

# ARTICLES

## Gender Bias in the Courts: Social Change Strategies

KAREN CZAPANSKIY\*

In recent years, many states and state court systems have studied gender bias in the judicial system. Reports have been issued in New Jersey,<sup>1</sup> New York,<sup>2</sup> Massachusetts,<sup>3</sup> Minnesota,<sup>4</sup> Rhode Island,<sup>5</sup> Nevada,<sup>6</sup> Florida,<sup>7</sup> and California,<sup>8</sup> as well as Maryland.<sup>9</sup> Studies are underway in 17 additional states and the District of Columbia.<sup>10</sup> What every study has found is a need for reform in order to eliminate the impact of gender bias on judicial processes and decisionmaking.<sup>11</sup>

---

\* Associate Professor, University of Maryland Law School. B.A., 1969, University of California at Berkeley; J.D., 1973, Georgetown University Law Center. Many thanks to Professors Jane Murphy, Richard Boldt, Taunya Banks and Jana Singer for their responses to earlier drafts of this article. I also want to thank Virginia Nuta, J.D., University of Maryland 1990, for generously sharing her wealth of knowledge about child support.

1. NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS, *The First Year Report* (1984) [hereinafter cited as NEW JERSEY I]; NEW JERSEY SUPREME COURT TASK FORCE ON WOMEN IN THE COURTS, *Second Report* (1986) [hereinafter cited as NEW JERSEY II]; *Wikler and Schafraan, Learning From The New Jersey Supreme Court Task Force On Women In The Courts: Evaluation, Recommendations, Implications for Other States* (1989) [hereinafter cited as NEW JERSEY III].

2. New York Task Force on Women in the Courts, *Report, reprinted in Report*, 15 FORDHAM URB. L.J. 8 (1986-87) [hereinafter NEW YORK REPORT].

3. COMMONWEALTH OF MASSACHUSETTS, REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT (1989) [hereinafter cited as MASSACHUSETTS REPORT].

4. MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, 1989 *Final Report, reprinted in* 15 WM. MITCHELL L. REV. 825 (1989) [hereinafter MINNESOTA REPORT].

5. RHODE ISLAND COMMITTEE ON WOMEN IN THE COURTS, *Final Report* (1987) [hereinafter cited as Rhode Island Report].

6. NEVADA SUPREME COURT GENDER BIAS TASK FORCE, *JUSTICE FOR WOMEN* (1989) [hereinafter cited as NEVADA REPORT].

7. FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION, *Final Report* (1990) [hereinafter cited as FLORIDA REPORT].

8. CALIFORNIA JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, *ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS (Draft Report, 1990)* [hereinafter cited as CALIFORNIA REPORT].

9. MARYLAND SPECIAL JOINT COMMITTEE, *GENDER BIAS IN THE COURTS* (1989) [hereinafter cited as MARYLAND REPORT].

10. Arizona, Colorado, Connecticut, Georgia, Hawaii, Illinois, Louisiana, Michigan, Montana, Nebraska, Nevada, New Mexico, North Dakota, Utah, Vermont, Washington and Wisconsin. National Conference on Gender Bias in the Courts, *Conference Notebook 4-1* (1989) (conversation with Professor Bari Burke (Sept. 1990); conversation with Professor Catherine Klein (Sept. 1990)).

11. *See, e.g.*, MASSACHUSETTS REPORT 1 (gender bias must be eliminated from court system);

With few exceptions, the recommendations of state committees for curing gender bias fall into two categories: educate participants in the judicial system (judges, lawyers, court personnel, law faculty and students, etc.)<sup>12</sup> and change the legal standards to restrict the degree to which judges can rule against women.<sup>13</sup> Without being critical of what the study committees have devised, I think the need remains to analyze whether other options should be explored. While some gender bias problems are susceptible to only one or the other of these attacks, others are susceptible to both, others to neither, and still others to a third type of attack. What I seek to do in this article is develop a typology of judicial gender bias problems and problem-makers. I then evaluate alternative types of solutions from a theoretical and practical basis with respect to one type of problem, that of legal interpretive bias.<sup>14</sup>

Problems identified by gender bias studies fall into three rough categories: courtroom conduct, evidentiary perception, and legal interpretation. In the first category, studies find that male judges and lawyers treat female judges, judicial candidates, attorneys, parties and witnesses differently and worse than they treat males.<sup>15</sup> Responses to the Maryland surveys, for example, indicate women lawyers may be referred to informally, either by their first name or by an inappropriate term, such as "dearie."<sup>16</sup> They may see their

---

NEVADA REPORT 6 (women suffer injustices at the hands of the legal system); NEW JERSEY I 3 (underlying attitudes which give rise to gender bias will not take care of themselves); NEW YORK REPORT 15-18 (judicial and political leadership and professional legal community must become active in eliminating gender bias).

12. *See, e.g.*, MARYLAND REPORT 20-21 (recommend education of judges and court personnel); MASSACHUSETTS REPORT 121 (judicial training programs should include gender bias sessions); MINNESOTA REPORT 864, 868-69 (judicial education programs recommended); NEVADA REPORT 82, 86 (need to encourage community education programs); NEW JERSEY III 18-24 (sustained judicial education required to effect change); NEW YORK REPORT 113 (law schools should include gender bias information in family law courses).

13. *See, e.g.*, MARYLAND REPORT 73 (recommend legislation concerning awarding of alimony); MASSACHUSETTS REPORT 139 (should include gender bias instruction in jury instructions); MINNESOTA REPORT 857 (recommendations for judges in awarding child support); NEVADA REPORT 77, 82-83 (recommendations for how judges should decide child custody and domestic violence cases); NEW JERSEY III 43 (recommendations concerning gender bias in judicial response to damages, domestic violence, juvenile justice, matrimonial law and sentencing); NEW YORK REPORT 112-13 (recommend legislation that requires judges to state in writing the factors they considered in child custody disputes).

14. Because I served as reporter for the Maryland study committee, most of the data and examples I draw on are from Maryland. Most of the other studies report the same or similar data and experiences and are cited where pertinent.

15. *See, e.g.*, CALIFORNIA REPORT ch. 4 (pervasive gender bias by judges exists); MARYLAND REPORT ch. 7 (women lawyers, parties, witnesses and jurors treated differently because of their sex); MASSACHUSETTS REPORT 141-70 (gender affects manner in which judges, attorneys, and other court participants are treated); MINNESOTA REPORT 934-36 (women judges reported concern about conduct of attorneys, court personnel and other judges).

16. MARYLAND REPORT 250-51; *see, e.g.*, MASSACHUSETTS REPORT 149-53 (inappropriate forms of address to women attorneys); MINNESOTA REPORT 927 (women attorneys addressed by

arguments dismissed as unpersuasive before getting a fair hearing.<sup>17</sup> They may be ignored or treated disrespectfully.<sup>18</sup> Sometimes they are subject to unwelcome sexual joking, advances and even touching by judges and by lawyers.<sup>19</sup> Male lawyers may act hostilely to women who are candidates for judicial appointments.<sup>20</sup> They may take advantage of female attorneys and witnesses in the courtroom by subjecting them to inappropriate or demeaning forms of address, argument or examination.<sup>21</sup>

The second category of gender bias problems arises from evidentiary perception or misperception. Judges may hear evidence about experiences which women have and, quite simply, not understand it. They may be unable to see past their own stereotypes about how women and men are;<sup>22</sup> they may be unable to perceive as real or true experiences which are more common for women than for men;<sup>23</sup> they may be unable to accord the same credibility to

first names or by terms of endearment); RHODE ISLAND REPORT 16-17 (use of first names, terms of endearment and remarks about appearance or dress of female attorneys).

