forth, for the use of bench and bar. For example, the guidebook could deal with the use of pronouns.

5. O.C.G.A. §§ 17-4-45, -46 (1982).

6. O.C.G.A. § 28-9-5(a) (1986).

JUDICIAL ETHICS AND DISCIPLINE

The structure and substance of the rules relating to judicial ethics, as well as the application of those rules, comprised one of the focal points for study by the Court Rules Committee of the Georgia Commission on Gender Bias in the Judicial System.

For the course of the public hearings throughout the State, significant concern was expressed about the conduct of judges, both on and off the bench, and the concomitant perceptions of prejudice exhibited by some judges:

The judge's personal value system, biases, and attitudes have a tremendous impact on all those who enter the court or who are part of that court The judge in American society holds a position of esteem . . . the judge assumes a special burden of personal responsibility for the fairness, objectivity, and disinterestedness of his approach to the legal issues¹

Comments about judicial bias were expressed throughout the public hearings in less eloquent language, but with emotion and sensitivity. The types of judicial conduct complained of during the course of the public hearings included demeaning sexist language, disempowering actions, gender-role stereotyping, overt prejudice, and sexual harassment.

I. *Demeaning Sexist Language*

Incidents were reported of overt expressions of sexist language, such as calling a woman appearing at court "honey," "babe," "baby," "sugar," "sweetheart," "sweet young thing," "little lady," "honey pie," "sweetie," "young lady," and "little miss."²

Subtle forms of discrimination working to the disadvantage of women were alleged in such things as using differential titles or salutations during the conduct of proceedings. A woman lawyer or witness would be

1. The Hon. Lorenzo Arredondo, *Combatting Stereotypes: Sexism and Racism in the Courts*, CT. REV., Fall 1989, at 14.

2. Lisa W. Pettit, Assistant District Attorney, Rome Judicial Circuit, A Prosecutor's Observation: Written Testimony on Gender Bias in the Georgia Department of Corrections; *Albany Public Hearing Before the Commission on Gender Bias in the Judicial System* 84 (Jan. 19, 1990); *Columbus Public Hearing Before the Commission on Gender Bias in the Judicial System* 101, 102 (Oct. 20, 1989); *Macon Public Hearing Before the Commission on Gender Bias in the Judicial System* 66, 102 (Mar. 16, 1990); *Savannah Public Hearing Before the Commission on Gender Bias in the Judicial System* 48 (June 15, 1990).

called by her first name, "Jane," whereas a male would be called "Mr. Doe."³

II. *Disempowering Actions*

Comments about a woman lawyer's personal life, or lack thereof, or comments insinuating that litigation is unladylike behavior were dishonoring and disempowering and adversely impacted a focus on the issues. They included such remarks as "Well, Ms. [] you're a tough man to bargain with!"; "How could you represent these people, how could you spend so much time in jail, and why don't you get some better clients?"; and "What's a sweet young thing like you doing working on a case like this?". More generally, they were based on assumptions that a female attorney intrinsically has a problem with the hard, competitive environment of a law practice.⁴

Overt improprieties perceived to evince bias or prejudice by both words and conduct were characterized as "conduct belittling and patronizing and sometimes downright hostile." For example, it was said that one judge remarked to a female attorney seeking access to her client in jail, "Now why would you want to go into that nasty old jail? You know, I wouldn't want my daughter to go into that nasty old jail." Other court participants reported that remarks were made "about women being 'bitchy' or 'libbers.'" ⁵ It was also reported that women attorneys were kept seated and waiting longer than male lawyers. Similarly, it was charged that a general "discourtesy was shown to women witnesses." Some judges seemingly acted "less attentive, dismissing or bored" during the testimony of women witnesses.⁶

In cases involving domestic violence, it was said that some judges were known for making women's complaints look trivial and that some victims were treated differently by a lawyer's use of pressure tactics without protective judicial intervention. It was argued that victims frequently felt traumatized and helpless by a judge's attitudes that were reflected in comments that predefined women's and men's family roles in very traditional ways. Again the problem of categorical judicial stereotyping surfaced. The opinion was expressed that too many judges have too long regarded spousal battering as something other than criminal conduct, as a mere lover's quarrel or as a private family affair. The judicial comment "What did you do to make him hit you?" was presented as evidence of a disempowering, partial, and outmoded attitude.⁷

3. *Atlanta Public Hearing Before the Commission on Gender Bias in the Judicial System* 10, 11 (Aug. 3, 1990) [hereinafter *Atlanta Public Hearing II*].

4. *Savannah Public Hearing*, *supra* note 2, at 19, 47, 48.

5. *Macon Public Hearing*, *supra* note 2, at 28, 29.

6. *Columbus Public Hearing*, *supra* note 2, at 101.

7. *Atlanta Public Hearing II*, *supra* note 3, at 193, 244, 245; *Athens Public*

III. *Gender Role Stereotyping*

In hiring law clerks, some judges hire only men because of traveling difficulties with women. Others hire only women because they say men tire of the job soon or women write better and are more satisfied with one to two year clerkships.⁸

Several males testified about judges who, by virtue of their categorical public statements, appeared to lack the ability to perceive men as nurturing and effective parents. Repeatedly cited were sentiments, allegedly expressed in connection with custody matters, that the presiding judge believed young children belonged with their mothers, or that shared parenting or joint custody was an arrangement which the court would never approve. The most often quoted and colorful example of such categorical declarations, in which gender bias was charged as decisive and intrinsic, was the judicial comment: "I ain't never seen the calves follow the bulls, they always follow the cow; therefore, I always give custody to the mamas."⁹ Such gender-role stereotyping arguably disempowered by denying certain fathers a fair hearing. Statements of this nature would seem to foreclose a fair, searching, case-by-case, and impartial hearing to those persons falling outside the specific categorical stereotype approved by the court.¹⁰

Related to this problem was a belief that, in some instances, a "good ole boy" attitude reflected prejudice in the handling of cases. One person said the judge demonstrated gender role stereotyping in the courtroom by stating "Shoot, I think she's abusing him." Another questionable comment that was reported in reference to an especially attractive woman victim was "She can abuse me all she wants."¹¹

It was repeatedly recommended that judges need to have their consciousness raised to the issues of gender bias in the courtroom, as well as to the reality of domestic violence. It was said that too many judges view domestic violence cases only as a lover's quarrel or private business.¹²

IV. *Overt Prejudice*

What is most disturbing about some of the testimony presented during the hearings was the fact that when there was a preconceived,

Hearing Before the Commission on Gender Bias in the Judicial System 86 (Dec. 1, 1989).

8. *Macon Public Hearing*, *supra* note 2, at 5, 6, 14.

9. *Gainesville Public Hearing Before the Commission on Gender Bias in the Judicial System* 141 (May 18, 1990).

10. *Atlanta Public Hearing II*, *supra* note 3, at 134, 145.

11. *Griffin Public Hearing Before the Commission on Gender Bias in the Judicial System* 51 (July 13, 1990).

12. *Athens Public Hearing*, *supra* note 7, at 90; *Griffin Public Hearing*, *supra* note 11, at 43, 45, 55.

noticeable bias, it was sometimes demonstrated in a way that cast little doubt on the judge's predisposition towards specific cases. This was noted in testimony discussing domestic violence and the characteristics of behavior that offend victims, such as making light of the abuse and making comments that predefine men's and women's roles. It was felt that victims were left traumatized and helpless by judges' attitudes that men can be victims of violence by women and women's friends. It was said that there was little respect for victims of domestic violence, not because they are women but because spousal battering has been deemed something other than criminal conduct for too long. It was felt that there is a general lack of understanding on the part of judges, that the nature of their position is perceived as powerful, and that the words of the judge were persuasive and carry weight when there is perceived prejudicial conduct.¹³

There was also discussion about a judge's off-the-bench conduct. In some instances that were reported, there seemed to be only a lack of awareness with no intent to appear inappropriate and with a genuine willingness to be informed. In one such instance, there were some magazines in a judge's chambers that were removed when the judge was informed that they made others feel uncomfortable. Another witness, however, complained that during a domestic case, a judge put his feet up on the desk and was talking about his wife's tennis game during a discussion that was otherwise very traumatic for the witness, thus trivializing his custody case.¹⁴

Similarly, there were several reports that there is a perception of a "good ole boy system," that is, a "male dominated judicial system," in Georgia. One person complained that there was an obvious case of misconduct when a judge did not recuse himself from a case because of the judge's previous contact with the husband in divorce cases. It was noted that a judge should realize that those kinds of friendships compromise his credibility.¹⁵

V. *Sexual Harassment*

It was expressed that some judges made comments on physical characteristics, for example, commenting on the legs of female staff members. One woman commented that females were treated with less respect by a judge who was "patting and pinching our behinds and then winking." Another complained that the judge would rub the arms of

13. *Macon Public Hearing*, *supra* note 2, at 48.

14. *Athens Public Hearing*, *supra* note 7, at 66; *Macon Public Hearing*, *supra* note 2, at 8.

15. *Albany Public Hearing*, *supra* note 2, at 87; *Savannah Public Hearing*, *supra* note 2, at 12, 31, 32, 35.

women on several occasions, and still another noted incidents where the judge put his arms all around her.¹⁶

There was testimony that when women complained of sexual harassment, some judges were impatient and suggested, by their demeanor, a belief that sex on the job with the boss is consensual.¹⁷

VI. *Judicial Education*

Many speakers repeated that there is a need for effective judicial education to combat sex bias in the courts, that more extensive training should be given, that judges should be better trained in these matters, that they are not keeping up with the times, and that they need sensitivity training. There was a call to make these a part of the curriculum. For example, someone specialized in gender bias awareness training should lead a quality program for all court personnel that would involve judges in role playing or that would allow reflection on the subtle issue of bias.¹⁸

It was typically thought that almost everyone is occasionally careless and when something is pointed out to them, they immediately become defensive. Their reaction is that it was not intended and that if it is a problem, they may even offer assistance and suggest ways to help. Without specific incidents and education on the topic, though the intent to help or change may be admirable, the reality is that people say "fine, wonderful" and go on with the status quo.¹⁹

These foreseeable difficulties were expressed by Norma J. Wikler, Ph.D., Associate Professor of Sociology at the University of California, Santa Cruz, and Research Associate at the Institute for the Study of Social Change at the University of California, Berkeley. In a presentation sponsored by the National Center for State Courts in Williamsburg, Virginia, she stated that most gender bias commissions will "focus on courtroom interaction, because it is easier to address than the issues of harbored gender bias that impact decision making and in trying to address these issues there will be resistance to education and reform."²⁰

16. *Columbus Public Hearing*, *supra* note 2, at 102; *Macon Public Hearing*, *supra* note 2, at 8, 52, 66.

17. *Savannah Public Hearing*, *supra* note 2, at 22.

18. *Id.* at 11, 52-54; *Athens Public Hearing*, *supra* note 7, at 12, 34; *Atlanta Public Hearing II*, *supra* note 3, at 168, 178, 245; *Columbus Public Hearing*, *supra* note 2, at 24; *Griffin Public Hearing*, *supra* note 11, at 39; *see also* Mary E. Conway, Written Submission to the Commission 3-4 (Dec. 1, 1989).

19. *Savannah Public Hearing*, *supra* note 2, at 53, 54.

20. Norma J. Wikler, *Water on Stone: A Perspective on the Movement to Eliminate Gender Bias in the Courts*, CT. REV., Fall 1989, at 6.

There were speakers who believed that guidelines and rules should be established. It was expressed that judges should "establish, maintain, and enforce high standards of conduct in the courtroom so that the integrity and independence of the judiciary may be preserved."²¹

VII. *Code of Judicial Conduct*

One of the concerns expressed to the Commission was the perception that there is no recourse for an individual who feels a judge has acted in a gender-biased manner. The Commission reviewed the Georgia Code of Judicial Conduct, under which disciplinary action against a judge may be taken, as well as the American Bar Association's 1972 and 1990 Model Codes of Judicial Conduct, and the opinions of the Judicial Qualifications Commission. The purpose of this review was to determine if the current Code should be changed to insure that if gender-biased conduct is exhibited by a judge, an injured party may effectively seek disciplinary action.

A. *Contemporary Status of Current Ethics Rules*

The present Code of Judicial Conduct employed in Georgia is based upon the 1972 Model Code of Judicial Conduct,²² promulgated by the American Bar Association (ABA). During the mid-1980s, review of the Code was undertaken with an eye toward updating both its form and content. This process was completed in 1984, resulting in Georgia's present Code.²³ Currently, the State's Judicial Qualifications Commission, at the request of the Georgia Supreme Court, has a study committee to assess the ABA's 1990 Model Code of Judicial Conduct²⁴ for possible use, in whole or in part, in Georgia.

B. *Appropriate Language Structure*

One result of the mid-1980s update effort was the creation of a Code with gender-neutral language. This was accomplished by using plural noun forms throughout the document. On March 15, 1984, Georgia became the only state in the country with a code of judicial conduct employing gender-neutral language.

The 1972 Model Code's use of the ambiguous directive word "should" in critical passages defining ethical conduct has raised numerous questions over the years. In connection with behavior involving the

21. *Athens Public Hearing*, *supra* note 7, at 35.

22. MODEL CODE OF JUDICIAL CONDUCT (1972).

23. GEORGIA CODE OF JUDICIAL CONDUCT (1984).

24. MODEL CODE OF JUDICIAL CONDUCT (1990).

appearance of impropriety, or in the context of actions not clearly right or wrong pursuant to the law but subject to the influence of shifting social values and cultural sensitivities, this use of the word "should" has resulted in indefinite guidance as to the better judicial practice. Georgia's 1984 judicial ethics code revision did not deal with these concerns. The ABA's 1990 Model Code of Judicial Conduct carefully assesses use of the word "should," substituting for it as needed the clearly mandatory term "shall" or the precatory term "may."

A second goal, unrelated to language, achieved by Georgia's 1984 changes was allowance for greater flexibility in the permissible political activity of judges' spouses (predominately women due to the gender make-up of the state judiciary) as well as for other members of judges' families. Other improvements wrought by the 1984 judicial ethics code revisions lacked any similar particular gender impact. They involved matters such as limitations on business investment activity, disqualification criteria, comment in public about court cases, acceptance of gifts, personal election campaign restrictions, and so forth.

