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Gender Bias Task Force: Comments on Substantive Law Issues

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The Substantive Law Subcommittee of the Gender Bias Task Force examined whether gender bias exists in areas of the substantive law of Virginia other than family or domestic relations law. The Subcommittee examined the following three principal areas: sexual assault laws,[1] stalking laws,[2] and criminal sentencing.[3]

The Subcommittee examined whether Virginia courts treat victims of sexual assault with sensitivity, whether the complaints of victims of sexual assault are taken seriously, and whether judges demonstrate an understanding of the dynamics of sexual assault.[4] In general, attorneys who responded to the surveys were overwhelmingly positive in their views of how Virginia's court system handles sexual assault cases. For example, all of the public defenders who responded reported that the courts "almost always" or "often" treat rape cases seriously.[5]

Individuals who provide services to victims of sexual assault sounded a discordant note. Contrary to the overall high marks given to Virginia's courts by attorneys, these "sexual assault service providers" were generally negative in their views of the courts' handling of sexual assault cases.[6] For example, sixty-four percent of these respondents thought that the courts "rarely" or "almost never" understood the dynamics of sexual assault.[7] Representatives of the Task Force interviewed these sexual assault service providers to explore their views further. The principal complaints of the sexual assault service

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1. GENDER BIAS IN THE COURTS TASK FORCE, GENDER BIAS IN THE COURTS OF THE COMMONWEALTH – FINAL REPORT 26-30 (2000) [hereinafter FINAL REPORT] (analyzing sexual assault cases).

2. *See id.* at 64-67 (analyzing stalking cases).

3. *See id.* at 58-64 (analyzing sentencing cases).

4. *See id.* at 27-28 (discussing methodology for studying perception of bias in sexual assault cases).

5. *See id.* at 197, app. D (delineating perception of judicial treatment of sexual assault cases).

6. *See id.* at 28-29 (noting discrepancy between attorneys and service providers).

7. *See id.* at 197, app. D (delineating perception of judicial handling of sexual assault cases).

providers arose from prosecutors' interactions with victims of sexual assault. These service providers cited the reluctance of prosecutors to prosecute certain cases, the willingness of prosecutors to accept plea bargains to greatly reduced charges without consulting the victim, and the tendency of some prosecutors to intimidate victims to accede to such plea bargains.[8]

To remedy some of these concerns, the Task Force recommended education for prosecutors about the potential harm to victims of sexual assault arising from the practice of plea bargaining for a guilty plea to a reduced charge.[9] In addition, the Task Force recommended the creation of local coordinating councils to increase the awareness of gender bias issues and discussion of sexual assault issues among the various participants in the criminal justice system who handle sexual assault cases.[10]

The next area that the Subcommittee investigated was Virginia's stalking laws.[11] The focus of the study was to determine whether they adequately protect victims of stalking.[12] The Subcommittee initially considered stalking to be an offense committed almost exclusively by men against women. The Subcommittee learned, however, that women are often stalkers as well as the victims of stalkers.[13] In fact, the Commonwealth's Attorney for Lee County reported that the majority of stalkers prosecuted by her office are women. In the end, the inquiry was expanded to determine the adequacy of stalking laws regardless of the gender of the victim.[14]

The Subcommittee concluded that Virginia's stalking statute[15] was inadequate to protect victims of stalking.[16] In order to convict under that statute, the defendant must be shown to have acted "with the intent to place, or with the knowledge that the conduct places, [the victim] in reasonable fear of death, criminal sexual assault, or bodily injury to [the victim] or to [the victim's] family or household member."[17] Virginia case law makes clear that the intent

8. *Id.* at 29.

9. *See id.* at 31 (proposing recommendations).

10. *Id.*

11. For more information about stalking, see generally Carol E. Jordan et al., *Stalking: Cultural, Clinical and Legal Considerations*, 38 BRANDEIS L.J. 513 (2000) (discussing stalking crimes); Amy C. Radosevich, Note, *Thwarting the Stalker: Are Anti-Stalking Measures Keeping Pace with Today's Stalker?*, 2000 U. ILL. L. REV. 219 (2000) (discussing efficacy of anti-stalking laws); Belinda Wiggins, Note, *Stalking Humans: Is There a Need for Federalization of Anti-Stalking Laws in Order to Prevent Recidivism in Stalking*, 50 SYRACUSE L. REV. 1067 (2000) (discussing inadequacy of state stalking laws); Nick Zimmerman, *Attempted Stalking: An Attempt-to-Almost-Attempt-to-Act*, 20 N. ILL. U. L. REV. 219 (2000) (discussing "attempted stalking" in context of anti-stalking laws).

12. *See* FINAL REPORT, *supra* note 1, at 64-67 (analyzing stalking cases).

13. *See id.* at 65 (relaying study's findings regarding stalking).

14. *See id.* at 66-67 (addressing stalking laws).

