



NATIONAL ASSOCIATION OF WOMEN JUDGES COUNTERBALANCE

Volume 30 Issue 1

Memphis' Southern Charm Animates NAWJ's 31st Annual Conference Justice on the River: Navigating Change

Photo: Women in Prison Co-Chairs Justice Betty Williams and Judge Brenda Murray at NAWJ's Annual Conference in Memphis, Tennessee October, 2009. Justice Williams was awarded the Justice Vaino Spencer Leadership Award at Saturday's Awards Banquet. Read about Justice Williams' and Judge Murray's, NAWJ Past President, work with women in prison in this issue of Counterbalance.

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Memphis, Tennessee's historic Peabody Hotel was the site of NAWJ's annual meeting of NAWJ members, this year enhanced by leading program participants from around the country, Tennessean legal stars, local corporate movers and shakers, and guests from throughout the Memphis area, the U.S., and seven nations around the world. Conference Co-Chairs, Memphis City Judge Earnestine Dorse and Tennessee State Supreme Court Chief Justice Janice Holder, with Education Chair Judge Bernice Donald of the U.S. District Court for Western Tennessee joined then NAWJ President Justice La Tia W. Martin to preside over four days of learning, exchange, jubilation and historical reverence. The National Association of Women Judges' 31st Annual Conference *Justice on the River: Navigating Change* drew approximately 400 people who partook of the ready wisdom of Keynote Speakers former U.S. Supreme Court Justice Sandra Day O'Connor and Reverend Samuel 'Billy' Kyles, and explored current developments from among 21 educational offerings in which highly focused discussions with top-level content and informed analysis better enabled participants to make informed decisions in all areas of their professional legal life. Performing one of its favorite acts, NAWJ awarded Diana M. Comes, a second law student at the Cecil C. Humphreys School of Law at the University of Memphis, the Sandra Day O'Connor Scholarship.



The Memphis Planning Committee's famous Dine Around, where local 'Friends of NAWJ' hosted conference attendees from outside the area, ignited the four-day Conference with a big warm welcome of friendship, conversation, and all around good cheer over dinner in homes around Memphis. Among the many generous hosts was the family of Stephen Hale of the Memphis firm Hale • Dewey • Knight PLLC, who excelled at merging fine dining, good storytelling and exceptional genuine hospitality. All the Dine Around participants shared similarly favored memorable tales of invitation and good cheer from our hosts who included: Hon. Arnold B. Goldin, Shelby County Chancery Court; Hon. Robert S. Benham, Probate Court, Division I; Hon. Jayne Chandler, Memphis City Court; Julian Bolton, Esq., Hon. Robert L. Childers, Circuit Court of Tennessee, 30th Judicial District; Amy Amundsen, Esq., Rice Amundsen & Caperton, PLLC; Suzanne Landers, Esq.; Denise McCrary, Esq.; Dottie Pounders, Esq.; Leslie Coleman, Esq.; Susan Lane, Esq.; Don Donati, Esq.; David Cook, Esq.; Hon. Jon P. McCalla, U.S. District Court, Western District of Tennessee; Ashley Ward, Esq., Nahon, Saharovich & Trotz, PLC; Valerie Smith, Esq., Nahon, Saharovich & Trotz, PLC; John Cannon, Esq.; Betty Campbell, Esq.; Toni Parker, Esq.; Mary Morgan Whitfield, Esq.; Ashley Martin, Esq.; Hon. Kenny W. Armstrong, Shelby County Chancery Court; Hon. D'Army Bailey; and Walter Bailey, Esq.

At the Center for Southern Folklore the next night attendees basked in that rare sight of dancing judges. Ribs, macaroni and cheese, corn bread and greens could not stop the 'happy feet' of judges grooving to the sounds of Memphis' leading blues and rock band. By night's end almost everyone appeared in either a conga line or favorite hustle.

PRESIDENT'S MESSAGE

MISSION

NAWJ's mission is to promote the judicial role of protecting the rights of individuals under the rule of law through strong, committed, diverse judicial leadership; fairness and equality in the courts; and equal access to justice.

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Dear NAWJ Members and Friends,

I am writing this column on Martin Luther King Jr. Day because few people have meant more to our collective hopes for a fair and just society than Dr. King. Martin Luther King, Jr. said many wise and eloquent things in his too-short life. He called for equality, he called for nonviolence, and he called for an end to poverty. But the words that have been with me daily throughout my legal and judicial career are those he spoke about justice.

"Injustice anywhere is a threat to justice everywhere" was his famous call to conscience. He recognized that to live up to the ideals of our democracy, we must make the promise of justice real for everyone--regardless of race or creed, wealth or influence. "A right delayed is a right denied" is another of his challenges to the forces that would work against justice. He reminded us that justice cannot be a far-off ideal for a distant tomorrow, but a living reality of today.

And though Dr. King suffered under laws that he believed stood in the way of justice, and spent many nights in jail to demonstrate the strength of his convictions, he was at heart a man of great hope, with great confidence in his fellow human beings. "The moral arc of the universe bends at the elbow of justice" he said. Despite the obvious injustices he faced in his day, he could see a different-and a better-future.

Which brings me to NAWJ, and its mission of ensuring equal justice and access to the courts for all. From the day it was founded, NAWJ has been committed to diversity in our membership. And we have worked together in a spirit of serving our communities and improving the justice system. As Martin Luther King Jr. urged us to realize, each of us has within us a special ability to make a difference. He instructed us that true greatness comes from service. "Everybody can be great," he said, "because everybody can serve." We have it within our power to keep the world arching towards justice, and we must use that power.

Many of NAWJ's programs are designed to make such a difference, perhaps most of all, The Color of Justice. Created by Judge Brenda Stith Loftin of St. Louis, Missouri, this program has been replicated in every one of NAWJ's districts, through collaborations with court systems, law schools, and universities. Now in its tenth year, I am confident that we will see more women and people of color aspire to judgeships because of the inspiration, encouragement, and guidance the program offers. Diversity on the bench speaks equality to those who stand before it. It is a value that we must work together to achieve.

I conclude this column the way it began - with the words of Dr. Martin Luther King, Jr., who said: "Power at its best is love implementing the demands of justice. Justice at its best is love correcting everything that stands against love." And isn't that really why we belong to NAWJ -- to do what love requires and be of service? As a judge, I don't get to speak of love very often in my official capacity. The word doesn't appear in many laws or many court decisions. But I do believe that love is ultimately what drives us all to work for a more just society. So in honor of Martin Luther King Jr., I encourage everyone to listen to your heart -- and continue our path to service, with love. With your help, we can keep the arc of the universe bending towards justice.

All the Best,

Dana Fabe, President



THE SIR RICHARD MAY SEMINAR ON INTERNATIONAL LAW AND INTERNATIONAL COURTS

Hon. Amy Nechtem, Dr. James Apple, and
Hon. Carolyn Engel Temin, NAWJ International Director

The International Judicial Academy conducted its Fifth Sir Richard May Seminar on International Law and International Courts last year from September 20 - 25, 2009 in The Hague, Netherlands. The program agenda combined presentations and site visits to give an overview of international law and the international courts, tribunals, and organizations located in The Hague.

The Seminar is named in honor of the late Sir Richard May, the first British representative on the International Tribunal for the Former Yugoslavia (1997) and a member of the first Board of International Advisors of the International Judicial Academy. Judge May became internationally prominent during his service as the presiding judge in the Slobodan Milosevic trial at The Hague. He published a seminal text on international criminal evidence in 2002.

This extraordinary opportunity is available to NAWJ members and non members who seek to enrich their judicial experience with exposure to the Seminar's intriguing and stimulating curriculum. The wealth of information it provides solidly acquaints attendees with existing International Tribunals, their laws, effectiveness, and limitations, and raises questions and issues regarding our own system of government and justice in the United States.

Last fall's delegation of judges had the unique opportunity to observe several hearings and trial proceedings during the Seminar. At the International Court of Justice the participants attended a public hearing in the case of *Pulp Mills on the River Uruguay* (Argentina v. Uruguay) during which two lawyers presented their cases on behalf of the government of Uruguay. They also witnessed the testimony of Charles Taylor, the former President of Liberia on trial at the Special Court for Sierra Leone, who took the stand in his defense.

At the International Criminal Court (ICC) the delegation watched as Judge Daniel David Ntanda Nsereko of Uganda issued a summary of the Appeals Chamber's judgment which dismissed the appeal of Germain Katanga of the Democratic Republic of the Congo who challenged the admissibility of his case before the ICC. The decision carried particular significance because it was the first time that the ICC received a challenge to admissibility based on the principle of complementarity, which holds that the ICC can only prosecute individuals when a national court with jurisdiction over the case is unwilling or unable to do so.

In addition to learning about the prominent courts and tribunals located in The Hague, the participants also received information about some of the lesser-known organizations such as the Iran-United States Claims Tribunal, the Organization for the Prohibition of Chemical Weapons, and the OSCE High Commissioner on National Minorities. Attendees were feted to a fascinating tour of the World Peace Palace followed by a discussion with one of the judges currently sitting at the Palace. The Seminar concluded with a closing dinner reception seaside at which certificates and scholarship checks were presented to the participants.

I had the very good fortune to attend the fall 2009 Seminar orchestrated by Dr. Apple along with Judge Carolyn Engel Temin, NAWJ Past President. We were among judges from across the United States and Latin America who took in the magnificent, historic city side of The Hague, Netherlands, while expanding our judicial horizons. It was an unforgettable, outstanding experience not only unlocking mysteries of International Law and Tribunals but one that offered an opportunity for collegiality with fellow judges in attendance, making fast and lasting friendships.

For us, it was a humbling privilege to be counted among those in this wide, wide world having the honor to do justice guided by our appreciation and celebration of the rule of law.

The Foundation to Promote Open Society in New York City provided the financial support with additional assistance from the Atlantic & Pacific Exchange Program, a non-profit organization based in Rotterdam, Netherlands. Twenty-six state and federal judges from the United States and four judges from Argentina participated in the seminar. For further information on the Sir Richard May Seminar for 2010, you may contact the International Judicial Academy in Washington, DC. Or visit their Website www.ijaworld.org/RichardMaySeminar.html.

By Judge Amy Nechtem, NAWJ Vice President of Publications and
Dr. James Apple, President of the International Judicial Academy

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The National Association of Women Judges greatly appreciates the generosity of law firms, organizations and individuals whose multi-year sponsorships allows us to expand the reach of our programs. NAWJ's mission is to promote the judicial role in protecting the rights of individuals under the rule of law with a strong, committed diverse leadership that acts for fairness and equality in the courts.

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National Association of Women Judges Midyear Meeting and Leadership Conference Washington, D.C.

March 11-14, 2010

Thursday, March 11, 2010

RECEPTION HONORING JUSTICE GINSBURG, JUSTICE SOTOMAYOR, AND LADY HALE OF RICHMOND National Museum of Women in the Arts



Speakers:

Justice Ruth Bader Ginsburg, Associate Justice, Supreme Court of the United States

Justice Sonia Sotomayor, Associate Justice, Supreme Court of the United States

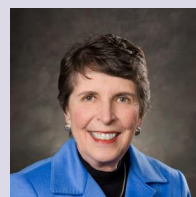
Lady Brenda Marjorie Hale, Justice, Supreme Court of the United Kingdom

Moderator: Professor Judith Resnik, Arthur Liman Professor of Law, Yale Law School

Presentation of the NAWJ Justice Ruth Bader Ginsburg Scholarship

Friday, March 12, 2010

EDUCATIONAL PROGRAM: LAW, JUSTICE AND THE HOLOCAUST The United States Holocaust Memorial Museum



Attendees will have a private guided tour of the United States Holocaust Memorial Museum, followed by a program at the museum that will explore the failure of the judges and those in the legal profession to protect the millions of persons who were left vulnerable to the racist and anti-Semitic ideology of the Nazi regime. A fascinating multi-media historical presentation will examine the judicial response to the key decrees and legislative acts that facilitated the Nazis' ability to carry out their agenda. A guided panel discussion, moderated by U.S. District Court Judge Gladys Kessler, explores the role of the judiciary in modern society and the need for judicial courage and independence.

Speaker: Dr. William F. Meinecke, Jr, Holocaust Museum

Moderator: Judge Gladys Kessler, U. S. District Court, District of Columbia

Panelists: Mrs. Herbert J. Gans, Survivor of the Cracow, Poland ghetto and Bergen-Belsen concentration camp
Colonel Linda Strite Murnane, Judge, U.S. Air Force (Retired)
Judge Maria P. Rivera, California Court of Appeals, First District
Judge Mary M. Schroeder, U.S. Court of Appeals, Ninth Circuit
Chief Judge Eric Washington, District of Columbia Court of Appeals

AFTERNOON PROGRAM LUNCHEON ADDRESS

The Fairfax Hotel

KEYNOTE SPEAKER

Tina M. Tchen, Director of the White House Office of Public Engagement and Executive Director of the White House Council on Women and Girls
Greetings from the Honorable Kim Young-ran, Supreme Court of Korea



EVENING RECEPTION

As a prelude to the International Association of Women Judges' 10th Biennial International Conference May 11-15 in Seoul, South Korea, Ambassador of the Republic of Korea, Han Duk-soo will host a reception at the Ambassador's Residence.

Saturday, March 13, 2010

BOARD MEETING

JUDICIAL RECEPTION

NAWJ Sponsor Jeff Wilson, The Wilson group, has agreed to open his home just blocks away from The Fairfax Hotel, for an evening reception.

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H. KIM BOTTOMLY'S REMARKS

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EDUCATION OF 21ST CENTURY WOMEN AS LEADERS AND ARCHITECTS OF OUR SOCIETY

Remarks given at the NAWJ District One Fall Reception honoring new women judges on November 17, 2009.

By H. Kim Bottomly, President of Wellesley College



I am happy to be here today, and happy to see so many new women judges in our state. Massachusetts is a fairly progressive state, but even here, this is not an event to be taken for granted. It is one we should celebrate. When I was a very young girl – and I assure you that is not as long ago as it might seem – a woman in Massachusetts couldn't even serve on a jury. And I look out at all of you today, becoming judges in those very same courtrooms, and I am very happy, indeed.

Addressing the question of whether women judges would really make a difference, Bertha Wilson, the first woman appointed to the Canadian Supreme Court made an interesting point almost 20 years ago. Her speech at the time was controversial, but her essential point should not have been. She noted that women in the judiciary should not make a difference in an ideal world.

She said a judge, "...must be independent and impartial....must not approach his or her task with preconceived notions about law or policy, with personal prejudice against [certain] issues, or with bias toward a particular outcome."¹ All judges, she said, should model the qualities outlined by Socrates, "...to hear courteously, to answer wisely, to consider soberly, and to decide impartially." All judges.

So, how could women judges make a difference? That, Judge Wilson said, depends on your view of current law. "If the existing law can be viewed as the product of judicial neutrality or impartiality," she said, "then...increased numbers of women judges should make no difference." But, she added, "...if you conclude that the existing law, in some areas at least, cannot be viewed as the product of judicial neutrality, then your answer might be very different."

Since my mother, and many of your mothers, were prohibited or discouraged by existing law from even serving on juries in this and many states until the U.S. Supreme Court finally changed that in 1975, I have trouble seeing how all areas of current law could have truly resulted from impartial judicial neutrality. Impartiality – even when intended – is framed by context, by one's vision of the world. You will make a difference. In small part you will because you are women. In the largest part however, you will because you are so very good at what you do. You are leaders in your area.