C. Membership in Discriminatory Organizations

In 1984, shortly after Georgia revised its Code of Judicial Conduct, the ABA adopted an amendment to the 1972 Model Code prohibiting judges from belonging to private organizations that engage in "invidious discrimination." Georgia's revised Code does not include this modification. The ABA's 1990 Model Code Canon 2C incorporates a new provision regarding the question of judicial membership in clubs and other organizations that practice or may have at some time practiced "invidious discrimination."

D. Confidence Inducing Behavior Generally

Canon 2 of the present Georgia Code of Judicial Conduct calls for judges to "conduct themselves at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."²⁵ This provision elaborates on the canon that admonishes against both "actual" and "apparent" impropriety on the part of judges. The commentary speaks against "irresponsible" and "improper" conduct, which erodes public confidence in the judiciary, while reminding judges that they "must expect to be the subject of constant public scrutiny."²⁶

No clearer idea is anywhere presented, however, as to what actions or other behaviors constitute either actual or apparent impropriety,

25. GEORGIA CODE OF JUDICIAL CONDUCT Canon 2 (1984).

26. *Id.* commentary.

especially in the nonadjudicative, extra-judicial aspects of judicial conduct. Nationwide, the lack of objective consensus surrounding Canon 2 impropriety has resulted in virtually no professional disciplinary proceedings simply for "apparent improprieties." Correspondingly, sanctions imposed for "actual improprieties" under Canon 2 seem primarily to reinforce express violations of other canons that involve more objective, demonstrable behavior such as Canon 3, governing adjudicatory and administrative decision making; Canon 4, covering avocational ventures; Canon 5, regulating extra-judicial conduct; or Canon 7, treating political activity.

The ABA's 1990 Model Code retains much of this hortatory posture in its general impropriety canon. By incorporating a gender-neutral textual treatment throughout the new document, by including the invidious discrimination clause (Canon 2C), and by explicitly affirming cultural diversity sensitivities in the later portions of the Code (Canons 3B(5), 3B(6), and 4A), the 1990 version plainly makes a new statement about behavior that is acceptable and more preferred.

E. Partial and Prejudicial Official Acts

Canon 3 of Georgia's current Code of Judicial Conduct focuses on diligent and impartial performance of judicial duties, rather than on all the activities of a person who also happens to be a judge. It admonishes judges to be patient, courteous, and dignified while daily doing their jobs. But, like Canon 2, it fails to deal expressly with official acts in which demonstrable decisions, writings and speech, subliminal body language and intentional gestures, or other conduct can be reasonably perceived by others as evincing bias or prejudice.

Moreover, the advisory opinions periodically issued by the State's judicial disciplinary body, the Judicial Qualifications Commission, construing the language of the Code have never dealt with inappropriate workplace speech, physical gestures, and other behaviors. Nevertheless, Georgia's cultural norms regarding social or family role, humor, dress, etiquette, and possibly even courtesy are changing and, therefore, demand greater sensitivity on the part of judges, as well as other professionals, both on the job and elsewhere.

The ABA's 1990 Model Code of Judicial Conduct attempts to deal with behaviors relating to the duties of office that display inadvertent bias or overt prejudice. It expressly admonishes judges to "refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment" and to "require the same standard of conduct of others" subject to their direction and control.²⁷ Furthermore, the 1990 Model Code admonishes judges to avoid any "facial expression, body

27. MODEL CODE OF JUDICIAL CONDUCT Canon 3B(5) commentary (1990).

language, in addition to oral communication²⁸ that could influence jurors, lawyers, witnesses, the media, and others regarding the judge's views in a proceeding. Finally, it directs judges to supervise appearing lawyers "to refrain from manifesting, by words and conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, against parties, witnesses, counsel or others."²⁹

F. Biased or Prejudiced Extra-Judicial Behavior

Appropriate extra-judicial actions and involvements are governed by Canon 4 and 5 of the present Code. In these provisions, however, the main concerns relating to inappropriate behavior are misuse of the prestige of judicial office, and creation of adjudicatory conflict of interest situations that would require judicial disqualification. The prestige of judicial office may be misused to win changes in the substantive law or in policies concerning the administration of justice, as well as in fundraising for worthy public causes and membership recruitment for public service groups. The emphasis in the present canons is on avoiding the risk of conflict with the performance of judicial obligations due to outside organizational involvements or justice reform activities.

The advisory opinions periodically issued by the State's judicial disciplinary body, the Judicial Qualifications Commission, construing the language of the Code, have seldom dealt with emerging values in support of honoring cultural diversity and judges' inappropriate associations, speech, gestures, and other personal behaviors. Nevertheless, cultural norms regarding social or family role, humor, dress, etiquette, and possibly even courtesy are changing and, therefore, are demanding greater sensitivity on the part of judges in everything they do. What constitutes reasonable evidence of judicial bias evinced by particular behavior may be becoming less apparent to judges because of the growing cultural diversity in the State.

The ABA's 1990 Model Code of Judicial Conduct attempts to deal with inadvertent and intended manifestations of bias and prejudice, both reasonably apparent and actual, in the context of anything a judge does. The 1990 Model Code explicitly defines expressions of bias and prejudice by a judge that may reasonably cast doubt on the capacity to act impartially to include "jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status."³⁰

28. *Id.*

29. *Id.* Canon 3B(6).

30. *Id.* Canon 4A commentary.

VIII. Survey Data Available to the Commission

The Commission's own survey of judges and court support personnel regarding their perceptions about the presence or absence of gender bias in the court system contained a wide variety of inquiries. The following paragraphs illustrate a sampling of these survey results that parallel the professional ethics issues treated above, especially in connection with testimony presented during the Commission's public hearings.

When judges were asked if they had observed sexist remarks or jokes being made in court or in chambers, the affirmative response that they had observed such conduct by judges was 12.3% of magistrate court judges, 18% of probate court judges, 17.1% of juvenile court judges, 15.4% of state court judges, and 14% of superior court judges.

When judges were asked if they had addressed women attorneys by their first names or terms of endearment when men were not so addressed, the affirmative response that they had observed such things happening was 17% of magistrate court judges, 30.7% of probate court judges, 11.1% of juvenile court judges, 11.5% of state court judges, and 10.3% of superior court judges.

When judges were asked if they had addressed women litigants by their first names or terms of endearment when men were not so addressed, the affirmative response that they had observed such things happening was 9.7% of magistrate court judges, 35% of probate court judges, 8.3% of juvenile court judges, 0% of state court judges, and 5.2% of superior court judges.

When judges were asked if they had asked women lawyers if they were in fact attorneys when men lawyers were not so quizzed, the affirmative response that they had observed such things happening was 23.3% of magistrate court judges, 30% of probate court judges, 16.7% of juvenile court judges, 11.5% of state court judges, and 12.3% of superior court judges.

When the answers to various questions are further differentiated by male and female respondents, the survey yields additional interesting data. For example, women magistrates were consistently and often significantly more likely to perceive gender bias than their male colleagues. Among probate court judges, women (who comprise the majority of this judicial population) are more likely than men to attribute gender-biased behaviors to themselves. Superior court judges (a judicial group made up overwhelmingly of males) are least likely to perceive gender bias conduct in themselves or in others.

As this brief sampling indicates, however, even judges perceive the presence of certain gender-biased behaviors in the State's court system, a presence which tends to undermine the professionalism with which the courts function.

FINDINGS

1. Judicial conduct, both in and outside of courtroom processes, impacts the perception of fairness and, in some instances, the outcome of judicial decision making.
2. The current Code of Judicial Ethics has not sufficiently curtailed impropriety by some judges within the State of Georgia.
3. Meriting special attention is conduct regarded as sexual harassment, as well as any action commonly viewed as demeaning and disempowering conduct (whether or not so intended) toward women, persons who are members of racial, religious or ethnic minorities, the aged, the disabled, and others. Whether displayed by judges or other court officers, employees, volunteer agents, or participants, these behaviors are intolerable in the context of modern justice administration.
4. There is a perception by professionals, such as lawyers, social workers, teachers, law officers, and other experts, that training and education is necessary to correct gender bias within the courtrooms.
5. Six other states' task forces or commissions have concurred that judges should monitor behavior in courtrooms and chambers and swiftly intervene to correct lawyers, witnesses, and court personnel who engage in gender-biased conduct.
6. Court employees lack access to an appropriate and protected process through which to lodge a complaint against these types of conduct, especially sexual harassment charges that may involve retaliation from an employer.
7. Because demeaning, sexist language, gender-role stereotyping, disempowering actions, and sexual harassment are only implicitly admonished against by the "impartiality preservation provisions" of the current Code, and because they are not expressly disavowed by already existing Judicial Qualifications Commission opinions, the State judiciary lacks a clear climate of understanding that distances judicial professionalism from these things, these forms of gender bias, and these means of insensitivity to cultural diversity.
8. To joke, comment, restate, or fail to admonish when the result of such action or inaction demeans individuals on the basis of their race, gender, age, religion, national origin, disability, sexual orientation, or socioeconomic status amounts to conduct that is not tolerable for a judge.

9. More extensive training of judges, as well as court support personnel, is needed regarding gender fairness and sensitivity to contemporary cultural diversity. In connection with the civil and the criminal law, perpetuation of gender-role stereotypes that unduly influence or merely appear to influence the exercise of judicial discretion constitutes a particularly harmful form of gender bias. The impacts resulting from such insensitivity, in addition to improper etiquette and sexist language, must be part of judicial education.

RECOMMENDATIONS

1. Georgia should stay on the leading edge of judicial ethics awareness by continuing periodically to modernize its Code of Judicial Conduct, together with the body of interpretive opinions issued by the State's Judicial Qualifications Commission.
2. The Code of Judicial Conduct and interpretive opinions should guide the personal and professional behavior of judges and others subject to judicial direction and control.
3. A series of requests seeking formal Judicial Qualifications Commission advisory opinions should be made to clarify application of the present Georgia Code of Judicial Conduct. Such counsel from the Judicial Qualifications Commission should definitively address the ethical propriety of the remarks and other questioned behavior about which the Commission received public testimony.
4. The Georgia Code of Judicial Conduct should preserve the current gender-neutral language. The hallmark of the State's judicial ethics code should be complemented by promotion of gender neutral application of the laws.
5. The Georgia Code of Judicial Conduct should be modified to incorporate a contemporary provision guarding against voluntary judicial membership in organizations that practice invidious discrimination on the basis of race, gender, religion, or national origin. This may be accomplished by adopting Canon 2C, and the accompanying Commentary, of the ABA's 1990 Model Code of Judicial Conduct.
6. In the context of day-to-day activities in both adjudicative and administrative decision making, the professional ethical performance of judges would be strengthened by their exercise of a keener awareness as to their own behavior and the conduct of others over whom judges

exercise supervisory powers. Judges have an affirmative duty to combat discrimination. This may be facilitated by adopting Canon 3B(5) and 3B(6), along with accompanying Commentary, of the ABA's 1990 Model Code of Judicial Conduct.

7. Judicial demeanor in realms outside of adjudication and court administration should be guided by respect for cultural diversity. Canon 4A, along with accompanying commentary, of the ABA's 1990 Model Code of Judicial Conduct should be adopted.

8. Recruitment, appointment, and compensation of potential staff members should be made without regard to gender, race, creed, or national origin.

9. The *Georgia Rules of Court Annotated* and the Rules and Regulations for the Organization and Government of the State Bar of Georgia should be revised to include the following under Disciplinary Standards: In representing a client, a member of the bar shall refrain from engaging in conduct that exhibits or is intended to appeal to or engender bias against a person on account of that person's gender, race, religion, or national origin, whether that conduct is directed to other counsel, court personnel, witnesses, parties, jurors, judges, judicial officers, or any other participants.

10. Governance, policies of mandatory continuing judicial education, should include: Judges shall receive periodic training and education about the effects of gender bias on attorneys, judges, witnesses, and juries, and methods for avoiding it. If possible, this training shall be provided in a form that involves judges as active participants and not merely as an audience. Judges shall oversee the implementation of periodic training and education programs for non-judicial staff. They shall ensure that each present and future employee is educated on the rules associated with the work environment, employment and sexual harassment. Staff shall be informed about how and where complaints can be made in an appropriate and protected manner.³¹

31. GEORGIA RULES OF COURT ANNOTATED (1990).

JUDICIAL SELECTION

I. Methodology

Determining whether and how gender bias affects the selection of judges is fundamental to the evaluation of gender bias in the judicial system. Public belief that the judiciary is unbiased is essential to the effective and orderly functioning of the court system and to the authority the judiciary exercises over society. Ultimately, the public perception of fairness is critical if the judicial system is to function at all.

If society perceives that judges are selected by a system that discriminates against segments of that society—whether on the basis of gender or otherwise—then society may well regard the judicial system as biased and unjust. At a minimum, the groups discriminated against may question the ability of the judicial system to recognize and deal equitably with their needs, experiences, interests, and demands.

It is clear that every judge brings to the bench a view of the world which is shaped by personal experiences. Sex, race, ethnicity, religion, wealth, and other factors are fundamental aspects affecting every individual's values, beliefs, judgments, and opinions. While each judge strives to lay personal viewpoint aside, the view from the bench must inevitably be colored by the person who lives beneath the robes. In fact, a judge who brought none of that personal experience and perspective to the responsibility of judging would be a very poor jurist indeed.

It is axiomatic that "the principle of equal treatment of all persons before the law is essential to the very concept of justice."¹ Research exists that says that a judge's actions and decisions are unaffected by sex, race, ethnicity, religion, and other factors, but research also exists to support the proposition that a judge's sex, race, ethnicity, religion, and other factors, affect the substantive decisions of the court as well as the way the judicial process operates.²

1. Resolution XVIII of the Conference of Chief Justices (Aug. 4, 1988) (urging "every chief justice to address gender bias and minority concerns in the state courts").