17. MARYLAND REPORT 260-61; *see, e.g.*, MASSACHUSETTS REPORT 163-66 (women have a difficult time establishing and maintaining credibility).

18. MARYLAND REPORT 120-22; *see, e.g.*, CALIFORNIA REPORT 22-24 (unequal extension of professional courtesies and double standard for women attorneys); NEW YORK REPORT 129-33 (sexist conduct toward female attorneys).

19. MARYLAND REPORT 124-26, 258; *see, e.g.*, CALIFORNIA REPORT 13-14 (offensive joking, comments and behavior by male judges); MASSACHUSETTS REPORT 149-51 (joking comments and improper touching of female attorneys, litigants and witnesses); MINNESOTA REPORT 928-29 (comments about physical appearance or apparel of women attorneys); Himelstein, *Lawyer Claims Spurned Judge Punished Client*, *Legal Times*, June 26, 1989, at 1, col. 4 (woman attorney claims judge allowed his personal feelings to compromise his impartiality); *see Surratt v. Prince Georges County*, No. 140 (Md. Ct. App. Sept. 4, 1990) (LEXIS, States Library, MD file) (where motion to recuse based on attorney's allegations that judge had made sexual advances to her and ruled against her client in retaliation for her rejection of his advances, judge cannot rule on the motion to recuse); Czapanskiy, *Sexual Politics and the Courtroom*, 3 MD. FAM. L. MONTHLY 3 (1990) (limitations on recourse available to lawyer sexually harassed by judge).

20. MARYLAND REPORT 104-5, 246. Male lawyers responded to Committee surveys with comments such as: "It happens all the time. Women are being selected because of their sex." "Judicial selection has tended to favor females out of a misplaced sense of imbalance on the bench." During the two and a half year period surrounding the survey, however, only three of the 36 people appointed to the bench were female. *Id.* *See also* MINNESOTA REPORT 935-36 (a sense within the legal community that "women's slots" for judicial appointments have been filled).

21. *See supra* note 15. In Maryland, as in the other states, women lawyers reported that they more frequently experience negative conduct by male lawyers than by male judges. For example, while about 44% of women lawyers reported judges addressing women lawyers by their first names, the figure was nearly 68% for the same conduct by male lawyers. MARYLAND REPORT 250-51. Forty seven percent of the female lawyers reported hearing sexist remarks or jokes by judges; 68% reported hearing such remarks from male lawyers. MARYLAND REPORT 255. *See* CALIFORNIA REPORT 32-34 (need to create judicial ethical duty so that judges will prevent others from engaging in gender biased conduct).

22. *See, e.g.*, FLORIDA REPORT 140-41 (widespread belief that sexual molestation victims precipitated such crimes); *id.* at 166-68 (societal myth that women choose a life of prostitution); MARYLAND REPORT 37 (gender biased attitudes about mothers and fathers in child custody disputes).

23. *See, e.g.*, CALIFORNIA REPORT 17 (judges unaware that child support guidelines are insufficient); FLORIDA REPORT 124-25 (expert testimony on Battered Woman's Syndrome excluded);

a woman's testimony as they would to a man's.<sup>24</sup>

A striking example in the Maryland study involved a woman who was seeking temporary protection from continued domestic violence. At the hearing on her petition, she testified that her husband had threatened her life with a gun. The judge rejected her request for help. The woman paraphrased for the Maryland Committee what the judge said:

I don't believe anything that you're saying . . . . The reason I don't believe it is because I don't believe that anything like this could happen to me. If I was you and someone had threatened me with a gun, there is no way that I would continue to stay with them. There is no way that I could take that kind of abuse from them. Therefore, since I would not let that happen to me, I can't believe that it happened to you.<sup>25</sup>

Similar evidentiary misperceptions occur when a judge finds himself unable to separate the individual woman or man before him from his stereotypes of how women and men behave. Such a judge may decline to consider a father a serious candidate for custody,<sup>26</sup> just as he may decline to find fit for custody a divorced mother who works or one who is sexually active.<sup>27</sup> Judges can also find it difficult to accord women the same credibility they accord men. In the Maryland surveys, for example, judges responded that they never require more evidence for a female litigant to prove her case than for a male litigant. However, over a fifth of female court personnel who observe courtroom proceedings and two-fifths of female attorneys responded that judges always, often or sometimes do exactly that.<sup>28</sup>

The third category of gender bias problems is legal interpretation, that is, when judges interpret legal authority that is not itself gendered in ways

MARYLAND REPORT 2-3, 9 (judges suggest that domestic violence victims should just "behave" in order to avoid violence).

24. *See, e.g.*, MARYLAND REPORT 114-15 (testimony of female witnesses and experts given less weight); NEW YORK REPORT 113-23 (credibility accorded female lawyers and litigants less than that accorded male lawyers and litigants).

25. MARYLAND REPORT 2-3.

26. *See, e.g., id.* at 279 (custody awards based on assumption that children belong with their mothers); MASSACHUSETTS REPORT 62 (fathers not receiving "fair and serious consideration by the court" when seeking child custody); MINNESOTA REPORT 857-58 (stereotypes that disadvantage fathers in custody disputes).

27. *See, e.g.*, MANITOBA ASS'N OF WOMEN AND THE LAW, GENDER EQUALITY AND THE COURTS 92-95 (1988) (in making custody decisions against the mother, the judge gave undue weight to the fact that the mother worked outside the home and had to utilize paid day care); MARYLAND REPORT 35-36 (mothers lost custody solely or primarily because they had sexual relations with another man after separating from their husbands); MASSACHUSETTS REPORT 63-65 (in making custody determinations, judges apply a double standard when considering parents' work outside the home, temporary relinquishment of custody, dating, and cohabitation); MINNESOTA REPORT 859 (judges penalize mothers who work outside the home, or they apply a double standard to mothers' personal behavior).

28. MARYLAND REPORT 262 (percentages reflect those respondents who expressed an opinion on the question).

which favor men over women. A telling example comes out of the Maryland statute providing for temporary protection from domestic violence. Under the law, a judge can order an abuser out of the home for a limited period of time.<sup>29</sup> The judge also can provide for custody of minor children, for counseling, and so on.<sup>30</sup> The statute's catch-all clause allows judges to order "any other relief as necessary."<sup>31</sup> When a victim of domestic violence asks a judge to invoke this clause to order temporary financial assistance to cover rent and food during the month when the primary breadwinner is out of the home, the typical response is no.<sup>32</sup> Judges often say they lack authority to provide such relief, despite the permissive language of the statute.<sup>33</sup> The beneficiary of this restrictive legal interpretation typically is male<sup>34</sup> and an adjudicated abuser of a female member of his household.<sup>35</sup> What the judge is awarding him should be called a battering bonus.

A second example also involves money. In Maryland, courts are empowered to order that child support payments begin as of the date the payee's petition was filed,<sup>36</sup> which can be anywhere from six weeks to six months before child support is awarded by a court. Rarely, however, do judges do that.<sup>37</sup> When pressing for an explanation, the Maryland Committee was told that judges did not want to start the father out in debt.<sup>38</sup> Of course, what is overlooked by this explanation is the fact that the custodial parent, usually the mother, is left solely responsible for the child's support between the time of the petition and the time of the award. Not only is she likely to be "starting out" in debt, but she is constitutionally entitled to be burdened with child support only to the extent of her proportional share of the economic resources of both parents.<sup>39</sup> Judicial concern for the financial situation of the noncustodial parent, usually a man, effectively places an extra and illegal burden on the custodial parent, usually a woman.<sup>40</sup>

---

29. MD. FAM. LAW CODE ANN. § 4-505(2)(i) (Supp. 1989) (30 days).

30. *Id.* § 4-506(e)(3).

