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"Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."
—Berkey v. Third Avenue Ry. Co., *244 N.Y. 84, 94, (1926) Cardozo, J.*

L.A.W. PANEL: WINNING WOMEN'S RIGHTS

By Donna Riccobono and Becky Plattus

Organizing for womens rights through coalition building, grassroots organizing and litigation was the focus of a two hour panel discussion held Thursday evening, Oct. 6, which culminated in the drafting and circulation of several petitions demanding specific reforms at Brooklyn Law School. The program was sponsored by the Legal Association of Women (L.A.W.),

The panel featured Florynce Kennedy, an attorney whose long list of credits include founding the Media Workshop and the Feminist Party, organizing the Coalition Against Racism and Sexism and National Director of "Voters, Artists, Anti-nuclear Activists and Consumers for Political Action and Communications Coalition" (VAC-PAC), and her publications include her autobiography, *Color Me Flo, My Hard Life and Good Times,* and co-authorship of *Sex Discrimination in Employment* (with William F. Pepper) and *Abortion Rap,* (with Diane Schulder). The other panelists were Rioghan Kirchner, Assistant Director of the Family Law Unit at South Brooklyn Legal Services, whose current interest is the reform of laws affecting spouse and child abuse; and Suzanne Lynn, an A.C.L.U. staff attorney who specializes in litigation related to abortion rights, sterilization abuse and birth control issues.

Rioghan Kirchner began the program by addressing the necessity of organizing on a grassroots level in order to make changes that are important to women. Kirchner sees this organizing as something which must be done by all classes of women working together; Legal Services Corporations, such as the one which Kirchner is part of, are examples of truly grassroots organizations.

Kirchner related the story of a particularly successful organizing effort in which South Brooklyn Legal Services utilized all strata of their organization—from the women victims to the lawyers and everyone in between—to make the criminal justice system responsive to women who are victims of crimes by their husbands. First, in a class action suit brought by legal services, the police force was made to comply with its neglected duty to arrest men who were accused of beating their wives. The next obstacle, refusal of the District Attorney to prosecute the alleged wifebeaters, was alleviated by pressing for the formation of the sex crimes unit at the Brooklyn District Attorney's office. The problems were still not over, however, as judges refused to acknowledge the seriousness of the crimes committed against women.

Finally, when a case of attempted murder against a woman by her husband came to trial, Brooklyn Legal Services contacted women's groups around the city and packed the courtroom with women eager "to see justice done." As a result, the man was given eight to fifteen years.

For those interested in changing the condition of women, the most important thing is to listen to those women who are really in need, and to hear their problems befopre running off blindly and passing legislation. Women must work cooperatively and understand all women's needs to organize to fulfill those needs.

Next on the program was Suzanne Lynn who addressed the efforts of litigation as a means for achieving women's rights. An attorney with the ACLU Reproductive Freedom Project, Lynn traced the history of abortion litigiation in the struggle for abortion rights, emphasizing the importance of grassroots organizing as a complement to litigation.

Early in the history of the country, Lynn said, there was no legislation restricting abortion. Beginning around the 1820's anti-abortion legislation was advocated by the medical profession and fully flowered in the 1860's.

One hundred years later, in the 1960's, the abortion rights movement began, spearheaded by the women's movement. In the beginning litigation to protect abortion rights was primarily defensive, as a result of prosecutions of doctors. Toward the late 1960's affirmative constitutional challenges were brought by women lawyers who saw themselves as vehicles of an overall women's movement. These suits, some naming hundreds of plaintiffs, were educational and "political tools in the best sense."

After the major victory of *Roe v. Wade,* 410 U.S. 113, 93 s.ct 705, 35 L. ed.2d 147 (1973), in which the Supreme Court struck down restrictions on the right of women to abort early in pregnancy, the women's movement became complacent and stopped organizing. Lynn said this inaction permiotted right-to-lifers to gather power in the mid 1970's and push through scores of restrictive state and local abortion laws which, in effect, chipped away at the *Roe* decision.

Lynn said the movement's biggest setback was the loss of Medicaid funding for abortions, decided in the Supreme Court case of *Harris v. McRae,* 448 U.S.____ (1980) Despite the prodigious legal efforts, the case was lost; a result directly attributable to a failure of the politics of

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L.A.W. Panelists (l. to r.)—Florence Kennedy, Suzanne Lynn and Rioghan Kirchner

ALUMNI DISCUSS EXCLUSIONARY RULE

By Risa Gerson

On Wednesday October 5, 1973, the Brooklyn Law School Alumni Association presented a panel discussion on the exclusionary rule at their fall meeting. The discussion began with Peter Zimroth, a graduate of Yale Law School, currently a partner at Kostelanetz & Ritholz, which specializes in white collar criminal defense. Zimroth has also held the positions of Chief Assistant District Attorney in Manhattan, Assistant U.S. Attorney in the Southern District and clerk for Judge David Bazelon in the U.S. Court of Appeals for the District of Columbia and former Supreme Court Justice Abe Fortas.

Zimroth began by giving some background on *Gates v. Illinois,* 103 *S.Ct.* 2317 (1983), and relating the Court's request for *amici* to brief the issue of whether there should be a good faith exception to the exclusionary rule, to the Court's decision to defer deciding that issue. The Supreme Court recently granted cert. to three other cases which raise the issue of a good faith exception to the exclusionary rule, *United States v. Leon,* No. 82-1771, *Massachusetts v. Sheppard,* No. 82-963, and *Colorado v. Quintero,* No. 82-1711.