2. See, e.g., David W. Allen & Diane E. Wall, *The Behavior of Women State Supreme Court Justices: Are They Tokens or Outsiders?*, 12 JUST. SYS. J. 232 (1987); Herbert M. Kritzer & Thomas M. Uhlman, *Sisterhood in the Courtroom: Sex of Judge and Defendant in Criminal Case Disposition*, SOC. SCI. J., Apr. 1977, at 77; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Judith Resnick, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988); The Hon. Patricia M. Wald, *Women in the Law: Stage Two*, 52 UMKC L. REV. 45 (1983); Thomas G. Walker & Debra J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596 (1985); Robin West,

Any court system may reasonably be judged by the degree to which opportunity is afforded to all qualified applicants who seek judicial office, regardless of gender or minority status. Many qualified men and women in the legal profession aspire to elevation to the bench—an aspiration which cannot be lawfully or logically denied based on gender. Clearly, the equal protection mandates of the federal and state constitutions extend to the selection of judges—whether by appointment or election.³

The information for our report and analysis was obtained through a variety of means. The Judicial Selection Committee researched and reviewed the election and appointment process for judges in Georgia as it exists now and in the past. Testimony from the Commission's public hearings was reviewed and considered at length. The Committee also studied the responses to the survey questionnaire sent to sitting judges and to attorneys by this Commission, as well as relevant attorney responses to the State Bar of Georgia's 1989 Survey on Women and Minorities in the Profession. An analytical study was performed of the procedures and records of the Judicial Nominating Commission covering all applications made for appointment to the appellate and trial bench (supreme court, court of appeals, superior, and state courts) from 1972 through 1990. Reliance was also placed upon State Bar Membership records, statistical records of the Administrative Office of the Courts, statistical records of the Election Divisions of the Georgia Secretary of State's Office, newspaper and periodical studies which deal with the composition of the bench and judicial election and appointments to the bench, and a review of the relevant legal literature on gender as a factor in judicial selection.

II. Constitutional and Statutory Mandates Affecting Judicial Selection

In order to determine whether and to what extent gender bias exists in the judicial selection process, the Commission began by examining the current system of judicial selection, studying the legal requirements for sitting on the bench of the major courts in Georgia, and the methods by which judges ascend to the bench.

According to the Georgia Constitution and statutory law, the clear majority of judges are elected to serve their terms. A definitive study of

Jurisprudence and Gender, 55 U. CHI. L. REV. 1 (1988). Despite their validity, these analyses may be limited because of the extremely low numbers of women serving as judges in this country to date. Caution is urged against using any analysis to generate stereotypes that would work to the detriment of women in the appointment and election process.

3. See, e.g., Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273 (1989).

the methods by which all Georgia judges come to the bench is beyond the scope and resources of this Commission. As such, the Commission has focused on the constitutionally created courts in Georgia: supreme court, court of appeals, superior courts, state courts, juvenile courts, probate courts, and magistrate courts. The composition, method of judicial selection, and the jurisdiction of each of these courts is as follows:

A. Supreme Court

Number: Seven Justices

Selection: The seven justices serving on the court are elected to staggered, six year terms in statewide, nonpartisan elections. A candidate for the supreme court must have been a practicing attorney for at least seven years prior to assuming office. A vacancy on the court is filled by gubernatorial appointment to complete the unexpired term.

Jurisdiction: Appellate jurisdiction over cases of constitutional issue, title to land, validity of and construction of wills, habeas corpus, extraordinary remedies, convictions of capital felonies, equity, divorce, alimony, election contest, certified questions, and certiorari from the court of appeals.

B. Court of Appeals

Number: Nine Judges in three divisions

Selection: The judges of the court of appeals are elected to staggered, six year terms in statewide, nonpartisan elections. A candidate for the court of appeals must have been a practicing attorney for at least seven years prior to assuming office. In the event of a vacancy on the court during a judge's term, the governor appoints a successor to complete the unexpired term.

Jurisdiction: Appellate jurisdiction over lower courts in cases in which the supreme court has no exclusive appellate jurisdiction.

C. Superior Courts

Number: Forty-five circuits; 137 judges (149 judgeships authorized)

Selection: Superior court judges are elected to four year terms in nonpartisan, circuit-wide races. To qualify as a superior court judge, a candidate must be at least thirty years old, a citizen of Georgia for at least three years, and authorized to practice law for at least seven years. A vacancy on the court is filled by gubernatorial appointment to complete the unexpired term.

Jurisdiction (general): Civil law actions, misdemeanors, and other cases, exclusive jurisdiction over cases of divorce, title to land, equity, and felonies. Jury trials.

D. State Courts

Number: Sixty-two courts; eighty-five judges (forty-one full-time and forty-four part-time judges)

Selection: State court judges are elected to four year terms in nonpartisan, county-wide elections. Candidates must be twenty-five years old, have practiced law for at least five years, and have lived in the county for at least three years. If a vacancy occurs in a state court judgeship, the governor may fill the office by appointment.

Jurisdiction (limited): Civil law actions (except cases within the exclusive jurisdiction of the superior court), misdemeanors, traffic offenses, felony preliminaries. Jury trials.

E. Juvenile Courts

Number: 159 courts; Fifty-one judges (twelve full-time and thirty-nine part-time; two state court judges serve as part-time juvenile court judges and superior court judges serve in counties without independent juvenile courts)

Selection: Juvenile court judges are appointed by the superior court judges of the circuit for a four year term. One exception is that the juvenile court judge of Floyd County is elected. Judges must be at least thirty years of age, have practiced law for five years, and have lived in Georgia for three years.

Jurisdiction (limited): Delinquent, unruly, deprived juveniles, and juvenile traffic offenses. No jury trials.

F. Probate Courts

Number: 159 courts; 159 judges

Selection: Probate court judges are elected to four year terms in county-wide, partisan elections. A candidate for office must be at least twenty-five years of age, a high school graduate, a U.S. citizen, and a county resident for at least two years preceding the election. In counties with a population over 100,000, candidates must fulfill additional qualifications on age and the practice of law.

Jurisdiction (limited): Exclusive jurisdiction in probate of wills, administration of estates, appointment of guardians, guardianship of the mentally ill, involuntary hospitalizations, issuance of marriage licenses. Traffic court in some counties. Truancy in some counties. Hold courts of inquiry. Search warrants and arrest warrants in certain cases. In counties with a population over 100,000 where the probate judge is an attorney practicing at least seven years, a party to a civil case has the right to a jury trial if so asserted by a written demand with the first pleading.

G. Magistrate Courts

Number: 159 courts; 159 chief magistrates and 284 magistrates; thirty-eight also serve state, juvenile, probate, civil, or municipal courts.

Selection: Chief magistrates are either appointed or elected in partisan, county-wide elections to serve for a term of four years. Terms for other magistrate judges run concurrently with that of the chief magistrate who appointed them. The authority to appoint a replacement if a vacancy occurs in the office of chief magistrate usually resides with a circuit's superior court judges. To qualify for candidacy for magistrate office, persons must reside in the county for at least one year preceding their term of office, be twenty-five years of age, and have a high school diploma or its equivalent. Additional qualifications for the office of chief magistrate or magistrate or both may be imposed by local law.

Jurisdiction (limited): Search and arrest warrants, felony and misdemeanor preliminaries, misdemeanor bad check violations. Civil claims of \$5,000 or less, dispossessories, distress warrants, county ordinances. No jury trials.

III. Current Profile of Judges on the Bench

A review of the number of judicial seats held by women in Georgia indicates that gender bias exists to a significant degree in the judicial selection process. Women are not adequately represented on the bench at any judicial level. The higher the court, the more evident are the effects of discrimination against qualified women who aspire to sit on the bench.

In 1990 women constituted 52% of the population of Georgia. The percentage of women in Georgia's four accredited law schools in the class which will graduate in 1992 is presently 43%. This number has consistently reflected a significant and growing percentage over the past two decades.

Women have been actively engaged in the practice of law in large and previously unprecedented numbers since the late 1960s and early 1970s. The pool of women currently engaged in the practice of law and qualified to serve on the bench is significant and continues to grow every year. In fact, 21% of all members of the State Bar of Georgia for 1990 are female.⁴ However, as demonstrated in Table 1 below, only 7% of the judges sitting today on the trial and appellate courts of this state are female.

Counting judges who are sitting on all seven courts, 24% of the bench is comprised of women. However, if one narrows the count to those

4. Information provided by State Bar of Georgia.

judges who are also attorneys, the figure is much lower. Judges who are attorneys in these seven courts number 423, of which 35 are women. Therefore, only 8% of these judges who are also attorneys are women. And, if one examines only the trial and appellate benches, the percentage of judges who are women is only 7%.

Nationwide, there were a total of 355 judges who sit on the state courts of last resort as of December 1990. Of those, 36 are women—reflecting a total of 10% of these judges. The proportion of women sitting on the intermediate appellate courts of the state courts in the United States is only 8% with a total of 78 women holding these offices out of a total of 978 judges.⁵

Table 1
Breakdown of Judges in Georgia Courts by Gender
as of November 1, 1990

<u>Courts</u>	<u>Total Judges</u>	<u>Men</u>	<u>Women</u>	<u>% Women</u>
Supreme Court	7	7	0	0%
Court of Appeals	9	8	1	11%
Superior Court	137	129	8	6%
State Court	85	77	8	9%
<u>Subtotals</u>	<u>238</u>	<u>221</u>	<u>17</u>	<u>7%</u>

<u>Courts</u>	<u>Total Judges</u>	<u>Men</u>	<u>Women</u>	<u>% Women</u>
Juvenile Court	51	48	3	7%
Probate Court	159	92	67 *	42%
Magistrate Court	450	319	131 *	29%
<u>Totals</u>	<u>898</u>	<u>680</u>	<u>211 *</u>	<u>24%</u>

[* Seven women serve as both probate judges and magistrates and are subtracted when calculating percentage of total judges who are women.]

IV. *Election of Women to the Bench*

Few women have reached the trial bench in Georgia initially through election. No woman has ever been elected to the supreme court, though one woman sought office by election in 1982 and was unsuccessful.⁶ One woman currently sits on the court of appeals,

5. National Center for State Courts, Williamsburg, Va.

6. Since this section of the report was written, Governor Zell Miller appointed Judge Leah Sears-Collins to the Georgia Supreme Court to fill the unexpired term of

having been initially appointed and since reelected.⁷ No other woman has sought this office by election.

Of eight women sitting on the superior court bench as of December 1990, four (50%) were initially elected to the position.⁸ One additional woman previously served as a superior court judge—The Honorable Phyllis Kravitch. Judge Kravitch was the first woman elected to the superior court in Georgia in 1977. President Jimmy Carter appointed Judge Kravitch to the United States District Court for the Southern District of Georgia, and later to the Eleventh Circuit Court of Appeals, where she continues to serve.

Of the eight women sitting on the state court bench as of December 1990, five (63%) came to office initially by election.⁹ Four

Justice George Smith. Justice Sears-Collins will stand for election in July 1992.—ED.

7. The Honorable Dorothy Toth Beasley presently sits as the sole woman on the Georgia Court of Appeals. She is the first and only woman ever to serve on an appellate court in Georgia, after being appointed by Governor Joe Frank Harris in 1984. Judge Beasley had previously served as a state court judge in Fulton County.

8. Eight women served on the superior court benches in Georgia as of November 1, 1990. The Honorable Carol Hunstein serves on the DeKalb Superior Court, having won her seat by election in 1984 following a career in private practice. The Honorable Leah Sears-Collins serves on the Fulton Superior Court with The Honorable Frank Mays Hull and The Honorable Thelma Wyatt Cummings. Judge Sears-Collins won her seat in 1988 through election, having previously served on the Atlanta City Court. Judges Hull and Cummings were appointed to the superior court from the State Court of Fulton County in 1990. The Honorable Dorothy Robinson won election to the Superior Court of Cobb County in 1980 after serving (first by appointment in 1972) on the State Court of Cobb County. The Honorable Elizabeth Glazebrook was appointed to the Superior Court of the Appalachian Circuit in 1988 from her seat on the juvenile court. The Honorable Rufe McCombs won election first to the state court bench in 1978 and next to the Superior Court of the Chattahoochee Circuit in 1982, where she now serves. The Honorable Faye Sanders Martin was appointed to the Superior Court of the Ogeechee Circuit from her career in private practice in 1978.

In January 1991, The Honorable Amanda Williams was sworn into office for the Superior Court of Glynn County, after successfully running for that office following a career in private practice. Also, in June 1991, The Honorable Linda W. Hunter was appointed to the DeKalb Superior Court, after having been appointed to state court in 1987 from her position as an Assistant District Attorney for DeKalb County.

9. Eight women also served on the state court benches in Georgia as of November 1, 1990. The Honorable Dorothy J. Vaughn was elected to the State Court of Fulton County in 1988 following a career in private practice. The Honorable Alice D. Bonner was appointed to the State Court of Fulton County in 1990, after a career in private practice. The Honorable Anne Workman was elected to the State Court of DeKalb County in 1984, after her 1983 appointment to the magistrate court from her career in private practice. The Honorable Linda W. Hunter, also in the State Court of DeKalb County, was appointed in 1987 from her position as an Assistant District Attorney for DeKalb County. The Honorable Nancy Campbell was elected to the State Court of Cobb County in 1986, after having served as an Assistant Solicitor in Cobb County. The Honorable Mary E. Staley was elected to the State Court of Cobb County in 1984, having previously served as a magistrate. The Honorable Kathlene S.

additional women have previously served as judges of the state court, one of whom was initially elected.

Since the absolute numbers of female candidates and successes remain so few, it is difficult to draw absolute conclusions from these figures. While national research concludes that women fare better through the appointment process than the election process, it appears that more women have first come to the state and superior court benches in Georgia by election than by appointment.

By contrast, of the 129 men sitting on the superior court bench as of December 1990, thirty-three (26%) were initially elected to the position. Of the seventy-seven men sitting on the state court bench as of December 1990, forty-one (53%) came to office initially by election.

In the past, women have not competed for judicial office through the election process in great numbers. It is reasonable to speculate that this decision may well have reflected the accurate assessment that the likelihood of success in these races was small. In fact, no woman has ever successfully run for statewide elective office of any kind in Georgia with the exception of Judge Dorothy Toth Beasley who sits on the Court of Appeals and ran as an incumbent after initial appointment.