31. *Id.* § 4-506(e)(5).

32. MARYLAND REPORT 283 (85% of female lawyers with a domestic relations specialization, 60% of male lawyers with a domestic relations specialization, and 58% of judges disagree with the statement that "when granting civil orders of protection, the courts issue support awards for dependents.")

33. MARYLAND REPORT 13 n.40.

34. R. GELLES & M. STRAUS, INTIMATE VIOLENCE 88-92 (1988); Frieze & Browne, *Violence in Marriage*, in FAMILY VIOLENCE 163, 180-83 (1989).

35. MD. FAM. LAW CODE ANN. § 4-506(d)(2) (Supp. 1989).

36. *Id.* § 12-101 (1984 & Supp. 1989).

37. See MARYLAND REPORT 51, 277 (retroactive child support rarely or never granted, despite long and seemingly unwarranted delays in scheduling hearings).

38. *Hearing Before the Special Joint Committee on Gender Bias in the Courts*, (Sept. 16, 1987) (testimony of Master Rita Rosenkrantz).

39. *Rand v. Rand*, 280 Md. 508, 516-17, 374 A.2d 900, 905 (1977); MARYLAND REPORT 45.

40. Of course, judges need not be blind to the gendered consequences of their legal interpreta-

Of the three categories of problems, I think legal interpretation and evidence perception will be the hardest to resolve. When it comes to courtroom conduct, judges have an investment in appearing impartial which, I believe, they will work to protect.<sup>41</sup> Certainly, the efforts of the original Maryland Committee and the successor Special Committee on Gender Equality to educate judges about proper courtroom conduct already have met with some success, if only on the anecdotal level. A follow-up study conducted in New Jersey concluded that courtroom conduct problems have diminished since judicial education efforts were undertaken pursuant to that state's gender bias study.<sup>42</sup>

What I want to address for the remainder of this article are social reform strategies relating to the legal interpretation problem. Evidence perception problems, it seems to me, may be susceptible to a similar analysis. The issues and their synergies are different enough, however, that separate consideration is needed.

Gender bias study committees recommended essentially two types of reform to address problems of biased legal interpretation: change the law so that less interpretation of any type, whether biased or unbiased, is possible, or change the people doing the interpretation through judicial education. I think the social reform challenges of gender bias require a more complex consideration for three reasons: first, *per se* rules can be problematic in their creation and execution; second, not all judges are alike in their susceptibility to change; and third, changing values may be as necessary as changing the law and the lawgivers.

The social reform approaches suggested by gender bias studies can be tested by looking at their impact on the problem of inadequate child support awards. Child support is a particularly intriguing problem to consider because many advocates for women across the country think that legal changes affecting child support have been, on the whole, a success. Furthermore,

---

tions. The Delaware Supreme Court, for example, recently reversed a trial court's refusal to impute the pre-incarceration income of a noncustodial father for the purpose of calculating his child support obligation. The trial court acted out of concern for the father's circumstances when he was released from prison. If the child support award were computed based on an imputed pre-incarceration income, the father would be "heavily in debt when he is released from prison — a time when he should not be pressured." The Supreme Court responded that the "more appropriate concern is the welfare of Jason during the father's incarceration . . . . It would be inequitable to have the support obligation discharged by one parent [while the other parent's assets are protected]." Delaware Div. of Child Support Enforcement *ex rel.* Harper v. Barrows, 16 Fam. L. Rep. (BNA) No. 18, 1205, 1209-10 (Feb. 21, 1990).

41. The Maryland Select Committee on Gender Equality, a committee of judges and lawyers appointed in 1989 to work on issues relating to gender in the judiciary, undertook a program of judicial education on courtroom conduct. On the whole, the response of the judges and the teaching teams has been quite positive.

42. NEW JERSEY III 65.

child support provides an almost unique laboratory because, of all the legislative recommendations made by the Special Joint Committee on Gender Bias in the Courts, only legislation related to child support has passed.<sup>43</sup> Most importantly, the nature of the changes affecting child support are exactly of the type recommended by many gender bias committees: judicial discretion has been reduced, while standardization, in the form of presumptive guidelines, has been increased.

I must preface my analysis of child support guidelines by previewing my conclusion because I fear that readers who have worked hard and long for child support reform will find my criticism of the guidelines approach so objectionable that we will not be able to pursue this conversation further. I conclude that a guidelines regime is a necessary, but not a desirable, solution to the insurmountable problems created by judges who have shown themselves incapable of acting fairly and impartially toward women with children with basic human needs. I also conclude with the hope that the values of the judges and the general public on these issues will change sufficiently within our lifetimes to allow guidelines to be abolished.

In Maryland, as in most states, child support is based on an analysis of two factors: the child's needs and the parents' resources.<sup>44</sup> Prior to the enactment of guidelines, judges had broad discretion to manipulate these factors when deciding the amount of child support to be awarded.<sup>45</sup> As the Maryland Report showed, judges who were permitted to exercise this broad discretion were, in general, entering very low awards. A typical interim award in one county, for example, was \$25 a week per child.<sup>46</sup> In other cases, less was awarded for child support than the paying parent spent each month for his car or his housecleaning service.<sup>47</sup>

Maryland was not alone in the abysmal level of child support awards. Nationally, in 1983, the average amount of child support collected by the custodial parent was \$195 a month.<sup>48</sup> Because low child support affects the

---

43. Md. S.B. 633, 396th Leg., 1990 Md. Laws, ch. 58.

44. *See, e.g.*, *Rothschild v. Strauss*, 257 Md. 396, 397, 263 A.2d 511, 511 (1970) (affirming chancellor's decision to increase child support payments, based on estimate of child's financial needs and the social and financial status of her father and mother); *Wagshal v. Wagshal*, 249 Md. 143, 147, 238 A.2d 903, 906 (1968) (principal considerations in making child support award are the needs of the child and financial circumstances of the father); *Kramer v. Kramer*, 26 Md. App. 620, 636, 339 A.2d 328, 339 (1975) (supporting parent's financial ability and needs of children are controlling factors in determining child support award).

45. *See, e.g.*, *O'Connor v. O'Connor*, 22 Md. App. 519, 525, 323 A.2d 632, 636 (1974) (order increasing award of child support to pay for private parochial high school); *Richardson v. Richardson*, 17 Md. App. 665, 684, 304 A.2d 1, 9 (1973) (appellate court refused to disturb child support award of lower court when award was not clearly erroneous).