Let me talk for a few moments about leadership. Part of what keeps me going at Wellesley College, what makes battling the bad economy worth the struggle, is my vision of a world in which at least half of the leadership positions in all areas are held by women. Our stated mission at Wellesley College is to educate "Women who make a difference in the world." We do, and we do it well. The fact is, though, all women in leadership positions make a difference. In my inaugural address at Wellesley College, I noted that over 50% of college graduates today are women, that occupational structures and career ladders are more open than they ever have been, and that women are moving into decision-making positions at an ever-accelerating rate. Unlike previous centuries, the 21st century will represent decision-making by an additional 50% of the talent pool – by women.

In that inaugural speech, I predicted that the tumultuous 21st century would someday be referred to by historians as "The Century of the Woman." Major social structural changes are upon us, and this generation of women must formulate and make them work, in cooperation with their male colleagues. They must be ready and able to populate the leadership ranks. They must be the designers and architects of a new society, in a world we have never known, and could not have even imagined twenty-five years ago.

The world is a mess. It is an increasingly complex and dangerous mess. Women, who will play a bigger role in the world, will have to take ownership of the mess and clean it up, and this is a good thing. Economic studies of microfinance in third-world countries document pretty convincingly the enhanced benefits of giving resources and leadership roles to women. Studies of decision-making show the same thing. Women are agents of positive change, and are, I think, our hope for the future.

"If the existing law can be viewed as the product of judicial neutrality or impartiality," she said, "then...increased numbers of women judges should make no difference." But, she added, "...if you conclude that the existing law, in some areas at least, cannot be viewed as the product of judicial neutrality, then your answer might be very different."

¹Bertha Wilson, "Will Women Judges Really Make a Difference?" Osgoode Hall Law Journal, vol 28, no 3, 2000

Most of our problems today, are inherently interdisciplinary and global, and will require unprecedented levels of holistic, systemic approaches that integrate science and technology with business, economics, political science, psychology, sociology, and even religion. To take a simple example, nanoparticles can already be used to detect the presence of dangerous levels of mercury in drinking water – they cause a color change, just like litmus paper. Suppose someone wanted to apply that more broadly to other types of dangerous pollutants and wanted some sort of always-present sensor to keep us safe. To address this problem, one couldn't be just a bioengineer who understands nanoparticles and how they work, one would need to also understand social behavior (to address the issue of “wait, you're going to put what in my water that might turn it what color?”); in addition one would need to understand and learn from our history (remember fluoride?); one would need to know law and politics.

Our important problems are not simple, unidimensional ones. We need leaders to emerge in each of our important areas. And we need women leaders.

Higher education has a responsibility to ensure that such leaders do emerge. One strong focus at Wellesley College today is addressing the question of how undergraduate education can hone the skills that will lead to leadership. We must figure out how to do that.

How do we prepare students today for leadership? It is not as easy as simply offering leadership courses. Leadership follows from competence and confidence. I believe that the development of leadership skills begins in the classroom. It is a part of liberal arts education. We colleges are the first step, and we educators are responsible for fostering that competence and confidence. We at Wellesley talk about how we invest in women and the leadership potential of women. We educators also have to recognize that the world has changed immeasurably since the ancient Greeks invented liberal arts study. Clearly, there are things we need to add to liberal arts education if we are to have an impact in the future. We don't need to add things that teach specific job skills, or to narrow our focus, but instead we need to embrace the educational imperative. We must encourage students to take on complexity, to understand ethical dilemmas, conflict and change.

We need a new renaissance, a renaissance that will reform our world as drastically as the original renaissance did in the 15th century. We need to populate the country with renaissance women and men who know a lot about many things, and we need them in leadership positions. To produce these new renaissance people we must create new and better integrated educational approaches – approaches that prepare students to take leadership roles in solving the important complex problems of our time.

We need, for one example, to cite the area I know best, stronger and better leadership in science. What does leadership in science mean? Scientists, in some respects, just need to be left alone in their labs, and allowed to do their work without political interference. That is becoming an ever more difficult ideal to attain in modern society. We need leaders to ensure that the best scientists can be left alone in their lab, with adequate funding to pursue those interests that inevitably benefit all of us. But how do we get that? We need to create a science leadership pool – a broad collection of citizenry who have a deep understanding of science. If we are to solve the problems of science in this complex, interrelated world, we need broad understanding of the science enterprise. We need lawyers, businessmen, lobbyists, journalists, judges who majored in science. We need a pool like this from which to draw

science leadership. This idea may seem odd to you. Science is a relative late-comer to liberal arts education. We all think that a bright, well-educated classics graduate can do anything, have any career. Yet, we think that a science graduate can only do science, period. We must change that. We need to prepare our students better for leadership not just in this area, but in all areas.

Consider some of the areas of increasing complexity that will require strong leadership to resolve:

Technology will continue to mushroom – we will see an increase in problems involving genetically engineered food, new medicines, access to health care, new ability to sustain life, intellectual property, privacy issues – just to mention a few. Cultural conflict will introduce an increasing number of thorny problems – the world may or may not be flat, but it is certainly smaller and much more interdependent than ever, and ever greater numbers

The world is a mess. It is an increasingly complex and dangerous mess. Women, who will play a bigger role in the world, will have to take ownership of the mess and clean it up, and this is a good thing. Economic studies of micro-finance in third-world countries document pretty convincingly the enhanced benefits of giving resources and leadership roles to women. Studies of decision-making show the same thing.

of our citizens work for corporations that hang their hats in many different countries and parts of the world. A sub-area of this set of problems will be an increase in religious issues. Such issues are front and center in our country, but religious issues will also weigh heavily in the international arena. Madeleine Albright makes a strong case for the coming importance of religion in international decision-making

in her recent book, *The Mighty and the Almighty*. And of course, I should have said, “Madeleine Albright, Wellesley College Class of '59.” Finally, ethical dilemmas will also increase a hundred-fold. Many of them will be inherent in the first two areas, but some new ones will arise as well.

As judges, you will be confronting many of these same issues and dilemmas, and you will not be able to just watch with interest – you will have to make decisions. You will make decisions based on the law, but the law contains many grey areas. In this age, you can expect an increasing frequency of those grey areas – they are endemic to major change. We as a society need you to make wise, far-sighted, and effective decisions in those grey areas. We need you to be leaders. Leaders whose wisdom will help to dispel the grayness. This grayness proceeds from the fact that we are facing complex interrelated problems in a complex interrelated world. We need renaissance leaders.

We have a daunting task before us. My generation was the female workplace pioneers. In large numbers we blazed the trail, we knocked down the barriers, we broke the glass ceilings. But ours was an easier job. We could focus on tearing down discriminatory structures. There are still many more to be removed, but the end is inevitable now. Women now can occupy half of the leadership positions. It is up to us to see that they do. A sociologist once said, “the removal of roadblocks only makes travel possible, it does not advance the journey.” The journey remains. You new leaders honored here tonight have the very hard work left to do. You must finish knocking down the barriers while being the architects of the new world. And looking at you tonight, I feel confident that you will.

DISTRICT ONE (MA, ME, RI, NH, PR)

Annual District Meeting



On November 18, 2009, at the John Adams Courthouse in Boston, District 1 members and friends gathered to honor 10 newly appointed and elevated woman judges in Massachusetts: Sydney Hanlon, Appeals Court; Janet Kenton-Walker and Kim Budd of the Superior Court; Dana M. Gershengorn, Juvenile Court; Angel Kelly-Brown, District Court; Margaret Guzman, District Court; Judith C. Cutler, Land Court; Deborah Capuano, Juvenile Court; Beverly Cannone, District Court; Shannon Frison, Boston Municipal Court; Pamela Dashiell, Boston Municipal Court; and Magistrate Judge Judith Dein elevated to Chief Magistrate Judge.

In addition to introducing our new colleagues to NAWJ, the event provided us with an opportunity to hear from Kim Bottomly, President of Wellesley College (see remarks on previous page), who gave an inspirational and informative talk on women, science and



NAWJ Past President Fernande R.V. Duffy,
Wellesley College President H. Kim Bottomly,
and NAWJ District One Director Judge
Ariane Vuono

to children and families and is committed to NAWJ and its mission. The evening gave everyone the opportunity to reconnect and remind one another of the value of NAWJ in our District.

leadership. We also honored our good friend and lifetime member and past District Director, Martha Grace. She recently retired from the Juvenile Court where she was a highly respected, beloved Chief Justice for 10 years. Judge Grace remains a staunch supporter of NAWJ holding various board and committee positions. She is devoted to issues related

Justice Vuono, Justice Duffy, Judge Amy Nechtem and Hon. Martha Grace



Women of Justice

Women of Justice is an annual celebration recognizing women who have made great strides in the fields of law, justice and advocacy. The Award is co-sponsored by *Lawyers Weekly*, the Women's Bar Association and Massachusetts Association of Women Lawyers. The most recent awards were given in December 2009, to District 1 members Charlotte Anne Perretta, Julia Huston, Lauren Stiller Rikleen. The 2008 inaugural class included District 1 members Ruth Abrams, Nan Duffly and Sydney Hanlon.

NAWJ Task Force Report

In May 2008, Nan Duffly formed the **NAWJ Boston Task Force**, a coalition of District One members, Massachusetts Women's Bar Association and women leaders in the profession. The Task Force was convened to work on ways women could collaborate to promote advancement of women, including minority women, in the profession. One goal of the committee was to have the National Association of Law Placement (NALP) collect data from its member law firms regarding equity and non-equity partnerships and part-time work, in order that law students might make informed decision about where to seek employment, much as women law students did in the early 70's when NALP provided data regarding law firms that hired women and provided pro bono opportunities. With the key support of several major law schools and law firms around the country, the Task Force succeeded in obtaining NALP's agreement in June, 2008, to study its proposal.

Jim Leipold, NALP's Executive Director, has recently informed the Task Force that NALP's demographic grid for lawyers will now include Equity Partner and Non-Equity Partner, which will enable us to see the breakdown of men and women and minority and non-minority by equity and non-equity status for the first time). They also will use the same definition of equity vs. non-equity that has been used by AmLaw, which will for the first time permit across the board comparison of data as to the number of women and minorities who have achieved equity partner status. In addition in the work-life section of the form, NALP has added question about a written part-time policy for associates and partners, and what the impact is, if any, of working part-time on an associate's progression toward partner.

The changes that NALP has instituted promotes NALP's and NAWJ's shared interest in providing young lawyers entering the work force with as much information as possible to help them select a law firm. The Task Force anticipates that, by their choices, young lawyers will have a positive influence on the hiring, development and retention of women and minority attorneys. As NAWJ Liaison to Women's Bar and Affiliate Groups, Nan Duffly will continue to represent NAWJ in its work with others in the legal profession who seek to advance women and minorities in the profession.

Branching Out

This spring, District One has plans to present its signature program **"Branching Out: Opportunities to Make a Difference in the Three Branches of Government."** NAWJ will partner with the Women's Bar in inviting local area women law students, minority law students and newly appointed attorneys, giving them the benefit of learning from over 30 panelists of judges, legislators and executive branch representatives about different paths taken to achieve their goals and positions.

DISTRICT THREE (NJ, PA, DE)

Weekend in Pennsylvania

District Three held a weekend event in and around Harrisburg, Pennsylvania from September 25 to 27 last year, 2009. It began with dinner at the Harvest Restaurant at the historic **Grand Hotel Hershey Resort**. On Saturday morning a tour of the Pennsylvania Governor's Residence occurred with First Lady and Federal Third Circuit Court of Appeals Judge Majorie O. Rendell as our hostess. This was followed by a luncheon in the State Dining Room with 24 judges from New Jersey, Maryland, West Virginia, and Pennsylvania in attendance including NAWJ Vice President for Districts Judge Joan Churchill, Judge Debbie O'Dell-Seneca, NAWJ Pennsylvania Chair, Justice Debra Todd, Justice Jane Greenspan, Commonwealth Court President Judge Bonnie Leadbetter, and Commonwealth Court Judge Rochelle Friedman.

Dining was not to be missed! The First Lady welcomed everyone and the Mansion's chef served a special menu of Roasted Beet Salad with Citrus Vinaigrette and Gorgonzola, Pan Roasted Barramundi with Linguini Carbone, Roasted Tomato Coulis and Pesto with Maitake Mushrooms, and Cinnamon Poached Adams County Pear with Pecan Crumble and Vanilla Bean Sauce on Pennsylvania State china. District Three gave Judge Rendell the Lady Justice Award which was a beautiful watercolor painted by her colleague, Judge Jane Roth. Governor Edward G. Rendell joined us for a short welcome. In addition to the Mansion tour, a local artist spoke about her artwork on display in the Governor's Residence.

Following the luncheon, the entire group visited the new **Pennsylvania Justice Center** to view the latest courtroom technology with P.J. Leadbetter moderating, toured the center, and participated in a Judicial Security Session lead by the Administrative Office of Pennsylvania Courts and the US Marshall Service. Attendees at the Hotel Hershey on Saturday night enjoyed a wonderful dinner at Alfred's Victorian in Middletown. By Debbie O'Dell-Seneca.

DISTRICT FOUR (MD, DC, VA)

16th Annual Irma Raker Dinner



District Four held its 16th Annual Irma Raker Dinner on February 2, 2010 **with the Maryland Women Legislators at the Government House in Annapolis, Maryland**. Hosted by First Lady, the Hon. Catherine Curran O'Malley (District Court Baltimore City), **the women judges and legislator meet at the Governor's home to discuss need for legislative action in**

areas such as human trafficking, and domestic violence. This event presents an opportunity to discuss matters of mutual concern. The NAWJ's projects for the women in prison and the girls' detention center were well received and supported (see Women in Prison for more information.).



Judicial Clerkships Panel Discussion

On March 18, 2010, District Four judges will present a panel discussion with students at the George Washington University law school on judicial clerkships. Judges from different federal, state and administrative courts will talk about qualifications they look for in prospective law clerks, the variety of experience each clerkship will offer, and what the heck "duties as otherwise assigned" means. The program will be held at the law school at 6 p.m. with a reception to follow.

Upcoming Events

NAWJ will for the third year be organizing a one day **Re-entry Programs at the Maryland Correctional Institute for Women**. The Women Moving Forward Conference is offered to give the women the benefit of education and information as they prepare to go home. NAWJ partners with a number of non-profit organizations that provide programs and support for the women of MCIW. The conference will again be held this fall in Jessup, Maryland.

Women's History Month at Waxters

The Prince Georges County's Women's Bar Association and NAWJ District Four presents a series of programs in March for Women's History Month at Waxters, the only girls' detention facility in the State of Maryland. For both the short and long term residents, there is a dearth programs and services. Making an effort to fill a bit of the gap, the WBA and the NAWJ come to the facility in Laurel, Maryland each Saturday in March with a different program. This year the theme is **"Step into a New Decade with Expectations."** Volunteer judges, masters, and lawyers are needed for each Saturday. **If you are interested in attending on any Saturday, contact Judge Julia Weatherly, Circuit Court for Prince Georges County, or Valeria Tomlin, Esq. in Largo, Maryland.**

March 6th: Stepping workshop with sororities from Maryland and D.C. universities. The girls will be given an introduction of the history of stepping, with a focus on admission to college. The girls will be provided literature on financial aid, loans, and scholarships. They will be assigned a project to work on such as an essay about themselves for college admission, or preparing their own step routine.