While voter interest in judicial elections in Georgia tends to be low in the larger metropolitan areas, community awareness and information about judicial elections in less populous parts of the state can be high. Lack of voter awareness is so serious a problem that political folklore in Georgia ascribes a significant winning factor to the alphabetic priority that a candidate's name will have on the ballot.

Notwithstanding the lack of voter interest, contested judicial elections are expensive and women have reported tremendous obstacles to raising money for campaigns, obstacles that they perceive not to exist for male candidates. These problems exacerbate the power of incumbency. Since the bench is overwhelmingly male dominated, the advantage of incumbency furthers the longstanding effects of gender bias in the electoral process.

V. *Gubernatorial Appointment of Women to the Bench*

Although judges maintain office by election, most judges first reach the bench by gubernatorial appointment, either to fill a newly created judgeship or to replace a judge who has left office during midterm, thereby creating a vacancy. National research concludes that increasing

Gosselin has served in the State Court of Hall County since her election in 1986 following a career in private practice. The Honorable Jeannette Little was appointed to her part-time position in the State Court of Troup County in 1986 and continues to be engaged in the private practice of law.

the number of women on the bench must come through the appointment and not the electoral process.¹⁰

The Commission reviewed the operations of the appointment process in Georgia over the past two decades (focusing on 1972 through 1990) when women have for the first time started to make appearances in the state judiciary.¹¹ This historical analysis reveals that the appointment process does not act to solicit and support women candidates for judicial office and it fails to adequately eliminate obstacles to women reaching the bench.

In June 1973, acting by Executive Order, Governor Jimmy Carter created the Judicial Nominating Commission (JNC) (replacing a 1971 Executive Order which first created the Appellate Judicial Selection Commission). The JNC was intended as a large first step towards institutionalizing merit selection for gubernatorial appointments and minimizing political considerations for these appointments. Until 1991, the JNC continued to exist in much the same form as when it was first initiated.¹²

In 1991, by Executive Order, Governor Zell Miller revised the composition of the JNC. The new JNC, chaired by Norman Underwood, includes nine members. Ex-officio members include the President of the State Bar of Georgia and the State Attorney General. Three members are appointed by the Governor and must be members of the State Bar of Georgia. The four remaining members of the JNC must be non-lawyers—two appointed by the Governor, one by the Lieutenant Governor, and one by the Speaker of the House. The appointed members serve at the pleasure of the appointing authority. The Executive Order specifically requires, however, that “[a]t all times, the JNC shall include one member who is either Black, Hispanic, Asian-Pacific American, Native American, or Asian-Indian American and one woman.”¹³ The Commission notes with some dismay the absence of a requirement that the JNC include at least one man. The present formulation implies the “traditional” view that the JNC will naturally

10. The Fund for Modern Courts, *The Success of Women and Minorities in Achieving Judicial Office: The Selection Process* (1985).

11. For an excellent article reviewing the history of the judicial appointment process, written by the long-time Chair of the Judicial Nominating Commission, see A. Gus Cleveland, *The Judicial Nominating and Appointment Process in Georgia: 1971-1990*, GA. ST. B.J., Nov. 1990, at 54.

12. Before 1991, the Judicial Nominations Commission was composed of ten members, five appointed by the Governor and five members seated by virtue of their positions on the Executive Committee of the State Bar of Georgia (President, President-Elect, Immediate and Next Immediate Past Presidents, and the President of the Younger Lawyers Section; the latter changed in 1978 to the Immediate Past President of the Younger Lawyers Section). Governors Busbee and Harris continued the Judicial Nominating Commission in its original form when they held office.

13. Exec. Order (Feb. 12, 1991).

consist predominantly of males—the presence of at least one female being statutorily mandated.

No woman ever sat on the JNC until 1983 when Governor Harris appointed Jane Kahn to hold a seat. Later, The Honorable Romae T. Powell was appointed to the JNC by Governor Harris. Since no woman has ever held office in the State Bar of Georgia (except within the Younger Lawyers Section), no woman served on the JNC through the Bar seats, with the exception of Donna G. Barwick who served when she was Past President of the Younger Lawyers Section. The revised JNC appointed in 1991 includes two women, both lay members. However, the Commission observes that no female attorney presently serves on the reorganized Judicial Nominating Commission.

The Gender Bias Commission has not examined the yet unwritten record of the newly constituted JNC, instead focusing on the work of its predecessor from 1972 through 1990. It is hoped that the new JNC will seize the unique opportunity presented to eradicate gender bias in the judicial appointment process, and to that end, we offer this report and recommendations for their consideration.

Throughout its existence, the JNC has operated in essentially the same fashion, with present procedures solidifying since 1978. The JNC has the duty to receive nominations and applications for judicial positions to be filled by gubernatorial appointment and to recommend candidates for the Governor's consideration based on issues of merit.

The JNC solicits nominations from judges and local and state bar leaders and utilizes direct mail or legal notices to notify the general bar of judicial vacancies to be filled by appointment. It was not until 1989 that the Georgia Association for Women Lawyers and the Georgia Association of Black Women Attorneys were provided notices of vacancies.

The JNC requires as part of its application process that each applicant complete a formal questionnaire.¹⁴ Questionable areas of inquiry include the following issues: marital status, spouse's name, and the names and ages of all children; information on a nominee's divorce action; data on military service; and health inquiries which might include information on maternity leave.

The interview of each applicant is conducted collectively by the JNC and is very brief, lasting "from around 15 minutes to up to an hour and [had] no set format."¹⁵ As part of the screening process, members of the JNC have "confidential discussions with lawyers, judges and non-lawyers as to the character, habits and abilities of the various

14. The Committee reports that in 1991 the Commission deleted the requirement that each candidate "send a small photograph to each member of the Commission" as part of the application process.

15. Cleveland, *supra* note 11, at 58.

nominees."¹⁶ "Over the years the JNC has not adopted any specific written rules that it follows in its evaluation process."¹⁷

Until 1989, women's bar organizations had not been asked to participate in the screening process. At that time, the Georgia Association of Black Women Attorneys and the Georgia Association for Women Lawyers initiated their own roles in the process without invitation.

The Commission received input expressing concern that the judicial appointment process may inadvertently discriminate against female applicants by applying "traditional" standards and criteria that have a disparate impact on male and female candidates, for example, according less weight to traditionally "female" areas of practice with larger percentages of female attorneys (for example, family law, poverty law, and so forth), with more weight accorded to fields viewed as predominantly "male" (for example, corporate law, criminal prosecutions, and so forth) notwithstanding how relevant each area of practice may be to the position being filled. It is also a subject of concern that female candidates for judicial appointments are subject to stereotyped expectations about appropriate lifestyle, experiences, stature, and demeanor which devalue their abilities and background. Inquiries about the status of spouses and children are rumored to accompany the applications of female but not male candidates.

The absence of written "merit" criteria is also believed by some to contribute to a sense that women continue to suffer from unequal consideration in the selection process. While the criteria for defining what makes a judge qualified or good are complex and multi-faceted, leaving such complexities wholly to individual discretion by JNC members fosters the perception that such judgments are not properly circumscribed.

Leadership positions in the organized bar have been historically closed to women. Although small changes have occurred in recent years, women have only in rare and limited circumstances ever held office in the Bar, served on the Board of Governors, or been appointed to key committee chairs. The organized Bar has traditionally been an important key to securing judicial office, whether by appointment or election. The importance of bar activities with the JNC appears to be very great, although perhaps diminished with the 1991 revision in its composition.

All of the areas where gender bias exists in the practice of law in Georgia today—hiring, promotion, work assignments, access to social

16. *Id.*; Judicial Nominating Commission Statement on Judicial Merit Selection in Georgia (May 1989).

17. Cleveland, *supra* note 11, at 58; Judicial Nominating Commission Statement, *supra* note 16.

functions, mentors, special appointments, and so forth—are integral to the evaluations made at every stage of the judicial selection process and cumulatively serve to reinforce the effects of discrimination by significantly excluding women from the bench.

Membership in sex-segregated private clubs is not considered as an obstacle for judicial aspirants to appointment, election or service on the bench in Georgia despite inclusion of a prohibition of such membership in the ABA Code of Judicial Conduct.

While 10% of all applicants to the Judicial Nominating Commission since 1972 have been female, only 6% of the people ultimately appointed were female. Table 2 contains information on applications for judgeships and gubernatorial appointments between 1972 and 1990.

Table 2
Analysis of Gubernatorial Appointments
1972–1990

<u>Court</u>	<u>Applicants</u>	<u>Women Applicants</u>	<u>% of Applicants Who Are Women</u>
Supreme	215	23	10.7%
Appeals	205	34	16.0%
Superior	592	44	7.4%
State	392	44	11.2%
Totals	1,404	145	10.3%

<u>Court</u>	<u>Appointed</u>	<u>Women Appointed</u>	<u>% of Appointees Who Are Women</u>
Supreme	12	0	0.0%
Appeals	10	1	10.0%
Superior	106	4	3.8%
State	52	6	11.5%
Totals	180	11	6.1%

Between 1972 and 1990, eleven women received gubernatorial appointments to the bench. Governor Carter appointed one state court judge in 1972. Governor Busbee appointed one superior court judge in 1978. Governor Harris appointed nine women to judicial office through 1990: one to the court of appeals in 1984; five to the state court in 1984, 1985, 1986, 1987, and 1990; and three to the superior court in 1988 and

1990. Four of these appointments elevated to a higher court women already sitting on the bench. Overall, women have received 6% of the gubernatorial appointments to the bench since 1972.

VI. Results from Gender Bias Commission Survey and State Bar Survey on Women and Minority in the Profession

Responses to the Commission's survey of attorneys and the responses to the State Bar Survey on Women and Minorities in the Profession in 1989 demonstrate the extent to which gender bias in the bar affects the judicial selection process and lawyers' perception of the effect of gender on that process. The responses consistently demonstrated that male attorneys were significantly less likely to recognize or report gender bias than women attorneys. This combined with a pronounced insensitivity and occasional open hostility evident in assertions by male attorneys that women receive preferential treatment in their efforts to secure judicial office. There appears to be a belief by many male attorneys that women attorneys benefit from gender bias in the judicial selection process.

Question VI on the Gender Bias Commission's survey of attorneys asked "Are you aware of any instances of gender bias in the judicial selection process?" One hundred thirty-two of the survey respondents (81%) responded "No" and thirty-one (19%) answered "Yes." A series of lines was left beside the "Yes" response allowing respondents to "Briefly describe." Seventeen people added comments in response to this question—only three of whom were women. Four of the seventeen comments expressed the position that the gender bias perceived in the judicial selection process disadvantaged women. The remaining thirteen comments were consistently hostile in asserting that gender bias against males was present in the judicial selection process, as follows:

I know of many instances when women have been appointed or have sought office with the primary qualification being their gender.

Recent appointments prefer females to gain political approval for the appointing executive: Sandra Day O'Connor and many others.

The appointment of female judges [is] based strictly on the politics of gender. This is not to say they did not meet the technical requirements for judgeships. They, as a whole, have proved competent. It is just that there was a large pool of better qualified males in many instances who were not considered since they were not female.

Today women get the appointments.

It appears most recent appointments by the Governor the criteria was they must be either female or black, to hell with ability, etc.

The Governor appears to (for 8 years) favor women and blacks when filling vacancies.

The Governor has appointed females who were determined [sic] unqualified or less qualified than male candidates.

All of the foregoing remarks were those of white males. However, two comments asserting the lack of qualifications for women either nominated or appointed to the bench were submitted by females. Implicit and often explicit in these accusations of reverse discrimination is the assertion that the females were not qualified to be appointed, and would not have been selected but for their gender. Given the dramatic scarcity of women on the bench in Georgia, these responses are cause for grave concern.

The judges' surveys performed by the Commission made a similar inquiry as to the existence of gender bias in the judicial selection process. Of the forty-four probate court judges responding, twenty-nine (66%) responded that they did not know or did not answer. Twelve (27%) respondents answered "No" and three (7%) responded that they had observed instances of gender bias in the judicial selection process. Magistrate and juvenile court judges' responses to this inquiry were not reported, except that one juvenile court judge commented that "[a]lthough the appointments resulted in well qualified persons, the recent supreme court and court of appeals appointments were generally thought to favor blacks and females." It should be noted that all three "recent" appointments were males. No woman has ever served on the supreme court, and the only woman to serve on the court of appeals was appointed in 1984. The results of this inquiry to superior court judges were also not reported although six judges made comments on the judicial selection process which were quoted verbatim. Four of the six comments asserted that judicial appointments favor women over men. One respondent, presumably a woman, noted that although she won election without a runoff against three males, she had never received an appointment, though she had applied many times. One commentator asserted that no woman had sought a position on the superior or state court bench in that area.

Other indicia of discrimination in the profession are strong signals that these problems adversely impact the struggle for gender neutrality in the judicial selection process. For example, the Executive Summary of the State Bar's Survey on Woman and Minorities in the Profession reports that the "majority of both male and female attorneys agree that female attorneys encounter discrimination (60% of males, 92% of females)." Furthermore, the Summary states that

[w]hen asked a series of questions regarding "how female attorneys have fared in certain areas of the profession" as compared to male attorneys, a consistently larger percentage of women, both minority and white, than men, and an even larger percentage of minority women than white women or white men, believe that women have fared less well in terms of income, success in attracting clients, relations with co-workers and other attorneys, and professional visibility.

Similarly, significantly greater numbers of women perceived themselves as excluded from leadership roles in the State Bar, that their prospects for advancement were less than for males, and that they receive less respect from other attorneys, clients, and judges than men.

It is apparent that vestiges of bias in varying forms and degrees remain pervasive among attorneys in Georgia. As with other forms of pernicious discrimination, it will be necessary for those playing key roles in the judicial selection process—the Governor, the organized bar, and members of the judiciary—to go beyond the goal of eliminating obstacles to judicial office that are sex related, to actively solicit and support women in moving towards a time when Georgia's judiciary will begin to reflect the numbers of qualified women in the bar.