Zimroth, who does not believe the Court should erode the exclusionary rule by creating a "good faith" exception, characterized his opponents' main argument as one of cost benefit analysis; that is, that the cost of following the exclusionary rule did not outweigh the benefit of its deterrent value. Zimroth said that the argument was not focused on the correct issue. He said that questions of law cannot be answered as though one were a social scientist and that one cannot look to the purpose of a rule and then adjust the rule accordingly. The analysis, he argued, should answer legal questions. His opponents, who speak of the "constable blundering," or of criminals escaping punishment because of "technicalities" are not employing vigorous constitutional analysis to the legal problems at hand. The courts are the one institution which are supposed to articulate and enforce limitations on government without considering politics. The good faith on the part of a police officer is entirely irrelevant to the constitutional norms defined—in part—by the exclusionary rule.

Zimroth also addressed the deterrence value of the exclusionary rule. He said the exclusionary rule is largely responsible for a constant dialogue between the police and

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SBA MEETS ON BUDGET

By Phillip Rheinstein

Vowing to keep an "open office" and to give students an opportunity to become more "active in their education," officers of the Student Bar Association welcomed the newly elected representatives. The one-and-a-half hour meeting was a slightly disorganized, but generally harmonious beginning. The SBA debated its constitution and budget, ideas for parties and lectures, relations between the SBA and the administration, and, in a chaotic 15 minute discussion, when to meet in the future. Later in the meeting, Phil Russel, Brooklyn Law School's representative to the American Bar Association's Law Student Division, discussed the role BLS students can play in this national organization.

This year the SBA is requesting a budget of $25,000 from the administration. These funds will finance organizations, lectures, parties, and the bookstore. President Mary Malet said students can have input in many areas, from forming an organization to initiating parties. Debbie Studer, a first year student from section three, suggested holding a party for all first year students later in this semester. If the SBA's reaction to her proposal is any indication it will be responsive to student requests for money and support in the future. The administration has not yet given the SBA a budget figure, but the hearing to allocate whatever funds the group will receive will be starting in the coming weeks.

Members of the executive board stressed their role as liaison between the students and the administration. Lisa Heide Gordon, the SBA secretary, said the SBA should try to "provide redress for student gripes." President Malet said lecture programs, like a proposed alumni series being developed with Dean Trager, would give students a wider variety of programs to choose from.

After the SBA had covered domestic affairs, Russel reported on the ABA/LSD's summer conference in Atlanta which both he and President Malet attended. The most immediate issue they addressed was the new Law Student Admission Service loan program. This program will take over a student's GSL loan from their present bank (at the same interest rate), provide the extra $3000 dollars with less red tape for those who qualify, and defer both parts for longer periods than most banks. The SBA has more information for those interested. Russel said there are tremendous oportunities for involvement in ABA/LSD, especially for first year students who have the potential to gain standing and eventually run for national positions. The ABA's well known role in setting standards for lawyer's conduct and making amicus cureae appearances would make such participation invaluable.

The tenor of the meeting was set by the active participation of mostly new representatives who, like first year representative Jeff Houlihan, are "anxious to get involved." Bernie Graham, a 2nd year student who was on the SBA last year, spoke of an atmosphere of "cooperation" in the present House of Delegates. He attributed a sometimes "open hostility" in last year's house to the "personal reign" of president Bobby Steinberg and was pleased with the enthusiasm of the new members. Mr. Graham cited the SBA's role in eliciting a response from the administration last year as proof that the SBA could be effective as a student advocate.

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EDITORIALS

BUDGET CAN'T WAIT

It is not unusual for students to believe administrators and faculty are less than empathetic towards their plight. This is inherent in the structure of any institution of higher learning. Students pay dearly for their education in terms of time, emotional energy, and money. In return, students are lectured to by their professors and directed by administrators. The relationships are the result of institutional structure and human factors are of secondary importance.

There are other areas of interaction that cannot be said to be strictly the result of institutional structure. In these areas basic fairness and responsiveness should be taken into account.

One area is the annual administrative allocation of funds for student organizations. Only now, seven weeks into the semester, have funds been allocated. Up until now student groups have been engaged in the roulette game of deficit spending. This occurs every fall because the administration does not release funds to the SBA until late October. Only then does the SBA begin its own budgetary process of alloting funds to each student group.

This creates a problem for many student organizations which have to incur major expenses or present the bulk of their programs in the first few weeks of the fall semester. For these groups planning is nearly impossible and spending is risky.

We have joined our voice to those calling for an amended SBA constitution mandating spring elections for fall delegates. This would permit the SBA to begin its budgetary process and get right to work in September. But such a constitutional change can only go so far. The SBA can not apportion money that has yet to be allocated to it by the administration and the trustees.

The BLS administration has had some serious public relations problems. It often presents an image to students as being less than responsive, even callous.

We call on the administration and SBA to respond to the genuine need of students groups to plan their budgets and their programs. There seems little reason to leave them hanging. If, however, this is another of those areas determined by the institutional infrastructure, the student body should be so informed.

ANNOUNCEMENTS

Following the L.A.W. panel discussion Thursday October 6, students composed a list of pertinent issues that need to be addressed, with an invitation to the new Dean to answer them directly. The issues are listed below, although the order does not necessarily reflect a consensus on priorities:

1. Elimination of sexism and racism in the classroom, particularly with regard to certain faculty members.
2. A resolution to support the proposal of a day-care center.
3. Creation of a health care station on the school premises.
4. Efforts to achieve greater equity between the opportunities available to day and evening sections.
5. Greater encouragement of clinical work experiences, particularly in settings other than corporate litigation.
6. Re-analysis of the military draft provision in financial aid applications.
7. Creation of more flexible "make-up" exam policies (within two weeks rather than six months) to reflect a heightened sensitivity to problems of working students, students who are parents and students who have other pressing obligations.
8. Revised employment recruitment practices to discourage the military's presence until it becomes affirmatively active and ends its gay and lesbian discrimination.

An informal talk by Professors Marc Feldman and Jay Feinman of Rutgers Law School-Camden on *Legal Education and Preparation for Law Practice.* Wednesday, October 26, 3-4:30 pm, Student Lounge.

