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**Author**

Mayer, Megan G.

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# IN RE *MARRIAGE OF IVERSON*: DUBIOUS BENEFITS IN REDUCING JUDICIAL GENDER BIAS

Megan G. Mayer\*

*Gender bias is alive and well. It has just gone underground.*<sup>1</sup>

Despite attempts to reduce the effects of gender bias, the legal industry continues to find judicial gender bias in the courtroom.<sup>2</sup> In *re Marriage of Iverson*,<sup>3</sup> a divorce action determining the validity of a premarital agreement, presented the California Court of Appeal with evidence of judicial gender bias against a female plaintiff.<sup>4</sup> The court reversed the trial judge's ruling that the premarital agreement was valid because of his apparent gender bias, and remanded for retrial of the issues before a different judge.<sup>5</sup> The court found that evidence of gender bias in the judge's oral statement of decision compelled the conclusion that the plaintiff, Cheryl Iverson, did not receive a fair trial. The appellate court's reversal was a victory for Cheryl. However, this precedent will not increase the likelihood

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\* J.D. candidate, UCLA School of Law, 1994; B.A., UCLA, 1985.

1. PRELIMINARY REPORT OF THE NINTH CIRCUIT GENDER BIAS TASK FORCE 44 (1992) [hereinafter NINTH CIRCUIT REPORT] (quoting comment from task force participant).

2. *Id.* at 70 (“[W]omen as litigants face problems of credibility because of gender-biased stereotypes.”). The term “judicial gender bias” can include gender bias by female judges against male attorneys, parties, and witnesses. More commonly, the term is used to mean gender bias by male judges against women. The Ninth Circuit Report concluded that judicial gender bias, most often by male judges against female attorneys, parties, and witnesses, was an ongoing concern. *Id.* at 175. This Essay thus focuses on judicial gender bias against women. The educational recommendations apply to men and also to women who might be unaware of their bias against other women or against men.

For an explanation of the demographics of the Ninth Circuit, including the percentages of female judges, see *id.* at 7–18.

3. 11 Cal. App. 4th 1495, 15 Cal. Rptr. 2d 70 (1992).

4. *Id.*

5. *Id.* at 1497, 15 Cal. Rptr. 2d at 71.

that women receive fair trials unless judicial education is made mandatory.

### I. THE PROCEDURAL HISTORY OF *IVERSON*

Cheryl Iverson filed an action to dissolve her fifteen-year marriage to George Chick Iverson. A bench trial ensued to determine the validity of a premarital agreement both Cheryl and Chick had signed. Key to the litigation was the issue of who had initiated marriage. If Chick had initiated marriage, then the trial judge would be more likely to find that Chick used undue influence to make Cheryl sign the agreement. This fact would strengthen Cheryl's claim that the agreement was invalid.

To prove the agreement was invalid, Cheryl sought to show that Chick, not she, had initiated marriage. She asserted that Chick asked her to marry him in front of the late actor John Wayne at Wayne's birthday party, just after asking Wayne to be his best man.<sup>6</sup> Cheryl testified that she had moved in with Chick before he proposed because he wanted them to live together and be married.<sup>7</sup> She also testified that prior to signing the agreement, she did not consult an attorney concerning its contents or her rights to property acquired during the marriage.<sup>8</sup> Although she had no recollection that she signed the agreement, Cheryl acknowledged that the signature on the agreement was her own.<sup>9</sup>

Chick, however, testified that he did not want to get married. Chick's witness, his late attorney's wife, testified that Chick and Cheryl met with Chick's attorney on the attorney's boat.<sup>10</sup> According to the attorney's wife, the attorney read the agreement to Chick and Cheryl on the boat, asked if they understood the agreement, told Cheryl "maybe it's advisable you see another attorney," and then handed her a pen to sign the agreement.<sup>11</sup>

The trial judge found the premarital agreement valid and delivered an oral statement of decision. He concluded that Cheryl was not a credible witness, that Chick could not have initiated the marriage, and that the agreement was therefore valid.<sup>12</sup> The judge explained:

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6. *Id.*

7. *Id.*

8. *Id.* at 1498, 15 Cal. Rptr. 2d at 71.

9. *Id.*

10. *Id.* at 1497, 15 Cal. Rptr. 2d at 71.

11. *Id.* at 1498, 15 Cal. Rptr. 2d at 71.

12. *Id.* at 1498, 15 Cal. Rptr. 2d at 72.

One of the things that struck me, first of all, was that the petitioner in this case, Cheryl Iverson, only had five or six luncheon dates with Chick Iverson before she decided to move into his home. Now, he sure as heck does not look like John Wayne and he doesn't look like John Derek. And even if we take 17 years off him, I don't think he looks like Adonis.