VII. Factors Affecting Appointment of Women to the Bench

In the last twenty years, women have been coming into the bar in significant numbers both nationally and locally. In 1989 the State Bar of Georgia had approximately 20,000 total members of which 3500 (18%) were women. In 1990, the State Bar records 21,675 total members of which 4516 (21%) are women. Attorneys holding active membership in the State Bar total 17,631 of which 3508 are women (20%).

In order to be a candidate for certain judgeships, there are minimum requirements of years of practice; only in recent years have large numbers of women become eligible.

Historically, women have faced the reality that they would not be appointed and the belief that they would not be returned to office by the voters to retain their posts. This has detrimentally affected their willingness to run for office or seek appointment. The incumbency advantage has also been a powerful deterrent.

Women have tended toward more nontraditional areas of practice such as practice in smaller firms or as sole practitioners rather than in large law firms (which failed to hire women in the past), and in areas of law other than litigation. Women's professional involvements are in areas that are not conducive to forming the kinds of connections that can assist in judicial appointment or judicial election.

Women are less likely to take part in statewide and local bar activities in leadership roles. Good bar political connections are and were particularly powerful in the past when one half of the Judicial Nominating Commission members were State Bar Officers. Not only do nominations and endorsements for appointment and election come from local bar associations, but so do the opposition candidates when it comes time to run for office initially or run to be retained in office after an appointment.¹⁸

In judicial races, money for a campaign is an important consideration. Women often are at a disadvantage in having the necessary contacts for raising money for judicial races that many men in the profession enjoy.

Historically, there has not been any active recruitment by the organized bar or the executive branch to encourage women to aspire to the bench. In the past, women who wanted judgeships have had to be tenacious self-promoters with close ties to statewide and local bar associations or appropriate political connections or who were willing to face an uphill battle in contested elections.

Some women have felt that the electoral process was more open to them than the appointment process from a fairness standpoint. They viewed election to be a fairer chance for them to succeed than appointment because they were "outside the circle, outside the loop" when compared with their male counterparts.¹⁹ This perception is borne out statistically as one-half (50%) of women superior court judges currently sitting came to the bench by election while five of the eight women state court judges currently sitting (63%) reached the bench by election. As to male judges, statistics bear out the reality that they come to the bench more readily through the appointment process.

These statistics have changed since 1989, particularly in the larger number of women who have applied for gubernatorial appointments. In 1989 and 1990, there were ten appointments to the bench with 132 applicants, of which forty-eight (36%) were women. Three women were appointed to these ten judgeships—two of these women were already sitting judges.

18. See Katie Wood, *Too Willing to be Ignored*, FULTON COUNTY DAILY REP., Aug. 9, 1989, at 1.

19. *Atlanta Public Hearing Before the Commission on Gender Bias in the Judicial System* pt. 1, at 189 (Sept. 22-23, 1989) (testimony of Will Robinson, President, Gate City Bar Association).

FINDINGS

General

1. Society has an important interest in an unbiased judiciary. It is essential to achieving the perception of fairness and to effecting justice that the judiciary be selected in a process which is unbiased and which reflects the community.
2. The citizens of the State of Georgia have an important interest in having a judiciary which includes both men and women. There is a well founded public belief that a judiciary which includes disparate parts of the community (in terms of sex, race, ethnicity, and other factors) is indicative of fairness and justice. Therefore, a judicial selection process must not discriminate on the basis of sex and must afford equal opportunity to all qualified candidates.
3. A judiciary equally open to women and men is essential in achieving justice for the community. It is crucial to remove obstacles to equal opportunity for women attorneys to ascend to the bench.

Women Are Seriously Underrepresented in the Judiciary of Georgia

4. The pool of women actively engaged in the practice of law in Georgia and qualified to serve on the bench is significant and continues to grow. Women have been engaged in the practice of law in large and unprecedented numbers since the late 1960s and early 1970s. Considering the number of qualified women eligible for judicial appointment, the number of women who have ascended to the bench by appointment or by election demonstrates serious underrepresentation, a phenomenon which may result from gender bias.
5. As of 1990, the population of women in Georgia was 52%, the percentage of women in Georgia's four accredited law schools in the class of 1992 was 43%, and the number of women who were members of the Georgia Bar in 1990 was 21%. However, the total percentage of women judges serving on the Georgia Supreme Court, court of appeals, superior court, and state court was only 7% as of December 1990.
6. Women have not been elevated to the bench in adequate numbers in Georgia.
7. In the history of the State of Georgia, no woman has ever served on the Supreme Court of Georgia, and only one woman has served on the Georgia Court of Appeals. The Honorable Dorothy Toth Beasley was first appointed to the Georgia Court of Appeals in 1984.

8. Women are reflected in only token numbers on the superior and state court benches in the state.
9. More women serve as probate court and magistrate court judges than serve as judges in any other courts in Georgia. Forty-two percent of all probate court judges are women, and 29% of all magistrate court judges are women. However, with a few exceptions, these positions do not require that the individual be a lawyer to serve as a judge.
10. Only 6% of all juvenile court judges are women.
11. While 10% of all applicants to the Judicial Nominating Commission between 1972 and 1990 were women, only 6% of the judges ultimately appointed were women.

The Small Number of Women on the Bench is the Result of Gender Bias in the Election and Appointment Processes

12. Although perhaps unintentional, discrimination on the basis of sex is pervasive in the judicial appointment and election processes in Georgia. Some women lawyers have been denied equal opportunity to judicial appointments by a system which results in token appointments. Some male lawyers have been antagonistic to the efforts of women candidates to be elevated to the bench.
13. While Georgia law provides that judges of the supreme court, court of appeals, superior courts, and state courts be elected to office, vacancies and almost all newly created judicial positions are filled by appointment of the governor.
14. The conventional wisdom is that women generally fare better in the appointment process than in the election process. However, statistics demonstrate that more women judges in the state and superior courts in Georgia first took office by election than by appointment.
15. Despite the significant difficulties women face in the electoral process, a review of the way women have come to the bench in the past twenty years in Georgia demonstrates that bias in the appointment process has been even more effective at keeping women off the bench than the rigors of an election.
16. It remains very difficult for women to ascend to the bench through the electoral process.

17. The history of judicial elections in Georgia reflects that incumbency is a decided advantage in the electoral process. Because most judges on the bench today are male, the power of incumbency in elections continues to reinforce the effects of past gender bias.

18. Very few contested elections occur where incumbency is not a factor. Members of the bar are traditionally unwilling to support someone running for office against a sitting judge.

19. The established bar has traditionally played a significant role in the selection and support of judicial candidates. In the past, women have not had access to key roles and leadership positions in the bar.

20. Female candidates have anticipated and encountered greater difficulties in raising large sums of money to fund judicial campaigns than male candidates.

The Processes and Procedures of the Judicial Nominating Commission Lack Adequate Safeguards to Assure Gender Fairness

21. The Gender Bias Commission focused primarily on the appointment of women to judicial positions under the Judicial Nominating Commission as constituted from 1972 through 1990. The organization of the JNC was revised in early 1991 and has a unique opportunity to eliminate gender bias in judicial appointments. The newly constituted JNC is encouraged to review this report and consider these issues in formulating new policies and procedures.

22. Over the years, the JNC has never adopted any specific written rules that it follows in its evaluation process, despite the availability of standards and criteria utilized by such entities as the American Bar Association.

23. The screening process used by the JNC is abbreviated, unstructured, and relies heavily on the opinions of non-members.

24. It is perceived that the judicial appointment process unintentionally applies different standards and criteria for male and female candidates, for example, according less weight to traditionally female areas of practice with more weight accorded to fields viewed as predominantly male. It is perceived that female candidates for judicial appointments are subject to stereotyped expectations about appropriate experiences, stature, and demeanor which devalue their abilities and background. Inquiries about how candidates handle marital circumstances and children occur with women and not with men.

25. All of the areas where gender bias exists in the practice of law in Georgia today—hiring, promotion, work assignments, access to social functions, mentors, special appointments, and so forth—are integral to the evaluations made at every stage of the judicial selection process and cumulatively serve to reinforce the effects of discrimination by significantly excluding women from the bench.
26. No women lawyers are on the newly constituted Judicial Nominating Commission.
27. Membership in sex-segregated private clubs is not considered an obstacle for judicial aspirants to appointment, election, or service on the bench in Georgia.
28. One-third of the women on the superior court bench had served as state court judges prior to joining the superior court. That figure is now fully 50% with the October 1990 appointments of two women judges from the Fulton State Court to the superior court of the Atlanta Judicial Circuit.

RECOMMENDATIONS

1. The State Bar, the Governor, and the Judicial Nominating Commission must act to eliminate all vestiges of bias in the judicial selection process and to seek out, inform, encourage, and support women in seeking the bench, whether by appointment or election.
2. Further analysis and study should be undertaken by the Governor, the State Bar, the Judicial Nominating Commission, and the judiciary to review the mechanisms by which judges are nominated and elected or appointed in Georgia with a view toward identifying the impediments to qualified women achieving judicial positions.
3. Positive steps should be taken to develop and implement ways to assist qualified women in gaining judicial office through appointment and election.
4. The processes and procedures of the Judicial Nominating Commission should be examined to ensure that its processes and procedures are unbiased, including the following:
 - a. Ensure that the process for selecting members of the Commission draws from a broad cross section of the bar, including women and minorities;
 - b. Ensure that the Commission communicates with women's bar organizations regarding the availability of and the filling of vacancies;

- c. Ensure that the questionnaire and interview process are free of gender bias and that its processes and procedures are fair;
 - d. Ensure that the informality of the process does not contribute unintentionally to gender-biased decision making;
 - e. Ensure that the criteria and standards for evaluation are formalized and written;
 - f. Address gender bias directly in the selection process to ensure that male and female judges who are appointed are sensitive to such attitudes;
 - g. Endeavor to make the sources of input deemed important to Commission members representative of the community; and
 - h. Prohibit questions to applicants (or considerations) regarding marital status and child care arrangements.
5. Attorneys being considered for appointment to the bench should be closely screened as to their attitudes concerning gender bias.
6. The American Bar Association policy prohibiting membership by judicial aspirants in sex-segregated clubs should be adopted.
7. A study should be undertaken of the effect of the electoral process on women being elected to the bench in Georgia with a view to identifying how to help women overcome those barriers.
8. The number of women judges should be increased in order to eliminate the public perception that gender bias infects the judicial selection process.

COURT FACILITIES

I. Methodology

The Commission examined whether and how the physical facilities of the court affect men and women differently. Social psychologists have long known that physical environment has a significant effect on human behavior. In fact, many architectural and design features that are unique to courthouses are intended to create a sense of solemnity and grandeur—the feeling that government is at work here and that its purpose is to ensure that justice is served. That feeling is intended to affect the way people behave and respond to the environment. The different views of power in our society that men and women may share along gender lines naturally and profoundly influence the way in which they react to those cues and to their surroundings. Of course, it is these issues about the perception of judicial fairness and of effecting that fairness which is the essence of this Commission's work.

We set out to ask whether the physical layout of the court serves or affects men and women differently, whether they be judges, attorneys, court employees, litigants, victims or witnesses. Are there any aspects of the physical facilities of the courtroom or the courthouse which tend to be unsuitably sized, unwieldy, or otherwise improperly proportioned for most women or most men? What arrangements are made for allowing a respectful separation between witnesses and parties in the court room, particularly criminal defendants and victims in cases involving violence? Are courtroom acoustics adequate so that those with softer or higher pitched voices may be heard? Are there adequate restroom facilities available? Is there a difference in the availability of restrooms based on sex? Are child care services available at the courthouse for children of judges, attorneys, court personnel, victims, witnesses, or others involved with the court system?

To begin to answer these questions, we relied upon the Commission's surveys of court personnel, judges, and attorneys; testimony presented at the Commission's statewide hearings; data and literature from other studies regarding court facilities conducted within the state; and surveys and information from Georgia and other states examining these issues.

II. Restroom Facilities

A 1975 survey of courthouse facilities in Georgia (Phase I of the state-wide Judicial Facilities Study) constituted a comprehensive study of judicial facilities—the first of its kind in the United States. The overall findings of that study identified that in 1975, only twenty-four

of the 159 counties in Georgia had court facilities that "are capable of meeting the needs of the courts both architecturally and operationally."¹

As part of the study's dozen conclusions, the Study found that "57% of all courthouses do not provide satisfactory restroom facilities for the public, and 59% do not provide satisfactory restroom facilities for private use."² Although most counties had deficiencies in this regard, the smaller the county, the more likely it was to have a severe problem regarding restroom facilities.³ Substandard conditions were also closely correlated to the age of the building.⁴

The majority of courthouse restrooms received ratings (selecting from "good," "fair," and "poor") of "fair" to "poor."⁵ The lowest possible rating—"poor"—was assigned to the public restroom facilities in courthouses in thirty-eight counties and to the private restroom facilities in the courthouses in forty-two counties.⁶

A 1990 survey performed by the Judicial Council of California's Administrative Office of the Courts examined the existence and content of architectural guidelines for court facilities in twenty-one states (including Georgia) and the federal government.⁷ That study revealed no state with architectural guidelines for court facilities which required a ratio of restrooms different for men than women. Although state law may dictate a particular ratio, courthouse facility requirements did not do so.⁸

The Georgia State Plumbing Code enacted pursuant to state law⁹ presently requires that public buildings contain an equal number of restroom facilities for men and women. Until recently, the State of Virginia's requirements had been the same. In 1988, the Virginia House of Delegates enacted a "resolution changing the Plumbing Code to require 50% more restroom capacity for women than men in new public buildings."¹⁰

This resolution was based in part on a University of Virginia study which concluded that women's restroom facilities were used more than men's because of the higher portion of the population which is female,

1. State of Georgia Judicial Facilities Study, Phase I Report 19 (1975).

2. *Id.* at 20.

3. *Id.* at 28 chart 4.

4. *Id.* at 30 chart 5.

5. *Id.* at 38 chart 9.

6. *Id.* at 40-46 chart 10.