46. MARYLAND REPORT 47.

47. *Id.*

48. CALIFORNIA REPORT 12.

national welfare program called Aid to Families with Dependent Children (AFDC), the federal government has some concern about a child becoming impoverished as the result of the absent parent providing insufficient financial support. In 1984, Congress amended the law governing AFDC to require states to enact guidelines for the determination of child support by the end of 1987.<sup>49</sup> Maryland, as usual a bit out of step, was the last state to comply: guidelines were enacted in January of 1989.<sup>50</sup>

Consistent with the national goals, a major objective of the Maryland guidelines was simple: to raise the amounts of money which noncustodial parents paid to custodial parents for the support of their mutual children.<sup>51</sup> Also consistent with the national methodology, Maryland sought to achieve the objective by reducing the degree of discretion available to judges in determining a child's needs and the parents' resources. Instead, the guidelines provide a method and a standard for determining the child's needs: the incomes of the parents are added together, and every child whose parents' incomes total X dollars is deemed to have a need level of Y dollars.<sup>52</sup> The ability of the parents to pay is also determined according to general rules: the Y dollars representing the child's needs are divided by the percentage of the total income which each parent contributes. In essence, that is the child support award, give or take a few additional steps.<sup>53</sup>

As a matter of theory, replacing a discretionary child support regime with a guidelines regime should be a positive development for women. In this situation, women, as economically disadvantaged custodial parents, cannot afford to hire lawyers to present complicated evidence on difficult and perhaps unknowable issues such as how much a child "needs" or the level of "resources" available to the child's parents.<sup>54</sup> At the same time, men, as economically advantaged workers and noncustodial parents, can more easily afford to hire lawyers to defend against child support claims, and they can use those lawyers to delay resolution of the claims for a long enough period

---

49. 42 U.S.C. § 667(a) (Supp. 1987).

50. Child Support Guidelines, ch. 2, 1989 Md. Laws 8.

51. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH AND HUMAN SERVS., DEVELOPMENT OF GUIDELINES FOR CHILD SUPPORT ORDERS II - i (1987).

52. MD. FAM. LAW CODE ANN. § 12-204(e) (Supp. 1989).

53. *Id.* § 12-201(b)-(k).

54. Perhaps in recognition of the unbalanced access to legal services, states are required to provide legal assistance with respect to child support. 42 U.S.C. § 654(6) (Supp. 1987). While ameliorating some of the problem, this federal program has not eliminated the need for private counsel, who remain unaffordable for many women. *See, e.g.*, MASSACHUSETTS REPORT 20-22 (women's disproportionate lack of access to adequate legal representation in family law matters); RHODE ISLAND REPORT 46 (process of securing child support places the burden of proving noncompliance entirely on the custodial parent); Dodson & Horowitz, *Child Support Enforcement Amendments of 1984: New Tools for Enforcement*, 10 Fam. L. Rep. (BNA) No. 50, 3051, 3057 (October 23, 1984) (low cost child support enforcement services available to clients unable to pay for such services).



of time to starve the mothers into compromise. They can use a custodial threat to the same end.<sup>55</sup> In short, custodial mothers are oppressed relative to noncustodial fathers and oppressed people can be further oppressed by a judicial system characterized by discretionary case-by-case decisionmaking.<sup>56</sup> When David meets Goliath, David is helped by the simplicity of his weapon.

At a practical level, adopting guidelines seems like an unqualified success for women because, first and foremost, custodial parents, predominantly women, will be provided with more money for the support of their children. The standard of living of the female-headed custodial family will improve.<sup>57</sup> At the same time, the equity between the parents will improve. Under the law in Maryland, as in many states, parents are required to contribute to the support of their children proportionally to their economic resources.<sup>58</sup> When a child support order is entered which is too low, the custodial parent is overburdened; she will have to spend a disproportionately large percentage of her resources to meet the needs of the child. When the amount of child support increases, the burdens become more equitably distributed.<sup>59</sup>

Procedurally, although the evidence is not yet clear, the change may be positive as well because child support decisions made pursuant to guidelines can be easy and predictable and therefore, fast. Very few facts are needed for decisions, and judges can determine the right result just by fitting those few facts into a relatively simple framework.<sup>60</sup> The simplicity also means that lawyers representing parents can predict more accurately and with greater

---

55. See, e.g., CALIFORNIA REPORT 20-24 (interplay between child custody and support adversely affects the parent with primary custody, usually the mother); MARYLAND REPORT 52 (mother's pre-hearing impoverishment may push her into settling with the father for a lower child support award); *id.* at 53 n.26 (father's counterclaim for custody delays the enforcement of child support); MINNESOTA REPORT 862-63 (fathers seek joint custody as a means of securing economic leverage over mothers in divorce).

56. See, e.g., Czapanskiy, *Time Limits Under the Freedom of Information Act: Another Problematic New Property Reform*, 44 MD. L. REV. 38, 41 (1985) (rejection of bureaucratic discretion as a central tenet of public administration); Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1400 (alternative dispute resolution increases the risk of unfair treatment for minority disputants, women, and the poor); Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 1, 27-28 (1985) (Charles Reich proposed repudiating administrative discretion).

57. Dodson & Horowitz, *supra* note 54, at 3059. See OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 51, at II-105-12 (child support awards higher under new guidelines).

58. *Rand v. Rand*, 280 Md. 508, 517, 374 A.2d 900, 905 (1977).

59. *Id.*; see MARYLAND REPORT ch. 3 (overall inequity against women in child support awards).

60. See *Gates v. Gates*, 83 Md. App. 661, 577 A.2d 382 (1990) (use of numerical child support guidelines have replaced former case by case factual analysis). At least in some jurisdictions in Maryland, however, domestic relations masters still require the parties to submit lengthy and detailed financial statements containing information not necessary for the application of the guidelines. Conversation with Professor Jane Murphy (May 1990). Cf. Dodson & Horowitz, *supra* note 54, at 3059 (requirement that states develop guidelines for child support awards does not necessarily make the attorney's task easier).

certainty what the judge's decision will be. Clients who hear these predictions can then settle their cases with greater assurance that the amounts would be the same after a hearing. Under the discretionary regime, on the other hand, outcomes cannot be so easily predicted, and the paying partner, who can hope for interpretive bias favoring a male litigant, is encouraged to wait for a judicial determination of the support obligation.<sup>61</sup>

Nonetheless, I have doubts about whether guidelines are the best solution for this problem, and my doubts are both theoretical and practical. At a theoretical level, what discretion provides and *per se* rules eliminate is contextualized decisionmaking that is adapted to the relationships between and among the particular parties. While some feminists have made much of contextualism and the importance of relationships,<sup>62</sup> little has been heard about it with respect to child support guidelines, and that worries me. It worries me particularly in this arena because the *per se* rules are not being written by feminists who might seriously inquire into the lives and experiences of the people affected by the rules before attempting to write them, and who might try to take into account at least the most common experiences which many of these people probably share.<sup>63</sup> Instead, the people writing the *per se* rules are state legislators who are no more likely than judges to be curious or well-informed about the realities of the lives of custodial families, and who are more likely to identify with the experiences and lives of the noncustodial parents who at least share the male gender.<sup>64</sup>

What courts and legislators say and think they know about the lives of parents and children often seems full of myths and misperceptions, so their ability to formulate *per se* rules that accurately represent the reality of many,

---

61. See MARYLAND REPORT 52 (delay in child support hearings and denial of retroactive support discriminates against mothers).

62. See, e.g., D. RHODE, JUSTICE AND GENDER (1989) (feminist examination of traditional legal approaches within broader historical, philosophical, and socio-economic frameworks); Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L.J. 355 (1989) (feminist critique of prevailing discourse must refuse to venture into abstraction unrelated to the common experiences of women); Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988) (feminists emphasize connection and interrelatedness, while traditional judicial aspirations are deeply suspicious of relationships).

63. See D. RHODE, *supra* note 62, at 147-60 ("equal" division of marital assets in divorce as currently applied ignores the unequal needs, responsibilities, and opportunities confronting contemporary divorced men and women); Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 837-43 (1990) (feminists ask "the woman question" in law to identify the gender implications of rules and practices which might otherwise seem neutral or objective).