Color of Justice

*Fostering Diversity in the Legal Profession & Judiciary
...One Student at a Time*

Free workshops presented annually in June at the
University of Alaska Anchorage and the Alaska Court System

High School Track - For Students in Grades 9-12
Career Track - For College Students and Other Interested Adults
Advisors Track - For Educators, Youth Program Leaders and Career Counselors

- Mentor with prominent Alaskan judges and lawyers
- Attend classes taught by law professors and participate in mock trials
- Learn the steps to a successful career as a lawyer or judge

Find out more at:
<http://www.state.ak.us/courts/outreach.htm#coj>

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Gonzaga University School of Law
Law School Admission Council
Northwest Indian Bar Association
Seattle University School of Law
University of Alaska Anchorage
University of Washington School of Law

March 13th: A special guest, Tonya Blount from Sister Act 2, will discuss her life and ability to overcome DV, homelessness, raising 5 kids alone, and life's challenges.

March 20th: "Presenting Self" Workshop. We will do training on how to act and react to life situations, jobs, interviews, meetings, and public events. The girls will simulate real-life professional situations, including interviewing. Victoria Lanteigne, who works at Center for Development and Population Activities as the Senior Associate, Leadership & Capacity Building, will assist us in implementing a training that is fun, interactive and educational for the girls. Girls will be assigned a project— making pins and stickers that reflect how they want to present themselves to the world.

March 27th: Closing ceremony and celebration. The girls will be perform step routines they designed, read their essays, and explain their pin and stickers from the earlier programs.

By Judge Julia B. Weatherly, President of District Four

DISTRICT SEVEN (MI, OH, WV)

District Seven is making plans for a **continuing education seminar and reception in early June** (June 4 target date but awaiting confirmation) at the University of Cincinnati College of Law. As our President Justice Fabe is a native of Cincinnati she will be honored at the event. We also plan to award a scholarship to a deserving law student.

Judge Margaret Clark, District Seven's Director, has remained active with the Ohio Judicial Conference where she serves as co-chair of the Juvenile Law and Procedure Committee. In addition, in late February she will travel to Washington, D.C. with other persons from the American Red Cross Greater Cincinnati Chapter to be brought up to date at national headquarters and to visit Capitol Hill. **Margaret has been active in the Cincinnati chapter of the Red Cross for many years.**

DISTRICT NINE (IA, MO, WI)

Missouri. St. Louis, Missouri Judges Kristine Kerr, Ellen Levy Siwak, Angela Quigless, Mary Pat Schroeder, Thea Sherry, Municipal Judge Kim Whittles and Retired Judge Susan Block participated in the **Sue Shear Institute for Women in Public Life's "Women Walk Before They Run" program** held on September 26, 2009. They were joined by over 65 elected officials in the annual walk designed to raise funds to underwrite the 21st Century Leadership Academy, a week-long residential leadership program for college students, focused on women's public sector leadership.

St. Louis County Associate Circuit Judge Mary Pat Schroeder is currently serving as President of the Missouri Association of Probate and Associate Circuit Judges. The Association will hold its Annual Conference on April 7-9, 2010 at the Lake of the Ozarks, Missouri.

St. Louis County Associate Circuit Judge Thea Sherry was appointed to the Missouri Supreme Court Committee on Science and Technology.

Iowa. Rosemary Sackett, Chief Judge of the Iowa Court of Appeals, received the 2009 Arabella Mansfield Award from the Iowa Organization for Women Attorneys for her legal contributions to Iowa and her dedication to promoting and nurturing women in the legal profession. Judge Sackett was the only woman and the youngest graduate of the Drake University Law

School class of 1963 and the only woman admitted to the bar in June of that year. For the next twenty years, she practiced law in northwest Iowa, appearing in many courtrooms where women lawyers had never stepped. She tried over 250 cases to completion until 1983 when she was appointed to the Iowa Court of Appeals. For 13 years Judge Sackett was the youngest and only woman member of the court. **She has now served on the court for over 25 years and has authored over 2400 majority opinions. Judge Sackett obtained an L.L.M. in the Judicial Process from the University of Virginia in 1990. She has been the Chief Judge of the Court of Appeals since 1996. Arabella Mansfield was the first woman lawyer admitted to the practice of law in the United States.** Ms. Mansfield studied law in her brother's law office for two years and was admitted to the Iowa Bar in 1869. She was admitted despite the fact that Iowa law required an applicant for bar admission to be white, male, and over the age of 21.

Iowa District Court Judge Kristin Hibbs and Iowa District Associate Court Judge Sylvia Lewis were both recently appointed to Senior Judge status by the Iowa Supreme Court following their respective retirements from the trial bench.

DISTRICT TEN (KS, MN, NE, ND, SD)

NAWJ members in Kansas sponsored a joint gathering with women judges from the Missouri side of Kansas City. The gathering was held in Kansas City, Missouri in November and was well attended and very much enjoyed by all! Thank you to our Missouri colleagues who opened up their homes to host the gathering, to everyone who attended, and to the judges who worked so hard to put the event together.

A membership drive gathering is planned in Wichita, Kansas during the Joint Bench-Bar Conference in June 2010. Invitations will be sent to all judges in the state of Kansas and Justice Carol Beier is in contact with the Wichita Women's Bar Association in hopes that they will jointly host the event.

DISTRICT THIRTEEN (WA, OR, AK, HI, ID, MT)

ALASKA

Read about another fantastic production of Success Inside and Out, 2009 in See Women in Prison news later in this Counterbalance.

COLOR OF JUSTICE 2010, JUNE 16-18, 2010

University of Alaska, Anchorage; Alaska Court System

College and Career Track

June 16th 3:30 pm to 7:30 pm

This track is designed for college students and other interested adults, and will feature a Mentoring Reception.

Advisors Track

June 16th 3:30 pm to 7:30 pm, June 17th 9:00 am to 5:30 pm

June 18th 8:30 am to 4:30 pm

This session is devoted to updating educators, youth program leaders and career counselors on opportunities available to raise awareness of the legal profession to our young people. This program will also feature a mentoring reception.

High School Track

June 17th 10:00 am to 5:30 pm

June 18th 8:30 am 4:30 pm

This track is designed for students in grades 9-12.

WASHINGTON

Color of Justice Program



Washington Supreme Court Justice Debra Stephens addressing attendees

Gonzaga University School of Law in Spokane, Washington sponsored the “Color of Justice” program in October 2009. Fifty-six students attended and learned about law and met lawyers and judges from across the country. Dozens of professionals spent the day mentoring the students and participating in four mock trials.

Pro Tem Training

Washington judicial officers worked with the state bar association to develop a pro tem training course. The intention of this course is to increase diversity on the bench by actively marketing the course through the minority bar associations. The training provided information on how to “successfully navigate” the responsibilities of a pro tem. The first course was held in Seattle, Washington February 26–27, 2010 and another course will be held on March 20 in Spokane, Washington.

Scholarship Award, Judicial Officer Reception



Monica King and Michelle Hankins, the Co-Presidents of the Seattle University School of Law



Chief Justice Barbara Madsen and Maria Lucia Chavez

On January 27, 2010, Washington NAWJ District 13 members and the Seattle University School of Law Women’s Law Caucus sponsored a judicial officer reception in Seattle, Washington at the Vermillion Gallery.

The event provided an opportunity for young people who are pursuing a law degree to

interact with judicial officers and Chief Justice Barbara Madsen presented a NAWJ scholarship to law student Maria Lucia Chavez.

Ms. Chavez has extensive volunteer and work experience with the immigrant population ensuring access to school and resources which made her stand out to be selected for this honor. It was evident that her peers also recognized her contribution to equal access by their extensive praise of her.

New Chief Justice



Chief Justice Barbara Madsen sworn in by previous Chief Justice Gerry Alexander

Hon. Barbara Madsen was elected Washington State Chief Justice. She assumed that position on January 11, 2010. Chief Justice Madsen is the first woman voted into the position. Previously, appointments were made by seniority.

Upcoming Events

On Wednesday, January 27, 2010 Chief Justice Barbara Madsen presented an NAWJ scholarship award to a Seattle University School of Law student at a judge’s reception.

There will be a District 13 meeting in Seattle June 25-27, 2010

The Hague Convention Domestic Violence Research Project is planning a half-day public event followed by an advisory board lunch and feedback session for April 19, 2010 at the University of Washington’s School of Social Work. Presentations will be made on study findings, feedback received on findings from several respondents, including Professor Merle Weiner and a program officer from the National Institute of Justice. It will end with an open discussion with the audience. Professor Weiner participated on the Hague Convention panel at NAWJ’s Annual Conference in Portland in 2008. Advocacy, social service, and legal communities will be invited to this event. The event will adjourn to a lunch with attendees in order to get direction on next steps on interpreting and disseminating the findings, and continuing the work to support mothers, advocates, attorneys, and judges.

DISTRICT FOURTEEN (CA, NV)

Prelude to Seoul: Women Judges and Lawyers in Korea and the United States



On February 6th, the energy and momentum for change was palpable as members of NAWJ met with Korean American judges, lawyers and their counterparts from the Republic of Korea for the “Women Judges and Lawyers in Korea and the United States” at the Korean Cultural Center in Los Angeles. As a prelude to the upcoming IAWJ Conference in Seoul, Korea this program was created and organized by NAWJ member Kathleen Mulligan, Administrative Judge for the United States Equal Employment Opportunity Commission whose jurisdiction includes Korea, Japan and Guam. Jae-Soo Kim, the Consul General, Republic of Korea and his consul staff co-sponsored the event with District 14 of NAWJ. The Consulate of the Republic of Korea in Los Angeles graciously hosted the attendees to a traditional Korean lunch buffet followed by traditional Korean dance and music performances. Before the formal program attendees were able to tour the displays within the cultural center to gain insight into the traditions of this dynamic country. The Department of Tourism provided a photographic display of Korea as further motivation to visit.

The program was kicked off by the keynote address by Congresswoman Na, Kyung Won, Member of the National Assembly and former Seoul District Judge. Traveling to Los Angeles for our program, Congresswoman Na spoke with candor and great enthusiasm about the rising role of women in the legal profession and politics in Korea. Reflecting the face of these changes, Congresswoman Na is a mother of two teenagers, wife of a judge, former judge herself and now influential member of the National Assembly. Congresswoman Na spoke on the dramatic changes since Korea had its first female lawyer in 1954. Congresswoman Na shared her amazement at the rate of change since she was appointed judge in the early 1990s and many of her colleagues were reluctant to work with women or complained about women judges taking the maternity leave afforded them under the law. Despite a law requiring female proportional representation, most female law-makers leave their office after their first term. She attributed this to the glass ceiling in politics. However, she also shared the good news that the general public seems to increasingly favor women to men. Congresswoman Na explains this as a desire for feminine charisma, warm communication and professionalism. She attributed her experience in the legal profession before entering politics as giving her the skills to win public recognition for good debates on television.

In contrast, Justice Dana Fabe, NAWJ President spoke on the progress and distance we still have to go in the United States. As the first woman Justice of the Alaska Supreme Court and having served two separate terms as Chief Justice, Justice Fabe spoke on the diversity among the various benches amongst the states and the processes to become a judge. She explained the background of NAWJ and some of its flagship programs such as the Color of Justice and Bar to Bench. In particular she focused on the judicial selection panels and need for diverse members and also diversity as a selection criterion.

Ryul Kim, Director of the Korean Law Center, University of California at Irvine provided a photographic montage of the changes in the Korean courts as he presented a primer on the Korean legal system and the obstacles to enforcing a US judgment in a Korean court.

The program was rounded off with a panel discussion among Korean and American judges, moderated by Judge Mulligan: “Is It Different for Women? Why and How We Became Judges? and What We Do Now That We Are.” The panelists were Judges Sujin Le, District Court, Seoul; Howard Lee Halm, Tammy Chung Ryu and Mark C. Kim all of the Los Angeles Superior Court; and Jamoa Moberly, District 14 Director and Marjorie Laird Carter, President-elect NAWJ, both of the Orange County Superior Court. The discussion was led off by youthful Judge Lee who spoke about the rapid progression of women into the judiciary and the profound changes it is requiring since most are of child-bearing age. In the current judicial system law graduates test directly from legal training into the judiciary and women graduates have been performing very well. Due to the rapid influx of women into the profession and increasing concentration among the judiciary, the entry level courts are expanding from three to four panels to allow for women to take their maternity leaves without slowing down the judicial process or overburdening their colleagues. The three judges from the Los Angeles Superior Court reflect Korean American judges from different vantage points. Judge Kim was the first Korean American judge appointed in his 30’s to the LA Superior Court and has now been followed by many. Judge Ryu was the first woman Korean American appointed to the bench in California. She shared that several years later at age 45 (and mother of teenagers) her colleagues were shocked at news of her maternity but that she was supported in taking three months leave. Judge Halm spoke about his experiences at applying for judge at age 66 and wondering whether he was too old, another aspect of diversity. Judge Moberly spoke about initial inspiration from attending one of the first ‘So You Want to Be a Judge’ programs and how years later the advice tied together when she applied for the bench after 20 years of civil practice and community and bar involvement. The program was rounded out by comment from Judge Marjorie Laird Carter, the premier example of NAWJ and the benefits. The two judicial systems seem to be coming closer together in structure and character. Advisory juries are being experimented with, legal practice experience will soon be a requirement for judicial appointment and certainly the role of women is greatly expanding in the Korean legal system.

In conclusion, come to Seoul! See for yourself! Meet some very gracious hosts who are anxious to share their hospitality! District Director Judge Jamoa Moberly.



International Association of Women Judges

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IAWJ 2010

**10TH BIENNIAL CONFERENCE
SEOUL KOREA**

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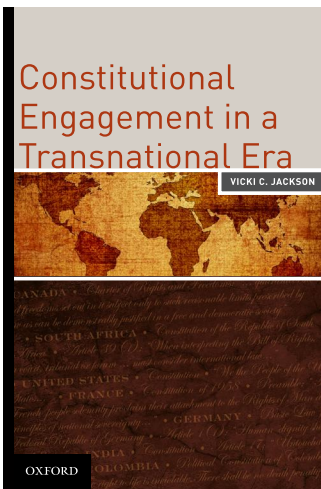


Vicki C. Jackson

In Constitutional Engagement in a Transnational Era

(Oxford University Press, 2010), Vicki Jackson explores the role of foreign and international law in constitutional adjudication in the U.S. Supreme Court and in constitutional courts around the world. In the excerpt below from Chapter 4, reprinted with permission of the publisher, Professor Jackson explores some of the history of U.S. engagement with the transnational in constitutional interpretation:

Vicki C. Jackson is the Carmack Waterhouse Professor of Constitutional Law at the Georgetown University Law Center, where she teaches courses in constitutional law, comparative constitutional law, federal courts, the Supreme Court, and on gender-related subjects. She previously served as a Deputy Assistant Attorney General in the Office of Legal Counsel in the U.S. Department of Justice (2000-01); as a member of the D.C. Bar Board of Governors (1999-2002); as a co-chair of the Special Committee on Gender of the D.C. Circuit Task Force on Gender, Race and Ethnic Bias (1992-95), and a member of the D.C. Circuit Advisory Committee on Procedures (1992-98).



Professor Jackson is co-chair of NAWJ's Judicial Academic Network and Judicial Education Committee.

Should the United States seek to bring its constitutional law into harmony with that of a transnational community of nations? Should it resist efforts to do so as a matter of first principle, rejecting even the consideration of foreign or international sources as bearing on constitutional meaning? The first approach, a convergence posture, risks ignoring the singular and long history of the U.S. Constitution; the second, a posture of general resistance, would deny to our judges the many benefits of considering foreign and international law arising from constitutions, treaties, and human rights instruments to which the United States has contributed. Engagement offers important insights for constitutional adjudication, both from a deliberative perspective concerned with improving the decision-making of the U.S. Supreme Court, and from a relational perspective in accommodating and mediating the developing relationships among and between constitutional and supranational legal systems.