And, so, we have a situation in the beginning where we have a girl who has been testified to [sic] was lovely, and is lovely, but who did not have much of an education, and did not have much of a background in business, and did not have much by way of material wealth. Had nothing going for her except for her physical attractiveness. Who, somehow or other, comes to the attention of Mr. Iverson and, after five or six luncheon dates, is invited to move into his home.

It seems to me that the process of marrying is one in which there is some mutual advantages [sic] from the act of getting married, maybe different ones from the act of establishing a relationship, a live-in type, spousal-type relationship.

But, in light of the testimony that Mr. Iverson had come out of a very unpleasant, very unhappy marriage, his statement that he was reluctant to get married again adds some dimension here. 'Once burned, twice cautious.' He had just gone through a divorce which cost him a million dollars. He does not want to get in one of those things again. He has talked to his important friends in the film industry and other areas, where living together is the common situation rather than marriage. And, so, decides that's the best thing for him. He makes an offer to petitioner, who thinks it's good. And then she moves in.

I cannot accept the fact that, as she said, he was the one that proposed marriage to her. That would be the last thing that would be on his mind. And why, in heaven's name, do you buy the cow when you get the milk free, as we used to say. And, so, he's getting the milk free. And Cheryl is living with him in his home.

And the impetus for marriage must be coming from her side, because there's nothing Mr. Iverson is going to get out of it. Marriage is a drag on the market. It's a deprivation of his freedom. He's got everything that he would want out of a relationship with none of the obligations.<sup>13</sup> Now, I am of the opinion that the impetus for the marriage in the home, prior to the incident of the birthday party for John Wayne, came almost entirely from the petitioner in this case, resisted by respondent.<sup>14</sup>

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13. *Id.* at 1499, Cal. Rptr. 2d at 72. The appellate court did not discuss the trial judge's characterization of marriage as women giving sex in return for financial security, akin to prostitution. Presumably, the appellate court ignored this issue because the characterization reflected Chick's view of marriage and not the trial judge's. This conclusion, however, is not clear from the record.

14. *Id.* at 1498-99, 15 Cal. Rptr. 2d at 72.

Cheryl appealed this judgment. The appellate court reversed and remanded to a different judge for a new trial on all issues. The appellate court based its reversal on a finding that the language in the trial judge's statement of decision indicated that gender bias tainted his decision-making process. The appellate court relied particularly on two statements to conclude that gender bias affected the trial judge's determination of Cheryl's credibility.

First, referring to Cheryl as a "lovely girl," especially in contrast to her lack of "education," "background in business," and "material wealth," evidenced a gender bias against Cheryl when used to judge her credibility as a witness.<sup>15</sup> This language indicated the judge used gender stereotypes in his decision-making process. The judge applied a general stereotype—that "lovely" women ask wealthy, unattractive men to marry them—to Cheryl's relationship with Chick simply because the judge thought Cheryl fit into the class of "lovely" women. The appellate court properly categorized the judge's use of the term as belonging to the "romantic paternalism" identified in *Frontiero v. Richardson*.<sup>16</sup> The appellate court also found that the use of the word "girl" to refer to Cheryl "seriously detract[ed] from the *appearance* of justice" since Cheryl was a woman in her forties.<sup>17</sup>

The appellate court then turned to the judge's cow analogy, finding the reference an "obvious double standard based on stereotypical sex roles."<sup>18</sup> The appellate court found the analogy demeaning to Cheryl, evidencing the trial judge's preconceptions about the parties based on their gender. The appellate court noted that a direct bias against Cheryl was not necessary to warrant rever-

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15. *Id.* at 1499, 15 Cal. Rptr. 2d at 73.

16. 411 U.S. 677, 684 (1973) (explaining that "romantic paternalism" rationalized sex discrimination by putting women "not on a pedestal, but in a cage"). Plaintiff and appellant *Frontiero* was an officer in the U.S. Air Force. She sought to increase benefits for her husband as a dependent in accordance with 37 U.S.C. §§ 401, 403 (living quarters allowances) and 10 U.S.C. §§ 1072, 1076 (medical and dental benefits), which provided that spouses of male service members are dependents for purposes of the Code, whereas spouses of female service members are not unless they are in fact dependent on their wives for more than one-half of their support. The lower court denied Officer *Frontiero*'s request because she failed to meet the Code's requirements. In concurring opinions, the U.S. Supreme Court reversed in favor of *Frontiero*, on the ground that the difference in treatment between female and male members of the service under the Code constituted unconstitutional discrimination against women in the armed forces. Justice Brennan's opinion of the Court, in which Justices Douglas, White, and Marshall joined, attacked the "romantic paternalism" rationalization of sex discrimination that is so rooted in our culture. *Frontiero*, 411 U.S. at 684.

17. *Iverson*, 11 Cal. App. 4th at 1500, 15 Cal. Rptr. 2d at 73.