64. The writers of the California gender bias study speculated that the inclination of judges to identify with particular parties in domestic disputes because of their own family histories and experiences might affect their decisionmaking, so judges were asked about their marital status. It turned out that approximately a third had experienced divorce. CALIFORNIA REPORT ch. 5, at 3-4. Given that nationally fewer than 10% of judges are female, most of these experiences would have been from the perspective of the husband or father, not from the perspective of the wife or mother. MARYLAND REPORT 98 n.7.

much less most, parents and children seems to me questionable.<sup>65</sup> For example, when it was determined that it was unconstitutional under the Maryland Equal Rights Amendment for only the father to be charged with the duty of financial support for a child, the duty was extended to mothers, and the Maryland Court of Appeals decided that the obligation properly should be distributed proportionally to the financial resources of the parents.<sup>66</sup> As study after study makes clear, however, a decision like this ignores the reality of the lives of most mothers and children insofar as it ignores the unpaid labor performed for the children by their female caregivers.<sup>67</sup> Following the lack of insight demonstrated by the Court of Appeals, the Maryland guidelines give no credit for that labor either. At the same time, the financial child support duty which the guidelines impose on the custodial parent may interfere with her ability to perform nonfinancial support activities.<sup>68</sup>

In addition, the Maryland guidelines, like those of many states, require the entry of a minimum child support order in the situation where a noncustodial parent is earning too little money to support even himself.<sup>69</sup> What such a requirement ignores is the possibility that these parents may be able and quite willing to contribute nonmonetary support to the child but are motivated to desert them entirely because of their inability to meet the monetary support which is demanded.<sup>70</sup>

The minimum child support order is having an unexpected adverse impact on a small group of women as well: those who give up children to the foster care system because they are homeless. Although such mothers have demon-

---

65. See, e.g., S. OKIN, *JUSTICE, GENDER, AND THE FAMILY* (1989) (exclusion of marriage and the family from most discussions of justice impedes the potential for a fully humanist theory of justice); Czapanskiy, *Child Support and Visitation: Rethinking the Connections*, 20 Rutgers L.J. 619, 635 (1989) (some judges agree that other, questionable interests sometimes take priority over interests of children and parents when resolving divided families' child rearing problems).

66. *Rand v. Rand*, 280 Md. 508, 516-17, 374 A.2d 900, 905 (1977).

67. A recent example of the important and growing body of literature concerning such unpaid labor is A. HOCHSCHILD, *THE SECOND SHIFT* (1989).

68. See Czapanskiy, *Giving Credit Where Credit is Due: The Role of the Noneconomic Contribution of the Physical Custodian in Establishing Child Support*, in *CRITICAL ISSUES, CRITICAL CHOICES: SPECIAL TOPICS IN CHILD SUPPORT GUIDELINES DEVELOPMENT* 144-45 (1986) (custodial parent, who provides a disproportionate share of nurturance, is likely to be disadvantaged in the labor market and suffer economically); Williams, *Feminism and Post-Structuralism*, 88 MICH. L. REV. 1776, 1788-89 (1990) (maintaining the invisibility of work of women supports their continued oppression).

69. MD. FAM. LAW CODE ANN. § 12-204(e) (Supp. 1989). See *Lapeer County Dep't of Social Servs. v. Harris*, 16 Fam. L. Rep. (BNA) No. 27, 1315, 1322 (Mich App. Mar. 19, 1990) (noncustodial parent's general assistance welfare payments cannot be subject to withholding to satisfy child support obligation).

70. See BUSH INST. FOR CHILD AND FAMILY POLICY, *ESTIMATES OF NAT'L CHILD SUPPORT COLLECTIONS POTENTIAL AND THE INCOME SECURITY OF FEMALE-HEADED FAMILIES* 61-65 (1985) (absent fathers in North Carolina Child Support Enforcement program provide the mothers and children with assistance beyond that specified in the child support order).

strated their willingness to provide nonmonetary support for their children, foster care payments are not available to permit them to keep their families together, even when AFDC is insufficient. In a cruel twist of fate, however, such a mother can be charged with the expense to the state of having a foster family care for her own child.<sup>71</sup>

Many commentators are also troubled by the application of rights-based analysis<sup>72</sup> to problems involving women in and out of family situations. One source of criticism is that rights-based analysis is predominantly individualistic and therefore inappropriate to a family relationship where altruism and sharing should be the basis for responsible conduct.<sup>73</sup> Child support guidelines are paradigmatically rights-based in that each parent is required to provide a particular amount and type of support to the child, who is entitled to receive it. Each family member stands separate and apart from the others in most respects under the guidelines. A child and his or her caregiver both can be harmed by rights-based analysis because it has a way of relieving the non-custodial parent of responsibility.<sup>74</sup> The parent can say to him or herself (and often does, in my experience as a litigator in cases such as this): I've paid what the court ordered me to pay, so I don't have to think about buying him a toy, an extra pair of pants, or taking her to the zoo, no matter what his or her need.

Even if guidelines were not abstract and rights-based, they would still be problematic. One reason is that, given the social, economic and political place of women in this country right now, any issue affecting women's lives is an issue in the process of change.<sup>75</sup> Although most women with pre-school

---

71. MD. CTS. & JUD. PROC. CODE ANN. § 3-830 (1989); Young & Morse, *Where Do Homeless Children Sleep?*, MD. B.J., Mar.-Apr. 1990, at 24, 26.

72. See generally Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986) (children's rights should address the mutual needs and connections of children and adults); Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986) (potential of rights analysis to both advance and impede political struggle); Sherry, *Civic Virtue and the Feminist Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986) (recognition of a distinctly feminine jurisprudence ameliorates an overly individualist liberal paradigm).

73. See Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1505 (1983) ("The morality of altruism has been supposed to animate the family to the same extent that the morality of individualism has been supposed to pervade the marketplace").

74. Compare J. WALLERSTEIN & S. BLAKESLEE, *SECOND CHANCES* 237-44 (1989) (children of divorced parents still have emotional needs for absent fathers) with BUSH INST. FOR CHILD AND FAMILY POLICY, *supra* note 70, at 61-65 (absent fathers in North Carolina Child Support Enforcement program willing to provide the mothers and children with assistance beyond that specified in the child support order).

75. See B. BERGMANN, *THE ECONOMIC EMERGENCE OF WOMEN* (1986) (growing social and economic forces promoting women's emergence into paid work); A. HOCHSCHILD, *supra* note 67, at 239-56 (women's move into the economy is analogous to earlier changes in men's lives due to industrial revolution); Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male*

children are in the labor force today, that is a recent development.<sup>76</sup> What the impact of that change will be on child support laws a decade hence cannot yet be predicted, because changes in women's labor force participation must be viewed in tandem with changes in men's labor force participation; with changes in women's access to education; with changes in publicly supported and workplace daycare; with changes in housing and transportation, both public and private; with changes in women's political lives, and so on. Since we cannot know what the challenges to or the needs of women with children will be in a decade, and since we cannot adequately predict such challenges or needs until women's voices are better represented in public discourse, we may be premature in making alterations in the law in ways that obscure the need for further change. Guidelines are, unfortunately, an alteration of that type.

Because they incorporate large tables full of numbers that are claimed to be based on intricate economic research, guidelines have a mystique of perfection. They seem, therefore, immutable, even when they should be subject to ongoing criticism. For example, the Maryland guidelines are based on research which has been criticized for understating the costs of children.<sup>77</sup> If that criticism is valid, support amounts based on the research will be too low.<sup>78</sup> Critics who should be addressing such problems about the guidelines have been largely silent in the Maryland legislature this year, and one guess is that they have been defeated in advance by the appearance of fairness that any table full of numbers seems to impart.