7. California Administrative Office of the Courts, *Standards Comparative Report: Court Facilities* (1990).

8. In fact, none of the guidelines were formulated in gender-specific terms.

9. See O.C.G.A. § 8-2-20 (1989).

10. *Virginia House Joint Resolution*, NAT'L CONF. WOMEN'S BAR ASS'N NEWS. (Oct. 1989).

and the fact that children under the age of six utilize women's restrooms almost exclusively. Consideration was also given to the "exigencies of anatomy, including pregnancy" which made it "clear that providing women with even 'equal' numbers of restroom facilities is not equitable."

In response, other states and national building trade associations are studying the Virginia statute for broader implementation.

III. *Child Care Facilities and Subsidies*

The Commission observes that the challenge of providing adequate and safe child care for infants and young children in this society is of enormous proportions. "The Children's Defense Fund estimates that by 1995, two-thirds of all preschool children will have mothers in the work force. Four out of five school-age children will have mothers who work."¹¹ Responsibility for providing child care has historically fallen in a disproportionately high degree to the females in our culture.

The Commission's survey of court employees, the testimony presented at the hearings, and our research confirm that the problem of access to child care adversely affects people with primary child care responsibility who come into contact with the judicial system—judges and attorneys, court employees, jurors, litigants, and witnesses.¹²

No community in Georgia reported, and we found none, that provided at this time any on-site child care (or subsidy for child care) for judges, court employees, attorneys, litigants, witnesses, or jurors.

A. *Jurors*

The May-June 1989 Grand Jury for DeKalb County brought the following problem to the fore in evaluating their two-month service commitment. With compensation limited to \$25.00 per day, the jurors noted that those individuals who sacrificed income during their service on the Grand Jury, either because they were self-employed or worked

11. *State Perks: On the Job Child Care Wins Converts*, STATE GOV'T NEWS, at 12, 13 (July 1990).

12. Judge Tina Stanford of Columbus noted the failure to deal with the broad need for child care for employees and others coming into contact with the courts. *Columbus Public Hearing Before the Commission on Gender Bias in the Judicial System* 103 (Oct. 20, 1989). Also, Robert M. Baynard, President of the Dougherty County Bar Association reported on the absence of any child care facilities for jurors, litigants, witnesses or others who are summoned into court. The Senior Judge's secretary confirmed that every two months (every term of court) she received one or two requests to be excused because of the absence of child-care facilities. Mr. Baynard reported that others may have problems too but simply make arrangements at an inconvenience or expense to themselves. *Albany Public Hearing Before the Commission on Gender Bias in the Judicial System* 5, 6 (Jan. 19, 1990).

for hourly wages, suffered particularly difficult circumstances where they were, nevertheless, required to pay for child care during that time.

B. Attorneys and Judges

Attorneys and judges reported that special considerations were not routinely available to them to arrange for child care problems on a continuing or crisis basis. The Summary of the Hearings of the ABA Commission on Women in the Profession reported that

[o]ne barrier encountered by lawyers who try to juggle their family responsibilities with work demands is the assumption that family responsibilities are not an acceptable reason to ask for professional scheduling adjustments.

Witnesses also stressed the need for the profession to consider the availability of some form of day-care assistance, at least on an emergency basis, for working parents. Testimony described a range of options, including bar association day-care referral or large firm on-site emergency day-care. Day-care assistance for women often means the difference between successfully participating fully in the professions and having to make professionally disadvantageous sacrifices.¹³

C. Court Employees

The Commission's survey of court employees in Georgia found that 19% of all respondents required child care in order to work. While the response rate to that survey was low, it is informative to note that 15% of respondents indicated that they would use on-site day care at their jobs if it were available. In fact, 18% of all employees responding to the survey said that they had found it necessary to take official leave from work (other than maternity or paternity leave) in order to care for a dependent child. All but one of these respondents was female.

The Maryland Special Joint Committee on Gender Bias in the Courts found that "[a] need exists for on-the-job and/or partially subsidized child care for working parents in the court system" based upon the following facts: Only 1% of court employees reported that day care is currently available where they work.¹⁴ Twenty-three percent of female employees and 16% of male employees reported a need for child care for

13. Summary of Hearings of the ABA Commission on Women in the Profession 15, 16 (Feb. 1988).

14. REPORT OF MARYLAND SPECIAL JOINT COMMISSION ON GENDER BIAS IN THE COURTS xxvii, 92-93 (1989) [hereinafter MARYLAND REPORT].

children under twelve years of age. Of these, 46% of female employees reported that they would use day care at work if it were available.

The absence of adequate child care has a disproportionate effect upon female employees because they comprise 74% of the [court] work force. Further compounding the problem is the fact that 66% of the female employees earn \$20,000 or less while 87% earn \$25,000 or less. In addition, the increasing emergence of female-headed households means that many of these women are trying to support families on their incomes alone. Accordingly, it is hard to imagine how court employees can afford to pay for child care in order to work.¹⁵

As such, the Maryland Report recommended that court administrators and the judiciary “[e]stablish on-site child care or subsidize off-site child care programs.”¹⁶

The Status Report of the *Gender Bias Study of the Massachusetts Supreme Judicial Court* found, as is the case in Georgia, that “[n]o courthouses in the state have day care facilities. This lack may be a factor in the job decisions of potential court employees.”¹⁷

Businesses are increasingly providing on-site day care as a benefit to employees. Statistics indicate a 500% increase in this service between 1984 and 1989. As the labor market shrinks in the 1990s and women are increasingly entering the labor market, day care is widely believed to be a critical way to recruit and retain satisfied employees in the public and private sectors.¹⁸ The First National Bank of Atlanta was the first bank in the country to provide on-site child care and has been used as a model for other banks nationwide. Benefits are claimed to accrue for employee loyalty, productivity, and reduced absenteeism.¹⁹

A 1990 survey of state governments revealed that seventeen states provide on-site child care for state employees, and an additional ten states subsidize the provision of child care to their employees.²⁰ The states of California, Illinois, and Wisconsin recently enacted requirements that plans for child care facilities be included in the design of all state buildings.²¹

15. *Id.* at 93 (citations omitted).

16. *Id.* at 95.

17. STATUS REPORT: GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT, COMMONWEALTH OF MASSACHUSETTS 8 (1988).

18. Julia A. Hairston, *Baby in the Board Room*, BUS. ATLANTA, Dec. 1989, at 40, 41-46.

19. *Id.*

20. *State Perks*, *supra* note 11.

21. *Id.*

D. Witnesses and Litigants

For a variety of reasons, it is often inappropriate for small children to remain in the courtroom during proceedings. Testimony may be too graphic for small children, children may fidget or cry, or in some instances, children may be sequestered witnesses. Under such circumstances, persons responsible for those children often are forced to choose between leaving children unattended in waiting areas (if they exist) or missing critical proceedings. Because women are more often responsible for child care than men, this problem disproportionately affects women.

Sometimes the individual with child care responsibility is a litigant, a witness, a victim, or other interested person whose absence from the courtroom is disadvantageous. The Commission has found that most courthouses provide no appropriate waiting areas for children—not even a place where a parent can change a child's diaper.

The New York Task Force found that parents

unable to obtain child care may be effectively precluded from attending court proceedings central to [their] welfare The adequacy of physical facilities affects the integrity of the judicial process. One aspect of this inadequacy—the dearth of space available for children whom mothers must bring to court—effectively precludes many women from appearing in court.²²

The Maryland Commission on Gender Bias also found that “[f]emale parties can be disadvantaged by the absence of accommodations for the presence of children in the court” and recommended the establishment of on-site day care for jurors, litigants, and witnesses.²³ The study based this conclusion on the fact that

[c]ases involving domestic violence, child support, juvenile proceedings, and landlord/tenant cases often involve women required to have children with them because the mother is the primary or sole caretaker of the child and cannot afford to pay someone to care for the child during the court appearance, or the case may require the child's presence in court. “No courthouse in the state has made arrangements for assisting litigants to care for children who must accompany them to court.” So children must be brought into the courtroom and wait for the case to be tried. Judges may criticize mothers for the behavior of a child who naturally

22. *Report of the New York Task Force on Women in the Courts*, 26 FORDHAM URB. L.J. 11, 125 (1986-87) [hereinafter *New York Task Force Report*].

23. MARYLAND REPORT, *supra* note 14, at 115, 116.

becomes restless. Women must wait in halls with children and miss the call of their case, leave children alone or discipline them inappropriately to compel quiet behavior. Some women have been required to testify with children in their laps. Other women had to abandon their cases and leave court because of the needs of the children.²⁴

The Gender Bias Commissions from the states of Connecticut, New York, Maryland, and New Jersey each recommended that child care facilities be made available to persons who use the court system. The Connecticut Task Force on Gender, Justice and the Courts received the following testimony at almost each and every hearing it held: "Child care facilities are needed for people who use the court system."

The *Report of the New York Task Force on Women in the Courts* recommended that "when undertaking improvements to physical court facilities in the Unified Court System, take into account the special needs of parents by providing for a supervised area where children may wait with their parents and may stay while their parents attend proceedings."²⁵ In response to the Task Force recommendation, the New York Office of Court Administration issued guidelines sent to each local government containing a requirement that provision for child care facilities be considered when planning any courthouse renovation or construction.²⁶

The Maryland Report recommended that Court administrators and the judiciary "establish on-site day care or subsidize off-site child care programs."²⁷ The Maryland Report also suggested scheduling cases where children are likely to be in court for special times rather than on the general case list, thereby limiting the time a parent must be in court. If the parent need not wait all day, the idea is that he or she might be able to get care for that more limited time. Also, the court could give priority to cases where a parent has brought a child so that the child need not wait so long at court. Finally, the courts could establish drop-in centers for children in the courthouse.

As early as 1974, the superior court for the District of Columbia had opened an on-site day care center used by approximately 300 children per year while their parents are in the courthouse.²⁸

24. *Id.*

25. *New York Task Force Report, supra* note 22.

26. SECOND REPORT OF THE COMMITTEE TO IMPLEMENT RECOMMENDATIONS OF THE NEW YORK TASK FORCE ON WOMEN IN THE COURTS 22, 23 (May 1988).

27. MARYLAND REPORT, *supra* note 14, at 115-16.

28. Mary C. Hickey, *A Place for Kids at Court*, WASH. LAW., May-June 1988, at 20.

IV. *Intimidation of Victims and Witnesses*

Georgia's 1975 survey of court facilities did not assess whether the physical facilities of the courthouse afford adequate security to witnesses brought to court to testify against defendants in cases alleging the use of violence. Because of typical disparities in size and strength between men and women, this problem is particularly serious when the victim or witness is female and the accused is male.

Georgia's nonbinding court facilities standards recommend sequestered witness rooms in courthouses. However, reports have been made of victims being menaced and intimidated by the proximity to defendants and other lack of security afforded to them.

Witnesses at the Commission hearings repeatedly voiced how terrifying the experience of coming to court was for victims, especially in the context of domestic violence cases. Note was made that small courtrooms exacerbated this problem by placing victims and defendants in close proximity to one another. By the same token, other witnesses understandably expressed how a large ceremonial courtroom was very intimidating to some victims.²⁹

Experts in courthouse design should increasingly examine these issues and make appropriate recommendations to be implemented in the design and construction of courthouses. The Commission urges judges to watch vigilantly for signs that a victim may be menaced or intimidated by proximity to the defendant, or by the courtroom surroundings, and to search for individualized solutions necessary in each case.

V. *Conclusion*

Georgia's 1975 survey of court facilities throughout the state did not address issues involving the size or configuration of courthouse facilities based on gender. Given the magnitude of the overall issues surrounding the adequacy of Georgia's courthouse facilities, it is widely believed that addressing this relatively narrow issue is not a high priority. However, the Commission believes that consideration should be given to this point as women continue to present themselves in growing numbers in

29. For example, Elaine Gerke, Director of Rape Response, Inc. of Gainesville, Ga., testified that

Many magistrates' courtrooms are so small that a victim literally has to sit within a foot of the rapist, and some superior [court] courtrooms are so large that they are incredibly intimidating One softspoken teenage rape victim . . . was reprimanded by the judge for speaking so softly that the jury couldn't hear her [stating that if she did not speak up, he would not proceed with the trial].

Gainesville Public Hearing Before the Commission on Gender Bias in the Judicial System 21-22 (May 18, 1990).

all aspects of the judicial process, and increased awareness is available about the disparate consequences courthouse facilities may have for citizens based upon their sex. An ideal opportunity to do so is presented where Georgia counties begin the process of renovating or rebuilding their courthouses.

FINDINGS

1. Restroom facilities in many courthouses are not adequate or equitably available to each sex, based upon use and need.
2. The absence of child care facilities on-site at most courthouses adversely affects access to the courts for female jurors, witnesses, and litigants who disproportionately bear primary responsibility for child care.
3. The presence of child care facilities or subsidies for court employees could be an incentive to attract people to these jobs and could be a significant factor in reducing absenteeism, increasing job satisfaction and loyalty, and allowing people with primary child care responsibility to remain on the job.
4. Child care facilities for attorneys would be a significant benefit to attorneys with child care responsibilities as this is a largely unmet need.
5. Adequate safeguards are not always provided to prevent or minimize the intimidation of victims and witnesses arising from close proximity to defendants in criminal cases involving violence or from the unfamiliarity of the courtroom setting.
6. The extent to which courtroom layout and design should be modified to be gender neutral needs to be evaluated.

RECOMMENDATIONS

1. Amend Georgia's State Plumbing Code and courthouse facilities guidelines to ensure that the required minimum number of restroom facilities is appropriate to the use and need. This may require that restroom facilities for women be built in a two-to-one ratio to men's restroom facilities.
2. Include areas for changing a child's diaper in courthouse restroom facilities.
3. Provide on-site child care facilities in courthouses for use by witnesses, jurors, and litigants when they must come to court and for court employees, attorneys, and judges on a regular basis.