ATTENTION

All student groups: Budgets must be submitted to the SBA by Friday, October 21.

ADVERTISEMENT

In honor of the members of our armed forces, missing in action, we ask that you display, at half-mast, the American Flag on November 11th. "Let them not be Forgotten."

Ladies Auxiliary
Vanderveer Park—Memorial Post No. 7874
Veterans of Foreign Wars of the U.S.

★★★★★★★★

MOTHERS-IN-LAW

Possibly the newest organization at Brooklyn Law School made its debut this semester. If you've been in the women's locker room (and at least half of us have!) you've seen the signs—"Mothers-in-Law". It's an organization of full and part time students who are mothers, or soon plan to be.

Mothers-in-Law meets over lunch once a month and discusses combining a legal career with raising children, being a responsive spouse, working, studying, etc.

Mothers-in-Law meets in room 503 from noon until 1 p.m. The next meetings are Wednesday Nov. 9 and Wednesday Dec. 7.

The Brooklyn Law School National Lawyers Guild is sponsoring a discussion on U.S. involvement in El Salvador on Tuesday, November 1st from 4 to 6 pm in the student lounge.

BLS WELCOMES BACK LIZ SCHNEIDER

By Kinnet McSweeney

Professor Liz Schneider may be new to most of us, but she's not new to BLS. From 1973-80, she was an adjunct professor and co-taught *Women and the Law* with Prof. Rhonda Copelon (Copelon left BLS last year). Together they received the Faculty Excellence award in 1979-80.

In addition to teaching *Women and the Law*, a 3 credit intensive seminar on women's rights and the constitutional theory of equal protection, Prof. Schneider teaches Civil Procedure and will teach Constitutional Law next semester.

This is the first time that Schneider teaches Civil Procedure in the classroom. Her approach is unique and reverses the traditional curriculum. Schneider is teaching the Federal Rules of Civil Procedure to her classes this fall and will teach jurisdiction in the spring semester.

Her explanation for the reversal is that she wanted her students to learn civil procedure in the same manner as she had come to understand it as a litigator. "Law students can, I am convinced from my years of doing clinical teaching, do things right away based on common sense and understanding." By understanding the litigation aspect first, Schneider feels that the students will find jurisdiction more readily understandable. Her students are currently drafting pleas for the parties in *Buffalo Creek Disaster*.

Schneider said she realizes that Civil Procedure is very intimidating to anxious first year students, but stresses the importance of it being thoroughly understood for future law school courses and future employment.

Schneider was brought here in 1973 by popular demand of women law students who wanted *Women and the Law* as part of the curriculum. At that time there were not many women's rights cases. Dean Lisle hired Schneider, who at the time was a staff attorney for the Center for Constitutional Rights, a privately funded legal organization that does test case litigation on constitutional issues.

This semester there are twenty-six enrolled students in *Women and the Law*, two of whom are male. Schneider greatly encourages more men to take the course as it is stimulating and enlightening, regardless of sex. Today, unlike ten years ago, there are enough women's rights cases to fill a casebook, which Schneider uses for the course.

Schneider is also the author of several published articles on women's rights, including "Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense", 15 *Harvard Civil Rights-Civil Liberties Law Review* 623 (1980), and "Perspectives on Women's Subordination and the Role of Law" in *The Politics of Law* (Pantheon 1982), (co-written with Nadine Taub).

Schneider graduated cum laude from Bryn Mawr College in 1968, received a fellowship to the London School of Economics and Political Science where she received her MA in Political Science in 1969, and received her JD from New York University in 1973. While at NYU, she helped found the Women's Rights Clinic where she was involved in various civil rights activities. Her summers were spent as a staff law clerk at the Center for Constitutional Rights under the Law Students Civil Rights Research Council (LSCRRC) pro-

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THE LEGAL IDEOLOGY OF SEXUAL INEQUALITY

By Nadine Taub and Elizabeth M. Schneider

The following piece is excerpted from Women's Subordination and the Role of the Law, *Printed in* The Politics of Law *(Pantheon 1982).*

Historically women's subservient status has been associated with a view of differences between the sexes and differential legal treatment. A succession of Supreme Court decisions[1] has legitimized that subservient status by upholding laws which, on their face, mandate that the sexes be treated differently. This article examines the principal doctrinal bases used by the Court by focusing on three illustrative Supreme Court decisions. In an 1873 decision, differences between men and women were expressed in terms of gross overgeneralizations reflecting moral or religious views of women's nature and proper role. The ideology masked women's inferior treatment by glorifying women's separate role. In 1908, the differences focused to a much greater extent on the "facts" of women's physical limitations necessitated by their reproductive functions and their consequent dependence on men. These deficiencies called for special treatment for women to be on an equal footing with men. Present-day ideology is even more subtle. The Supreme Court espouses a concern for sexual equality and purports to reject stereotypical overgeneralizations about the sexes; yet it refuses to recognize classifications based on reproductive capacity as sex-based, and it regards legal and social disabilities that have been imposed on women as realistic differences sufficient to justify differential treatment. By continuing to make differential treatment appear fair, the current Court provides a rationale for present inequalities.

Women's "Separate Sphere": *Bradwell* v. *Illinois*

In *Bradwell* v. *Illinois*[2] the Supreme Court upheld the Illinois Supreme Court's decision to refuse Myra Bradwell admission to the Illinois bar because she was a woman. She studied law under her husband's tutelage; raised four children; ran a private school; was involved in civic work; and founded a weekly newspaper, the *Chicago Legal News*, which became an important legal publication. A feminist active in women's suffrage organizations, Myra Bradwell played an important role in obtaining Illinois legislation that removed women's legal disabilities. She took her case to the Supreme Court, arguing that admission to practice law was guaranteed by the privileges and immunities clause of the recently adopted Fourteenth Amendment.