15. VA. CODE ANN. § 18.2-60.3 (Michie 1996) (amended by Va. House Bill No. 2112).

16. *See* FINAL REPORT, *supra* note 1, at 67 (outlining conclusions of stalking analysis).

17. VA. CODE ANN. § 18.2-60.3 (Michie 1996).

needed for a conviction under the statute is the defendant's subjective intent, not an objective standard of what a reasonable person would or should know.[18]

The Subcommittee recommended strengthening the stalking law to follow the Model Anti-Stalking Code for States.[19] This model code contains an objective standard that the defendant "knew or should have known" that reasonable fear would result from his or her conduct.[20] I am pleased to tell you that the 2000 Session of the Virginia General Assembly amended Virginia's stalking statute in accordance with the Task Force's recommendation.[21] House Bill 2112 amends Virginia Code § 18.2-60.3 to include the objective standard that the defendant "knows or reasonably should know" that his or her conduct puts the victim in fear.[22] In addition, the General Assembly passed House Bill 1710 which creates a civil cause of action for stalking and provides for both compensatory and punitive damages.[23]

The last area that the Substantive Law Subcommittee investigated was whether sentences differ for male and female offenders for the same offenses.[24] This was one of the easiest areas to study because each judge in Virginia must follow sentencing guidelines, and if a judge departs from those guidelines, he or she must state the reasons why.[25] The Subcommittee studied sentences given to men and women in Virginia in 1999 for the following five offenses: prescription fraud, felony bad checks, drug distribution, unlawful wounding, and malicious wounding.[26] The Task Force selected these offenses for study because it was thought that both men and women committed them in sufficient numbers to yield meaningful data.[27] The Subcommittee found no differences in sentencing between male and female offenders who commit violent offenses.[28] For some non-violent offenses, however, female offenders tend to be sentenced more leniently.[29]

The Subcommittee hypothesized that the disparity between the sentences for male and female non-violent offenders might be explained by a judicial concern for a female offender's family responsibilities, such as care of young

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18. *See* Bowen v. Commonwealth, 499 S.E.2d 20, 22 (Va. Ct. App. 1998) (concluding that Commonwealth's burden included proving defendant's subjective intent).

19. *See* FINAL REPORT, *supra* note 1, at 67 (stating recommendations).

20. *See id.* at 66 (describing Model Anti-Stalking Code for states).

21. Act of March 14, 2001, 2001 Va. Acts ch. 197 (to be codified at VA. CODE ANN. § 18.2-60.3(A)).

22. *Id.*

23. Act of March 20, 2001, 2001 Va. Acts ch. 444 (to be codified at VA. CODE ANN. § 8.01-42.3).

24. *See* FINAL REPORT, *supra* note 1, at 58-64 (analyzing sentencing cases).

25. *See id.* at 63 (discussing departures from sentencing guidelines).

26. *See id.* at 59 (discussing comparison analysis).

27. *Id.*

28. *See id.* at 60 (stating conclusions of comparison analysis).

29. *Id.*

children. An examination of judges' stated reasons for departing downward from voluntary sentencing guidelines, however, revealed that judges are not citing a female offender's family responsibilities as a reason for sentencing a non-violent female more leniently than her male counterpart.[30]

Other data examined by the Subcommittee suggested that a lack of sentencing alternatives for women is a concern.[31] For example, female offenders sometimes opt for a determinate sentence in a local jail rather than enter a diversion program.[32] Although the diversion program offers drug treatment and job training, it is frequently located in a distant city.[33] Furthermore, the offender is released from the diversion center and returned to her community only when she completes certain goals rather than after a fixed period.[34] Presented with such a choice, the female offender finds it difficult to arrange for childcare without a pre-determined ending date.[35] A fixed sentence in a local jail is often preferable.[36] As a result, the Subcommittee recommended that the Virginia General Assembly consider funding for more alternative sentencing programs for women located throughout Virginia near major metropolitan areas.[37]

The Subcommittee did identify one area of fairly explicit gender bias in sentencing. Several jurisdictions in Virginia are participating in a pilot project in which offenders who otherwise would be incarcerated are considered instead for alternative dispositions based on an analysis of the offender's likelihood of reoffending.[38] A "risk assessment" is conducted in which an offender is scored based on factors historically predictive of recidivism. For example, points are scored if the offender is young, never married, unemployed, or acted alone in committing the offense.[39] In addition, a point is scored against the offender if he is male.[40] If enough points are scored against the offender, he or she is not recommended for an alternative to incarceration.[41] The Subcommittee recommended that the Virginia Sentencing Commission should consider eliminating the "male point" from the risk assessment if the pilot program is expanded statewide.[42]

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30. *See id.* at 63 (discussing reasons for departing from sentencing guidelines).
31. *See id.* at 62 (discussing reasons for lack of sentencing alternatives for women).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 62-63.
36. *Id.*
37. *See id.* at 64 (listing recommendations).
38. *See id.* at 60-61 (discussing pilot project).
39. *Id.* at 61.
40. *Id.*
41. *Id.*
42. *See id.* at 64 (listing recommendations).