4. Assist judges in accommodating the problems of people coming to court with children by offering creative options which do not preclude or limit the participation of people with primary child care responsibility who are involved in the judicial process.
5. Enact legislation requiring that allocation of space for on-site child care facilities be required in the planning and development of new and renovated courthouses by local and state governments.
6. Require that appropriate modifications to courtroom layout and design which are sensitive to the needs of each sex be implemented in the construction of new and renovated court facilities.
7. Enforce mandatory sequestration and separation of witnesses and criminal defendants to insure the safety of victims and witnesses.
8. Assist judges by providing information on the importance of monitoring and modifying the effect of the courtroom on all persons coming in contact with the judicial process.
9. Establish mandatory statewide courtroom and courthouse architectural, design, and layout criteria and standards that are sensitive to the needs of each gender.

APPENDIX A

COURT EMPLOYEES AND REPORTERS SURVEY

Please note that all questions may not apply to you; answer only those which do. All questionnaires are confidential; please do not sign your name. Only group data will be used for analysis purposes.

I. General Information

1. Indicate the Judicial District in which you are employed.
2. In which county do you work?
3. In what year were you born? 19_____
4. Gender: Male Female
5. Race/Ethnicity: White Hispanic Black
 Asian/American Other-Please Specify
6. Is your position permanent? temporary?
7. Is it full time or part time?
8. If your position is temporary, do you receive benefits (medical, sick leave, annual leave)? Yes No
9. Currently employed at:
Superior Court
State Court
Other

- II. The following questions ask about specific behaviors and the frequency of their occurrence in your experience: Circle the response which best describes your experience. Responses are (1) Always (2) Often (3) Sometimes (4) Rarely or (5) Never. (CIRCLE RESPONSE: IF YOU HAVE NO EXPERIENCE IN A PARTICULAR AREA, CIRCLE "DON'T KNOW" COLUMN.)

<i>Court Interactions</i>	Always	Often	Sometimes	Rarely	Never	Don't Know
1. Women attorneys are asked if they are attorneys when men are not asked						
by judges.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
2. Women employees in the court system are addressed by first names or terms of endearment when men employees are addressed by surnames or titles						
by judges.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
3. Women litigants or witnesses are addressed by first names or terms of endearment when men litigants or witnesses are addressed by surnames or titles						
by judges.						
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
4. Comments are made about the personal appearance of women employees in the court system when no such comments are made about men						
by judges.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8

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<i>Court Interactions</i>	Always	Often	Sometimes	Rarely	Never	Don't Know
5. Comments are made about the personal appearance of women litigants when no such comments are made about men						
by judges.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
6. Sexist remarks or jokes are made in court or in chambers						
by judges.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
7. Women litigants are subjected to verbal or physical sexual advances						
by judges.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
8. Women employees in the court system are subjected to verbal or physical sexual advances						
by judges.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
9. Judges appear to give less weight to female attorneys' arguments than those of male attorneys.	1	2	3	4	5	8
10. Judges appear to give less weight to the testimony of female experts than to that of male experts.	1	2	3	4	5	8
11. Judges appear to require more evidence for a female litigant to prove her case than for a male litigant.	1	2	3	4	5	8

<i>Court Interactions</i>	Always	Often	Sometimes	Rarely	Never	Don't Know
12. For the same offenses judges give different sentences to female defendants than they give to male defendants.	1	2	3	4	5	8

III. In the first column, please circle the numbers corresponding to those behaviors that you personally experienced while working in the court system. In the second column, please circle the numbers corresponding to those behaviors that you have heard have occurred to another employee.

	Experienced	Heard About
13. Sexual advances in exchange for employment security/opportunity.	1	2
14. Requests for sexual activity.	1	2
15. Physical touching of a sexual nature.	1	2
16. Verbal behavior, such as sexist jokes or comments.	1	2

IV. The following questions are directed at job responsibilities and opportunities in the court system. All information is confidential: no individuals will be identified. All results will be reported as group data. Additional information or experiences which you would like to bring to our attention may be included on a separate sheet of paper. (Circle your response or fill in the blanks.)

17. What is your job title?

Briefly describe your job duties:

18. Does your position have a written job description?

0. No 1. Yes 8. Don't Know

19. Number of years you have been employed in the Georgia court system?

20. Number of years employed in your current position?

21. Before your employment with the court system, did you have prior work experience or was this your first job?

0. No, first job. 1. Yes; How many years?

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- 22. Level of education when first hired in the court system:
 - 1. Less than high school
 - 2. High School graduate
 - 3. Some college
 - 4. College graduate
 - 5. Post graduate credits or degree
- 23. Current level of education:
 - 1. Less than high school
 - 2. High School graduate
 - 3. Some college
 - 4. College graduate
 - 5. Post graduate credits or degree
- 24. Yearly salary level when first hired (approximate):
- 25. Current yearly salary (approximate):
- 26. How much of your time is usually spent in the courtroom while performing your job responsibilities and duties?
 - 1. Under 25% 2. 25%-49% 3. 50%-75% 4. Over 75%

V. Please circle the response (Always, Often, Sometimes, Rarely, Never, or Don't Know) which best describes your experiences while employed in the court system.

	Always	Often	Sometimes	Rarely	Never	Don't Know
27. My job duties and responsibilities have been reduced because of my gender.	1	2	3	4	5	8
28. My job duties and responsibilities have been increased because of my gender.	1	2	3	4	5	8
29. My opinions in job related situations are given different weight or importance than a person of the opposite gender.	1	2	3	4	5	8
30. I feel I am asked to perform duties that would not be asked of a person of the opposite sex.	1	2	3	4	5	8

	Always	Often	Sometimes	Rarely	Never	Don't Know
31. I feel that there are job duties I am <u>not</u> allowed to perform because of my gender.	1	2	3	4	5	8
32. Choice job assignments are given to employees on the basis of gender.	1	2	3	4	5	8
33. I get all the support/information I need to do my job.	1	2	3	4	5	8
34. I am permitted to go to job training programs which are available to my position.	1	2	3	4	5	8
35. Opportunities for job advancement in the court system are limited because of my gender.	1	2	3	4	5	8
36. When promotional opportunities are available in the court system, I am informed of the opening.	1	2	3	4	5	8
37. I am encouraged to apply for promotional opportunities.	1	2	3	4	5	8
38. In my area, it appears that members of one gender are given preferential appointments to supervisory position.	1	2	3	4	5	8
39. If there is a problem or complaint about my job, there is a person or agency that would deal with the problem or complaint.	1	2	3	4	5	8

IF YOU INDICATED THAT YOUR JOB DUTIES AND RESPONSIBILITIES HAVE BEEN AFFECTED BECAUSE OF YOUR GENDER (QUESTIONS 28 AND 30 ABOVE), BRIEFLY DESCRIBE HOW:

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40. In the past two years, have you filed a complaint involving gender bias on the job?

0. No 1. Yes; Was it resolved to your satisfaction? [] No [] Yes

41. In the past two years, have you attended any job training programs?

0. No; Why not?

1. Yes; Were you given:

Administrative leave to attend: [] No [] Yes
[] Paid [] Unpaid

Expenses: mileage reimbursement: [] No [] Yes
registration (if any): [] No [] Yes

42. Do you feel that the salary for most court employees in your area is too high, too low, or about right for the work that you do?

- 1. Too high
- 2. About right
- 3. Too low
- 8. Don't know

43. Are persons of the opposite sex paid more, paid less or about the same for performing the same job duties and responsibilities that you perform?

- 1. Paid more
- 2. Paid same
- 3. Paid less
- 8. Don't know

44. Do you feel that you have been denied a promotion while employed in the court system because of your gender?

0. No
1. Yes; Briefly describe the circumstances:

45. If you were ever denied a promotion, were you given a reason for the denial?

- 0. No
- 1. Yes
- 8. Have not been denied a promotion

46. Do you feel that someone else has been granted or denied a promotion while employed in the court system because of his/her gender?

0. No
1. Yes; Briefly describe the circumstances:

47. How much job advancement opportunity do you feel is available to you in the court system in Georgia?

1. No opportunity
2. Little opportunity
3. Some opportunity
4. A lot of opportunity
8. Don't know, not sure

48. Have you ever requested maternity or paternity leave?

0. No
1. Yes; Was the leave granted? No Yes
 Paid Unpaid

49. Have you ever requested leave, other than maternity or paternity, to provide care for an infant or adopted child?

0. No
1. Yes; Was the leave granted? No Yes

50. Have you ever requested any leave beyond that described in questions 48 and 49 to provide care for dependent children?

0. No
1. Yes; Was the leave granted? No Yes

51. Have you ever requested leave to provide care for elderly relatives?

0. No
1. Yes; Was the leave granted? No Yes

52. Do you have children under 12 for whom day care is needed?

0. No
1. Yes: Infant Preschool After School

53. Is day care currently available at your work place?

0. No - Would you use it if it were available? No Yes
1. Yes; What types? Infants Preschool After School

VI. This space is provided for any information on gender bias or discrimination in the courts, including attitudes, in addition to those just described which you would like to bring to our attention. Be as specific as possible.

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ATTORNEY'S SURVEY

I. In the following areas of law, have you found that the courts in Georgia apply, interpret, and enforce laws in a way that treats males more favorably than females, treats females more favorably than males, or treats individuals the same regardless of their gender: (CIRCLE RESPONSE)

	Treats Males More Favorably	Treats Females More Favorably	Treats Both Equally	No Opinion
<i>Family Law</i>				
a. Marital property				
- amount of monetary award	1	3	2	8
- Enforcement of judgment	1	3	2	8
b. Alimony				
- Amount of award	1	3	2	8
- Modification of award	1	3	2	8
- Duration of award	1	3	2	8
- Enforcement of award	1	3	2	8
c. Child support				
- Amount of award	1	3	2	8
- Modification of award	1	3	2	8
- Enforcement of award	1	3	2	8
d. Custody of children	1	3	2	8
e. Visitation of children	1	3	2	8
<i>Domestic Violence</i>				
a. Temporary Protective Order				
- Securing ex parte order	1	3	2	8
- Securing final protective order	1	3	2	8
- Enforcement of order	1	3	2	8
b. Criminal proceedings				
- Magistrate's decision to issue a warrant	1	3	2	8
- Complaint required to take a warrant	1	3	2	8
- Length of sentence	1	3	2	8
<i>Juvenile Courts</i>				
a. Delinquency	1	3	2	8
b. Treatment of adults in case involving abuse/neglect	1	3	2	8

	Treats Males More Favorably	Treats Females More Favorably	Treats Both Equally	No Opinion
<i>Negligence</i>				
a. Liability Finding	1	3	2	8
b. Amount of Judgment				
- General	1	3	2	8
- Pain & suffering	1	3	2	8
- Disability	1	3	2	8
- Scarring/Disfigurement	1	3	2	8

Please feel free to include details (on a separate sheet of paper) if you have any suggestions for changes in the application of the law which could correct any areas of unequal treatment reflected above, or if you would like to go into more detail about your experiences.

II. The following questions ask about specific behaviors and the frequency of their occurrence in your experience: Circle the response which best describes your experience. Responses are (1) Always, (2) Often, (3) Sometimes, (4) Rarely, (5) Never. (CIRCLE RESPONSE; IF YOU HAVE NO EXPERIENCE IN A PARTICULAR AREA, CIRCLE "DON'T KNOW" COLUMN.)

<i>Court Interactions</i>	Always	Often	Sometimes	Rarely	Never	Don't Know
1. Women attorneys are asked if they are attorneys when men are not asked						
by judges.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
2. Women attorneys are addressed by first names or terms of endearment when men attorneys are addressed by surnames or titles						
by judges.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
3. Women litigants or witnesses are addressed by first names or terms of endearment when men are addressed by surnames or titles						
by judges.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8

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<i>Court Interactions</i>	Always	Often	Sometimes	Rarely	Never	Don't Know
4. Comments are made about the personal appearance of women attorneys when no such comments are made about men						
by judges.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
5. Comments are made about the personal appearance of women litigants when no such comments are made about men						
by judges.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
6. Sexist remarks or jokes are made in court or in chambers						
by judges.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
7. Women litigants are subjected to verbal or physical sexual advances						
by judges.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
8. Women attorneys are subjected to verbal or physical sexual advances						
by judges.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
9. Women attorneys are appointed to important fee generating cases on an equal basis with male attorneys.	1	2	3	4	5	8

<i>Court Interactions</i>	Always	Often	Sometimes	Rarely	Never	Don't Know
<i>Credibility</i>						
10. Judges appear to give less weight to female attorneys' arguments than those of male attorneys.	1	2	3	4	5	8
11. Judges appear to give less weight to the testimony of female experts than to that of male experts.	1	2	3	4	5	8
12. Judges require more evidence for a female litigant to prove her case than for a male litigant.	1	2	3	4	5	8
<i>Marital Property</i>						
13. Where a wife's primary contribution is as a homemaker, the monetary award reflects a judicial attitude that the husband's income producing contribution entitles him to a larger share of the marital estate.	1	2	3	4	5	8
14. Courts award counsel and expert fees to the economically dependent spouse sufficient to allow that spouse to effectively pursue litigation.	1	2	3	4	5	8
15. Effective injunctive relief is granted where necessary to maintain the status quo until monetary awards are made.	1	2	3	4	5	8

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<i>Court Interactions</i>	Always	Often	Sometimes	Rarely	Never	Don't Know
16. Judges impose meaningful sanctions, including civic commitment, when injunctions are violated.	1	2	3	4	5	8
<i>Alimony</i>						
17. A wife's alimony award is based on how much the husband can give her without diminishing his current life style.	1	2	3	4	5	8
18. Older, displaced homemakers are awarded indefinite alimony after long term marriages.	1	2	3	4	5	8
19. The courts effectively enforce alimony awards.	1	2	3	4	5	8
20. Alimony awards at the time of divorce are close to or the same as temporary awards.	1	2	3	4	5	8
<i>Child Support</i>						
21. Child support awards reflect a realistic understanding of the local costs of child raising.	1	2	3	4	5	8
22. Child support awards reflect a realistic understanding of a particular child's needs.	1	2	3	4	5	8
23. Child support awards adequately reflect the earning capacity of the:						
a. noncustodial parent	1	2	3	4	5	8
b. custodial parent	1	2	3	4	5	8