The *Bradwell* litigation took place within the context of a particular conception of sex roles. Although women were in no way the equals of men during the colonial and Revolutionary periods, the nature of the subordination, particularly in the middle classes, changed dramatically between the end of the eighteenth century and the middle of the nineteenth century. The early stages of industrial capitalism involved increasing specialization and the movement of production out of the home, which resulted in heightened sex segregation. Men went out of the house to work; and women's work, influence and consciousness remained focused at home. Although women continued to be dependent on and subservient to men, women were no longer placed at the bottom of a hierarchy dominated by men. Rather, they came to occupy women's "separate sphere," a qualitatively different world

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ANNOUNCEMENT

The Natural Resources Law Society will hold a general meeting on Wednesday, October 19, at 1 p.m. in room 402. All students and faculty are invited to attend. We would especially encourage any interested first year students to attend. We will describe the activities of the society and talk about the fall publication of the Natural Resources Bulletin. Anyone interested in submitting an article for this bulletin or a future edition may discuss his/her topic at the meeting. This meeting will be informal and you are invited to bring your lunch. Beverages will be provided by the society.

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centered on home and family. Women's role was by definition incompatible with full participation in society.

"Separate-sphere" ideology clearly delineated the activities open to women. Women's role within the home was glorified, and women's limited participation in paid labor outside the home was most often in work that could be considered an extension of their work within the home.... Likewise, after a period of time, teaching became a woman's occupation. Unpaid charitable and welfare activities, however, were encouraged as consistent with women's domestic responsibilities....

The development of separate-sphere ideology appears in large measure to have been a consequence of changes in the conditions of production. Behavior was then further channeled by a vast cultural transformation promoted through books and magazines. The law does not seem to have played an overt role in the initial articulation of the separate-sphere ideology; but to the extent that the ideological transformation that occurred in the early part of the nineteenth century was a reaction to a strict hierarchy imposed by the previous legal order, the legal system may well have played an important part at the outset.

In any event, the law appears to have contributed significantly to the perpetuation of this ideology. Immediately following the Civil War, feminists attempted to have women expressly included in the protections of the Fourteenth and Fifteenth Amendments to address the needs of women, and indeed for the first time to write the word "men" into the Constitution, resulted in a long-lasting division in the women's movement, which reflected differences regarding both ends and means, and which lasted at least until the 1890s. Feminists aligned with the Republican Party stressed black suffrage and saw women suffrage as coming through a constitutional amendment at some future time. The more militant and effective National Woman Suffrage Association favored legal and political efforts to obtain a judicial or congressional declaration that the Wartime Amendments also secured rights for women. Although Myra Bradwell's legal challenge was not known to be part of an organized strategy, her attempt to use the Fourteenth Amendment to challenge state prohibitions on occupational choices legally reflected this tack. By invoking the cult of domesticity as a legal rationale for rejectng this demand, the courts enshrined and reinforced separate-sphere ideology while deferring women's rights.

In rejecting Myra Bradwell's challenge to Illinois's prohibition on occupational choice, the Supreme Court had two options: to construe the new constitutional guarantees narrowly so as to defeat all comers, or to find special reasons for treating women differently. The majority adopted the first approach. It held that the decision was controlled by the Court's decision (the day before) in the *Slaughter-House Cases,*[4] which held that even after the adoption of the Fourteenth Amendment, states retained the unmediated right to regulate occupations.

However, Justice Joseph Bradley, who dissented in *Slaughter-House,* opted for the second approach. His concurring opinion is the embodiment of the separate-sphere ideology:

"The civil law as well as nature itself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.... The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband....

"It is true that many women are unmarried and not affected by any of the duties, complications, and incapacities arising out of the married state, but these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."[5]

Glorification of women's destiny serves to soften any sense of unfairness in excluding women from the legal profession. Since this "paramount destiny and mission" of women is mandated by "nature," "divine ordinance," and "the law of the Creator," the civil law need not recognize the claims of women who deviate from their proper role. By conceiving of the law as the means of enforcing reality as it "is or should be," Bradley can concede that some women do live apart from men—or even that some women who live with men are capable of functioning in the public domain—without exposing the law as unreasonable.

...With industrialization and urbanization in the late nineteenth century came deplorable work conditions for all workers, which prompted unions and social reformers to press for legislation regulating conditions of work, hours, and wages. By the turn of the century, both sex-neutral and sex-based protective laws had been passed and sustained against legal challenge. Women-only protective laws were enacted with the express support of such reform groups as the National Women's Trade Union League, the General Federation of Women's Clubs, and the National Consumers' League, which merged the energies of wealthy and working women. Although sex-based legislation might have conflicted with suffragists' initial argument that women were entitled to the role because they were fundamentally equal to men, it was entirely consistent with the more expedient position they had adopted in the 1890s, to the effect that women should be given the vote because their special perspective would benefit society.

Protective-labor legislation was countered legally by conservatives who, led by the American Bar Association, revived the natural-law notion of freedom of contract and located it in the due process clause of the Fourteenth Amendment. The effort culminated in *Lochner* v. *New York,*[6] a decision that, in striking down maximum-hour legislation for bakers by relying on the "common understanding" that baking and most other occupations did not endanger health, cast doubt on the validity of all protective legislation.

Advocates of state "protective" legislation for women could take two routes after *Lochner:* one, to displace the "common understanding" in *Lochner* with scientific evidence that all industrial jobs, when performed more than ten hours a day, were dangerous to a worker's health; of two, by arguing that women's need for special protection justified an exception to *Lochner.* In *Muller* v. *Oregon,*[7] the Supreme Court was faced with a challenge to an Oregon statute that prohibited women from working more than ten hours a day in a laundry. The National Consumers' League, which played the major role in the middle- and upper-class reform movement, filed an *amicus* brief, written by Louis Brandeis, Josephine Goldmark, and Florence Kelly,[8] which attempted to combine both approaches. The brief portrayed as common knowledge pseudo-scientific data regarding physical differences between men and women, emphasizing the "bad effects" of long hours on women workers' health, "female functions," childbearing capacity, and job safety, and on the health and welfare of future generations. Adopting the view urged by the *amici,* the Court upheld the challenged legislation:

"That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race...