Congress anticipated the immutability problem in 1988 when it required

---

*Battering of Women*, 1989 U. CHI. LEGAL F. 23, 23 (analyzing women's battering experiences under transitional conditions).

76. B. BERGMANN, *supra* note 75, at 10-11.

77. Polikoff, *Looking for the Policy Choices Within an Economic Methodology: A Critique of the Income Shares Model*, in *ESSENTIALS OF CHILD SUPPORT GUIDELINES DEVELOPMENT: ECONOMIC ISSUES AND POLICY CONSIDERATIONS* 27, 30-40 (1987).

78. *Id.* at 29. A similar criticism relates to the relative standards of living of the custodial and noncustodial households. An appropriate goal of child support is to help the custodial family achieve a standard of living close to that of the noncustodial household. At least, the custodial household should suffer no greater decline in its standard of living than the noncustodial household suffers. The average working mother earns approximately half of what the average working father earns. One would expect, given that one goal of guidelines is to protect a child's standard of living to the extent possible, that a good guideline would do its best job in the most typical situation. Maryland's guideline, however, does not come close to that result. Instead, it appears that the greatest equality comes in families where both parents earn roughly the same amounts of money, and much less equity between the households happens in the typical situation with the mother earning half of what the father earns. In this more typical situation, a noncustodial father's post-divorce standard of living rises approximately 75% on a per capita basis, while the standard of living of the custodial mother and children declines by approximately 25% on a per capita basis. MD. FAM. LAW CODE ANN. § 12-204(e) (Supp. 1989). See Czapanskiy, *Foreword*, in *ESSENTIALS OF CHILD SUPPORT DEVELOPMENT: ECONOMIC ISSUES AND POLICY CONSIDERATIONS* 5 (1987) ("Following divorce, it is not uncommon for the standard of living of the noncustodial parents to increase substantially").

states to adopt modification procedures.<sup>79</sup> But that is still only one problem area for guidelines. Other problems have been and will continue to be identified as guidelines are implemented and as the lives of children and their parents continue to change. The lack of political power that women can exercise, however, will make continuing revisions of guidelines politically impossible. It is instructive that advocates for women have only gotten as far as they have in changing child support law because they have been allied with the welfare bureaucracies of the federal and state governments. Where the alliance has broken down, advocates for women have not been as successful. For example, the Maryland guidelines law has a provision that reduces the child support available to a child's primary custodial household if the other parent is to have access to the child for 35% or more overnights a year.<sup>80</sup> Although this provision is unfair to custodial parents because it assumes a reduction in their expenses that is unrelated to their typical experiences,<sup>81</sup> custodial parents who are most likely to be affected are the ones who are not on welfare. Efforts to change the rule were not supported by the state welfare authorities, and that seems to have been an influential reason for why those efforts were unsuccessful in the legislature this year.<sup>82</sup>

If legislative changes to reduce discretion are not the best way to solve gender-based legal interpretive problems, one alternative is to try to solve the problems through the people who exercise the discretion, the judges. I think we learned some lessons about this alternative during the work of the Special Joint Committee on Gender Bias in the Courts.

As a preliminary point to understanding this alternative, it should be noted that in Maryland, as in most other states, about 90% of the judges and more than 80% of the lawyers are male. As I will be discussing, one's sex may not determine how one will interpret legal authority.<sup>83</sup> Nonetheless, it is significant that the overwhelming majority of judicial decisionmakers have not had the experiences more common to women than to men in our society, such as primary responsibility for children,<sup>84</sup> susceptibility to rape and violence, or relative economic powerlessness. It is also important to note that all

---

79. 42 U.S.C.A. § 667(a) (Supp. 1989).

80. MD. FAM. LAW CODE ANN. §§ 12-201(i)-(j), 12-204(l) (Supp. 1989).

81. See Getman, *A Critique of the Effect of Non-Traditional Visitation and Custody Arrangements on Child Support Awards Under Current Guidelines and Formulas*, in *ESSENTIALS OF CHILD SUPPORT GUIDELINES DEVELOPMENT: ECONOMIC ISSUES AND POLICY CONSIDERATIONS* 127, 132-36 (1987) (increased visitation may not decrease the costs to the custodial parent of raising the child).

82. Md. S.B. 634, 396th Leg. (1990); Conversations with Virginia Nuta, Esq. and Lois Stovall, Esq. (Mar. 1990). Legislative proposals addressing other recommendations of the Special Joint Committee on Gender Bias in the Courts have fared even less well than child support.

83. The California study, however, found some data suggesting that female judges may be more sensitive to certain experiences more common to women. CALIFORNIA REPORT 85-96.

84. S. OKIN, *supra* note 65, at 127.

but one of the judges who are female serve on trial court benches,<sup>85</sup> so they have fewer opportunities to educate other members of the judiciary about experiences common to women through the vehicle of appellate decisions.

So what did we learn about judges when studying gender bias in the courts? For the limited purpose of figuring out how to correct legal interpretive bias, it is possible to divide judges into three rough categories: the empathosaur, the sympathosaur, and the antagonistosaur, a.k.a. the misogynistosaur.<sup>86</sup>

Category one: the empathosaur. An empathosaur can, at an emotional level, imagine himself inside a woman's circumstances or experiences. For our purposes, the most important quality of the empathosaur is his or her ability to understand women's experiences so well that he or she can interpret the law in situations involving women without instinctively favoring men's needs or crediting men's experiences. Instinctively, but thoughtfully, he or she can include and credit women's experiences *and* men's experiences into his or her decisionmaking.

We saw several wonderful examples of the empathosaur at work during the hearings held by the Special Joint Committee. My favorite is a Baltimore attorney who had served on a judicial selection committee. He told the Special Joint Committee that female candidates for judicial appointments are asked about their husbands' occupations, their childcare arrangements, and their pregnancy-related hospitalizations. He talked about the discounting of public sector lawyering experience, which is more common among women lawyers, while experiences more likely to be characteristic of the careers of male attorneys, such as criminal jury trials, were highly valued.<sup>87</sup>

Two things about the statements of this lawyer indicate to me that he is an empathosaur. First, he understood that questions about a female applicant's number of children or her husband's occupation are wrong for both rational and emotive reasons. On the rational level, such questions are irrelevant: they have no substantive bearing on the candidate's qualifications for the bench. On the emotional level, he understood that people asking the questions will use the answers to derogate the female candidate's capacity to do the job. Since the answers will not be used in gender-neutral ways, asking the same questions of men would not cure the problem. The lawyer's statements convinced me that he was an empathosaur for another reason: they showed that he understood that a male had to tell the Special Joint Committee about

---

85. MARYLAND REPORT 97.

86. I decided that dinosaur analogy names were appropriate out of a sincere hope that over time the categories will become extinct. Many thanks to my life partner, Dana Czapanskiy, for his help in creating these neologisms.

87. *Hearing Before the Special Joint Committee on Gender Bias in the Courts*, (Oct. 13, 1987) (testimony of Albert Matricianni, Esq.).

problems in judicial selection. Remember, the Committee was half male and half female.

The second category is the sympathosaur. The difference between an empathosaur and a sympathosaur is small but important. An empathosaur understands instinctively the possibility of women having different experiences than men and can incorporate both into his decisionmaking. He or she does not need a female guide. The sympathosaur will accept the reality which the female guide explains to him or her, but he or she cannot get to those conclusions without such help.