[T]he U.S. Court and its justices have been involved in deliberative engagements with foreign and international law episodically over the course of our constitutional history, and in many of our most important constitutional decisions. It is thus emphatically not “foreign to our Constitution” to engage with the constitutional approaches of other nations. And there is more reason in the twenty-first century to look to outside sources as an aid to interpretation than in the past, both because there are more transnational legal resources that bear on problems of constitutional interpretation in the United States and because the legitimacy of national states in the international community depends more than in the past on their adherence to transnational norms of democracy, the rule of law, and the protection of individual rights. . . .

[D]eliberative uses of foreign and international law serve many legitimate roles in constitutional interpretation. Comparison is an inevitable part of the project of national self-expression that is so distinctive a feature of constitutions and constitutional law. To the extent that constitutions commit their polities to the protection of “inalienable” human rights, or to a common ideal of governance (for example, separation of powers, or judicial independence), constitutional interpreters are engaged in what is, in some sense, an overlapping project from which reciprocal learning is likely. Outsider perspectives, moreover, can help provide a check on error, as illustrated by the Court’s allusions to avoiding totalitarian practice in its mid-twentieth-century decisions,¹ as well as by some justly famous dissents, noted below. Constitutional law is also in part about solving functional problems of governance; these functions are sometimes addressed by other countries similar enough to offer useful experience or information, and the U.S. Court has looked to that experience from time to time. Finally, because the role of an independent judge interpreting a written constitution in a democracy is a common one exercised under varying institutional and legal frameworks, considering such comparative sources of law may improve judging by providing a distinctive external perspective or lens through which familiar problems can be reexamined. In short, knowing more is generally better than knowing less. And judicial candor through written justification generally contributes more than silence to the legitimacy of the judicial process. . . .

The U.S. Constitution functions as something more than a binding legal instrument. As often observed, it has taken on over time something of the character of a civic religion—in the sense that commitment to the Constitution is a central, indeed constitutive, element of national identity. . . .

Transnational comparisons have long reinforced the expressive aspects of the Court’s work. If national states are in some respects “imagined communities,”² they can exist as communities only where “others” exist or are envisioned. . . .

¹ See, e.g., *Kotteakos v. United States*, 328 U.S. 750, 773 (1946); *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944); see also *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring); *Fikes v. Alabama*, 352 U.S. 191, 199 (1957) (Frankfurter, J., concurring); *Brown v. Allen*, 344 U.S. 443, 512 (1953) (Frankfurter, J.); *Wieman v. Updegraff*, 344 U.S. 183, 194 (1952) (Black, J., concurring).

² BENEDICT ANDERSON, *IMAGINED COMMUNITIES* (2006 ed.). . . .

Self-expression in governance cannot be based on an uninformed imagination. If the United States is to be a “city on a hill,” as some proponents of American exceptionalism argue it has been and should remain,³ the surrounding terrain must be known: one cannot be a “city on a hill” if one is not surrounded by valleys or plains. One cannot be a “beacon of light” if one operates below the terrain of those who are supposed to see it. One cannot be a leader in the protection of freedom if one ignores baselines of freedom elsewhere or resorts to the procedures of dictatorships. The assertion of American exceptionalism as a basis for resisting comparative inquiry is thus internally inconsistent.

American constitutional identity (including its exceptionalist strands) has been linked to elements of our experience viewed comparatively in constitutional adjudication. Examples in five areas are suggestive.

Foreign experience will not, of course, always point in more just directions, or in only one direction. The question is, always, what is the best reading of our own constitution?

Freedom and Equality In *Plessy v. Ferguson*,⁴ the Court rejected a challenge under the Fourteenth Amendment to a state law requiring racial segregation in public transportation, legitimating a regime of racial separation and subordination that lasted as a formal matter for nearly six decades (until *Brown v. Board of Education*⁵), a regime whose vestiges, some believe, continue to this day. As the sole dissenter in *Plessy*, Justice John Marshall Harlan wrote that state-mandated racial segregation “is a badge of servitude wholly inconsistent with the civil freedom and the equality before the law established by the Constitution,” that “cannot be justified upon any legal grounds.” This well-known statement would now be accepted by virtually all U.S. lawyers as embodying a core constitutional principle. But Justice Harlan went on, in a comparative vein, stating, “We boast of the *freedom enjoyed by our people above all other peoples*. But it is difficult to reconcile that boast with a state of the law which, practically, puts the brand of servitude and degradation upon a large class of our fellow-citizens, our equals before the law.”⁶ Harlan’s reference to the freedom of “our people above all other peoples” cuts to the heart of the comparative nature of exceptionalism: how, he asks, can the United States profess an ideology of freedom and liberty superior to all others while at the same time failing to extend that freedom and liberty to all of its own citizens?

In more modern times members of the Court have referred to transnational law to reflect on issues of personal freedom and race equality. References to the avoidance of totalitarianism in U.S. conceptions of personal freedom are found in cases like *Griswold v. Connecticut*, dealing with marital privacy and the

right to use contraceptives.⁷ In a 1990 dissent, Justice Kennedy quoted from a South African apartheid-era government document to support his argument for “strict scrutiny” of all racial classifications, even those purportedly justified by benign motivations, implying that we should take care not to end up like apartheid-era South Africa;⁸ the Court has since adopted Kennedy’s position on strict scrutiny.⁹ More recently, in 2003 the Court in *Lawrence v. Texas* invoked European conceptions of personal freedom in striking down a Texas law prohibiting homosexual sodomy and Justice Ruth Bader Ginsburg relied on international human rights covenants in her concurrence in *Grutter v. Bollinger*, to support the compatibility of temporary race-conscious special measures in law school admissions with core commitments to equality.¹⁰

Due Process and Criminal Procedure . . . In *Miranda v. Arizona*,¹¹ an iconic case from the 1960s, it was the Court itself

that spoke in a comparative vein. The issue involved the constitutionality of custodial interrogation of a suspect without the presence of counsel. The Court held that, in order to protect the Fifth Amendment right against self-incrimination, statements made by a suspect in custodial interrogation—absent prior police advice of the constitutional rights to remain silent and have counsel—were not admissible. Invoking the traditions of American exceptionalism as a reason to embrace learning from the experiences of nations such as England, Scotland, India, and Ceylon (which at the time evidently provided greater protections for custodial interrogations), the Court wrote: “[I]t is consistent with our legal system that we give *at least as much protection to these rights* as is given in the jurisdictions described. We deal in our country with rights grounded in a specific requirement of the Fifth Amendment of the Constitution, whereas other jurisdictions arrived at their conclusions on the basis of principles of justice not so specifically defined.”¹²

Executive Power The Court’s opinion in *Miranda*, like Harlan’s dissent in *Plessy*, can be read to express a vision of American exceptionalism—the idea of the United States as a “city on a hill,” with its liberty-protecting Constitution¹³—as a positive reason to look at how U.S. practices compare to those of other countries. But the importance of comparison, the inevitability of comparison in the project of self-definition, and the utility of negative comparisons, are illustrated in many other cases. Justice Felix Frankfurter’s concurring opinion in the *Youngstown Steel* case observed:

³ See Stephen G. Calabresi, “A Shining City on a Hill”: American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law, 86 B.U. L. REV. 1335 (2006). For earlier versions of this paragraph, see Jackson, *Constitutional Law and Transnational Comparisons: The Youngstown Decision and American Exceptionalism*, 30 HARV. J. L. & PUB. POL’Y 191 (2006).

⁴ 163 U.S. 537 (1896).

⁵ 347 U.S. 483 (1954).

⁶ *Plessy*, 163 U.S. at 562 (emphasis added).

⁷ *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring); see also MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS 90–114 (2000); RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 177–233 (1999). . . .

⁸ *Metro Broadcasting, Inc. v. Federal Communications Commission*, 497 U.S. 547, 635 (1990) (Kennedy, J., dissenting). . . .

⁹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995) (overruling *Metro Broadcasting, Inc. v. FCC*).

¹⁰ *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003); *Grutter v. Bollinger*, 539 U.S. 306, 344–45 (2003) (Ginsburg, J., concurring).

¹¹ 384 U.S. 436 (1966).

¹² *Id.* at 489–90 (emphasis added).

¹³ See Calabresi, *supra* note 3.

It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley. The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.¹⁴

Comparing Harry Truman and recent “dictators” (Hitler, Mussolini, Stalin) by denying that one is doing so (a form of rhetorical preterition) should not obscure the aversive use of comparison here:¹⁵ “We” are a country of “sturdy democratic traditions” and not a country of “dictators”—but we risk becoming what we are not and do not want to be, if we abandon the fences that check power.

But the importance of comparison, the inevitability of comparison in the project of self-definition, and the utility of negative comparisons, are illustrated in many other cases.

Citizenship and Immigration In closely divided cases, contested visions of national identity have been played out through invocation of foreign comparisons. In *Fong Yue Ting v. United States*,¹⁶ the Court upheld a statute authorizing the deportation of Chinese laborers who did not possess a required residency certificate unless, on the testimony of at least one “white witness,” they met the conditions to excuse them from the certificate requirement. In so ruling, the majority began by noting the universal practice of sovereigns to retain the right to expel aliens, “an inherent and inalienable right of every sovereign and independent nation” that the Court found unconstrained by the Constitution.¹⁷ For four pages the majority opinion addressed international law, as enunciated by treatise writers, and the laws of both England and France concerning the power to expel aliens.¹⁸

While the majority in *Fong Yue Ting* invoked the practices of other sovereigns as a positive reason to read the U.S. Constitution to provide such powers, the dissenting justices invoked American exceptionalism. According to Justice David Brewer, “[t]he expulsion of a race may be within the inherent powers of a despotism... [The] framers [of this Constitution] were familiar with history, and wisely... they gave to this government no general power to banish.”¹⁹ Justice Field also dissented, denying that the majority had correctly described the powers of other countries, and arguing that in any event, other countries’ practices

would have no bearing in these cases ... Spain expelled the Moors; England, in the reign of Edward I, banished fifteen thousand Jews; and Louis XIV, in 1685, by revoking the Edict of Nantes ... drove out the Huguenots ... Within [the last] three years Russia has banished many thousands of Jews, and apparently intends the expulsion of the whole race.... All the instances mentioned have been condemned

for their barbarity and cruelty, and no power to perpetrate such barbarity is to be implied from the nature of our government, and certainly is not found in any delegated powers under the Constitution. The government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments, nor does it take any power by any supposed inherent sovereignty.²⁰

Thus, two contrasting narratives: “We the People” are not constituted under a basic law that permits barbarism, cruelty or despotism, in the dissenters’ view; or, according to the majority, “We the People” have equivalent powers to other sovereign peoples around the world.

Cruel and Unusual Punishment In a number of cases involving Eighth Amendment issues, the Court has compared U.S. practices to those of other “civilized” nations. In at least one case, however, the foreign origin of a punishment, its “alien source,” helped demonstrate that it was “barbarous” and “cruel and unusual” within our system.²¹ In several other cases, an international consensus against a practice helped establish or confirm that a U.S. practice should be regarded as cruel and unusual. In *Trop v. Dulles*,²² for example, four members of the majority concluded that imposing the loss of citizenship as punishment for a crime violated the Eighth Amendment, noting that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.” Thus, not only do we “take nothing” from the practices of barbarous European dictators, but our practices ought to accord with those of the “civilized nations of the world” in order to assure the stature of the United States as among those “civilized nations.”

...

Closely related to the expressive and constitutive resort to comparative law to illuminate U.S. constitutional values and commitments is the possibility of shared knowledge and learning from other polities that have similar constitutional commitments. The degree of normative overlap between the U.S. Constitution and those of many other liberal democracies is considerable. One need not believe that there are, as an ontological matter, universal human rights across all human societies in order to see that many constitutions incorporate shared legal concepts, rights believed to be necessary for “liberty” or “justice” or “equal protection,” which it is the task of written constitutions to help secure. Notwithstanding claims of American constitutional “exceptionalism,” there are similarities between the rights-protecting provisions of the U.S. Constitution and those found

¹⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593–94 (1952) (Frankfurter, J., concurring).

¹⁵ See Kim Lane Scheppele, *Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence Through Negative Models*, 1 INT’L J. CONST. L. 296 (2003).

¹⁶ 149 U.S. 698 (1893).

¹⁷ *Id.* at 711.

¹⁸ See *id.* at 707–11.

¹⁹ 149 U.S. at 737 (Brewer, J., dissenting).

²⁰ *Id.* at 757 (emphasis added) (Field, J., dissenting)

²¹ *Weems v. United States*, 217 U.S. 349, 368–69, 377 (1910).

²² *Trop v. Dulles*, 356 U.S. 86, 102–03 (1958) (plurality opinion).

in many other liberal democracies—in due process protections of liberty, in requirements for fair hearings before impartial decision-makers, in equal protection and in bans on cruel and unusual punishments. . . .

In the first case holding that a criminal sentence authorized by law violated the Eighth Amendment, the Court noted the important “difference between unrestrained power and that which is exercised under the spirit of *constitutional limitations formed to establish justice*.”²³ If one function of written constitutions is—as ours proclaims—to “establish Justice,”²⁴ taking into consideration outsider perspectives on contested practices might offer a kind of check against constitutional moral error. A number of Supreme Court opinions later determined, by political or legal processes, to have been serious constitutional errors were issued over dissents that sought to invoke “outsider” perspectives on shared values to forestall the error. The two dissenters in *Dred Scott* invoked then-contemporary European laws to challenge the majority’s conclusion that Scott remained a slave;²⁵ as already

tutional law—its capacity to be regarded as legitimate in a social, legal, and moral sense—requires that even apparently settled understandings, such as the permissibility of classifying women as unfit for “male” occupations,²⁹ or of racial segregation, be open to “unsettlement,”³⁰ to “normative disturbances” toward better constitutional understandings.³¹ To the extent that our Constitution shares values with others, outsider perspectives may prove helpful in efforts toward improved constitutional self-understanding. . . .

Functional comparisons can cast light on how to solve emerging constitutional problems and provide empirical information relevant to doctrinal questions that U.S. constitutional law asks, illuminating both more, and less, successful approaches. . . .

