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## In Memoriam

### A Tribute to Brave Pioneering: Judge Diana Murphy and the Eighth Circuit Gender Fairness Task Force: 1993–1997

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Deep in the 182 pages of the Final Report of the Eighth Circuit Gender Fairness Task Force lies a passage noting a marked discrepancy between the survey frequency of incidents of “incivility, gender-related incivility, [and] unwanted sexual attention” in the federal courts, and the incidence of actual reporting of those events to seek redress—a stunning 1.5% rate of reporting.<sup>1</sup>

More conspicuously in the Report’s section on sex discrimination cases, as informed by data in the Eighth Circuit, lies an observation of discrepant views between plaintiffs’ lawyers and defense lawyers regarding the sufficiency of damages for sex discrimination in employment, for punitive damages to deter such conduct, and for awards of attorneys’ fees to encourage attorneys to represent those who have experienced discrimination.<sup>2</sup>

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<sup>†</sup> Janice M. Symchych served as the first female full time Magistrate Judge in Minnesota and enjoyed years of service on the bench with Judge Murphy, who became a mentor and dear friend. Judges Murphy and Symchych comprised the female segment of the district court along with Judge Nancy Dreher of the bankruptcy court. Ms. Symchych also worked with Judge Murphy teaching at the DOJ advocacy institute in Washington, D.C., and importantly on the Eighth Circuit Gender Fairness Task Force. Ms. Symchych had previously served as one of the co-chairs of the Minnesota Supreme Court Gender Fairness Task Force. Subsequent to her service as a magistrate, Ms. Symchych was a first-chair trial lawyer with Dorsey & Whitney for fifteen years, and led worldwide litigation counsel for Medtronic before her semi-retirement in the mountains of Colorado. She now serves as a mediator and arbitrator with JAMS, handling complex matters across the nation. Copyright © 2018 by Janice M. Symchych.

1. FINAL REPORT & RECOMMENDATIONS OF THE EIGHTH CIRCUIT GENDER FAIRNESS TASK FORCE, *reprinted in* 31 CREIGHTON L. REV. 9, 136–39 (1997) [hereinafter FINAL REPORT & RECOMMENDATIONS].

2. *Id.* at 72–78.

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Here and now, with the breaking of the Harvey Weinstein sexual harassment news in October 2017, and the surge of increased reporting of this conduct across all kinds of businesses, politics, and institutions, the enforcement of the rule of law in gender fairness matters has been exponentially actualized. Today's environment is more likely to produce justice and adequate results in gender discrimination cases due to this new and widely publicized reality addressing both the historic fear of reporting and the negative job consequences for women who do report—inevitably leaving the place of employment with small awards and a figurative Scarlet Letter of warning to prospective employers.<sup>3</sup>

That these two seemingly disconnected and 1990s-tethered data points in the Task Force Report have proven prescient with two full decades' hindsight is reflective of Judge Diana Murphy, in whose honor this tribute is written. Surely the work of the Task Force, and the observations of its Final Report represent the collective diligence in fact-gathering, statistical analysis, and derivative findings and conclusions of a talented cross section of judges and attorneys from seven states. The point takes nothing away from the synergy from which the Report resulted, but it tells much about Judge Murphy and serves as an example of her attributes.

#### I. PROFESSIONALLY DISPASSIONATE, PERSONALLY PASSIONATE LEADER

Judge Murphy's judicial work resides fully in the realm of proof-based, disciplined legal analysis. The visible skill she exacted over her years of judicial service demonstrates why she avoided the purgatory of those prone to be labelled as judicial activists, politicized and agenda-driven to the point of disrespect by the bar, the bench, and the litigants who expect even-handed justice from the courts.