It seems to me that a great many men are in the sympathosaur category, maybe even the majority. The majority may even be growing, because many issues affecting women's lives are pertinent to the lives of their own spouses, the lives of their own children, the lives of their own children's spouses, even the lives of their own neighbors. Certainly a lot of the Committee's discussions were among sympathosaurs.

I think the most impressive example of how sympathosaurs are educated was shown by how Committee members came to understand the phenomenon of female victimization by domestic violence. This is a subject completely foreign to most people, whether male or female, because we are not victimized ourselves, we do not know anybody who identifies herself as a victim, or we do not represent anybody that we know has been victimized, although some of them may have been. But it was particularly foreign to male members of the Committee who had never had the experience, common to women, of organizing their lives out of fear of violence.

During the Committee's seven hearings, we heard story upon story of domestic violence. Even someone willing to deny the phenomenon completely could not maintain that position after a time. About halfway through the hearings the most persuasive witness of all appeared. I quoted earlier what she said about the judge who did not believe she could have experienced what she said she did, because he would not have let such a thing happen to him.<sup>88</sup> Of course, there were sympathosaurs on our Committee who had felt exactly like that. When they saw the victim, however, they could not deny what their attitudes might mean to the person hearing those words. She completed their education with the rest of her statement:

I have just never forgotten those words . . . . When I left the courtroom that day I felt very defeated, very defenseless, and very powerless and very hopeless, because not only had I gone through an experience which I found to be very overwhelming, very trying and almost cost me my life, but to sit up in court and make myself open up and recount all my feelings and fear and then have it thrown back in my face as being totally untrue just be-

---

88. See *supra* text accompanying note 25.



cause this big man would not allow anyone to do this to him, placed me in a state of shock which probably hasn't left me yet.<sup>89</sup>

The danger with sympathosaurs is that their understanding of women's experiences is not deep or intuitive. They need education, in much the same way that well-meaning white people continue to need to be educated and reflective about issues involving race. That education must be based in the realization that sympathosaurs often will evaluate new information in light of experiences that differ from those of the women before them. Just as they have never been placed in fear by a spouse, they have never been asked while in the courtroom to identify themselves as a lawyer when the male lawyer in the courtroom was not asked. They do not have these experiences, and they need to hear about them from women who have. Sharing information with a sympathosaur is a lot like looking through a prism. Each time you try it, you get a slightly changed image.

The third group of judges is the antagonistosaurs, a.k.a. the misogynistosaurs. Some people call them neanderthals, but I am reluctant to libel neanderthals and have no evidence that they hated women. In any event, the term neanderthal is not quite precise. The problem with antagonistosaurs is not that they are antiques, nor that they have been superceded; the problem is that they are antagonistic to women.

Antagonistosaurs may believe that giving any help to women will work a detriment to men; they may be right, although that is an ungenerous and short-sighted way of looking at the world. They may simply believe that women's problems are no worse than men's. In my view, whatever its source, a belief system which leads people to denounce and trammel social change for women should be proclaimed for what it is.

Domestic violence victimization, being so foreign to the experiences of many of us, provides a showcase for antagonistosaur attitudes. A state's attorney talked to the Committee about a judge who was handling criminal prosecutions involving domestic violence. In one case, the victim accused her husband of kidnapping her, hitting her with a stun gun, and threatening her with death by gasoline fire. Her husband, while out on bond, followed and harassed the wife continually. Revocation of bond was denied, however, because the judge said the husband was permitted to follow his wife to gather evidence for divorce, and, after all, she was "being a fretful woman for worrying about that sort of thing because it was obvious he would not hurt her."<sup>90</sup>

When a judge is called upon to interpret legal authorities and the parties before him are male and female, it is clear that women litigants will receive

---

89. MARYLAND REPORT 3.

90. *Id.* at 5.

their best hearing when they are in front of an empathosaur and their worst hearing when they are in front of an antagonistor, all else being equal. The best hearing, as I see it, consists of a woman's voice being heard with sufficient understanding and willingness so that she has the same chance to persuade the decisionmaker of the rightness of her position as has a man.<sup>91</sup> I am not suggesting that she should be getting better treatment — only that her circumstances be understood well enough so that she does not get worse treatment simply because of being unknown, invisible or stereotyped. Sympathosaurs will, it seems to me, interpret legal authorities more or less impartially, depending on the degree to which they have been educated about women's experiences in the particular setting.

It is time now to return to the initial question: does the nature of judicial decisionmakers require that women seek legal reforms which limit judicial discretion? The answer may depend on a head count: Obviously, when the bench is occupied by many more empathosaurs than antagonistosaurs, women will not be harmed by entrusting more discretion to judges. What is less clear is what to do now and during the rest of the transition period, when many antagonistosaurs are on the bench. Assuming that the outcomes are better for women under a reduced discretion regime, are they better enough to justify the compromises they demand in terms of context and relationships?

One way to pose the question is to ask how much power an antagonistor retains to do his dirty work even under a reduced discretion regime for the determination of child support. The question is important because the answer may indicate how severe the reduction of discretion may need to be before significant improvement results. The greater the reduction of discretion on a complex subject such as child support, the greater the likelihood that the absence of contextualization or relational concerns will be problematic.

The structure of Maryland's child support guidelines calls for the decisionmaker to determine the actual incomes of the parents,<sup>92</sup> adjust those amounts if one of three types of expenses is shown,<sup>93</sup> add the incomes together, and determine the child's needs based on tables which set need levels for income levels below \$10,000 a month.<sup>94</sup> Additional amounts can be allocated for expenses such as child care, extraordinary medical expenses, and schooling.<sup>95</sup> The total is allocated between the parents proportional to their

---

91. See Resnik, *supra* note 62, at 1903 (requirement of fair judging — treating individuals without regard to race, status, gender, or class — is not being met).

92. MD. FAM. LAW CODE ANN. § 12-201(b)-(c) (Supp. 1989).

93. *Id.* § 12-201(d).

94. *Id.* § 12-204(e).

95. *Id.* § 12-204(g)-(i).

adjusted incomes unless a shared custody adjustment is required.<sup>96</sup> A shared custody adjustment occurs when a parent keeps a child overnight for more than 35% of the year, and it results in a different calculation and allocation of the support obligation.<sup>97</sup>

While this scheme sounds settled and determinate, in fact it leaves substantial room for interpretation. For example, income is defined to include a parent's "actual income," which means the money earned or received by a parent who "is employed to full capacity," and "potential income," which is applicable to those a court finds to be "voluntarily impoverished."<sup>98</sup> A broad interpretation of "voluntarily impoverished" would help custodial parents in many cases because it would permit a court to calculate what a noncustodial parent should be earning and base a child support order on that figure.<sup>99</sup>

The same language, however, permits an antagonistosaur to attribute income to a custodial parent who determines that she or he cannot provide sufficient care to a child while working full time.<sup>100</sup> The child may have special needs, or the custodial household may be in a neighborhood where after-school daycare is unavailable, but the antagonistosaur may be dismissive of the reasonableness of the custodial parent's decision. Thus, at the same time that narrow interpretation of "voluntarily impoverished" may assist a custodial parent who reduces his or her labor force attachment to care for a child or children, it may also permit an antagonistosaur judge to reduce the child support obligation of a noncustodial parent who reduces his or her labor force attachment primarily for the purpose of reducing his or her child support obligation. Language to limit a judge's discretion in the one situation could have a negative effect in the other situation.

A similar conundrum occurs in the section permitting adjustments to actual income. Adjustment is permitted for "preexisting reasonable child support obligations actually paid."<sup>101</sup> At least two rational readings of this language can be found. First, the preexisting child support obligation includes only those created by court order. Second, the preexisting child support obligation includes not only those created by court order but also those created by the sense of duty felt by a parent to a child residing in or out of

---

96. *Id.* § 12-204(k).