Still again history discloses the fact that woman has always been dependent upon man...As minors, though not to the same extent, she has been looked upon in the courts as needing special care that her rights may be preserved... Though limitation upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will generate against a full assertion of these rights. She will still be where some legislation to proect her seems necessary to secure a real equality of right...Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when the legislation is not necessary for men and could not be sustained.[9]

Muller expresses a view of women as different from and more limited than men because of their "physical structure" and "natural functions." Although this view of women is every bit as fixed as that expressed in *Bradwell,* it purports to be grounded in physical fact. Legal reforms, such as the removal of "limitations upon personal and contractual rights," would be ineffective in changing women's rights because of women's "disposition and habits of life." These differences in physical structure and childbearing capacity are thus sufficient for women to be "properly placed in a class by themselves." Women's primary function as mother is now seen as physically incompatible with the demands of equal participation in the work force. Special work conditions for women are therefore justified.

Both social reformers and legal realists regarded the statute's survival and the Supreme Court's recognition of economic and social facts as important victories. However, as organized labor lost interest in protective legislation for men, the primary legal legacy of *Muller* was a view of women that justified excluding women from job opportunities and earning levels available to men. The Court's focus on the apparently immutable facts of women's physique obscured the exploitation of workers generally and the social discrimination that assigned full-time responsibility for the household to women. As an ideological matter, the notion that women's different physiology requires special protection continues to legitimize a division of labor in which men are primary wage earners entitled to draw on the personal services of

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organizing, in Lynn's opinion. Because the link was never made between organizing and litigation in that fight against the Hyde Amendment, it did not matter how good the attorneys were. What is crucial to remember, Lynn said, is that litigation is not the way to win on the abortion rights issue. Organizing and political education of the public are necessary, and these things have not happened. Lawyers, Lynn said, are the "experts called in at the last minute," after the foundation which eill enable them to win has been laid.

The last speaker on the panel was Flo Kennedy. Armed with an array of controversial but memorable one-liners, Kennedy's enthusiasm and optimism for the potential of social change was infectious.

Born February 11, 1916, Flo Kennedy was one of the first Black women to graduate from Columbia Law School's night division. At one time a legal representative for jazz greats Billie Holiday and Charlie Parker, Kennedy became a delegate to the Black Power conferences of the 1960s and was a member of the legal team instrumental in liberalizing New York State abortion laws.

For years a political organizer, activist, author and attorney, Kennedy asserts that more than one level of operation is necessary for progressive reform and that "all struggle pays off." She said students should maintain their contacts and remember their goals at Students, she said, should "use powers that you have in a relevant way" and "extend your power at law school; don't just isolate your mind."

Kennedy said that students and others are often guilty of the "BOHICA" Syndrome, i.e., the 'Bend Over Here It Comes Again' philosophy of daily living in a socialized world. The real remedy to this problem "is not Vaseline" but lies in an effective use of one's personal power; specifically body power, dollar power and voting power. She comments that women are just beginning to use their voting power but have never forcefully used their dollar power, even though women are the primary consumers. Women are starting to organize demonstrations in meaningful numbers, but she considers it a mistake to disavow the idea of violence. She said "We are committed in this society to violence. The right to violence does not mean that you aim to be violent" but merely that it remains a possibility, since the power of women is negatively impacted when "we announce to a violent society that we are non-violent."

Kennedy said that women and other low status groups often "consent to oppression" by passively accepting derogatory stereotypes, and thus embodying a sense of "noble niggerhood." Kennedy said that "You don't have to be black to be a nigger, although it helps," and that this group has come to include Blacks, women and the elderly, among others.

At the suggestion that the prevalence of apathy is hard to overcome, Kennedy countered with: "There's plenty of things going on. You're just not in on it," and said "If you want to know where the apathy is, you're probably sitting on it."

Kennedy agrees with students who suggested that many of the public interest options available to people provide few incentives by offering hard work and low salaries. She said that she doesn't see those jobs as a viable solution since "your work must be fun or no one will join you," and too often it leads to complaining about "burnout, though you never lit any fires.' Finally, as long as you submissively remain at the bottom of the economic scale, you are still "consenting to oppression."

While there are significant advantages to splintering off into small cohesive organizations that deal with specialized concerns, Kennedy said that for political effectiveness, "we must have a certain ability to hold our noses and join coalitions." She is an active supporter of the 'rainbow coalition' supporting Jesse Jackson for the upcoming presidential election.

Following the panelists' presentation, an informal discussion was held concerning the pertinent issues at BLS that demanded reform. Several petitions were drafted and circulated to be presented to the Administration for timely action. A number of female students recounted tales of blatant sexism which they encountered in the classroom, ranging from being grabbed by male students to having to endure professor's frequent sexist remarks—most obvious in torts, criminal law, and civil procedure classes. Sexist slurs usually took the form of offensive sexual innuendo or subjects of violence against women which were treated in a flippant way, for example, a wife-beating case handled with a "blaming-the-victim" attitude, or a rape case being described as X-rated or sexy rather than as a violent crime. Students were highly critical of what was generally described as "degrading, embarassing, pool-room humor" and denounced the absence of an intellectual atmosphere for their studies which they, as consumers, were entitled to, by right. It was resolved that students owed a responsibility to themselves and others to answer these sexual comments directly. While acknowledging a degree of respect owed the professor, blatantly inappropriate conduct should be challenged and not condoned. It must be emphasized that while this problem is serious and is not merely limited to one or two staff members, neither is it so widespread as to be a reflection on the entire faculty or on the level of education as a whole.