Judge Murphy's legacy on the bench, both on the district court and the Eighth Circuit, arises from the same fundamentals that guided the Task Force in its work. The focus was on the data—its gathering carefully conceptualized and executed, professionally analyzed, and supplemented by real voices of focus groups to bring human reality to numbers and percentages. The purpose was to avoid the myopia of those who would say that there are no gender fairness problems, and at the same time to

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3. *Id.* at 137.

avoid the despair of those who would say there are no solutions. To conscientiously bring such discipline, neutral analysis, and human understanding to legal problems is the way in which Judge Murphy did her job, day in and day out—big case or small case, interesting or tediously monotonous.

Judge Murphy's ability to carefully sort this skill rubric from situations in which she was free to act on personal passion allowed her reputation as a leader for women in the legal and judicial professions to stand out. From a well-known episode early in her career when she refused to enter a private club through the side door to be used by women—to her lack of hesitation in privately counseling a young judicial applicant whether to disclose her not yet visible pregnancy to the selection committee—Judge Murphy has consistently and bravely acted on her beliefs and passion for gender fairness.

No doubt, this combination of attributes led then-Chief Judge Richard Arnold of the Eighth Circuit to ask Judge Murphy to create the Task Force and construct its work. To have a passionate leader of women, widely respected for her ability to be tied down and proof-based was the type of leadership promising a credible and no-nonsense outcome.

## II. MODEL OF INCLUSIVITY

It goes without saying that to be truly representative one must listen to all voices and account honestly for what each has to say. In fulfilling her job to name the members of the Gender Fairness Task Force, Judge Murphy's selections evinced—even before the work of the Task Force was defined or in process—this goal of having its work accepted and respected. To convince multiple stakeholders, like a diverse bar of practitioners ranging from Big Law senior partners to small-district public defenders, women and men, and a strong judiciary—many with lifetime presidential appointments, and perhaps most importantly, a constituency of court watchers, litigants, and aspiring attorneys-to-be, the Task Force Report would have to be credible to all, without regard to varying predispositions.

From her choice of the open-minded and highly regarded District Judge Lyle Strom of Nebraska to chair the Task Force, to her selection of strong-minded women's advocates, alongside highly committed conservative members, the expectation was created of a culture of straight-up discussion, respectful listening, and data integrity. The difficulty of such an endeavor was

made appealing by its very challenge, and incited the Task Force membership actively to commit to the job.

Not only is the membership of the Task Force reflective of Judge Murphy's sensibility for inclusion, but the constituencies consulted and the subject matter topics in the work of the Task Force show the same. For example, a Native American focus group provided anecdotal perspective that federal jurors may not have familiarity with Native American culture sufficient to fully understand the interactions involved in reservation crimes prosecuted in the federal courts.<sup>4</sup> These issues have become the foundation for current work in the courts regarding cultural impact and the need for appropriate translation resources for immigrants, and studies of implicit bias among lawyers and judges. Likewise, the Task Force's inclusion of study subjects such as the composition of jury pools, and their fairness in light of demographics and jury excuses show depth beyond the norm in studying the judicial system. This work directly examined root causes of jury selection bias—an issue the Supreme Court has addressed in a number of instances.<sup>5</sup>

Some of the most poignant work of the Task Force proved to be in the area of institutional self-examination. The section of the Report on "The Court as Employer," probing the experiences of a large number of employees in the judicial system, showed some difficult and critical results. The observation that the federal courts are not covered by the same federal civil rights and labor laws as virtually all employers in the United States laid bare the truth that the courts' own employees had less legal protection than the average American employee.<sup>6</sup> The absence of sexual harassment policies in the courts underscores the absence of policies to protect employees, in the very institution entrusted with the power to adjudicate these issues under federal law.<sup>7</sup>

The courage of the federal judiciary itself to look in its own mirror is emblematic of Judge Murphy's spirit of integrity, and her determination to include self-study as a vital component of the work on gender fairness. In a matter-of-fact way, the conclusion of the Report states that, despite real progress, the institution remains primarily male with many lifetime appointments, in a workplace exempt from the employment laws applicable

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4. *Id.* at 116 n.112.