97. *Id.* §§ 12-201(i)(1), 12-204(l).

98. *Id.* § 12-201(b).

99. *See, e.g., Stern v. Stern*, 58 Md. App. 280, 287-88, 473 A.2d 56, 59 (1984) (appellate court failed to adjust support level of father who was not earning at his capacity); *Link v. Link*, 35 Md. App. 684, 690, 371 A.2d 1146, 1150 (1977) (lower court erred in not taking father's actual earning capacity into account in setting child support level).

100. The judge may not, however, find a parent to be "voluntarily impoverished" if he or she is caring for an infant two years or younger for whom both parties are responsible. MD. FAM. LAW CODE ANN. § 12-204(b)(2)(ii) (Supp. 1989).

101. *Id.* § 12-201(d)(1).

her or his household. The first interpretation will tend to benefit those men who are rights-oriented because they are less likely to voluntarily pay child support and, therefore, more likely to be subject to a child support order. On the other hand, a less rights-oriented man who pays child support out of a sense of obligation to his children or a woman (rights-oriented or not) who supports children from more than one relationship in her household is penalized. No order is entered to require a custodial parent to pay for the support of a child in her household,<sup>102</sup> nor do cooperative noncustodial parents get brought to court.

If sympathosaurs or empathosaurs allow adjustments for non-court-ordered support, antagonistosaurs can use the precedent to permit a noncustodial noncooperating parent to claim to be providing support voluntarily and to place an additional burden on the custodial parent to prove the untruth of that statement. Interestingly, the original version of the child support guidelines bill permitted adjustment only for court-ordered support,<sup>103</sup> and the language was changed when advocates for women noticed the possible anomaly. Nonetheless, antagonistosaur judges are reported to have given the language the more restrictive interpretation in cases involving custodial mothers.<sup>104</sup>

In both of these situations, the discretion which can be exercised by antagonistosaur judges is not substantially different from what those judges had before the creation of guidelines. While tightening the language in both sections is possible, and could protect women more, it also can have costs to women and to men who value relationships or duties that accord with responsibilities. The question is whether the costs exceed the benefits, or whether there are less restrictive alternatives which will increase child support awards to rational amounts without simultaneously destroying other pertinent values.

My tentative response is no. While restrictive alternatives reducing judicial discretion limit options that empathosaurs and sympathosaurs might develop that fairly benefit women, the dangers posed by antagonistosaurs continue to be too great. The primary benefit to women from guidelines, it must be remembered, is the bottom line. No matter how inclined to ignore, dismiss or disbelieve women's arguments, antagonistosaur judges can no longer easily award insultingly small child support awards. Simply increasing the amount of money women with children have can have a dramatic impact on the quality of life for the children and their mothers. In addition, increased child

---

102. In fact, even under Maryland's allocation scheme, no order is entered with respect to the support obligation of the custodial parent. Instead, he or she is "presumed to spend that parent's total child support obligation directly on the child or children." *Id.* § 12-204(k)(2).

103. Conversation with Paula Peters, Esq. (Jan. 1989).

104. Conversation with Lois Stovall, Esq. (Mar. 1990).

support will improve the equitable position of women in society generally relative to men. Once women have financially more secure lives, their political participation may increase as well, and that may have positive results on political questions important to women, such as the elimination of antagonists from the bench. In the meantime, the increasing number of men and women lawyers aware of the negative impact of antagonists also can help improve the situation of women litigants.

The difficult issue here, as in so many other problem areas facing women during this transition period, is how to increase the legal value of a sense of relationship and context without sacrificing financial certainty, which has so often been associated with abstract assertions of rights. I find myself returning to the sympathosaurus to explore how to accomplish these seemingly inconsistent results. Is it possible, I wonder, to draw out of people an eagerness to maintain many perspectives simultaneously when that is difficult and unrewarding work? Can one be sensitive to a right to financial security and an investment in relationships existing at the same time in the same person?

A limited piece of evidence that this optimistic scenario can be achieved is provided by several recent appellate decisions involving alimony. A study of alimony awards in one county and the evidence collected by the Gender Bias Committee demonstrated that indefinite alimony was routinely being denied to middle-aged displaced homemakers and that alimony awards when made were inconsistent and inadequate.<sup>105</sup> Alimony is not governed by numerical guidelines; instead, judges are required to evaluate a group of 11 factors,<sup>106</sup> and the range of their discretion is quite broad. One might assume that, given this broad discretion, alimony awards would not improve without changes in the statute. Nevertheless, in one of the recent cases, a judge had awarded alimony to a displaced homemaker in the amount of \$1,600 a month and was upheld on appeal;<sup>107</sup> in the other, a judge in a different county had awarded \$1,500 a month *pendente lite* alimony to an employed spouse because of the great differences between the incomes of the wife and the husband.<sup>108</sup>

If these awards had been typical and expected, I doubt the husbands would have been motivated to appeal. A dedicated reader of Maryland appel-

---

105. Bell, *Alimony and the Financially Dependent Spouse in Montgomery County, Maryland*, 22 FAM. L.Q. 225, 316 (1988); MARYLAND REPORT 72.

106. MD. FAM. LAW CODE ANN. § 11-106(b) (Supp. 1989).

107. Giesler v. Giesler, No. 89-302 (Md. Ct. Spec. App. filed Dec. 5, 1989) (per curiam).

108. Quinn v. Quinn, 83 Md. App. 460, 575 A.2d 764 (1990); see also Payne v. Payne, No. 89-1260 (Md. Ct. Spec. App. filed Mar. 27, 1990) (per curiam) (upheld award of indefinite alimony to wife, where she would have an "unconscionably disparate" standard of living if she survived on her own earnings alone); Pattison v. Pattison, No. 89-830 (Md. Ct. Spec. App. filed Mar. 26, 1990) (per curiam) (upheld award of \$400 a month indefinite alimony to wife, where wife claimed inability to work due to a rheumatic condition).

late decisions certainly would not have predicted either result.<sup>109</sup> Nonetheless, the orders were entered by judges whose discretion was not heavily fettered, and they were upheld on appeal. In addition, the rationale in each case rests in part on the specific context of the relationship of the husband and wife and their ongoing responsibilities to each other.

While these cases give me no reason to rethink everything about social change to eliminate gender bias in the courts, they should give a person pause because they are examples of legal interpretations that are favorable to women in a relatively broad discretionary regime. There also are interpretations that take into account relationship and context. It may be that the judges involved are part of the majority sympathosaur group who are educable and who took seriously the criticism of the Special Joint Committee. It also may be worth evaluating more closely the impact on women of legislative schemes that permit discretion but which also require attention to detail and interrelationship. Alimony is an especially promising area for such an inquiry because the actors are adults and somewhat less vulnerable in most situations than children. It is also promising because it affects, most often, women of slightly greater economic wealth who may have slightly more room to maneuver than women in some of the other problem areas, such as domestic violence or child custody disputes.

While cautious, then, and even somewhat pessimistic, I find myself recommitting to an attempt to figure out what to do instead of limiting discretion. I do this in part as an expression of my hope that sympathosaurs and empathosaurs will show the way, while antagonistosaurus fail, like true dinosaurs, to reproduce themselves. I also do this as an expression of my commitment to expanding the values that are taken into account in law. The measure of victory will be, I think, a return to discretion in an era of trust that is coupled with justice.

---

109. MARYLAND REPORT.