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Racism, Sexism and Gender Orientation in the Law, the Legal Process and In the Legal Profession

J. Clay Smith Jr.

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By

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I wish to open my remarks with a question: Why should the Judicial Conference of the D.C. Courts be concerned about racism, sexism and gender orientation in the law, judicial process and the profession, so as to make this subject the centerpiece of its annual conference?

For a minute, let us look at and try to evaluate the words which constitute the theme of a substantial segment of this Judicial Conference:

- racism in the law, legal process and the profession;
- sexual preference in the law, legal process and the profession;
- sexism in the law, legal process and the profession.

When I began to ponder what I could say to wrap up this segment of the Judicial Conference, I wondered whether in the abstract the law itself could be classified as racist, sexually biased or other than sexually and race neutral. I reached for my books on jurisprudence and began to flip through the pages of these books seeking to discover a resolve to my inquiry. Finding no immediate answer, I then reached for my legal process books to see if I could find a section on racism in the legal process, or sexual preference, or sexism in the legal process. The indexes to the available volumes were silent. Then I said to myself, boy, you are going

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*/ These remarks were presented at the 1988 Judicial Conference of the District of Columbia on June 16, 1988, as wrap-up comments on a series of panel discussion on which the title of this paper is based.

to be a sorry wrap-up speaker at the Judicial Conference unless you can address some of these issues. So, I threw away the law books and began to reflect on my ongoing research on the history of black lawyers in America.

What was it that Charles Hamilton Houston, Leon Ransom, Spottswood W. Robinson, III, and Constance Baker Motley were trying to do when these black lawyers invaded the Southern Courts litigating civil rights cases? What were the states of Missouri, Texas, Virginia and Louisiana trying to do in order to combat and to respond to the civil rights law suits filed by Houston, Ransom, et al? Each side was attempting to uphold what they believed to be the law. Each used the processes of the law to prosecute and to defend the law as they thought it was or as they thought it should be. These lawyers and their clients were not only governed by a body of laws; they were also govened by its application and the environment in which human conduct was regulated.

I suspect that these sessions on racism, sexism and gender orientation were held to facilitate our thinking on the application of law on discrete groups in our society and to dispel any notion that racism, sexism and sexual preference are not critical areas needing critical discussion by the judicial system. I applaud the planners of the Conference for daring to facilitate such a discussion.

The discussion of racism, sexism and gender orientation are not new issues in the law. In 1966, my second year as a student at Howard University School of Law, a Conference was held on the subject of discrimination in American Courts. I recall very vividly a panel discussion on the very small number of blacks employed in the judicial systems in the South. It is my recollection that there were no black judges in most Southern states. At the time, I was

not aware of the full meaning of this unfortunate employment profile. However, in later years when I reviewed one or two of the papers presented that survived the Conference, I recognized that because of the intentional exclusion of blacks from the judicial system that the notion of justice was blurred in the eyes of black Americans by customs, usages and historical biases. It is my estimate that a judicial system that is captured solely by intractable opinions about custom, usage and historical biases perpetuate and may never question custom, usage and historical biases.

Racism and the Practice of Law

I would like to turn my attention to panels that have so eloquently addressed the issues of racism, sexist and gender orientation. The panel on racism and the practice of law brought back many memories during my years as a member of the Lawyer Study Group in the 1970's. A group of the so-called black lawyers in uptown law firms formed the Study Group so that we could find sanctuary in order to discuss and to share ideas on how: (1) we could survive in white law firms; (2) make partner; (3) be more effective in persuading our firms to recruit more blacks. Yes, racism in those firms was discussed openly. Here are a few samplings of the many discussions that were held during those meetings:

(1) Case One. I am the only black associate at the firm and I am scared to tell anybody that I don't understand the problem assigned to me for fear that it will reflect on my race.

(2) Case Two. A black lawyer in one firm recommended that a particular black student be hired as an associate. One of the principal senior partners asked the black lawyer who had recruited the student: "Is he cosmetic?"

(3) Case Three. A story was told by one black lawyer about the time he

went for an interview at a major white firm in the city. Nervousness had overtaken his bladder by the time he got off the elevator causing him to dash to the restroom without checking in with the receptionist. While this young black lawyer stood at the urinal, a large man employed by the firm asked him what he was doing in the building. The interview went poorly.

(4) Case Four. There were always discussions about being left out of important meetings with clients and hard feelings as to why one's peers were invited to the country club by senior partners and black associates were not invited. There were discussions about how one who is black can or should act like the majority of people in the work environment. There were discussions that bordered on personal worth, and then their discussions about the jokes.