<i>Court Interactions</i>	Always	Often	Sometimes	Rarely	Never	Don't Know
24. Enforcement of child support awards is denied because of alleged visitation problems.	1	2	3	4	5	8
25. Enforcement of child support awards is delayed because of counter claims for custody.	1	2	3	4	5	8
26. Temporary awards of child support are made within 60 days of filing the motion.	1	2	3	4	5	8
<i>Custody</i>						
27. Custody awards to mothers are apparently based on the assumption that children belong to their mothers.	1	2	3	4	5	8
28. Judges give fair and serious consideration to fathers who actively seek custody.	1	2	3	4	5	8
29. Judges favor the parent in the stronger financial position when awarding custody.	1	2	3	4	5	8
30. Child custody awards disregard father's violence against the mother.	1	2	3	4	5	8
31. Mothers are denied custody because of employment outside the home.	1	2	3	4	5	8
32. Joint custody is ordered over the objections of one or both parents.	1	2	3	4	5	8

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<i>Court Interactions</i>	Always	Often	Sometimes	Rarely	Never	Don't Know
<i>Domestic Violence</i>						
33. Civil orders of protection, directing respondents to stay away from the home, are granted when petitioners are in fear of serious bodily harm.	1	2	3	4	5	8
34. When granting civil orders of protection, judges issue support for dependents.	1	2	3	4	5	8
35. Petitions for temporary orders of protection are rejected where domestic relations cases are pending.	1	2	3	4	5	8
36. Superior court judges order emergency injunctive relief to protect victims of domestic violence.	1	2	3	4	5	8
37. Judges appear to believe that domestic violence is not a crime.	1	2	3	4	5	8
38. Assault charges are not treated seriously when domestic relations cases are pending.	1	2	3	4	5	8
<i>Rape</i>						
39. Rape victims are accorded less credibility than victims of other types of assault.	1	2	3	4	5	8
40. Judges control the court so as to protect the complaining witness from improper questioning.	1	2	3	4	5	8
41. Sentences are shorter where the victim had a prior relationship with the defendant.	1	2	3	4	5	8

III. Women offenders are sentenced below the guidelines: (CIRCLE ONE)

1. Less frequently than men
2. About the same as men
3. More frequently than men
8. Don't know

IV. In your experience as an attorney, have you been involved with a case(s) in which you felt the litigation process or outcome was affected (either negatively or positively) by the gender (male or female) of one of the parties? (PLEASE CIRCLE YOUR RESPONSE.)

0. No—GO TO QUESTION V.

1. Yes

- a. How many times in the past five years has this occurred?
- b. Briefly describe the most recent case in which you felt this occurred—in what way do you feel gender affected the case? (You may include a separate sheet of paper if you feel you need more room.)

In which year did this occur?

In which County?

V. In your experience as an attorney, has there been a situation where you felt the litigation process or outcome of a case was affected (negatively or positively) by your gender (male or female)? (CIRCLE RESPONSE)

0. No—GO TO QUESTION VI.

1. Yes

- a. How many times in the past five years has this occurred?
- b. Briefly describe the most recent case in which you felt this occurred - in what way do you feel gender affected the case? (You may include a separate sheet of paper if you feel you need more room.)

In which year did this occur?

In which County?

VI. This space is provided for any cases, instances or examples of gender bias or discrimination in the courts in addition to those just described which have occurred in the last five years that you would like to bring to the Commission's attention. Be as specific as possible.

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The Commission is especially interested in obtaining transcripts, sections of transcripts or relevant opinions, reported and unreported. Please include these documents, if you have them, along with this survey. (Additional postage will be necessary.) The Commission will consider purchasing transcripts in appropriate cases when all information necessary to identify the case is provided. (Provide the information you have available—case name, case number, county, year, court—on the next lines.)

VII. Are you aware of any instances of gender bias in the judicial selection process?

0. No

1. Yes—Briefly describe:

The following questions are to provide general background information about the attorneys answering the survey. Results will be given as group data so that no individuals will be identified in the survey.

1. Number of years practicing law _____
Year admitted to the Georgia Bar: 19_____
2. Primary County where you practice in the State of Georgia:
3. During the past two years, has litigation formed over 20% of your practice?
 No Yes
4. Check if any of these areas constitute 20% or more of your current practice:
 Personal Injury (Plaintiff) Criminal (Defense)
 Personal Injury (Defendant) Criminal (Prosecutor)
 Domestic
5. In what year were you born? 19_____
6. Sex: Male Female
7. Race/Ethnicity (Optional):
 White Hispanic Other - please specify
 Black Oriental

JUDGES SURVEY

Please note that all questions may not apply to you; answer only those which do. All questionnaires are confidential; please do not sign your name. Only group data will be used for analysis purposes.

- I. The following questions ask about specific behaviors and the frequency of their occurrence in your experience: Circle the response which best describes your experience. Responses are (1) Always, (2) Often, (3) Sometimes, (4) Rarely, (5) Never. (CIRCLE RESPONSE; IF YOU HAVE NO EXPERIENCE IN A PARTICULAR AREA, CIRCLE "DON'T KNOW" COLUMN.)

<i>Court Interactions</i>	Always	Often	Sometimes	Rarely	Never	Don't Know
1. Women attorneys are asked if they are attorneys when men are not asked						
by you.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
2. Women attorneys are addressed by first names or terms of endearment when men attorneys are addressed by surnames or titles						
by you.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
3. Women litigants or witnesses are addressed by first names or terms of endearment when men are addressed by surnames or titles						
by you.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8

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<i>Court Interactions</i>	Always	Often	Sometimes	Rarely	Never	Don't Know
4. Comments are made about the personal appearance of women attorneys when no such comments are made about men						
by you.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
5. Comments are made about the personal appearance of women litigants when no such comments are made about men						
by you.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
6. Sexist remarks or jokes are made in court or in chambers						
by you.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
7. Women litigants are subjected to verbal or physical sexual advances						
by you.	1	2	3	4	5	8
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
8. Women attorneys are subjected to verbal or physical sexual advances						
by you.						
by counsel.	1	2	3	4	5	8
by court personnel.	1	2	3	4	5	8
9. Women attorneys are appointed to important fee generating cases on an equal basis with male attorneys.	1	2	3	4	5	8

<i>Court Interactions</i>	Always	Often	Sometimes	Rarely	Never	Don't Know
<i>Credibility</i>						
10. Do you give less weight to female attorneys' arguments than those of male attorneys?	1	2	3	4	5	8
11. Do you give less weight to the testimony of female experts than to that of male experts?	1	2	3	4	5	8
12. Do you require more evidence for a female litigant to prove her case than for a male litigant?	1	2	3	4	5	8
<i>Marital Property</i>						
13. Where a wife's primary contribution is as a homemaker, the monetary award reflects a judicial attitude that the husband's income producing contribution entitles him to a larger share of the marital estate.	1	2	3	4	5	8
14. Courts award counsel and expert fees to the economically dependent spouse sufficient to allow that spouse to effectively pursue litigation.	1	2	3	4	5	8
15. Effective injunctive relief is granted where necessary to maintain the status quo until monetary awards are made.	1	2	3	4	5	8
16. Judges impose meaningful sanctions, including civic contempt, when injunctions are violated.	1	2	3	4	5	8

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<i>Court Interactions</i>	Always	Often	Sometimes	Rarely	Never	Don't Know
<i>Alimony</i>						
17. Alimony awards are based on how much a spouse can provide without diminishing his/her current life style.	1	2	3	4	5	8
18. Older, displaced homemakers are awarded indefinite alimony after long term marriages.	1	2	3	4	5	8
19. The courts effectively enforce alimony awards.	1	2	3	4	5	8
20. Alimony awards at the time of divorce are close to or the same as pendente lite awards.	1	2	3	4	5	8
<i>Child Support</i>						
21. Child support awards reflect a realistic understanding of the local costs of child raising.	1	2	3	4	5	8
22. Child support awards reflect a realistic understanding of a particular child's needs.	1	2	3	4	5	8
23. Child support awards adequately reflect the earning capacity of the:						
a. noncustodial parent	1	2	3	4	5	8
b. custodial parent	1	2	3	4	5	8
24. Enforcement of child support awards is denied because of alleged visitation problems.	1	2	3	4	5	8
25. Enforcement of child support awards is delayed because of counter claims for custody.	1	2	3	4	5	8

<i>Court Interactions</i>	Always	Often	Sometimes	Rarely	Never	Don't Know
26. Pendente lite awards of child support are made within 60 days of filing the motion.	1	2	3	4	5	8
27. Earnings withholding orders are entered as soon as the obligor is 30 days behind in paying child support.	1	2	3	4	5	8
<i>Custody</i>						
28. Custody awards to mothers are apparently based on the assumption that children belong to their mothers.	1	2	3	4	5	8
29. The court gives fair and serious consideration to fathers who actively seek custody.	1	2	3	4	5	8
30. The court favors the parent in the stronger financial position when awarding custody.	1	2	3	4	5	8
31. Child custody awards disregard the father's violence against the mother.	1	2	3	4	5	8
32. Mothers are denied custody because of employment outside the home.	1	2	3	4	5	8
33. Joint custody is ordered over the objections of one or both parents.	1	2	3	4	5	8

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<i>Court Interactions</i>	Always	Often	Sometimes	Rarely	Never	Don't Know
<i>Domestic Violence</i>						
34. Civil orders of protection, directing respondents to stay away from the home, are granted when petitioners are in fear of serious bodily harm.	1	2	3	4	5	8
35. When granting civil orders of protection, the courts issue support for dependents.	1	2	3	4	5	8
36. Petitions for temporary orders of protection are rejected where domestic relations cases are pending.	1	2	3	4	5	8
37. Circuit court judges order emergency injunctive relief to protect victims of domestic violence.	1	2	3	4	5	8
38. The courts do not treat domestic violence as a crime.	1	2	3	4	5	8
39. Assault charges are not treated seriously when domestic relations cases are pending.	1	2	3	4	5	8
<i>Rape</i>						
40. Rape victims are accorded less credibility than victims of other types of assault.	1	2	3	4	5	8
41. Judges control the court so as to protect the complaining witness from improper questioning.	1	2	3	4	5	8
42. Sentences are shorter where the victim had a prior relationship with the defendant.	1	2	3	4	5	8

II. Sentencing

43. Women offenders are sentenced below the guidelines: (CIRCLE ONE)
1. Less frequently than men
 2. About the same as men
 3. More frequently than men
 8. Don't know
44. Judges give sentences to female defendants that are (less severe, about the same, or more severe) than they give to male defendants.
1. Less severe
 2. About the same
 3. More severe
 8. Don't know
45. List what you would consider to be mitigating factors in sentencing a female.
46. Would these mitigating factors be different for a male?
0. No
 1. Yes; In what way?

III. Jury Leadership

47. Can you recall cases in which you believed it was advantageous to have a female jury foreperson?
0. No
 1. Yes; Why was that?
48. Can you recall cases in which you believed it was advantageous to have a male jury foreperson?
0. No
 1. Yes; Why was that?
49. Approximately what percentage of juries have male forepersons? _____%

IV. General

50. Is there a behavior that is often displayed by female attorneys which you find especially offensive? (If yes, explain)
51. Is there a behavior that is often displayed by male attorneys which you find especially offensive? (If yes, explain)

APPENDIX B

SUPREME COURT OF GEORGIA COMMISSION ON GENDER BIAS IN THE JUDICIAL SYSTEM

The Hon. Carol W. Hunstein, Chairperson, Superior Court, Stone Mountain
Judicial Circuit
Ms. Elizabeth J. Appley, Attorney Member, Atlanta
The Hon. Henry Baker, Probate Court, Newton County
Ms. Donna G. Barwick,* Attorney Member, Atlanta
The Hon. Dorothy T. Beasley, Georgia Court of Appeals
Ms. Veronica Biggins, Citizen Member, Atlanta
Mr. Richard Y. Bradley, Attorney Member, Columbus
Mr. Joseph H. Briley, District Attorney, Ocmulgee Judicial Circuit
Mr. Robert M. Brinson, Attorney Member, Rome
Ms. Sally Byers,* Citizen Member, Stone Mountain
Mr. A. Gus Cleveland,* Attorney Member, Atlanta
Ms. Josephine Holmes-Cook, Attorney Member, Atlanta
Ms. Susan Warren Cox, Attorney Member, Statesboro
Ms. Deryl Dantzler,* Professor of Law, Walter F. George School of Law, Mercer
University, Macon
The Hon. Hilton Fuller, Superior Court, Stone Mountain Judicial Circuit
The Hon. Frank M. Hull, Superior Court, Atlanta Judicial Circuit
The Hon. Willis B. Hunt, Georgia Supreme Court
Ms. Carol Jackson, Clerk of Superior Court, White County
The Hon. Edward H. Johnson, Superior Court, Atlanta Judicial Circuit
The Hon. Walker P. Johnson, Jr., Superior Courts, Macon Judicial Circuit
Ms. Harriet King, Professor of Law, Emory University School of Law
Ms. Marjorie Fine Knowles, Dean, Georgia State University College of Law
Ms. Elaine LaLonde, Citizen Member, Atlanta
The Hon. T. Jefferson Loftiss, II, Juvenile Court, Thomas County
Ms. Laura Moriarty, Citizen Member, Decatur
The Hon. Guy D. Pfeiffer, Magistrate Court, Crisp County
Mr. Richard D. Reaves, Executive Director, Institute of Continuing Judicial
Education
Dr. Helen Ridley, Professor of Political Science, Kennesaw State College
The Hon. John H. Ruffin, Jr., Superior Courts, Augusta Judicial Circuit
Ms. Carolyn Stradley, Citizen Member, Marietta
Mr. Randolph W. Thrower, Attorney Member, Atlanta
Ms. Sidney Watson, Professor of Law, Walter F. George School of Law, Mercer
University, Macon
The Hon. Anne Workman, State Court, DeKalb County

Staff: Ms. Marla S. Moore, Project Director, Administrative Office of the Courts
Ms. Carrie N. Baker, Research Assistant, Administrative Office of the
Courts
Ms. Jeannette Huckaby, Secretary, Administrative Office of the Courts

*Resigned from the Commission prior to completion of this report.