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EXCLUSIONARY RULE...

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prosecutors on whether, for example, a warrant is appropriate, or whether more investigation should be done. Under the proposed good faith exception, he said, the entire focus of the inquiry will change from whether the police did the right or wrong thing to whether the police were acting in good faith, changing the objective standard to a subjective one.

The strongest argument for a good faith exception, Zimroth said, is the warrant requirement. Proponents of the good faith exception argue that if a magistrate issues a deficient warrant, the police officers will then suffer (by not being able to use evidence obtained under the warrant) becaue the magistrate made a mistake. Therefore the good faith exception would promote justice and fair play in a situation where police officers were acting under illegitimate authority. Zimroth said the fourth amendment applies to any government officials—not solely police officers. He warned that the history of the fourth amendment is to protect against unreviewable discretion of the government in issuing warrants—ensuring that warrents are issued only for probable cause.

Zimroth concluded by asserting that the greatest impetus for modifying the exclusionary rule is frustration stemming from the inability of our society to adequately deal with crime control. The exclusionary rule, he maintained, is a scapegoat. In terms of crime on the street, the exclusionary rule has a very minor impact; the percentage of those who go free is low. Limits on governmental power, he said, are the cost one must pay to live in a free society.

The next speaker, Mr. Edward Korman, is a graduate of Brooklyn Law School, a commissioner on the State Investigation Commission and a partner in the law firm Stroock & Stroock & Lavan. Korman began by explaining that he was not going to argue that the exclusionary rule should be abandoned, but that it should not be applied where it would not have its intended effect. He said that under current law there are circumstances where the exclusionary rule is not applicable. For example, a defendant must show that he himself was the victim of an unlawful search and seizure; showing that an accomplice or co-defendant was the victim is not sufficient to give the defendant standing to argue that the evidence should be suppressed pursuant to the exclusionary rule. Although illegally seized evidence cannot be admitted for its substantive value, it can be admitted to impeach a witness, and the Second Circuit has recently held that illegally seized evidence can be used to determine sentencing.

Korman that his suggestion is merely that there are other areas in which the exclusionary rule can be modified without affecting its deterrent purpose.

The law, he asserted, should operate with just and rational rules. He said that an inflexible exclusionary rule operates to dilute and weaken substantive fourth amendment rights. In most contexts, Korman alleged, the exclusionary rule becomes an issue when the defendant is guilty. If there is no flexibility in the exclusionary rule, courts will read flexibility into the substantive right. The net effect is that such practices lend themselves to flexibility in substantive rights and weaken and undermine basic fourth amendment values.

In explaining to what extent he believes the exclusionary rule should be modified, Korman proposed that in cases of close factual questions, where reasonable men would disagree, there would be no reason to apply the exclusionary rule to a deficient warrant if police were acting in good faith under the warrant. The Court, he cautioned, should proceed slowly. The context in which potential good faith exceptions would apply varies. He warned that in each instance of applying the good faith exception, there should be an objective basis by which to measure the police officer's good faith.

Seymour Boyers, an associate justice in the Appellate Division's Second Department, discussed where New York fit into the recent changes that have taken place in the Supreme Court's interpretation of the exclusionary rule, and spoke to the issue of police officers acting pursuant to informants' tips. The New York Court of Appeals, he said, has not abandoned the two-prong test articulated in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969) which queries 1) whether the informant is reliable, and, 2) whether the information has additional indicia of reliability. In his opinion, the Court of Appeals is not prepared to erode the exclusionary rule as fast as the United States Supreme Court. New York, he predicted, will continue to determine whether the warrant is valid, and then apply the *Aguilar* test. Justice Boyers concluded that the requirements should continue to be an integral part of the bedrock of our criminal justice system. He warned that if fourth amendment guarantees were eroded, due process may well be denied to deserving individuals.

THE EXCLUSIONARY RULE: WHAT'S UP FOR GRABS?

The exclusionary rule was first articulated by the Supreme Court in *Weeks v. United States*, 232 U.S. 383 (1914) as an enforcement provision of the fourth amendment applicable to federal cases. Though the fourth amendment was held to be enforceable against the states through the due process clause of the fourteenth amendment in *Wolf v. Colorado*, 388 U.S. 25 (1949), it wasn't until 1961 that the Court found the exclusionary rule applicable to the states in *Mapp v. Ohio*, 367 U.S. 643. There the Court stated that, "...the admission of a new constitutional right by Wolf could not consistently tolerate denial of its most important constitutional privilege, namely, the exclusion of the evidence which an accused had been forced to give by reason of the unlawful seizure."

Certain members of the Court and concerned citizens have questioned whether criminals should benefit because "the constable blundered." The good faith exception most recently arose in *Gates v. Illinois*, 103 S.Ct.2317 (1983), where, after submission of briefs and arguments on the issue of probable cause, the court asked for resubmission of briefs and reargument on the good faith exception. The Court then declined to decide the issue since it had not been raised in the courts below. The Court then granted cert. to three cases which squarely raise the issue, *United States v. Leon, Massachusetts v. Sheppard* and *Colorado v. Quintero*.

In its brief in *Gates*, the government argued that "When the costs of applying the rule are found to outweigh whatever deterrent effect it might achieve, the rule will not be imposed." It is presumably this cost-benefit analysis that the government will empoy in its argument for the adoption of the good faith exception this term.

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their wives, and women remain marginal workers available to replace more expensive male workers.

Unequal Equal Protection

Michael M. v. *Sonoma County*

Although Supreme Court opinions of the 1960s began to acknowledge some changes in woman's position, it took the rebirth of an active women's movement in the 1960s and the development of a legal arm to obtain a definitive legal determination that sex-based discrimination violated the equal-protection clause of the Fourteenth Amendment. In 1971, the Supreme Court, in *Reed* v. *Reed,*[10] for the first time invalidated a statute on the ground that it denied women equal protection. The Court unanimously struck down an Idaho statute preferring males to females in the performance of estate administration, refusing to find generalizations about women's business experience adequate to sustain the preference. Although the actual dispute involved a relatively trivial duty, a statue that already had been repealed, and facts that presented no major threat to the established social order, the opinion appeared to voice a view of women that seemed radically different from previous judicial expressions.