. . . For example, when U.S. state governments began to enact mandatory vaccination laws at the turn of the twentieth century and a constitutional challenge arose, the Court looked to practice in several European countries to satisfy itself that the restraints on liberty entailed by the law were reasonable in light of current

One need not believe that there are, as an ontological matter, universal human rights across all human societies in order to see that many constitutions incorporate shared legal concepts, rights believed to be necessary for “liberty” or “justice” or “equal protection,” which it is the task of written constitutions to help secure.

noted, Justice Harlan appealed to a comparative sense of American commitment to freedom to condemn the Court’s approval of state-imposed racial segregation in *Plessy*; and in *Lochner v. New York*, Justice Harlan invoked the concerns of “civilized peoples” about working hours in support of the New York law struck down by the majority.²⁶ And even Justice Scalia, arguing that foreign legal materials are “hardly ever” relevant to constitutional interpretation, has acknowledged that they may be helpful in deciding whether “a particular holding will be disastrous.”²⁷

Foreign experience will not, of course, always point in more just directions, or in only one direction.²⁸ The question is, always, what is the best reading of our own constitution? Reflective comparisons may assist decision-makers in finding the answer. Implicit in this claim is an understanding of law, and specifically of constitutional law, as having a certain reflexive quality to it, permitting change in interpretations over time. True, constitutional law is often thought of as performing important settlement and coordination functions, both of which require stability and predictability. But at the same time the legitimacy of our consti-

understandings of scientific knowledge and the practices of other governments.³² Foreign solutions may be deemed unsuccessful, illustrating the negative consequences of accepting a particular claim, as . . . in the Court’s considerations of foreign law permitting assisted suicide in *Washington v. Glucksberg*³³

[J]ustice Robert Jackson, . . . in the *Youngstown Steel* case, made intensive use of foreign constitutional experience to explain some of the functional reasons for his decision. . . . Drawing on Clinton Rossiter’s book, *Constitutional Dictatorship*, and other sources for descriptions of the constitutional means by which power was centralized in the executive in the United Kingdom, France, and Germany in the years leading up to and during World War II, Jackson concluded that contemporary experience suggested that “emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them.”³⁴

[E]ngaging with transnational sources of constitution-like law may strengthen both the quality of decisions and the power of reason-giving as a mechanism of accountability for politically independent judges. Comparison today is inevitable. It is

²³ *Weems v. United States*, 217 U.S. 349, 381 (1910) (emphasis added).

²⁴ U.S. CONST. pmbl. Justices with very different substantive views have invoked this aspiration toward justice in interpreting the Constitution. See, e.g., John Paul Stevens, *Is Justice Irrelevant?*, 87 NW. U. L. REV. 1121, 1121–22 (1993); Stenberg v. Carhart, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

²⁵ See, e.g., *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 534 (1857) (McLean, J., dissenting) (“[N]o nation in Europe . . . considers itself bound to return to his master a fugitive slave . . .”) . . .

²⁶ See *Lochner v. New York*, 198 U.S. 45, 71 (1905) (Harlan, J., dissenting) In the New York Court of Appeals, more explicit reference was made to British law. See *People v. Lochner*, 69 N.E. 373, 382, 384 (N.Y. 1904) (Vann, J., concurring)

²⁷ Justice Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, (address to the Annual Meeting of the American Society of International Law, Washington D.C., 2004), 98 Am. Soc. INT’L L. PROC. 305, 307 (2004)

²⁸ See, e.g., *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), discussed above in text. . . .

²⁹ See, e.g., *Goesaert v. Cleary*, 335 U.S. 464 (1948); *Bradwell v. Illinois*, 83 U.S. 130 (1873)

³⁰ See L. MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION: A NEW DEFENSE OF CONSTITUTIONALISM AND JUDICIAL REVIEW* (2001).

³¹ Jan-Werner Müller, *A General Theory of Constitutional Patriotism*, 6 INT’L J. CONST. L. 72, 76, 85 (2008)

³² *Jacobson v. Massachusetts*, 197 U.S. 11, 28 (1905)

³³ 521 U.S. 702, 718 n. 16, 734 (1997)

³⁴ [cite], 652 (195x).

almost impossible to be a well-informed judge or lawyer now without having impressions of law and governance in countries other than one's own. These impressions, which may influence views of U.S. constitutionalism, could be incorrect or subject to interpretive challenge. A recent sequence of decisions provides an example. Chief Justice Warren Burger's 1986 concurring opinion in *Bowers v. Hardwick*³⁵ implied that homosexual sodomy was universally condemned in Western civilization. Seventeen years later, the Court in *Lawrence v. Texas* responded by noting that, several years prior to *Bowers*, the European Court of Human Rights had held that such a prohibition violated the ECHR.³⁶

This sequence suggests that judges' reliance on what they think they know about other systems is inevitable, and illustrates that overt references to such reliance can be a form of accountability, permitting correction of errors. . . .

In a more positive vein, comparison can be a useful way to achieve some reflective distance, improving impartiality and ob-

court of last resort), considering "outsider" perspectives found in transnational sources of law can be particularly helpful.

...Looking to foreign law [e]xpands opportunities for ethical engagement with the views of those having equivalent responsibility and aspiring to similar impartiality, providing a partial intellectual substitute for conversation, a testing from outside that may be particularly helpful on the most controversial and apparently value-laden choices. . . . offer[ing] the hope of more, rather than less, impartiality

[D]eliberation and reason-giving are of most importance to the legitimacy of constitutional law on issues regarded as open. . . . These open questions call for . . . a decision process designed to reduce errors in making choices among interpretations that are plausibly supported by conventional strands of domestic authority. . . . In open cases these authorities apply or fit together with some degree of uncertainty. Traditions are multiple and may "becom[e] ... a resource from which reasons for change may be derived ... [t]

[E]ngaging with transnational sources of constitution-like law may strengthen both the quality of decisions and the power of reason-giving as a mechanism of accountability for politically independent judges. Comparison today is inevitable. It is almost impossible to be a well-informed judge or lawyer now without having impressions of law and governance in countries other than one's own.

jectivity about interpretive questions. . . . Confronting the power of others' ideas about common legal problems or concerns can, in other words, contribute to a better intellectual product, and can also impose the discipline of explanation upon the decision-maker.³⁷ Even if the reasoning of a foreign court ultimately is rejected, explaining why it is inapplicable or wrong may improve the quality of the Court's reasoning, making its choices more clear to the audience of lawyers, lower courts, legislators, and citizens. . . . Reflective awareness of alternative constitutional approaches, then, may improve a judge's distance on the interpretive problem before the court. . . .

Engaging with the reasoned decision of other constitutional courts may be particularly helpful to professionally ethical judging in the United States. [U.S.] judges are ethically required to avoid discussion of pending cases with outsiders (except in the presence of the parties' counsel).³⁸ Such ethical rules reflect aspirations for decisions based on judges' impartial, reasoned views of the best understanding of the law. Achieving this understanding may require a judge to distance herself from her own first reactions, testing them for prejudice and subjecting them to reasoned interrogation.³⁹ Given aspirations for U.S. judges to maintain isolation from the immediate legal community in deciding cases (an isolation that is particularly weighty for judges on a

he past is mobilized to invent a future."⁴⁰ Law must, in these settings, function as a form of "inquiry,"⁴¹ open to learning from its own past and from the experiences of others. . . .

* * *

Constitutional democracies committed to empowering a democratic government and to constraining its actions all have a stake in the idea of law as a constraint on political and economic power, especially as the demands for transnational intergovernmental cooperation increase. Indeed, constitutional democracies may be in a symbiotic relationship with each other. Apart from the increasing proliferation and fragmentation of legal systems, law itself is, in a sense, under assault from many sources—globalization, markets, consumerism, transnational crime, terrorism—the material demands of which may threaten a domestic legal system's capacity to sustain a significant regulatory and expressive role for public law. If that is correct, then constitutional democracies around the world have a general, if indirect, stake in the continued salience and workability of public law around the world. Each country, in other words, has a stake in the success or failure of constitutionalism in others. This may be the strongest relational reason for engagement. Not only do we benefit from using foreign law as a critical lens on the necessities and values of our own system, but inviting multiple relationships of engagement, evaluation, critique,

³⁵ 478 U.S. 186, 196 (1986) (Burger, C.J., concurring) (asserting that homosexual conduct has "been subject to state intervention throughout the history of Western civilization"). . . .

³⁶ *Lawrence*, 539 U.S. at 573 (referring to the ECtHR's decision in *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981)).

³⁷ See Michael Kirby, *Think Globally*, 4 GREEN BAG 2D 287, 291 (2001) (Australian High Court Justice arguing the benefit of looking to foreign decisions "to stimulate [the] mind with analogous reasoning")

³⁸ See ABA Model Code of Judicial Conduct Canon 2, Rule 2.9 & cmt. (2007)

³⁹ See generally Chris Guthrie, Jeffrey J. Rachlinski, & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 5 (2007) (. . . "intuition is generally more likely than deliberation to lead judges astray").

⁴⁰ H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 22 (2000).

⁴¹ See H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261 (1987)....

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³⁶ See Md. R. Evid. 5-702.

³⁷ See *Reed v. State*, 391 A.2d 364 (Md. 1978) (adopting *Frye* as test for expert opinion admissibility in Maryland).

³⁸ *Blackwell*, 971 A.2d at 245.

³⁹ See *Marsh v. Valyou*, 977 So. 2d 543 (Fla. 2006) (reaffirming *Frye* rule's viability in Florida courts).

⁴⁰ See *People v. McWhorter*, 212 P.3d 692, 725 (Cal. 2009) (noting California has adopted *Frye* for expert opinion admissibility).

⁴¹ See *Nonnon v. City of N.Y.*, 819 N.Y.S.2d 705, (N.Y. App. 2006) (noting epidemiology and toxicology not novel techniques and thus epidemiological and toxicological evidence admissible without undergoing *Frye* hearing).

⁴² See *Grady v. Frito-Lay, Inc.*, 839 A.2d 1038 (Pa. 2003) (affirming *Frye* rule as applicable test for admissibility in Pennsylvania).

⁴³ See *People v. McKown*, 875 N.E.2d 1029, 1031 (Ill. 2007) (noting parties had not raised issue of whether *Daubert* should be applied).

⁴⁴ See *Donnellan v. First Student, Inc.*, 891 N.E.2d 463, 479 (Ill. App. Ct. 2008).

⁴⁵ *Id.*

⁴⁶ *People v. Shreck*, 22 P.3d 68, 77 (Colo. 2001).

⁴⁷ *Id.*

⁴⁸ See *State v. Crosby*, 927 P.2d 638, 641 (Utah 1996).

⁴⁹ *Id.*

⁵⁰ See *State v. Schultz*, 58 P.3d 879, 885 (Utah App. 2002) (noting that for inherent reliability prong of test, “a showing of general acceptance’ is generally sufficient”).

⁵¹ See *Crosby*, 927 P.2d at 641.

⁵² *Id.* at 642.

⁵³ *Billips v. Com.*, 652 S.E.2d 99, 102 (Va. 2007) (quoting *Spencer v. Com.*, 393 S.E.2d 609, 621 (Va. 1990).

⁵⁴ *Billips*, 652 S.E.2d at 101.

⁵⁵ *Id.*

⁵⁶ *Id.* at 102.

and appreciation may enable the constitutional democracies of the world each to improve their systems and thereby to sustain the capacity of public law generated within national states to continue to play an important role in actually regulating conduct and expressing particular national values....

The book explores other reasons for engagement, within “deliberative” and “relational” models of constitutional interpretation, and addresses various objections to use of foreign or international law. Later chapters also explore examples of engagement in various areas, including equality law, abortion, and affirmative action.



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THE ISSUE OF EXPERTISE:

MODERN JURISDICTIONAL TRENDS IN THE DAUBERT V. FRYE DEBATE

By Sharon Caffrey, Esq., and Michael Lyon, Jr., Esq.

Introduction

While the *Daubert* test remains the undisputed practice in federal courts, state courts throughout the United States have split over whether to follow the U.S. Supreme Court's pronouncement in *Daubert*, whether to retain *Frye* or whether to adopt a new standard for the admissibility of expert testimony. Furthermore, certain jurisdictions have evidenced an internal struggle within their courts over which standard should apply to expert testimony offered. This article examines the various approaches and trends states have taken recently regarding the adoption of expert testimony.

Until 1993, federal courts used the test enunciated in *Frye v. United States*¹ to evaluate the admissibility of expert testimony. In *Frye*, the U.S. Court of Appeals for the District of Columbia held that in order to be admissible, an expert's opinion "must be sufficiently established to have gained general acceptance in the particular field in which it belongs"; i.e., the expert's opinion must be generally accepted.² The rationale behind the *Frye* test was to ensure that expert evidence carried some indicia of reliability. As the court stated, the essential issue in forming the test was to determine "[j]ust when a scientific principle or discovery crosses the line between the experimental and demonstrable stages."³

The *Frye* test, however, would not remain viable—at least in federal courts—after the promulgation and adoption of the Federal Rules of Evidence. In particular, Rule 702 governs the admissibility of expert testimony and states: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.⁴ Considering the viability of *Frye* after the adoption of Rule 702 in *Daubert v. Merrell Dow Pharms.*⁵, the U.S. Supreme Court determined that the Federal Rules of Evidence superseded *Frye* as the basis for admitting expert testimony.

In so doing, the Court firmly entrusted the trial judge as "gatekeeper" over proffered expert evidence, placing the task of determining the admissibility of the evidence squarely within the trial judge's purview.⁶ The Court held that the trial judge must use a two-pronged inquiry to determine whether expert testimony should be admitted: (1) whether the expert would base his opinion on reliable scientific knowledge and (2) whether the expert would testify to relevant information that would "assist the trier of fact to understand or determine a fact in issue."⁷ In making this determination, the Court also discussed several factors that a judge may use to evaluate the proposed testimony, including whether the methodology can be tested, whether it has been subjected to peer review and publication, and the known or potential rate of error of the methodology.⁸ Most notably, however, the Court stated that whether the techniques had gained general acceptance in the scientific community was but another factor in the trial court's analysis, representing a major shift away from the *Frye* test's reliance on this factor as the ultimate determination of expert testimony admissibility.⁹ These factors were not to be taken as a definitive checklist, and the Court clarified that the inquiry before a trial judge is a "flexible one" under Rule 702.¹⁰

States Retaining *Daubert*

The majority of states have followed the guidance of the Supreme Court and now have adopted *Daubert* or a test similar to *Daubert* to evaluate the admissibility of expert testimony within their courts. Since the Court's decision in 1993, state courts have developed several different tests, at least loosely based on *Daubert*'s requirements. All of these tests, however, are designed to emphasize the judge's role as gatekeeper of scientific evidence and to downplay *Frye*'s previous reliance on the scientific community as the authority of whether such evidence is to be admitted.

Most states choosing to follow *Daubert* have adopted the Supreme Court's analysis in its entirety.¹¹ In many cases, these states have done so because they perceive the Federal Rules of Evidence as exceptionally persuasive upon their interpretations of similar state rules of evidence.¹² Many of these states have expressed a similar concern to the *Daubert* court that the testimony of an expert who bases his reasoning on unsound science could have an exceedingly persuasive effect on the jury, which would not have the same level of scientific comprehension as the expert and may credit the expert's opinion, despite its potential lack of scientific reasoning.¹³ Courts also tend to follow *Daubert* to suggest that other checks in the judicial system, most notably cross-examination, serve an important purpose in filtering proper scientific reasoning from spurious opinions.¹⁴

Although *Daubert* has been followed by a majority of state courts, some states have been reluctant to adopt the Supreme Court's analysis in their own courts, despite the similarities between

their rules of evidence and the federal rules. Nevada is an example of one such state. In *Krause Inc. v. Little*¹⁵, the Nevada Supreme Court reaffirmed its previous decisions, declining to accept the Daubert analysis, and held that the judge's focus should instead center on the personal qualifications of the expert rather than the substance of the expert's methodology.¹⁶ This necessarily leads Nevada judges away from the required showing under *Daubert* of relevance and reliability before expert testimony can be admitted. Similar to Nevada, Wisconsin case law has commanded trial judges to examine the qualifications of the expert before admitting expert testimony, while declining to probe the reliability of the expert's methods.¹⁷ However, at least one concurring justice in the Wisconsin Supreme Court has noted that the standard in Wisconsin may be evolving towards a more *Daubert*-like analysis.¹⁸

Various other jurisdictions claim to have fully accepted *Daubert*, but have not yet adopted one or both of *Daubert*'s principal progeny cases of *General Electric Co. v. Joiner*¹⁹ and, more prominently, *Kumho Tire Co. v. Carmichael*,²⁰ the latter of which requires that *Daubert* be applied to all expert testimony—regardless of whether the expert's testimony is limited to the scientific context.²¹ Iowa and Hawaii, for example, have previously refused to apply *Daubert* to all types of expert testimony as required by

procedure in question has reached a scientific stage of verifiable certainty” based on the evidence presented.³³ In rejecting the potential application of *Frye* to such evidence, the Supreme Court of Georgia has stated that this test ensures that the trial judge's focus remains on the evidence presented within the court rather than on the scientific community as a whole.³⁴ This view reinforces the judge's role as gatekeeper of the evidence presented and severely restricts outside science's role in developing in-court expert testimony.