18. *Id.*

sal.<sup>19</sup> Rather, it noted that statements which do not accord with recognized principles of fairness and which leave absent the appearance of justice require reversal.<sup>20</sup> Thus, the appellate court found gender bias based solely on the judge's statement of decision which indicated gender bias.

## II. PROGRESS AND PROBLEMS WITH THE RESULT IN *IVERSON*

The appellate court's decision marks progress toward the elimination of gender bias in judicial decision-making, first, by recognizing the problem and remanding the case, and second, by citing as authority judicial reports on gender bias.

Recognizing and attempting to correct the effects of the trial judge's gender preconceptions, the appellate court identified that gender bias hinders a woman's ability to receive a fair trial.<sup>21</sup> Prior to the decision in *Iverson*, several judicial reports on gender bias in the courts addressed this concern.<sup>22</sup> In these reports, judicial committees<sup>23</sup> discussed the effects of gender bias on judicial interaction with litigants and on judicial decision-making.<sup>24</sup> The committees concluded that the effects of gender bias on judicial decision-making limit the ability of women to receive a fair trial.<sup>25</sup> The appellate

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19. A reversible error is an error so substantial that it reasonably might have prejudiced the complaining party such that an appellate court must render the judgment void.

20. *Iverson*, 11 Cal. App. 4th at 1501, 15 Cal. Rptr. 2d at 74.

21. *Id.* at 1502, 15 Cal. Rptr. 2d at 74.

22. NINTH CIRCUIT REPORT, *supra* note 1; JUDICIAL COUNCIL OF CALIFORNIA, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS (Draft 1990) [hereinafter CALIFORNIA REPORT]; NATIONAL CENTER FOR STATE COURTS, PROCEEDINGS OF THE NATIONAL CONFERENCE ON GENDER BIAS IN THE COURTS (1990) [hereinafter GENDER BIAS IN STATE COURTS]; MARYLAND SPECIAL JOINT COMMITTEE, GENDER BIAS IN THE COURTS (1989) [hereinafter MARYLAND REPORT]; LYNN H. SCHAFRAN, THE FOUNDATION FOR WOMEN JUDGES, OPERATING A TASK FORCE ON GENDER BIAS IN THE COURTS (1986) [hereinafter FOUNDATION FOR WOMEN JUDGES].

23. In her article *Why A Women's Law Journal/Law Center Experience: Episode XV/The Sequel/The Movie/Film at 11:00*, 1 UCLA WOMEN'S L.J. 11 (1991), Sheila J. Kuehl gives a succinct account of the history of the CALIFORNIA REPORT, *supra* note 22, including who composed the judicial committee.

24. Judicial decision-making includes judicial case management and doctrinal decision-making. Case management includes decisions relating to docketing, allowing parties to develop their cases, and controlling courtroom conduct. The doctrinal decision-making in *Iverson* involved the validity of the premarital agreement. For further discussion of how gender bias affects case management, see NINTH CIRCUIT REPORT, *supra* note 1, at 115-19, and CALIFORNIA REPORT, *supra* note 22, at Tab 4.

25. *E.g.*, NINTH CIRCUIT REPORT, *supra* note 1, at 70 (noting that judges in immigration, federal benefits, and employment law cases systematically questioned the credibility of female parties and witnesses).

court in *Iverson* seized the opportunity to demonstrate how the trial judge's gender bias affected judicial decision-making. The reversal, necessary because the judge denied Cheryl a fair trial based on her gender, set a precedent which may reduce the occurrence of such bias in future decisions.

Merely by citing the judicial reports on gender bias, the appellate court helped efforts to reduce gender bias in judicial decision-making.<sup>26</sup> The court enhanced the authority of the reports by treating them as relevant judicial readings, rather than as unimportant academic reports. Relying on the reports to specifically define gender bias and to support the position that gender bias does affect judicial decisions, the court identified an authority from which judges can evaluate their own behavior and decision-making. This dissemination of information by the appellate court, combined with the recognition that the information is pertinent to judicial decisions, further enforces the conclusion that gender bias has no place in the courtroom.

Despite the progress made by the *Iverson* decision, the larger problem for women seeking fair trials remains untreated. Judicial decisions influenced by gender bias, but not exposed in a judge's statement of decision, are generally not reversible.<sup>27</sup> Had the trial judge in *Iverson* refrained from giving a statement of decision, the appellate court would have had nothing to reverse, since it was within the trial judge's discretion to find Cheryl an unbelievable witness.<sup>28</sup> Thus, the risk remains that judges whose decisions are affected by gender bias and who want their decisions upheld need only refrain from making statements of decision.

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26. The appellate court used the CALIFORNIA REPORT, *supra* note 22, for a definition of gender bias, and quoted from the NINTH CIRCUIT REPORT, *supra* note 1. *Iverson*, 11 Cal. App. 4th at 1499 n.3, 15 Cal. Rptr. 2d at 72 n.3.