Equal protection rests on the legal principle that people who are similary situated in fact must be similarly treated by the law.[11] In *Reed* the Court for the first time held that women and men are similarly situated. The Court recognized the social reality, through "judicial notice," that "in this country, presumably due to the greater longevity of women, a large proportion of estates...are administered by women."[12] By recognizing a departure from traditional social roles as so obvious as to be able to rely on judicial notice, the Court appeared to presage the erosion of the "differences" ideology.

Over the last ten years, in upholding equal-protection challenges to sex-based legislation, the Supreme Court has repeatedly rejeced overgeneralizations based on sex.[13] For example, in *Frontiero* v. *Richardson,*[14] the Court upheld an equal-protection challenge to the military's policy of denying dependency benefits to male dependents of female servicewomen. The plurality opinion criticized *Bradwell* as reflective of an attitude of "romantic paternalism" that "in practical effect, put women not on a pedestal but in a cage."[15] Similarly, in *Stanton* v. *Stanton,*[16] the Court upheld an equal-protection challenge to a state statute, specifying a greater age of majority for males than females with respect o parental obligation for support. In so doing the Court appeared to understand the effect of stereotypes in perpetuating discrimination and the detrimental impact that differential treatment has on women's situation.[17]

However, the Supreme Court's developing application of equal protection has not lived up to its initial promise. The Court has adopted a lower standard of review for sex-based classifications[18] than for race-based classifications, reflecting its view that race discrimination is a more serious social problem than sex discrimination. The Court has rejected only those stereotypes that it perceives as grossly inaccurate. Indeed, the Court has developed a new and more subtle view of "realistically based differences," which encompasses underlying physical distinctions between the sexes, distinctions created by law, and socially imposed differences in situation, and frequently confuses the three. In these cases, the Court simply reasons that equal protection is not violated because men and women are not "similarly situated."

The paradigmatic physical distinction between the sexes, womens' reproductive capacity, has been consistently viewed by courts as a proper basis for differential treatment. The present Court does so by refusing to recognize that classifications based on pregnancy involve sex discrimination and by ignoring the similarities between pregnancy and other temporary disabilities. In *Geduldig* v. *Aiello,*[19] the Supreme Court rejected an equal-protection challenge to California's disability insurance system, which paid benefits to persons in private employment who were unable to work but excluded from coverage disabilities resulting from pregnancy. The Court noted that:

"While it is true that only women become pregnant, it does not follow that every legislative classifcaiton concerning pregnancy is a sex-based classificaiton like those considered in *Reed, supra* and *Frontiero, supra.* Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition."[20]

This position was effectively reaffirmed in *General Electric v. Gilbert*[21] in which the exclusion of pregnancy from General Electric's disability program was upheld in the face of a challenge under Title VII of the Civil Rights Act.

Similary, the present Court finds differential treatment justified by women's special circumstances, even when those circumstances reflect legislatively or socially imposed burdens.

...The most recent expression of the Court's current ideology of equality is a 1981 Supreme Court case, *Michael M.* v. *Sonoma County,*[22] upholding California's statutory rape law, challenged by a seventeen-year-old male, which punished males having sex with a female under eighteen. The thrust of his attack on the statute was that it denied him equal protection since he, not his partner, was criminally liable.

Statutory rape laws have rested historically on the legal fiction that young women are incapable of consent. They exalt female chastity and reflect and reinforce archaic assumptions about the male initiative in sexual relations and the weakness and naivete of young women.[23] Nevertheless, the Court in *Michael M.* found no violation of equal-protection guarantees and upheld the differential treatment as reasonably related to the goal of eliminating teenage pregnancy.

Although the Court in *Michael M.* cited its prior decision rejecting sex-based classifications without proof of a "substantial relationship" to "important governmental objectives," it did not, in fact, apply them. No legislative history was produced in California or elsewhere to show that the purpose of the sex-based classification was to eliminate teenage pregnancy. Moreover, the experience of other jurisdiction showed that the criminalization of male, but not female, conduct bore little relation to the goal of eliminating teenage pregnancy. Instead, the Court simply stated that because females become pregnant and because they bear the consequences of pregnancy, "equalization" via differential punishment is reasonable...

Thus, the Court asserts, the sex-based classification, which "serves roughly to 'equalize' the deterrent on the sexes,"[24] realistically reflects the fact that the sexes are not similarly situated.

The classification at issue in *Michael M.* had very little to do with biological differences between the sexes. As is seen from the total absence of supportive legislative history, the statute was not designed to address the problem of teenage pregnancy. Moreover, as Justice John Paul Stevens points out, if criminal sanctions are believed to deter the conduct leading to pregnancy, a young woman's greater risk of actual or perceived harm, if anything, is a reason to subject her to sanctions. The statute instead embodies and reinforces the assumption that men are always responsible for initiating sexual intercourse and females must always be protected against their aggression. Nevertheless, the Court's focus on the physical fact of reproductive capacity serves to obscure the social basis of its decision. Indeed, it is striking that the Court entirely fails to treat pregnancy as sex discrimination when discrimination really is an issue, while using it as a rationale in order to justify differential treatment when it is not an issue.