States Retaining *Frye* or Similar Test

Several states remain dedicated to a *Frye*-based test as the most appropriate standard for admissibility of expert evidence in their courts. In many states, this remains the case, even though the state's rule of evidence governing expert testimony admissibility is substantially similar to Rule 702. Despite the Supreme Court's concerns, *Frye* states continue to theorize that trial judges retain a substantial gatekeeping function over the admissibility of expert evidence, in spite of the scientific community's role in accepting the science underlying the expert's proposed testimony as reliable.

All of these tests, however, are designed to emphasize the judge's role as gatekeeper of scientific evidence and to downplay *Frye*'s previous reliance on the scientific community as the authority of whether such evidence is to be admitted.

Kumho Tire.²² Iowa has more recently reverted to a loose adoption of *Daubert*, encouraging, but not requiring, its trial judges to consider the *Daubert* factors in determining whether to admit expert testimony.²³ Indiana mirrors the Iowa approach, considering *Daubert* and *Kumho Tire* to be a helpful analogy for its judges, but not binding on their decisions.²⁴

Other states have developed tests based on *Daubert* and have expanded upon the Supreme Court's principle that the various factors that a trial judge should consider in its analysis are not to be taken as exclusive. Maine, for example, has adhered largely to the basic tenets set forth in *Daubert*. In *State v. Bickert*,²⁵ the Maine Supreme Judicial Court reiterated a previous holding that all evidence must meet a two-pronged inquiry of relevance and reliability, much the same as *Daubert* commands.²⁶ Furthermore, the court noted its displeasure with a *Frye*-based analysis, holding that a finding of general acceptance is not required.²⁷ The court then noted, however, that the various factors for a trial court to consider in making its analysis differed from the *Daubert* factors, and noted with approval the trial court's reliance on these factors in finding an expert's testimony to be sufficiently reliable.²⁸ South Carolina has also developed a list of factors for consideration that are based on, but differ from the *Daubert* factors for use in determining expert evidence admissibility.²⁹ South Carolina trial judges should consider: (1) the publications and peer review of the technique, (2) prior application of the method to the type of evidence involved in the case, (3) the quality-control procedures used to ensure reliability and (4) the consistency of the method with recognized scientific laws and procedures.³⁰

Georgia, meanwhile, has fully accepted *Daubert* as it pertains to experts in civil cases.³¹ It does not, however, apply *Daubert* in the framework of criminal cases.³² For criminal cases, Georgia trial judges instead must consider “whether the technique or

The Court of Appeals of Maryland recently undertook a substantial review of its reliance on *Frye*.³⁵ Like Rule 702, Maryland Rule of Evidence 5-702 empowers the trial judge to admit expert testimony if it will assist the trier of fact to understand the evidence and requires the court to undertake a review of the expert's qualifications, the appropriateness of the testimony to the issue or issues of fact at trial, and the factual basis offered to support the testimony.³⁶ In *Blackwell*, however, the court reaffirmed Maryland's allegiance to the general acceptance test as the proper standard for expert admissibility. The court also posited that the trial judge remained the ultimate gatekeeper of the expert testimony, holding that “[f]rom even a limited review of our *Frye-Reed*³⁷ history, it can be seen that our jurisprudence engages trial judges in a serious gatekeeping function, to differentiate serious science from ‘junk science.’”³⁸ Florida has also reaffirmed its reliance on *Frye*, despite its previous adoption of the Federal Rules of Evidence in their entirety,³⁹ and other states similarly steadfast in their allegiance to *Frye* include California,⁴⁰ New York⁴¹ and Pennsylvania.⁴²

Although it continues to be followed in many states, *Frye*, like *Daubert*, is not without criticism within jurisdictions retaining its framework. In Illinois, for example, the continued viability of *Frye* has come under scrutiny. Although Illinois has continued to retain the general acceptance test, the Illinois Supreme Court has hinted that the issue of whether *Daubert* should replace *Frye* may be ripe for consideration, given an increasing number of jurisdictions' reliance on *Daubert*'s principles.⁴³ Within at least one Illinois intermediate appellate court, continued retention of *Frye* has faced significant criticism.⁴⁴ This court noted that “*Daubert* provides additional guidance to courts in determining the standard of evidentiary reliability of scientific evidence,” and it urged the state's supreme court to strongly consider such a change.⁴⁵

Furthermore, the Colorado Supreme Court recently undertook a substantial review of its previous reliance on *Frye* and determined that it should no longer be followed.⁴⁶ The court opined that its rule of evidence governing the admissibility of expert testimony required a demonstration of both relevance and reliability, and stated that general acceptance in the scientific field was only one of several factors for the trial judge to consider in making that analysis.⁴⁷ Although the court stopped short of expressly adopting *Daubert* as the governing rule for expert admissibility, its analysis seems very close to what is required by *Daubert*.

Unique Tests

Still other states, while adhering to the basic principles of either *Daubert* or *Frye*, have additional or unique requirements for the admission of expert testimony. Utah applies a threestep analysis to determine admissibility.⁴⁸ First, there must be a showing that the testimony is “inherently reliable.”⁴⁹ This test is frequently satisfied by a showing that the expert’s methodology has been generally accepted, bringing this prong of the test squarely within the purview of *Frye*.⁵⁰ Two other prongs, however, must also be met: The trial court must also determine that the expert’s principles have been properly applied to the facts of the particular case, and finally must find that the probative value of the expert’s proffered testimony outweighs any prejudicial effect.⁵¹ These additional tests appear to replicate what is generally thought to be required by Rule 702 and *Daubert*, as noted by the Utah Supreme Court.⁵²

However, nearly all states that do not maintain a strict adherence to the *Frye* test have followed the Supreme Court’s guidance in *Daubert* and placed their trial judges more in the position of gatekeeper over scientific evidence. A majority of courts most recently appear to be more receptive to the idea that the trial judge is better aware of the rules of evidence and can more easily determine authentic and reliable science from “junk science” likely to lead the jury astray.

Other states have explicitly or implicitly rejected *Daubert* and *Frye*, choosing to apply their own tests to evaluate the admissibility of expert testimony. Virginia, for example, is notable for the amount of discretion vested in its trial judges. Virginia trial courts, like states following *Daubert* and *Frye*, must make a “threshold finding of fact with respect to the reliability of the scientific method offered” before the proposed evidence is accepted.⁵³ However, Virginia has explicitly rejected

the *Frye* test, and does not impose *Daubert*’s requirements for relevance and reliability.⁵⁴ Instead, the trial court must determine whether the proposed scientific methods bear “some indicia of reliability.”⁵⁵ As such, the judge seems to be presented with a greater gatekeeping function than even *Daubert* would allow—as long as the proponent of the evidence makes out a prima facie showing of reliability, the judge should allow the jury to consider the testimony.⁵⁶

Conclusion

Although *Daubert* has gained a majority of followers in courts across the country, the adherence of several states to the *Frye* test and the reluctance of several other states to accept *Daubert* as the basic rule for the admissibility of expert testimony demonstrates a lack of uniformity in admissibility determinations in various jurisdictions. However, nearly all states that do not maintain a strict adherence to the *Frye* test have followed the Supreme Court’s guidance in *Daubert* and placed their trial judges more in

the position of gatekeeper over scientific evidence. A majority of courts most recently appear to be more receptive to the idea that the trial judge is better aware of the rules of evidence and can more easily determine authentic and reliable science from “junk science” likely to lead the jury astray. Thus, the current trend among states appears to favor an approach more in line with *Daubert* and a shift away from the *Frye* test as the principle to be used to evaluate the admissibility of expert testimony.

ENDNOTES

¹ 293 F. 1013 (D.C. Cir. 1923).

² *Id.* at 1014.

³ *Id.*

⁴ Fed. R. Evid. 702. The rule states, in full: If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. *Id.*

⁵ 509 U.S. 579 (1993).

⁶ *Id.* at 592.

⁷ *Id.* at 592-93.

⁸ *Id.* at 593.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See, e.g., *Gen. Motors Corp. v. Grenier*, 981 A.2d 531, 536 (Del. 2009) (adopting *Daubert* for use in Delaware trial courts); *DiPetrillo v. Dow Chem. Co.*, 729 A.2d 677 (R.I. 1999) (same); *E.I. DuPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995); *Com. v. Lanigan*, 641 N.E.2d 1342 (Mass. 1994) (same).

¹² See *Grenier*, 981 A.2d at 536 (expressing similarity of Delaware rule regarding expert testimony to analogous Federal Rules of Evidence).

¹³ See *E.I. duPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995).

¹⁴ See *Grenier*, 981 A.2d at 536 (noting *Daubert* court had focused on cross-examination as effective legal safeguard to ensure proper admissibility of expert opinions).

¹⁵ 34 P.3d 566 (Nev. 2001).

¹⁶ *Id.* at 569-70.

¹⁷ See *State v. Krogman*, 590 N.W.2d 283 (Wis. 1999).

¹⁸ See *State v. Plude*, 750 N.W.2d 44, 69 (Wis. 2008) (Ziegler, J., concurring).

¹⁹ 522 U.S. 136 (1997).

²⁰ 526 U.S. 137 (1999).

²¹ *Id.* at 147-48.

²² *Mensink v. American Grain Co.*, 564 N.W.2d 376, 381 (Iowa 1997); *State v. Vliet*, 19 P.3d 42, 45 (Haw. 2001).

²³ *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 532 (Iowa 1999).

²⁴ *Carter v. State*, 766 N.E.2d 377, 381 (Ind. 2002).

²⁵ *State v. Bickert*, 963 A.2d 183, 187 (Me. 2009).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 188.

²⁹ *State v. Council*, 515 S.E.2d 508, 517 (S.C. 1999).

³⁰ *Id.*

³¹ See Ga. Code Ann. § 24-9-67.1 (2009).

³² See *Vaughn v. State*, 646 S.E.2d 212, 215 (Ga. 2007) (adopting holding of *Carlson v. State*, 643 S.E.2d 410 (Ga. Ct. App. 2006)).

³³ *Harper v. State*, 292 S.E.2d 389, 395 (Ga. 1982).

³⁴ *Id.* at 396.

³⁵ *Blackwell v. Wyeth, Inc.*, 971 A.2d 235 (Md. 2009).

MEMPHIS' SOUTHERN CHARM ANIMATES NAWJ'S 31ST ANNUAL CONFERENCE JUSTICE ON THE RIVER: NAVIGATING CHANGE

Perhaps one of the nation's most moving museums can be found at the Lorraine Motel, site of the assassination of Dr. Martin Luther King, Jr. The National Civil Rights Museum chronicles key episodes of the American civil rights movement through a collection of historical items, exhibitions and education programs. Before dinner attendees viewed 'The Witness,' Conference Keynote Speaker Rev. Samuel Kyles' remembrance of sharing the last days of Dr. King from the sanitation's workers march to Dr. King's Mountaintop speech to sharing the balcony at the Lorraine Motel on April 4, 1968.

The week's events would not have been possible without the efforts of Friends Committee Co-Chairs FedEx Express Legal Director Jeana Littrell, and Jill Steinberg of Baker Donelson Bearman Caldwell & Berkowitz. Ms. Littrell's outstanding logistical and personnel support throughout the Conference was unparalleled in making this year's Conference a success.

The Conference's final day concluded with a Business Meeting at which NAWJ members voted in the 2009-2010 NAWJ Board of Directors Nominations Slate: President Justice Dana Fabe; President-Elect Judge Marjorie Laird Carter; Vice President of Publications Judge Amy Nechtem; Vice President of Districts Judge Joan Churchill (Ret.); Secretary Judge Sheri Roman; Treasurer Justice Patricia Hurst; ABA Delegate Judge Barbara Ann Zúñiga (Special election to replace Hon. Cara Lee Neville); and International Director Judge Sue Pai Yang (assumes office in May 2010).

During the Annual Awards Banquet the 2009 NAWJ Award recipients were recognized: Joan Dempsey Klein Honoree of the Year to Justice Sonia Sotomayor; Florence K. Murray Award to Hon. Betty Weinberg Ellerin; Justice Vaino Spencer Leadership Award to Justice Betty J. Williams; and the Mattie Belle Davis Award to Judge Sheila Johnson.

Again, thank you Friends Committee Co-Chairs FedEx Express Legal Director Jeana Littrell, and Jill Steinberg of Baker Donelson Bearman Caldwell & Berkowitz, and supportive Conference Sponsors.

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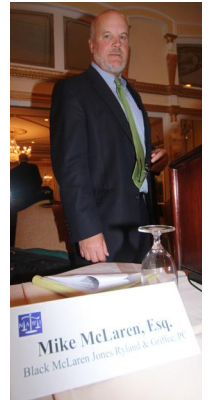
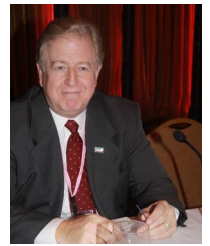
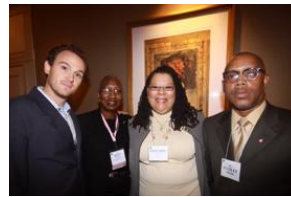
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Thank you all so very much!







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KEYNOTE SPEAKERS

Gail Collins and Richard North Patterson



Gail Collins joined *The New York Times* in 1995 as a member of the editorial board, and in 2001 became the first woman ever appointed editor of the *Times's* editorial page. In 2007, she stepped down and finished her book "When Everything Changed: The Amazing Journey of American Women from 1960 to the Present," returning to *The Times* as a columnist in July 2007.

Richard North Patterson is a former trial lawyer, and author of eight consecutive international best sellers, all greeted by critical acclaim including "Conviction" and "Protect and Defend." Mr. Patterson served as the Securities and Exchange Commission's liaison to the Watergate special prosecutor and is now on the boards of several Washington-based advocacy groups dealing with gun violence, political reform, and reproductive rights.

This Conference includes education sessions, speakers, entertainment, breakfast, lunch and networking breaks, receptions at the historic court house for the Ninth Circuit of the U.S. Court of Appeals and the Asian Art Museum.

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Towards Strengthening a Pipeline of Women in Legal Profession

By Lauren Stiller Rikleen, Esq.



Lauren Rikleen appearing at an NAWL panel Impact of Attrition of Women in Large Firms on Judicial Diversity and Judicial Independence, August, 2008 in Chicago.

The data analyzing women's progress in the legal profession continues to accumulate, but it does not contain much in the way of good news. In the past year, there have been reports focusing on law school demographics, continued challenges within the workplace, and statistics regarding diversity in our state courts. Each of these points to a stunning lack of progress with respect to women's retention and advancement in our profession. And when you put it all together, it does not bode well for the future of gender diversity on the bench.