The panel on racism and the practice of law suggests that some things simply have not changed, and they will not until there are more black, Hispanic and Native American partners in these firms. During the 1970's, and even today, discussions ensue about strategies to diversify law firms who indirectly benefit from the consuming power of the black community. It has been suggested that blacks should boycott companies using law firms whose employment records are poor and/or who have no black lawyers at the partnership level. I hope that discussions concerning such strategies do not shock the Conference or dismay the legal profession, but you should be aware of them and the causes that generate such discussions.

The "we can't find any qualified black, Hispanic or Native American lawyers" syndrome has run its course. Today, it looks like the "we will only hire lawyers in our firm who look like us" policy has returned to many law firms in the District of Columbia.

We will continue to hope for a better day.

Sexism

I think all too often commentators compare racism and sexism as if they were the same, except for metaphysical differences.

There are many similarities and many differences.*/ I had the honor and privilege of knowing the late Ruth Weyand, a graduate of the University of Chicago Law School in the early 1930's. If it were not for her psychological make-up and her determination to succeed as a lawyer she told me that she would never have made it. Ruth is a case study because she was one of the first women lawyers to work at the NLRB in the 1930's; one of the few women during the 1930's to argue cases before the U.S. Supreme Court as a government lawyer and one of the few active women in the Federal Bar Association.

Yet, there are other women lawyers, many just starting out in the profession who are facing isolation, rejection and downright overt and direct negative treatment by males who control access to the legal profession and the ladder by which success is determined.

There are many similarities between sexism and racism in the litigation of civil and the prosecution of criminal claims. The legal system is a hollow log without people from the community that it serves. That log is filled by people, who are privileged to serve on the juries; judges, who are privileged to referee disputes among parties; and prosecutors, who are privileged to represent the community by enforcing the laws. The City Council of the District of Columbia, indeed the people of the United States, fill the judicial log of this community by their enactment of a body of rules and regulations that often form the basis of administrative decisions, cause of actions, rules of evidence, and rules of procedure. So, when I talk about sexism and racism in the law, I think that we are referring to the content which fills the hollow log of the legal system.

*/ Cohen and Peterson, Bias in the Courtroom: Race and Sex Effects of Attorneys on Juror Verdicts, 9 Social Behavior and Personality 81 (1981).

Citizens and the systems in which they are active and the environments from which they come or to which they are accustomed bring concepts of sex discrimination within the fabric of the judicial system.

Life expectancy tables are not the creation of the courts, they are the creation of the insurance industry and the Department of Commerce. These tables are used by men and women to plan and to prognosticate a host of important decisions in the nation. Yet, do these tables and similar devices which are brought into the courtroom in a wrongful death claim prove detrimental to a woman in such a manner as to discriminate against them in the assessment of damages.

Can a judge of virtue and self-defined moral standards be unintentionally influenced by evidence obtained through legitimate discovery that a woman had a relationship outside of a broken marriage that impacts negatively on the property settlement in a divorce case? How does one know? Is gender preference relevant in a simple case of negligence? Can or should a lesbian person be required to respond to such an inquiry during the course of a deposition or an interrogatory in a contract dispute. Given the nature of the content of the judicial system and the rules of its process, how can the purpose and intent of such an inquiry be known before its effects have been rendered?

The Conference needs to think about these questions and others such as -- do we males believe that every female lawyer representing a woman in any type of litigation is a member of the National Organization of Women? Are male judges influenced by the size, shape, dress, color of hair, eyes, lipstick, of a female lawyer or her client? Do law firms assign women as ornaments to certain cases on which women judges sit to influence the outcome? If so,

isn't this unfair employment conduct toward that woman lawyer and disrespectful to the judicial process?

Women in the law have come a long way in the District of Columbia since Belva Lockwood, a white woman, an 1873 graduate of The National University School of Law (now George Washington University National Law Center) was admitted to the bar in 1873 one year after Charlotte Ray, a black woman, was graduated from Howard University School of Law in 1872 and admitted to the District of Columbia bar in the same year. These women and their female clients really had it tough. However, they forged a path through which all of us walk today -- hopefully, with attitudes which will fill the hollow log of the judicial system with a more abundant sense of fairness.