Like *Bradwell* v. *Muller, Michael M.* affirms that there are differences between the sexes, both the physical difference of childbearing capacity and women's social role, which should result in differential legal treatment. However, because this affirmation comes at the same time as the Court claims to reject "overbroad generalizations unrelated to differences between men nd women or which demean (women's) ability or social status," the Court's approval of differential treatment is especially pernicious. The fact of and harms caused by teenage pregnancy are used by the Court to avoid close analysis of the stereotypes involved and careful scrutiny of the pregnancy rationale. The role that the challenged statute plays in reinforcing those harms is never examined. The Court accepts as immutable fact that men and women are not similarly situated, particularly when pregnancy is involved. The Court then appears to favor equal rights for women, but for one small problem—pregnancy.

As an ideological matter, the separation of pregnancy and child-bearing capacity, social discrimination, and even legally imposed discrimination from "invidious" discrimination, in which differential treatment is unrelated to "real" differences between men and women, perform an important function of legitimizing discrimination through the language of equality.[25] Although its doctrinal veneer is different, the Court's current approach has the same effect as *Bradwell* and *Muller.* If both pregnancy and socially imposed differences in role always keep men and women from being similarly situated—thereby excluding sex-based differences from the purview of equal protection—then the real substance of sex discrimination can still be ignored. Childbearing capacity is the single greatest basis of differential treatment for women—it is a major source of discrimination in both work and family life, and the critical distinction on which the ideology of both separate spheres and physical differences rests. Yet, by appearing to reject gross generalizations about proper roles of the sexes exemplified by both *Bradwell* and *Muller,* current ideology attempts to maintain credibility by "holding out the promise of liberation."[26] By emphasizing its reliance on a reality that appears more closely tied to physical differences and the hard facts of social disadvantage, e.g., the consequences of teenage pregnancy for young girls, the Court appears sensible and compromising. Indeed, the message of the Court's approach is merely to reject "ultra feminist" androgyny while favoring equality generally. However, by excluding the core of sex discrimination, the Court is effectively removing women from the reach of equal protection...

...Although the legal ideology of equality shows some progression from *Bradwell* to *Michael M.,* there is less than might be expected. Certainly the Court's view of women, and the ways in which it sees the sexes, has moved from an overt view of women's separate roles to a more subtle view of limited differences, but this new view is more dangerous precisely because it appears so reasonable. The Court's perception of differences that suffice to justify discrimination has altered somewhat, but it remains equally fixed. The Court continues to validate inequality by legitimizing differential treatment.

FOOTNOTES *[Some footnotes omitted, others renumbered. Ed.]*

1. The Supreme Court is by no means the exclusive source of legal ideology. Indeed, it is arguable that in the area of women's rights, Supreme Court opinions are not the best or most accurate source of prevailing views of women, since few Supreme Court cases prior to 1970 involved assertions of equal rights by women.
2. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1873).
3. Only about 10 percent of all women worked in the paid labor force in the mid-1840s. The percentage did not rise above 20 percent before 1900....
4. 83 U.S. (16 Wall.) 130 (1873).
5. *Id.* at 141-42.
6. Lochner v. New York, 198 U.S. 45 (1905).
7. Muller v. Oregon, 208 U.S. 412 (1908).
8. This brief has mistakenly come to be known as the first Brandeis brief, since Louis Brandeis actually filed it, although Josephine Goldmark, Florence Kelly, and other volunteers assembled the data....
9. Muller v. Oregon, 208 U.S. at 421-22.
10. Reed v. Reed, 404 U.S. 71 (1971).
11. *See generally* Joseph Tussman and Jacobus TenBroek, "The Equal Protection of the Laws," 37 *California Law Review* 341 (1949).
12. Reed v. Reed, 404 U.S. at 75.
13. Most of these cases have involved assumptions built into government benefit statutes that the male was the breadwinner and the female the dependent at home. See Frontiero v. Richardson, 411 U.S. 677 (1973); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Califano v. Goldfarb, 430 U.S. 199 (1977); and Califano v. Westcott, 443 U.S. 76 (1979).
14. Frontiero v. Richardson, 411 U.S. 677 (1973).
15. *Id.* at 684.
16. Stanton v. Stanton, 421 U.S. 7 (1975).
17. *Id.* at 14-15.
18. In Craig v. Boren, 429 U.S. 190, 197 (1976), the Court articulated the standard that "to withstand constitutional challenge,...classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."
19. Geduldig v. Aiello, 417 U.S. 484 (1974).
20. *Id.* at 496, n.20.
21. General Electric v. Gilbert, 429 U.S. 125 (1976). The Supreme Court's view of pregnancy expressed in *Gilbert* was promptly rejected by Congress. The Pregnancy Discrimination Act, 26 U.S.C. §3304(a) (12) (1976), was passed by Congress to overturn the *Gilbert* decision. This suggests that the Supreme Court's ideology concerning pregnancy as a permissible basis for differential treatment in employment was not widely accepted.
22. Michael M. v. Sonoma County, 450 U.S. 464 (1981).
23. Note, "The Constitutionality of Statutory Rape Laws," 27 *UCLA Law Review* 757, 761 (1980); Michael M. v. Sonoma County, 159 California Reporter 340, 601 P.2d 572 (1979); (Mosk J., dissenting). Leigh Bienen, "Rape III: National Developments in Rape Reform Legislation," 6 *Women's Rights Law Reporter* 170, 189 (1981).
24. Michael M. v. Sonoma County, 450 U.S. at 471.
25. *See* in particular, chapter 5; Alan Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine," 62 *Minnesota Law Review* 1050 (1978).
26. *Id.* at 1052.

SCHNEIDER...

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gram. Her first legal job was law clerk to the Honorable Constance Motley, Chief Justice for the U.S. District Court, Southern District. In 1980 she left BLS to teach a constitutional litigation clinic at Rutger's Law School in Newark. She left Rutgers last year when BLS offered to hire her as a full associate professor.

Schneider is married and the mother of two young children. She said that she finds teaching different, but no less demanding than litigation. She is on the Curriculum and Clinical Committees and said she hopes to improve the availability and quality of the clinical programs at BLS.