These studies should sound an alarm for all of us. For example, a report issued by the Brennan Center for Justice offered a sobering analysis of diversity in our state courts. As the Brennan Report observed, the justice system is best served by a diverse court, which provides different voices and perspectives. The importance of that simple message, however, still has not fully impacted the judicial selection process. Based on its detailed analysis of ten state court systems, the Brennan Report concluded that state judiciaries are consistently less diverse than the communities they serve.[1]

In particular, the Brennan Report noted that white males are over-represented on state appellate benches by nearly a two-to-one margin. And notwithstanding the length of time that women have been graduating from law schools in nearly equal numbers to men, there are still significantly fewer female judges. The data is even more discouraging with respect to minority judges. For example, the number of black male judges is actually decreasing. Of interest, the data demonstrated no significant difference whether the judges were appointed or elected - both produced benches that lacked racial and gender diversity.

In October, the National Association of Women Lawyers (NAWL) released its National Survey on Retention and Promotion of Women in Law Firms, which analyzed data from the 200 largest law firms in the United States.[2] The NAWL survey demonstrated that women have gained little ground in achieving equity partner status and in their participation in key leadership roles. According to the NAWL data, nearly half of the largest firms in the country do not have women represented among their top ten rain-makers, and only one-third reported having just one woman among their top ten. Not surprisingly, firms that reported no women among their top rain-makers also demonstrated a greater compensation disparity between male and female partners.

In another study released in 2009, the Women's Bar Association of Massachusetts analyzed thousands of lawyers listed in the database of the Massachusetts Board of Bar Overseers.[3] In a majority status that women should not aspire to achieve, the study revealed that women are leaving the legal profession in greater numbers than men. Women make up nearly 60 % of those lawyers listed by the Massachusetts Board of Bar Overseers as "inactive".

And the data is just as sobering on the law student front. The American Bar Association reports declining numbers in female

enrollment in U.S. law schools since its peak of 49% in 2002. At the beginning of 2010, The American Lawyer reported on a Columbia Law School study which demonstrated a decline in African-American and Mexican-American student enrollment between the years 1993 and 2008, even as overall law school capacity increased.

One additional study provides insight into the hurdles women face as they begin their journey into the legal profession. An article in the Journal of Legal Education reported that male law students at the top 15 ranked law schools published at nearly twice the rate as women in the law schools' general interest law reviews.[4] In analyzing this disparity, the author concluded that one reason for the significantly lower number of women authors may be due to feelings of alienation that grow out of women's experiences in law school. As noted in the study, this under-representation of women as authors likely has long-term implications for their legal careers. Authored works serve as important writing samples for future employers, and are of critical importance in the clerkship application process.

Together, all of these studies point to a troubling time in the professional advancement of women today, and in the future. Jessie Kornberg, the Executive Director of Ms. JD, the nation's leading law student organization for women, states: "I think we find ourselves at a critical moment in women's education and women's professional advancement. The century-long progress that saw women increasing in number and proportion in colleges and law schools appears to be at an end."

Public confidence in our justice system requires a profession that reflects society. We all have a stake in a diverse profession and a diverse judiciary, and both are dependent on one another. The path to the bench begins in our law schools, and continues through the building of each credential. Each step requires vigilant attention to the barriers that impact opportunities for women to succeed.

We must focus our attention on the development of a pipeline in which women are provided with a level playing field to compete, and where opportunities are available and transparent. Many of today's barriers are steeped in unexamined bias which cannot be overcome without focused attention and the development of training programs. Law school curriculum and workplace initiatives are needed to create a path to success that does not contain the obstacles that women have faced to date. We must ensure that young girls today who dream of becoming a judge can achieve their goals. The fairness of our justice system depends on it.

Lauren Stiller Rikleen is the Executive Director of the Bowditch Institute for Women's Success and a Partner at the Massachusetts law firm of Bowditch & Dewey LLP. She is the author of Ending the Gauntlet: Removing Barriers to Women's Success in the Law. See www.bowditchinstitute.com.

[1] See Ciara Torres-Spelliscy, Monique Chase, Emma Greenman, "Improving Judicial Diversity"; Brennan Center for Justice at New York University School of Law; electronic copy available at: <http://ssrn.com/abstract=1407249>.

[2] "Report of the 2009 NAWL Survey on the Status of Women in Law Firms"; The NAWL Foundation; October, 2009; see <http://www.nawl.org/Assets/Documents/2009+Survey.pdf>.

[3] "Where are We Now? A Report on the Occupational Status of Women Attorney's in Massachusetts"; Issued by the Employment Issues Committee of the Women's Bar Association of Massachusetts; 2009; see <http://www.womensbar.org/Default.aspx>.

[4] See Nancy Leong, "A Noteworthy Absence", Journal of Legal Education, November 2009, pg. 279.

Success Inside and Out 2009



Justice Dana Fabe helps at the registration table for Success Inside & Out at Hiland Mountain Correctional Center.



Conference sponsors and corrections officials gather before the opening ceremony, L-R: Dean Marshall, Superintendent, Hiland Mountain Correctional Center; Denise Morris, Executive Director, Alaska Native Justice Center; Commissioner Joe Schmidt, Department of Corrections; (1st name to be provided) Schmidt; Justice Dana Fabe; Janice Weiss, Executive Director, YWCA.

Success Inside & Out is a program to support women prisoners in re-entry that was founded by Justice Dana Fabe of the Alaska Supreme Court in November 2006. Recidivism rates in Alaska are high, and re-entry programs such as SIO offer a promising way to reduce recidivism by giving released prisoners a stronger chance of success in their transition back into the community. The SIO program brings women judges and professionals from the community to Hiland Mountain Correctional Center near Anchorage for a full day of workshops and plenary sessions designed to prepare women inmates for the transition to life outside jail.



Shirley Mae Springer Staten has entertained the inmates at the beginning of the conference since the program's inception.



Former inmates share their stories of re-entry during a conference panel.



A highlight of the SIO program each year is the luncheon fashion show, during which inmates model clothing from Second Run, a high-end Anchorage consignment shop. Shop owner Ellen Arvold, seen here at the podium, volunteers to coordinate the fashion show each year.



The Hiland Mountain Orchestra performs during the conference registration.

One hundred women participated in the most recent event, held October 31, 2009. Featured in the program was a keynote presentation by Alaska Commissioner of Corrections Joe Schmidt, who has championed re-entry programs. Also featured were a wide variety of workshops on topics such as parenting, economic advancement, addiction treatment, succeeding in the workplace, mental health resources, fostering creativity, surviving probation, and promoting wellness. Highlights of the day included the traditional luncheon fashion show, which this year focused on building a basic wardrobe; mock job interviews; a session on journaling; and several interludes of motivational speaking and music.



Inmates learn about educational opportunities during one of more than 50 workshops to choose from throughout the day. Plenary sessions included a presentation on journaling, which is a perennial favorite.



Anchorage businesswoman and civic leader Eleanor Andrews conducts a mock job interview for SIO participants.



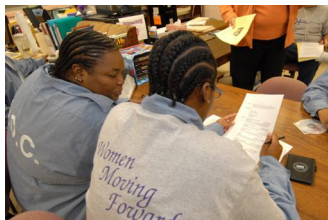
Stacey Marz of the Alaska Court System's Family Law Self-Help Center conducts a conference workshop.



Each year at SIO, Assistant Public Defender Margi Mock relates her personal experiences as a young mother who spent most of her high school years on probation. She encourages participants to look for strength within themselves, and shares the sign she keeps in her office, which reads "Still waiting for someone to rescue me."

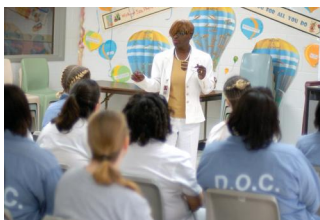
The program continues to grow and garner community support, and to fulfill its mission of providing mentorship, encouragement, and information to women prisoners facing re-entry through interaction with women judges and professionals. Over thirty professional men and women serve as volunteer presenters at the conference, and over fifteen organizations participate in the various activities. Success Inside and Out is sponsored by the National Association of Women Judges, the Alaska Court System, the Alaska Native Justice Center, and the YWCA. For more information, please contact Justice Dana Fabe (dfabe@appellate.courts.state.ak.us, 264-0622) or SIO Coordinator Brenda Aiken (baiken@courts.state.ak.us, 264-8266).

Second Annual Women Moving Forward Reentry Conference



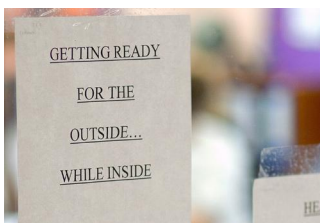
On October 24, 2009 the **Second Annual Women Moving Forward Reentry Conference** was held at the Maryland Correctional Institution for Women (MCIW). The conference, initiated by the NAWJ was organized by a coalition of organizations, including the Maryland Women's Bar Association, the Maryland Women's Commission, the National Women's Prison Project, and Alternative Directions. **One hundred and sixty women scheduled to be released within the year participated.** The goal was to provide resources, information and inspiration to support the participants' successful return to their communities.

The Conference opened with a dynamic **keynote speaker, Angela T. Jackson**, author and Behavioral Health Specialist with LIGHT, Health and Wellness Comprehensive Services and a former inmate. **Fourteen workshops were presented on topics pertinent to successful re-entry**, such as affordable housing, financial management, drug and mental health resources, education, employment preparation, family reunification and access to healthcare.



Everyone enjoyed a lunch-time fashion show featuring business wear apparel followed by an extensive resource fair. Women within ninety days of release were provided the opportunity to interview with potential employers. **All gained interview experience and several secured employment.**

The closing plenary, "Walking in My Shoes," featured a panel of women who had formerly been incarcerated who shared inspirational testimony and answered questions about their struggles and successes after incarceration.



Judges Sue-Ellen Hantman, Ellen Heller, Theresa Nolan, Irma Raker, Cathy Hollenberg Serrette and Julia Weatherly serve on the organizing committee, which was co-chaired by U.S. Magistrate Judge Susan Gauvey and Carolyn Mattingly, immediate past chair of the Maryland Commission on Women.



Maryland Correctional Institution for Women College Degree Program

By NAWJ Past President Judge Brenda Murray



It is a fact that if you improve the life of a woman, you transform the lives of her family, extended family, and community. The effort to provide MCIW women with a college education officially began in earnest in 2006 when the Women in Prison Project of the National Association of Women Judges sent letters asking Baltimore and Washington, D.C., area professors to participate in a prison book club. About a dozen professors responded, in the process becoming educated about criminal justice issues and becoming ambassadors for the incarcerated women. After a short period of time, a group of academics from Goucher College began creative writing sessions with many of the Book Club participants.

Because of these coordinated efforts, MCIW now has a year-round program of Book Club discussions and Writing Sessions all led by academics who volunteer their time. It was participants in this volunteer group who began the efforts that have resulted in

MCIW's College Degree Program. When incarcerated people lost their eligibility for Pell grants in 1994, almost all in-prison college education programs ended.

In Maryland, there is very little in the way of postsecondary education, despite compelling evidence that it reduces re-incarceration and crime rates, lessens the taxpayers' burdens, makes prisons safer and creates better transitions for convicted felons to become productive and valued members of the community. L'Oreal Paris recognized the College Degree Program as a 2009 Women of Worth award winner.

What We Are

Begun in 2008, the MCIW College Degree Program offers the 850 women incarcerated in Maryland's only women's prison an opportunity for college education. The many academically qualified women inside MCIW are starved for intellectual activity and desperate for an opportunity to change their lives. We believe college education provides a basis for change. The State of Maryland is supportive, but it is required to provide education only up to the twelfth grade level. There are no state funds for college classes except a small amount from a federal grant that has so many restrictions that most prisoners are ineligible.

What We Offer

The MCIW College Degree Program offers a college education, mainly through volunteers who teach college classes and provide remedial classes in math and English. The MCIW College Degree Program is a non-profit that has tax exempt status under the federal Internal Revenue Code. In conjunction with Anne Arundel Community College, the degree granting institution, the College Degree Program has made possible college credit classes in English Literature, the History of Western Art, Philosophy, and Sociology and remedial classes in math. To date, approximately sixty women have participated in classes. In January 2010, at least one hundred new applicants took a placement instrument to determine their eligibility.

Why The Need

Persons leaving prison face a hostile atmosphere in the best of times. Studies in 1991 and 1994 found that inmates who earned a degree while incarcerated had recidivism rates of 23-26%, whereas persons who did not earn a degree had recidivism rates from 41-45% percent. Recent studies have shown that when women are given support to improve their lives, the results, to a large degree, also positively impact the lives of their children, their families, and society generally.

It costs approximately \$300 for a three-credit college class. A typical MCIW class is twenty women so that a total class costs approximately \$6,000. Donations to the MCIW College Degree Program are welcome and can be sent to the address below. The women at MCIW have asked us to provide them this educational opportunity. If you would like to come to MCIW and observe, we would be happy to make arrangements for you to do so. We welcome volunteers who make this program possible.

The Board of Directors: President, Brenda Murray, National Association of Women Judges; Treasurer, Pamela Sheff, Johns Hopkins University; Secretary, Mary Jo Wiese, Goucher College; Maryjoel Davis, Alternative Directions, Inc.; Dennis Kaplan, Stevenson University; Carol Phippen, Goucher College; Barbara Roswell, Goucher College; Brenda Shell-Eleazer, Anne Arundel County, Department of Detention Facilities; Natalie J. Sokoloff, John Jay College of Criminal Justice.

Supporters include: Hon. Dana Fabe, President, National Association of Women Judges; Robert A. Harleston, Former Warden, Maryland Eastern Correctional Institution and Associate Professor, University of Maryland, Eastern Shore (Retired); Gary D. Maynard, Secretary, Maryland Department of Public Safety and Correctional Services; Pamela Paulk, Vice President, Human Resources, The Johns Hopkins Hospital and Health System; Sanford J. Unger, President, Goucher College.



MCIW,
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New Initiatives

Storybook Project

The Storybook project, a successful NAWJ program developed by Judge Marielsa A. Bernard in Maryland, is a parenting program for incarcerated mothers.

The program works on multiple levels: it is a literacy program for both children and their mothers; a way to strengthen parent child bonds; and an important means of communication between mothers and their children. The program provides incarcerated mothers a selection of books to read to their children and allows them to record themselves reading the book. The tapes are packaged, along with the books, and mailed to the children at their home address. **A similar program to the Storybook program, called Story Corner, exists at the Bedford Hills Correctional Facility, in New York State.** The New York State Department of Corrections (DOC) is currently reviewing updating the technology used in recording the books.

In 2009, Justices La Tia Martin and Debra A. James in consultation with Marie Komisar, NAWJ Executive Director, decided that the Storybook project should be developed as a national program. Judges Brenda Murray and Betty J. Williams, Co-Chairs of the NAWJ Women in Prison Committee, and Judges Cheryl J. Gonzales, Laura L. Jacobson, Debra A. James and Marcela Bernard agreed to provide follow up information requested by Marie Komisar for program development of the Storybook project. In keeping with that agreement, the New York Chapter of NAWJ's Women in Prison Committee (WIPC) approached and received the support of DOC's Commissioner Brian Fischer, and on November 10, 2009. Commissioner Fischer designated his Assistant Commissioner for Program Services, Mary Bogan de Belmonte, to serve as his liaison on the project.