27. Actually, this problem was not mentioned in the appellate court's majority opinion in *Iverson*. However, in his concurring opinion, Justice Moore mentions the mirror of this concern when explaining that "[u]nder the majority's approach, a trial judge may well be reluctant to explain his or her reason for a ruling for fear the comments would later be taken out of context by a creative appellate court and used to reverse the decision . . ." 11 Cal.App.4th at 1504, 15 Cal. Rptr. 2d at 76 (Moore, J. concurring). It is interesting that Justice Moore was concerned with reversals based on comments taken out of context. Many see the real concern as there being less opportunity for reversal and therefore more frequent affirmations of decisions made with gender bias. This greater frequency results from the silence of trial judges, leaving undisclosed the gender bias which consciously or subconsciously affects their decisions. See NINTH CIRCUIT REPORT, *supra* note 1, at 44 (quoting participant as saying that "[g]ender bias is alive and well. It has just gone underground.").

28. 11 Cal. App. 4th at 1505, 15 Cal. Rptr. 2d at 76 (Moore, J. concurring).

In response to this decision, judges may change their outward behavior (by not making oral or written statements) without changing their decision-making. This result, however, will not help the plight of women seeking fair trials. Judgments may continue to result from the same destructive gender bias, but when the bias is hidden in elusive silence, women are powerless to eliminate it or correct its effects.

A more effective method of eliminating gender bias in judicial decision-making would be to implement mandatory judicial education. Existing judicial education programs do not require mandatory entering or continuing education other than state bar requirements for attorneys acting as judges in each jurisdiction. Current voluntary state and federal judicial education programs have only recently begun to include issues of gender bias. The Federal Judicial Center now provides workshops and seminars on gender bias in the courts, but these forms of judicial education are not mandatory.

Gender bias task forces for state and federal courts have concluded that judicial education is the most vital and effective tool for correcting gender bias.<sup>29</sup> Attorneys, experts, and even judges themselves support such education.<sup>30</sup> The Judicial Council of the Courts of California adopted a new Standard of Judicial Administration effective January 1990, which states that "judges should consider participation [in continuing education] to be an official judicial duty."<sup>31</sup> Despite this support, and even with this new standard, judicial education is not mandatory.

The resistance that judges show towards gender bias education renders the voluntary system of judicial education ineffective. Judges consistently prefer to attend programs on substantive legal topics or practical case management techniques.<sup>32</sup> Relying on judges to self-regulate a problem they deny exists is clearly an inef-

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29. CALIFORNIA REPORT, *supra* note 22, Tab 9, at 28; GENDER BIAS IN STATE COURTS, *supra* note 22, at 53; MARYLAND REPORT, *supra* note 22, at 128; THE FOUNDATION FOR WOMEN JUDGES, *supra* note 22, at 63.

30. CALIFORNIA REPORT, *supra* note 22, Tab 9, at 6.

31. *Id.* at 11. The Judicial Council of the Courts of California adopted this standard to provide guidelines on the amount of time judges should spend on education, to prescribe the objectives of judicial education, and to encourage presiding judges to establish educational plans for judges in their courts. Thus, as guidelines, these standards are not binding on California judges. *Id.*; see also JUDICIAL COUNCIL OF THE COURTS OF CALIFORNIA, STANDARDS OF JUDICIAL ADMINISTRATION, standard 25 (1990).

32. CALIFORNIA REPORT, *supra* note 22, Tab 9, at 7; GENDER BIAS IN STATE COURTS, *supra* note 22, at 60, 69; THE FOUNDATION OF WOMEN JUDGES, *supra* note 22, at 54.



fective way to eliminate gender bias in judicial decision-making. For example, there is no way to ensure that the trial judge in *Iverson* will read any of the literature cited by the appellate court. Nor is there any indication that the *Iverson* judge will refrain from using gender bias in future decisions. A more likely result of the appellate court's holding is that the *Iverson* judge will simply remain silent.

Mandatory judicial education on gender bias will force judges to confront their gender bias, and thus positively affect more judges than does the current system of voluntary self-improvement. Mandatory education that includes information on how gender bias enters judicial decision-making is critical to ensuring fair trials for women, and therefore should be implemented at both state and federal levels.

### III. CONCLUSION

While Cheryl Iverson won one small victory, much work is still needed. The appellate court's reversal sets an important precedent, requiring that statements of decision be free of gender bias. However, this rule alone is insufficient to yield fair trials for all women. Without the support of mandatory judicial education, the rule in *Iverson* is limited to the degree that trial judges remain silent and not reveal their biases. Thus, without mandatory judicial education, gender bias will continue to limit women's right to a fair trial *sotto voce*, while hiding underground.