Gender Orientation

How the law and its application affects the homosexual persons is being faced on many fronts that influence the law, legal process and the legal profession. Homosexuals are the subject of religious literature and politics*/ just as women and blacks have been, which questions their right to choose or to be what they are, or simply to be. In the past, most religious teachings have condemned homosexuality. Such condemnation may influence public attitudes toward homosexuality.**/ Homosexualiity has been fraught with such strong emotional aversion that it has worked its way into the criminal statutes in nearly all states. Hence, the law, legal process, and the legal profession have been inclined to reject claims of equality in some cases when gender orientation was the balancing factor.

I think that it is fair to say that homophobia in the legal profession,

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*/ Hyer, Methodist Reaffirm Anti-Gay Stand, Wash. Post, May 3, 1988, at A16, col. 1; Steinfels, Methodist Vote to Retain Policy Condemning Homosexual Behavior, N.Y. Times, May 3, 1988, at A22, col. 1. See also, A. Karlen, Sexuality and Homosexuality, 12-43 (1971).

**/ Attacks on Philadelphia Homosexuals Studied, N.Y. Times, June 12, 1988, at 45, col. 1

the judicial system and in the application of the judicial process is not to be underestimated. Homophobia is brought to the hollow log of the legal system as is racism and sexism. It may be a wise litigation move to negotiate the settlement of a claim in some communities where a person is black and a lesbian, too. Dual bases for discrimination in the judicial process must be set aside for another day for it requires special treatment.

This Conference has focused on the plight of a lesbian mother in a custody proceeding. What does the legal professon know about lesbians?*/ According to one excellent article by Professors Nan D. Hunter and Nancy D. Polikoff, quoting from P. Lyon & D. Martin, Lesbian Woman 141 (1972)) they say that -

> "Two well-known lesbian writers have suggested that '[m]ostly these are women who were unaware of their lesbian tendencies until after they married and had children. Or they are women who suppressed their lesbian feelings, convinced, as most heterosexuals are, that these feelings merely represented a natural phase in their lives and would disappear after they experienced marriage and motherhood. There are some women, too, who consciously rejected the gay life in favor of the more societally accepted and respected heterosexual relationship.'" (25 Buffalo L. Rev. 691, (1976)).

Several human concerns may enter the legal process in a custody case when one of the parties is lesbian or gay; namely, the concern that a child raised by a homosexual parent will choose homosexuality as a way of life, or become psychologically affected because of observations of homosexual conduct in the home environment, or suffer psychologically because of possible rejection by their peers, or isolation from nonapproving relatives.

The question presented at this Conference is — can a homosexual parent receive a fair trial in a custody case? Do the rules of evidence and procedure

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*/ There is confusion in the workplace about lesbians also. See, e.g., Zaslow, Lesbian is Confused by Co-worker, The Washington Times, June 7, 1988, at E9, col. 5.

disfavor them in the judicial process? Does entry into the legal process by a homosexual make what one is the issue in a custody case? Should it? These are very sensitive questions, but answers are required unless we are inclined to risk the application of the law solely on the basis of homophobia.

In custody cases involving gender orientation, mothers, fathers, lawyers face important ethical concerns -- they must advise their clients of the risk, not only of losing a case on the public record, but, in those instances where the choice of being gay or lesbian has not been declared before, the lawyer may be required to advise the client on the effect that disclosure may have on other aspects of their lives. Such advice and the client's interests may result in dropping the custody fight.

However, when a custody fight ensues, the lawyer representing the lesbian mother or gay father must be prepared to argue and establish that the being of these parents, per se, does not betray the best interests of the child. In other words, gay or lesbian parents should have as equal a right in a custody proceeding as any other citizen.

For two years (1986-1988) I served as a public member on the Board of Social and Ethical Responsibilities of the American Psychological Association. During those meetings, I learned a great deal more about the personal struggles of lesbian mothers. It is true that law and psychology may explain a great deal on the subject of custody of gays and lesbians. However, neither the judicial nor psychological societies should conclude that gender orientation alone makes such a parent unfit.

Conclusion

In conclusion, I again applaud the program planners of this 13th Judicial Conference for daring to speak openly on the subject of racism, sexism and gender orientation in the law, the legal process and in the legal profession.

The legal profession has considerable responsibility to make the subject of racism, sexism and gender orientation part of its ongoing discussions. It may be that the subject matter discussed during the Conference has hardened the attitude of some members of the profession toward the groups discussed. Whatever the consequences -- good or not so good -- this 13th Annual Judicial Conference will come to be valued by all in the days and years to come.