Working with the Assistant Commissioner, the WIPC identified and contacted the Deputy Superintendents of Programs at five women correctional facilities—Albion, Bayview, Beacon, Bedford Hills, and Taconic—that were at various stages of designing and implementing a similar program. To assist in the design of these programs, the program coordinator of the “Story Corner” program at Bedford Hills Correctional Facility provided an overview of the parent child reading program that has existed at that facility for many years. **A representative from the Assistant Commissioner's office has volunteered to coordinate the program submissions from each facility and to compile the proposals into one package.** The final package will be reviewed by Judge Jacobson, Chair, NAWJ Project Committee, and forwarded to Marie Komisar with a request for funding. **The package will include two “Story Corner” proposals from Albion and Bayview Correctional Facilities, an “Hour Children” proposal from the Taconic Correctional Facility, and a “Stories from Mom” proposal from the Beacon Correctional Facility.**

Introduction to Drawing Class, Bayview Correctional Facility

During a Bayview Community Advisory Board meeting, the Deputy Superintendent for Programs advised the Board that a volunteer art teacher had requested funding for an art class for students not enrolled in Bayview's Bard College undergraduate program. Judges Debra A. James and Judge Betty J. Williams are members of the Advisory Board. The Board approached Judges James and Williams with a request that the NAWJ consider funding the drawing class.

The proposal, “The Introduction to Drawing Class—Dry Material,” focuses on developing self-esteem through self-discipline, problem solving, and team work and producing two large-scale drawings at the project's completion. The class will meet for three (3) hours and thirty (30) minutes a week for two (2) semesters per year. The class will mirror the college level drawing course currently offered by the Bayview Bard Prison Initiative and will be available to the women unable to participate in the college initiative.

The draft proposal for the drawing class was submitted, upon request, to the Assistant Commissioner Bogan de Belmonte for review. The Assistant Commissioner informed the WIPC that the DOC: (1) intends to provide women prisoners a gender-informed curriculum that is in keeping with National Evidence Based Practices; (2) is strategically arranging their program interventions for maximum impact on the prison population; (3) has identified a Cognitive Behavioral curriculum, entitled “Moving On” that satisfies these objectives; (4) intends to purchase and implement “Moving On” at Bayview and at four (4) other female facilities in New York State; and (5) will be submitting a proposal, which includes, under a similar format, a drawing class program, to the NAWJ for review and funding. The proposal will be reviewed by Judge Laura L. Jacobson, Chair, NAWJ Project Committee and forwarded to Marie Komisar with a request for funding.

Legislation Update

The New York Chapter of the Women in Prison Committee continues to support the passage of the Adoption and Safe Families Act (ASFA) Expanded Discretion Bill (A.5462/S.2233). ASFA would minimize the harsh impact of New York's child welfare policies on families separated by incarceration by (1) amending the law to appropriately reflect the special needs and circumstances of criminal justice-involved families and (2) granting foster care agencies discretion to delay filing termination of parental rights papers when a parent's incarceration or participation in a residential drug treatment program is a significant factor in why the child has been in foster care for fifteen (15) of the last twenty two (22) months. ASFA is sponsored by Assembly member Jeffrion Aubry, Chair

of the Correction Committee, and Senator Velmanette Montgomery, Chair of the Social Services, Children and Families Committee. The New York State Advisory Committee of Judicial Ethics, in response to a written request from WIPC Chairperson Judge Betty J. Williams, issued an Advisory Opinion granting judges permission to advocate on behalf of the legislation. Judge Joan Madden has volunteered to coordinate the advocacy efforts of New York judges.

Prison Projects at New York State Correctional Facilities for Women

Ninth Annual "Beyond the Bars" Re-Entry Workshop Bayview Correctional Facility for Women

The annual "Beyond the Bars" program took place at the Bayview Correctional Facility on December 17, 2009. Members of the NAWJ New York began the program at Bayview Correctional Facility nine years ago.

Judges Sharon Aarons and Robin Garson, along with court attorneys J. Mark McGowan and Richard Johnson, Esqs., joined Judge Debra A. James, chair of the local Women in Prison Committee, in attending the workshops and observing the presenters and women prisoners interact at the ten workshop sessions that took place throughout the day. Summoning the power of literature, Judge James kicked off the initial plenary session with a reading of "Mother to Son" penned by Langston Hughes in 1922, one of the pieces from his first book of poetry called "Weary Blues."

Each one hour workshop was led by volunteers, who were either attorney experts in their fields or other specialists from community based organizations. The subjects of the workshop included permanent housing options and other entitlement benefits, parole matters, foster care, custody and parental rights, overcoming criminal record barriers and the "Ancient Healing Power of Meditation". A professional jazz saxophonist provided entertainment to the delight of all in attendance, performing selections in the spirit of the winter holidays.

On the Saturday following the workshops, the children and grandchildren of the incarcerated parents gathered at the annual winter holiday party, which is hosted by the staff of Bayview. **As has been the tradition for the past nine years, NAWJ members, attendees at the annual dinner of New York's Judicial Friends organization, other New York City judges, court attorneys and law stenographers throughout the boroughs donated toiletries for the gift bags presented to all of Bayview's residents.** They also contributed toys, primarily stuffed animals, dolls, books, educational games and movie passes for the children who attend the party. Judges Laura Jacobson and Betty Williams did yeo person's work in coordinating the logistics of assembling the gifts. NAWJ-NY has been advised by Bayview personnel that each and every child received a present and that the holiday celebration was a success for the families in attendance.

Bayview Holiday Gift Bags

On December 10, 2009, Judges Laura L. Jacobson, Cheryl J. Gonzales, Robin Garson, Loren Bailly-Schiffman, Betty J. Williams and Brooklyn Bar Association President, JoAnne Quinones, along with court staff volunteers, assembled over 220 holiday gift bags for the residents of Bayview. The gift bags were assembled at Kings County Supreme Court and included gifts donated by the local and state NAWJ community and the Brooklyn Women's Bar Association.

The 2009 gift bags, given to all Bayview residents and double in size to the first gift bags assembled in December 2000, included hair combs, clear nail polish, emery boards, pens, note cards, toothbrushes, wash cloths, toiletries, candy canes and chocolate bars. Day planners were contributed by the Court Officers' Union. The gift bags were picked up from the court houses by the Bayview staff on December 15, 2009 and distributed to the women during the holiday season.

Housing Workshop Planned

On March 12, 2010, a workshop on housing issues, organized by the New York Chapter of the NAWJ's Women in Prison Committee, will be held at the Beacon Correctional Facility, a minimum security prison for women 80 miles north of New York City. The workshop will be conducted by Legal Aid Supervising Attorney, Stephen Myers, and its staff, on how to access public housing and the availability of government subsidies for formerly incarcerated persons. Judge Cheryl Gonzales, who is coordinating the workshop, has asked Beacon's Superintendent to acquire a list of questions from the women at Beacon that will be forwarded to Mr. Myers and his staff, before the date of the workshop.

Respectfully submitted,
Judges Cheryl J. Gonzales, Laura L. Jacobson, Debra A. James, and Betty J. Williams

THE NAWJ NEW YORK CHAPTER WIPC MEMBERS are Justices Bernadette Baynes, Cheryl E. Chambers, Darcel Clark, Carolyn E. Demarest, Phyllis Gangel-Jacob, Robin Garson, Marguerite Grays, Laura L. Jacobson, Sylvia Hinds-Radix, Debra A. James, Marcy L. Kahn, Sarah L. Krauss, Yvonne Lewis, Joan A. Madden, La Tia W. Martin, Janice Taylor, Delores J. Thomas and retired Justice Betty Weinberg Ellerin as well as Judges Sylvia G. Ash, Loren Bailly-Schiffman, Susan Danoff, Cheryl J. Gonzales, Tanya Kennedy, Ellen Spodek, Ruth Smith, Wavny Toussaint, Carolyn Wade, Betty J. Williams and retired Judge Claire T. Pearce.

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The NAWJ Resource Board are leaders in their field. Resource Board members work with NAWJ members and staff to raise judicial awareness about subjects of mutual interest, offer advice regarding education projects, and provide and cultivate crucial professional and financial support for the organization as it works towards its mission.

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NAWJ Member Hon. Bernette Joshua Johnson Receive ABA's 2010 Spirit of Excellence Award

On November 10, 2009 the American Bar Association Commission on Racial and Ethnic Diversity in the Profession honored Justice Bernette Joshua Johnson of the Louisiana Supreme Court with its Spirit of Excellence Award, recognizing her unwavering commitment to enhancing diversity in the legal profession. "Justice Johnson epitomizes community service. She has been committed to helping the disadvantaged from her early days as a community organizer for the National Association for the Advancement of Colored People Legal Defense and Educational Fund. Even as a justice for the highest court in Louisiana, Justice Johnson maintains her commitment to communities in need," said Fred Alvarez of Palo Alto, Calif., chair of the commission. "She has been a champion for increasing diversity in the profession since the beginning of her career. Her courage and determination serve as inspiration for others—and not just women and minorities. She inspires all of us who are committed to a more diverse profession." The commission presented her the award on February 6, 2010 during the 2010 ABA Midyear Meeting in Orlando, Florida.

ABA's Judicial Division, National Conference of Federal Trial Judges Diversity on the Bench: Is the Wise Latina a Myth?

On February 6th in Orlando, Florida NAWJ joined 59 other co-sponsors to support presentation this free CLE program, Diversity on the Bench: Is the "Wise Latina" a Myth. The notion that judges' decision-making might be affected by their gender and race or ethnicity may seem repugnant to those who view "judging" as the sterile, bloodless, objective disposition of cases, without regard to judges' personal backgrounds, biases, attitudes, and ideologies. But a growing number of studies are now demonstrating the dramatic impact that judges' gender and race/ethnicity may have, at least in certain types of cases. What does this fascinating and provocative research mean for the justice system?

ABA Women in Law and Leadership Academy April 29-30, Philadelphia, Pennsylvania

The ABA Commission on Women in the Profession, together with the ABA Young Lawyers Division, will be holding its fourth Women in Law Leadership Academy ("WILL Academy") on April 29-30, 2010, in Philadelphia, Pennsylvania at the Loews Philadelphia Hotel. NAWJ has joined in co-sponsorship. This Conference assists aspiring lawyers in realizing their leadership potential, develop business, and take their careers to the next level. Attendees will be able to obtain concrete advice and guidance and learn best practices from prominent general counsel, judges, and practitioners.

Advice From the Bench

Thursday April 29, 2010. 4:00 – 5:30 PM

NAWJ Past President Fernande Duffly will moderate this panel of prominent state and federal court judges who will discuss the different communication styles of women and men, and include, among other things, a discussion of how women lawyers are perceived in the judicial system. It will provide practical tips and best practices for effective oral argument, opening and closing, examination of witnesses, and communication with the court, opposing counsel, and the jury. The goal of this program will be for attendees to enhance their litigation, negotiation, and appellate advocacy skills.

Program Speakers:

Judge Judith S. Kaye, Of Counsel, Skadden, Arps, Slate, Meagher & Flom LLP, and

Former Chief Judge of the New York Court of Appeals

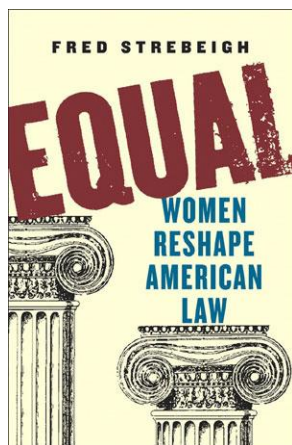
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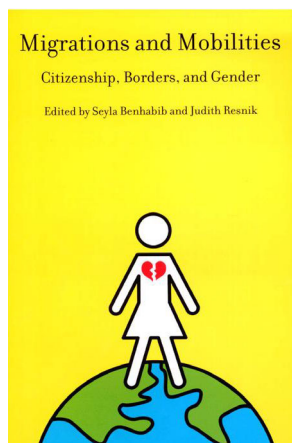
Moderator: Associate Justice Fernande "Nan" Duffly, Massachusetts Appeals Court

RECOMMENDED READINGS



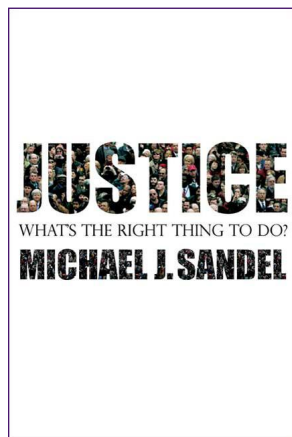
Equal: Women Reshape American Law by Fred Strebeigh

Want to read and hear from your fellow NAWJ members? As late as 1967, men outnumbered women twenty to one in American law schools. Judges would not hire women. Law firms asserted a right to discriminate against women. Judges permitted discrimination against pregnant women. Fred Strebeigh has interviewed litigators, plaintiffs, and judges, including Ruth Bader Ginsburg and many NAWJ member judges, and has done research in their private archives as well as those of other attorneys who took cases to the Supreme Court to make the law equal and just for all.



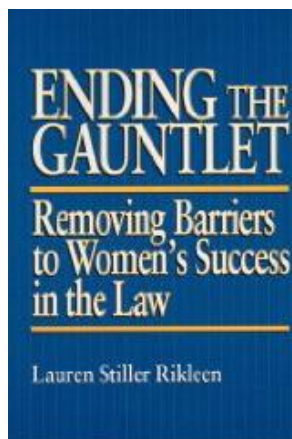
Migrations and Mobilities: Citizenship, Borders, and Gender Edited by Judith Resnik and Seyla Benhabib

Migrations and Mobilities situates gender in the context of ongoing, urgent conversations about globalization, citizenship, and the meaning of borders. Following an introductory essay by editors and Judith Resnik, NAWJ Judicial Academic Network/Judicial Education Committee Co-Chair, and Seyla Benhabib, that addresses the parameters and implications of gendered migration, the interdisciplinary contributors consider a wide range of issues, from workers' rights to children's rights, from theories of the nation-state and federalism to obligations under transnational human rights conventions. NAWJ Judicial Academic Network/Judicial Education Committee Co-Chair Vicki C. Jackson is among the contributors.



Justice: What's the Right Thing To Do? by Michael Sandel

What are our obligations to others as people in a free society? Should government tax the rich to help the poor? Is the free market fair? Is it sometimes wrong to tell the truth? Is killing sometimes morally required? Is it possible, or desirable, to legislate morality? Do individual rights and the common good conflict? This book is an exploration of the meaning of justice, inviting readers of all political persuasions to consider familiar controversies in fresh and illuminating ways. Affirmative action, same-sex marriage, physician-assisted suicide, abortion, national service, patriotism and dissent, the moral limits of markets are among topics discussed.



Ending the Gauntlet: Removing Barriers to Women's Success in the Law

by Lauren Stiller Rikleen

This book focuses on the institutional impediments to women's success in the practice of law--the challenges and roadblocks women face as they struggle to succeed in law firms. It addresses all aspects of law firm life including firm management, the assignment process, billable hour demands, business generation, compensation, mentoring, attrition, and work/family issues. It also sets forth recommendations for change, describing concrete actions which law firms can implement in order to enable women to take their rightful place as equals in the legal profession. In addition to her years of interviews with women lawyers and law firm managers, the author also draws on a wide range of research across multiple disciplines in order to shed further light on the areas covered.

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The American Bench: Judges of the Nation 2009

	Female	Total	
United States Appeals Courts, Bankruptcy Appeals Courts	65	329	20%
United States District Courts	329	1512	22%
United States Bankruptcy Courts	76	313	24%
Other Federal Courts	18	87	21%
State Final Appellate Courts	104	359	29%
State General Jurisdiction Courts	2440	8123	30%