5. *See, e.g.*, *Berghuis v. Smith*, 559 U.S. 314 (2010); *Duren v. Missouri*, 439 U.S. 357 (1979); *Taylor v. Louisiana*, 419 U.S. 522 (1975).

6. FINAL REPORT & RECOMMENDATIONS, *supra* note 1, at 146.

7. *Id.* at 154.

elsewhere. “[I]t is not surprising to find an institution that has evolved to be more in tune with the needs and interests of the men who form its majority and managers. . . . [W]e are seeing history rather than intent at work; yet, the effects are real and wide-ranging.”<sup>8</sup>

Her innate sense of respect for differences among people was a driver of Judge Murphy’s own ability, in her judicial function, to understand the viewpoint of the litigant in the controversies before her. Combined with the difficult work of self-examination, this talent cannot be underestimated, because over time they prove up a lack of stereotypical approach, and a focus on the individuality of each case. Women can be wrong in their pursuit of a case, business tycoons can be right, or vice versa. The prosecution may be flawed, or the defense may have failed, all depending on the facts. The lower court made a mistake, or it did not, in reaching its judgment. The faithfulness to this approach in Judge Murphy’s work gives her great due in the performance of equal justice in its most meaningful sense.

### III. LEADER OF HER TIME

Throughout her tenure, Judge Murphy was a force for positive change. In her refreshingly quiet form of power and persuasion, she accomplished much. The sheer facts of being the first woman appointed to the Federal District Court in Minnesota in 1980 and the first woman appointed to the U.S. Court of Appeals for the Eighth Circuit in 1994 tell a piece of that story.

During Judge Murphy’s time on the court, the demographics of the federal bench began a monumental—but unfinished—transition. In 1997 seven of sixty-five sitting district court judges were women; now in 2018 that proportion has shifted to eighteen of sixty-seven.<sup>9</sup> As for magistrate judges, in 1997 there were seven women of forty-five; today twenty of fifty magistrate judges in the Eighth Circuit are women.<sup>10</sup> Bankruptcy courts have seen comparable change: in 1997 there were four women of twenty-one. In 2018 the numbers are ten of twenty-two.<sup>11</sup> Sadly, this measure of change has not occurred on the Eighth Circuit bench, where there is still only a single active sitting female, following the recent passing of Judge Murphy. The full appellate

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8. *Id.* at 165–66.

9. *U.S. Courts Library 8th Circuit*, U.S. CTS., <https://www.lb8.uscourts.gov:444> (last visited Oct. 15, 2018).

10. *Id.*

11. *Id.*

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bench consists of sixteen members, with ten men of active status and four of senior status.

Even with the improved demographics on the lower courts, it goes without saying that the work of changing the numbers is itself a work in progress. If there is a point to Judge Murphy's lifetime work, it perhaps is that much is left to be done to accomplish the goals of true equity and fairness, and that others must model their ambitions on what she has started.

During her judicial tenure, Judge Murphy served as president of the Federal Judges Association, advocating for the interests of her fellow members of the judiciary in the halls of Congress. She also served as chair of the U.S. Sentencing Commission from 2000–2004. On a more local level, she was an active member of Minnesota Women Lawyers, contributing to the success of an organization that has encouraged the interests of women practitioners in everything from parental leave, to judicial appointments, to gatherings of mutual support keynoted by other strong women leaders. From the grass roots to the halls of Congress, Judge Murphy exhibited her passion for the justice system and all who play a role in it.

As can be seen from the Final Report of the Eighth Circuit Gender Fairness Task Force, many of the things so avidly pioneered by Judge Murphy have shaped the pathway for work yet to be done. The stated point in the Final Report that the results show “history” rather than “intent”<sup>12</sup> reveals the unstated expectation that more needs to be done—so that the history created by us today shows progress over the history of the past. And herein is the heart and soul of this intrepid judge's legacy.

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12. FINAL REPORT & RECOMMENDATIONS, *supra* note 1, at 32.